Florida: Vendor Refund Must be Paid to Customer before Vendor Can Obtain Refunds

Recently, the Florida Division of Administrative Hearings denied a vendor's sales tax refund because the vendor did not first refund the sales tax to its customer. The vendor, a computer software and technology company, sold electronically delivered software and computer hardware to a Florida customer. Electronically delivered software is not subject to tax in Florida, but the vendor erroneously collected sales tax from the customer. With regard to the computer hardware, Florida law provides that only the first $5,000 of the purchase price of tangible personal property is subject to a local option sales tax (also called a discretionary sales surtax). The vendor erroneously collected the local option sales tax from its customer based on the full purchase price of the computer hardware. The customer later identified these errors, contacted the vendor, and requested that the vendor assign its refund rights to the customer. The vendor declined to assign its refund rights (for unspecified reasons), however, and instead filed a refund claim directly with the Department of Revenue. Additionally, the vendor chose to not refund the overpaid sales tax to the customer prior to filing the refund claim. The vendor's rationale was that it did not have assurance from the Department that the refund claim would be approved. The Department denied the vendor's refund claim, explaining that Florida law requires a vendor to first refund the sales tax to its customer, and that this rule operates to protect the Department from exposure to potential liability. In response to the refund claim denial, the vendor filed a request for a formal hearing before the Division of Administrative Hearings.

In its decision, the Division found that the vendor had met its burden by a preponderance of the evidence that the electronically delivered software sold to the customer was not subject to tax, and that the vendor had collected the local option sales tax on the full amount of computer hardware to the customer, rather than limiting the tax to the first $5,000 in price. The Division agreed with the Department, however, that under Florida law, a vendor has no right to a refund of erroneously remitted or overpaid sales tax until the vendor has refunded the tax its customer. Alternatively, a vendor can assign the right to seek a refund directly to its customer. The Division found that the Department's interpretation of the Florida statutes and rules were based on their plain and unambiguous meaning. Here, the vendor chose not to assign the right to the refund, nor to refund its customer the overpaid sales tax. In addition, although the vendor claimed that it was contractually obligated to pay any sales tax refund that it received to its customer, the Division found that the parties' contract did not address the

parties' rights and responsibilities regarding refunds of improperly collected taxes. Therefore, the Division affirmed the Department's denial of the vendor's refund claim request. While this is not a particularly surprising outcome, it is a good reminder that a Florida vendor must assign the right to a refund to a customer or pay the sales tax refund to the customer before requesting a refund directly with the Department. Please contact Ben Cella with questions on *Oracle America Inc. v. Dep't of Revenue.*