Audit exemption to extend discretionary sales surtax

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Subject:
Audit exemption to extend discretionary sales surtax

Ms. Janette S. Knowlton
County Attorney for Charlotte County
18500 Murdock Circle, Suite 573
Port Charlotte, Florida 33948-1068

RE: DISCRETIONARY SALES SURTAX-PERFORMANCE AUDIT EXEMPTION-whether the duration of a discretionary sales surtax must be the same as the immediately preceding surtax to be exempt from the requirement of a new performance audit. S. 212.055(11)(d), Fla. Stat.

Dear Ms. Knowlton:

This office has received your request for an Attorney General opinion on behalf of the Charlotte County Board of County Commissioners asking essentially the following question regarding the local government infrastructure surtax authorized by section 212.055(2), Florida Statutes (2019):

> Does section 212.055(11)(d), Florida Statutes, which exempts a county from obtaining a performance audit when voters are being asked to adopt "the same discretionary surtax" as the surtax being replaced, require only the surtax *rate* to be the same, or does it also require the *duration* of the surtax as described in the enacting ordinance and ballot question to be the same?[[1] The Legislature enacted Chapter 2019-64, Laws of Florida, in the 2019 legislative session, adding a new section 212.055(10), and redesignating the former subsection (10) as a new subsection (11), with some changes to the provision. Former subsection (10)(d), now (11)(d), is unchanged.
> 1]

In sum:

> To be exempt from the requirement of a performance audit pursuant to section 212.055(11)(d), Florida Statutes, the proposed discretionary sales surtax being voted upon must be the same as the immediately preceding surtax in all material respects, which would include the duration of the tax if duration was included in the preceding surtax.

You state that Charlotte County enacted a one percent discretionary sales surtax in 1998 pursuant to section 212.055(2), Florida Statutes, and has extended it multiple times. In 2014,

voters approved a new surtax at one percent to apply through 2020 in the following ballot measure:

> Title: Extension of the one percent (1%) local option sales tax from January 1, 2015, to December 31, 2020.
> Question: Should the one percent local option sales tax be extended for six (6) years from January 1, 2015, to December 31, 2020, with the proceeds to be used for infrastructure as defined by law, including school security and technology improvements; road improvements; and public safety and service buildings; and libraries, parks and recreational facilities.

Section 212.055(11) provides that when a referendum is held to "adopt a discretionary sales surtax under this section," the county must submit a copy of its proposed surtax to the Office of Program Policy Analysis and Government Accountability, which in turn must retain a certified public accountant to conduct a performance audit of the program associated with the surtax. No audit is required, however, when the following condition is met:

> (d) This subsection does not apply to a referendum held *to adopt the same discretionary surtax* that was in place during the month of December immediately before the date of the referendum. (Emphasis added.)

Therefore, a performance audit is required before a surtax referendum unless the same surtax is being adopted as was previously in place. The phrase "the same discretionary surtax that was in place," is not defined in chapter 212, and thus the words must be given their plain and ordinary meaning.[[2] Black's Law Dictionary (11th ed. 2019), defines "same" as: "Identical or equal; resembling in every relevant respect."[[3] *See also* American Heritage Dictionary of the English Language (5th ed. 2018) ("[s]imilar in kind, quality, quantity, or degree"; "[c]onforming in every detail").3] Although section 212.055, Florida Statutes does not require any of the discretionary sales surtaxes authorized therein to include a duration, the statute does require that an enactment specify "the maximum length of time the surtax may be imposed, if any." You point out that the County included both the surtax rate and its duration in its ballot question.

The duration of time during which taxpayers will pay a discretionary surtax is a material and relevant aspect of the surtax to be approved or rejected by voters. For example, in *Florida Department of State v. Slough*, 992 So. 2d 142 (Fla. 2008), the Florida Supreme [4]Court found the ballot title and summary for a proposed constitutional amendment addressing certain ad valorem taxation issues to be fatally misleading because they omitted the one-year duration of the amendment. This omission could lead voters to believe that the surtax would be "permanent and continuous" rather than limited in time. Thus, a referendum proposing to extend the length of time taxpayers must pay a discretionary surtax would not be "the same" as the existing surtax which may expire sooner.

It is therefore my opinion that a local government is exempt from obtaining a performance audit pursuant to section 212.055(11)(d), Florida Statutes, when the discretionary sales surtax being voted upon is the same in all material respects as the prior surtax, which would encompass duration of the tax if such is included in the prior surtax.

Sincerely,

Ashley Moody
Attorney General

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[1] The Legislature enacted Chapter 2019-64, Laws of Florida, in the 2019 legislative session, adding a new section 212.055(10), and redesignating the former subsection (10) as a new subsection (11), with some changes to the provision. Former subsection (10)(d), now (11)(d), is unchanged.

[2] *See, e.g., Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 961 (Fla. 2005).

[3] *See also* American Heritage Dictionary of the English Language (5th ed. 2018) (“[s]imilar in kind, quality, quantity, or degree”; “[c]onforming in every detail”).