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LEGAL STUDY OF FLORIDA'S SALES TAX ON SERVICES

Walter Hellerstein
Prentiss Willson, Jr.
MORRISON & FOERSTER

January 2, 1987
Washington, D.C.

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EXECUTIVE SUMMARY

The Legal Study of Florida's Sales Tax on Services was prepared pursuant to a contract between the legal consultants (Walter Hellerstein, Prentiss Willson, Jr., and the law firm of Morrison & Foerster) and the State (the Florida Department of Revenue). Under the contract, the legal consultants undertook to prepare a legal study in the form of a written report addressed to the legal issues raised by the enactment of Chapter 86-166 of the Laws of Florida. The contract further provided that the written report would include, among other things, an overview of the legal problems raised by Chapter 86-166, a model annotated revision of Chapter 212 refining Chapter 86-166, and an appendix considering alternatives to Chapter 86-166.

Before summarizing the principal conclusions and features of the written report, we wish to stress that the Legal Study in general and the Model Annotated Revision in particular are most appropriately viewed as an initial attempt to come to grips with the critical questions raised by Florida's enactment of a sales tax on services. We do not offer the Legal Study as a final and definitive treatment of all the issues spawned by Chapter 86-166. Nor could we reasonably have done so given the multiplicity and complexity of the issues involved, and the severe time constraints under which we were operating. Our principal aim in the Legal Study was to identify and explore the

questions that will ultimately have to be resolved by others. We fully expect that further consideration of the issues examined in the Legal Study will lead to refinement and modification of its tentative conclusions.

We also wish to stress that in preparing the Legal Study we viewed ourselves essentially as legal technicians, not as economic or social policy makers. We were not charged with creating a utopian sales tax structure for Florida, nor were we charged with evaluating on the merits any sales tax exemptions that have been repealed, sunsetted, or subjected to further study by the Sales Tax Exemption Study Commission. Rather our task was the narrower one of analyzing the legal issues raised by Chapter 86-166 and drafting a proposed statute that could be added to Chapter 212 to provide for a clear and workable interface between the preexisting provisions of Chapter 212 and the tax on services imposed by Chapter 86-166.

The principal conclusions and features of the Legal Study are as follows:

-- Chapter 86-166 imposes a tax on all services.

-- Chapter 86-166 is most reasonably construed as not imposing a tax on the services that employees provide to their employers.

-- Chapter 86-166 creates substantially more pyramiding of taxes under Chapter 212 than was permitted under the preexisting provisions of Chapter 212.

-- Occasional and isolated sales of services are taxable under Chapter 86-166.

-- Chapter 86-166 imposes a tax on the sale of tangible personal property purchased and consumed by providers of taxable services unless such property is "materia[l] . . . used one time only in the process of providing a [taxable] service."

-- Chapter 86-166 imposes a tax on services purchased and consumed by sellers of tangible personal property.

-- Services rendered in connection with the sale or production of tangible personal property that is exempt from taxation are not exempt from taxation.

-- Preexisting exemptions for sales to governmental and charitable organizations generally do not, by their terms, apply to sales of services.

-- There is considerable uncertainty regarding many of the interpretative issues raised by Chapter 86-166, and the Legal Study explicitly acknowledges this uncertainty notwithstanding its conclusions regarding these issues.

-- There is a serious risk that provisions of Chapter 86-166 imposing a tax on services would be held unconstitutional under state constitutional principles forbidding the delegation of legislative power to executive agencies on the ground that the statute fails to provide intelligible principles to guide the executive in implementing the terms of the statute.

-- There is a serious risk that the provisions of Chapter 86-166 in their application to the sales of services by natural persons would be held to impose an income tax in violation of the Florida Constitution.

-- The Model Annotated Revision of Chapter 212 is designed to

(1) refine Chapter 86-166 so as to integrate the tax on services in a workable fashion into the preexisting structure of Chapter 212 without making substantive changes in the preexisting provisions of Chapter 212;

(2) incorporate substantive changes explicitly identified in the contract between the Legal Consultants and the State, such as a sale for resale exemption and a casual sale exemption; and

(3) reorganize to a limited extent and without substantive change the preexisting provisions of Chapter 212 by grouping exemption and imposition provisions and by alphabetizing multiple provisions where feasible.

-- The basic assumptions underlying the Model Annotated Revision are

(1) the Revision does not attempt to create a utopian sales tax and therefore neither seeks to make the Florida sales tax a uniform tax on expenditures nor considers questions of equity;

(2) the Revision makes no substantive changes in the preexisting provisions of Chapter 212 other than those required by the extension of Chapter 212 to services; and

(3) the Revision attempts to avoid uncertainty.

-- The Revision creates a sale for resale exemption for services that applies only when the purchaser of the service does not use it in the ordinary course of his business, the purchaser separately states the value of the purchased service in its subsequent sale, and the subsequent sale of the service is taxable.

-- Taxable services do not include interest, payments for insurance, or payments for the lease or use of other intangibles.

-- When taxable services are sold in a transaction that involves both taxable services and the nontaxable sale, lease, or use of intangibles or real property, the transaction is taxable insofar as the consideration paid reflects consideration paid for the taxable service.

-- Services rendered by partners to their partnerships are not taxable, unless the

service is rendered by the partner in the capacity of an independent contractor.

-- A sale of a service is taxable in Florida when most of the service is performed in the state, based on cost of performance.

-- A complementary use tax is imposed on the use of any service in the state when the sale of the service is not taxable in the state.

-- The legal incidence of the sales tax is on a transaction -- sale of services in the state -- whereas the legal incidence of the tax imposed by the preexisting provisions of Chapter 212 is on the privilege of engaging in various activities.

-- Many of the determinations made in drafting the Model Annotated Revision were close questions that the legislature may wish to resolve differently, and the Legal Study explicitly identifies the competing considerations that bear on such determinations.

-- The Appendix considers alternatives to sales taxation of services including payroll taxes, gross receipts taxes, and value added taxes.

-- The Legal Study should serve as a vehicle for more focused and informed consideration of the issues raised by Florida's sales tax on services.

OVERVIEW

I. Introduction

On October 1, 1986, the Legal Consultants[1] and the State[2] entered into an Agreement for Expert Legal Services (the "Agreement").[3] Under the Agreement, the Legal Consultants undertook to prepare a Legal Study in the form of a written report addressed to the legal issues raised by the enactment of Chapter 86-166 of the Laws of Florida. The Agreement further provided that the written report would include, among other things, an overview of the legal problems raised by Chapter 86-166, a model annotated revision of Chapter 212 refining Chapter 86-166, and an appendix considering alternatives to Chapter 86-166. This Overview is designed to fulfill the first of these contractual requirements.

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1 The Legal Consultants are Walter Hellerstein, Professor of Law, University of Georgia School of Law, Athens, Georgia and Of Counsel, Morrison & Foerster, Washington, D.C.; Prentiss Willson, Jr., Partner, Morrison & Foerster, San Francisco, California; and Morrison & Foerster, a California partnership, with its principal office in San Francisco, California.

2 The State is the Department of Revenue of the State of Florida, with its principal office in Tallahassee, Florida, on behalf of the State of Florida.

3 The Agreement is appended hereto as Attachment A.

II. Purpose and Scope of Overview

The Overview has two general purposes. The first is to identify and analyze the legal issues raised by the enactment of Chapter 86-166. This task includes consideration of the relationship between Chapter 86-166 and the preexisting sales tax in Florida; the problems of implementing Chapter 86-166 in its present form; the policy concerns[4] generated by extension of the sales tax to services; and the constitutional objections that may be encountered in the application of the sales tax to a broad range of services.

The second general purpose of the Overview is to explain the thinking that underlies the Model Annotated Revision of Chapter 212. The second purpose is intimately related to the first because the conceptual framework that shapes the proposed statutory revision was developed in light of the legal and policy concerns raised by Chapter 86-166. Perhaps the most important aspect of this second task -- if not of the entire Overview -- is to make explicit to the legislature what assumptions underlie the proposed statutory revision; how particular issues were resolved; and why specific statutory language was chosen.

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4 Our consideration of "policy concerns" is limited to structural matters such as the expressed intent of the Florida Legislature to avoid pyramiding or duplication of taxes in Chapter 212. We do not consider substantive policy questions such as the pros and cons of providing exemptions for particular service industries.

This will allow the legislature to focus on the determinations that it must make should it decide to revise Chapter 86-166 and will facilitate its mark-up of the Model Annotated Revision.

III. Chapter 86-166

In this section, we consider the questions raised by Chapter 86-166 on the assumption that it is permitted to go into effect without legislative modification. The questions involve the meaning of Chapter 86-166, particularly with regard to its relationship to preexisting Chapter 212. They also involve the administrative problems and related legal challenges that may be encountered in implementing the statute in its present form.

A. Does Chapter 86-166 Impose a Tax on Services?

The first question that must be addressed is whether Chapter 86-166 actually imposes a tax on services. As stated in the Department of Revenue ("DOR") Staff Report on the Impact of Chapter 86-166 (the "DOR Staff Report"),[5] "Does the enactment in Ch. 86-166, Laws of Florida, of § 212.05(1)(j) 'at the rate of 5 percent of the consideration for performing or providing any service' levy

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5 Staff Report of Florida Department of Revenue, The Impact of Chapter 86-166, Laws of Florida, August 25, 1986. The Report is appended as Exhibit A to the Agreement appended hereto as Attachment A.

a tax? On all services or just those associated with the transfer of property?"[6]

In our judgment, Chapter 86-166 levies a tax on "any" service, which we read to mean all services, however defined.[7] Section 212.05 of the Florida Statutes is the operative provision that declares the legislative intent

> that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

Fla. Stat. § 212.05. The statute then goes on to tax the identified goods or services by declaring "[a]t the rate of 5 percent" of the receipts or price of the particular goods or services subject to tax. Chapter 86-166 adds to this list "[a]t the rate of 5 percent of the consideration for performing or providing any service." We do not see how the legislative language could be clearer in identifying "any service" as the "services taxable under this chapter."

Other observers who have examined Chapter 86-166 share this conclusion. Joseph Jacobs, Professor of Law at Florida State University, has declared that "[t]he actual

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6 Id. at 14.

7 Even if the statute applies to all services, there may still be considerable controversy over the scope of the term "services." See pp. 75-88 infra.

operative provision contains the broadest conceivable language: A five percent tax is imposed on 'the consideration for performing or providing any service.'" Jacobs, Florida's New "Income" Tax, 14 Fla. St. U.L. Rev. 493, 498 (1986) (emphasis in original). Robert Pierce, formerly General Counsel of the Florida Department of Revenue, and Carol Peacock likewise conclude that the "Act imposes a sales tax on all services" and that "[a]ll services appear to be taxable." Pierce and Peacock, Broadening the Sales Tax Base: Answering One Question Leads to Others, 14 Fla. St. U.L. Rev. 474, 476 (1986). Cass D. Vickers, a member of the special commission established by Chapter 86-166 to review the exemptions in Florida's sales tax, has expressed similar views that the statute, "[a]s written" imposes a tax on "any" service. Vickers, Recent Development in Florida State Taxation: The Proposed Taxation of Services, Fla. B.J., Dec. 1986, at 35, 36.

B. Does Chapter 86-166 Impose a Tax on Employees?

Even if one concludes that Chapter 86-166 imposes a tax on "any" service, one must still determine what activities are embraced within that term. Perhaps the most controversial question raised by Chapter 86-166 in this regard is whether "services" include the labor of employees. The question also bears directly on the viability of Chapter 86-166 as it presently stands. If Chapter 86-166 imposes a tax on employees, it would compound the

administrative and legal problems confronting the DOR in its efforts to implement the statute. If Chapter 86-166 does not impose a tax on employees, the Act stands a better chance of surviving a court challenge in its present form.

Section 212.05 of the Florida Statutes provides that it is a taxable privilege to furnish "any of the . . . services taxable under this chapter." The tax is to be collected by the "dealer," Fla. Stat. § 212.05(2), who is defined as "any person who provides or performs a taxable service for a consideration," Fla. Stat. § 212.06(2)(k).[8] The only indication of what constitutes a "taxable service" under the statute is the provision imposing a five percent tax on the performance of "any service." Fla. Stat § 212.05(1)(j) (emphasis supplied). "Service" is otherwise undefined by the statute.

"Service," however, has at least two possible meanings. One is the literal, technical, all-encompassing interpretation that embraces any conceivable service that anyone performs for consideration under any conceivable circumstances. The other is the conventional, more limited meaning of the word as it is used, for example, in characterizing "service" industries. This understanding of "service" imparts the notion of a transaction between two

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8 Although the current version of the Florida Statutes does not yet include the changes made by Chapter 86-166, all statutory references will be to the Florida Statutes as amended by Chapter 86-166.

independent entities, the seller and the purchaser of the service. It would include the services that an independent contractor provides for his client or customer; it would not include the services that an employee provides for his employer.

The suggested distinction for purposes of the scope of the term service in Chapter 86-166 between an "employee" and an "independent contractor" is one that is deeply rooted in the law, and the law relies on the distinction for a variety of purposes. For example, liability for social security taxes, see I.R.C. § 3121(d), withholding for federal income tax purposes, see I.R.C. § 3401, and jurisdiction for state income tax purposes, see 15 U.S.C. § 381(d), all depend, to some extent, on the distinction between employees and independent contractors.[9] To be sure, there is no bright line between employees and independent contractors. Yet there is a general acceptance of the distinction, and the line between the two classes of economic actors is frequently drawn.

Since a broad interpretation of the term "services" would encompass the services that an employee provides for his employer and a narrow interpretation might not, the

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9 In defining employees, the Internal Revenue Code refers to "services" that employees perform for employers. I.R.C. §§ 3121, 3401. This underscores the fact that the distinction suggested in this paragraph between employees and independent contractors for purposes of Florida's tax on "any service" is rooted in common usage, not in a literal construction of the term service.

question becomes whether the broad or narrow interpretation represent a more appropriate reading of Chapter 86-166? Although the matter is not free from doubt, it is our opinion for the reasons set forth below that it is more reasonable to construe Chapter 86-166 as not imposing a tax on employee services.

Under Florida law, a court will not ascribe to the legislature an intent to create an absurd result. Consequently, if language is susceptible of two interpretations, that which avoids absurdity is always to be preferred. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950); Haworth v. Chapman, 152 So.2d 663 (Fla. 1934). Courts will also give words of common usage their plain and ordinary meaning rather than a technical construction. Gasson v. Gray, 49 So.2d 525 (Fla. 1951); Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950). Where uncertainty exists, however, courts are increasingly unwilling to engage in conjecture in order to restrict or extend the meaning of language used. State v. Egan, 287 So.2d 1 (Fla. 1973); Hialeah, Inc. v. Horse Transportation, Inc., 363 So.2d 930 (Fla. App. 1979); Devin v. City of Hollywood, 357 So.2d 1022 (Fla. App. 1976). Courts will not correct supposed omissions or defects, for the object of interpretation is to extract the meaning of, rather than to impose meaning upon, the words used. State ex rel. Bie v. Swope, 30 So.2d 748 (Fla. 1947). Nor will courts pass on a measure's efficacy. Moore v. State, 343

So.2d 601 (Fla. 1977). In cases involving tax statutes, there is a presumption that the legislature placed in or omitted from a statute all things intended to be taxed or exempted from taxation. Volunteer State Life Insurance Co. v. Larson, 2 So.2d 386 (Fla. 1941). This emphasis on judicial restraint is relaxed when the statute itself suggests a saving construction. Brown v. State, 358 So.2d 16 (Fla. 1978). Considering these canons of construction and the impact of extending Chapter 212 to services rendered by employees to employers, there are several factors that favor adoption of the conventional meaning of the term "services."

First, adoption of the broad interpretation of the term services would impose an extraordinary burden on DOR in identifying and registering every employee in the state and then enforcing the statute. In light of the maxim refusing to ascribe to the legislature an intent to create an absurd result -- i.e., the enactment of a statute that is virtually impossible to administer[10] -- the narrow interpretation of the term services should be preferred. Moreover, courts generally will defer to a practical construction of a statute by the administrative department charged with its execution, and will not overturn such a construction unless

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10 The prospect that DOR would have to register every employee in the state as a "dealer" with sales tax collection responsibility indicates the enormity of the administrative problems DOR would face if the tax imposed by Chapter 86-166 were construed to apply to employee services.

it is clearly erroneous, in conflict with the Constitution, unauthorized, or contrary to the plain intent of the act. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983); Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952); State ex rel. Fronton Exhibition Co. v. Stein, 198 So. 82 (Fla. 1940). Given the problems DOR would encounter if Chapter 212 applied to employees, a narrow construction of the term services seems eminently practical.

Second, the legislative history of Chapter 86-166 suggests that the legislature did not intend to include employees within the scope of the tax on services. Prior to the introduction of the legislation, DOR prepared an analysis that described the scope of the then-existing services exemption by specifically listing 25 categories of services. All were traditional service industries. The services provided by employees to employers was not included as a category. The total value of the listed service exemptions, and thus the revenue to be raised by their sunset, was estimated at $1,228.7 million. The 1986 fiscal notes for the various bills that the legislature considered in enacting Chapter 86-166 reflected these estimates, since all valued the repeal of the services exemptions at about $1,200 million.[11] These values are well below the revenue

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11 Specifically the 1986 fiscal note for HB 1307 predicted a revenue of $1,178.7 million; the 1986 fiscal note for PCB FT 86-5 (the bill before the House Committee) predicted (Footnote 11 Continued)

that Florida legislators would have reason to anticipate if they actually intended to tax employees. United States Department of Treasury Income Statistics show that the total salaries and wages in Florida for 1984 was $72,842.1 million. Statistics of Income Bulletin, vol. 1, at 97 (Dept. of Treasury, Summer 1986). At a tax rate of five percent, the estimated revenue from a tax on employees would be $3,642.1 million -- an amount far in excess of the figures contemplated by the legislature.

The legislative history further indicates that the legislature was informed that the legislation would require the registration and education of a "large number" of new dealers, a task which could delay the effectiveness of the bill and which would require additional DOR manpower and funding. See 1986 Fiscal Notes for HB 1307, PCB FT 85, and CS/HB 1307; Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 470. Nowhere in the legislative history is there any suggestion that the legislature understood that these new dealers would include all employees in the state. In fact, the 1986 fiscal note for Conference Bill CS/HB 1307 discusses the need for registration and education only of "service businesses."[12]

(Footnote 11 Continued)
revenue of $1,178.4 million; and the 1986 fiscal note for the conference version CS/HB 1307 predicted that $1,208.3 million would be generated by the sunset of all the targeted exemptions.

12 Professor Jacobs likewise found no support in the
(Footnote 12 Continued)

Third, the nature of the sales tax imposed by Chapter 212 reinforces the position that Chapter 86-166 should not be interpreted to tax the services that employees provide for employers. As expressed by the legislature, and as repeatedly construed by the Florida Supreme Court, the sales tax imposed by Chapter 212 is a tax on exercising the privilege of engaging in a business or occupation. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950) (describing sales tax as a "privilege or occupation tax"); see Fla. Stat. § 212.05; see also Fla. Stat. §§ 212.03(1), 212.03(6), 212.031(1)(a), 212.031(8)(c), 212.04(4), 212.0505(1). The employer-employee relationship is not commonly characterized in this manner. Employees are generally viewed as exchanging their labor for wages rather than as enjoying the privilege of engaging in a business or occupation.[13] If the distinction between a privilege or occupation and ordinary employment is blurred, as it would be by extension of Chapter 212 to employees, there would be an increased risk

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(Footnote 12 Continued)
legislative history for a broad interpretation of the word services: "An analysis of the legislative history and reading of the face of the statute do not evince any clear expression of intent to impose a five percent tax on all employee services." Jacobs, supra, 14 Fla. St. U.L. Rev. at 498. Professor Jacobs does, however, conclude that Chapter 86-166 levies a tax on employees. We consider this conclusion further below. See p. 14 infra.

13 A similar distinction is drawn for federal income tax purposes between a taxpayer's "trade or business" expenses and his "employee business expenses." See I.R.C. §§ 162, 62.

that the levy would be vulnerable to attack as a prohibited income tax. See Fla. Const. art. VII, § 5; State ex rel. McKay v. Keller, 191 So. 542 (Fla. 1939).[14] In light of these considerations and the maxim of statutory construction that statutes should be construed to avoid constitutional doubts, I.T.T. Development Corp. v. Seay, 347 So.2d 1024 (Fla. 1977), a narrow interpretation of the term "services" in Chapter 86-166 is justified.[15]

The conclusion that Chapter 86-166 does not tax employees is not beyond debate, however. Professor Jacobs

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14 The issue whether a sales tax on services is vulnerable to constitutional attack as an income tax is considered further below. See pp. 44-50 infra.

15 It might also be suggested that a broad interpretation of the term services is unwarranted because it would violate the broad statutory injunction against pyramiding of the tax imposed by Chapter 212. See Fla. Stat. §§ 212.081(3)(b), 212.12(12). Taxation of employee services to employers, coupled with taxation of the final product or service sold by the employer, would constitute pyramiding. (In its present form, the definition of retail sale does not exclude the sale of services for resale. Retail sale means a sale "other than for resale in the form of tangible personal property." Fla. Stat. § 212.02(3)(a) (emphasis supplied)). This argument may prove too much, however. In the first place, notwithstanding the injunction against pyramiding, there is substantial pyramiding within the existing structure of Chapter 212. See pp. 68-69 infra. Moreover, it is clear that the legislature intended to extend Chapter 212 to services provided by independent contractors. Since many of the same services can be provided by either employees or by independent contractors, there will inevitably be pyramiding within the existing structure of Chapter 212 in taxing the services of independent contractors. Unless one has grounds for believing that the legislature was concerned about pyramiding only with respect to taxing employee services and not with respect to taxing the services of independent contractors, it is difficult to invoke the anti-pyramiding principle as a basis for excluding employees from the scope of Chapter 86-166.

believes that Chapter 86-166 does reach employees. Notwithstanding the legislative history of the statute, Jacobs declares that "the plain language of chapter 86-166 imposes just such a tax regardless of the lack of specific legislative expression."[16] Jacobs, supra, 14 Fla. St. U.L. Rev. at 498.[17] Cass Vickers appears to agree: "Without appropriate limitation, the tax would apply to the consideration received by an employee for his services, even though that cost is factored into the sales price or consideration received by the employer, the end price or consideration in either event being taxable in full." Vickers, supra, Fla. B. J., Dec. 1986, at 36. Robert Pierce and Carol Peacock are less certain. They ask, "How should the state tax the routine services that secretaries perform for their employers? Did the legislature really intend to tax all services -- including employee services -- even though it appeared only to repeal the exemption of professional and personal services?" Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 477.

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16 It is worth noting, however, that "'[p]lain words, like plain people, are not always so plain as they seem.' The question of whether the meaning is 'plain' is often a source of controversy." Rhodes & Seereiter, The Search for Intent: Aids to Statutory Construction in Florida -- An Update, 13 Fla. St. U.L. Rev. 485, 486 (1985) (citations omitted).

17 Professor Jacobs also concludes that a sales tax on employee services could withstand challenge as an unconstitutional income tax, although he concedes that the questions are "close." Jacobs, supra, 14 Fla. St. L. Rev. at 505. As noted, we consider this question below. See pp. 44-50 infra.

In sum, while there are sound arguments for the proposition that Chapter 86-166 as written does not extend Chapter 212 to services provided by employees to employers, the arguments are open to question. On one proposition, however, there is unanimous agreement. Chapter 86-166 as written creates uncertainty with regard to the taxation of employees. It creates uncertainty with regard to the meaning of services; it creates uncertainty with regard to the constitutional implications of imposing a sales tax on the services of employees, should Chapter 86-166 be construed to impose such a tax; and it creates uncertainty with regard to DOR's ability to administer such a tax. Perhaps, then, the most significant point that emerges from the preceding discussion is that "[g]reat debate and extensive litigation will arise unless the legislature carefully describes what it intends by the taxation of the 'consideration for performing or providing any service.'" Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 481. This is a point that will emerge repeatly in the discussion that follows.

C. Other Statutory Questions Raised by Chapter 86-166

In addition to the questions whether Chapter 86-166 imposes a tax on services and whether the services taxed include employee services, there are a host of other statutory issues raised by Chapter 86-166 and its

relationship to the preexisting provisions of Chapter 212. These issues in turn raise questions regarding DOR's ability to implement Chapter 86-166 consistent with constitutional constraints on delegation. In this section, we consider the substantive statutory questions raised by Chapter 86-166; in the next section, we consider the delegation issues along with other state and federal constitutional questions.

1. Chapter 86-166 and the Preexisting Provisions of Chapter 212: General Considerations

Most of the critical statutory questions raised by Chapter 86-166 turn on the relationship between Chapter 86-166 and the preexisting provisions of Chapter 212. The fundamental issue is whether the extension of the Chapter 212 tax base to services contemplates application to services of the preexisting rules relating to sales of tangible personal property. Insofar as Chapter 86-166 specifically addresses this problem, the answer is clear. For example, in expanding the definition of "dealer" to include "any person who provides or performs a taxable service for consideration," Fla. Stat. § 212.06(2)(k), the legislature clearly evinced its intent to extend the preexisting collection provisions, which are keyed to the definition of dealer, to sales of services. With that exception, however, the legislature did little to delineate how Chapter 86-166's tax on services is to be integrated with the preexisting provisions of Chapter 212. Conse-

quently, the questions raised by the interface of Chapter 86-166 and the preexisting provisions of Chapter 212 are legion.

Does the sale for resale exclusion applicable to sales of tangible personal property apply to sales of services and, if so, in what manner? Is tangible personal property purchased and consumed by service providers -- generally a taxable sale under the preexisting provisions of Chapter 212 -- now excluded from taxation because it is consumed in the process of providing a taxable service to the ultimate consumer?[18] Alternatively, are services purchased and consumed by sellers of tangible personal property excluded from taxation because they are consumed in the process of producing tangible personal property for taxable sale to the ultimate consumer? Do the "occasional and isolated" sale rules, which exclude sales of tangible personal property by nondealers from the sales tax base, apply to occasional and isolated sales of services? Are services rendered in connection with the production of tangible personal property that is exempt from taxation

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18 Chapter 86-166 amended the definition of a "retail sale" in Fla. Stat. § 212.02(3)(c) to provide that retail sales "do not include materials, containers, labels, sacks, or bags intended to be used one time only . . . in the process of providing a service taxable under this part." It did not, however, broadly extend to sales of services the preexisting exclusion from the definition of retail sale applicable to sales of materials incorporated into articles of tangible personal property for resale when such materials become a component or ingredient of the finished product. Id.

under Chapter 212 likewise exempt? Are services subject to a complementary use tax analogous to the use tax on tangible personal property? The questions go on and on. See DOR Staff Report passim; Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 476-81; Vickers, supra, Fla. St. B.J., Dec. 1986, at 36-37.

Before we address the particulars of any of these issues, we wish to make several general observations. First, a literal reading of Chapter 86-166 in conjunction with the preexisting provisions of Chapter 212 suggests a negative answer to most of these questions -- i.e., few of the preexisting provisions of Chapter 212 by their terms apply to the sales of services. The preexisting provisions were written with regard to the sale or use of tangible personal property, transient rentals, admissions, and leases of real and personal property. There is little in the language of the preexisting provisions of Chapter 212 or in the language added to Chapter 212 by Chapter 86-166 that would generally extend those preexisting provisions to the sale of services.

The question then becomes whether, in the absence of further legislative action, DOR could reasonably construe Chapter 86-166 to apply, insofar as it deemed appropriate, the preexisting provisions of Chapter 212 to the sales tax on services. Reading Chapter 86-166 in pari materia with the related provisions of preexisting Chapter 212, DOR could

conceivably take the position through interpretive regulations or otherwise, that Chapter 86-166 should be construed to incorporate various of the preexisting provisions of Chapter 86-166 even though the legislature did not explicitly so provide. Wholly apart from the content of any such interpretative guidelines, there is the basic question whether the delegation doctrine would bar DOR from issuing such guidelines. Although we have postponed our general consideration of that issue,[19] it suffices for the moment to state our conclusion: If DOR sought to read the preexisting provisions of Chapter 212 into the tax on services imposed by Chapter 86-166, there is a serious risk that its action would be held unconstitutional under the delegation doctrine.

The message for the legislature is clear: If it wishes the preexisting provisions of Chapter 212 to apply to the sales tax on services enacted by Chapter 86-166, it should say so explicitly.

2. Chapter 86-166 and the State Policy of Avoiding Double Taxation and Pyramiding of Taxes

The legislature has explicitly stated its intent that "there shall be no pyramiding or duplication of excise taxes levied by the state" under Chapter 212. Fla. Stat. § 212.081(3)(b); see also Fla. Stat. § 212.12(12). With respect to sales of tangible personal property, this intent

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19 See pp. 33-44 infra.

is implemented by imposing a tax on the retail sale of tangible personal property, which means a sale "other than for resale in the form of tangible personal property," Fla. Stat. § 212.02(3)(a), and does not include "the sale, use, storage or consumption of industrial materials . . . for future processing, manufacture, or conversion into articles of tangible personal property for resale where such industrial materials . . . become a component or ingredient of the finished product." Fla. Stat. § 212.02(3)(c). Despite the broad statement of legislative intent against pyramiding and the implementation of that intent by imposing the tax on retail sales, there is nevertheless substantial pyramiding -- in an economic sense at least -- within the preexisting structure of Chapter 212. For example, the definition of retail sale explicitly includes the sale of tangible personal property that is "used and dissipated in fabricating, converting, or processing tangible personal property for sale," Fla. Stat. § 212.02(3)(c), even though the cost of such property is likely to be a component of the taxable price of the end product when it is sold.

The real question raised by the enactment of Chapter 86-166, then, is not whether it violates some abstract and absolute proscription against pyramiding but whether it creates more pyramiding than was tolerated by the preexisting provisions of Chapter 212. The answer to this question is that it does -- at least in the absence of

further "construction" or "implementation." Chapter 86-166 imposes a tax "at the rate of 5 percent of the consideration for performing or providing any service." Fla. Stat. § 212.05(1)(j). There is no limitation in Chapter 86-166 or in the relevant preexisting provisions of Chapter 212 restricting the levy to the retail sale of services. On its face, Chapter 86-166 thus applies to the sale of all services regardless of whether the service is sold at retail or for resale. Other observers concur in this conclusion. See Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 476; Vickers, supra, Fla. St. B.J., Dec. 1986, at 36. Unless Chapter 212 is amended to limit the application of Chapter 86-166 to retail services or unless the DOR so "construes" it, Chapter 86-166 will create more pyramiding than is tolerated by the Chapter 212 with respect to tangible personal property.

The question remains whether, in the absence of further legislative action, DOR could reasonably construe Chapter 86-166 to create a sale for resale exclusion for the tax on services. We have adverted to this question in general terms above. In this instance, DOR could invoke the anti-pyramiding intent embodied in Chapter 212 as a basis for reading the provisions of Chapter 86-166 in pari materia with the related provisions of Fla. Stat. § 212.05 pertaining to sales of tangible personal property, and it could issue regulations applying a sale for resale exclusion

to the sale of services. As suggested above, not only might there be considerable debate over the substance of such a sale for resale exclusion,[20] but it would also raise the fundamental question whether the DOR is empowered to issue such rules under the delegation doctrine. To reiterate our predictable refrain, if the DOR were to undertake such a course of action without further instruction from the legislature, it would be a high risk venture.

3. Chapter 86-166 and the Preexisting Provisions of Chapter 212: Specific Issues

Having examined the general question of the relationship between Chapter 86-166 and preexisting Chapter 212 as well as the specific question of Chapter 86-166 and Chapter 212's policy against pyramiding, we turn now to a consideration of other specific statutory questions raised by Chapter 86-166. In each case, we assume that DOR has provided no guidance with regard to resolution of the question, and we repeat our admonition that the constitutional fate of any such guidance would be uncertain in any event. We also note that the following discussion is necessarily selective in light of the large number of statutory issues raised by the enactment of Chapter 86-166. See DOR Staff Report, supra, passim; Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 476-81; Vickers, supra, Fla. B.J., Dec. 1986, at 36-37.

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20 We consider the substantive questions relating to a sale
(Footnote 20 Continued)

a. Does the exemption for "occasional and isolated" sales apply to sales of services taxable under Chapter 86-166?

The statutory basis for the occasional and isolated sale exemption appears in Fla. Stat. § 212.02(9), which defines "business." The statute excludes from the definition of business "occasional or isolated sales or transactions involving tangible personal property by a person who does not hold himself out as engaged in business." Because the sales tax imposed by Fla. Stat. § 212.05 is levied only on those "who engag[e] in the business of selling tangible personal property" (emphasis supplied), it does not generally apply to persons making occasional or isolated sales of tangible personal property.[21]

There is no analogous provision applicable to persons "who ren[t] or furnis[h] any of the things or services taxable under this chapter." Fla. Stat. § 212.05. The exclusion from the definition of business is limited to occasional or isolated "sales or transactions involving tangible personal property." Fla. Stat. § 212.02(9) (emphasis supplied). One could argue, however, that insofar as an occasional or isolated service transaction involves any tangible personal property, it should be excluded since

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(Footnote 20 Continued)
for resale exemption in the context of a sales tax on services at pp. 67-74 infra.

21 The tax does apply, however, to occasional or isolated sales of aircraft, boats, and motor vehicles. Fla. Stat. § 212.05(1)(a)2.

it technically falls outside the definition of "business." The difficulty with this argument is that Fla. Stat. § 212.05 declares that every person exercises a taxable privilege who "engages in the business of selling tangible personal property" or "who rents or furnishes any of the things or services taxable under this chapter." Hence if there is a technical argument for including occasional and isolated service transactions "involving" incidental sales of property within the occasional and isolated sale exemption, there is a countervailing technical argument for excluding them by reference to Fla. Stat. § 212.05, which employs the term "engages in business" only with regard to sales of tangible personal property. The statutory grounds for an occasional and isolated sales exemption for services is therefore weak.

b. Does Chapter 212, as amended by Chapter 86-166, impose a tax on the sale of tangible personal property purchased and consumed by providers of services taxable under Chapter 86-166?

Under the preexisting provisions of Chapter 212, the purchase of tangible personal property consumed in the process of rendering a service was generally taxable. Because the sale of the service to the ultimate consumer generally was not taxable, taxing the sale of property to the service provider was appropriate because this was the final taxable transaction. Under Chapter 212, as amended by Chapter 86-166, the question will arise anew whether the

sale of property to be consumed by a service provider is exempt. The argument will be that the cost of the property will be a component of the final sales price of the service, and it will be taxed at that time. To tax the sale of the property to the service provider would therefore result in duplication of the tax contrary to established legislative policy.

There is a statutory basis for this argument, although one with a somewhat narrower reach than suggested in the preceding paragraph. Under the preexisting provisions of Chapter 212, "materials, containers, labels, sacks, or bags intended to be used one time only for packaging tangible personal property for sale" were excluded from the definition of a retail sale, Fla. Stat. § 212.02(3)(c), as were materials that became ingredients of other property for resale. Id.; see also p. 17 supra. On the other hand, tangible personal property that was consumed ("used and dissipated") in the process of producing other tangible personal property for sale generally was taxable. Fla. Stat. § 212.02(3)(c); see p. 17 supra. In Chapter 86-166, the legislature broadened the above quoted exclusion from the definition of retail sale for packaging materials to include such materials "used . . . in the process of providing a service taxable under this part." Reading this language broadly, one could contend that any "materials" used "one time only" "in the process of providing a service

taxable under this part" are excluded from taxation under this definition of a retail sale. The question whether the property is "dissipated" or not in rendering the service should be irrelevant, because the limiting language refers only to property dissipated in producing "tangible property for sale." The exemption would, however, be limited by the "used one time only" requirement.

c. Does Chapter 212, as amended by Chapter 86-166, impose a tax on services purchased and consumed by sellers of tangible personal property?

The other side of the question addressed in the preceding subsection is whether services purchased and consumed by sellers of tangible personal property are taxable by Chapter 86-166 in light of the preexisting provisions of Chapter 212. The arguments against taxation are essentially the same as those considered above. The cost of the service will be a component of the final sales price of the tangible personal property, and it will be taxed at that time. To tax the sale of the service to the seller of tangible personal property would therefore result in duplication of the tax contrary to established legislative policy.

In contrast to the case of property consumed by providers of taxable services, there is no statutory basis -- other than the broad policy against duplicative

taxation[22] -- that would limit the tax on services imposed by Chapter 86-166 even though the cost of the services becomes a component of the price of tangible personal property that is sold and taxed at retail. The Florida courts have been reluctant to hold otherwise taxable transactions exempt solely in reliance on the policy against duplication or pyramiding of the tax. See American Video Corp. v. Lewis, 389 So.2d 1059 (Fla. App. 1980); Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964). It thus appears that services purchased and consumed by sellers of tangible personal property are taxable under Chapter 86-166.

d. Are services rendered in connection with the sale or production of tangible personal property that is exempt from taxation likewise exempt from taxation? And to what extent do the preexisting exemptions in Chapter 212 apply to the services otherwise rendered taxable by Chapter 86-166?

There is nothing in the language of Chapter 86-166 to indicate that the services it renders taxable are nonetheless exempt from tax under Chapter 212 if they are rendered in connection with the sale or production of property that is exempt from taxation under Chapter 212. Indeed, Fla. Stat. § 212.21(3), which appears to be applicable without modification to the tax on services

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22 The effect of this policy in the face of statutory language suggesting a result inconsistent with this policy is considered at pp. 67-74 supra.

imposed by Chapter 86-166, declares the legislative intent "to tax each and every taxable privilege made subject to the tax or taxes, except such sales . . . as are specifically exempted therefrom by this chapter."[23] Because Chapter 86-166 does not specifically exempt services rendered in connection with the sale or production of exempt property, and because the exemption provisions generally make no reference to services, see Fla. Stat. § 212.08, such services would seem to be taxable.

It should be noted, however, that some of the preexisting exemptions in Chapter 212 would appear to embrace the tax on services imposed by Chapter 86-166. For example, Fla. Stat. § 212.08(7)(t) provides that "[t]here shall be exempt from the tax imposed by this part nonprofit organizations . . . that contribute to the development of good character or good sportmanship, or to the educational or cultural development of minors in this state." And Fla. Stat. § 212.08(7)(u) provides that "[n]onprofit corporations . . . which qualify as homes for the aged . . . or are licensed as a nursing home or hospice . . . are exempt from the tax imposed by this chapter." Such language is broad enough to embrace the tax on services imposed by Chapter 86-166 -- although it is not entirely clear whether

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23 This language plainly is broad enough to embrace the taxable privilege of furnishing "services taxable under this chapter." Fla. Stat. § 212.05.

the exemption is intended to apply to the qualifying organizations as sellers, as purchasers, or as both.[24]

In other cases, there is greater uncertainty whether the exemption provision applies to sales of services that are otherwise taxable under Chapter 86-166. For example, "sales made to the United States Government, the state, or any county, municipality, or political subdivision of this state" are exempt from tax when payment is made directly to the dealer by the governmental entity. Fla. Stat. § 212.08(6). Similarly, sales to churches, to nonprofit religious, charitable, scientific, or educational institutions, and to state headquarters of qualified veterans' organizations are exempt from taxes imposed by Chapter 212. Fla. Stat. § 212.08(7)(a). Read in light of the purpose of such exemptions, these provisions would seem to exempt from taxation sales of services to the entity in question. One could nevertheless argue that sales of

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24 Pierce and Peacock characterize these provisions as exempting, respectively, "[p]urchases by organizations providing educational, cultural, recreational and social benefits to minors" and as "[p]urchases by qualified nursing homes and homes for the aged." Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 491. Of course, there was scant reason to refer to sales by such organizations because virtually everything they sell is services, and such services were not taxable prior to the enactment of Chapter 86-166. Because the tax "imposed by this chapter" is technically a tax on the person exercising a taxable privilege, which is generally the seller of the item in question, the language exempting qualifying youth organizations and nursing homes would seem to apply to their sales as well as to their purchases.

services to such organizations are not exempt because the literal language of each of these provisions exempts only "sales," which is defined only in terms of tangible property and does not include sales of services. See Fla. Stat, § 212.02(2). It would appear that the only organizations which clearly are exempt from a tax on services are the yough groups and nursing homes discussed supra. In the absence of additional guidance on this issue, the taxability of sales to governmental, religious, and charitable entities remains uncertain.[25] It goes without saying, however, that insofar as state or federal constitutional requirements prohibit the taxation of governmental or religious entities, any statutory provisions to the contrary are of no force.

e. Are services subject to a complementary use tax analogous to the use tax on tangible personal property?

Like most states, Florida imposes a use tax on tangible personal property used or consumed in the state. Fla. Stat. § 212.05(1)(b). Use taxes were designed to deal with two concerns created by the constitutional restraints prohibiting the states from taxing sales consummated outside

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25 Another provision whose application to the tax on services is uncertain is Fla. Stat. § 212.08(7)(c) which exempts "from payment of the tax imposed by this chapter on rentals . . . patients and inmates of any hospital." If the charges for hospital rooms might otherwise be regarded as consideration for taxable services, the explicit exemption of such charges for purposes of the preexisting tax on transient rentals suggests that they should be exempt for purposes of the tax on services as well.

their borders or in interstate commerce. First, states feared the loss of business that local merchants would suffer when prospective purchasers made out-of-state or interstate purchases to avoid local sales tax liability. Second, states feared the loss of revenue they would incur as a result of the diversion of sales to nontax states.

The use tax deals with this potential loss of business and revenue by imposing a tax on the use, storage, or other consumption in the state of tangible personal property that has not already been subjected to a sales tax. The use tax imposes an exaction equal in amount to the sales tax that would have been imposed on the sale of the property in question if the sale had occurred within the state's taxing jurisdiction. The state overcomes the constitutional hurdle of taxing an out-of-state or interstate sale by imposing the tax on a subject within its taxing power -- the use, storage, or consumption of property within the state. In principle, then, the in-state consumer stands to gain nothing by making an out-of-state or interstate purchase free of sales tax because he will ultimately be saddled with an identical use tax when the property is brought into the taxing state.[26] As the Florida Supreme Court has stated,

> the primary function of the use tax is to complement the sales tax so as to make

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26 In practice, the critical question facing the taxing state is often whether it can require the out-of-state vendor to collect the use tax concededly due from the local consumer. See National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967).

> uniform the taxation of property subject to the tax, whether produced, purchased and used in this State or produced and purchased in another state or country, but used in this State.

United States Gypsum Co. v. Green, 110 So.2d 409, 412 (Fla. 1959).

Although the policy concerns that motivated the legislature to provide for a use tax on tangible personal property would likewise justify a use tax on services,[27] it seems quite clear that neither Chapter 86-166 nor the preexisting provisions of Chapter 212 impose such a tax. Chapter 86-166 makes no reference to use taxation of services. And the use tax provisions of Chapter 212 refer to the storage, use, or consumption of each or any "item or article of tangible personal property" in the state. Fla. Stat. §§ 212.05, 212.05(1)(b) (emphasis supplied). Indeed, we have seen no suggestion that Chapter 212, as amended by Chapter 86-166, actually imposes a use tax on services.

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27 "If all services provided in Florida become subject to the sales tax, there should, for enforcement and symmetry, be a complementary use tax on all services provided to a Florida consumer. Without the tax also falling on in-state consumers of services rendered by out-of-state providers, tax avoidance would increase and in-state providers would be placed at a competitive disadvantage." Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 479; see also DOR Staff Report, supra, at 14.

As indicated at the outset of this subsection, our consideration of the statutory problems raised by Chapter 86-166 was illustrative. Its purpose was to elucidate the nature of the problems arising out of the enactment of Chapter 86-166 and its relationship to the preexisting provisions of Chapter 212. Although we sought to examine some of the more important issues spawned by the enactment of Chapter 86-166, the foregoing discussion is not offered as an exhaustive treatment of those or many other issues that could be and have been raised concerning Chapter 86-166. The discussion nevertheless unmistakably indicates the need for additional legislation clarifying the legislature's objectives in enacting Chapter 86-166.

D. Constitutional Issues Raised by Chapter 86-166

1. State Constitutional Questions

a. Can Chapter 86-166 withstand constitutional scrutiny under the delegation doctrine?

(i) The delegation doctrine in Florida: general principles. The delegation doctrine is rooted in the principle of separation of powers that underlies both the Florida and United States Constitutions. Under the classic test articulated by the United States Supreme Court, delegation of legislative power to the executive branch is permissible only so long as the legislature expressly prescribes "an intelligible principle" to guide and cabin the administrative delegatee's exercise of such power. J.

W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). The United States Supreme Court, however, has declared a statute to be an unconstitutional delegation on only two occasions, and the doctrine under the Federal Constitution is currently described as "moribund." Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986), aff'd sub nom. Bowsher v. Synar, 106 S. Ct. 3181 (1986).

Florida, however, is widely recognized as one of the few states in which the delegation doctrine retains vitality. As a consequence, "[f]ew questions are raised with more fervent consistency in constitutional litigation involving administrative agencies." Department of Citrus v. Griffin, 239 So.2d 577, 580 (Fla. 1970). It is perhaps the only state in which the state supreme court has directly addressed and rejected, in no uncertain terms, critics who suggested that its retention of the doctrine was anachronistic. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978) (criteria for designating "areas of critical state concern" to be protected from uncontrolled development were constitutionally inadequate); Orr v. Trask, 464 So.2d 131 (Fla. 1985) (requirement that Governor reduce number of deputy commissioner positions was invalid because devoid of criteria for determining which positions to abolish).

The Florida Supreme Court distinguishes its constitution from the Federal Constitution and other state constitutions by observing that in addition to the customary

grants of legislative, executive, and judicial powers to the respective departments, the Florida Constitution also contains an express limitation: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches." Fla. Const. art. II, § 3; see Cross Key Waterways, 372 So.2d at 924. The court stated that both stare decisis and reason compelled the conclusion that the application of the delegation doctrine was required by this constitutional limitation.[28]

Florida delegation theory, as it has been articulated by the Florida Supreme Court, has changed little since the beginning of the century. The essential statement is as follows: "Although modern procedural safeguards in the administrative process and the availability of judicial review serve to limit the potential for capricious or arbitrary action by executive agencies, [the] state constitution wisely requires that the power to make the law reside exclusively with the legislature. . . . [Legislative] authority granted to the executive branch of government must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed." Florida Home Builders Ass'n v. Division of Labor, 367 So.2d 219 (Fla. 1979) (invalidating delegation of

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28 The court conceded, however, that other jurisdictions followed the modern trend despite similar constitutional language. The court dismissed them, stating that the decisions of such jurisdictions had never discussed the meaning of the limiting constitutional language. Id.

duty to approve or reject registration of apprenticeship programs based on "need").

A key concern underlying the delegation doctrine is the safeguarding of courts' ability to review administrative action.

> A corollary of the doctrine of unlawful delegation is the availability of judicial review. In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

Askew v. Cross Key Waterways, 372 So.2d at 918-19. Consequently, the invalidation of an improper delegation often appears to be as much an effort to protect the judicial review power from erosion, thus preserving to the judiciary the power to decide what the language of delegation means, as an effort to preserve legislative power in the proper hands.

Where specific words are challenged as unconstitutionally vague, it is not necessary that they be defined in detail in the statute itself. The courts will often find that a standard is implied by reference to the purposes of an Act. See Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968) (court found no implied standard,

invalidated delegation of authority to regulate "trade barriers" and "unfair trade practices"). Definitions may be provided by reference to (or inferred from) a source outside the statute. "Whether a particular statute is valid . . . or invalid . . . is contingent on how well defined the controversial language has become through common law, trade usage, or perhaps federal law (if the intent of the legislature is to bestow precision to the statute through reference to federal law)." D'Alemberte v. Anderson, 349 So.2d 164, 168 (Fla. 1977) (statute prohibiting public official from accepting gifts "that would cause a reasonably prudent person to be influenced in the discharge of public duties" was invalid delegation to Ethics Commission).

The court has suggested that the delegation of quantitative assessments, such as "undue or unreasonable," "harmful," or "significantly contribute [to pollution]," which were once held invalid,[29] may now be "saved." Such "approximations of the threshold of legislative concern" may be found valid where the statutory language is further articulated and refined through policy statements adopted as rules under the Florida Administrative Procedures Act (APA), thus imposing administrative rather than legislative

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29 See Sarasota County v. Barq, 302 So.2d 737 (Fla. 1974) (statute creating "marine life sanctuary," prohibiting "undue or unreasonable" dredging or destruction of vegetation which would be "harmful or significantly contribute" to pollution was invalid; these terms were ambiguous).

limitations. Askew v. Cross Key Waterways, 372 So.2d at 919.

The court has recognized a general category of exceptions to the strict application of the delegation doctrine, although it is not applicable here. This exception goes under the broad rubric of "police power" -- "where the legislature authorizes an agency to enforce a statute enacted under the police power, the legislature need not provide specific rules to cover all conceivable situations that may confront the agency." Astral Liquors v. Department of Business Regulation, 463 So.2d 1130 (Fla. 1985) (statute which gave liquor control agency discretion to restrict license transfers when licensee had been charged with violation of liquor laws was valid under police power exception). A subcategory is the realm of statutes involving licensing, the determination of the fitness of licensing applicants, and the regulation of businesses which are operated as a privilege and not a right. Id. Even a delegation under the police power is not completely unreviewable. The court still requires sufficient "legislative standards as to constitute a judicially reviewable discretion"; the standard of review is said to be a reasonable standard. Id. In practice, however, the court tends to overlook the delegation inquiry as to whether the legislative standards are adequate to permit judicial review, instead proceeding directly to the traditional reasonableness review of administrative action.

Finally, a growing category of cases relies upon the oft-repeated statement that "the specificity of standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards." Askew v. Cross Key Waterways, 372 So.2d at 918; Reynolds v. State, 383 So.2d 228 (Fla. 1980) (statute requiring junkyards to keep detailed records of autos and auto parts was valid delegation under police power); Straugn v. K & K Land Management Co., 326 So.2d 421 (Fla. 1976) (statute which authorized tax assessor to classify land as agricultural "upon a showing of special circumstances by landowner that the land is to be continued in bona fide agriculture" was valid); Department of Citrus v. Griffin, 239 So.2d 577 (Fla. 1970) (validating statute authorizing "advertising, merchandising, and sales promotion" to create new or larger markets for oranges). Other considerations may be the "practical context of the problem sought to be remedied or the policy sought to be effected." Department of Citrus v. Griffin, 239 So.2d at 577. The legislature need not be burdened to the point of paralysis. The subject matter may be such that only a general scheme or policy can be laid down by the legislature, and the detailed execution is left to the agency, for "the very conditions which may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of

detailed or specific legislation impractical or undesirable." Id. The court hastened to add, however, that "[t]his is not to imply that a double standard exists. Even where a general approach would be more practical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards." Id. While the courts are to recognize the need for flexibility and practicality in administering legislatively articulated policies, id.; Askew v. Cross Key Waterways, 372 So.2d at 924, this flexibility "is essentially different from reposing in an administrative body the power to establish fundamental policy." Id. "[F]or an administrative agency to 'flesh out' an articulated legislative policy is far different from that agency making the initial determination of what policy should be." Id. The court expressed the distinction between improper delegation and the proper role of the agency as "[involving] the exercise of primary and independent discretion rather than the determination 'within defined limits, and subject to review, [of] some fact upon which the law by its own terms operates.'" Id. at 920.[30]

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30 Although we have not burdened the body of this Overview with a detailed discussion of individual cases, we have appended as Attachment B hereto a summary and analysis of the principal delegation cases decided by the Supreme Court during the past decade, as well as a few older cases that are repeatedly cited.

(ii) Does the delegation doctrine jeopardize the constitutionality of the tax on services enacted by Chapter 86-166? In light of the viability of the delegation doctrine in Florida and the uncertainty of the meaning and implications of the language of Chapter 86-166 imposing a tax on services,[31] there is a substantial risk that particular provisions of Chapter 86-166 will not survive constitutional scrutiny in their present form.

The difficulties facing DOR in determining how to define "services" underscore the vulnerability of Chapter 86-166 to an improper delegation challenge. The language of the statute broadly requires that DOR implement the sales tax on "any service." The only limit imposed on DOR is that what it seeks to tax under this provision must indeed be "services." The statute itself offers no definition of "any services" or "taxable services." Although clarification of the term services might be achieved by reference to common or federal law, to other statutes, to usual practices, or to the list of services compiled in the Standard Industrial Classification (SIC) Manual (Executive Office of the President, Office of Management and Budget), there is nothing in Chapter 86-166 to indicate to which of these definitional sources DOR should turn. The statute thus leaves to the discretion of DOR the arguably legislative task of defining services.

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31 We have considered a number of these uncertainties above. See pp. 5-33 supra.

As a consequence, DOR must make such determinations as whether services includes the services that employees provide to employers;[32] whether interest on loans constitutes consideration for a service; how, if the employee services are excluded from the definition of a taxable service, to distinguish employees from "dealers";[33] whether services are limited to those rendered by in-state providers to in-state consumers or whether they include services rendered by out-of-state providers to in-state consumers and/or services rendered by in-state providers to out-of-state consumers; and whether, and the extent to which, the preexisting provisions of Chapter 212 are applicable to taxable services, however defined.[34]

It might be argued that this is precisely the type of technical subject matter for which the legislative branch is equipped simply to lay out a general scheme or policy due to the impracticality or difficulty of drafting detailed legislation. This argument is undermined, however, by the

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32 We have considered the merits of this issue at pp. 5-15 supra.

33 For example, the legislature has provided no standard for DOR in determining whether a law firm associate, an office temporary, or a teacher would be an employee or a "dealer."

34 For example, the legislature has provided no guidance with regard to the reconciliation of its stated policy against duplication and pyramiding of the tax imposed by Chapter 212 and the language of many of the anti-pyramiding provisions which do not by their terms apply to services. We have considered the merits of some of these issues at 19-22 supra.

wealth of statutory detail provided by the legislature in the preexisting provisions of Chapter 212. The stark contrast between these preexisting provisions and the skeletal nature of Chapter 86-166 provides grounds for contending that the legislature has failed to provide its customary guidance in this area.

Moreover, the tapes of the House committee and subcommittee hearings indicate that even the legislature suspected that the statute needed, but lacked, further definition of services, and that the interface between preexisting Chapter 212 and Chapter 86-166 required further attention. Frequent statements in the legislative committees support the proposition that the statute was not contemplated as a complete or final expression of legislative intent but was rather designed as an effort by the legislature to establish a self-imposed deadline before which it would be compelled to enact a more comprehensive and refined revision of the Chapter 212. See Jacobs, supra, 14 Fla. St. U.L. Rev. at 498-99.[35]

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35 This is not to suggest, however, that the legislature did not in fact intend to enact a tax on services or that it did not in fact enact a valid tax on services. Whatever the motivations behind the bare-bones approach to the services tax question embodied in Chapter 86-166, the legislature nevertheless enacted a statute purporting to impose a tax on services. Even if the legislature in enacting Chapter 86-166 was "putting a loaded gun to [its] head . . . [so that] [t]he consequences of inaction will be so horrendous as to make inaction distasteful, to say the least," Jacobs, supra, 14 Fla. St. U.L. Rev. at 498-99, the statute is nonetheless valid if it passes constitutional muster under the objective standards reflected in Florida case law. And (Footnote 35 Continued)

Given the breadth of the delegation of legislative power in Chapter 86-166, the brevity of the statutory language, the uncertainty of the meaning of services, and the awkward interface of Chapter 86-166 with the preexisting provisions of Chapter 212, the Florida courts might well find it difficult to determine whether the regime that DOR attempts to implement is in fact the regime that the legislature intended to adopt. As a consequence, there is a serious -- though unquantifiable -- risk that some provisions of Chapter 86-166 will be held invalid under the delegation doctrine if DOR is required to implement it in its present form.

b. Does Chapter 86-166 impose an income tax in violation of the Florida Constitution?

Section 5(a) of article VII of the Florida Constitution prohibits a tax "upon the income of natural persons." Fla. Const. art. VII, § 5(a). The enactment of Chapter 86-166 raises the question whether the extension of the tax levied by Chapter 212 to "the consideration for performing or providing any service" levies a forbidden income tax on noncorporate service providers.[36] The

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(Footnote 35 Continued)
if the statute violates the delegation doctrine, it is not because the legislature expected that it would have more to say about the matter at some point in the future. It is rather because Chapter 86-166 fails to pass muster under the prevailing criteria in Florida for determining the validity of a statute under the delegation doctrine.

36 Corporations are subject to state income taxation. Fla. Const. art VII, § 5(b).

question would be raised in its starkest form if Chapter 86-166 were construed to apply to employee services. A five percent tax on an employee's paycheck bears a striking resemblance to a personal income tax -- at least to those who are not steeped in the nuances of state and local tax law.[37] But the same fundamental question arises with regard to any individual who derives income from services: Does a tax on the privilege of providing services, measured by the consideration received for such services, amount to an unconstitutional tax on the individual's income? The answer, like so many others in this Overview, is uncertain. There is nevertheless a distinct possibility that a court would invalidate Chapter 86-166 in its application to an individual's services as an unconstitutional income tax.

The most troublesome precedent is State ex rel. McKay v. Keller, 191 So. 542 (Fla. 1939) involving an effort by the City of Tampa to impose a license tax on professions. Payment of the tax was a prerequisite to the issuance of an annual city license. The tax was graduated by reference to "gross receipts derived from the practice of the profession" during the preceding year -- $25 for receipts of $2,500 or less and $10 for each additional $1,000 of receipts. The city license ordinance explicitly provided that "[i]t is intended that the foregoing classification shall be a

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37 As Professor Jacobs put it: "A tax which extracts five percent of everyone's yearly earnings sure looks like an income tax." Jacobs, supra, 14 Fla. St. U.L. Rev. at 499.

license tax for the professions as named and nothing contained in this ordinance shall be construed as meaning or intending that such tax be . . . an income tax or a tax on income, or other than a license tax." Id. at 544.

McKay, a Tampa lawyer, attacked the ordinance on the grounds, among others, that it levied an unconstitutional tax upon his income regardless of the characterization placed upon the tax by the City of Tampa. The City responded that it had merely imposed a license or occupation tax upon lawyers, which admittedly lay within the City's power. Id. at 546. The court conceded that it had earlier upheld a license tax upon anyone who received payment for electricity in the state, measured by the gross receipts derived from the sale of electricity, City of Lakeland v. Amos, 143 So. 744 (Fla. 1932), and had rebuffed the claim that it amounted to an unconstitutional income tax by distinguishing taxes on the privilege of doing business measured by income from direct taxes on the income itself.[38] In Keller, however, the court saw things differently:

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38 The court declared: "It is in no sense a 'tax . . . upon the income of residents or citizens of this State' within the terms or intent of section 11 article 9, adopted in 1924 as part of the Constitution of Florida. . . . The tax is on the corporation, firm or individual for the privilege of engaging in the business or occupation of selling electricity, etc. and not upon money received for sales, though the excise is measured by reference to gross receipts from such sales. . . . The tax is not upon earnings, but upon the occupation or business of selling measured by reference to gross receipts from sales." City of Lakeland, 143 So. at 747.

> It is not difficult to distinguish between an excise tax or a tax on the privilege of engaging in an occupation or a sales tax or a transaction tax or an indirect sales tax and hold that they are not controlled or fall within the inhibitions of Section 11 of Article IX of the Constitution . . . The relator is an attorney and the receipts, either net or gross, cannot be classified as an excise tax, sales tax or tax on the privilege of practicing law within the meaning of Section 11 of Article IX whereby it is unlawful to levy on the income of citizens or residents of Florida on the part of the State of Florida. The learning and legal ability of an attorney are among his business assets and differ materially from capital invested in a mercantile business.

191 So. at 547. See also City of De Land v. Florida Public Service Co., 161 So. 735 (1935). The court's failure to elaborate upon the distinction it perceived between the tax at issue in Keller and the license taxes measured by gross receipts that it had sustained over constitutional objections makes it difficult to determine the precise scope and implications of Keller.

The waters are muddied even further by Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950), the Florida Supreme Court's landmark decision sustaining the constitutionality of Florida's sales tax. Under the statute, Kirk, a landlord, was subjected to a tax measured by three percent of his rentals for exercising the "taxable privilege" of "renting, leasing or letting any living quarters." Fla. Stat. § 212.03(1). Kirk attacked the constitutionality of the statute on numerous grounds. In upholding the statute, the

court devoted much of its attention to the proposition that the levy was an excise as distinguished from a property tax. In passing, however, the court also observed that the levy was not an income tax:

> The tax levied by the statute here under attack is nonetheless an excise tax, because the amount of the tax to be paid is measured by the compensation received for the merchandise sold or services rendered. . . . Moreover, the tax here involved is not an income tax. Although the tax is determined upon the price charged for the merchandise or services, it is not a tax upon the personal property or services, but upon the privilege of selling the same, and it is measured by the extent to which the privilege is enjoyed.

47 So.2d at 574. The court in Kirk makes no reference to its earlier decision in Keller.

Although Kirk offers considerable comfort to those who would defend the Chapter 86-166 tax on services against the charge that it levies an unconstitutional income tax, the issue is clearly debatable and one cannot confidently predict the outcome of a legal challenge to the tax. Even Professor Jacobs, who argues in his thoughtful law review article that "the case for sustaining Florida's services tax is strong," Jacobs, supra, 14 Fla. St. U.L. Rev. at 403, nevertheless concedes that "a court . . . could hold the services tax unconstitutional," id. at 500, and that "the technical arguments for and against the constitutionality of

the services tax are close." Id.[39] Robert Pierce and Carol Peacock are less sanguine about the constitutionality of Chapter 86-166 in its present form:

> Without further direction from the legislature, it is difficult to characterize the nature of the tax on services, its incidence, or the scope of its intended coverage. This dearth of detail about the tax leaves it vulnerable to challenge as an unconstitutional personal income tax. Even with precise detailing of the characteristics and nature of the tax, such a challenge might not be avoided.

Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 480-81. Cass Vickers appears to harbor similar doubts about the constitutionality of Chapter 86-166. He observes:

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39 Professor Jacobs' position rests on several propositions. First, he contends that the tax on services imposed by Chapter 86-166 should be regarded as an excise tax and sustained under the authority of Gaulden v. Kirk. Jacobs, supra, 14 Fla. St. U.L. Rev. 501-03. He also cites decisions from other jurisdictions that held that taxes imposed on employees did not constitute income taxes. Second, Professor Jacobs contends that the services tax, by definition, is not an income tax for constitutional purposes. Reading the Florida constitutional provision as prohibiting "exactly what Congress was prohibited from doing prior to the sixteenth amendment," id. at 504, to wit, imposing a tax that reached both earned and investment income, Jacobs concludes that the services tax is not an income tax because it reaches only earned income. In support of the definitional argument, Jacobs notes further that "[t]here is a suggestion in early federal case law that deductions are an indispensable feature of an income tax." Id. at 505. Because Florida's service tax offers no deductions, it does not fall within the definition of a "classical" income tax. Finally, Professor Jacobs relies on policy arguments in support of the constitutionality of the tax on services. He notes that the services tax would be less regressive than the existing general sales tax and that the tax, if it was applicable to employees, would likely be deductible for federal income tax purposes. Id. at 505.

> While an excise tax upon the privilege of providing services within the State of Florida measured by the consideration received may sound like something different from a tax upon that individual's income, the difference, for an individual whose income is derived solely from his services, may lie only in the absence of any deductions, i.e., the services tax would be levied on a gross basis. To the extent that deductions are permitted, the tax even more clearly resembles an income tax.
>
> Interpreting the predecessor to Art. VII, § 5 of the Florida Constitution, the Florida Supreme Court held in Gaulden v. Kirk . . . that the Ch. 212 tax was not a prohibited income tax, saying:
>
> > Although the tax is determined upon the price charged for the merchandise or services, it is not a tax upon the personal property or services, but upon the privilege of selling the same and it is measured by the extent to which the privilege is enjoyed.
>
> While it remains to be seen whether the extension of the tax to services requires a different result, the court's gratuitous reference to services may prove haunting.

Vickers, supra, Fla. B.J., Dec. 1986, at 35-36.

In sum, given the uncertainty over the scope of the court's holding in Keller, the court's failure to distinguish Keller in Kirk, and the force of the argument that a tax on the consideration for performing services is in substance a tax on the income of an individual whose income is derived entirely from services, there is at the very least a palpable risk that a court would find Chapter 86-166 imposed an unconstitutional income tax as applied to individual service providers.

c. Other state constitutional issues

Apart from the questions relating to delegation and to characterization of Chapter 86-166 as an income tax, the potential state constitutional objections to Chapter 86-166 do not provide grounds for serious concern. The uniformity clause of Florida's Constitution, Fla. Const. art. VII, § 2, applies only to property taxes. See, e.g., North American Co. v. Green, 120 So.2d 603, 614 (1960) see generally 1 W. Newhouse, Constitutional Uniformity and Equality in State Taxation, 183 (2d ed. 1984); 50 Fla. Jur. 2d Taxation § 7.8. Hence it does not apply to the excise tax imposed by Chapter 212, as amended by Chapter 86-166. Gaulden v. Kirk, 47 So.2d at 574.[40]

Florida's equal protection provision, Fla. Const. art. I, § 2, requires that statutory classifications have a rational basis, that is, rest on some difference among individuals which bears a just and reasonable relation to the statutory purpose. See, e.g., Sasso v. Ram Property Management, 431 So. 2d 204 (Fla. App. 1983), approved, 452 So. 2d 932 (Fla. 1984). Suspect classifications involve a

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40 As we noted above (see pp. 44-50 supra), there may be some question whether the tax on services imposed by Chapter 86-166 will be characterized as an excise tax or as an income tax for purposes of the constitutional prohibition against income taxes on natural persons. It has never been suggested, however, that the tax on services imposed by Chapter 86-166 would change the character of Chapter 212 from an excise tax to a property tax. For purposes of the applicability of Florida's uniformity clause, the only question is whether the levy constitutes a property tax, which it clearly does not.

strict scrutiny standard, Graham v. Ramani, 383 So. 2d 634 (Fla. 1980), while "quasi-suspect" classifications are subject to an intermediate standard -- the classification must bear a substantial relationship "to the interest asserted by the state." State Department of Health and Rehabilitative Services v. West, 378 So. 2d 1229 (Fla. 1979). With regard to excise taxes, the legislature enjoys considerable freedom in classification, see, e.g., Eastern Air Lines Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), appeal dismissed, 106 S. Ct. 213 (1985) (upheld gasoline tax imposed on airlines but not railroads or vessels); see generally Broward County v. Overmayr, 397 So. 2d 1175 (1981) (upheld occupational tax on professional association challenged on basis that tax was not imposed on partnerships or unincorporated associations); Shevin v. Kahn, 233 So. 2d 72 (1973), aff'd, 416 U.S. 351 (1974) (upheld $500 tax exemption for widows); Faircloth v. Mr. Boston Distiller Corp., 245 So. 2d 240 (1970) (upheld tax imposed only on bottlers bottling exclusively in Florida). It does not appear that the tax on services imposed by Chapter 86-166 abuses the wide discretion generally accorded the legislature in drawing lines for tax purposes. We recognize the suggestion that there may be no rational basis for distinguishing employee services from nonemployee services (on the assumption that only the latter would be taxed under Chapter 86-166). See Vickers, supra, Fla. B.J.,

Dec. 1986, at 36; DOR Staff Report at 15-16; cf. Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 477. Nevertheless, for the reasons set forth in Section III(B) above as well as the fact that the distinction has been drawn, apparently without successful constitutional challenge, in other states which have enacted expansive sales taxes on services,[41] we believe there is ample authority for state constitutional purposes for distinguishing between employee and nonemployee services under Chapter 86-166.

2. Federal Constitutional Questions

Chapter 86-166 does not by its terms raise any substantial federal constitutional questions. To be sure, substantial federal constitutional questions could be raised by the application of Chapter 86-166 to particular transactions. If DOR sought to apply the tax on services to a firm without de minimis contacts with Florida, it could raise problems of sufficient nexus under the Due Process Process Clause. See Vickers, supra, Fla. B.J., Dec. 1986, at 36. If DOR sought to apply Chapter 86-166 to services

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41 Hawaii's tax exempts "[a]mounts received as salaries or wages for services rendered by an employee to an employer," Hawaii Rev. Stat. § 237-24(6) (1976); Iowa's tax excludes from the definition of services those services performed for an employer, Iowa Code § 422.42(13) (1985); New Mexico's tax exempts "receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services," N.M. Stat. Ann. § 7-9-17 (1986); and South Dakota's tax declares that "services rendered by an employee for his employer are not taxable," S.D. Codified Laws Ann. § 10-45-4.1 (1982).

provided by out-of-state firms that threatened to impose a multiple tax burden on such firms, it could raise problems of unconstitutional multiple taxation under the Commerce Clause. And if DOR construed Chapter 86-166 as not reaching employee services, it could raise questions of unconstitutional classification under the Equal Protection Clause of the Fourteenth Amendment.[42] On the other hand, DOR could construe Chapter 86-166 to avoid all of these problems. Hence unless and until DOR applies Chapter 86-166, one cannot sensibly address the federal constitutional issues raised by such application. In the context of our efforts to refine Chapter 86-166, however, we do consider related federal constitutional concerns. It is therefore appropriate to defer consideration of the significant federal constitutional issues potentially raised by the application of Chapter 86-166 to our examination of those issues in conjunction with our discussion of the Model Annotated Revision of Chapter 212. See pp. 68-103 infra.

IV. The Model Annotated Revision of Chapter 212

In addition to the assignment of identifying and analyzing the legal problems created by the enactment of Chapter 86-166, the Legal Consultants were charged with the task of drafting a Model Annotated Revision of Part I of Chapter 212 (the "Revision") in order to provide the Florida

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42 As intimated above, we do not regard this question as substantial. See p. 52 supra.

Legislature with a "workable solution" to these problems. Agreement for Expert Legal Services § 5.02(b). The Model Annotated Revision is included as Part II of this Report. This section of the Overview is designed to explicate the thinking that underlies the Revision.

A. The Scope of the Revision

Beyond its broad requirement that the Legal Consultants were to prepare an annotated revision of Chapter 212 consistent with the conceptual framework developed in the Overview, the Agreement explicitly provided that the Revision would contain:

> (3) An exemption for salaried employees with a complementary provision taxing the self-provision of services as currently provided for tangible personal property in § 212.06(1)(b), F.S.;
>
> (4) An exemption for casual and isolated services;
>
> (5) A solution to the sale for resale problem as it applies to resales to non-exempt entities as well as to exempt or immune entities;
>
> (6) A "use" tax for services purchased outside Florida for use in Florida; and
>
> (7) A Definition of the term "any service" if required to identify taxable transactions and of terms such as "performing," "providing," "use," or "consuming" in this state to minimize nexus problems associated with multi-state service transactions.

Agreement for Legal Services § 5.02(b).

From the outset of the Agreement, however, the Legal Consultants and the State, represented by DOR, recognized that the precise scope of the Revision of Chapter 212 could not be determined until the issues raised by the enactment of Chapter 86-166 had been analyzed in some detail. Indeed, inasmuch as the Revision was intended to provide a "workable solution" to the problems associated with Chapter 86-166, it was plainly necessary to develop an appreciation of these problems before a proposal could be tendered for their solution. The Agreement itself contemplated an interchange between the Legal Consultants and DOR during the initial stages of the project: The Legal Consultants agreed to deliver within twenty days after the date of the Agreement "an outline or rough-up of a Conceptual Plan acceptable to the STATE which will be negotiated between the parties during such twenty (20) days as to content." Agreement for Legal Services § 5.02(a).

During the twenty day period,[43] the Legal Consultants delivered a Rough-Up of Conceptual Plan acceptable to the State.[44] The Rough-Up, which elaborated on the Agreement, provided that the Revision would:

(1) impose a tax on the purchase, use, or consumption of all services (including services provided by employees to employers);

(2) revise Chapter 212 in order to incorporate modifications necessitated by the imposition

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43 The period expired on October 20, 1986.

44 The Rough-Up is appended as Attachment C hereto.

of a tax on services (including the placing of the legal incidence of the tax imposed by the existing provisions of Chapter 212 on the purchase, use, or consumption of the property or services taxed thereby);

(3) revise Chapter 212 to clarify, simpl[ify], and systematically organize the provisions of existing Chapter 212 without substantive change;

(4) provide for collection of the tax by the seller or by the purchaser, as appropriate;

(5) provide an exemption for the sale of casual and isolated services;

(6) provide a sale for resale exemption for services along the lines suggested in the Appendix hereto;

(7) address the problems identified in the AGREEMENT, in EXHIBIT A to the AGREEMENT, and in a Supplement to Exhibit A to the AGREEMENT to be provided to the CONSULTANTS by the Department of Revenue not later than November 15, 1986 which Supplement shall identify any additional problems that the STATE believes the CONSULTANTS should consider in drafting their Model Annotated Revision to Chapter 212.

Rough-Up of Conceptual Plan at 2. At the time the Legal Consultants delivered the Rough-Up, they also provided DOR with a summary of their "preliminary thoughts" regarding the Overview and the Revision. See Appendix to Rough-Up to Conceptual Plan.[45]

In the course of the next month, as a result of additional research, further consideration of the Model Annotated Revision, and ongoing discussions between the Legal Consultants and DOR, it became apparent that several

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45 The Appendix to the Rough-Up of Conceptual Plan is appended to the Rough-Up as part of Attachment C hereto.

of the preliminary decisions that had been reached regarding the scope and form of the Revision were unrealistic, unwarranted, or unnecessary. Specifically, the Legal Consultants and DOR recognized and agreed that (1) an attempt to clarify, simplify, and systematically reorganize Chapter 212 was an overwhelming task that could not be accomplished in the time allotted and that, in any event, it was extremely difficult to determine in many cases whether the changes that the Legal Consultants were considering constituted "substantive" changes; (2) an attempt to revise the structure of preexisting Chapter 212 to place the legal incidence of the tax on the consumer was unnecessary to achieve the perceived objectives of Chapter 86-166 and unwise in light of the danger, however remote, that the change would undermine the judicial precedents sustaining the constitutionality and various other features of preexisting Chapter 212; and (3) it was more reasonable, in light of the considerations discussed in Part III(B) above, to read Chapter 86-166 as excluding services provided by employees from the tax imposed by Chapter 86-166 and, consequently, that the Revision should be drafted to provide for such an exclusion.

To confirm this understanding, DOR sent a letter to the Legal Consultants on November 20, 1986 reciting "our agreement" as to the following:

> 1. The annotated revision will contain an exemption for employee services and no provision for the self provision of labor services.

2. The annotated revision of the existing Part I of Chapter 212 will be limited to reorganizing the several taxes internally by grouping exemptions and impositions and alphabetizing multiple provisions within a sub-section where feasible. No substantive changes to Chapter 212 outside 86-166 are to be made. The only changes to existing (Chapter 212) language will be those required to interface the Chapter 86-166 annotated revisions into Chapter 212.

3. Finally, if you need until December 31, 1986, to complete the project, this will serve to amend our contract extending the due date from December 15, 196, to December 31, 1986.

Letter from Jeff Kielbasa to Walter Hellerstein, November 20, 1986. The letter also noted that the letter constituted "a modification of the contract you are performing under."

Although the letter did not say so explicitly, it was the clear understanding of the Legal Consultants and DOR that the other aspects of the Legal Consultants' charge with regard to the Revision remained unchanged. Hence, the Revision was to provide for (1) a tax on the purchase, use, or consumption of all services (except services provided by employees to employers); (2) an exemption for casual and isolated services; (3) collection of the tax by the seller or by the purchaser, as appropriate; (4) a sale for resale exemption along the lines suggested by the Legal Consultants in the Appendix to the Rough-Up of the Conceptual Plan; (5) and various other miscellaneous items identified in the Agreement and related documents.

In sum, the scope of the Revision, as finally determined by the Legal Consultants and DOR, embraces essentially three objectives: first, to refine Chapter 86-166 so as to integrate the tax on services in a workable fashion into the preexisting structure of Chapter 212 without, however, making any substantive changes in the preexisting provisions of Chapter 212; second, to incorporate the substantive changes explicitly called for by the Agreement, as amended, such as the casual sale exemption and the sale for resale exemption; third, to reorganize to a limited extent and without substantive change the preexisting provisions of Chapter 212 by grouping exemption and impositions and by alphabetizing multiple provisions where feasible.

B. Basic Assumptions

In preparing the Model Annotated Revision of Chapter 212, the Legal Consultants proceeded on the basis of certain fundamental assumptions. Some of these were dictated by the scope of the Revision as finally determined. Others were rooted in basic judgments about the nature of the Revision and the Legal Consultants' role in drafting it. In this section, we identify these assumptions and set forth our reasons for adopting them. This should provide a fuller understanding of our approach to or resolution of particular issues in the Revision and may assist the legislature in making its own judgments about these issues.

1. The Revision Does Not Attempt to Create a Utopian Sales Tax

In utopia, a sales tax would conform to the following "widely accepted"[46] standards for evaluating sales tax structures. First, the tax would be a uniform levy on consumer expenditures, unless there was a compelling reason for exception.[47] Second, the tax structure would be designed to minimize regressivity in the distribution of the tax burden in order to accommodate generally accepted standards of equity. Third, the tax structure would not create economic inefficiency by favoring particular forms of business organization or particular modes of delivering goods and services. Finally, the tax structure would facilitate tax administration and tax compliance.

In approaching the Revision, we did not envision our task as creating a utopian sales tax structure for the State of Florida. To be sure, by drafting legislation refining Chapter 86-166's extension of Florida's sales tax to services, we may be able to move Florida's sales tax closer to the perceived ideal. Thus the Revision embraces a broad class of consumer expenditures that up to now have been excluded from the sales tax base without principled

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46 J. Due and J. Mikesell, Sales Taxation: State and Local Structure and Administration 23 (1983).

47 Exceptions in this category would include those based on a desire to avoid pyramiding (e.g., sale for resale), constitutional necessity (e.g., sales to the United States), and commonly held notions of equity (e.g., sales of prescription drugs).

justification. In a number of other respects, however, we have either ignored or consciously deviated from the goals of a model sales tax in our effort to refashion Chapter 86-166 to accommodate preexisting Chapter 212. In this regard, we wish to make explicit two specific assumptions that depart from the stated ideal.

a. The Revision does not seek to make the Florida sales tax a uniform tax on consumer expenditures

In refining Chapter 86-166's extension of the sales tax to services, we do not systematically seek to make the Florida sales tax a uniform tax on consumer expenditures. To implement the objective of an ideal sales tax, one would have both to broaden the sales tax base to include all services (which <u>is</u> one of our assignments) and to confine the sales tax base to purchases for personal consumption (which is <u>not</u> one of our assignments). Indeed, to achieve the latter goal, all purchases for business use (whether of tangible personal property or services) would be exempt from the sales tax base because their cost will later be reflected in the price of the goods or services that are sold to consumers and, under a broad-based tax on goods and services, would be subject to taxation at that time. No state has ever attempted to implement this objective completely. Even within the confines of sales of tangible personal property, most states, including Florida, fail to do so. For example, Florida taxes sales of machinery and

equipment used in manufacturing and processing personal property that will be taxed when sold, unless the machinery and equipment is used in new or expanding industry. Fla. Stat. §§ 212.05(1)(f), 212.08(5)(b). Presumably the cost of non-exempt machinery is taxed twice, once when purchased and again as an element of the price of the goods they produce, when such goods are sold at retail.[48] In short, Florida, like most states, presently does not impose a uniform tax even on sales of tangible personal property, and it is outside the scope of our undertaking to deal with that problem.

b. The Revision does not consider questions of tax equity

The second specific departure from the criteria that should guide the creation of a utopian sales tax is our assumption that we are not to consider questions of tax equity in drafting the Revision. We view our fundamental task as the technical one of creating a workable sales tax structure that integrates the tax on services imposed by Chapter 86-166 with the preexisting provisions of Chapter 212. We have not been charged with evaluating on the merits any exemptions that have been repealed, sunsetted, or subjected to further study by the Sales Tax Exemption Study

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48 See also pp. 24-27 supra discussing the analogous problem with respect to tangible personal property that is "used and dissipated" in the process of producing other property for sale.

Commission created by Chapter 86-166, nor are we equipped to make such policy decisions. Consequently, the only exemptions for services that we have included or recognized in the draft Revision are those that are specified in the Agreement, as amended (such as sale for resale and casual sales), those that are required by the Federal Constitution (such as sales to the United States Government), and those that are compelled by structural or definitional aspects of the tax itself (such as the exemption "from the tax imposed by this chapter" for nursing homes under Fla. Stat. § 212.08(7)(u)).[49] Hence medical services (e.g., kidney dialysis) and other services that have traditionally been excluded from the sales tax base are generally taxable under the draft Revision. Furthermore, no effort was made to create exemptions for sales of services that might be regarded as parallel to existing exemptions for sales of tangible personal property. For example, even though Chapter 212 presently exempts sales of items such as fertilizers, insecticides, herbicides, and fungicides used for application on crops, Fla. Stat. § 212.08(5)(a), the

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49 By amending the definition of "sale" to include sales of services, see proposed Fla. Stat. § 212.02(18), -- a change that was required by our charge to integrate Chapter 86-166 and the preexisting provisions of Chapter 212 in a workable fashion -- we necessarily extended the exemption of sales to governmental and charitable organizations to sales of services. See Fla. Stat. §§ 212.08(6), 212.08(7). Under Chapter 86-166, there is considerable uncertainty whether sales of services to governmental and charitable organizations are exempt from tax. See pp. 27-30 supra.

draft Revision provides no exemption for the sales of the service of applying such items to crops.

We recognize that this sweeping approach to the taxation of services may not comport with the type of tax that the legislature had in mind when it enacted Chapter 86-166. The legislature, however, is fully capable of making any changes it deems necessary in the draft Revision. Given our assignment, it seemed more appropriate to leave to the legislature the essentially political task of carving out specific exemptions from the service tax rather than presuming -- even on a preliminary basis -- to undertake that task ourselves.

2. The Revision Makes No Substantive Changes in the Preexisting Provisions of Chapter 212, Except Those Required by the Extension of Chapter 212 to Services

In drafting the Revision, we have proceeded under the assumption that no substantive changes were to be made in the preexisting provisions of Chapter 212, except insofar as such changes were necessitated by the extension of the tax imposed by Chapter 212 to services. This assumption was required by the Agreement, as amended. Furthermore it reinforces the point that the Legal Consultants are performing the technical task of refining Chapter 86-166 into a more workable statute rather than creating new substantive law.

Transactions that were taxable prior to the enactment of Chapter 86-166 therefore remain taxable after the enactment of Chapter 86-166, except to the extent that Chapter 86-166 has itself created exemptions from the preexisting provisions of Chapter 212.[50] By the same token, transactions that were specifically exempted from taxation under the preexisting provisions of Chapter 212, and with respect to which the exemption has not been repealed by Chapter 86-166, remain exempt from taxation under the Revision. We assume that the legislature, by imposing a tax on any service in Chapter 86-166, did not intend to subject to taxation activity that might be regarded as a service under a broad construction of that term (e.g., the provision for a consideration of temporary living accommodations for migrant workers), when such activity is nevertheless exempt from taxation by other specific preexisting provisions of Chapter 212. See Fla. Stat. § 212.03(7)(d). We have drafted a provision in the Revision to make this assumption explicit. See proposed Fla. Stat. s. 212.059(6).

3. The Revision Attempts to Avoid Uncertainty

A third fundamental premise that guided our drafting efforts was that the Revision should avoid

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50 Chapter 86-166 does, for example, expand the preexisting exemptions for sales of tangible personal property by providing that retail sales "do not include materials, containers, labels sacks or bags intended to be used one time only . . . in the process of providing a service taxable under this part." Fla. Stat § 212.02(3)(c).

uncertainty. Although we did not delude ourselves into thinking that we could resolve all of the issues that will inevitably arise in construing the Revision should it become law, we attempted within reason to resolve as many of such issues as we could. Our purpose in doing so was to minimize the compliance and administrative burdens that uncertainty imposes upon both taxpayers and the DOR and to avoid the constitutional doubts that uncertainty can spawn. See Section III(D)(1) supra. Moreover, by explaining our rationale for such tentative determinations and by implementing them with proposed statutory language, we believe that we are performing a more useful service for future legislative policymakers and draftsmen than if we had done no more than identify areas of uncertainty that needed clarification.

C. The Conceptual Framework

In this subsection, we describe in detail the conceptual framework that underlies the Model Annotated Revision. The framework was developed in light of the questions examined in Part III and the factors considered in the preceding two subsections. Our focus, however, now turns much more directly to the substance of the statutory revision.

1. Sale for Resale and Pyramiding

In principle, a retail sales tax is a single-stage levy on the final sale of goods or services to the consumer. To avoid multiple-stage imposition or pyramiding of the tax, retail sales tax jurisdictions generally provide an exemption for goods or services that are sold for resale. Since the goods or services will be taxed when resold, to tax them at the preceding stage of the economic process would result in duplicative taxation.

As we have observed above, the sale for resale concept in Florida (and in other jurisdictions) is often determined more by physical than by economic criteria. For example, if a producer of goods purchases property that it resells as such or incorporates as an ingredient into property to be resold, the property typically is exempt under the resale (or retail sale) provision. If, on the other hand, a producer of goods purchases property that it consumes or "dissipates" in the process of producing other property, the property will often be taxable. See Fla. Stat. § 212.02(3)(c); pp. 26-27 supra. In both cases, the costs of the property purchased by the producer will be reflected in the price of the final good sold to the consumer. Yet only in the first case will the sale for resale concept prevent pyramiding of the tax. Despite the injunction against "pyramiding or duplication" of sales taxes in Chapter 212, Fla. Stat. § 212.081(3)(b), Chapter

212 unmistakably tolerates substantial pyramiding in an economic sense. Indeed, more than 25 percent of the revenues generated by Chapter 212 derive from purchasers of producers' goods,[51] which provides some rough idea of the amount of pyramiding in Florida's existing tax structure.

In approaching the sale for resale concept in the context of services, we adopt essentially the same approach that Florida had taken, prior to the enactment of Chapter 86-166, with regard to sales of tangible personal property: a tax will not be imposed on the sale of property if the property is to be resold as such in a subsequent transaction; a tax will be imposed on the sale of property if it is not to be resold as such in a subsequent transaction, i.e. if it is to be "consumed" in a physical or conventional sense by the purchaser. By a parity of reasoning, a tax will not be imposed on the sale of a service if the service is to be resold as such in a subsequent transaction; a tax will be imposed on the sale of a service if it is not to be resold as such in a subsequent transaction, i.e., if it is to be "consumed" in a physical or conventional sense by the purchaser. For example, automobile body work billed to an automobile mechanic by the body shop which repaired the owner's car would not be taxable if the mechanic resells the body work as such to the

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51 See Information Package prepared by the Department of Revenue for the December 17, 1986 Meeting of the Sales Tax Exemption Study Commission, Exhibit 9, p. 5 (pie chart).

customer by separately stating such charges on his invoice. On the other hand, if services are purchased by a firm that does not resell the services as such but rather consumes them in the performance of its own services, the purchased services will be taxable even though they enter into the price of the taxable services it sells. For example, courier services purchased by a law firm would be taxable because they are consumed by the law firm in performing its services for its client. The fact that such services might be separately stated on the law firm's bill to its client would not transform such services into those that are "resold" to the client. The key point is that the law firm's use of courier services is an integral part of the performance of its duties to its client -- delivery of legal services in a timely fashion. The separate statement requirement, which is a prerequisite to the application of the sale for resale exclusion with regard to qualifying resales of services, see Proposed Fla. Stat. § 212.02(17), is not intended to provide an exemption for any purchaser of a service who separately states the service charge in a subsequent taxable transaction. Rather the resale exclusion is intended to apply only to those purchasers who in effect act as brokers or middlemen in procuring services for their customers but who do not themselves use the services in conducting their own business.

With the extension of the sales tax base to services, however, the pyramiding problem goes beyond the question of resales of services. Two additional questions must also be addressed: how to treat sales of tangible personal property that are used in connection with the performance of a taxable service, and how to treat sales of services that are performed in connection with the production of tangible personal property for sale. The legislature has already addressed the first question, at least in part. Chapter 86-166 amended the definition of a retail sale to provide that retail sales "do not include materials, containers, labels, sacks or bags intended to be used one time only . . . in the process of providing a service taxable under this part." Fla. Stat. § 212.02(3)(c). Hence "materials" used "one time only" in providing a taxable service--such as plastic clothing bags purchased by dry cleaners or shampoos purchased by beauty parlors--will be exempt from taxation under an expanded tax on services.[52] Materials used more than once in performing a taxable service--such as word processing equipment purchased by a law firm--will remain taxable.

The remaining question is the treatment of sales of services performed in connection with the production of tangible personal property for sale. The Florida

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52 In fact, cleaning, laundry, and dry cleaning services were subjected to tax effective July 1, 1986 by Chapter 86-166. See Fla. Stat. § 212.05(1)(i).

legislature's expressed "intent that there shall be no pyramiding or duplication" of sales taxes, Fla. Stat. § 212.081, would as an economic matter favor an exemption of the sale of such services for reasons we need belabor no further. Yet its treatment of tangible personal property that is not resold as such suggests that services used in connection with the production of property, but not resold as such, should be taxable. Does the limited exemption for tangible personal property discussed in the preceding paragraph lead to a different conclusion? In our judgment, it does not. The exemption does not appear to reflect an abandonment of the general principle that physical rather than economic concepts dominate the notion of sale for resale. Indeed, even the limited exemption for tangible personal property used once in connection with taxable services, appears to be directed to items that are physically transferred to the consumer in connection with the performance of the service. Thus, we believe that we are being more faithful to the preexisting statutory scheme and to the legislature's intent in this area by providing for a sale for resale exemption only with regard to the resale of services as such and not with regard to the sale of services whose costs may ultimately be reflected in a subsequent sale of tangible personal property but which is not itself resold.

The approach outlined above appears to reflect current DOR policy with respect to taxable services. After the legislature extended the sales tax to cleaning, laundry, and garment services in Chapter 86-166, Fla. Stat. § 212.05(1)(i), DOR issued a Notice that provided, among other things, that valet laundry or dry cleaning services provided by a hotel are taxable to the customer and that the hotel or motel must give a resale certificate to the laundry or dry cleaning establishment that provides the service.[53] In this instance, the service is being resold qua service and is not being consumed by the hotel in performing its business activities. On the other hand, businesses providing cleaning, pressing, dry cleaning, and laundry services directly to consumers must collect a tax on the services they provide and, in addition, must pay tax on materials and supplies (such as soaps, cleaning fluids, and laundry and dry cleaning equipment) that they use to perform their services. In this instance, the supplies are not being resold as supplies and therefore do not qualify for a sale for resale exemption, even though their costs will be reflected in the services tax base. On the other hand, purchases by laundry and dry cleaning establishments of such items as hangers, plastic bags, and shirt boards that are

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53 See Florida Department of Revenue, Important Notice to Persons Engaged in the Business of Providing Cleaning, Laundry, and Garment Services, reported in [Florida] St. & Loc. Taxes (P-H) ¶ 23,172 (1986).

physically transferred to the customer fall under the sale for resale exemption, presumably because they are "materials . . . to be used one time only . . . in the process of providing a service taxable under this part." Fla. Stat. § 212.02(3)(c).

We recognize that the legislature may wish to take a broader approach to the sale for resale problem than the one we have suggested. In the context of an expanded tax base, it might well desire to expand the anti-pyramiding policy to exempt not only goods and services that are resold as such but also goods and services whose cost will ultimately be reflected in the price of a subsequent sale of a good or service. The effect of such an approach, however, would likely be to decrease rather than to increase Florida's tax revenues. Not only would it reduce the existing tax base by roughly 25 per cent because producers' goods would be exempt, it would also fail to pick up professional services performed for business--such as lawyers' and accountants' services. Such an approach would therefore effectively result "in the continuation of many of the exemptions so recently repealed." Pierce and Peacock, supra, 14 Fla. St. U.L. Rev. at 477.[54]

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54 In considering the sale for resale problem in the context of a sales tax applied to a broad range of services, the legislature may wish to consider the experience of other states which include many services within their retail sales tax base. Hawaii's gross receipts tax does not provide for a sale for resale exemption, although wholesale transactions are taxed at a lower rate than retail transactions. Hawaii
(Footnote 54 Continued)

2. The Definition of a Taxable Services

The issues raised by Chapter 86-166's failure to define the term "services" demonstrate the need for the Model Annotated Revision of Chapter 212 to define the term with greater specificity. On that question, at least, there seems to be little disagreement. See Jacobs, supra, 14 Fla. St. U.L. Rev. passim; Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 476-77, 480-81; Vickers, supra, Fla. B.J., Dec. 1986, at 36-37. It is the question of precisely how to define a taxable service that generates the controversy.

Perhaps the most significant issue in this regard -- whether employees' services should be included within the concept of a taxable service -- has been resolved in the negative for the reasons set forth at length above (see pp. 5-15 supra), and we have explicitly provided an exemption for such services in the Revision. There are,

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(Footnote 54 Continued)
Rev. Stat. § 237-13(2) (Supp. 1984). Iowa takes a broader approach than the one we have suggested by excluding from the definition of services "services used in processing of tangible personal property for use in taxable retail sales or services." Iowa Code § 422.42(13) (1985). New Mexico provides a sale for resale exemption for services along the lines of the exemption we have proposed. See N.M. Stat. Ann. § 7-9-48 (1986). However, New Mexico also provides an exemption for services performed directly on tangible personal property that is to be resold. N.M. Stat. § 7-9-75 (1986). South Dakota defines the retail sale as the sale of tangible personal property or services or both "other than for resale." S.D. Codified Laws § 10-45-1(5) (1982). Interpretative rules flesh out the sale for resale concept and generally require a service provider to pay sales tax on property purchased and consumed by him in rendering a taxable services.

however, other questions regarding the definition that remain unresolved, such as the treatment of interest and insurance premiums. Although we have resolved these questions for purposes of the Revision in the manner explained below, we wish to emphasize at the outset that our decision to do so was based more on our firm belief that they ought to be resolved in some fashion than that they ought to be resolved in the particular fashion we have proposed. Failure to resolve these issues in some manner would, in our judgment, leave the statute unnecessarily vulnerable to attack under the delegation doctrine. Hence, however the legislature may ultimately view the merits of the issues we discuss below -- and the issues are fairly debatable -- it should address them explicitly to reduce the risk of a successful constitutional challenge to the statute.

a. Interest

Does interest paid to financial institutions, and others in the business of lending money,[55] constitute consideration paid for performing or providing a service? In our judgment it does not, although we recognize that there are reasonable grounds for concluding that all charges

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55 In light of the Model Annotated Revision's exemption for casual services, -- an exemption dictated by the Agreement, as amended -- interest paid to those who are not in the business of lending money would be exempt in any event. See Proposed Fla. Stat. § 212.0591(2).

made by lending institutions should be included in a service tax base.

At the core of the concept of service is the notion of activity performed by one person for another. See, e.g., Webster's New Collegiate Dictionary (defining "service"). For purposes of state sales tax statutes, services may be distinguished from sales, on the one hand, and from leases on the other. For example, the New Mexico sales tax statute defines services as

> all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling or leasing property.

N.M. Stat. Ann. § 7-9-3(K) (1986). In contrast to consideration paid for labor-related activities, interest is consideration for the use of money. It is essentially payment for the lease of an intangible. Unless one views a lease as a service, interest would not constitute consideration for a service.

We do not believe that most observers would view leasing of property -- whether real or personal, tangible or intangible -- as constituting a service. Coopers & Lybrand appears to share this view. In defining the term "service related" for purposes of its report on service industries for DOR, Coopers & Lybrand declared:

> While the phrase is not totally self-explanatory, we used the common meaning. For example, for a bank, income from advisory services or servicing checking accounts is service-related,

> while interest income or rental of safety deposit boxes is not.

See Cover Letter from Coopers & Lybrand to James Francis, Director Office of Research, Planning and Budgeting, Florida Department of Revenue, at 3 (November 19, 1986) (enclosing Cost and Pricing Characteristics of Specific Service Industries in the State of Florida). We recognize that others may take a view of the term service that includes rentals. Due and Mikesell, for example, treat rentals under the rubric of services. Due & Mikesell, supra, at 83-105. Florida, on the other hand, has accorded discrete treatment to leases by explicitly taxing transient rentals, leases of commercial realty, and leases of tangible personal property under specific provisions of Chapter 212. See Fla. Stat. §§ 212.03, 212.031, 212.05(1)(c), 212.05(1)(d). For purposes of answering the question whether interest is taxable under Florida's tax on services, one might ask whether, in the absence of these provisions directed explicitly at leases, a tax on services would include amounts received for the specified leases. We believe a tax on services would not generally include such amounts,[56] and, by analogy, that a tax on services would not generally include interest -- amounts received for the lease of money.

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56 If the "lease" or "rental" was principally a charge for services rather than a charge for the use of property as, perhaps, in the case of hotel or motel charges, we would have no difficulty in including such charges within a services tax base.

If one answers the suggested question in the affirmative, however, one could fairly conclude by analogy that interest does constitute consideration for a service.

Even assuming that one concurs in our conclusion that interest is not consideration for a service, there are other factors that might nevertheless justify including interest in the service tax base. Financial institutions engage in many activities apart from lending money that indisputably constitute services. They render investment advisory services, checking account services, currency exchange services, and credit investigation services -- to mention just a few. For this reason, financial institutions are usually regarded as part of the "services" sector of the economy. Because it is often difficult to distinguish a financial institution's service charges from its interest charges, and because of the possibility that a tax on bank service charges but not on interest would induce financial institutions to characterize service charges as interest, DOR could face thorny administrative problems in enforcing a services tax on financial institutions that included only their service-related charges and not their interest. A services tax that included all charges by financial institutions could therefore be justified as a practical legislative solution to these administrative problems.

Finally, even if one were not persuaded that interest constitutes a consideration for a service or that

the administrative difficulties in separating interest from bank service charges justify taxing them both, policy concerns may nevertheless favor the taxation of interest under an expanded sales tax base. If the legislature perceived no justification for substantially excluding an important sector of Florida's economy -- the financial services industry -- from a broad-based sales and use tax, it could decide to provide explicitly that interest should be taxed under Chapter 212, in the same way that it has decided that leases of transient accommodations, commercial realty, and tangible personal property should be taxed under Chapter 212. See p. 78 supra.

In short, while we do not believe that interest is embraced within a sales tax on services, and have explicitly so provided in the Revision, we acknowledge the arguments for the opposite conclusion. The critical point, as we noted at the outset, is that the legislature resolve this issue one way or the other to avoid the uncertainty that will inevitably result should it fail to do so.[57]

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57 It may be worth noting that none of the other states with a broad-based sales tax on services extends it to interest. See Hawaii Rev. Stat. § 237-23(1)(1976) (exempting banks taxable under Chapter 241); Iowa Code § 422.43(11)(1985) (taxing "bank service charges"); N.M. Stat. Ann § 7-9-25 (1986) (exempting interest); S.D. Codified Laws § 10-45-12.1 (Supp. 1986) (exempting financial services).

b. Insurance premiums

Do insurance premiums constitute consideration for a service? As in the case of interest, it is our judgment that they do not, but we recognize that there are reasonable grounds for concluding that insurance premiums should be included in a service tax base.

Insofar as insurance premiums constitute an investment, i.e., insofar as they increase the cash surrender value of the policy, it seems clear that they do not constitute consideration for a service. The more difficult question is whether premiums that purchase insurance against specified risks such as death, fire, or casualty amount to the consideration for a service. In our view, such premiums are more properly characterized as the purchase of a right to indemnification secured by a pool of capital. Resting our judgment on the notion that a service may be defined essentially as an activity performed by one person for another, we believe that payment for the right to be indemnified against particular risks is the purchase of an intangible right rather than the purchase of a service.

There is nevertheless a case that can be made for including insurance premiums (other than those that constitute pure investment) in a service tax base. First, there is evidence that the Florida legislature believes that insurance premiums constitute payment for a service. Section 212.08(7)(d) of the Florida statutes, which was

repealed effective July 1, 1986 by Chapter 86-166, provides an exemption for "professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made." A fair reading of this language indicates that the legislature is of the opinion that insurance constitutes a service business rather than a business of selling intangible rights, as we have suggested above.

Second, insurance premiums clearly are used to defray the costs of some service-related activities. Claims service, the agent's commission, and advice relating to reduction of insured risks fall within the traditional definition of a service. As in the case of interest, one can argue that the administrative difficulties in separating the service-related from the non-service-related aspects of the insurance premium justify a tax on the entire premium (except any investment component, which is readily identifiable). Finally, as in the case of interest, one can argue that even if one were to resolve the definitional and administrative issues against the taxability of insurance premiums, such premiums should be taxed because failure to do so would unjustifiably exclude a significant sector of Florida's economy from its broad-based sales and use tax.

In short, while we do not believe that insurance premiums are embraced within a sales tax on services, and have explicitly so provided in the Revision, we acknowledge

the arguments for the opposite conclusion. We further acknowledge that the issue is considerably closer than it was with respect to interest in light of the preexisting language of Chapter 212 suggesting a legislative judgment that insurance constitutes a service. The critical point once again, however, is that the legislature resolve this issue one way or the other to avoid the uncertainty that will inevitably result should it fail to do so.[58]

c. Receipts from the license or lease of other intangibles.

For the reasons suggested in the preceding two subsections, we do not view receipts from or associated with intangible rights as constituting consideration for a service. We therefore believe that patent and copyright royalties, franchise fees, and other payments for the lease of intangible rights do not fall within the sales tax on services.

We recognize, however, that the lease of intangible rights may be accompanied by the rendering of services. As in the case of charges made by financial institutions and

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58 We note that none of the other states with a broad-based sales tax on services extends it to insurance premiums. See Hawaii Rev. Stat. § 237-23 (1976) (exempting insurance companies which pay the state tax upon their gross premiums under Chapter 431); Iowa Code § 422.43 (1985) (insurance not among enumerated taxable services); N.M. Stat. Ann. § 7-9-24 (1986) (exempting insurance companies or any agent thereof from gross receipts tax); S.D. Codified Laws § 10-45-12.1 (Supp. 1986) (exempting commissions earned or service fees paid by an insurance company to an agent or representative for the sale of a policy).

insurance companies, a significant component of the charge may in fact reflect a payment for services. The typical franchise fee, for example, entitles the franchisee to substantial services provided by the franchisor in addition to the right to use the franchisor's name.

This raises the question of how the service element of such transactions should be taxed under the tax on services. Indeed, the question can be stated quite generally: when a transaction involves both taxable and nontaxable elements, how should that transaction be treated for sales tax purposes? There are essentially two approaches to this problem. First, one could take the position that a transaction must be viewed as a whole -- that its taxability should depend on whether it is "principally," "primarily," or "predominantly" a sale of a taxable service or the sale or lease of a nontaxable intangible. Alternatively, one could take the position that where transactions have both taxable and nontaxable components, the components should be separately identified with a tax falling on the taxable component.

The choice between these two approaches turns on the question whether substantive policy or administrative convenience should be the dominant concern. A rule that imposed a tax on the taxable but not on the nontaxable component of transactions involving both taxable and nontaxable components would most faithfully reflect the

legislative intent of taxing particular transactions. On the other hand, the administrative problems that DOR could encounter in attempting to enforce a rule that broke down transactions into their taxable and nontaxable elements may counsel adoption of an all-or-nothing approach to the taxation of mixed transactions. Although we do not have a strong opinion on this issue, we have resolved it in favor of the former approach because it represents the more principled approach to the question,[59] and we have no empirical basis for making any judgments regarding the administrative difficulties that such an approach could entail. We fully recognize, however, that the legislature, with further enlightenment that DOR can provide on this issue, may determine that administrative concerns militate in favor of a requirement that each transaction be viewed as an inseparable whole. And we reiterate our view that it is more important that the issue be explicitly resolved than that it be resold in any particular fashion.

d. Services rendered by partners to partnerships

The question whether partners who render services to their partnership should be treated as selling taxable

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59 In a bow to administrative convenience, however, we have provided that transactions involving both taxable and nontaxable elements should be taxable in full when the nontaxable element is "inconsequential" and should be fully exempt when the taxable element is "inconsequential."

services is closely allied to the question whether employees should be treated as selling taxable services to their employers -- a question we have considered at length above. See pp. 5-15 supra. In light of the uncertainty surrounding the treatment of partners' services under Chapter 86-166, see Vickers, supra, Fla. B.J., Dec. 1986, at 36, coupled with our goal of reducing such uncertainty in the Model Annotated Revision, we feel that it is important to deal explicitly with such services in the Revision. For the reasons set forth below, we have determined that it is more appropriate to exclude to include partners' services within the scope of the services tax.

First, we believe that the exclusion of services provided by employees to employers from the service tax base militates in favor of a similar exclusion for the services performed by partners for their partnerships. Just as employees are not generally regarded as independent contractors selling their services in arm's length transactions to their employers, partners also are not generally regarded as selling their services to their partnership. Indeed, the characterization of partners selling their services to the partnership seems even more far-fetched than the characterization of employees selling their services to their employers. The "consideration" the partner supposedly receives for the services rendered is presumably his distributive share of partnership income.

Yet he only receives a distributive share of income when the partnership in fact earns income during its taxable year, regardless of the extent of services the partner may have rendered to the partnership during that year.

Second, a partner's distributive share may well be attributable in part to a return on the partner's capital. If partners are to be taxed on the basis of their distributive shares for services rendered to their partnership, some mechanism would have to be found for separating the services-related from the capital-related source of the partner's distributive share. Unless the division were specified in the partnership agreement, the task of distinguishing the sources of the partner's distributive share could be difficult.

Finally, it could be argued that, where a partner renders services in his capacity as a partner, particularly in a service partnership (e.g. a partner in a law firm or a medical partnership), intolerable pyramiding would result if a second tax were to be levied on the rendition of services by the individual partners. To the extent the gross income of the partnership attributable to the rendition of services to third parties is, in turn, reflected in the partners' shares of income, a second sales tax on those services would occur. Although this point has merit on its own terms, it may prove too much for reasons we have suggested in connection with our discussion of employee services. See p. 13, note 15 supra.

To summarize, in light of the exclusion of employee services from the service tax base, partners working in or for their partnership should generally be treated similarly to employees of that partnership and not subject to tax on services rendered by them. There should be an exception where the person renders services essentially as an independent contractor who would be subject to tax on those services rendered to the partnership if the person were not a partner,[60] subject to the possible application of a sale for resale exemption. See pp. 6774 supra. On the other hand, if the legislature determines to tax employees, there would be little justification for failing to tax partners on the value of the services they render to the partnership. It should be expected, however, that greater difficulty will arise in ascertaining what the proper measure of the tax should be since the return or distributive share of a partner can be for things other than services rendered (e.g., a return on capital invested).

3. The Territorial Scope of a Taxable Service

Subject to federal constitutional limitations, the legislature is free to determine where a sale of a service occurs for state tax purposes. There is no simple or universally accepted answer to the question where the sale

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60 This accords with the distinction we suggested above between services rendered by employees and services rendered by independent contractors. See pp. 5-15 supra.

of a service takes place. The determination could turn on where the service (or most of it) is performed, where the service (or most of it) is consumed, or on some proportionate basis, employing either of these factors. In addressing this question for purposes of the Revision, we sought to provide an answer that was certain, simple, and reasonable.

The rule adopted provides that the sale of a service is in this state (and is therefore taxable)[61]

> if the service is performed wholly within this state or if the service is performed partly within and partly without this state but the greater proportion of the service is performed within this state, based on costs of performance.

Proposed Fla. Stat. § 212.059(1)(a). The rule is derived from the DOR's regulations governing the attribution of receipts for purposes of the sales factor of the corporate income tax apportionment formula. See DOR Rule 12C-1.15(4)(d)(5). The rule is also embodied in the Uniform Division of Income for Tax Purposes Act § 17, which is in force (either by its terms or in substance) in more than half the states that levy corporate income taxes.

We believe that adoption of this rule satisfies our criteria of certainty, simplicity, and reasonableness. The rule is relatively straightforward and is employed as widely as any other in the state tax field for determining the

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61 Only the sale of services "in this state" are taxable. See Proposed Fla. Stat. § 212.059(1).

locus of services. Use of the rule should also facilitate compliance because corporate taxpayers engaged in selling services partly within and partly without the state will already be maintaining for state corporate income tax purposes the records necessary to determine whether the sale of a service is in Florida for sale tax purposes.

Despite our adoption of the above-quoted rule in the Revision, we recognize that it may have some shortcomings. First, it is arguably fairer to have a rule that provides that a sale of a service occurs in the state only insofar as it is performed in the state -- rather than taking the all-or-nothing approach we have suggested. Quite apart from the question whether such apportionment of the sale of a service is required by federal constitutional constraints,[62] one could contend that it is more equitable to adopt a concept of the sale of a service that, by definition, is tied to the amount of the service activity that occurs in the taxing state.

Our adoption of an all-or-nothing approach does not dispute this point. Rather it is based on the two contervailing considerations. First, the sales tax on services is an excise tax on a transaction -- the sale of a service -- not a direct tax on the income earned from those services. Unlike income taxes, sales taxes have not traditionally been apportioned based on a proportionate

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62 We take up this question below. See pp. 95-99 infra.

share of the activity underlying the sale and, subject to federal constitutional constraints, we see no reason to deviate from the traditional pattern.[63] Second, compliance and administrative considerations seem to favor the all-or-nothing approach. If the amount of the sales tax on services depended in each instance on the precise proportion of the activity that took place within the state, the record-keeping burdens on many sellers of services would be much greater than if they simply had to determine where a greater portion of the service was performed.

A second objection to our approach to the determination of the territorial scope of a taxable service is that tying the determination of where a sale takes place to "costs of performance" -- "direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions in the taxpayer's trade or business," Proposed Fla. Stat. § 212.059(1)(a)1 -- may not in practice provide a certain or simple means of ascertaining where a sale of a service

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63 We recognize that Florida has, to a limited extent, provided for proration of the tax imposed by Chapter 212 upon certain carriers engaged in interstate or foreign commerce. Fla. Stat. §§ 212.08(4)(a)2, 212.08(8), and 212.08(9). Such treatment is an exception to the general rule, and neither the Florida nor the United States Supreme Courts appears to believe that such proration is constitutionally required. See Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), appeal dismissed, 106 S. Ct. 213 (1985); Delta Airlines v. Department of Revenue, 455 So.2d 317 (1984), appeal dismissed, 106 S. Ct. 214 (1985); cf. Wardair Canada, Inc. v. Department of Revenue, 106 S. Ct. 2369, 2371 (1986).

occurs. Our only response to this objection is that the approach again follows DOR's rules governing the attribution of receipts from services for purposes of the sales factor of the corporate income tax apportionment formula. DOR Rule 12C-1.15(4)(d)(5). If the rule is unsatisfactory in practice -- an issue about which we have no empirical knowledge, then DOR presumably can make its views known to the legislature and suggest some more satisfactory alternative (e.g., a time ratio basis).

4. The Use Tax on Services

In accordance with the Agreement, as amended, the Model Annotated Revision provides for a use tax on services. The theory underlying the use tax on services is identical to the theory underlying the use tax on the sale of tangible personal property: It is designed to counteract the potential loss of business and revenue the state might incur if in-state consumers of services sought to avoid the tax by purchasing services from out-of-state service providers. See pp. 30-32 supra. By imposing a use tax equal in amount to the sales tax that would have been imposed on the sale of services if the sale had occurred within the state's taxing jurisdiction, the state in principle removes the incentive for Florida consumers of services to purchase services outside the state. The justification for a use tax on services has been noted by other observers:

> If all services provided in Florida become subject to the sales tax, there

> should, for enforcement and symmetry, be a complementary use tax on all services provided to a Florida consumer. Without the tax also falling on in-state consumers of services rendered by out-of-state providers, tax avoidance would increase and in-state providers would be placed at a competitive disadvantage.

Pierce & Peacock, supra, 14 Fla. St. U.L. Rev. at 479; see also DOR Staff Report, supra, at 14.

In accord with the theory underlying the use tax, we have drafted the use tax provisions of the Revision to complement the sales tax on services. A tax is imposed only on those transactions that are not subject to the sales tax on services, i.e., the use tax applies only "when the sale of the service is not taxable in this state." Proposed Fla. Stat. § 212.059(2). On the other hand, if the service is not taxable in the state, then the use tax applies broadly to services that are "rendered, furnished, or performed in this state, or when the product or result of the service is used or consumed in this state." Id. Indeed, the definition of the "use" of services, see Proposed Fla. Stat. § 212.02(26), is broad enough to embrace within the use tax base all transactions that can reasonably be regarded as the use of a service in this state.[64] Although the legislature

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64 We also note that the language is broad enough to assure that the use tax will apply if the service is not "taxable" in this state -- even if the service is sold in the state -- in the event that the tax on the sale of services should encounter state constitutional problems. See pp. 100-01 infra.

may ultimately wish to reduce the scope of the use tax base, we felt that the theory underlying the use tax justified a broad approach, and that whatever limits might be imposed on that approach should be left to legislative judgment.

The measure of the use tax is the "cost price" of the service, which means its actual cost without any deductions on account of expenses. See Proposed Fla. Stat. § 212.02(4). As in the case of the sales tax on services and for similar reasons (see pp. 88-92 supra),we have not adopted a general scheme for apportioning the measure of the tax by reference to the proportion of the service that is used in the state. If the service is used in the state, the service is taxable based on its full cost price.

Although our approach to the use tax on services may seem to be quite expansive, we believe that it is consistent with the use tax on tangible personal property. It must be remembered that the use tax will apply only to the extent that other states do not tax services performed within their borders. As provided in Proposed Fla. Stat. § 212.06(7).

> The provisions of this chapter shall not apply apply in respect to the use or consumption or distribution, or storage of tangible personal property or services for use or consumption in this state upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state. . . . If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the department an amount sufficient to make

> the tax paid in the other state and in this state equal to the amount imposed by this chapter. (Emphasis supplied.)

Hence, if every state were to adopt the sales and use tax regime proposed herein for the State of Florida, the state would never collect a use tax on services performed outside the state, except insofar as other states imposed sales taxes at rates lower than Florida's. Instead, the state where the services were performed would impose a sales tax on the transaction, and Florida would effectively grant a credit against the tax as a result of Proposed Fla. Stat. § 212.06(7).

When it is recognized that Florida's use tax applies only when (1) no Florida sales tax has been paid on the service and (2) no other state has taxed the service (or the state has taxed it a rate lower than Florida's), the propriety of imposing a use tax on the full cost price of the services wherever performed, subject to a credit for taxes paid to other states, becomes more apparent. Indeed, if Florida failed to impose a tax on the full cost price of the service, it would undermine the complementary nature of the use tax by imposing a lower tax on services purchased elsewhere and used in Florida than on services sold in Florida.

The adoption of such a broad approach, however, does raise the question whether it can withstand federal constitutional scrutiny. The constitutionality of the

essential use tax scheme, of course, is well established, see General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944); Henneford v. Silas Mason Co., 300 U.S. 577 (1937). The question is whether Florida may constitutionally impose a use tax on the full value of services that are performed elsewhere. The question may be broken down into two subsidiary issues.

The first issue is whether the state has a sufficient connection with the services to impose a use tax on them. Although this issue can be resolved only on a case by case basis, the Court's standards in this area have generally been quite tolerant of assertions of state tax power. See, e.g., United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973). The basic criterion is simply that there be "some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax." Miller Bros. v. Maryland, 347 U.S. 340, 344-45 (1954). Even if there is a sufficient nexus with the transaction, i.e., the use of the service, the state must still be in a position to assert jurisdiction over the out-of-state seller of the service in order to require it to collect the tax on behalf of the state. This is a perennial problem in connection with the imposition of use taxes on sales of tangible personal property, see, e.g., National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967), and one with which Florida has some familiarity, see Scripto,

Inc. v. Carson, 105 So.2d 775 (Fla. 1958), aff'd, 362 U.S. 207 (1960). There is no reason, however, to believe that the problem would be significantly different with respect to sales of services than it is with respect to sales of tangible personal property.

The more troublesome problem may be the second issue -- whether a state that has the power to impose a tax on the use of services may do so without apportionment when those services are performed and, perhaps, used in other jurisdictions. Although there is language in many Supreme Court cases declaring that the Due Process and Commerce Clauses require that taxes be "fairly apportioned" to the taxpayer's activities in the taxing state, see, e.g., Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (Commerce Clause); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (Due Process Clause), the Court has never required apportionment of retail sales and use taxes -- at least in the sense of requiring that the measure of the tax be divided among different jurisdictions. See W. Hellerstein, State Taxation of Interstate Business and the Supreme Court, 1984 Term, 62 Va. L. Rev. 151, 172 (1976). Indeed, because retail sales and use taxes are consumer taxes which are separately stated, collected from the purchaser, and imposed on a transaction by transaction basis, apportionment has never been viewed as a practical solution to the Due Process and Commerce Clause problems that such taxes raise. Rather

the Court has intimated, although it has never held, that states may be required to give a credit for sales or use taxes imposed by other states to avoid the problem of multiple taxation that would otherwise arise. See Williams v. Vermont, 105 S. Ct. 2465, 2474 (1985); International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349-62 (1944) (Rutledge, J., concurring and dissenting). Since Florida effectively provides such a credit, it appears to be on solid constitutional ground under the traditional constitutional analysis of sales and use taxes.

A recent Minnesota case lends further support to the constitutionality of the broad approach to use taxation of services adopted by the Revision. The taxpayer had purchased equipment in North Dakota, on which he paid a 2 percent sales tax, for use on a farm that straddled North Dakota and Minnesota, with 68 percent of the land lying in Minnesota. The taxpayer took the position that Minnesota's 4 percent use tax should apply only to 68 percent of the cost of the property, with a credit for the North Dakota sales tax paid on that portion of the property. The court held that the Minnesota tax was applicable to the full purchase price of the equipment, which was consistent with the Commerce Clause, because it merely "equalize[d] the positions of in-state and out-of-state purchasers." Miller v. Commissioner of Revenue, 359 N.W.2d 620 (Minn. 1985).

Needless to say, despite the constitutional basis for imposing a use tax on the full cost price of the service, the legislature may determine that it is desirable to provide for apportionment of the use tax (or, indeed, of the sales tax) on the ratio of in-state to out-of-state costs, time, or some other factor. It is also possible that a successful constitutional claim to apportionment could be made against the assertion of unapportioned use tax liability for the use of services only tangentially connected to the state. To deal with such an eventuality, we have provided in the Revision that

> [i]f the entire sales price of the sale of a service or if the entire cost price of the use of a service cannot be included within the measure of the tax imposed by this chapter under the Constitution or laws of the United States, there shall be apportioned to the state and included in the measure of the tax imposed by this chapter on the sale and use of services that proportion of the sales price or cost price so requiring apportionment which the cost of performing the services within the state bears to the total cost of performing the services.

See Proposed Fla. Stat. § 212.0593.

5. The Legal Incidence of the Sales Tax

When we first considered the question where the legal incidence of the tax on the sale of services should lie, we favored following the preexisting structure of Chapter 212, which would have meant imposing the tax on the "exercise" of the "taxable privilege" of selling services.

This, of course, is the approach taken by Chapter 86-166. Our preference was based primarily on the fact that it accorded with the preexisting sales tax structure and that the tax on services would therefore be easier to integrate with the preexisting rules. Moreover, existing legal precedents, which are largely directed to the sales tax on the taxable dealer, would provide greater certainty with regard to a service tax on the taxable dealer than they would with regard to a service tax imposed on some other event.

Nevertheless, after considering State ex rel. McKay v. Keller, 191 So. 542 (Fla. 1939), in which the Florida Supreme Court struck down a professional license tax as an unconstitutional income tax,[65] we concluded that the safer course from a constitutional standpoint would be to place the incidence of the sales tax on the transaction itself -- the sale of services -- rather than on the privilege of selling services. To be sure, the tax at issue in Keller may be distinguishable from a tax on the privilege of providing services, and Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950) may be read as undermining Keller. See pp. 47-48 supra. We believe, however, that the risk of a successful constitutional challenge to a tax on the privilege of providing services -- especially professional services -- is sufficient to counsel the safer course of

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65 The Keller case is examined at pp. 46-47 supra.

imposing the tax on the sale of services. And we have so provided. See Proposed Fla. Stat. § 212.059(1).

It is possible, of course, that even a tax on the sale of services as distinguished from a tax on the privilege of providing services would be struck down by the Florida Supreme Court as an unconstitutional income tax. See pp. 45-51 supra. In that event, the tax on the use of services would apply, because the tax is imposed "on the use of any service in this state when the sale of the service is not taxable in this state." Proposed Fla. Stat. § 212.059(2). The language of the statute imposing the use tax, as well as the language defining use, see Proposed Fla. Stat. § 212.02(26), was deliberately chosen to assure that the use tax on services would be applicable in the event that the sales tax on services was held to be an unconstitutional income tax. It would be much more difficult to argue that the use tax, which is explicitly imposed on the consumer of services with the seller acting merely as the collector, amounts to an income tax on the seller.

6. Sales of Services to Exempt Entities

As indicated above (see pp. 27-30 supra), there is considerable question whether sales of services to exempt entities are exempt under Chapter 86-166. Although sales to governmental, religious, charitable, scientific, and educational organizations are generally exempt under Chapter

212, see Fla. Stat. §§ 212.08(6), 212.08(7), the preexisting definition of a sale in Chapter 212 does not include sales of services. See Fla. Stat. § 212.02(2); p. 30 supra. Although we have not undertaken to carve out any exemptions from the sales and use tax on services other than those specifically identified in the Agreement, as amended, by amending the definition of sale to include the sale of services, see Proposed Fla. Stat. § 212.02(18)(e), we necessarily extended to sales of services the exemption for sales to governmental and charitable organizations.

One important issue that may arise in connection with the sale of services to exempt entities is the treatment of payments by the Federal Government directly to providers of medical services under Medicaid and similar programs. If the payments are viewed as sales to the Federal Government, they would be exempt under Proposed Fla. Stat. § 212.08(6), and, indeed, under the Federal Constitution. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). On the other hand, if they are viewed, in substance, as sales to the consumer of the medical services, with the Federal Government merely subsidizing the costs of those services, then the tax on services may apply to such transactions. Given the complexity of Medicaid and related programs, and the technical nature of the question whether the legal incidence of a tax falls on the Federal Government, see J. Hellerstein & W. Hellerstein, State and

Local Taxation ch. 14 (1978), we do not purport to express any opinion on the merits of the issue. Our purpose is simply to bring this issue to the attention of the legislature. It may be noted, however, that in the event that the tax on services is construed to apply to Medicaid payments made by the Federal Government, the tax would not be regarded by the Federal Government as an allowable cost for which it would reimburse the service provider. Healthcare Financial Administration, The Medicaid Bureau, Hospital Insurance Manual No. 15 ¶ 2122.2(1978).

With regard to sale of services for resale to exempt entities, the Revision makes it clear that such sales are taxable. Although sales of services for resale are excluded from the tax base under the proposed definition of a "retail sale," Proposed Fla. Stat. § 212.02(17), the Revision provides that "a sale of a service shall be considered a sale for resale only if . . . the service . . . will be taxed under this chapter in a subsequent sale." Hence, the sale of the service for resale to any exempt entity would not qualify as a sale for resale under the proposed statute.

c. Construction Contractors

Under the preexisting provisions of Chapter 212, construction contractors are generally regarded as the consumers of the materials, supplies, and equipment that they use in performing construction services. See DOR Rule

12A-1.051. They are not viewed as reselling such tangible personal property to their customers. Contractors therefore pay a sales tax to their suppliers on the materials, supplies, and equipment that they purchase. There is an exception to this rule for contracts in which the contractor agrees to sell specifically described and itemized materials at a specified price and to complete the work for an additional agreed price or on the basis of time consumer. DOR Rule 12A-1.051(2)(d). in this case, the contractor is viewed as a reseller of the property he purchases, and he must collect a tax on its resale from the purchaser.

Under the Model Annotated Revision, construction contractors will be taxable on their sale of construction services. The question will then arise as to the appropriate treatment of purchases by construction contractors who include the cost of their materials in their contract price (and thus paid a tax on those materials when they purchased them under the preexisting provisions of Chapter 212). As noted above (see pp. 25-26 supra), Chapter 86-166 amended the definition of a retail sale to provide that retail sales "do not include materials, containers, labels, sacks or bags intended to be used one time only . . . in the process of providing a service taxable under this part. Fla. Stat. § 212.02(3)(c) (emphasis added). Reading this provision broadly, one could conclude that the "lump sum" contractor may purchase his materials

and supplies tax free under an expanded tax on services, because such materials will be used one time only in providing a taxable service. As a consequence, all construction contractors will be treated alike: no tax will be due on the contractors' purchases of their materials and supplies, and a tax will be due on both the service and material component of the contract, whether separately stated or billed in a lump sum. If the contractor purchases materials, supplies, or equipment that are not used "one time only" in the process of providing his service, the contractor will, of course, continue to pay a tax on such purchases even though the cost of these purchases is likely to be included in the price of his taxable service.

III. Concluding Observations

This Overview reflects our best effort to analyze the legal issues raised by Chapter 86-166 and to explain the thinking that underlies the Model Annotated Revision of Chapter 212. Because the principal conclusions of the Overview are set forth in the Executive Summary, we see no need to repeat them here. Instead, we would like to take the opportunity in closing to situate the Overview and, indeed, the entire Legal Study, within the larger framework of the broad reconsideration of Florida's sales tax structure that Chapter 86-166 has stimulated.

We believe that the Legal Study is most appropriately viewed as an initial attempt to come to grips

with the critical questions raised by Florida's enactment of a sales tax on services. We do not offer it as a final and definitive treatment of all of the issues spawned by Chapter 86-166. Nor could we reasonably have done so given the multiplicity and complexity of the issues involved, and the severe time constraints under which we were operating.

Our principal aim in the Legal Study was to identify and elucidate the questions that will ultimately have to be resolved by others. Although we composed a Model Annotated Revision of Chapter 212, we regard the Revision as simply the first cut at a working draft of legislation that will no doubt be modified or, perhaps, rejected altogether in the months to come as those entrusted with the responsibility of enacting legislating confront the issues that we have tentatively addressed in the Revision. Moreover, despite the fact that the Overview touched on numerous legal questions raised by Chapter 86-166 and the proposed statute, many of these questions remain unanswered and still others remain unexplored. We could not, for example, consider the implications of Chapter 86-166 and the Model Annotated Revision for every service industry in Florida. Even a brief glance at the list of services compiled in the Standard Industrial Classification Manuel reveals the enormity -- and, under the constraints of the Agreement, the futility -- of that task. Furthermore, there are many questions bearing on implementation and enforcement

of Chapter 86-166 or a revised tax on services that as a practical matter can only be addressed and resolved by DOR through detailed rules and regulations of the type that already exist for the preexisting provisions of Chapter 212.66.[66] Hence the treatment of particular industries, of particular transactions, and of particular problems of implementation (e.g., the interstate service provider) will ultimately have to be resolved through the administrative process (and, perhaps, through litigation).

In the final analysis, the Legal Study should serve as a vehicle for further and, we hope, more focused and informed consideration of the legal issues raised by Florida's sales tax on services.

Walter Hellerstein
Prentiss Willson, Jr.
MORRISON & FOERSTER

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66 In this connection, DOR will find valuable guidance in the sales tax regulations of states such as New Mexico which have experience in dealing with service tax issues.

AGREEMENT FOR EXPERT LEGAL SERVICES

THIS AGREEMENT, is made and entered into this 1st (last) day of October, 1986, by and between CONSULTANTS, as independent contractors, and the STATE (collectively the PARTIES) in consideration of the mutually beneficial provisions, and according to the obligations, terms, conditions, and covenants set forth herein.

§1. PARTIES

1.01 THE CONSULTANTS. The CONSULTANTS are:

(a) WALTER HELLERSTEIN, Professor of Law, University of Georgia School of Law, Athens, Georgia 30602; Of Counsel, Morrison & Foerster, 2000 Pennsylvania Avenue, N.W., Suite 5500, Washington, D.C. 20006;

(b) PRENTISS WILLSON, JR., Attorney at Law, Morrison & Foerster, California Center, 345 California Street, San Francisco, California 94104-2105; and

(c) MORRISON & FOERSTER, a California partnership with its principal office at California Center, 345 California Street, San Francisco, California 94104-2105.

1.02 The STATE. The STATE is the Department of Revenue of the State of Florida (the Department), with its principal office at Room 204, Carlton Building, 500 South Calhoun Street, Tallahassee, Florida 32301, on behalf of the STATE OF FLORIDA.

§2. RECITALS.

2.01 Purpose. The Florida Legislature, in the General Appropriations Act, Ch. 86-167, §1, Line 1588A, appropriated funds for, among other things, a study identifying and analyzing the legal and administrative problems relating to the repeal of sales tax exemptions, as contained in CS/SB 46, or similar legislation. The Department, in consultation with the Consensus Revenue Estimating Conference, has been charged by the Florida Legislature with responsibility for implementing Line 1588A. The Department, in consultation with the Consensus Revenue Estimating Conference, has determined that the study authorized in Line 1588A will serve the needs of the STATE if it complies with the requirements contained in §5 in this AGREEMENT and is conducted by a legal consultant with significant credentials in the area of state and local taxation. Accordingly, the STATE wishes to engage a recognized expert in the field of state and local taxation for the purposes described in this AGREEMENT.

2.02 CONSULTANTS' Warranties. The PARTIES agree that CONSULTANTS are in the business of practicing and teaching law, have special skills, knowledge, and experience, and are recognized experts in state and local taxation. As such, CONSULTANTS are fully qualified to perform the Duties and obligations and to satisfy the terms, conditions and covenants contained in this AGREEMENT, and will use their best efforts in doing so pursuant to §9 of this AGREEMENT. Office space, word processing, other support and supplies, and professional, secretarial and other personnel services necessary for performing the Duties and obligations and for satisfying the terms, conditions, and covenants required of CONSULTANTS in this AGREEMENT shall be provided by MORRISON & FOERSTER in accordance with §7.01 of this AGREEMENT.

§3. **EMPLOYMENT.** The STATE hereby retains and employs CONSULTANTS, as independent contractors, and CONSULTANTS hereby agree to perform the obligations and Duties and to satisfy the terms, conditions, and covenants set forth in this AGREEMENT.

§4. **TERM AND EXTENSION.**

4.01 Initial Term. The retainer and employment of CONSULTANTS hereunder shall commence on the date first appearing in this AGREEMENT and shall continue through June 1, 1987.

4.02 Extended Term. Subject to this AGREEMENT continuing in full force and effect, the STATE shall have the sole and exclusive right and option to continue this AGREEMENT for an Extended Term, commencing June 2, 1987, and ending June 1, 1988, by giving CONSULTANTS written notice of the exercise of such option not earlier than December 1, 1986, and not later than June 1, 1987. Upon the exercise of such option, all of the terms and conditions of this AGREEMENT applicable thereto shall continue in full force and effect for such Extended Term.

§5. **DUTIES.** During the Initial or Extended Term of this AGREEMENT, CONSULTANTS shall provide the Services and Legal Study described in this section.

5.01 Consulting Services. Within the limitations provided in this AGREEMENT, CONSULTANTS shall serve the STATE in an advisory or consultative capacity, including but not limited to providing those services necessary for the timely production of the Legal Study described in §5.02 herein, and shall be available for such purposes, and at such times and places as shall be reasonably requested from time to time by the STATE, without further compensation than that for which provision is made in this AGREEMENT. CONSULTANTS shall not be required, without their consent, to render advisory or consultative services at any location other than the CONSULTANTS' addresses contained in the first paragraph of this AGREEMENT except as provided otherwise in §§5.03 and 5.04 herein.

5.02 Legal Study-Written Report. On or before December 1, 1986, CONSULTANTS shall provide the STATE with a Legal Study in the form of a written report containing a Preface or Overview, a Model Annotated Revision or Model Annotated New Part, a Formal Response, an Appendix, and Other Material which shall comply with the following requirements.

(a) Preface or Overview. The written report shall contain a Preface or Overview in expository form, identifying and analyzing the legal problems relating to the enactment of Ch. 86-166, Laws of Florida, responsive to the issues and concerns raised in the preliminary report of Florida Department of Revenue staff (appended hereto as Exhibit A), and addressing the interface between the Ch. 86-166 sales tax on "any service" and the existing sales tax in Florida.

The Preface or Overview shall determine the scope of Ch. 86-166 from both a plain and in pari-materia reading, and shall develop a conceptual framework toward a Model Annotated Revision of Part 1 of Ch. 212, F.S., or a Model Annotated New Part of Ch. 212, F.S. In defining the scope of Ch. 86-166, the Preface or Overview shall take into consideration, inter alia:

(1) The numerous service industries and transactions brought within the defined scope of the statute as identified in Attached Exhibit A;
(2) The policy of the State (expressed in Ch. 212, F.S.) of avoiding double taxation and pyramiding of taxes;
(3) The State policy (inherent in Ch. 212, F.S.) of protecting businesses in this State from unfair competition brought on by consumers purchasing services outside of this State for use in this State;
(4) The possibility of the Legislature choosing to exempt or pass the tax through broad classes of services such as those performed by employees for their employers, and that the Legislature may wish to exempt numerous types of transactions within classes of services;
(5) The incidence of the tax, i.e., whether it is more properly on the privilege of consuming services or on the privilege of providing services; and
(6) Federal and State Constitutional limitations to State taxation of services.

The PARTIES agree that within twenty (20) days from the date of this AGREEMENT CONSULTANTS shall deliver an outline or rough-up of a Conceptual Plan acceptable to the STATE which will be negotiated between the parties during such twenty (20) days as to content. Should the CONSULTANTS fail to provide such an outline or rough-up of a Conceptual Plan acceptable to the STATE within the time alloted or as extended, then the STATE may cancel this contract at its discretion and pay Consultants only the amount stated in §5.04 of this AGREEMENT.

(b) Model Annotated Revision or Model Annotated New Part. The written report shall contain a Model Annotated Revision of Part 1, Ch. 212, F.S. or Model Annotated New Part of Ch. 212, F.S. drafted to provide the Florida Legislature with a workable solution to the problems identified and analyzed in relation to the enactment of Ch. 86-166, Laws of Florida. Such Revision or New Part shall be consistent with the conceptual framework developed in the Preface or Overview and the Conceptual Plan approved by the STATE, both described in section 5.02(a)(1) above. The Model Annotated Revision or Model New Part shall contain, inter alia:

(1) amendatory language or deletions (in statutory-bill style as in exh. G of the preliminary report of the Department of Revenue appended hereto as Exhibit A) wherever required to implement Ch. 86-166, Laws of Florida, consistent with the conceptual framework developed in the Preface or Overview described in section 5.02(a) above;
(2) an annotation following each and every amendatory provision or deletion which will be a commentary explaining the provision (intent) and stating:

[a] why the provision or deletion is required or recommended;
[b] what it accomplishes, i.e., address the industries and transactions affected by the provision or deletion and how they are affected; and
[c] judicial authority for the provision or deletion, from this and other jurisdictions, as well as similar provisions in other jurisdictions, if any.

Unless amended by STATE during the twenty (20) day negotiation for an outline or rough-up of a Conceptual Plan (§5.02(a) above) the Model Annotated Revision or New Part shall further contain, inter alia;

(3) An exemption for salaried employees with a complementary provision taxing the self-provision of services as currently provided for tangible personal property in §212.06(1)(b), F.S.;
(4) An exemption for casual and isolated services;
(5) A solution to the sale for resale problem as it applies to resales to non-exempt entities as well as to exempt or immune entities;
(6) A "use" tax for services purchased outside Florida for use in Florida; and
(7) A Definition of the term "any service" if required to identify taxable transactions and of terms such as "performing," "providing," "use," or "consuming" in this state to minimize nexus problems associated with multi-state service transactions.

(c) Formal Response. The written report shall contain a formal response, in expository form, to all Federal and State constitutional issues raised by the Model Annotated Revision or New Part with appropriate citation of authority.

(d) Appendix. The written report shall contain an appendix containing alternative approaches available to the legislature, such as a value added tax, a payroll tax, a tax on employees, a gross receipts tax, etc., with comments as to the relative strengths and weaknesses of each, and State and Federal Constitutional limitations pertaining to each.

(e) Other Material. The written report shall contain any other material, recommendations, or advice which CONSULTANTS determine to be appropriate.

5.03 Personal Testimony. CONSULTANTS, at their own expense, shall personally appear before the Florida Legislature for no more than two (2) trips for two (2) working days each in Tallahassee, Florida and meet with or testify before the appropriate commission, committee, or other legislative body designated by the STATE.

5.04 Additional Services.

CONSULTANTS understand that the STATE may call upon CONSULTANTS to provide Additional Services in connection with the anticipated revision of the Florida sales tax, or other similar legislation including but not limited to:

(a) Presentation and defense of their Legal Study before the interim study commission and the Florida Legislature;
(b) Drafting of proposed legislation not included in the Legal Study; and
(c) Assisting the defense of the final statute against challenges by taxpayers and others.

Compensation for such Additional Services shall be paid in accordance with the terms of §6.02 of this AGREEMENT.

§6. COMPENSATION.

6.01 Services and Work Product. In consideration for the timely performance of all of the Duties (except those described in §5.04 herein) and the timely satisfaction of the terms, conditions, undertakings, and covenants required of CONSULTANTS under this AGREEMENT, the STATE shall pay CONSULTANTS the aggregate amount of SEVENTY-FIVE THOUSAND DOLLARS ($75,000) in the following manner:

(1) TEN THOUSAND DOLLARS ($10,000) upon signing this AGREEMENT;
(2) TWENTY-FIVE THOUSAND DOLLARS ($25,000) upon receipt and acceptance by the STATE of the Conceptual Plan due 20 days from the date of this AGREEMENT as described in §5.02 herein;
(3) THIRTY THOUSAND DOLLARS ($30,000) upon receipt and approval by the STATE of the Annotated Revision, or New Statute(s), as the case may be, on December 1, 1986; and
(4) TEN THOUSAND DOLLARS ($10,000) on the earlier of June 1, 1987, or the CONSULTANTS' second trip to Tallahassee.

6.02 Additional Services. In consideration for timely performing the Additional Services described in §5.04 of this AGREEMENT, the STATE shall pay CONSULTANTS at the following rates:

(1) TWO HUNDRED TWENTY-FIVE DOLLARS ($225.00) per hour for the services of WALTER HELLERSTEIN and PRENTISS WILLSON, JR. (2) The rates of other personnel of MORRISON & FOERSTER likely to be involved can be expected to be lower. These rates will apply to work rendered prior to August 1, 1987. Should the state request additional work after that date, the rates will be at the same billing rate customarily charged by ~~consultants~~ CONSULTANTS for state and local tax services. QW WH

§7. EXPENSE REIMBURSEMENT.

7.01 Overhead. The PARTIES contemplate that CONSULTANTS, in performing the Duties described in §5 of this AGREEMENT, will require office space, word processing, other support and supplies, and professional, secretarial and other personnel services. Expenses for such items as well as other incidental expenses (except expenses incurred for travel), will be the sole and exclusive responsibility of CONSULTANTS. There shall be no obligation for the STATE to reimburse CONSULTANTS for any expense except expenses incurred for travel in accordance with the terms of §7.02 of this AGREEMENT.

7.02 Travel Expenses. Expenses for travel, meals and lodging, that are incurred by CONSULTANTS in connection with the performance of Duties described in §§5.01 through 5.03 herein shall be the sole and exclusive responsibility of CONSULTANTS. There shall be no obligation for the STATE to reimburse CONSULTANTS for such expenses. Expenses for travel, meals, and lodging incurred by CONSULTANTS at the prior written request of the STATE, other than those expenses described in the preceding sentence, shall be reimbursed to CONSULTANTS by the STATE in the actual amount of such expenses and in the manner customarily required by the STATE for reimbursing full time employees of the STATE in accordance with Ch. 110, F.S. No entertainment expenses shall be reimbursed by the STATE.

7.03 Other Expenses. The STATE shall have no obligation to reimburse CONSULTANTS for any expenses except those expenses expressly reimbursable under §7.02.

§8. EMPLOYMENT STATUS. CONSULTANTS are retained and employed by the STATE solely for the purposes and to the extent set forth in this AGREEMENT, and the relationship of CONSULTANTS to the STATE shall be that of independent contractors. CONSULTANTS shall be free to dispose of such portion of their entire time, energy, and skill during regular business hours as they are not obligated hereunder to devote to the STATE, in such

manner as they see fit, and to such persons, firms, or corporations as they deem advisable except as expressly provided otherwise in §12 of this AGREEMENT. CONSULTANTS shall not be entitled to participate in any plans, arrangements, or distributions by the STATE or pertaining to or in connection with any pension, stock, bonus, profit-sharing, or similar benefits for the regular employees of the STATE.

§9. PROFESSIONAL RESPONSIBILITY. CONSULTANTS shall utilize their best efforts in providing the Services and Legal Study described in §5 of this AGREEMENT and shall periodically, or at any time requested by the STATE, submit data as to the time expended by CONSULTANTS in performing the Duties required herein. Nothing in this AGREEMENT shall be construed to interfere with or otherwise affect the rendering of services by CONSULTANTS in accordance with their independent and professional judgment. CONSULTANTS shall perform under this AGREEMENT in accordance with generally accepted legal practices and principles. This AGREEMENT shall be subject to the rules and regulations of any and all legal professional organizations or associations to which CONSULTANTS may from time to time belong and the laws and regulations governing the practice of law in Florida. By signing this agreement, the parties understand that they are in an attorney-client relationship and are bound thereby.

§10. NONTRANSFERABILITY. Neither CONSULTANTS nor their estates shall have any right to assign their rights and obligations under the terms of this AGREEMENT, including but not limited to: their obligations to perform the Duties and satisfy the terms, conditions, and convenants hereunder; or to commute, anticipate, encumber or dispose of any payment hereunder, which payments and the rights thereto are expressly nonassignable and nontransferable, except as otherwise specifically provided herein.

§11. DEATH OR DISABILITY. If either WALTER HELLERSTEIN or PRENTISS WILLSON, JR. die or become disabled before satisfying all of the duties, obligations, terms, conditions, and covenants required of them under this AGREEMENT, then the STATE shall have the sole and exclusive right and option to continue this AGREEMENT with MORRISON & FOERSTER by giving MORRISON & FOERSTER written notice of the STATE'S intent to continue under the terms of this AGREEMENT. Such written notice shall be given within ten (10) days after the STATE receives written notice of such death or disability from MORRISON & FOERSTER.

§12. RESTRICTIVE COVENANT.

12.01 Exclusive Services. The PARTIES expressly agree that WALTER HELLERSTEIN, PRENTISS WILLSON, JR., their employees, agents and assigns shall perform the Duties and obligations and satisfy the other terms, conditions, and covenants contained in this AGREEMENT solely and exclusively to and for the benefit of the STATE, including but not limited to providing expert testimony now and in the future in the defense of the final statute against administrative, judicial, legislative or other challenges to such statute by taxpayers or others for a period of ten (10) years after the date of this AGREEMENT.

12.02 Representation By MORRISON & FOERSTER. Except as provided otherwise in §12.01 herein, the terms of this AGREEMENT shall not preclude MORRISON & FOERSTER from representing clients in tax and other matters involving the STATE and/or the Department of Revenue presently or in the future and the STATE expressly waives any conflict of interest which may

arise from such representation. Under no circumstances, however, shall MORRISON & FOERSTER represent any client (directly, or assist in such representation) challenging the sales tax or similar statute in Florida which is involved under the terms of this AGREEMENT, and the STATE does not waive such conflict of interest with respect to such representation.

§13. ASSIGNMENT OF INTANGIBLE PROPERTY RIGHTS.

13.01 CONSULTANTS hereby assign any and all of their respective rights to oral and written opinions, Legal Study, Model Annotated Revisions, Model New Statutes, Other Proposed Legislation or other matters rendered or provided by CONSULTANTS in connection with their performance of the Duties and obligations, and in connection with the satisfaction of the terms, conditions, and covenants of this AGREEMENT, including but not limited to copyrights and publication rights.

13.02 Indemnity. CONSULTANTS indemnify and hold the STATE harmless against any damages, costs, and expenses, including attorney's fees, arising out of any claims that the Duties and obligations performed by CONSULTANTS or their satisfaction of the terms, conditions, and covenants of this AGREEMENT infringe any copyright or is libelous or contains any unlawful matter. However, CONSULTANTS shall not be liable for any matter not originally contained in their Services or Legal Study and inserted by or at the instance of the STATE.

13.03 Use of CONSULTANTS' Names. The STATE shall have the sole and exclusive right to use the names of the CONSULTANTS as the CONSULTANTS of any final statue(s), in connection therewith, and in connection with any version thereof.

§14. NOTICES. All notices required or permitted under the terms of this AGREEMENT shall be in writing and shall be mailed by registered or certified mail, return receipt requested, postage prepaid, to the appropriate PARTIES, at the address of the respective PARTY listed below, or to such other address as such PARTY may have fixed by notice:

Morrison & Foerster
California Center
345 California Street
San Francisco, California 94104-2105

Department of Revenue
State of Florida
Room 204, Carlton Building
500 South Calhoun Street
Tallahassee, Florida 32301

Notices so delivered are effective on the date they are either accepted or refused as such date is evidenced by the return receipt.

§15. WAIVER. Failure to insist upon strict compliance with any of the Duties, obligations, terms, covenants, or conditions in this AGREEMENT shall not be deemed a waiver of such Duty, obligation, term, covenant, or condition, nor shall any waiver or relinquishment or any right or power hereunder at any one or more times be deemed a waiver or relinquishment of such right or power at any other time or times.

§16. SEVERABILITY. The invalidity or unenforceability of any provision in this AGREEMENT shall in no way affect the validity or enforceability of any other provision.

§17. GENDER AND PLURAL. In construing the terms of this AGREEMENT, any word contained in the text of this AGREEMENT shall be read as the singular or plural and as the masculine, feminine or neuter gender as may be applicable in the particular context.

§18. COMPUTATION OF TIME. Use of the term "day(s)" in this AGREEMENT in any form other than "calendar days" shall be conclusively construed to mean any day during which the main office for the United States Postal Service in Tallahassee, Florida, is open for regular services for a period of not less than seven (7) hours.

§19. CAPTIONS. The captions herein are a part of this AGREEMENT but are for convenience only and do not in any way limit or expand the terms and provisions hereof.

§20. ENTIRE AGREEMENT. This instrument constitutes the entire AGREEMENT. All prior negotiations, understandings, and agreements between the PARTIES have been merged herein and are superseded by this AGREEMENT. This AGREEMENT cannot be changed, modified, or discharged orally, and any agreement hereafter made shall be ineffective to change, modify, or discharge it in whole or in part, unless such AGREEMENT is in writing and signed by the PARTY against whom enforcement of the change, modification, or discharge is sought.

IN WITNESS WHEREOF the PARTIES have executed this AGREEMENT the day and year first above written.

Walter Hellerstein

WALTER HELLERSTEIN

Prentiss Willson, Jr.

PRENTISS WILLSON, JR.

MORRISON & FOERSTER, A California General Partnership

By: Joseph E Feraciano

Member of the Firm

FLORIDA DEPARTMENT OF REVENUE
ON BEHALF OF THE STATE OF FLORIDA

By: Randy Miller

Randy Miller
Executive Director
Department of Revenue
State of Florida