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FLORIDA'S FLEETING SALES TAX ON SERVICES

VICKI L. WEBER*

As this Article went to press, Florida legislators had returned for a second special session to wrestle with the controversial services tax once more. By December 10, both houses of the Legislature had voted to repeal the services tax and increase the sales tax on goods. The Governor signed the legislation into law on December 11. Yet the discussion below remains important not only for the legislative history of the Florida experience, but as a guide for other states who may choose to follow Florida’s lead in imposing a services tax of their own.

On July 1, 1987, Florida became the first large state to impose a sales and use tax on a broad range of personal and professional services.1 The state’s immediate need for additional revenue was the major impetus for the legislation, but there were underlying reasons Florida’s policymakers chose to tax services, reasons that have to do with the long-term fiscal health of the state. The purpose of this Article is to explain those reasons, review the process which led up to the new sales tax statute, provide

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1. Ch. 87-6, 1987 Fla. Laws 9 (amended by ch. 87-101, 1987 Fla. Laws 842, to be codified at FLA. STAT. ch. 212). Florida also became the first large state to repeal a sales and use tax on services. Initial public reaction to the tax was extremely negative, with various polls indicating that a majority of Floridians opposed the tax. Governor Martinez, who originally supported the tax, called the Florida Legislature into a special session beginning September 21, 1987, for the purpose of repealing the tax. Four weeks and two special sessions later, the Legislature adjourned, leaving the tax law in place, and announcing plans to call themselves back into special session to consider the tax on December 1, 1987. At this special session, the Legislature repealed the services tax and increased the sales tax on goods to six cents. FlA. H.R. JOUR. 4 (Spec. Sess. “D” Dec. 9, 1987); FlA. S. JOUR. 40 (Spec. Sess. “D” Dec. 10, 1987). The repeal is effective January 1, 1988. The rate hike goes into effect February 1. Ch. 87-548. For a more detailed discussion of events subsequent to enactment of the tax legislation, see infra, Part IX, POSTSCRIPT.
an overview of the tax, and explain the legislative policy decisions that guided its development.

I. The Problem

Despite the state constitutional mandate for a balanced budget, we are engaging in Florida in the functional equivalent of deficit financing. And we're on a collision course with the reality of our fiscal predicament as a state.²

Florida's tax base has been characterized as one of the most restrictive in the nation.³ All states have three potential tax bases—property, income, and sales.⁴ In Florida, a tax on real and tangible property is constitutionally reserved for funding local governments.⁵ And although the state imposes a 5.5% tax on corporate income,⁶ a tax on personal income is prohibited by the state constitution.⁷ That leaves the tax on sales as the cornerstone of the state's financial structure.

Historically, Florida has relied heavily upon a narrow-based, extremely cyclical sales tax that has not kept pace with the growth of the state's personal income.⁸ By broadening the sales tax base to encompass most service transactions, the Legislature in 1987 sought to diminish these shortcomings in the sales tax structure.⁹ A 1% increase in the sales tax rate certainly would have generated

8. Zingale & Davies, supra note 3, at 457; see Appendix B.
enough revenue to alleviate the state’s short-term budget needs.\textsuperscript{10} However, an expansion of the tax base to include services is expected to produce the revenue needed for the 1987-88 fiscal year, ensure the state a faster-growing, more stable tax base for the future, and render the sales tax less regressive.\textsuperscript{11}

The need for a long-term solution to the lack of stability and revenue growth caused by the narrow sales tax base, as opposed to another short-term “fix,” was well-documented in the final report of the State Comprehensive Plan Committee.\textsuperscript{12} In February 1987, the Committee completed an eighteen-month study of the costs and means of implementing the State Comprehensive Plan. Its conclusions were sobering. The Committee found that:

Florida is . . . a state with jammed highways, polluted natural resources, struggling schools, poorly-paid teachers, teeming jails, neglected children, needy senior citizens, inadequate health care, a shortage of affordable housing and a declining quality of life. Florida is a state on a collision course with painful realities that must be faced—now.\textsuperscript{13}

The Committee estimated that the ten-year cost of implementing the State Comprehensive Plan to state and local governments will be $52.9 billion\textsuperscript{14}—money that the Committee warned could not be raised under the existing state tax structure.\textsuperscript{15}

\textsuperscript{10} FLA. S. COMM. ON FIN., TAX. & CLAIMS, FLA. H.R. COMM. ON FIN. & TAX., FLA. LEGIS., JT. LEGIS. MGT. COMM., DIV. OF ECON. & DEMOGRAPHIC RESEARCH, FLA. DEP’T OF REVENUE, FLORIDA TAX SOURCES: FISCAL IMPACT OF POTENTIAL TAX CHANGES, 1987-88, 1988-89, at 31 (Mar. 1987) (estimating yield from one-cent increase in sales tax rate without extension to services at approximately $1.1 billion in 1987-88 and approximately $1.2 billion in 1988-89). See also STRATEGIES FOR THE FUTURE, supra note 9, at 38 (reflecting a $490.5 million budget deficit if a continuation budget was funded in fiscal year 1987-88).


\textsuperscript{12} The State Comprehensive Plan Committee, established in 1985, was a 21-member group composed of legislators and prominent business and civic leaders charged with determining how best to finance the 10-year goals of the state as set forth by the Legislature in 1985. See ch. 85-57, § 3, 1985 Fla. Laws 295, 322. It was dubbed the “Zwick Commission” after its chairman, Charles J. Zwick of Miami, chairman of Southeast Banking Corporation, who served as director of the United States Bureau of the Budget during the Johnson Administration. The Committee noted that between 1972 and 1987, Florida increased taxes 54 times without undertaking genuine tax reform. ZWICK COMMISSION REPORT, supra note 2, at 25. During that period, Florida's ranking among the states in tax revenue raised as a proportion of personal income fell from twenty-third to forty-fifth. Appendix B.

\textsuperscript{13} ZWICK COMMISSION REPORT, supra note 2, at 3.

\textsuperscript{14} Id.

\textsuperscript{15} Id. at 25.
II. The Response

So the broad question is whether Florida should assess a sales tax on services. And, broadly, the answer is yes.16

Even before the State Comprehensive Plan Committee issued its report, state policymakers were becoming increasingly aware of the need to look for a more fertile and stable source of tax revenue, and a tax on services received close attention.17 Such a tax is not without precedent. Four states impose a transactions tax on most services.18 In Florida, some repair services have been subject to the sales tax since 1949.19 Charges for admissions,20 hotel and motel accommodations,21 electricity and telecommunications,22 all represent fees for services that were subject to the sales tax prior to the 1987 legislation.

The pivotal step leading to the 1987 sales tax legislation was taken when the Legislature in 1986 provided that the exemption for personal and professional services would automatically expire on July 1, 1987.23 The 1986 legislation established the Sales Tax

16. A Grudging 'Yes' Vote For A Sales Tax on Services, FLORIDA TREND, April 1987, at 102.
17. E.g., Fla. SB 654 (1985); Fla. HB 1029 (1985); Fla. HB 1049 (1986). A proposal to "sunset" the sales tax exemptions for a variety of services, Senate Bill 654, passed the Senate in 1985. FLA. S. JOUR. 423 (Reg. Sess. 1985). However, the bill died in the House. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REGULAR SESSION, HISTORY OF SENATE BILLS at 88, SB 654. So did two similar House bills. Id., HISTORY OF HOUSE BILLS at 141, HB 1029; id. at 144, HB 1049. Under the sunset process, the Legislature provides for the automatic repeal at a future date of a regulatory program, an agency, or a law, but provides itself enough time to review the statute and enact saving legislation. See Deffenbaugh & Hayman, Motor Carrier Deregulation in Florida: Before, During and After, 8 FLA. ST. U.L. REV. 681, 681 n.5 (1980).
19. Ch. 26319, § 2(d), 1949 Fla. Laws 9 (current version in scattered sections of FLA. STAT. ch. 212 (1985)).
20. FLA. STAT. § 212.04 (Supp. 1986).
21. FLA. STAT. § 212.03 (1985).
22. FLA. STAT. § 212.05 (Supp. 1986).
23. Ch. 86-166, § 3, 1986 Fla. Laws 816, 819 (codified at FLA. STAT. § 212.05(1)(j) (Supp. 1986)) (imposing tax on "any service"); id. § 5, 1986 Fla. Laws at 824 (codified at FLA. STAT. § 212.08 (Supp. 1986)) (repealing various exemptions).
Study Commission,\textsuperscript{24} whose charge was to use specific criteria\textsuperscript{25} to evaluate the exemptions\textsuperscript{26} repealed by the legislation, and to recommend to the Legislature in 1987 which, if any, should be retained or modified.\textsuperscript{27} The Legislature also appropriated $300,000 to the Department of Revenue (DOR) for consultants to assist the state with revenue, legal and administrative questions that a sales tax on services would pose.\textsuperscript{28}

DOR hired the accounting firm of Coopers and Lybrand to survey the services sector of the Florida economy and gather information needed to estimate the potential revenue from a tax on various service industries.\textsuperscript{29} DOR also hired Professor Walter Hellerstein of the University of Georgia, a nationally recognized state and local tax scholar,\textsuperscript{30} to review the legal questions that would inevitably arise from imposition of a tax on services. Hellerstein also was asked to draft a model services tax statute.\textsuperscript{31} Mean-

\footnotesize

24. Ch. 86-166, § 9, 1986 Fla. Laws 816, 825. Pursuant to the statute, the Governor appointed five members and the President of the Senate and Speaker of the House each appointed eight.

25. Id. The statute required the Commission to consider the following questions: (1) What is the economic impact of the exemption? (2) Does the exemption support other statutory policy, such as environmental or growth management laws? (3) Is the exemption consistent with state tax policy? (4) Would the Legislature appropriate money to fund the exemption? (5) Is granting a sales tax exemption the most efficient way to provide a more favored status for an industry or group? (6) Are the reasons for granting the exemption still valid? (7) Should an exemption be subject to periodic review or repeal?

26. Id. The law defined exemption to mean "transactions specifically exempted from the tax imposed in part I of chapter 212, Florida Statutes, and transactions not specifically taxed in that part."

27. Id.


29. DOR REPORT, supra note 18, at A-143; Coopers & Lybrand, Cost and Pricing Characteristics of Specific Service Industries in the State of Florida (Nov. 19, 1986), in DOR REPORT, supra note 18, at A-158. A second pricing study was conducted by MGT of America. Id. at A-375.

30. Professor Hellerstein has had a distinguished academic career. He is the author or co-author of four well-regarded books on taxation, and of 33 published articles in the field. In addition, he is a faculty member of 11 tax institutes. His books and monographs include: W. Hellerstein, State and Local Taxation of Natural Resources in the Federal System: Legal, Economic, and Political Perspectives (American Bar Association Section of Taxation 1989); W. Hellerstein & J. Hellerstein, State and Local Taxation, Cases and Materials (4th ed. 1978 & Supp. 1982). A list of Hellerstein's numerous articles and the institutions of which he is a member is available at the Florida State University Law Review.

while, DOR conducted its own study on the implementation and administration of the tax.\textsuperscript{32}

As these studies progressed, Florida was in the midst of electing a new governor, all 120 members of the House of Representatives, and 20 of the 40 members of the Senate. Not surprisingly, the services tax was the subject of much discussion throughout the 1986 campaign season.\textsuperscript{33} The election also delayed the work of the Sales Tax Study Commission because incumbent Governor Bob Graham, recognizing the importance of the services tax issue, waited to make his appointments to the Commission until he was able to obtain the advice of his successor.

Shortly after the Study Commission set to work in December 1986, Florida’s newly elected governor, Bob Martinez, began preparing his first recommended budget. He faced not only the prospect of a shortfall in revenue needed to fund his 1987-88 budget, but, as he worked, the State Comprehensive Plan Committee issued its bleak assessment of the long-term outlook for the state. Its final report concluded, "Florida cannot compete for quality economic growth in the coming years without genuine reform of our rigid, self-destructive state tax structure."\textsuperscript{34} The Committee called for a tax on services and warned that opposition to such a tax was tantamount to support for either a business receipts tax or a personal income tax.\textsuperscript{35}

Most observers anticipated the support given to the services tax by leaders in the House of Representatives. However, perhaps because candidate Martinez was fond of portraying gubernatorial opponent Steve Pajcic as a man who "'never met a tax he didn't like,'" and of pledging to "'sweat’ $800 million out of Florida's budget,"\textsuperscript{36} Governor Martinez’s subsequent strong endorsement of the tax on services caught many off guard.\textsuperscript{37} But as the Governor

\textsuperscript{32} See generally DOR REPORT, \textit{supra} note 18.

\textsuperscript{33} For example, the Democratic and Republican nominees for governor were often asked their positions on whether the sales tax should be applied to services. Both candidates, Democrat Steve Pajcic and Republican Bob Martinez, generally favored the expansion of the tax. \textit{E.g., 12 issues: Where Pajcic, Martinez stand}, Miami Herald, Nov. 2, 1986, at 5P, col. 1.

\textsuperscript{34} \textit{Zwick Commission Report, \textit{supra} note 2, at 25.}

\textsuperscript{35} \textit{Id.} at 43.


\textsuperscript{37} For example, at one public appearance after the tax went into effect, the Governor was asked whether, during the 1986 campaign, he had been "'ignorant or deceptive as to the
has since noted of those claiming surprise, "someone wasn't listening" during the campaign when he expressed support for taxing services.38

The focus of the debate soon shifted when, shortly after the Governor's announcement, a coalition of Republicans and conservative Senate Democrats, who had recently come to power, announced support for a services tax. The question was no longer "if," but "how."

III. THE PROCESS

Without more, the sunset course on which this legislation has set sail will lead the ship of state to its predictable destination—the dark.39

Without any further action by the Legislature, the 1986 legislation would have imposed a 5% sales tax on "the consideration for performing or providing any service," starting July 1, 1987.40 "Service" was an undefined term. No exemptions were authorized. There was no method for determining where a service was sold or used. There was no provision for a complementary use tax. In short, the tax on services simply did not fit within the state's existing sales tax law.41

Hellerstein's mission was to analyze legal issues raised by the 1986 legislation and draft a model services tax statute42 that would mesh with the existing sales tax law; he was not responsible for need of a tax increase."

He replied—accurately—that he had said then that he favored the repeal of some sales tax exemptions. Martinez raps critics of sales tax expansion, Tampa Tribune, July 11, 1987, at 1B, col. 5. Ironically, the criticism Governor Martinez received at home by members of his own party was in contrast with the favorable reaction he received from Republicans outside of Florida. See Gov. Bob Martinez Wins Praise in GOP Circles for Backing Florida's Biggest Tax Increase Ever, Wall St. J., May 8, 1987, at 48, col. 1 (southeastern ed.).

38. Martinez, Martinez' Rebuttal: Someone Wasn't Listening, Tampa Tribune, Aug. 16, 1987, at 1C, col. 3. However, the Governor later withdrew his support for the tax and called for its repeal. The Legislature ultimately did so. See infra, Part IX, POSTSCRIPT.


40. Ch. 86-166, § 3, 1986 Fla. Laws 816, 819 (codified at FLA. STAT. § 212.05(1)(j) (Supp. 1986)).

41. See FLA. STAT. ch. 212; Hellerstein Report, supra note 31, part 2 at 18, in DOR Report, supra note 18, at L-54.

evaluating the merits of any exemptions from the tax.\textsuperscript{43} The latter task initially fell to the Sales Tax Study Commission, and ultimately rested with the Legislature.\textsuperscript{44}

In early December 1986, the Sales Tax Study Commission began a series of public hearings throughout the state to consider testimony on the impact of the sales tax on various service industries.\textsuperscript{45} Before the Commission could complete its work, Governor Martinez was required by statute to submit his budget recommendations to the Legislature.\textsuperscript{46} On February 18, 1987, the Governor advised the Legislature that he would seek a sales tax on all but five services: health care, social services, interest payments, insurance, and agricultural services directly related to food production.\textsuperscript{47} By law, the Governor had two weeks from that date to submit to the Legislature detailed tax legislation to support his recommended budget.\textsuperscript{48} In the interim, the Sales Tax Study Commission developed its initial recommendations calling for a tax on all but twelve types of services.\textsuperscript{49} When the Governor submitted his proposed tax bill, he expanded his list of proposed exemptions to include ten of those recommended by the Commission.\textsuperscript{50}

The first legislative draft of the tax act was Proposed Committee Bill 11 prepared by the House Committee on Finance and Taxation. It was little more than a paste-up of Hellerstein's model law.\textsuperscript{51} The next version, Proposed Committee Bill 11a embodied only minor changes from the first draft, but was the first version of the tax bill reviewed by the House Sales Tax Subcommittee.\textsuperscript{52}

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\textsuperscript{43} Hellerstein Report, supra note 31, part 1 at 1-2, in DOR Report, supra note 18, at L-31 to L-32 (executive summary).

\textsuperscript{44} Id.


\textsuperscript{46} Fla. Stat. § 216.162 (1985) (requiring governor to submit recommended budget at least 45 days before the regular session).


\textsuperscript{49} Study Commission Report, supra note 45, at 45-58.

\textsuperscript{50} Draft Sales Tax Legislation filed with Legislature by Governor (n.d.) [hereinafter Governor’s draft bill] (on file, Fla. H.R. Comm. on Fin. & Tax.).

\textsuperscript{51} Compare Fla. H.R. Comm. on Fin. & Tax., PCB 11 (1987) with Hellerstein Report, supra note 31, part 3 at 1-58, in DOR Report, supra note 18, at L-181 to L-238 (Hellerstein’s model act).

\textsuperscript{52} Fla. H.R. Comm. on Fin. & Tax., Subcomm. on Sales Tax (preliminary committee report for meeting of Mar. 4, 1987) (on file with committee).
next version, Proposed Committee Bill 11b, was the result of subcommittee amendments that added several exemptions recommended by the Sales Tax Study Commission. Proposed Committee Bill 11c contained minor technical changes, and was the starting point for the first draft of the Senate version of the tax bill, Senate Bill 777. Proposed Committee Bill 11d, however, contained a number of significant changes that resulted in large part from a two-day meeting between Hellerstein and legislative and executive branch staff, during which an effort was made to develop criteria for determining where a service is used or consumed.

Senate Bill 777 was passed by the Senate Committee on Finance, Taxation and Claims on April 9, 1987. It was amended and reported favorably as a Committee Substitute for Senate Bill 777 by the Senate Appropriations Committee on April 13, 1987. The following day, the House Sales Tax Subcommittee and the House Committee on Finance and Taxation met back-to-back and amended and passed out Proposed Committee Bill 11d, which was filed as House Bill 1250. On April 15, Committee Substitute for Senate Bill 777 was amended and passed by the Senate, and House Bill 1250 was passed by the House Appropriations Committee. The next day, the House took up Committee Substitute for Senate Bill 777, in lieu of the House bill, and amended and passed it. When the Senate refused to accept the House amendments, a House-Senate conference committee was appointed to write a compromise bill. The Committee met and on April 23, presented its report. Both the House and the Senate adopted it, in the form of

\[53. \text{When Proposed Committee Bill 11a was heard in subcommittee on March 17, 1987, 35 amendments were adopted (amendments on file, Fla. H.R. Comm. on Fin. \\& Tax.).}
54. \text{See Fla. SB 777 (1987).}
55. \text{Meeting with Hellerstein (Apr. 2, 1987) (notes on file, Fla. H.R. Comm. on Fin. \\& Tax.).}
56. \text{FLA. S. JOUR. 68 (Reg. Sess. Apr. 13, 1987).}
57. \text{FLA. S. JOUR. 80 (Reg. Sess. Apr. 15, 1987).}
59. \text{FLA. S. JOUR. 89-112 (Reg. Sess. Apr. 15, 1987).}
60. \text{FLA. H.R. JOUR. 138 (Reg. Sess. Apr. 15, 1987).}
61. \text{id. at 170-71 (Reg. Sess. Apr. 16, 1987).}
63. \text{The Conference Committee was staffed by the Senate Committee on Finance, Taxation and Claims. All materials relating to these meetings are on file with the committee.}\]
Committee Substitute for Senate Bill 777, and it was signed into law by Governor Martinez that evening without fanfare.  

Before the ink on the governor's signature had dried, work was begun on a second bill, commonly known as the "glitch bill." This legislation began as a bill for making only technical corrections, but it ultimately embodied many substantive, as well as technical, changes.

On May 27, Proposed Committee Bill 19, the House version of the glitch bill, surfaced. Two days later, a similar bill, Committee Substitute for Senate Bill 2, was passed by the Senate Committee on Finance, Taxation and Claims. On June 1, the House Committee on Finance and Taxation substantially amended Proposed Committee Bill 19 and passed it. The following day, the House Appropriations Committee heard the bill as House Bill 1506, amended it, and passed it as Committee Substitute for House Bill 1506. On June 4, the Senate considered and amended Committee Substitute for Senate Bill 2, and the House considered and amended Committee Substitute for House Bill 1506, but delayed passage of the bill until the following day. On June 6, the Senate and House appointed a conference committee to develop a compromise bill. The conference report, Committee Substitute for House Bill 1506, was passed by both chambers in the waning hours of the 1987 regular session, and was signed by the Governor on June 30.

Although the Legislature in 1987 completed formal action on the tax law during a short three-month period, the entire process of studying the tax on services took the better part of a year. Contrary to popular belief, legislators did not decide to tax services one evening over pizza at a lobbyist's townhouse.

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64. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF SENATE BILLS at 135, SB 777 (thereby becoming ch. 87-6, 1987 Fla. Laws 9).
68. Id. at 1066 (Reg. Sess. June 2, 1987).
73. That belief was fostered by the widely reported fact that representatives of Governor Martinez and leadership from the House and Senate reached agreement on a few central issues of the measure during a late-night private meeting held at a lobbyist's Tallahassee
IV. The Tax

The fundamental design of the tax is simple: the sale or use of services whose benefit is enjoyed in the state is taxed; the sale or use of services whose benefit is enjoyed outside the state is exempt. 74

Hellerstein's draft provided the starting point for the tax bill, and most of his work was incorporated into the final law. He conceived of the tax on services as a separate tax, with the legal incidence on the transaction itself. 75 This is in contrast to the sales tax on goods, where the tax is imposed on the seller's privilege of doing business. 76 He placed the legal incidence on the transaction to avoid the potential argument that the tax was a constitutionally prohibited personal income tax. 77 However, as with the sales tax on goods, the services tax is collected from the purchaser. 78

A. Service Defined

Hellerstein provided for a tax on "the sale at retail of any service in this state." 79 The term "service" was not defined in the 1986 legislation, and its meaning was the subject of extensive debate. 80 Hellerstein defined service as "any activity engaged in for other persons for a consideration other than sale of real, tangible personal, or intangible personal property." 81 DOR expressed concern that the exception in this language could be read broadly to prohibit a tax on activities that involved the brokering of property by
Realtors, or on activities that resulted in the production and sale of intangible property such as attorneys' legal documents. For this reason, and because the tax on services was not thought to reach the consideration paid for real, tangible, or intangible property anyway, the final phrase in Hellerstein's definition was deleted in the first drafts of the legislation.

Thus, the Legislature began by defining service as "any activity engaged in for other persons for a consideration." But House members, concerned that they might unintentionally tax a service they had not thought of, limited the scope of the tax by redefining services as those functions "usually provided for consideration" by certain establishments enumerated in the Standard Industrial Classification Manual (SIC Code). When this issue was considered by the conference committee, the Senate concurred in the House position and the universe of taxable services was restricted by reference to the SIC Code. Therefore, the starting point for any analysis of the taxability of a specific transaction is a determination of whether the activity is a "service" within the meaning of the statutory definition. If it is not, the transaction is not taxable under the services tax. No specific exemption is necessary.

82. See DOR Report, supra note 18, at L-273.
85. Fla. H.R. Comm. on Fin. & Tax., Subcomm. on Sales Tax, tape recording of proceedings (Mar. 4, 1987) (tapes on file with committee) (discussion between Reps. James Burke, Dem., Miami, and Tom Drage, Repub., Orlando). As a result of these concerns, the definition of "services" was changed between PCB 11c and 11d. Proposed committee bills can be modified without formal amendment in committee. That was done in this case at the direction of the committee chairman so no formal record of the change exists other than the comparison of the two proposed bills.

The Standard Industrial Classification Manual is a publication of the Executive Office of the President, Office of Management and Budget. It is designed to classify the entire field of economic activity in a manner that promotes comparability of statistics. It is periodically revised, but for purposes of the sales tax statute, the 1972 edition, as amended by the 1977 Supplement, is the relevant manual. See ch. 87-6, § 7, 1987 Fla. Laws 9, 25 (to be codified at Fla. Stat. § 212.02(24) (defining "SIC").

86. Ch. 87-6, § 7, 1987 Fla. Laws 9, 25 (to be codified at Fla. Stat. § 212.02(22)). See Appendix G. The definition of "service" (the scope of the tax) was a major issue debated when the Legislature reconvened in special session to consider repeal or revision of the tax act. See infra, Part IX, Postscript. Attempts were made to limit the scope of the tax by defining "service" in a more restrictive manner. Various bills considered by the Legislature would have eliminated the long list of potentially taxable services and the list of exemptions, and replaced the two with a more limited definition of "service" that listed only those services specifically subject to tax. See Fla. H.R. Comm. on Fin. & Tax., PCB 1-B, § 1 (1987); Fla. HB 26-B, § 6 (1987); and Fla. CS for CS for SB 5-B, § 74 (1987).
It is important to realize that the SIC Code typically describes establishments, not activities. However, the Legislature generally wanted to tax or exempt specific services regardless of the establishment or person providing the service. For this reason, the statute includes a rule of construction spelling out this legislative intent. For example, although accounting services generally are taxable, if an accountant provides a financial service that is customarily performed by a bank or other financial institution, the service is not taxed because of the exemption specifically provided for financial services.

B. Location of Sale

Once an activity is classified as a potentially taxable service, the second question to be answered is: Where did the sale of the service occur? Hellerstein defined a sale of a service as one occurring in Florida if more than 50% of the costs of performing the service are incurred in the state. He borrowed this concept from the income apportionment rules used to determine Florida corporate income tax liability, and it was ultimately adopted by the Legislature.

Professor Hellerstein defined “costs of performance” to mean “direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the taxpayer’s trade or business.” When DOR suggested that a particular taxpayer could manipulate the allocation of performance costs, and thus avoid the tax, the Legislature initially modified this definition to “direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the type of trade or business in which the taxpayer engages.”

87. See generally EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1972 ed.).
88. Ch. 87-6, § 2, 1987 Fla. Laws 9, 13 (to be codified at FLA. STAT. § 212.0591(1)).
89. HELLERSTEIN REPORT, supra note 31, part 3 at 2, in DOR REPORT, supra note 18, at L-182 (model act).
90. FLA. ADMIN. CODE R. 12C-1.015 (1986).
91. Ch. 87-6, § 1, 1987 Fla. Laws 9, 12 (to be codified at FLA. STAT. § 212.059(1)(b)).
92. HELLERSTEIN REPORT, supra note 31, part 3 at 2, in DOR REPORT, supra note 18, at L-182 (model act) (emphasis added).
93. Fla. H.R. Comm. on Fin. & Tax., PCB 11a (1987). See DOR REPORT, supra note 18, at L-272 (emphasis added). The final legislation changed the word “taxpayer” to “service provider.” Ch. 87-101, § 9, 1987 Fla. Laws 842, 860 (amending ch. 87-6, § 7, 1987 Fla. Laws 9, 25, to be codified at FLA. STAT. § 212.02(6)).
C. Retail Sales/Resale

The sales tax is imposed on "the sale at retail" of any service.\(^94\) Prior to the present legislation, the term "retail sale" was defined to exclude only the resale of tangible personal property.\(^95\) A sale of goods was considered one for resale if the purchased goods were resold as goods or incorporated into property that was resold, but not if they were used by the original purchaser or dissipated in a manufacturing process.\(^96\)

Although leaving the provision intact with respect to goods, the 1986 legislation did not expand this provision to also exclude from the tax the resale of services.\(^97\) But in Hellerstein's draft legislation, he attempted to use the same distinction in describing the sale of services for resale as is applicable to the resale of goods.\(^98\) His draft provided that a service is sold for resale if the purchaser does not use or consume the service in the ordinary course of business.\(^99\) Hellerstein's proposed test was whether the purchased service was consumed by the purchaser in the delivery of his service to his client, or whether the original purchaser was simply functioning as a broker or intermediary in procuring a service for his customer.\(^100\)

Hellerstein included two other conditions for meeting the proposed resale test. First, the value of the service must be stated separately when resold, and second, the service must be taxed in a subsequent sale.\(^101\)

While his proposal arguably paralleled the treatment of goods sold for resale,\(^102\) Hellerstein recognized that the Legislature might

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\(^94\) Ch. 87-6, § 1, 1987 Fla. Laws 9, 12 (to be codified at Fla. Stat. § 212.059(1)(a)).
\(^95\) Fla. Stat. § 212.02(3)(a) (1985).
\(^96\) Id. § 212.02(3)(c).
\(^97\) See ch. 86-166, 1986 Fla. Laws 816; see also Hellerstein Report, supra note 31, part 2 at 21, in DOR Report, supra note 18, at L-57.
\(^98\) Hellerstein Report, supra, note 31, part 2 at 68-74, in DOR Report, supra note 18, at L-104 to L-110.
\(^99\) Id., part 3 at 17-18, in DOR Report, supra note 18, at L-197 to L-198 (model act).
\(^100\) Id., part 2 at 69-70, in DOR Report, supra note 18, at L-105 to L-106.
\(^101\) Id., part 3 at 17-18, in DOR Report, supra note 18, at L-197 to L-198 (model act).
\(^102\) It is debatable whether the proposed language would have provided similar treatment for goods and services. Industrial materials which become a component of a tangible good are excluded from sales tax under the resale rule applicable to tangible personal property. Fla. Stat. § 212.02(3)(c) (1985). Arguably, a court reporter's service used by an attorney is no different than a component part in a finished good. However, such a service would not qualify for exclusion from the tax under the resale rule contemplated by Hellerstein. Hellerstein Report, supra note 31, part 2 at 70, in DOR Report, supra note 18, at L-106.
want a broader resale rule.\textsuperscript{103} The broadest possible resale rule would exclude from the tax all goods and services whose costs were ultimately reflected in the price of a retail sale of a good or service.\textsuperscript{104} In other words, the tax would never be applicable to goods or services purchased by businesses. He correctly noted that such a resale rule would result in a substantial loss of existing tax revenue because more than 25\% of the revenue currently derived from the sales tax on goods is paid by businesses.\textsuperscript{105}

The resale issue was one of the most contentious issues of the services tax. Early in the process, the House abandoned Hellerstein's proposal in favor of a broader resale definition. The House position would have allowed a service provider to purchase a service tax exempt for resale if the service provided a direct and identifiable benefit to a single client or customer of the purchaser.\textsuperscript{106} Typical overhead expenses of a service provider would not have qualified as services purchased for resale. The ability to claim the service resale exemption would have been limited to persons primarily engaged in the sale of services.\textsuperscript{107} Sellers of goods would not have been entitled to buy services tax exempt for resale. Likewise, service providers generally would not have been allowed to claim a resale exemption for goods used in the process of delivering a service.\textsuperscript{108}

The Revenue Estimating Conference\textsuperscript{109} determined that the House's broadened resale rule would have reduced the funds gen-

\begin{flushleft}
\textsuperscript{103} Hellerstein Report, supra note 31, part 2 at 74, in DOR Report, supra note 18, at L-110.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Fla. HB 1250, § 7 (1987) (proposed amendment to Fla. Stat. § 212.02(3)(a), to have been recodified at Fla. Stat. § 212.02(19)(a)).
\textsuperscript{107} Id.
\textsuperscript{108} Id. The law as ultimately passed embodied an exception for goods used one time only in the packaging of a service, such as plastic used by dry cleaners to package clothes. Ch. 87-101, § 9, 1987 Fla. Laws 842, 860 (amending ch. 87-6, § 7, 1987 Fla. Laws 9, 25, amending Fla. Stat. § 323.03(3), to be recodified at Fla. Stat. § 212.02(19)).
\textsuperscript{109} The Revenue Estimating Conference was statutorily created by section 216.136(3) (1985), Florida Statutes, and is composed of professional staff from the legislative and executive branches. The conference is responsible for developing, on a consensus basis, official information on anticipated state and local government revenues to be used for state planning and budgeting. No substantive change to the sales tax legislation escaped the close scrutiny of the conference. Lobbyists in search of exemptions from the tax lived in fear of the exemption cost estimates produced by the conference.
\end{flushleft}
erated by the services tax by approximately $90 million. The Senate, however, stood by Hellerstein's original resale proposal; a position later accepted by House conferees in the conference committee.

The resale issue was revisited in the House glitch bill, but by then, the pressure to deliver tax legislation that could fund the appropriations bill had increased to the point that reconsideration of the original House position on resale was no longer a viable option. Nevertheless, the House glitch bill targeted two types of industries that were perceived as ones that would be particularly affected by the strict resale limits, and therefore expanded the resale test to certain services purchased by these businesses. The two industries were advertising agencies and construction support services such as architectural, engineering and surveying services. The Senate concurred with a broadened resale rule for construction support providers, but did not accept application of the same resale rule to advertising agencies. As a result, the statute only provides a specific exemption for construction support service providers who purchase other construction support services for the benefit of a single client.


111. Fla. CS for SB 777, § 6 (1987) (proposed amendment to Fla. Stat. § 212.02(3)(a), to have been recodified at Fla. Stat. § 212.02(17)(o)).

112. Ch. 87-6, § 7, 1987 Fla. Laws 9, 25, (amending Fla. Stat. § 212.02(3), to be recodified at Fla. Stat. § 212.02(19)).

113. Fla. H.R. Comm. on Fin. & Tax., tape recording of proceedings (June 1, 1987) (on file with committee). During consideration of the glitch bill, Representative Winston "Bud" Gardner, Dem., Titusville, chairman of the House Committee on Finance and Taxation, told Representative Samuel P. Bell III, Dem., Ormond Beach, chairman of the House Committee on Appropriations, that the glitch bill would cost $27 million in its current form, but that he had prepared amendments which, if passed, would run the "cost" down to nothing by the end of the meeting. Id. (remarks by Rep. Gardner).


115. Under a pre-existing exemption for master tapes that was overlooked during the legislative deliberations on the services tax, some costs associated with production of advertising are exempt from taxation. See Fla. Stat. § 212.08(12) (1985) (providing partial exemption for master films and master tapes used for advertising purposes). This exemption is scheduled for automatic repeal July 1, 1988, but until then it exempts certain costs associated with the production of commercials. Letter from Randy Miller, Exec. Dir., Fla. Dep't of Revenue, to Jeb Bush, Sec., Fla. Dep't of Commerce (n.d.) (in response to July 6, 1987 letter from Jeb Bush) (on file with Fla. H.R. Comm. on Fin. & Tax.).

116. Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (to be codified at Fla. Stat. § 212.0592(50)).
With this exception, the resale rule applicable to service purchases is extremely limited, and will no doubt continue to be the subject of controversy and further legislative debate.\textsuperscript{117}

D. Sales Price

A related issue involves the definition of "sales price." The tax is computed on the basis of the sales price which is defined as "the total amount paid for tangible personal property or services . . . without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever."\textsuperscript{118}

When goods are sold, the sales price typically reflects all costs of producing, marketing, and delivering those goods. However, it is not uncommon in the sale of services for the service provider to seek separate reimbursement for certain expenses associated with the delivery of the service. As a result, the tax pyramiding that occurs in the services tax is much more obvious—and controversial.

For example, it would be highly impractical for a retailer to state separately in his sales price the travel and entertainment expenses associated with the cost of selling a good. Such expenses are taxed once when incurred, and again when the sales price of the good is taxed. However, it is standard practice for attorneys and many other professionals to separately itemize certain expenses associated with the cost of delivering a service when billing a client for that service.

Economists argue that there is no economic basis upon which to distinguish between these two types of transactions. Although this may be true, there is a practical distinction between them. A retailer generally does not incur travel and entertainment expenses for the benefit of a single customer and it would be virtually impossible for a retailer to calculate sales tax on the retail price of a good minus certain previously taxed expenses. Conversely, a ser-

\textsuperscript{117} Efforts to greatly broaden the resale rule were undertaken when the Legislature reconvened in special session. See infra, Part IX, Postscript. The proposed revision essentially would have returned to the standard in House Bill 1250 and allowed the tax-free purchase for resale of a service if that service provided a direct and identifiable benefit to a single client or customer of the service purchaser. Fla. CS for CS for SB 5-B, § 73 (1987) (definition of retail sale).

\textsuperscript{118} Ch. 87-6, § 7, 1987 Fla. Laws 9, 25 (amending Fla. Stat. § 212.02(4), to be codified at Fla. Stat. § 212.02(21)).
vice provider generally seeks direct reimbursement for expenses incurred solely for the benefit of a particular client.\footnote{119}

Nonetheless, as enacted, the sales price of a service includes all charges billed to the client, including reimbursement for such items as court filing fees and travel expenses incurred on behalf of the client.\footnote{120} Any future expansion of the resale rule would not necessarily eliminate tax pyramiding related to reimbursable expenses. Some expense items such as court filing fees, rental cars, hotels, and meals are not defined as services under the tax statute and therefore would not qualify as services purchased for resale.

\subsection*{E. Use Tax}

The 1986 legislation failed to provide for a complementary use tax on services purchased outside the state.\footnote{121} Without a use tax, a service purchaser would have an incentive to shop for services in other states or countries, and as a result Florida service providers would suffer a competitive disadvantage.\footnote{122} Therefore, Hellerstein provided for a tax on “the use of any service in this state when the sale of the service is not taxable in this state.”\footnote{123} He made the tax applicable “when services are rendered, furnished, or performed in this state, or when the product or result of the service is used or consumed in this state.”\footnote{124}

Close scrutiny of this language raised at least two questions. First, what was meant by the phrase, “the service is not taxable in this state?” Second, how could one determine where the product or result of a service was used or consumed?

\footnote{119. While it is possible that a service provider, in an effort to reduce the tax, could attempt to attribute certain overhead costs to a particular client in return for a reduced service fee, such a manipulation of the tax could be prevented by a statutory prohibition against any deductions for typical overhead costs.}

\footnote{120. Supra note 118 and accompanying text. The definition of “sales price” would have been revised under the legislation passed during the first special session. See infra, Part IX, Postscript. The revised definition would have allowed a seller to deduct certain reimbursable expenses, such as travel, entertainment, court costs and postage, from the sales price prior to calculating the sales tax due on the service transaction. Fla. CS for CS for SB 5-B, § 73 (1987).}

\footnote{121. Hellerstein Report, supra note 31, part 1 at 32, in DOR Report, supra note 18, at L-68.}

\footnote{122. This is particularly true since so few states currently tax a broad range of services. See supra note 18 and accompanying text.}

\footnote{123. Hellerstein Report, supra note 31, part 3 at 3, in DOR Report, supra note 18, at L-183 (model act).}

\footnote{124. Id.}
A service could be "not taxable" for a number of reasons. The service could be specifically exempt; the purchaser of the service could be exempt or immune from taxation; the sale could be a sale for resale rather than a "retail sale"; the greater proportion of the costs of performing the service could be outside Florida; or the sales tax could be precluded by constitutional restraints.

Apparently recognizing these possibilities, Hellerstein included language providing that the use tax would not apply to "the use of any service the sale of which the legislature did not intend to tax if the service had been sold in this state." This language seemed to limit the use tax to two types of transactions: those that would have been taxable under the sales tax but for the fact that the greater proportion of the costs of performance occurred outside Florida, and those to which the Legislature intended that a sales tax apply, but constitutional restraints prohibited collection of the sales tax. This broad use tax contemplated by Hellerstein was later narrowed by the Legislature to impose the tax only on the Florida use of a service sold at retail outside the state.

F. Where Is a Service Used?

Unanswered was the question: Where is a service used? Early discussions of this issue focused on the physical location of the purchaser as the situs for use of the service. But in the case of a multistate business, it is theoretically possible to consume simultaneously a single service in a number of different locations. In the case of other purchasers, this test raised the subsidiary question of whether to look to the purchaser’s permanent location—that is, his domicile—or to the physical location of the purchaser when the service was either sold or performed.

It soon became apparent that the logical site of consumption of a service would vary depending upon the service involved. For instance, a tourist who purchases a massage while on vacation in Florida logically consumes that service in Florida, not in the tourist’s home state. However, a tourist who spends three winter...
months in Florida and uses a Florida accountant to prepare his federal tax return arguably consumes that service where he permanently resides. Any single rule, if applied to all transactions, would have produced results inconsistent with the Legislature's goal of taxing captive sales but exempting other sales to the extent necessary to keep Florida businesses competitive with out-of-state businesses.

Ultimately, the Legislature opted for a series of rebuttable presumptions to be used in determining where the benefit of a service is enjoyed.130 Enjoyment of the benefit of a service is equated with the use of the service.131 The rebuttable presumptions are divided into two categories, depending on whether the purchaser is an individual or a business.

The statute provides three mutually exclusive presumptions applicable to services purchased by individuals.132 The first is that services directly related to real property are presumed enjoyed where the real property is located.133 The second presumption is applicable only if the first is not; it provides that a service is presumed enjoyed where the purchaser receives tangible personal property representing the service.134 The third presumption applies if the first two do not; it provides that the service is presumed used where the greater proportion of the service is performed.135 Finally, notwithstanding these presumptions, the statute affords the tax-

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130. Ch. 87-101, § 2, 1987 Fla. Laws 842, 845 (amending ch. 87-6, § 2, 1987 Fla. Laws 9, 13, to be codified at FlA. STAT. § 212.0591(9)). Legislation passed during the first special session would have revised these presumptions. See infra, Part IX, Postscript. The revised act would have provided multistate business purchasers an option of using either these presumptions or an alternative set of presumptions designed to allocate to Florida and tax 100% of certain services, but leave unapportioned and untaxed all other services not so allocated. Fla. CS for CS for SB 5-B, § 66 (1987).

131. Ch. 87-6, § 7, 1987 Fla. Laws 9, 25 (amending FLA. STAT. § 212.02(8) (Supp. 1986), to be recodified at FLA. STAT. § 212.02(27)).

132. Id. (to be codified at FLA. STAT. § 212.0591(9)(a)).

133. Id. (to be codified at FLA. STAT. § 212.0591(9)(a)(1)).

134. Id. (to be codified at FLA. STAT. § 212.0591(9)(a)(2)). This presumption was added by the glitch bill after Florida bankers questioned whether out-of-state banks sending credit cards to Floridians should be able to offer their cards tax exempt if Florida bankers were required to charge the tax. However, a strict reading of the definition of "tangible personal property" in this case could avoid the legislative intent to tax such transactions. By their nature, such items as credit cards, tax returns, and other tangible evidences of a service are probably intangible, and not tangible, personal property within the definition of section 212.02(26).

135. Ch. 87-101, § 2, 1987 Fla. Laws 842, 845 (amending ch. 87-6, § 2, 1987 Fla. Laws 9, 13, to be codified at FLA. STAT. § 212.0591(9)(a)(3). For purposes of determining where a service is performed, the same "costs of performance" test applicable to determining where a sale occurs is used. See supra note 93 and accompanying text.
payer an opportunity to demonstrate to DOR that a service was enjoyed outside Florida.  

A different set of presumptions is applicable to business purchasers. The first presumption is the same one applicable to individuals; it ties a service directly related to real property to the location of the realty. The second presumption ties a service directly related to tangible personal property to the property's business situs, if there is one. The third presumption provides that a service directly related to the purchaser's local market is presumed enjoyed where that local market exists.

The fourth presumption, applicable only if the first three are not, applies to multistate businesses. This rule creates a presumption that a multistate business uses a service where it is doing business. To measure how much business is done in Florida, the Florida corporate income tax apportionment formula is used.

The fifth presumption is applicable if the first four are not; it presumes that a single-state business uses a service where it does business. Finally, business purchasers, like individual purchasers, are entitled to demonstrate to DOR that the benefit of a service was enjoyed outside the state, notwithstanding the presumptions.

Three types of services—advertising, transportation, and services provided to the estate of a decedent—are not governed by these presumptions. The nature of these services is such that more exact rules governing the location of their use were available. The benefit of services to a decedent's estate is presumed enjoyed where the decedent last established residency. Transportation services are presumed enjoyed on an allocated basis, with 50% of the sales or cost price allocated to the point of origination and 50% to the point of termination. Advertising services are pre-

137. Id. (to be codified at Fla. Stat. § 212.0591(9)(b)(1)).
138. Id. (to be codified at Fla. Stat. § 212.0591(9)(b)(2)).
139. Id. (to be codified at Fla. Stat. § 212.0591(9)(b)(3)).
140. Id. (to be codified at Fla. Stat. § 212.0591(9)(b)(4)).
141. The three-factor—payroll, property, and sales—Florida corporate income tax apportionment formulas are set forth in part IV, chapter 214, but are modified by chapter 220 to provide for double-weighting of the sales factor.
143. Id. (to be codified at Fla. Stat. § 212.0591(9)(b)(6)).
144. Id. (to be codified at Fla. Stat. § 212.0591(9)(e)).
145. Id. (to be codified at Fla. Stat. § 212.0591(9)(c)).
sumed enjoyed in Florida to the extent the advertising is disseminated in the state.\textsuperscript{146}

V. THE EXEMPTIONS

The art of taxation consists of so plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing.\textsuperscript{147}

A. Structural Exemptions

With the basic structure of the sales and use tax on services established, the Legislature began to consider exemptions. The first exemptions granted were structural exemptions, designed to accomplish broad tax policies applicable regardless of the type of service sold. The statute provides for five such exemptions.\textsuperscript{148}

1. Services Sold in Florida But Used Elsewhere

The first structural exemption is the mirror image of the use tax on services purchased outside the state but used in the state. That exemption is for services purchased in the state for use outside the state.\textsuperscript{149}

Early in the process, legislators expressed concern for maintaining a "level playing field" between Florida and non-Florida service providers.\textsuperscript{150} The use tax was designed to make the service tax consequences identical regardless of where the Florida purchaser bought a service. However, a Georgia purchaser obviously could not be required to pay a Florida tax on a service purchased and used in Georgia, so a Florida service provider still suffered a competitive disadvantage relative to similar service providers located outside Florida.\textsuperscript{151} A related problem involved the tax implications

\textsuperscript{146} Id. (to be codified at Fla. Stat. § 212.0591(9)(d)).
\textsuperscript{147} Attributed to Jean-Baptiste Colbert, circa. 1665, \textit{The International Thesaurus of Quotations} 958.4 (compiled by Tripp, 1934).
\textsuperscript{148} Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at Fla. Stat. § 212.0592(1)-(5)).
\textsuperscript{149} Id. (to be codified at Fla. Stat. § 212.0592(1)).
\textsuperscript{150} Fla. H.R. Comm. on Fin. & Tax., Subcomm. on Sales Tax, tape recording of proceedings (Mar. 4 & 17, 1987) (on file with committee) (statements of Chairman Gardner regarding the importance of this exemption). \textit{See also} \textit{Study Commission Report}, \textit{supra} note 45, at 46.
\textsuperscript{151} Although arguably the cost of doing business is higher in states that impose different taxes, a business would have no choice in whether to pass on the full 5% sales tax or
for multistate businesses with large operations in Florida that purchased services in Florida of benefit to the company's business outside of Florida.152

With these problems in mind, lawmakers fashioned an exemption for services sold in Florida for use elsewhere. Such an exemption was recommended by the Sales Tax Study Commission, and incorporated in the Governor's proposed tax legislation.153 The Governor's proposal would have exempted all sales of services to persons without sales tax nexus in Florida if the product or result of the service was delivered outside Florida.154 It also would have allowed a multistate business purchaser, with sales tax nexus in Florida, to apportion certain service purchases in Florida, if the benefit of the service could not be assigned to a specific location.155 Apportionment would have been based upon the purchaser's Florida sales revenue as a percentage of its total sales revenue.156 The exemption would have been available in the form of a tax refund.157

During the legislative process, the exemption for services sold in Florida for use outside Florida was modified to parallel the application of the use tax on services purchased outside Florida for use inside Florida. The same presumptions used to determine where the benefit of a service was enjoyed for use tax purposes were made applicable to the exemption for services sold in Florida for use outside Florida.158 Instead of the refund process proposed by the Governor, purchasers were authorized to claim the exemption by executing an exempt purchase affidavit or obtaining an exempt purchase permit.159

absorb some or all of it when setting its price. The sales tax cannot be absorbed, but must be passed directly on to the buyer. Ch. 87-6, § 13, 1987 Fla. Laws 9, 40 (amending FLA. STAT. § 212.07(4) (Supp. 1986)).


153. STUDY COMMISSION REPORT, supra note 45, at 46; Governor's draft bill, supra note 50, § 2.

154. Governor's draft bill, supra note 50, § 2.

155. Id.

156. Id.

157. Id.

158. Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at FLA. STAT. § 212.0592(1)(b)).

159. Id. § 4, 1987 Fla. Laws at 852 (amending ch. 87-6, § 4, 1987 Fla. Laws 9, 21, to be codified at FLA. STAT. §212.0593).
2. Employee Services

The second structural exemption is for services rendered by an employee to an employer.\(^{160}\) Prior to passage of the 1987 legislation, there was much discussion about whether the 1986 statute would have reached services performed by employees.\(^{161}\) There was no legislative intent—in 1986 or 1987—to tax employee wages,\(^{162}\) but to eliminate any uncertainty on this issue, the statute specifically exempts employee services from tax.\(^{163}\) An employee is defined\(^{164}\) as anyone who is not an independent contractor, and whose wages are subject to tax under the Federal Insurance Contributions Act\(^{165}\) or the Federal Unemployment Tax Act,\(^{166}\) or are subject to withholding for federal income tax purposes.

3. Occasional or Isolated Sales

The third structural exemption is for occasional or isolated sales of services.\(^ {167} \) Prior to 1987, there was an exclusion from the sales tax for "occasional or isolated sales or transactions involving tangible personal property."\(^ {168} \) Both Hellerstein and the Sales Tax Study Commission recommended that the exemption be expanded to encompass services,\(^ {169} \) and it was included in the 1987 legislation.\(^ {170} \) While there is no definition of an occasional or isolated sale, the exemption was described throughout the legislative process as one for such services as babysitting and lawn care per-

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160. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. §212.0592(2)).
161. See, e.g., Pierce & Peacock, supra note 81, at 476-78; Jacobs, supra note 81; Hellerstein Report, supra note 31, part 1 at 5, in DOR Report, supra note 18, at L-11.
162. Had the Legislature intended the 1986 legislation to extend the sales tax to employee services, the state's economists certainly would have included in their revenue estimates the enormous sums of money resulting from such a change. They did not. See Staff of Fla. H.R. Comm. on Fin. & Tax., CS for HB 1307 (1986) Fiscal Note 1 (July 7, 1986) (on file with committee) (estimating revenues from services tax at $1.2 billion in general revenues).
163. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(2)).
164. Id. § 7, 1987 Fla. Laws at 25 (to be codified at Fla. Stat. § 212.02(9)).
167. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. §212.0592(3)).
168. Fla. Stat. § 212.02(9) (Supp. 1986) (amended by ch. 87-6, § 7, 1987 Fla. Laws 9, 25, to be recodified at Fla. Stat. § 212.02(3)). Florida law excludes occasional or isolated sales of tangible personal property from the definition of "business." Id. The sales tax on goods is a tax on the privilege of engaging in "the business" of selling tangible personal property. Id. § 212.05.
170. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(3)).
formed by persons who do not hold themselves out as engaged in that business.\textsuperscript{171}

4. Partners' Services

The fourth structural exemption is for services sold to a partnership by partners who are natural persons or professional corporations.\textsuperscript{172} A broader exemption was originally recommended by Hellerstein, who likened partnership services to services performed by employees.\textsuperscript{173} However, a more narrowly drawn exemption was adopted after concern was voiced that an exemption for all services rendered by partners could result in tax avoidance if corporations formed partnerships for the purpose of transferring services without taxation. The partnership exemption in Committee Substitute for Senate Bill 777 was limited to services sold by partners who are natural persons.\textsuperscript{174} When attorneys and accountants questioned the rationale of taxing similar services provided by partners who chose to incorporate as professional corporations, the Legislature expanded the exemption to encompass the services of partners who are professional corporations.\textsuperscript{175}

5. Intercompany Sales

The fifth structural exemption is for intercompany sales of services between members of an affiliated group of corporations.\textsuperscript{176} This exemption was first recommended by the Sales Tax Study Commission as a method to avoid excessive tax pyramiding.\textsuperscript{177} The Governor's proposed legislation would have limited the exemption to members of an affiliated group electing to file a consolidated return for Florida corporate income tax purposes.\textsuperscript{178} Early drafts of the House and Senate bills would have broadened the exemption


\textsuperscript{172} Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at FLA. STAT. § 212.0592(4)).

\textsuperscript{173} HELLERSTEIN REPORT, supra note 31, part 1 at 85-88, in DOR REPORT, supra note 18, at L-121 to L-124.

\textsuperscript{174} Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (amended by ch. 87-101, § 3, 1987 Fla. Laws 842, 847, to be codified at FLA. STAT. § 212.0592(4)).

\textsuperscript{175} Id. (to be codified at FLA. STAT. § 212.0592(5)).

\textsuperscript{176} STUDY COMMISSION REPORT, supra note 45, at 50.

\textsuperscript{177} Governor's draft bill, supra note 50, § 2.
to include sales between members of an affiliated group filing a consolidated tax return for either state or federal income tax purposes.\textsuperscript{179}

Concern that such a broad exemption would have allowed multi-state affiliated groups to use an out-of-state subsidiary to purchase services outside Florida, and then resell those services in an exempt intercompany sale to a Florida subsidiary, resulted in a modification of the intercompany sales exemption. As enacted, the exemption is limited to intercompany sales between members of the "affiliated group," which is defined as a group designed, within certain statutory limits, by the corporate members that have tax nexus in Florida.\textsuperscript{180} If a subsidiary corporation is not included within the affiliated group, any sale of a service between that corporation and another related corporation is not entitled to the intercompany sales exemption, but is potentially taxable on the basis of the fair market value of the service.\textsuperscript{181}

\textbf{B. Specific Exemptions}

Lobbyists, in search of specific exemptions, regularly prefaced their remarks with, "We're not here to oppose this tax in general," and concluded them with some variation on, "Don't tax you, don't tax me. Tax that fellow behind the tree."\textsuperscript{182} On a superficial level, the statute suggests that at least forty-six of these lobbyists enjoyed some measure of success.\textsuperscript{183} In addition to the five structural exemptions and the resale provision, the Legislature enacted forty-six specific exemptions for various services.\textsuperscript{184} Of these, most of the significant exemptions were recommended by the Sales Tax Study Commission.\textsuperscript{185} The major role of the Sales Tax Study Commission was to consider the merits of retaining various exemptions from the sales tax on services.\textsuperscript{186} The Commission had a mandate to use

\begin{itemize}
  \item \textsuperscript{179} \textit{E.g.}, Fla. H.R. Comm. on Fin. & Tax., PCB 11a (1987).
  \item \textsuperscript{180} Ch. 87-101, § 9, 1987 Fla. Laws 842, 860 (amending ch. 87-6, § 7, 1987 Fla. Laws 9, 25, to be codified at FLA. STAT. § 212.02(2)).
  \item \textsuperscript{181} \textit{Id.} § 3, 1987 Fla. Laws at 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at FLA. STAT. § 212.0592(4)).
  \item \textsuperscript{183} But see infra notes 246-50 and accompanying text.
  \item \textsuperscript{184} Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (amended by ch. 87-101, § 3, 1987 Fla. Laws 842, 847, to be codified at FLA. STAT. § 212.0592(6)-(51)).
  \item \textsuperscript{185} Study Commission Report, \textit{supra} note 45, at 55-59.
  \item \textsuperscript{186} Ch. 86-166, § 9, 1986 Fla. Laws 816, 825.
\end{itemize}
seven criteria in evaluating exemptions. In its final report, the Commission relied upon at least one of seven justifications, based upon the statutory criteria, to recommend reinstatement of twelve categories of exemptions.

Many exemptions recommended by the Commission and adopted by the Legislature were intended to make the tax on services less regressive. For the same reason, food and medicine always have been exempted from the sales tax on goods. By exempting certain necessary services regularly purchased by the average household, the state shifted the burden of the services tax onto more affluent taxpayers.

Services that the Commission classified as basic necessities, and which the Legislature ultimately exempted, include: health and medical services, social services, educational services, and services associated with the production and transportation of agricultural products. Health and medical services constitute 51.2% of all potential tax revenue foregone as a result of exemptions from the new services tax. Educational and social services make up

187. Id. See supra notes 24-27 and accompanying text.
188. STUDY COMMISSION REPORT, supra note 45, at 45-61. The seven reasons were: (1) re-enactment of the exemption would maintain the competitive position of a specified industry, service or item in relation to other states or countries with which Florida competes; (2) re-enactment of the exemption would stimulate job formation or prevent loss of jobs within the State of Florida; (3) re-enactment of the exemption would be consistent with other state policies such as the State Comprehensive Plan, environmental or growth management laws; (4) re-enactment of the exemption would provide for a less regressive incidence of the tax; (5) re-enactment of the exemption would avoid undesirable double taxation or tax pyramid-ing; (6) re-enactment of the exemption is the most efficient way to provide a more favored status for this industry, group or item; and (7) re-enactment of the exemption is recommended for another reason specifically indicated.
189. STUDY COMMISSION REPORT, supra note 45, at 55-59.
190. Ch. 26319, § 8, 1949 Fla. Laws 9, 25 (current version at FLA. STAT. § 212.08(1), (2) (Supp. 1986)).
191. K. Walby & D. Williams, supra note 11 (showing that a greater proportion of low to moderate income household budgets is dedicated to medical and social services, health insurance, public transportation, education, and services directly related to food production).
192. STUDY COMMISSION REPORT, supra note 45, at 55-58; ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(12)).
193. STUDY COMMISSION REPORT, supra note 46, at 55-58; ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(24)).
194. STUDY COMMISSION REPORT, supra note 46, at 55-58; ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (amended by ch. 87-101, § 3, 1987 Fla. Laws 842, 847, to be codified at FLA. STAT. § 212.0592(6), (7)).
195. STUDY COMMISSION REPORT, supra note 46, at 55-58; ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (amended by ch. 87-101, § 3, 1987 Fla. Laws 842, 847, to be codified at FLA. STAT. § 212.0592(6), (7)).
196. Appendix C.
8.4% of the revenue lost to exemptions, and agricultural services constitute another 3.6% of the foregone revenue.\footnote{197}

Two other exemptions recommended by the Commission and adopted by the Legislature also were related to the goal of making the tax less regressive. The first is the exemption for sewage and garbage services sold to "residential households or owners of residential models."\footnote{198} The second is an exemption for certain motor vehicle transportation.\footnote{199} The Legislature exempted bus transportation,\footnote{200} in recognition of the fact that it is typically used by persons in lower income groups.\footnote{201} The exemption was later broadened to include taxicabs\footnote{202} when some legislators noted that taxis were heavily used by elderly citizens and less affluent persons who do not own their own automobiles.\footnote{203}

Two exemptions recommended by the Commission and adopted by the Legislature involve activities arguably beyond the reach of a tax on services—interest payments and insurance premiums.\footnote{204} The Legislature in 1986 did not contemplate taxing these two types of transactions.\footnote{205} In his legal analysis, Hellerstein concluded that, although there are "reasonable grounds" for including them in a service tax base, neither interest payments nor insurance premiums represented consideration for services.\footnote{206} Economists attempting to revise revenue estimates for the services tax disagreed on the proper classification of these two types of transactions.\footnote{207}

\footnote{197. Id.}

\footnote{198. Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at Fla. Stat. § 212.0592(22)). See also Study Commission Report, supra note 45, at 57.}

\footnote{199. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(20)). See also Study Commission Report, supra note 45, at 57.}

\footnote{200. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(20)).}

\footnote{201. Interview with Rep. Gardner (Nov. 6, 1987).}

\footnote{202. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(33)).}

\footnote{203. Interview with Rep. Gardner (Nov. 6, 1987).}

\footnote{204. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(13), (14)). See also Study Commission Report, supra note 45, at 57.}

\footnote{205. Fla. H.R. Comm. on Fin. & Tax., Sales Tax Exemption Bill, Conference Report (n.d.) (showing fiscal impact of taxing various services for which exemptions were repealed by CS for HB 1307 (1986)). The estimated fiscal impact of taxing banking services was $6.3 million, and for insurance, the document showed only a tax on agents and brokers with the fiscal estimate unavailable. Id. Interest and insurance, if taxed, would have generated $563.8 million. See Fla. Legis., Jt. Legis. Mgt. Comm., Financial Outlook Statement, n.(f) (Mar. 11, 1987) [hereinafter Financial Outlook Statement] (reflecting the official revenue forecasts by the Revenue Estimating Conference) (on file, Florida State University Law Review).}

\footnote{206. Hellerstein Report, supra note 31, part 1 at 76, 81, in DOR Report, supra note 18, at L-112, L-117.}

\footnote{207. Financial Outlook Statement, supra note 205.}
However, in its report, DOR stated its intent to read the 1986 legislation broadly and include interest and insurance premiums in the services tax base unless the Legislature directed otherwise in 1987.\textsuperscript{208} As a result, the Legislature clarified its intent by specifically exempting interest payments and consideration for insurance.\textsuperscript{209}

The exemption for insurance is limited to insurance as defined by the Florida Insurance Code and chapter 440, Florida Statutes, the workers' compensation law.\textsuperscript{210} The exemption for title insurance is limited to consideration equal to 110\% of the risk premium rate promulgated by the Insurance Commissioner.\textsuperscript{211} This limitation was imposed because of concern that certain service providers, particularly attorneys, could avoid taxation of their services by eliminating their service charge and increasing the costs at which they sell title insurance to compensate for the service fee.\textsuperscript{212} The limitation on the exemption was tied to the risk premium rate because it is uniform among various companies\textsuperscript{213} and it is the rate upon which the insurance premium tax is levied.\textsuperscript{214}

The Sales Tax Study Commission also recommended an exemption for commissions paid to insurance agents and brokers, basing the recommendation on the desire to stimulate creation of new jobs and prevent the loss of existing jobs.\textsuperscript{215} The Legislature adopted this recommendation and broadened the exemption to cover insurance services performed by insurance service companies.\textsuperscript{216} The term "insurance service company" is not defined for purposes of the exemption, and there is no clear record of legislative intent with regard to this provision. The term "service company" is defined in the Florida Insurance Code to mean a business entity which has obtained the Department of Insurance's approval to provide services necessary to establish and maintain a multiple-employer welfare arrangement.\textsuperscript{217} However, the SIC Code lists a number of insurance services provided to insurance companies and policyholders by independent organizations that arguably could be

\textsuperscript{208} DOR REPORT, \textit{supra} note 18, at L-271.
\textsuperscript{209} Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(13), (14)).
\textsuperscript{210} Id. (to be codified at FLA. STAT. § 212.0592(13)).
\textsuperscript{211} For the definition of "risk premium rate," see FLA. STAT. § 627.781 (1985).
\textsuperscript{212} Interview with Rep. Gardner (Nov. 6, 1987).
\textsuperscript{213} FLA. STAT. § 627.781 (1985).
\textsuperscript{214} FLA. STAT. § 624.509 (1985).
\textsuperscript{215} STUDY COMMISSION REPORT, \textit{supra} note 45, at 57.
\textsuperscript{216} Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(13)).
\textsuperscript{217} FLA. STAT. § 626.895 (1985).
described as "insurance service companies." But without a clear legislative intent to exempt such a broad range of insurance-related services, the statutory rule of construction mandating a strict reading of exemptions would appear to limit the exemption to service companies that provide administrative support to self-insurance funds, such as multiple-employer welfare arrangements.

When the exemption for interest was considered by the Legislature, a question was raised regarding the taxability of fees earned through the discounting of receivables sold by a retail business to a credit or charge card company. A major charge card company argued that it would be inconsistent to exempt interest but tax discount charges. To eliminate this disparity, the Legislature broadened the interest exemption to encompass discount charges for the purchase of accounts receivable.

Exemptions for forestry services, motion picture production services, and security brokerage services were recommended by the Commission and enacted by the Legislature to stimulate job creation and to prevent loss of existing jobs. Agriculture Commissioner Doyle Conner had urged the Commission and the Legislature to exempt all agricultural services. The Department of Commerce urged the Commission and the Legislature to exempt motion picture production services in order to further the state's efforts to promote this industry in Florida.

The present exemption for security and commodity brokerage services began as an exemption only for commissions or other consideration earned for the service of transferring securities or commodities. The belief that Florida brokers would be placed at a

218. STANDARD INDUSTRIAL CLASSIFICATION MANUAL, supra note 87, at 288.
220. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(14)).
221. STUDY COMMISSION REPORT, supra note 45, at 56-57; ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(8)).
222. STUDY COMMISSION REPORT, supra note 46, at 54-57; ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (amended by ch. 87-101, § 3, 1987 Fla. Laws 842, 847, to be codified at FLA. STAT. § 212.0592(18)).
223. STUDY COMMISSION REPORT, supra note 45, at 54-57; ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (amended by ch. 87-101, § 3, 1987 Fla. Laws 842, 847, to be codified at FLA. STAT. § 212.0592(23)).
225. STUDY COMMISSION REPORT, supra note 45, at 38.
226. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(23)).
competitive disadvantage if they were required to charge a tax, while out-of-state brokers—easily accessible to Floridians by calling toll-free telephone numbers—were not, was one reason the Commission and the Legislature gave for exempting these services. A second reason was concern that it would be administratively difficult to compute the service tax if the commission was not stated separately, but the consideration for the brokerage service was earned in the form of a price differential between the purchase and sale prices of the security transferred.

Beyond the exemption for consideration earned on the transfer of securities and commodities, the statute also exempts most services related to the sale of securities. This exemption resulted when, late in the legislative process, concern was expressed about the tax status of activities such as management of financial funds. Legislators wanted the securities industry in Florida to collect its fair share of taxes, but they did not want to tax those activities that could be done as easily outside Florida as inside the state. Therefore, they exempted most services related to the securities industry, but taxed accounting services, financial services taxable when performed by a financial institution, and investment advisory services performed by security brokers when a separate charge is made for the service.

The final exemption recommended by the Commission was for membership fees in certain organizations such as labor unions, and religious, political, civic, and social organizations. The Legislature limited this exemption to nonprofit groups, but expanded the

228. Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at Fla. Stat. § 212.0592(23)).
230. Id.
list of organizations to include business and professional membership organizations, and arts, historical, and science organizations.233

Most of the remaining exemptions were added by the Legislature for particular industries that, if taxed, would be at a competitive disadvantage relative to similar service providers located outside the state. Some exemptions were enacted in an effort to reduce tax pyramiding or to make the tax less regressive. A few were established because, in the words of Senate President John Vogt, "No tax law is perfect . . . . There will always be political considerations."235 One exemption was provided because, in the words of one lawmaker, "It's simply un-American to tax haircuts."236

Two exemptions represented a swap of the services tax for a different tax. Realtors' commissions on the sale of homestead property were exempted when realtors argued that the tax would increase housing costs.237 However, the documentary stamp tax on deeds was increased by five cents per $100 of value to generate most of the revenues foregone as a result of this exemption.238

Motor freight transportation was exempted after representatives of the trucking industry complained that the general exemption for employee services would make the independent trucker noncompetitive with in-house trucking operations, and that the mileage-based method then contemplated for apportioning the tax on interstate transportation would create administrative problems for the industry.239 In lieu of the tax on motor freight transportation, the Legislature opted for a five cents per gallon increase in the diesel fuel tax.240

Water transportation services, other than those conducted on inland waterways, were exempted by the Legislature when represent-

233. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(17)).
234. Dem., Cocoa.
238. Ch. 87-6, § 34, 1987 Fla. Laws 9, 63 (amending Fla. Stat. § 201.02 (Supp. 1986)).
240. Ch. 87-6, § 39, 1987 Fla. Laws 9, 64 (amending Fla. Stat. § 206.87 (Supp. 1986)).
atives of the ports argued that a tax on shipping and related stevedoring services would provide an incentive for shippers to use other ports in the Southeast, particularly if the shipment of the goods neither originated nor terminated in Florida.\textsuperscript{241} Rail transportation services were exempted in part because of the ports’ arguments that the intermodal transportation service provided by the railroads was an essential component of the total shipping service, and a tax on rail transportation could cause shippers to avoid moving cargo through Florida unless it originated in the state or was destined for this state.\textsuperscript{242}

Most financial services also were exempted for competitive reasons. Florida bankers effectively argued that a tax on most financial services, despite the use tax and the exemption for services used outside the state, would result in a diversion of banking business to out-of-state institutions. Representatives of the industry maintained that “the convenience factor, which at one time provided an inducement to dealing with local institutions has been largely wiped out by advances in telecommunication and other electronic technologies.”\textsuperscript{243} As a result, the financial services that were selected for taxation are generally those for which the convenience of using a local financial institution outweighs the price increase attributable to the tax.\textsuperscript{244} All international banking transactions and all financial services sold to nonresident persons or entities were exempted in furtherance of the state’s policy of providing tax incentives to promote international banking activities in Florida.\textsuperscript{245}

\textsuperscript{241} Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at FLA. STAT. § 212.0592(21)). \textit{See also} C. Lunetta, Dir., Port of Miami, Dangerous Waters: Economic Consequences to the State of a Sales Tax on Water Transportation Services (Feb. 24, 1987) [hereinafter Ports Position Paper](submitted on behalf of Florida Ports Council) (on file, Fla. H.R. Comm. on Fin. & Tax.).

\textsuperscript{242} Ports Position Paper, \textit{supra} note 241, at 4-5.


\textsuperscript{244} Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at FLA. STAT. § 212.0592(11)).

\textsuperscript{245} Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at FLA. STAT. § 212.0592(28)); ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at FLA. STAT. § 212.0592(11)). For other examples of tax legislation favoring international banking, see FLA. STAT. § 199.072(4) (1985) (exemption from intangibles tax for international banking transactions); id. § 201.23(4) (exemption from documentary stamp tax for international banking transactions).
Despite protests from the Florida bar, most legal services did not escape taxation under the services tax.\(^{246}\) Lawmakers apparently did not agree with the attorneys’ arguments that a tax on legal services was constitutionally prohibited. Only four classes of legal services received an exemption. The first is for criminal defense services provided once the constitutional right to counsel has attached.\(^{247}\) This exemption is available in the form of a refund of taxes paid on such legal services, but only if the charges in the case are dismissed or the defendant is adjudicated not guilty.\(^{248}\) The remaining three exemptions are for legal services provided to natural persons involving child support, bankruptcy, and enforcement of civil rights.\(^{249}\)

Two related provisions of the tax law may affect the tax liability associated with attorneys’ fees. The law provides an exemption for any service provided and paid for pursuant to court order in a bankruptcy proceeding, which would include legal fees, but also could exempt such services as accounting and appraisal services.\(^{250}\) A second provision defines the sales and use tax on legal services as a court cost that may be assessed and awarded pursuant to section 57.071, Florida Statutes.\(^{251}\)

In addition to these major exemptions, there are a number of less significant, narrow exemptions for particular service transactions. Some of these exemptions were probably unnecessary because the tax would not have reached the transaction anyway.\(^{252}\)

\(^{246}\) Shortly before the start of the 1987 Regular Session, the Florida Bar sent to its members a letter marked “Immediate Attention Needed,” asking lawyers to write their legislators to “let them know you’re a lawyer, you’re angry, your clients are angry, and you want to be counted as opposing the sales tax.” Letter from Joseph J. Reiter, Pres., Fla. Bar, to “Fellow Lawyer” (Feb. 27, 1987) (on file, Florida State University Law Review).

\(^{247}\) Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at Fla. Stat. § 212.0592(27)(a)).

\(^{248}\) Legislation passed during the first special session, but ultimately vetoed by the governor, would have eliminated the refund process and the condition that the defendant be acquitted, and would have authorized an exemption for all legal services provided once the defendant’s sixth amendment right to counsel had attached. Fla. CS for CS for SB 5-B, § 74 (1987); Fla. S. Jour. 3 (Spec. Sess. “C” Oct. 14, 1987) (veto message of the governor). For a more detailed discussion of events subsequent to passage of the tax act, see infra, Part IX Postscript.

\(^{249}\) Ch. 87-101, § 3, 1987 Fla. Laws 842, 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at Fla. Stat. § 212.0592(27)(b)).

\(^{250}\) Id. (to be codified at Fla. Stat. § 212.0592(44)).

\(^{251}\) Ch. 87-6, § 42, 1987 Fla. Laws 9, 65 (amending Fla. Stat. § 57.071 (1985)).

\(^{252}\) Fla. H.R. Comm. on Fin & Tax., tape recording of proceedings (June 1, 1987) (on file with committee) (comments of Reps. Gardner and Michael Langton, Dem., Jacksonville).
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legislative parlance, such exemptions provided "comfort language" for nervous lobbyists.

Despite the forty-six specific exemptions for various service transactions, Florida has exempted only 27.8% of the potential revenue.253 Over 80% of the tax revenue foregone as a result of the exemptions is attributable to exemptions recommended by the Sales Tax Study Commission.254 These statistics suggest that lawmakers, intending to broaden the sales tax base, exercised considerable restraint in granting exemptions from the tax despite the tremendous pressure applied by various special interest groups.

C. Institutional Exemptions

Although most services are subject to taxation, a particular service transaction may be exempt due to the identity of the buyer or seller. Historically, churches have been exempted from taxation when buying and selling goods.255 The statute now provides that churches also may buy and sell services tax exempt.256

Direct sales to governmental entities, including the federal government, the state, and political subdivisions of this state, have in the past been exempt from the sales tax.257 While the pre-existing exemption was broad enough to encompass services sold to these governmental entities, the Legislature elected to expand the exemption to cover sales to governmental entities outside Florida.258

Similarly, nonprofit organizations, including charitable, religious, educational, scientific, and veterans' organizations, also enjoyed the benefit of a sales tax exemption on their purchases.259 Again, the wording of the pre-existing exemption was broad enough to encompass purchases of services, so otherwise taxable services may now be purchased tax exempt if the purchaser is one of these qualifying organizations.260 Language that limited the exemptions for

253. Appendix D.
254. See Appendix C.
religious, educational, and scientific organizations to those located in this state was deleted in response to arguments that the exemption discriminated against out-of-state organizations.

Finally, certain other nonprofit entities, including nursing homes, hospices, adult congregate living facilities, and youth groups, also have historically enjoyed an exemption from the tax imposed by part I of chapter 212, Florida Statutes. This pre-existing exemption also was broad enough to encompass services. However, what is not clear from the wording of the law is whether the exemption applies only to purchases by these entities, or extends to sales by them. Because the sales tax must be paid by the purchaser, it is logical to assume that this exemption only applies in the event the nonprofit entity is the purchaser. In general, the types of services provided by these entities would be exempt as health or social services. But if a nursing home chooses to sell a service that would be taxable if sold by someone other than the nursing home, it is difficult to conceive of a policy reason that would support allowing the nursing home to sell its services tax exempt.

VI. Special Industries

And it came to pass, in those days, that there went out a decree from Caesar Augustus that all the world [even advertising] should be taxed.

Despite the broad application of the new tax to a large number of service providers, the lion's share of the attention, both in Florida and nationally, has focused on the taxation of advertising services. Numerous national advertisers responded to the tax by

261. Id.
262. Id. (amending Fla. Stat. § 212.08(7)(t), (u) (Supp. 1986), to be recodified at Fla. Stat. § 212.08(7)(m), (n)).
263. Ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(12), (24)).
announcing advertising boycotts against Florida. In place of these commercials, broadcasters aired ads denouncing the tax and the politicians who supported it. Various advertising and media trade associations threatened cancellations of future meetings and conventions in the state to protest the tax.

Throughout the legislative process, opponents of the tax on advertising services made three arguments against the tax. They asserted that: (1) it violated the constitutional right to free speech; (2) it was counterproductive because it would result in a decline in advertising, which in turn would produce a decline in sales of taxable goods and services; and (3) it was difficult to administer. Underlying much of the opposition was an admission of fear that if the tax on advertising worked in Florida, other states would follow suit.

Although advertisers were not the only ones to argue that constitutional prohibitions prevented imposition of the tax on a particular service, legislators were particularly sensitive to constitutional limitations in this area because of the national attention being paid to this aspect of the tax. The cases cited by opponents of the tax involved selective taxation of the press, most lawmakers viewed the Florida services tax not as an ad tax, but as a general sales tax on most services.

271. Attorneys also questioned the state's ability to impose a tax upon their services. Letter from Ray Ferrero, Jr., Pres., Fla. Bar, to "colleague" (Sept. 15, 1987) (noting that the Bar continued to challenge the tax on constitutional grounds) (on file, Florida State University Law Review).
273. Soon after the services tax bill was signed into law, Governor Martinez asked the Florida Supreme Court for an advisory opinion on its constitutional validity. See Fla. CONST. art. IV, § 1(c). Four of the five justices who responded agreed that the tax on advertising was facially valid because advertising was taxed under the same general taxation scheme applicable to other services. In Re: Advisory Opinion To the Governor, Request of
The advertisers' second argument, that the tax would result in a decline in the state's sales tax revenue, was based in large part upon a report commonly referred to as "The Wharton Study." Various economists, both inside and outside of state government, however, questioned the validity of the report's conclusions. Finally, in response to complaints that the tax would create administrative problems for advertisers and media service providers, legislators asked industry representatives to identify specific problems and offer solutions. Some suggestions were provided and incorporated into the law.

The statute defines advertising to include only the charges made for the medium itself and the costs of brokering the medium. Costs of producing advertising are excluded from the definition of advertising, but may be taxable under the general rules applicable to other services. Advertising is taxable only if it is sold or used in the state. The tax is computed on the portion of the sales price or cost price that reflects the market coverage of the advertising in Florida as a percentage of the total market coverage for the advertisement. Market coverage is statutorily defined for print media as "average circulation within the geographic area of distri-

May 12, 1987, 509 So. 2d 292 (Fla. 1987). Justices Ehrlich and Barkett declined to render an opinion, believing the constitutional advisory opinion process did not contemplate a response to the type of question posed by the Governor. Id. at 316, 318; Justice Grimes advised the Governor that he believed the tax on advertising imposed an "unconstitutional restraint on free speech." Id. at 315.


277. For example, the definition of "market coverage" was modified as a result of certain broadcasters' concerns that a measurement based upon viewer ratings would fluctuate too rapidly to provide a reasonable method for calculating market coverage on which the tax would be based. See ch. 87-101, § 7, 1987 Fla. Laws 842, 857 (amending ch. 87-6, § 6, 1987 Fla. Laws 9, 24, to be codified at FLA. STAT. § 212.0595(4)(b)).

278. Ch. 87-101, § 7, 1987 Fla. Laws 842, 857 (to be codified at FLA. STAT. § 212.0595(10)).

279. Id. Certain costs associated with production of master tapes of commercials are exempt from sales tax on goods pursuant to FLA. STAT. § 212.08(12) (Supp. 1986).

280. Ch. 87-6, § 6, 1987 Fla. Laws 9, 24 (to be codified at FLA. STAT. § 212.0595(1)).

281. Ch. 87-101, § 7, 1987 Fla. Laws 842, 857 (amending ch. 87-6, § 6, 1987 Fla. Laws 9, 24, to be codified at FLA. STAT. § 212.0595(4)).
bution for the publication in which the advertising appears.”²⁸² For broadcast media, market coverage is defined as “population within the signal reception area.”²⁸³ Thus, for print media, the total price of the ad space is multiplied by a factor equal to Florida’s portion of the total circulation. The tax is applied to this apportioned price.²⁸⁴ Similarly, for broadcast media, the price of the ad time is multiplied by a factor that equals Florida population within the broadcaster’s signal reception area, divided by total population residing within that area. The tax is applied to this apportioned price.²⁸⁵ The market coverage for other media is to be defined by administrative rule of DOR.²⁸⁶

As with most other services, if the majority of the costs of performing the advertising are incurred inside the state, the service is deemed sold in the state and the seller collects the sales tax on the apportioned sales price.²⁸⁷ However, if the costs of performance are primarily outside the state, the use tax is applicable, and the advertiser becomes responsible for directly remitting the use tax on the apportioned cost price of the advertising, if the advertiser has nexus for tax purposes with the state.²⁸⁸ If a third party, such as an advertising agency or media broker, who is registered with the state as a sales tax dealer, purchases the advertising for resale, that third party is responsible for collecting the applicable sales or use tax.²⁸⁹

It is not clear from the statute whether an advertiser could claim that the advertising was used outside the state despite its dissemination in Florida. Arguably, an advertiser could claim an out-of-state use exemption from the sales tax,²⁹⁰ or could claim inapplicability of the use tax on advertising because the statute states that “advertising shall be presumed to be enjoyed in this state to the extent that the sales price or cost price of such services is apportioned to this state pursuant to s. 212.0595.”²⁹¹

²⁸². Ch. 87-101, § 7, 1987 Fla. Laws 842, 857 (amending ch. 87-6, § 6, 1987 Fla. Laws 9, 24, to be codified at FlA. Stat. § 212.0595(4)(b)).
²⁸³. Id.
²⁸⁴. Id. (to be codified at FlA. Stat. § 212.0595(4)(a)).
²⁸⁵. Id.
²⁸⁶. Id. (to be codified at FlA. Stat. § 212.0595(4)(c)).
²⁸⁷. Id. (to be codified at FlA. Stat. § 212.0595(5)).
²⁸⁸. Id. (to be codified at FlA. Stat. § 212.0595(6)).
²⁸⁹. Id. (to be codified at FlA. Stat. § 212.0595(5), (6)).
²⁹⁰. Id. § 3, 1987 Fla. Laws at 847 (amending ch. 87-6, § 3, 1987 Fla. Laws 9, 15, to be codified at FlA. Stat. § 212.0592(1)).
²⁹¹. Id. § 2, 1987 Fla. Laws at 845 (to be codified at FlA. Stat. § 212.0591(9)(d)).
For example, an Alabama regulated utility which cannot legally sell its service in Florida, but which chooses to advertise on a Pensacola television station in an effort to reach the Mobile market, arguably could overcome the presumption that the advertising is used in Florida because it is disseminated here. However, such a reading of the statute would put DOR in the position of applying the tax in any particular case on the basis of the content of the advertising. In light of potential constitutional problems that could arise if tax liability was based on the content of the commercial speech, a better reading of the law would dictate a finding that the Alabama utility had used—albeit wasted—the advertising in Florida because it was disseminated in this state. The utility made a business decision to “waste” money on advertising that would reach consumers outside its market, and the sales tax on the price of the advertising simply represents an increment of the money so used.

There is one exemption particular to advertising. That exemption is for written contracts to purchase advertising if the contract is for a term in excess of two years, and was entered into prior to April 1, 1987.292

B. Construction

The construction industry also is treated separately in the statute. From the outset, there were a number of unusual problems associated with the taxation of construction services. Unless a contractor was performing under a labor-only contract, there was no easy way to calculate the taxable value of the construction service being provided. Contractors already were paying sales tax on the building materials they purchased.293 Most general contractors rely extensively upon subcontract labor, and these subcontractor services would not have been excluded from tax under the contemplated resale exemption.294 Yet, a tax on these subcontractors would have resulted in extensive tax pyramiding and would have created serious price distortions between contractors who used em-

292. Ch. 87-6, § 6, 1987 Fla. Laws 9, 24 (to be codified at Fla. Stat. § 212.0595(9)).
294. The general contractor could not be construed as simply brokering the subcontractors’ services. Under the resale rules, the contractor needed these services in order to perform the service under the construction contract. See supra notes 94-117 and accompanying text.
ployee labor and those who used subcontractors. For contractors who built for their own use, or on a speculative basis and later sold the property, the question was how to measure the value of the construction services associated with the project—that is, at what point does the price paid for improved real property include a return on investment? With these questions and others in mind, the Legislature set out to fashion a tax on construction services that treated all builders equally without excessive pyramiding of the tax.

The original legislation required "prime contractors" to pay the tax on the "cost price" of their own services and on the amounts paid by them to their subcontractors, if the construction performed was "new construction." The tax base could be reduced to reflect the price of materials on which the tax already had been paid if the contractor provided proper documentation. For construction that was not defined as new construction, the owner of the improved realty was responsible for paying a tax on the total consideration paid to the prime contractor. However, the tax base could be reduced by the amount paid by the prime contractor to subcontractors, and by the amount paid by the prime contractor for building materials upon which the tax had previously been paid.

Industry response to this legislation was swift. It ranged from confusion over the recordkeeping involved to outrage at the prospect of having to disclose the price mark-up on building materials in order to avoid a double tax on the materials. The various segments of the industry quickly united to support a simpler method of calculating the tax. As a result, the provisions in the original

295. See ch. 87-6, § 3, 1987 Fla. Laws 9, 15 (to be codified at Fla. Stat. § 212.0592(2)) (exempting employee services from sales tax on services).
296. Ch. 87-6, § 5, 1987 Fla. Laws 9, 22 (repealed by ch. 87-101, § 5, 1987 Fla. Laws 842, 853, to have been codified at Fla. Stat. § 212.0594(10)(a)).
297. Id. (to have been codified at Fla. Stat. § 212.0594(8)).
298. Id.
299. Id. (to have been codified at Fla. Stat. § 212.0594(10)(c)).
300. Id.
301. Id. (to have been codified at Fla. Stat. § 212.0594(3), (8)).
302. Id. (to have been codified at Fla. Stat. § 212.0594(8)).
304. See, e.g., Statement of Florida Associated General Contractors Council (n.d.) (on file, Florida State University Law Review); letter from Mark P. Wylie, Exec. Dir., Central
tax bill applicable to construction services were repealed and replaced by the glitch bill.\textsuperscript{306}

The goal was to develop an effective tax rate that would generate the same revenue as the earlier statute, without requiring builders to keep track of the materials used on any given project and without effectively double-taxing materials. That rate was determined to be 2.5\%, on the assumption that, the value of the construction project could be divided equally between labor and materials.\textsuperscript{306} Rather than apply a different tax rate to construction services, the Legislature opted for a plan that taxed 50\% of the contract or cost price of new construction.\textsuperscript{307}

In recognition of the fact that much repair work is either labor-intensive or materials-intensive, and that a tax on 50\% of these jobs would result in distortions in the true value of the construction service, the new provision differentiates between "new construction" and other improvements to realty.\textsuperscript{308} However, due to the difficulty in objectively distinguishing the repair of realty from a major renovation of realty, the Legislature opted for a simple monetary test. If the cost of the project exceeds $5,000, it is taxed as new construction; if not, it is taxed on the contract price less any materials purchased by the prime contractor for which the tax already has been paid.\textsuperscript{309}

The tax on new construction is based upon 50\% of the contract price if the construction is undertaken on a contract basis, or is undertaken on a speculative basis but sold in an arms-length transaction within six months of completion.\textsuperscript{310} In four situations, the tax is based instead upon 50\% of the cost price of the con-

\textsuperscript{305} Ch. 87-101, § 5, 1987 Fla. Laws 842, 853 (repealing ch. 87-6, § 5, 1987 Fla. Laws 9, 22); id. § 6, 1987 Fla. Laws at 853 (to be codified at Fla. Stat. § 212.0594). The tax on construction would have been substantially revised again under legislation passed during the first special session. The revisions would have significantly reduced the base price upon which the tax is due, and simplified the calculation of the tax. Contractors and subcontractors would have been entitled to purchase building materials tax-free using a resale permit. The distinction between new construction and repair would have been eliminated. All contractors and subcontractors would have been responsible for collecting the tax on their own work. Fla. CS for CS for SB 5-B, § 70 (1987). For a more detailed discussion of events subsequent to passage of the tax, see infra, Part IX, POSTSCRIPT.

\textsuperscript{306} The 2.5\% was based upon census data obtained with regard to gross receipts in the construction industry.

\textsuperscript{307} Ch. 87-101, § 6, 1987 Fla. Laws 842, 853 (to be codified at Fla. Stat. § 212.0594(2)).

\textsuperscript{308} Id. (to be codified at Fla. Stat. § 212.0594(1)(e)).

\textsuperscript{309} Id. (to be codified at Fla Stat. § 212.0594(2)(e)).

\textsuperscript{310} Id.
construction. These four cases are: (1) speculative building where the
property is not sold within six months of completion; (2) construction
done for the contractor's own use; (3) construction sold pursuant to a contract that is not an arms-length transaction; and (4) construction undertaken for the contractor's own use or on a speculative basis that directly relates to timeshare properties regulated under chapter 721 or land development governed by chapter 498.311

"Contract price" is defined to include the consideration paid for the construction, after subtracting the fair market value of land and existing improvements to the land, and subtracting construction support services performed by independent contractors.312 Construction support services were excluded from the price in recognition that these are generally pure service contracts that should be taxed at the full 5% when sold to the prime contractor.

A strict reading of the definition of "contract price" could result in a double tax on land development. The taxable contract price for construction of a structure excludes "the fair market value of land and any improvements to the land existing prior to the contract for the construction."313 If the contract price for the construction of the structure is increased to reflect improvements to the property that are not yet in existence, those improvements effectively would be taxed when the contract was formed, and taxed again when the improvements were actually made. In view of efforts made by the Legislature to avoid pyramiding the tax on construction services, a fairer reading would allow the contractor to pay the tax when the improvements were made, but deduct the value of the improvements from any other contract to further improve the realty.

"Cost price" is defined to mean all direct and indirect costs of construction without deductions.314 However, the cost price, unlike the contract price, does not include any profit earned by the prime contractor.

The "prime contractor" is the person responsible for remitting all tax due on the construction project.315 It is possible for more than one person involved in the project to fit within the definition of the prime contractor and become liable for remitting the tax. In

311. Id. (to be codified at Fla. Stat. § 212.0594(2)(b), (d), (f)).
312. Id. (to be codified at Fla. Stat § 212.0594(1)(g)).
313. Id. (emphasis added).
314. Id. (to be codified at Fla. Stat. § 212.0594(1)(i)).
315. Id. (to be codified at Fla. Stat. § 212.0594(1)(a)).
In such cases, DOR would be entitled to look to all "prime contractors" for the tax due, but some type of contractual agreement designating one person as responsible for the tax would be advisable to at least establish liability among the various prime contractors.

The schedule for remitting the tax varies depending upon who the construction is done for, and when and if the prime contractor is paid. If new construction is done under a contract, the tax is due when the prime contractor is paid. If the contractor is paid in draws or installments, a pro-rated share of the tax is due with each draw or installment.

For speculative construction, a portion of the tax is due with each payment made to a subcontractor. The tax is based upon 50% of the amount paid to the subcontractor. Any remaining tax is then due within thirty days of the issuance of the certificate of occupancy, or if no certificate is required, the tax is due when the new construction is first put to its intended use.

When new construction is undertaken for the prime contractor's own use, two conflicting provisions of the law come into play. One provision provides that the tax is due in the same manner as the tax on speculative construction; the other provides that the tax is due when the certificate of occupancy is issued, or if no certificate of occupancy is issued, when the new construction is first put to its intended use. The second method originated with the House version of the glitch bill and should have been eliminated when lawmakers opted for the first provision set forth in Committee Substitute for Senate Bill 2. Due to a scrivener's error in drafting the conference report, both provisions were left in the bill.

For construction contracts that do not exceed the $5,000 threshold for new construction, the tax is due when the prime contractor

316. Id.
317. Id.
318. Id. (to be codified at Fla. Stat. § 212.0594(3)(d)).
319. Id.
322. A draft of the conference committee report shows that half of paragraph (e) was marked through to be eliminated by the House Bill-Drafting Service. The original of this draft is on file with the House Committee on Finance and Taxation.
is paid.\textsuperscript{323} Although the statute is unclear as to the prime contractor's responsibility when only partial payment is received, the fairest reading of the statute would require only remittance of the tax due on the portion of the consideration paid. Such a reading would be consistent with the statute's provisions allowing other service providers to remit the tax on a cash basis.\textsuperscript{324}

For construction projects begun on or after July 1, 1988, contractors are allowed to use an alternative method for calculating the tax on new construction.\textsuperscript{325} This option provides for a tax to be paid by the prime contractor on the total consideration paid to all subcontractors, net of building materials purchased by the subcontractors, and on the cost price of the prime contractor's services, net of building materials purchased by the prime contractor and subcontractor services for which the sales tax has already been paid.\textsuperscript{326}

Under this option, the tax on the subcontractors' services is due when the subcontractors are paid. The tax on the prime contractor's services is due when the contract is fulfilled or within thirty days of when the certificate of occupancy is issued, whichever occurs first.\textsuperscript{327} If this option is elected, the contractor must use it for all construction services purchased or provided by him during the life of the election. The method of calculating the tax cannot be modified more than once in any twelve-month period.\textsuperscript{328}

Only three types of construction services are exempt from the tax. The exemptions are for the construction or repair of roads pursuant to or in furtherance of a contract with a governmental entity;\textsuperscript{329} the construction or repair of property used primarily for public worship;\textsuperscript{330} and construction services and construction support services performed by the employees of an employer who is only incidentally engaged in construction in furtherance of another primary business.\textsuperscript{331}

\textsuperscript{323} Ch. 87-101, § 6, 1987 Fla. Laws 842, 853 (to be codified at Fla. Stat. § 212.0594(3)(f)).
\textsuperscript{324} See infra notes 352-55 and accompanying text.
\textsuperscript{325} Ch. 87-101, § 6, 1987 Fla. Laws 842, 853 (to be codified at Fla. Stat. § 212.0594(2)(l)).
\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} Id. (to be codified at Fla. Stat. § 212.0594(2)(l)(5)).
\textsuperscript{329} Id. (to be codified at Fla. Stat. § 212.0594(2)(g)).
\textsuperscript{330} Id. (to be codified at Fla. Stat. § 212.0594(2)(h)).
\textsuperscript{331} Id. (to be codified at Fla. Stat. § 212.0594(2)(k)).
Because the tax on new construction is imposed on the prime contractor, governmental and other exempt purchasers who contract with prime contractors will pay indirectly the tax on construction services to the extent the prime contractor passes on the tax in the form of a higher price on the project. This result was anticipated when the Legislature considered the tax on construction services. However, it is not clear whether the Legislature considered the possibility of the governmental entity or other exempt purchaser itself qualifying as a prime contractor under the statute. In that event, the construction services purchased by and performed by the prime contractor would be exempt from the tax.

The Legislature apparently recognized that because the tax is paid directly by the prime contractor, an undue hardship would be imposed on a contractor who was locked into a fixed price for a given project. Therefore, the law provides a two-year transition period during which certain construction services, although performed after July 1, 1987, will not be subject to the tax. To qualify for this exemption, the contractor must have a written contract, or have submitted a binding bid, prior to May 1, 1987, to provide the construction services, or the construction must be funded pursuant to government bonds sold or contracted for sale prior to the May 1 date. The exemption is limited to services purchased before June 30, 1989. However, this limitation was the one provision of

332. Compare Fla. CS for HB 1506, § 6 (1987) (First Engrossed) (exemption for "construction services performed pursuant to or in furtherance of a contract with a governmental entity described in s. 212.08(6) or a nonprofit entity described in s. 212.08(7)(o)") with Fla. CS for SB 2 (1987) (not containing similar exemption). This was a $26.5 million issue in the conference committee; it was resolved in favor of the Senate position. See Staff of Fla. H.R. Comm. on Fin. & Tax., Glitch Bill Issues Chart (May 27, 1987) (on file with committee). However, legislation passed during the first special session would have removed the tax on construction done for governmental or other exempt entities. Fla. CS for CS for SB 5-B, § 70 (1987). For a more detailed discussion of events subsequent to passage of the tax, see infra Part IX, Postscript.

333. Nothing contained in the statute would appear to prevent a governmental or exempt institution from acting as the prime contractor, but revenue estimates prepared by legislative staff when the legislation was considered do not contemplate this ability to avoid the tax. The Department of Revenue has taken the position that a governmental entity cannot act as its own prime contractor. See letter from William D. Townsend, Gen. Counsel, Fla. Dept’ of Revenue to Joan Kanan, Florida Ass’n of Counties, (July 31, 1987) (on file with Fla. H.R. Comm. on Fin. & Tax.).


335. Id. § 18, 1987 Fla. Laws at 873 (amending ch. 87-6, § 31, 1987 Fla. Laws 9, 62).

336. Id.
the sales tax statute that the five supreme court justices who responded to the Governor's request for an advisory opinion found to be facially unconstitutional.\footnote{337}

\section*{VII. Collection and Enforcement}

\textit{In the business of raising taxes, it is hard to find volunteers.}\footnote{338}

Sales tax collection responsibilities under the new services tax do not differ drastically from those under the sales tax applicable to goods; use tax collection responsibilities do differ. As a general rule, a person who sells a taxable service in Florida is required to collect the sales tax on that service.\footnote{339} In three situations, the seller of a service will not be required to collect the sales tax: (1) if the purchaser is an exempt entity;\footnote{340} (2) if the purchaser is buying the service for resale;\footnote{341} or (3) if the purchaser is buying the service for use outside the state and presents the seller with an exempt purchase affidavit or an exempt purchase permit.\footnote{342}

Remittance of the use tax is generally the responsibility of the service purchaser under the statute.\footnote{343} The Legislature could have required any out-of-state seller over which the state had jurisdiction to collect any applicable use tax for the state.\footnote{344} Sellers of tangible goods who are subject to the state's sales tax jurisdiction historically have been required to collect Florida's use tax on goods sold outside the state but imported into the state for use here.\footnote{345}

Early drafts of the services tax statute would have required all out-of-state sellers to collect Florida's use tax on services sold outside of Florida for use or consumption in the state, to the ex-

\footnotesize{
\begin{itemize}
  \item \footnote{337}{\textit{In Re:} Advisory Opinion to the Governor, Request of May 12, 1987, 509 So. 2d 292 (Fla. 1987).}
  \item \footnote{338}{Brief of the Florida Senate and the Florida House of Representatives at 18, \textit{In Re:} Advisory Opinion to the Governor, Request of May 12, 1987, 509 So. 2d 292 (Fla. 1987) (No. 70,533).}
  \item \footnote{339}{Ch. 87-101, § 1, 1987 Fla. Laws 842, 844 (amending ch. 87-6, § 1, 1987 Fla. Laws 9, 12, to be codified at Fla. Stat. § 212.059(3)(a)).}
  \item \footnote{340}{See discussion of exempt purchasers, \textit{supra} notes 255-63 and accompanying text.}
  \item \footnote{341}{See discussion of the resale rule, \textit{supra} notes 94-117 and accompanying text.}
  \item \footnote{342}{See discussion of the out-of-state use exemption, \textit{supra} notes 149-59 and accompanying text.}
  \item \footnote{343}{Ch. 87-101, 1987 Fla. Laws 842, 844 (amending ch. 87-6, § 1, 1987 Fla. Laws 9, 12, to be codified at Fla. Stat. § 212.059(3)(b)).}
  \item \footnote{344}{See National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967).}
  \item \footnote{345}{Fla. Stat. § 212.06(1)(a) (Supp. 1986) (“dealer” responsible for collecting tax); id. § 212.06(2) (defining “dealer”).}
\end{itemize}
}
tent that they qualified as "dealers" under the statute. When representatives of IBM questioned how they, as Florida sales tax dealers, would ever be able to determine whether a data processing service sold out of their Atlanta office would be used in Florida, short of questioning every customer, it became apparent that the same use tax collection process applicable to goods would not work for services.

The legislation was then changed to provide that if the seller was a multistate business, any applicable use tax would be remitted by the purchaser of the service. And in an effort to better enforce the use tax, the glitch bill changed the collection language again to require the seller to collect the use tax under certain circumstances. Those circumstances, which were thought to be ones which would reflect use of a service in Florida, include the sale of transportation services originating or terminating in Florida, the sale of a service directly related to real property in Florida, the sale of a service related to tangible personal property in Florida (other than vehicles or vessels in interstate or foreign commerce), and the sale of a service represented by tangible personal property forwarded to a person in Florida.


349. Ch. 87-101, § 1, 1987 Fla. Laws 842, 844 (amending ch. 87-6, § 1, 1987 Fla. Laws 9, 12, to be codified at FLA. STAT. § 212.059(3)).

350. Id. However, the statute fails to address how an out-of-state seller is to handle a sale to a multistate business that may be entitled to apportion its use tax liability under chapter 87-101, section 2. (1987 Fla. Laws 842, 845, amending ch. 87-6, § 2, 1987 Fla. Laws 9, 13, to be codified at FLA. STAT. § 212.059(9)(b)(4)). For example, if an accounting firm with offices in Florida and New York sold tax preparation services to a corporation with offices in Florida and elsewhere, and sent the tax return information to the corporation in Florida, the statute appears to require the accounting firm to collect Florida's use tax on that service because the accounting firm is sending tangible personal property that represents the service to the corporation in Florida. However, the tax preparation service is arguably an apportionable service used and taxable in Florida only to the extent that the corporation does business in Florida. Under these circumstances, it would be inappropriate for the seller to collect Florida use tax on the full price of the service. Although the statute does not specifically provide for it, a more logical scheme would allow the corporation to use its exempt purchase permit to buy the service tax exempt and self-accrue the apportioned use tax.
Unlike sellers of tangible personal property, who must report sales tax on an accrual basis, service sellers have an option to remit taxes on a cash basis. This provision was recommended by the Sales Tax Study Commission in recognition of the fact that a service provider cannot repossess a service if it is not paid for. Only those persons primarily engaged in the business of selling services are entitled to remit sales tax on a cash basis. A seller must make an affirmative election to report the tax on the basis of cash receipts.

Any sales tax dealer who is first required to remit taxes after July 1, 1987, is not required to pay the tax under the estimated tax schedule. Provisions requiring other sales tax dealers to pay taxes on an estimated basis are in the process of being phased out and legislators determined that it would only create unnecessary confusion if the new dealers were required to follow this complex payment schedule.

As with other sales taxes, the tax on services is due and payable on the first day of the month following the month of the sale (or receipt of payment for the sale, if the seller has elected the cash basis of reporting). Tax returns are delinquent if not post-marked by the twentieth day of such month. Beginning October 1, 1987, DOR may authorize quarterly returns for a service provider whose tax collections are less than $500 for the three months preceding the provider’s request to file quarterly. This is in contrast to the statute applicable to other nonservice sales tax dealers, who may file quarterly returns only if their tax liability for the preceding quarter did not exceed $100.

A multistate business that self-accrues taxes on services is required to file an annual supplementary return that summarizes its

351. Ch. 87-101, § 1, 1987 Fla. Laws 842, 844 (amending ch. 87-6, § 1, 1987 Fla. Laws 9, 12, to be codified at Fla. Stat. § 212.059(4)).
352. Study Commission Report, supra note 45, at 51.
353. Ch. 87-101, § 1, 1987 Fla. Laws 842, 844 (amending ch. 87-6, § 1, 1987 Fla. Laws 9, 12, to be codified at Fla. Stat. § 212.059(4)(b)).
354. Id.
355. Ch. 87-6, § 16, 1987 Fla. Laws 9, 52 (amending Fla. Stat. § 212.11(1) (Supp. 1986)).
358. Ch. 87-6, § 16, 1987 Fla. Laws 9, 52 (amending Fla. Stat. § 212.11(1)(d) (Supp. 1986), to be recodified at Fla. Stat. § 212.11(1)(e)).
359. Ch. 87-101, § 15, 1987 Fla. Laws 842, 870 (amending ch. 87-6, § 16, 1987 Fla. Laws 9, 52, to be codified at Fla. Stat. § 212.11(d)).
purchases and sales of services for its prior fiscal year.\textsuperscript{361} This return is due on or before the deadline for filing Florida or federal income tax returns,\textsuperscript{362} and is designed to allow the multistate purchaser to reconcile its tax liability after it has the income tax apportionment data needed to compute sales and use tax liability on apportionable service purchases.

In recognition of the short timetable for implementing the new tax statute, lawmakers suspended penalties for failure to properly pay the sales tax on services due during the first three months of operation.\textsuperscript{363} They also authorized the executive director of DOR to waive interest on taxes due during such period if he determined that imposition of interest would cause an undue hardship for the taxpayer.\textsuperscript{364} However, there is no waiver provision for taxes due during this time period.

The statute provides for an expedited administrative proceeding under chapter 120, Florida Statutes, to resolve disputes regarding assessment of the sales and use tax on services.\textsuperscript{365} Petitions must be granted or denied within ten days of receipt, and an order on the petition must be entered within thirty days of the hearing or receipt of the hearing transcript, whichever is later.\textsuperscript{366} Unlike other proceedings under chapter 120, taxpayer contests may be resolved by a panel of one to three hearing officers,\textsuperscript{367} and the order of the individual hearing officer or panel constitutes final agency action.\textsuperscript{368}

The tax statute also amends the "Florida Equal Access to Justice Act" to allow a business, regardless of size or net worth, to qualify as a "small business party."\textsuperscript{369} This is for purposes of claiming attorneys fees when prevailing in a services tax dispute "initiated by a state agency" and not "substantially justified."\textsuperscript{370}

\textsuperscript{361} Ch. 87-101, § 1, 1987 Fla. Laws 842, 844 (to be codified at Fl. Stat. § 212.059(4)(d)).
\textsuperscript{362} Id.
\textsuperscript{363} Id. § 21, 1987 Fla. Laws at 875 (amending ch. 87-6, § 36, 1987 Fla. Laws 9, 64).
\textsuperscript{364} Id.
\textsuperscript{365} Id. § 24, 1987 Fla. Laws at 876 (amending ch. 87-6, § 45, 1987 Fla. Laws 9, 69, amending Fl. Stat. § 120.575 (1)(b)(1985)).
\textsuperscript{366} Id.
\textsuperscript{367} Id. § 25, 1987 Fla. Laws at 876 (amending ch. 87-6, § 46, 1987 Fla. Laws 9, 70, amending Fl. Stat. § 120.65 (Supp. 1986)).
\textsuperscript{368} Id. § 24, 1987 Fla. Laws at 876 (amending ch. 87-6, § 45, 1987 Fla. Laws 9, 69, amending Fl. Stat. § 120.575 (1)(b) (1985)).
\textsuperscript{369} Ch. 87-6, § 43, 1987 Fla. Laws 9, 65 (amending Fl. Stat. § 57.111 (1985)).
\textsuperscript{370} Fl. Stat. § 57.111(3)(b), (4)(a) (1985).
VIII. CONCLUSION

Florida’s Governor and Legislature, in search of a more fertile and stable state revenue source, opted for a sales tax on a broad range of services. Whether this decision proves to be the answer to the state’s long-term fiscal problems remains to be seen. A one-cent increase in the sales tax would provide only short-term relief. Short of a personal income tax, or a gross receipts tax on business, Florida has no other funding options.

In the immediate future, Florida’s tax on services will be hotly debated. As the debate progresses, states across the nation will monitor Florida’s experience in an effort to decide who was right—those who labelled the tax “an absolute nightmare,”371 or those who characterized it as “the fairest revenue-raising measure available to the Legislature”372 and “the right thing to do.”373

IX. POSTSCRIPT

The tax act took effect July 1, 1987. Numerous national advertisers immediately instituted a boycott of the state and replaced their normal advertising with television spots denouncing the tax.374 Various professional trade associations announced that they would no longer hold their meetings and conventions in Florida.376 Opponents of the tax instituted an initiative petition drive designed to allow a November 1988 referendum on a proposed constitutional amendment to prohibit a sales tax on services.376

In late August, Governor Martinez called for a statewide referendum to allow the people to vote on a constitutional amendment prohibiting the tax on services.377 At that time, Governor Martinez declared his continued support for the tax and vowed to campaign


375. Id.


377. Id.
against the constitutional amendment. Legislative response to the Governor's proposal was lukewarm at best.

Within a month of the Governor's call for a referendum on the tax, he called the Legislature into a two and one-half day special session beginning September 21, for the purpose of repealing the tax. That session was subsequently extended three times and continued through October 9. During that special session, the Legislature passed a bill which increased the general sales tax rate from five cents to five and one-half cents and repealed the sales tax on services effective February 1, 1988, unless the electorate voted in a January 12 special election to retain it. The bill also substantially revised the services tax. The major revisions included an exemption for advertising, simplification and reduction of the tax on construction, a broadened resale rule to eliminate much of the tax pyramiding that occurs under the present act, a simpler method for calculating tax on services purchased by multistate businesses, and a more limited definition of the term "service" to eliminate the tax on a large number of less significant service transactions such as freelance writing and music instruction.

Governor Martinez vetoed the bill on October 13, calling it "an even more inequitable incarnation [of the services tax] subject to the outcome of a referendum that is in fact a subterfuge."

Meanwhile, the Governor had called the Legislature back for another special session beginning October 12. By October 14, it became apparent that the Governor and the Legislature had reached

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378. Id.
384. Id. §§ 61, 62
385. Id. § 74.
386. Id. § 70.
387. Id. § 73.
388. Id. § 66.
389. Id. § 74.
an impasse on the tax issue, and the Legislature adjourned after agreeing to come back into a special session on the tax beginning December 1.

The legislators did return in early December for, as it turned out, one last look at the services tax. At the conclusion of the special session, the services tax had been repealed and replaced with a 6% sales tax on goods. But the services tax may be only sleeping, to resurface in Florida’s future. As Representative Gardner told his colleagues, “I think the special interests have carried this day. But ladies and gentlemen, there will be another day.”

392. At the October 14, 1987, meeting of the House Committee on Finance and Taxation, committee members considered and defeated a long list of proposals for repealing, replacing and revising the sales tax on services. The only favorable committee vote was on a proposed resolution asking the Senate to consider an override of the Governor’s veto of CS for SB 5-B. Fla. H.R. Comm. on Fin. & Tax., tape recording of proceedings (Oct. 14, 1987) (tapes on file with committee).


395. *Florida's sales tax goes up a penny* Feb. 1, St. Petersburg Times, Dec. 11, 1987, 1A at col. 5.
Appendix A

Source: Florida Consensus Revenue Estimating Conference

GENERAL FUND
REVENUES

Fiscal Year 1985-86
FLORIDA'S RANK IN U.S. TAX REVENUE AS A PERCENT OF PERSONAL INCOME

Appendix B
Source: Florida House of Representatives Committee on Appropriations
Appendix C
Source: Florida Consensus Revenue Estimating Conference

UNTAXED POTENTIAL NEW SERVICE REVENUES
Fiscal Impact of Ch. 87-6, L.O.F.
Fiscal Year 1987-88 Estimates

Residential Sewage & Garbage 16.8 3.1%
Construction Profits 47.1 8.7%
Forestry 7.8 1.4%
Educational & Social 45.3 8.4%
Agricultural 19.5 3.6%
Other 18.9 3.5%
Beauty & Barber Shops 17.3 3.2%
Selected Legal 11.8 2.2%
Membership Fees & dues 36.8 6.8%
Travel Agents 11.7 2.2%
Security Brokers 30.7 5.7%

Medical & Health 276.3 51.2%

All Estimates Are in $Millions
Appendix D
Source: Florida Consensus Revenue Estimating Conference

SALES AND USE TAX ON SERVICES
Fiscal Impact of Ch. 87-6, L.O.F.
Fiscal Year 1987-88 Estimates

Untaxed Potential New Services

- Management Consulting 35.1 1.8%
- Data Processing 32.5 1.7%
- Legal 96.8 5%
- Engineering & Architectural 34.7 1.8%
- Accounting & Auditing 30.6 1.6%
- Construction 209.6 10.8%
- Other 41.3 2.1%
- Hotel & Motel previously Taxed 244.8 12.8%

Newly Taxed Advertising 91.9 4.7%
Laundry & Dry Cleaning 27.4 1.4%
Utility Services Previously Taxed 174.7 9%
Recreational & Ent. Admissions Prev. Taxed 88.9 4.7%
Telecommunications Previously Taxed 160.1 8.5%

Misc. Business 25.4 1.3%
Temporary Help 39.7 2%
Real Estate Commissions 22.7 1.7%
Transportation 46.3 2.4%

All Estimates Are in $Millions
PERCENT DISTRIBUTION OF STATE TAXES BY SOURCE

Source: Florida Consensus Revenue Estimating Conference

FLORIDA

SALES TAX 48.5%
PROPERTY TAX 2%
MISC CHARGES 11.1%
OTHER TAXES 34.3%

U.S.

SALES TAX 25.3%
PROPERTY TAX 2%
MISC CHARGES 21.2%
OTHER TAXES 22.2%
INCOME TAX 29.3%
TAXABLE TRANSACTIONS UNDER CHAPTER 212, F.S.
AS A PERCENTAGE OF FLORIDA PERSONAL INCOME
FISCAL YEARS 1969-70 THROUGH 1988-89
INCLUDING THE IMPACT OF CH. 87-6, L.O.F.

LEGEND

- CH. 87-6, L.O.F.
- CURRENT LAW

FISCAL YEARS

Line represents underlying statistical trend w/o yearly fluctuations
Florida Sales and Use Tax on Services

<table>
<thead>
<tr>
<th>Sales Tax</th>
<th>Use Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Taxable</td>
<td>Is activity a &quot;service&quot;? S. 212.02 (22)</td>
</tr>
<tr>
<td>Not Taxable</td>
<td>Was service performed before 7/1/87?</td>
</tr>
<tr>
<td>Exempt</td>
<td>Does one of four structural exemptions apply (employee service, isolated sale, partnership, intercompany sale)? S. 212.0592 (2)-(5)</td>
</tr>
<tr>
<td>Exempt</td>
<td>Is service specifically exempt? S. 212.0592 (6)-(51)</td>
</tr>
<tr>
<td>Exempt</td>
<td>Is purchaser exempt organization or governmental entity with consumer certificate of exemption? S. 212.08 (6) and (7)</td>
</tr>
<tr>
<td>Exempt</td>
<td>Is purchaser buying for resale and using a resale permit?</td>
</tr>
<tr>
<td></td>
<td>Was &quot;sale&quot; of service in Florida? (50% or more of costs of performing service in Florida)</td>
</tr>
<tr>
<td></td>
<td>Is purchaser a multi-state business with exempt purchase permit?</td>
</tr>
<tr>
<td>Purchaser pays any tax directly</td>
<td>Is purchaser a multi-state business?</td>
</tr>
<tr>
<td>Purchaser pays any tax directly</td>
<td>Purchaser pays any tax directly</td>
</tr>
<tr>
<td>Exempt</td>
<td>Is purchaser out-of-state and entitled to use exempt purchase permit or exempt purchase affidavit?</td>
</tr>
<tr>
<td>Seller collects tax</td>
<td></td>
</tr>
</tbody>
</table>

*Service performed both before and after 7/1/87 is taxed on prorated basis unless prepaid in full before 4/1/87, in which case is exempt.*