MEMORANDUM

TO: Walter Hellerstein  FILE: 12564(1)
    Prentiss Willson, Jr.
    Jim Merritt

FROM: Linda Arnsbarger

DATE: November 12, 1986

RE: 12564(1) Florida Sales Tax Revision

You asked me to explore whether the Florida sales tax statute, as is, might be construed to avoid an interpretation which would suggest that taxation of services encompasses taxation of employees.

Section 212.05 provides that it is a taxable privilege to furnish "any...services taxable under this chapter." The tax is to be collected by "dealers", Fla. Stat. § 212.05(2), which is defined as any person who performs "a taxable service for consideration." Fla. Stat. § 212.06(2)(k). The only indication of what constitutes a "taxable service" under the statute is the provision imposing a five percent rate on the performance of "any service." Fla. Stat. § 212.05(1)(j) (emphasis added). "Service" is otherwise undefined by the statute.
"Service," however, has at least two possible meanings. One is the literal, technical, all-encompassing interpretation that DOR fears -- "service" means any possible service that anyone performs for consideration under any possible circumstances. The alternative meaning is the common traditional meaning of the word as it is used, for example, in characterizing "service" industries -- an understanding of "service" in the sense of a final transaction, analogous to a retail sale, and thus to be taxed only at the end transaction.

Adoption of the first interpretation would result in an extraordinary administrative burden on DOR in identifying and registering every employee in the state and then enforcing the statute. The legislative history suggests that the legislature was informed that the bill would require the registration and education of a "large number" of new dealers, a task which could delay effectiveness of the bill and would require additional DOR manpower and funding. See 1986 Fiscal Notes for HB 1307, PCB FT 86-5, and CS/HB 1307. The legislative history does not suggest a legislative understanding that these new dealers would include all employees in the state. [In fact, the 1986 fiscal note for the conference bill CS/HB 1307 discusses the need for registration and education only of "service businesses."]
Under Florida law, it is clear that a court will not ascribe to the legislature an intent to create an absurd result; consequently, if language is susceptible of two interpretations, that which avoids absurdity is always to be preferred. **Petersburg v. Siebold**, 48 So. 2d 291 (1950); **Haworth v. Chapman**, 152 So. 2d 663 (1934).

On the other hand, where uncertainty exists, the Florida courts are increasingly unwilling to engage in conjecture in order to restrict or extend the meaning of the language used. **State v. Egan**, 287 So. 2d 1 (1973); **Hialeah, Inc. v. Horse Transportation Inc.**, 363 So. 2d 930 (Fla. App. 1979); **Devin v. City of Hollywood**, 357 So. 2d 1022 (Fla. App. 1976). The court will not correct supposed omissions or defects, for the object of interpretation is to extract the meaning of, rather than impose meaning upon, the words used. **State ex rel. Bie v. Swope**, 30 So. 2d 748 (1947). The court also will refrain from passing on the efficacy of a measure. **Moore v. State**, 343 So. 2d 601 (1977). Moreover, in cases involving tax statutes, the presumption is that the legislature placed in or omitted from a statute all things intended to be taxed or exempted from taxation. **Volunteer State Life Insurance Co. v. Larson**, 2 So. 2d 386 (1941).

This emphasis on judicial restraint is relaxed, however, when the statute itself suggests a saving
construction. Brown v. State, 358 So. 2d 16(1978). In this instance, there are several arguments supporting the adoption of the ordinary meaning of the term "services".

First, it is a maxim of statutory construction that words of common usage are to be given their plain and ordinary meaning, rather than a technical sense. Gasson v. Gray, 49 So. 2d 525(1951); Gaulden v. Kirk, 47 So. 2d 567(1950). That is, where plain and ordinary language is used, resorting to rules of construction is simply unnecessary. Clark v. Kreidt, 199 So. 333(1941). This would favor adoption of the narrower definition of "services."

A second reason is the existence of two prior unamended statutory provisions which expressly provide that there shall be no pyramiding or duplication of taxes levied, and that the statute shall be construed to tax only the "end consumer, or last retail sale." Fla. Stat. §§ 212.081(3)(b); 212.12(12). But see American Video Corp. v. Lewis, 389 So. 2d 1059(1980) (tax on item purchased by cable company and tax on cable company rental to customer was not double taxation). Taxation of employee services to employers, coupled with taxation of the final product or service, would constitute pyramiding. It is presumed that legislators act with full knowledge of existing statutes
relating to the same subject, Tamiami Trail Tours v. Lee, 194 So. 305(1940), and thus enact new legislation within, and not in conflict with, the existing framework of the statute. Where there are two apparently repugnant statutes, the court will attempt to find a reasonable field of operation which will harmonize the two, yet will preserve the force and effect of each statute without destroying their evident intent. Ellis v. City of Winter Haven, 60 So. 2d 620(1952); Palmquist v. Johnson, 41 So. 2d 313(1949). In this instance, the proposed plain meaning interpretation of "services" would be a reasonable and successful resolution of this potential inconsistency without perverting or significantly undermining either provision.

Third, this interpretation of "services" also finds support in the rules of construction applicable to taxing provisions. Where a taxing statute is ambiguous, raising doubt as to the legislative intent, the statute will be construed in favor of exemption; a tax cannot be imposed absent clear and express language. Florida National Bank of Jacksonville v. Simpson, 59 So. 2d 751(1952); Lee v. Quincy State Bank, 173 So. 909(1937). This argument is reinforced by the fact that no state taxes employees in this manner; consequently there is absolutely no precedent for interpreting "services" so broadly.
A fourth reason is based upon what little legislative history we have. Prior to the introduction of this bill, DOR prepared an analysis which described the scope of the existing services exemption by specifically listing 25 categories of services. All were traditional service industries; the service of employees to employers was not included as a category. The total value of the listed service exemptions, and thus the revenue to be raised by the sunset, was estimated at $1,228.7 million. I would presume that this data was before the legislature, as it was sent to us as a part of the legislative history. In addition, all of the 1986 fiscal notes for the various forms of the bill value the repeal of the services exemptions at about $1,200 million. Specifically, the 1986 fiscal note for HB 1307 predicts a revenue of $1,178.7 million; the 1984 fiscal note for PCB FT 86-5 (the bill before the House Committee) predicts revenue of $1,178.4 million; and the 1986 fiscal note for the conference version CS/HB 1307 predicts that $1,208.3 million would be generated by the sunset of all the targeted exemptions. These values are well below the revenue that Florida legislators would have reason to anticipate if they had actually intended to tax employees. U.S. Department of Treasury Income Statistics show that the total income and wages in Florida for 1984 was $72,842.1 million. SOI Bulletin, vol. 6, no. 1 at 97 (Dept. of Treasury Summer 1986). At a tax rate of 5%, the
estimated revenue from a tax on employees would be $3,622.1 -- an amount that greatly exceeds the figures contemplated by the legislature.

A further argument, suggested by DOR, is premised on the definition of the state sales tax, as construed by the Supreme Court and as repeatedly expressed by the legislature, as a tax on exercising the privilege of engaging in a business or occupation. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950) (describing sales tax as a "privilege or occupation tax"); see Fla. Stat. § 212.05; see also Fla. Stat. §§ 212.03(1), 212.03(6), 212.031(1)(3), 212.031(8)(c), 212.04(4), 212.0505(1). The employer-employee relationship is not commonly characterized in this manner. Employees are generally viewed as exchanging their labor for wages rather than as enjoying the privilege of selling their services or a product or as exercising the privilege of engaging in a business or occupation. Once the distinction between a privilege or occupation and ordinary employment is blurred, as it would be by extension to employees, it would seem to become more difficult to distinguish the tax from a prohibited income tax. See State ex rel. McKay v. Keller, 19150, 542 (1939) (discussing meaning of "income").

Finally, it seems that DOR has little to lose in construing the statutory language to stop short of taxing...
employees; it is hard to imagine whose interest would be
served by raising a legal challenge to such an
interpretation. The courts generally will defer to a
practical construction of a statute by the administrative
department charged with its execution, and will not overturn
such a construction unless it is clearly erroneous, in
conflict with the Constitution, unauthorized, or contrary to
the plain intent of the act. Department of Insurance v.
Southeast Volusia Hospital District, 438 So. 2d 815 (1983);
Gay v. Canada Dry Bottling Co., 59 So. 2d 788 (1952); State
ex rel. Fronton Exhibition Co. v. Stein, 198 So. 82(1940).