STATE OF FLORIDA
DEPARTMENT OF REVENUE

WORKSHOP ON DEVELOPMENT OF PROPOSED RULES

In re: Proposed rule 12A-1.103, Florida Administrative Code

Room 170 Larson Building
Tallahassee, Florida
February 13, 1987
9:30 A.M.

Reported by:

Jerry L. Rotruck
Certificate of Merit

COPY
MR. KIELBASA: I think we can convene. It is, by
my watch, twenty of ten. My name is Jeff Kielbasa,
Deputy General Counsel for the Department of Revenue,
State of Florida. We are in 170 Larson Building,
Tallahassee, Friday, February 13, 1987.

This is the workshop that was noticed to take a
look at where we are going in the proposed rulemaking
process.

At the outset, I want to make it clear exactly what
we are doing here and what we are not doing here. We
are not proposing any rules. We have taken an approach
to sit down, almost in a separate way from some of our
technicians involved in this area, to sit down and make
an initial draft of where we think we may go with our
final rule product.

We have -- we are on a tight schedule because one
of the functions of the rulemaking process is to let
people know where we are going, and, of course, we have
the tax which is coming up in July, and we feel an
obligation to get it done as quickly as we can, all the
while trying to proceed in a slow and cautious manner so
that we take under advisement any consideration that we
can get our hands on.

This is a twofold process. One is construing what
we have in the law, ourselves, and the other one is allowing respective individuals to give us their thoughts, and that is what we are here for.

So when you take a look at these rules, understand full well that, in fact, one-half of them have not been reviewed at all. The other part was reviewed rapidly. They didn't come off the presses until a couple of days ago.

What our concept is -- and this is reflected in the agenda -- is to, nevertheless, get something down as a point of departure that you can take with you, or that individuals who are not here can call us or write us and ask for a copy of them, take a look at them and see which parts affect you, and respond to us in writing, a letter, position paper, whatnot, to give us your views, to allow us then to take what you say and what we think and weigh them and read the law and try to interpret the law consistent with the law.

We take the position on the statute that our job is to construe it in the manner intended by the Legislature, reading the words they use, fully aware that there are limitations on what the Legislature can do, which is found in federal and state constitutions, and possibly other superseding state and federal statutory laws.
To the extent we are construing this it is our object ultimately to fashion rules that are consistent with organic and statutory law that may supersede it.

The question is, how do we find those provisions, and that is what we are in the process of doing right now. So you may find provisions in these rules that, for instance, may forget to consider governmental immunity, and I think it was intended that that be considered, and it may simply have been left out of a section here or there. Certainly we can't impose a tax on an immune as opposed to an exempt entity, and we will not intend to.

In a nutshell, we have not had sufficient time to review these, to say to you that we are very confident that we don't have any typographical errors or misstatements ourselves; nevertheless, with the time constraints we are under, we felt that taking the additional time to run these through lots of people, review them, go back and redo them, would cut into our ability to then take and present them and redo them again based on our input from the general public, and get these things out in a manner and in a time that they can be reviewed and understood in time to start compliance with the tax on July 1.

So you see, we are kind of jumping quickly in here.
Before I answer you, Cass, I have been requested by the court reporter here that anyone who is speaking from the audience to indicate their name, and to leave a business card or something afterwards so he can make sure he gets your names down right.

We are going to try to make this as informal as possible to eliminate any kind of time problems with having to go through the basic parliamentary rules or whatnot. However, should it get a little noisy or something, we will still have to keep the meeting under some sort of control, so we would ask that you speak in turn and that kind of thing.

MR. VICKERS: Jeff, would it be the Department's intent to work through the proposed rule but to withhold submitting it to the Governor and Cabinet until after the session, so that if there is superseding legislation the Cabinet has not considered a rule that would never take effect?

MR. KIELBASA: We are looking at that right now. Exactly when we intend to go and propose the rules is unknown at this time. That would be a consideration, but we would have to weigh that with the timeliness of it and consider the fact that that may be too late.

We are right now scheduled to get something out in -- sometime in April, so at least with where we are
right now, that would be probably out of the question.

MR. VICKERS: When you say --

MR. KIELBASA: If it turns out that the Legislature, in fact, amends Chapter 86-166 in this session and such requires amended rules, we will simply have to do that.

MR. VICKERS: When you say "get something out," you are saying since this law is scheduled to take effect July 1, 1987 --

MR. KIELBASA: That is correct.

MR. VICKERS: -- you feel like you may need to go with the Governor and Cabinet before that date with an implementing rule?

MR. KIELBASA: That is correct. What our plan is on the rule -- I hope all of you have picked up a packet here that contains this initial draft. On the top of it is an agenda, and in Item 4 of the agenda is the request for the filing of position papers by persons affected by 86-166 prior to March 2, 1987.

We would like you to try to meet that date. Obviously, a few days here or there is not going to make any -- make that much of a difference. We will consider what we get when we get them. Nevertheless, the longer past that date that someone waits to share their views with us, the more difficult it would be for us to
incorporate those views into what we are doing, so that is why this says this.

MR. VICKERS: One last procedural question.

MR. KIELBASA: Yes?

MR. VICKERS: How many more meetings before you take the proposed rule to the Governor and Cabinet would you expect?

MR. KIELBASA: I am not really sure on that. I think what the procedure is, is that we notice the proposed rules through the "Administrative Weekly," and people have an opportunity to call for -- Steve, are we under a duty to have a hearing?

MR. KELLER: We are under a duty to have a hearing if someone requests it. That is what is proposed.

MR. KIELBASA: I think that is the procedural -- if someone requests one, if we do have one and somebody is unsatisfied with it and wishes a more full-blown hearing, they have all of those kinds of rights under 120, when that stage comes, it will be through the normal rulemaking procedures as outlined in the Administrative Procedures Act, and that process will be occurring sometime within the next, I would guess, 30 or 45 days.

Like I said, we are under -- there are, now, under the Administrative Procedures Act we have all kinds of
notice requirements and publication requirements and
hearing requirements, and those have to be planned for,
and that is why we are rushing ahead of ourselves here
to get our initial product out so that we can meet those
deadlines and still have something out in some form with
sufficient time to get going in July.

Of course, one of the considerations is being able
to send out notices to dealers and the tax return forms
and all of those kinds of things so that they can
respond to the tax when it comes, when July 1 comes
along.

Buzz asked me to make this announcement, that if
anyone has illegally parked, their vehicles may be towed
away. We had a problem with this in a meeting here the
other day on some other kind of tax.

What we have, to try to give you a brief sketch,
and again, there are provisions, there may be provisions
in these rules that on second glance need to be altered,
we, when we go back through these, normally, and review
these carefully we will probably find some, and I am
sure you will find some, and we would appreciate your
pointing them out to us.

We have -- the first provision talks -- we have two
packets here. The thick one that does not have an
agenda sheet on it is one that has not been reviewed at
all, and this is an attempt to take existing regulations
of the Department and adjust them to reflect 36-166, is
that correct?

MR. MCKOWEN: That is correct.

MR. KIELBASA: And this is something that
apparently one quarter of the way through, there are a
lot of little -- significantly thicker, and we will try
to make those available as quickly as we can.

The second packet, which has the agenda written on
it, is the draft leading to the development of the
proposed rules pertaining to the tax on services that is
to go into effect July 1. The initial provision, which
is subsection (1), deals with what is probably the very
core of where we are coming from and the scope of what
we are doing.

The Legislature defined the -- or provides for the
tax to be on any service, performing or providing of any
service, based on the consideration for performing or
providing any service.

It then made any person who performs or provides a
service a dealer, and through that mechanism, the
responsibilities, duties and whatnot of dealers is
provided for throughout.

In that regard, again, to the best of our ability,
which is an ongoing process right now, we are trying to
construe this in a manner that is not inconsistent with
state and federal constitutional law.

This means that we try to make as few assumptions
as we can, consistent with an executive administrative
policy of getting this thing done in a manner that would
be the most efficient and cause the least amount of
administrative problems; so that is an overriding
principle that I think you will find going through this.

The second provision, subsection (2) references the
jurisdiction of the state to impose a tax in this state.

Now, this area is, I know, of vital concern to many
people, there are all kinds of ramifications in it, and
we are, in effect, have something that is presently
skeletal that we hope to continue to improve on.

The overriding concept here is that to the extent,
not in violation of the federal and state Constitution,
a service that is -- has some connection with the state
is performed in this state, we have a position presently
that we are guided in this area by case law construed by
the federal and state Constitution and any possible
overriding federal statutory or state statutory
provision. What they all are, we don't know yet. We
are in the business of trying to find out what they all
are.

We understand that the concept of the use tax is a
way of -- a popular phrase now -- leveling the playing
field, and we are very aware that this is something that
is called for if we can do it.

What we can't do is do something that the statute
does not provide for under a reasonable construction of
the statute.

There is some feeling that possibly we may be able
to draft some form of way of approaching this, whether
it is performed or provided in this state, to minimize
problems that businesses will encounter with their
customers going to out-of-state companies to get their
services. We are very sensitive to that and we are
going to try to see what we can do in that regard.

Right now what we have is skeletal.

Subsection (3) and (4), I guess that is the same
thing. I think that covers the same thing, I think in
more detail, in subsection (3) and (4).

Subsection (5) I believe deals with situations
where you have a mixture of transactions, tangible
personal property and services which are sold and how
those are presently understood.

No. (6), subsection No. (6) deals with the concept
of sales and resales. Again, we are aware this is a
very sensitive area and we are doing what we can do to
get something that will work, again, consistent with
state and federal constitutional law.

Subsection (7) deals with the responsibilities of the dealer to collect the tax which we have reviewed, and some of the provisions regarding failure to collect and what can be done there.

Subsection (8) gives what we presently are looking at regarding the scope of the tax, any services, as probably most of you are aware. We haven't construed or are construing the tax not to reach employee services or actual wages and salaries paid to employees by their employers. There are a variety of reasons why we are not doing that. We will have a report out I think sometime in early March, which is the Department of Revenue's report on this whole thing, and we will address this concept more fully in that.

There are numerous items within subsection (8) which are addressed, and is non-exclusive. We still feel any obligation to read any services as simply that.

Subsection (9) covers additional resale provisions.

Subsection (10) is the isolated and casual sale of services. We read no exemption for those in Chapter 86-166 pertaining to services.

We understand many of you may think, well, this is just ridiculous. But we take the position that the -- not only is a tax self-executing, but that it is a
voluntary tax, and to the extent we are able to enforce
the tax on casual and isolated sales we will do so, as a
function of how much staffing we have and all of those
kinds of considerations.

Should this continue on, we would expect to get
additional funding to enforce that tax more, unless we
have legislative direction from the contrary.

No. (11) I think refers to what affiliated groups,
service transactions between them are taxable.

(12) gets into the notion that unless specifically
exempted by 86-166, all services are taxable, and this
is a laundry list of services that is not -- I was wrong
when I said this, when I said Subsection (8)
contained -- Subsection (12) contained a continuing list
of service industries, I believe, taken out of the
Standard Industrial Code as an example, non-exclusive
example of services which are taxable under Chapter
86-166.

On page 20, after the list, is more detailed
information concerning health services, financial
services, insurance services, and -- after those, we get
into -- actually I am not sure what page it is. I have
been skipping from subsections to pages, we go to other
individual-type services, membership in certain
organizations, dues, that kind of thing.
I think the final provision -- business associations and all of that kind of stuff, on page 35, I think the final provisions that deal with illegal services, they are fully taxable, and I believe what position we are taking, whether it is in this rule or not, does that mean that they are therefore legal, that they are taxable.

MR. VICKERS: Jeff, why do you have lobbying services right next to wrecking services?

MR. KIELBASA: That must be some kind of a flow there.

MR. KIELBASA: As indicated, back to the old agenda here, as indicated, the -- what we're here for today is to try to communicate to you the scope and our understanding of where we are going.

These rules are some of the specifics. We would invite and request that you take these with you and before March 2 give us your position as to any or all of these should you be so inclined.

Again, what our concern is, now, you have got to understand, we have very limited, if any, ability to recognize policy considerations for taxing or not taxing or all of these other things.

Presently there is a commission that is entertaining the policy considerations concerning this
tax, and they have to report to the Legislature this session, and that is what they do.

So we request that when you take a look at your particular industry, to transactions that go on within it, you take a look at Chapter 86-166 in a technical, legal fashion and instruct us in that manner as to a construction of it that would affect you the way you think you ought to be affected by it, and how our reading may not be accurate or may be more reasonable one way or the other -- that kind of thing -- based on what the law says, not so much on policy, social public policy consideration.

We, fortunately, can't get into that. Again, the commission, the Sales Tax Commission is reviewing those considerations and will report to the Legislature, and it is the Legislature that will consider those. Again there, the Legislature takes the position that any services are taxable. We are reading that, and there is where we are going from it.

MR. COULTER: Jeff, Bill Coulter, Florida Airport Managers Association. A question for you.

Your tax on lobbying here, you say are you not taxing salaries. All right, now, some associations hire a full-time lobbyist who is on on their staff full-time. Is his salary taxable, and the secretary's is not?
MR. KIELBASA: Sure, we have in the rule guidelines and outlines as to what -- how you determine who an employee is.

One of the determinations, of course, based on the common law as to the control that you have over the individual, whether they are independent contractors or employees, one of the ways of looking at it is the method of payroll, FICA taxes, withholding income taxes, all of these kinds of things.

To the extent those things are involved, you know, you would use those to weigh whether or not these individuals are employees, or are, in fact, independent contractors. I am sure there will be some gray areas in there where there will be disagreement, and again any information you may have on that to enlighten us would be useful.

MR. COULTER: Thank you.

MR. KIELBASA: On page 5 is the outline for what considerations we have regarding whether or not a person is an employee. The gentleman here.

MR. REILLY: Tom Reilly, Procter & Gamble. How are you treating services performed in interstate commerce?

MR. KIELBASA: Well, that again, as we indicated, is one of the areas that we need to do more work on. What we are looking at, are we going with an
apportionment formula?

Presently we do not have an apportionment formula.

We have a concept right now which is evolving that we will tax interstate commerce to the fullest extent permitted by, again, federal constitutional law, state constitutional law, and superseding federal statutes and any state statutes.

Because it is in that area where, I understand that is not very helpful yet, and we hope to respond exactly, and I think Mr. Vickers brought this out before the meeting started, there are ways of becoming more specific under that general concept than we have in these rules, and we certainly are going to look at that.

Again, the concept is -- my understanding of it, and I don't think I am incorrect, is that the state has the power to impose the tax under the federal Constitution to the fullest extent that the federal courts and other courts have viewed the context of the transactions with the state, such that the state can, in some sense of the word, be said to have given that business entity or that transaction the protection of the state, the benefits of the state and on and on.

There are ways of identifying what those contacts are. I am not really prepared to go into them in detail now, but we certainly await an attempt to get that out
and possibly put it in some type of test form, if you will, so that you will have an ability to say, okay, our transactions do not fall under this category, or they do, so that you will have some idea, and we hope to do that and take them to you. Ken?

MR. HART: Ken Hart, Ausley law firm. The taxation of services being such a new concept, you don't really expect to find a lot of precedents at the federal level with regard to taxation of services, interstate commerce, do you?

MR. KIELBASA: There is some in the states that presently do it under a reverse receipts tax, and I think you are correct, where the difficulty will come will be where the nature of the service -- it presents problems that you can't find that, of course that courts have addressed, have addressed simply because of the nature of the beast.

Services are typically not associated with anything physical, you can say is here, there or wherever, so there are problems in that area. But we believe that we can look at it and address it, and I think in our rules we have addressed it in some fashion where we consider the performing and providing in this state to mean certain things.

Again, we are talking about a certain amount of
connection with the state. We have no doubt that
ultimately, if past history is anything, that we will
take a position down the road on the margin in this
area, and in effect, if industry disagrees, you can
point out to us that the state does not have the
authority to tax this transaction, because it is not
really occurring or taking place or whatever in the
state, okay?

If we can be convinced of that before we impose the
tax, all the better. If it comes at a time when we say
we think it is and we start to impose the tax and you
come to us and convince us it is not, fine. If it takes
going and taking us to court and getting the judge to
tell us it is not, that is another thing, too.

MR. HART: Specifically, for example, the
transportation services that occur in interstate
commerce in nature, are you going to attempt to make
these kind of judgments beforehand, or are you just
going to say we are going to do it to the constitutional
limit and leave that for later application?

MR. KIELBASA: I would like to try to make some
judgments beforehand. The question, again, is -- and
this is something that I have not sat down and put
together yet -- to what extent can we go in there and do
that, under what -- under the law that we have. To the
extent we can, absolutely, I would like to.

MR. HART: Well, those that have interstate commerce issues in them, I would be surprised if you find a lot of precedents at the federal level and constitutional level to deal with it --

MR. KIELBASA: You are probably right.

MR. HART: -- for service.

MR. KIELBASA: Again -- go ahead, I am sorry.

MR. HART: It seems to me we will have to start addressing those on a conceptual basis, and whether we will have a quarrel later on about the actual application --

MR. KIELBASA: Yes, I would agree with that, and I think we are going to try to do that as best we can. I think there is some guidance in the area of, certainly in tangible personal property, some guidance in those states that have a tax on services, although several of those have state statutory criteria which limit the tax to either in-state or out-of-state, or permutations, that wouldn't be existing in our case.

So we couldn't say for certain whether or not the state power, absent a statute defining all of that stuff, would be sufficient to tax it. So that is going to be the difficulty. Do you have any comments?

DR. FRANCIS: For what it is worth, the two areas
that we are leaning toward that -- working some kind of apportionment framework, is interstate transportation and interstate advertising. Of course, we would be curious to hear if anyone else thinks that a particular kind of service inherent in the nature of its performance involves some interstate application. We would like to hear that.

MR. KIELBASA: Cass?

MR. VICKERS: Well, let me respond in the sense of what Jim said there. It strikes me that virtually any service that is provided across state lines, if you will, in the sense that the customer is beyond, outside the state of Florida, or that involves the movement of some employee or individual on the part of the service provider going out of state, would present -- it may not be strictly an interstate commerce, the kind that Ken is talking about, but it certainly has interstate aspects to it.

I think we ought to consider either excluding receipts from that kind of service, or at least looking at apportionment, apportionment formula, but to that principle, let me expand the principle involved here a little bit, because one of the things that concerns me in reading through this initial draft is that in a number of respects the taxation of services, it would
not at all parallel the current taxation of tangible personal property; and, for example, occasional isolated sales for resale, and specifically in the treatment of services which have an export or outbound character, or inbound, for that matter.

I am just -- I would have thought that since the Legislature specifically included services in Chapter 212 as distinct from writing a freestanding chapter, tax on services, that the -- that that was a pretty good indication of an attempt to fold this into the existing tax framework and as nearly as possible have it operate on parallel terms.

I am just curious why, for example, here there is not an effort, you know, with tangible personal property, that which is sold outside of Florida, unless the buyer comes in to get it, is not subject to Florida sales tax, and I am just curious why similar logic wouldn't prevail with the sale of the service to the non-Florida customer. What legislative intent to handle it differently is there?

MR. KIELBASA: The simple answer to that and the quick answer to that is again that is an assumption which we are not free to make right now, in our opinion. We are trying to take what the Legislature gave us and not get into the area of assuming they wanted to do a
lot of different things, because we felt once we get
into this area where we draw the line, we may have, by
doing such a thing, aggravated constitutional principles
in this state.

We fully well know that there are arguments that
say we are doing just that on the other side of the
coin. We, at least, in approaching this have taken the
position that unless we can find specific authority to
take a position, we are not taking a position.

I believe this is consistent with the way Chapter
86-166 was put together, and certainly I am not saying
that your position is not an arguable one, but we are
not taking that position. So we are trying to, as best
we can -- and they have been gone through it in putting
some of these rules together to construe the statute
using the words that are there and not make, attempting
to run over to other provisions to which there is no
hookup and say okay, this would be a lot better, so
let's go ahead and do that. Yes.

MR. SELLERS: Fred Sellers, Martin Marietta
Aerospace.

As I understand what has been said, in a quick
glance at this report, if we are selling big processing
services to an out-of-state user, through the concept
of -- if we are selling data processing services to an
out-of-state customer, out-of-state company, under the concept that you are outlining here, that transaction would be taxable.

MR. KIELBASA: To the extent it was performed or provided in this state.

MR. SELLERS: Not being performed here?

MR. KIELBASA: That is my understanding.

MR. SELLERS: The second part is the part, of course, is high technology and specifically -- or, indeed, primarily for the U.S. government, which I assume under the immunity clause here, that would not be --

MR. KIELBASA: Yes, under these rules -- we may have, in going through these things in certain spots forgotten about federal immunity and state immunity.

To the extent that those things are there, you know, we will attempt to identify them, recognizing, of course, we will not tax them unless we see an express waiver of that immunity by the state. We don't have one by the feds. I don't think there is any express waiver. There may be, I don't have an opinion on that right now.

MR. SELLERS: Now, there would be one identical service, out-of-state private company or foreign company, you have one specifically occasional point, a contract with a Swiss firm to do an R & D project. Do I
understand we have the rule proposed that that
transaction would be taxable?

    MR. KIELBASA: That is my understanding.

    MR. McKOWEN: Correct.

    MR. KIELBASA: Now, I think another concept that is
in here -- before we go any further, I didn't introduce,
which I forgot at the beginning, some of the individuals
that have been up here working on this.

    To my left is Dr. James Francis with the Department
of Revenue; Steve Keller, Assistant General Counsel with
the office; Buzz McKowen, who is with the Bureau of
Technical Assistance; Charles Strausser; and Bill
Norman, who has -- the three gentlemen to my right here
have been working on drafting these rules.

    Yes, my understanding, to answer your question, is
that it would be taxed. One thing I want to point out,
and correct me if I am misinformed on this, is that when
you do have a sale to an immune entity, that the tax
would not apply to that transaction, but different
treatment will apply to some other transactions that
were engaged in to produce that ultimate sale, so there
is all kinds of ways of getting into that.

    MR. SELLERS: Do you not have a nexus problem here
in what -- the statute and Constitution so that you levy
the tax on a foreign country?
MR. KIELBASA: Well, because if the service was performed or provided, and to some extent a sale occurred in the state, it would be taxable.

Now, again, what I am saying is that where the nexus of the transaction under the federal Constitution would prohibit the tax, the tax is prohibited, and we are looking at those questions and this is where we can get some information from affected industries.

In other words, the concept, if it is in this state, is something that is a question of fact. Depending upon the transaction and depending upon transactions and how things go, it is either in this state or it is not, and that understanding has been developed over the years in case law.

We are going to try to look at that more closely and get a way of trying to condense all of that into a way that we can say, okay, we understand all of these cases here mean that under these kinds of circumstances, you can't impose the tax, and we will try to say what those are; and over here, under all of these, you can, and we will try to say what those are, to give you more guidance from that form. That is the type of thing we will be going towards. I think the gentleman up at the top, Frank?

MR. HARTLEY: I am Tom Hartley with the Florida
Churches. I had a question in the way these things are phrased. There are a lot of different kinds of ways that churches operate. In ours, there is a voluntary contribution and church services are furnished in a lot of different ways.

There is sometimes customary donations for funerals, perhaps, or things like that, that usually are paid to the minister of the church and sometimes charges for -- if you want the air conditioning turned on and stuff like that.

In other -- but I know of some churches in which in order to be a member, you have to contribute a certain amount of money, and I know of some others that require you to join and require you to pay dues to the church, and I would just -- I would like your reaction as to whether or not you expect to charge a tax on all of these or some of them, or how would you handle that? I know that services by churches are not exempt here.

MR. KIELBASA: Well, first of all, the term "consideration" is the key word in the statute.
"Consideration" is a legal term which means what is paid under an obligation to pay, a binding contract to pay.

If you are not obligated to pay, and it is a contribution, it is simply not taxable, and this -- I understand in the real world that these contributions
are so expected that it seems that they are an absolute requirement. Nevertheless, I don't think that the term "consideration" would even apply in those circumstances, unless there was binding obligation to pay, which I think could be brought before a court; in other words, a contractual obligation to pay, which you would not have in most of those circumstances, I do not think.

In those circumstances where there is a contract, a binding obligation to pay, we are of the view that Chapter 86-166 imposes a tax on those services unless they are specifically exempted, again, or prohibited by state or federal constitutional law or superseding federal and state statutes. Those are our limits.

MR. HARTLEY: But as I understand it, then, if churches which maintain a specific membership and require dues or contributions or whatever in order to belong to that church, they would be taxed?

MR. KIELBASA: That is my understanding if that was a contractual obligation.

MR. HARTLEY: Now, let me put it a little different. I hear what you are saying on that. But what would you do with a lawyer or a doctor who tells his patients if you can pay me anything, pay me whatever you think, or otherwise you are going to have to apply the same rule --
MR. KIELBASA: Oh, yes --

MR. HARTLEY: -- in both of those?

MR. KIELBASA: I do think if there is no obligation to pay, we would have a difficult time in imposing the tax.

MR. HARTLEY: Now, is that in the rule somewhere?

MR. KIELBASA: Yes, we addressed that somewhere on the first page. Page 37, we address that concept, technical aspect.

MR. HARTLEY: 37?

MR. KIELBASA: Yes, 37, subsection (d), paragraph 2 -- actually, 1 and 2. Mr. Vickers?

MR. VICKERS: At the top of page 2 -- I know we keep talking about this, and I understand this is a very preliminary draft, but I want to see if I understand the intent of this paragraph 3 there.

It says, "Services shall be considered to be performed or provided in this state if the seller of the service, any of his employees or any person in privity with him performs or provides a service in this state, notwithstanding the fact that the product of the service may be immediately transported outside this state."

But it seems like to me that begs the question, how do we -- how do you look at that language and decide whether you are performing or providing services in the
state, and let me just give an example and see if you can figure it out.

I have a client who is a resident of Georgia, and I am representing the client in a matter in the Florida courts. Just to throw the last part in, let's say that I am preparing a brief for appellate proceeding and that is the product of my service, and I am going to mail a copy to him, to his residence in Georgia.

How do you decide whether I am performing or providing a service in the state? What if half of the time I put in representing that client I spend physically in Georgia with him in conference and gathering facts and that sort of thing, and the other half I spend in my office in Florida? Am I performing or providing a service in Florida?

MR. KIELBASA: Well, you know, you can recite a factual situation. Again, whether or not it is in this state would be a question of fact that could be -- could be merely something that is left to case law.

We don't want to do that, and again we are going to try and to look at what case law is available to guide us at what point a service is not performed, provided in this state, and at what point it is.

Generally, our understanding of it is is that if there is significant connection with the state under the
nexus concept, so as to afford benefits and all of these kinds of things, then we can tax it, and I don't believe that we are required under the law to apportion it under the notion that, okay, only half or two-thirds or one-third was really performed in Florida, so we will only tax one-third.

To the extent that we are required to apportion it by, again, superseding statutory or constitutional law, then, of course, we will have to do that, and if you can point that out to us, any of you, where those limitations are with regard to your particular industry or transactions, especially in the area of federal statutes that apply to certain kinds of specific industries, multi-state or not, this would be helpful to us.

MR. VICKERS: In that same hypothetical, of course, I am here in the state of Florida, and the tax is said to be on the privilege of my exercising the right of performing or providing a service in the state, but it also requires me to collect the tax from my client, and he may have no connection with the state whatever.

MR. KIELBASA: Right.

MR. VICKERS: That seems like to me right there would get a nexus consideration, and I am assuming that if, for some reason, I can't get the tax from him
because he refuses to pay it, and you don't have
jurisdiction to collect it from him, well, maybe I
shouldn't have said anything. I don't know if that is
the end of the game, or are you going to expect me to
pay the tax? Dr. Francis says I will have to pay it,
but -- one more question on this one and then I will let
other people ask questions.

MR. KIELBASA: Sure.

MR. VICKERS: The Georgia lawyer who provides that
same service to that same client --

DR. FRANCIS: He argues in a Florida court?

MR. VICKERS: He is going to, yes. He will come
down and argue in a Florida court. He will be here for
an hour for oral argument, and all of the rest of what
he does he will do in Georgia for that client. Is he
going to be subject to the tax or not?

MR. KIELBASA: Yes.

MR. McKOWEN: Yes.

MR. VICKERS: If he didn't come into -- if he
engaged me to handle oral argument on -- so that he
never comes into the state of Florida, I guess what I am
going at is, are -- isn't this going to fall on the
backs of Florida service providers in a discriminatory
fashion, because if you are not going to tax inbound
services, and when I sell services outside the state or
any other Florida service -- Florida service provider
does, so they are going to be taxable in full, but an
out-of-state service provider is not going to be subject
to that tax, haven't you laid the whole tax on the backs
of Florida services providers, basically, in the rule?

DR. FRANCIS: That is a policy issue, but in your
example -- we have not done that, and in your example
when the Georgia attorney comes to Florida and argues
the case, we have jurisdiction over him, we require him
to collect the tax. When he hires you as a
subcontractor you are providing him a service, and we
tax that transaction as well, and you pass it on to him.

But -- I don't know if this helps, but within the
realm of what we can do under the federal Constitution,
I think transactions that have a multi-state character
fall into three groups.

One is where you have customers in one state and
suppliers in another, and that is the end of it. I
don't think there is any federal obligation there to
apportion it. It is a question of do we or do we not
have jurisdiction over that transaction.

The second one is where the performance of the
service occurs in different states; that is, you have a
multi-state provider, okay, and he chooses to execute
part of the examination of your books in Florida and
some of the rest of the accounting work in Georgia, but he chooses to do that. There is no inherent interstate character to that transaction.

I don't think we are under any federal obligation to apportion this, but where you have got a service like advertising placed in a nationally circulated magazine or newspaper, on a national TV network that reaches multiple states, inherent multi-state character of the service, itself, there we are leaning toward the notion that apportioning would be required there.

Now, whether it is a good policy idea to apportion or set up special situations or rules, on the two earlier ones, that is a policy matter and it is not addressed in 86-166, and I think those are all or nothing situations.

MR. VICKERS: Unlike tangible personal property or services, it doesn't have a physical situs, and it is fine to say that because some portion of a service you can identify with a person or company that had a physical presence in Florida at some point, you can write a statute that says that should be considered to be performed in the state of Florida, but that is not necessarily so. It isn't so in the example I gave.

What you are doing, I could have made the example like one hour of my time is in Florida and all of the
rest it is elsewhere. You are giving situs to the
entire service in Florida, based on the tale wagging the
dog here, one hour compared to the other 59.

DR. FRANCIS: What do you think of the
Hellerstein's model?

MR. VICKERS: He used cost in performance.

DR. FRANCIS: It is an all or nothing rule with 50
percent being the --

MR. VICKERS: The way I understood it is it was
partly within and partly without the state, but the
greater proportion was in the state, based upon cost
performance, and it was taxable in full.

I will tell you what makes more sense to me, would
be something parallel with our sales tax and tangible
personal property. If it is going out of state, it is
not taxable. The portion of it -- if you can, what your
language says, if you perform or provide service in the
state, it is taxable, and you are going to look at the
seller, and under your rule you would look at the buyer
as well to determine whether it is in or out of state.

I would say to the extent that it is headed for out
of the state, the service is performed out of state,
however you define that, or the product is headed out of
state, you wouldn't tax it. To the extent it is coming
into the state, you would, either on a sales or use tax.
DR. FRANCIS: How about when the service is provided for the benefit of a corporation that is multi-state?

MR. VICKERS: You ought to be able to identify some of the benefits with that company's Florida stores, for example, and the rest presumably is for the benefit of the company beyond the state of Florida.

MR. KIELBASA: Yes, sir.

MR. REILLY: Just so I understand you correctly, you are defining the use tax concept to the services, are you not?

MR. KIELBASA: That is right. Now, we are uncertain as to the effect of that and how exactly -- the use tax is something that is in some circumstances not confused with, but it has elements that associate itself with this concept of nexus in the state.

Where the performing and providing has some contact with the state, we say it is taxable, not a use tax, but a sales tax.

MR. REILLY: Right.

MR. KIELBASA: There is really a blend there, so when we are talking about the transaction occurring in the state or the state having jurisdiction, you can say in effect a lot of the elements of that are the same elements that go with the use tax.
As to whether 86-166 specifically imposes a use tax, I am not quite sure yet. We have opinions that say it does not, but I am not satisfied with that, and we are specifically on that a lot closer, and certainly to the extent that we can impose a use tax out of the language of 86-166 to protect Florida businesses, we will, of course, do that.

Again, we will blend some of those elements that are in the concept of contacts or nexus. The term "nexus," for you fortunate non-lawyers, means the connection with the state of some kind, I think you can identify connections with services that are very similar to the ones that would associate themselves with the tangible personal property, because a lot of them -- my understanding is a lot of case law associates itself with the property, itself. It doesn't go right to the actual location of the property. You can have a sales office in the state. You can have some of the transactions occur here, the property can move around from here to here, and the sales tax as opposed to a property tax can be imposed.

But anyway, we are certainly looking with a lot more detail at that use tax, because there is some language, we will be able to track some form of it. Again, to the best of our ability, we are not going to
do something that the statute don't allow us to do.

A VOICE: An observation. Obviously not having a chance to study this, many of the rules effectively are interpreting that you are doing the use tax, just looking at some of the services that are provided by an out-of-state vendor, and it is, remember, sales tax, is a transaction tax, it is not a gross receipts tax.

MR. KIELBASA: We understand that.

MR. REILLY: It is a transaction tax. The services performed by an out-of-state vendor, even though the benefits of that service may subsequently accrue to an operation in Florida, the incidence of performing the services clearly takes place outside the state.

MR. KIELBASA: Well, I hate to be picky, but all we are saying at this time is when it is performed and provided in this state, we are taxing it.

Now, the question is to when, if it is not performed and provided in this state -- again, there may be circumstances, and I am certain there are, where they are not performed or provided in any sense in Florida, somebody goes to another state somewhere and has the service performed or provided for them, and then comes back to the state, and without some specific use tax ability, we would be strained to get it back.

However, I don't think that we can use that alone
and blindly ignore the transaction and not attempt to try to find some connection with the state of Florida in that transaction, because all transactions have buyers and sellers.

And it is on the transaction, on the privilege and all of these other kinds of blends to why we couldn't blindly say, oh, we can't touch that.

So I do say under the way we are trying to get at the tax, I know Florida businesses are interested in us trying to prevent any kind of business decision that would encourage businesses or consumers to use out-of-state services, and we -- they are fairly sensitive to that. Again, we're trying to do what the statute provides.

MR. REILLY: One follow-up question.

MR. KIELBASA: Sure.

MR. REILLY: Earlier Dr. Francis mentioned something, consideration of apportioning the services. Again, if it is a transaction tax, it is not a tax that is subject to apportionment.

Also, you had some reference to Hellerstein's comment about 50 percent or more, 50 percent of the services performed, more than 50 percent in this state, then the total services would be subject to the tax.

Is the converse of that true, if more than 50
percent of the services were performed out of the state, therefore it is not subject to tax?

DR. FRANCIS: Then the same doesn't occur in Florida, but we are talking in the context to the model act, and that has a use tax. But this model act didn't have that provision, and I think your conclusion would be right.

MR. KIELBASA: Again, now, I understand the concept of the transaction tax, and there is a -- this is -- has elements of that. I am not so sure -- let me let you hear me out. I am not so sure it is exclusively a transaction tax. The word the statute uses is "performed or provided." The services, of course, any transaction has two elements. You have the obligation on one side and obligation on the other other.

To the extent that the obligation to perform and provide that service is not instantaneous, I would at least right now take the position that we are not necessarily frozen to some notion of, you know, absolute where the sale took place, where the hands were shaken, or where the note was exchanged, or the promise or whatever that contract might be.

Now, I am not saying that is absolutely true. I appreciate your pointing that concept out, and I am going to try to look at it in more detail to see if we
can address that a little bit better.

MR. REILLY: This is not a gross receipts tax, it
is a sales tax, sales tax on services.

MR. KIELBASA: That is correct. But if you will
notice, the sales tax in Chapter 212 is a tax that is
really a hybrid. You've got a tax that is on the
privilege of engaging in business. It is a tax on the
same, it is a tax that, nevertheless, has to bear the
economic burden of paying.

A VOICE: That is no different than the 45 sales
taxes that exist in the other states.

MR. KIELBASA: No, that is not true. They are all
different; and, in fact, I think there is a treatise out
on that which breaks down the states into pure sales
tax, pure consumption tax, which is a tax based on the
privilege of consuming the property.

Then there are a group of states that are a blend
of those two extremes, and I think -- I don't know where
it comes out, something like 13 are pure sales on the
privilege of selling, 12 are pure consumption taxes, and
there is six or seven or eight states like Florida that
are somewhere in between. I think you can find that in
Dr. Hellerstein's report, he addresses that, too. Yes.

MR. JONES: Tom Jones with GTE Data. Moving away
from the theoretical problem here, getting down to the
practical problem that the taxpayers are going to have
to live with, are you suggesting or are you not
suggesting that we have to change our business practices
to indicate on our documentation under -- like these
transactions to show specifically where the service is
performed?

Commonly right now we deal with invoices which have
the seller's address, and the seller, and a buyer's
address and his -- and buyer there, and in describing
the transaction without any attempt to say where the
service is performed.

Now, the auditors come in to review this for
compliance. They generally in the past have been
limited only to looking at the invoice to be satisfied
with that, and the tax has to be determined based on the
invoice. I can see we need some additional guidance as
to how the state is going to enforce this and what they
are going to be looking for from a practical standpoint.

MR. KIELBASA: I understand that, and again we are
focusing now on really, again, a question of fact
regarding this transaction. We are focusing on the nuts
and bolts of how we are ultimately in an audit process
or you in anticipation of an audit process going to go
about fixing these things down. We have not -- at least
I am not aware of any specific detail in that area, but
we will certainly try to do that. Buzz, have we gotten into that?

MR. MCKOWEN: Not yet.

MR. KIELBASA: We will make a note of that fact if you would be so kind as to point that out. Any of you that want to send us position papers or whatnot, you can give us hypotheticals if you don't want to use specific transactions, names, or that kind of thing.

Again, we are interested in what is out there and the various problems, because that is the whole function of this workshop, is to try to get as much as we can, and we will see what we can do in that regard. I think that is an important consideration. Yes, sir?

MR. ALTMAN: I am Tom Altman, with NaBanco. Not being an attorney, I guess I am privileged by not having to understand all of the legalese of these instruments, but as a businessman, I want to make sure that I am understanding what I think I am hearing, and what I think I have right.

If I have a business in Florida, and I serve the United States and Europe, no matter what I do, no matter what it is, it doesn't matter what NaBanco does at this point, you literally are saying to me that you want five percent of my gross revenues when I read this, in fact, because, one, if it is consumed by a person in Florida,
they obviously already are going to be subject to it, but if I provide this same service from Florida, and again we will not get into the definition of what is in Florida, that is whole different argument --

MR. KIELBASA: Right.

MR. ALTMAN: -- if I do X millions of dollars a year in business, and my only operation is in Florida, you want five percent of it. How can you not call that a gross receipts tax, gentlemen?

MR. KIELBASA: Well, let me address that.

DR. FRANCIS: If you only sold tangible personal property --

MR. ALTMAN: This is service, I am pure service.

MR. KIELBASA: What he is trying to get at is the same argument you are making, the argument that would be made by any person whose business was the selling of tangible personal property, because their gross receipts from that business results from the sale of tangible personal property, and those are subject to the tax and have been for 35 years. The gross receipts tax, again, is a gross receipts tax and looks at all receipts, irrespective of their derivation. Here the tax is, again, a sales tax based on the transaction of selling the service.

MR. VICKERS: Except that the tangible personal
property, only those sales of tangible personal property
inside the state of Florida are going to be taxed.

MR. KIELBASA: We are taxing only those -- well,
that is a specific statute that, my understanding, the
Legislature carved out specifically exempting sales of
tangible personal property that immediately leave the
state.

What we are trying to say is where we don't have
specific authority to do that, and where the state power
to tax permits us to do so under the federal
Constitution and the Legislature has not limited that,
we are not going to make the assumptions at this stage
that they, in fact, wanted us to do that, because they
have not told us.

MR. VICKERS: Doesn't the language of 86-166 say
that the taxable privilege is for the privilege of
selling or providing or performing or providing a
service in this state?

MR. KIELBASA: I think --

MR. VICKERS: I think it does.

MR. KIELBASA: If it does, that is certainly how we
read it, because again -- no, doesn't -- it says
"performing or providing any service," it does not say
in the state.

MR. VICKERS: Are you looking at .05 or .06?
MR. KIELBASA: I think we are looking at .05.

MR. VICKERS: Look at .06.

MR. MCKOWEN: I beg your pardon?

MR. VICKERS: Look at 212.06 and see if it isn't in there. Somewhere in that act it says that because it is built right in the same part of the statute that says for selling tangible personal property in this state.

MR. KIELBASA: Yes, well, I mean, I know that, and all I am saying is "in this state" means within the jurisdiction of this state to tax.

MR. ALTMAN: Can I come back to make sure -- now I am confused. If I am selling a service to someone that is outside the state of Florida, and let's say that I am in the telecommunications business, and I am using land lines that run between New York and Florida, and back out to California, and up to Michigan and back to New York --

MR. KIELBASA: Right.

MR. ALTMAN: -- and it just so happens there is a switch sitting in Florida, and let's say that is the only thing I do, and I charge a customer $1 for providing him communication links between Michigan and Portland and down to south Florida and back up, I mean, in my mind it seems to me Florida -- what you are saying to me is that if I am located in Florida and I provide a
service to people anywhere in the world, that I have got
to collect five percent.

MR. KIELBASA: Let me explain first of all, that
example -- I think in 1985 we have a provision that
deals with telecommunications specifically there, we
have the Legislature addressing --

MR. ALTMAN: Well, my business is a little more
complex than that, in that I am, in fact, a non-bank,
bank financial service center and provide individual
clearing services all over the world.

Now, part of my business is DP-oriented. We have a
large data processing company. Part of it is network
systems all over the country. I don't unbundle my
pricing. It would be most impractical, and I am a CPA,
I know a little bit about cost accounting. It is not
feasible to charge an infinitesimal price of a sales
transaction.

Now, gentlemen, what you are literally saying to me
is because I choose and happen that the company grew up
in Florida, that every nickel I sell is going to have to
have five percent tacked onto it. That is what you are
telling me. I want to make sure I understand what you
are saying.

MR. KIELBASA: Let me address that. First of all,
I really can't speak to --
MR. ALTMAN: To the specific --

MR. KIELBASA: I can't speak specifically, because I am not familiar with your business. All we are prepared to say --

MR. ALTMAN: But the intent is to tax --

MR. KIELBASA: Well, again, the Legislature stated that the tax would be, at the rate of five percent, would be consideration for performing or providing any service, and indicated that any person who engages in that is a dealer, and sets up the mechanism for having these people charge, collect, and remit the tax.

Now, what we are saying is, and this is back to Cass's point, where are we talking about in this case, what kinds, and what we respond to that is that to the extent that the Legislature gave us guidance in this area, we follow it. To the extent it did not, we are not prepared to assume that they didn't want to do what they said to do, and that is, they understand the organic law, they understand what the -- the Constitution, excuse me, they understand what they are permitted to do.

The state of Florida can't tax a transaction that it has no power to tax or jurisdiction to tax, that in fact occurred in Switzerland, and in Florida, it is prohibited from taxing it because it there is no
connection with the state of Florida.

Now, I can't say, and I am not prepared to say, and I hope maybe this is something that we will have to spend a little bit more time in trying to give a little more guidance, but I am not prepared to say at this time exactly where these lines are drawn, under what circumstances that transaction has nothing to do with Florida, and under what circumstances it is a Florida transaction, or in the third set, under what circumstances we can apportion the thing.

Again, the apportionment is derived from the fact that it has a multi-state character, and we are prohibited from taxing the whole transaction.

MR. ALTMAN: Jeff, are you saying to me, then, assuming there were no other legislation, no other -- nothing changed --

MR. KIELBASA: Right.

MR. ALTMAN: -- in the state today it would be a matter of fact on each one of us business people in Florida as to whether what we did was in Florida and not in Florida?

MR. KIELBASA: Well, that is always the case. No matter what you have, even when you have statutes, you have -- all of the cases that come up in the case law are factual disputes as to whether or not their
particular business fits within this concept.

MR. ALTMAN: Is there something like with the IRS where a brief can be filed and get a pre-ruling as to whether this was or was not?

MR. KIELBASA: We have technical assistance amendments and those kinds of things that have -- and I am not that familiar with the process behind it. We have something that goes along that line, don't we?

MR. MCKOWEN: Yes, technical assistance filed in Florida, a state.

MR. KIELBASA: We can do both of those, which is a system I understand where you describe your particular activity, your transactions, and ask the Department of Revenue to take a position on them. This is an avenue that is open.

MR. ALTMAN: So the rule will not attempt to try to quantify what all of the parameters might be?

MR. KIELBASA: Here is what we are trying to do. We are trying to get as many as we can, and again, the whole point of this is, it is preliminary. We had to start somewhere, and rather than have nothing done and sit down and talk about all of these problems and bat them around with nothing physical, tangible, to take and say, okay this is what these guys are doing, I think it would be just a waste of time.
Everyone would be batting around these kind of things and we would have nothing, so we sat down and put these things together with the full understanding that they are incomplete, and that we are going to take what we get here and go back to them, revisit them, re-read the statute again, and see what we can find, and with the overriding concern of ourselves to do as much as we are permitted under the statute, to give people notice and the ability to understand what is coming July 1. Again, this represents our first understanding of this.

I can't think of any law or system of rules -- first of all, as an agency, we are of the position that this is emerging agency policy, "incipient" is the fancy word the courts use, that, in fact, are in effect. We are under no direct obligation to fully understand everything that could possibly be done about this kind of thing and pop out with rules instantly.

On the other hand, we know we have an obligation to do our best to get something out there to try to let as many people know where they stand as we possibly can, and that is what we are trying to do here as quickly as we can.

Your concern is well taken. We understand that your -- in effect you are telling me that you have a -- an international multi-state business, completely, and
you need to know what the effect is going to be on your business, and we will now go back and try to be more specific in this area to the extent we can.

Like I said, one of the things we are trying to avoid is just, you know, pop, this sounds like a good idea, let's do it. We are trying to do what the case law, statutes and federal law and all of those kinds of things permit us to do.

MR. JONES: Tom Jones. Are you telling me then that the Department of Revenue would be in a position to issue TAA's on specific rulings prior to the enactment date?

MR. KIELBASA: No, I am glad you pointed that out. I want to clarify what I said.

I can't really speak for these people, and I can't say exactly -- obviously if we received a flood of them and they were very complex and they were issued at a time when our rules had not yet become, in our own minds, final, never mind, we are final, to the rest of the world, i.e., go to the Governor and Cabinet and all of this other kind of stuff, we would really be in a position not to say a whole heck of a lot other than, you know, assuming that these facts exist over here and all of this happens as we think it is going to happen, and this, however, you must understand that these things
could happen, and this would go -- I certainly shouldn't make any promises to exactly when that would come out.

You have got to understand another thing that this is. This entire process is kind of an overlay to the Department of Revenue that has a staff that is geared to taking care of what we have now and what we are obligated to take care of now, and we are doing all of this in anticipation of the future, and it is very time-consuming on our part, and we have limited resources, and the more those are strained by additional questions, although I do not -- in fact, the position paper that we are requesting by March 2, you know, would help us address your particular problem.

We will look at them, we will think about them, because we want the information in the situation, and certainly, you know, I think lawyers -- I don't want to belabor that -- but get into the courts anyway, like real life situations, because it is from those that you really get an understanding of what you are doing as opposed to sitting behind somewhere and thinking about it without any real handle on what is going on out there.

Again, what -- but you have got to understand where we are coming from. We are bound to implement the statute. The Legislature has presumed to have enacted
constitutional laws, and our duty is to go about administering those things in the best way that we know how, and that is what we are trying to do.

A VOICE: Are you advising the Legislature on some of these gray areas and exactly that position? Is that --

MR. KIELBASA: Yes, we are learning a lot, and we are -- the more we understand, you know, should the Legislature choose and contact us and ask us what we think about this, that, or the other, then, of course, we will respond.

Administrative agencies are sort of the embodiment of all of the technical expertise in a lot of areas and courts rely on administrative interpretations of things, and I am certain the Legislature does. But they certainly can ignore us, too, and they can do whatever they want in this regard.

DR. FRANCIS: They do frequently.

MR. KIELBASA: Yes, sir.

MR. SELLERS: Fred Sellers from Martin Marietta Aerospace again. Have you given any consideration to transactions entered into -- pursuant to a binding contract, specifically, say, the construction industry, prior to the effective date of July 1?

MR. KIELBASA: Yes, a little bit, but nothing -- we
have not really addressed that and that maybe again
should be something that we need to address.

DR. FRANCIS: Of course, the Legislature
specifically did that in '82 in the statute when they
raised the rate, and there is no specific language to
that effect here.

MR. SELLERS: If they don't, I can tell you there
are a lot of --

MR. SELLERS: I could see some humongous problems
arising if that question is not addressed both from the
standpoint of the owner or customer as well as the
contractor in trying to apply and put a tax on services.

MR. KIELBASA: Yes. I don't really, unfortunately,
have -- there are several ways that we could take a
position, and I think you are correct on that, that we
ought to take some -- try to take some position on --
regarding that, that kick-in date, to transactions that
extend over time, payment, and all of that kind of
thing. We don't have anything in here, do we have?

MR. McKOWEN: No, we have already received letters
on that question asking us what is our position, and we
are in the process now of trying to formulate a position
on it.

MR. KIELBASA: So, you know, we will look at that.

If you are inclined and you want to send something in
and include that in it, so we can be sure about it?
Yes, sir?

A VOICE: The question that concerns me, on Section (11), which is the transfer of service between affiliate corporations, when you talk about, say, fully transfer of a home office expense, my understanding is your intent is if the service from the home office is just an overall portion of, say, the general expenses, not directed to any one service, that was the burden of proof, I guess, on a corporation to spell out actually was a service performed in Florida as opposed to just a blanket transfer or allocation of expenses, as opposed to, let's say, a corporation would provide data processing service versus just a transfer of a portion of home office expense type?

MR. KIELBASA: Well, I am not sure if I understood all of your question; I was busy looking for the provision. But again, your concern is a mix of the fact that you have an affiliated group that one may be a parent, or the sub or whatever may be out of state and one in-state.

A VOICE: Yes, say the parent being out of state and the sub in-state and the transfer of home office expenses.

MR. KIELBASA: Right, I understand. I think the
concept here is that the fact that they are affiliated
does not mean that they are not separate entities like
arms-length transactions, if that is the word, and the
same provisions which would apply to your question of
whether it is performed or provided in this state would
apply here. Is that essentially correct? I think that
is the understanding.

A VOICE: The service or consideration type of
thing?

MR. KIELBASA: Yes, you would have to have the
appropriate connection with the state or transaction,
the thing in this state under other types of
transactions, I think this just addresses the fact that
the affiliation doesn't go to avoid the tax.

DR. FRANCIS: Well, the sentence that begins on
line 21 there, though, is there to indicate that these
kinds of bookkeeping transfers as well would be indicia
of consideration for services being rendered, so whether
it was set up on a liability basis or whether there was
direct exchange in the books, that would be evidence of
consideration.

A VOICE: Well, could you have a transaction that
says -- setting up an accounts payable line, I am sure
maybe it is just a bookkeeping entry, but the transfer
of funds, which is actually immune to the transaction,
could have occurred in New York as opposed to in Florida, and it is just you are talking about a bookkeeping entry, but the actual flow of funds --

DR. FRANCIS: Yes, the tax is certainly on a cash basis rather than an accrual basis.

MR. KIELBASA: We could take a five-minute break, or if people feel that they don't have a lot more to say we could adjourn or go a few more minutes, and if anyone -- this is kind of informal, so we are here at your pleasure, so to speak. Yes?

MS. STEWART: My name is Nancy Stewart. I represent the Florida League of Hospitals. I am not well-versed in the tax law and I am sure that the statutes may address this in some way, but is it your intention to speak mainly to the problem of payment for the service, as far as the dealer's responsibility to remit it to the state?

In other words, if you go into a store and you are charged a five percent sales tax for a product, you usually can't walk away with the product until you have paid the tax. Therefore, that five percent is in the possession of the dealer and is very easily remittable.

In the case of a tax on services, frequently there is no payment by the taxpayer immediately upon the remission of the service, so it is a billable thing in
the future --

MR. KIELBASA: Right.

MS. STEWART: -- it gets paid in the future. Do you anticipate problems for dealer -- I mean, I anticipate problems for dealers --

MR. KIELBASA: Sure.

MS. STEWART: -- owing the state money they have not collected, and I was wondering if you intend to, well, either will never be collected or is not collected within the framework of your tax remittance --

MR. KIELBASA: Right.

MS. STEWART: -- procedures?

MR. KIELBASA: Yes, that is a problem. Now, in tangible personal property you do have the postponed payment in installment sales and things of that kind, which are then subsequently not paid for, and there is a specific statute providing for credits or refunds to fix that problem.

We don't have something like that for services. However -- this is something that we have not really looked at in depth, but the thought certainly has occurred to me, in our initial look at this back in August, we said, it is one of our questions, would nonpayment in effect be failure of consideration, in fact, no consideration?
given, then, of course, I would think that there is no
tax due. That is not a position, but that certainly
would be a way around that problem.

The Legislature knew what the word "consideration"
meant when it used it, and I think the law is fairly
clear that when you in fact don't get paid, you have a
failure of consideration. You don't have it, so there
is no basis upon which to apply the tax.

Administratively, we have a method of charging,
which is the second part of your question.

MS. STEWART: I am sorry?

MR. KIELBASA: I am saying the second part of your
question is how do we deal with it administratively, and
I am aware that administratively we intend to have
dealers charge the tax and attempt to collect it on
their sales invoice and whatnot and base the tax on
that.

All I am saying is that we may, under the notion of
a failure of consideration, have sufficient direction
from the law to establish some mechanism to avoid what
really is a problem.

We understand that, and again, there would be a
construction of the term "consideration" that would
allow us to get in on that problem. There is not a
statement by the Department at this time that we can, in
fact, do that under -- lawfully under 86-166. We will
have to look at it.

As I said, tangible personal property, they have
that refund credit mechanism set up where dealers are
allowed to get credits or refunds on transactions for
which no payment was ultimately received.

MS. STEWART: You have fairly well answered the
question on failure of consideration.

MR. KIELBASA: Right.

MS. STEWART: But since there will be a tax on the
services provided by trade associations where there are
dues involved, I guess my question is, is the focus
going to be on the charge or on the consideration, in
other words, the membership dues request or invoice that
goes to the membership?

MR. KIELBASA: Yes, I think we have it on the
charge the way we have it set out.

MS. STEWART: So the way I understand it, the
dealer is responsible to the state --

MR. KIELBASA: Yes.

MS. STEWART: -- once the charge is made, not once
the consideration is received by the dealer?

MR. KIELBASA: That is correct. And, of course,
that position is ultimately required, because again, the
dealer is charged with collecting -- charging with
collecting the tax, of course, you know, in a situation that involved tangible personal property and the dealer hookup is there for services providers; if that weren't the case, you would have this ultimate erosion going on. It has to be charged and demanded sometime.

What I was trying to address was the situation where you did get that failure of consideration, would there be room for us to move into a position where we would not have to lock horns over something that we could have otherwise avoided. I don't know. Yes?

MR. JONES: Tom Jones, GTE, again. One follow-up question on the Grumman situation with the allocation of home office expenses that are performed out of state; however, there are employees within the state of Florida that do work for the home office that would trigger the tax under the rules that you have written.

MR. KIELBASA: Would you like to respond?

MR. McKOWEN: It is a charge.

MR. JONES: There is an allocation of home office expenses such as accounts payable, bookkeeping entries?

MR. McKOWEN: For the people that -- that is the services for those people that are here in Florida, is that correct?

MR. JONES: There is no distinction at this time made -- it is allocation of all of the home office
expenses. You are telling us now that we will have to
go in and determine some proration of that, it is not a
transaction charge, then, if we are going to get down a
proration?

What we have on our books is one charge, some
employees, and incidentally, a small amount of employees
compared to the whole, less than 50 percent. I think
this is a big problem in a lot of major corporations
that are going to experience this who are multi-state,
and we ought to have that on the record so we know how
to apply that.

MR. ALTMAN: Buzz, let me ask you another question,
since it affiliates with this particular question Tom is
talking about, and if you are filing consolidated tax
returns, then the bookkeeping between the parent and the
sub is of no real significance.

Are you going to look to the value of services? I
mean, suppose I am charging $100,000 a month for
something and I just decided today I am going to charge
$1,000 a month. Would the Department come in and say,
"Oh, no, no, that is not right"? Are you going to
accept what I charge myself or my parent, or are you
going to get into the value of the services?

MR. KIELBASA: Well, a way of responding to that is
that the law provides a tax on the consideration for
normally providing a service. I keep repeating that; I sound like some kind of machine up here, but again, that is what we're charged with the duty to administer and enforce, and to the extent that the charge did not reflect a consideration and you were able to discern that, then, of course, we would have to say that the consideration for that service is what the tax should be applied to, not whatever you wrote down in the books somewhere.

But I understand there may be administrative problems with doing that, and again, the sales tax as it has existed in this state, there is lots of other people out there who I am sure think there are many ways to understate their tax liability, avoid it totally, and no system is perfect, and this one certainly will be no exception to that.

But again, that is what the state has the Department of Revenue for, is to try to get at a way of minimizing that to the best of its ability and resources, and again what we are doing here is that is something that we can address, I think there may be some provisions that address that somewhat in the rules and we will try to improve those. Cass?

MR. VICKERS: I was just going to say on the flip side of that, probably in response to Mr. Jones'
question, is that just because a parent or subsidiary or
out-of-state is allocating some overhead or other
expense to a Florida affiliate would not necessarily, I
would think, mean that it is consideration for the
performance or provision of the service to that
out-of-state company in Florida.

MR. KIELBASA: I think you are correct.

MR. VICKERS: You would, therefore, have to look
through those kind of transactions to decide whether
this was Florida service, and whether there was
consideration for it.

MR. KIELBASA: In that sense you would be
attending -- I think I am probably over my head here --
attending more gross receipts tax, if you blindly took a
look at back entries and stuff like that and assignments
of cash here or there.

It is not that kind of system. That is not saying
that we wouldn't take a look at these indications that
something has happened that is taxable, of course, and
then probably the burden would shift to the taxpayer to
say, "No, it is not, here is why, I will show you," and
all of that. But that is certainly a problem. Yes,
sir?

A VOICE: I have a follow-up on the young lady's
question a while ago. Perhaps I didn't understand your
answer. Let's talk about trade associations in billing.

When their anniversary date comes, do you bill
them, and let's say their dues are $100, if you extend
the sales tax for that, you bill them for $105?

MR. KIELBASA: Right.

A VOICE: As I understood your answer to her, that
association is immediately liable for payment of that $5
before payment is received, or at the time payment is
received?

MR. MCKOWEN: Basically it is the time of billing.
The question, though goes back to what happens to
your -- like, for instance, now, when they are billing
it for the next year --

A VOICE: Yes.

MR. MCKOWEN: -- and before the effective date and
the event doesn't ever occur until the affected tax went
into effect, and that is basically the question that we
have got in hand now, and that is what we are looking
at.

A VOICE: Let me give you an example. You deal
with the local government. Their fiscal year is October
1 to September 30.

On September 15 you bill them for the coming year.

All right, so your effective date of the law has nothing
to do with this, assuming that it takes effect on July
1. All right, there is always the possibility that they are going to mark "cancel" on that bill and send it back to me, but you are telling me that I am to send it -- we are responsible for that $5 even though they cancel my services? That is what I am hearing you say.

DR. FRANCIS: That is a failure of consideration.

MR. MCKOWEN: Yes, you don't have a sale, is it not --

A VOICE: That is what I say. Is it not smarter to say okay, it is due at the time I receive that money? If I buy something at a store and I charge it, does that -- my sales tax immediately become due on that.

MR. MCKOWEN: Sure it does.

A VOICE: When they receive payment?

MR. MCKOWEN: If you charge something that pertains to personal property and you use a credit card, it becomes due immediately upon your pulling out that credit card.

A VOICE: Let's say I don't have a credit card.

MR. MCKOWEN: Cash sales is also the same way.

A VOICE: If I return that product, in effect, I don't want it at all, what happens?

A VOICE: Then the dealer gives you credit for it.

A VOICE: If you return it, it is defective and you
do not take a replacement and it is canceled, then does the dealer get credit for that sales tax that he has already remitted, because the transaction didn't occur?

DR. FRANCIS: Yes.

MR. MCKOWEN: The answer to that is yes, he does get credit.

DR. FRANCIS: But the business of the obligation occurring at the moment of transaction, that is expressly stated in the statute, whether it is a good idea or not.

A VOICE: All right. When you bill somebody for services to be performed in the future, is that immediately a transaction, or when they complete the contract by returning the money, acknowledging that we don't want to do this? I think that is when your transaction is completed.

MR. KIELBASA: I understand. You want us to define what, in that particular statutory provision, if we can, or address under what circumstances the moment the sale would occur, or somehow we will take a look at that. We have not done that in any detail.

A VOICE: Actually, what the association is saying, we have performed the service to you in the past, we would like to perform it for you in the future. That is what you are saying with the state, if they choose not
to pay that statement, we say "Hey, we don't think we want to do business with you this year, so there is no transaction." They actually pay their dues, and that then makes them responsible.

MR. KIELBASA: We will take a look at that. We need to examine that. We need to examine it in light of the words the Legislature used, and to see if we can refine our thinking in that regard. I think that is a significant point, and we will certainly examine it. There are certain areas of that that do need more work, that is one of them. Yes?

MR. SOLE: Joe Sole, Associated Industries. It would seem to me it would be in the best interest of the Department, in my view, to take a strong look at this customarily charging for a service when it is charged, for you to follow through on that and make refunds, because people have made a charge and never receive any funds or monies. In associations or whatever, it doesn't matter, it would seem to me that you would want to have a more easily administered law.

MR. KIELBASA: I agree, we need to look at that.

MR. SOLE: Take a look at that law and say, hey, this is not going to work the same way as tangible personal property. With tangible personal property, I go buy a piece of property, whether I charge it, I still
get the property, that means a transaction occurs, not only services. To make it clear here, I think it would be in your best interest to look at that.

MR. KIELBASA: Yes, I think it is clear to us, too, that we need to examine this a lot more closely and come up with something that is a more reasoned or whatever approach.

That doesn't mean it will be any different; I am not saying what we will arrive at. I am saying we will go back now and huddle in the next few weeks and take a look at this in a little more detail, based upon what you are saying now, and if any of you, again, feel inclined to put it in writing as to what your way would be, or again, if you can, those of you who are lawyers or have lawyers, try to read what you are advising with the law, with the statute, and stuff like this, because we are limited to what we can do by law. Yes, sir?

MR. SOLE: In the industry that has a combined -- I should say combined new and commercial-type thing, U.S. government versus commercial, has any method of apportionment as to, say, services providing combines both areas, how do you apportion which provides for commercial would be taxable versus the new U.S. government?

MR. KIELBASA: Are you speaking on multiple
transactions or a single transaction?

MR. SOLE: A single transaction that may be -- it accomplishes both ends of industry; U.S. government versus a commercial industry.

MR. McKOWEN: I would think you would have to break it out some way, because any sales to the U.S. government or to the state would be exempt, but the sale of the service to anyone else would be taxable.

MR. KIELBASA: Well, are there any further comments or questions or whatnot? Yes, sir?

MR. JONES: Let me get one thing straight. Did we agree that home office allocation of expenses are taxable or are not taxable?

MR. KIELBASA: We will take a look at that. I don't think we have -- let's put it this way. We are making no agreements or understandings today. We have what we gave you in writing, which is our initial look, and they are not by any means final.

We want to take what you can give us and what we have learned here today, and go back and see if we can do a better job, and again we would like for you to submit whatever you can by 15 days, March 2 or whatever, thereabouts, so again, we can do a better job. Yes, sir?

A VOICE: One final question. Is there any
provision for resale of services?

    MR. KIELBASA: No, we do not have that, no.

    A VOICE: So you have a real estate broker who is providing a service for the sale of property --

    MR. KIELBASA: Right.

    A VOICE: -- in the process of providing that service, he has an appraisal done, so he goes and he has an outside appraiser to perform an appraisal on that property, which is a service that is subject to tax, and the broker then passes on to the owner of the property the billing for that service. Is that taxable again a second time?

    DR. FRANCIS: Yes, sir.

    A VOICE: Yes?

    DR. FRANCIS: There is even some question as to what kind of resale, you know, whether if we had a conventional resale rule, whether it would encompass that kind of transaction or not.

    A VOICE: Well, this is a rather simple question.

    MR. KIELBASA: I understand. Don't we have something that we do apply to something that is essentially consumed, and if something, in fact, is not, and is simply passed on to --

    DR. FRANCIS: With respect to TPT, that is part of this.
MR. KIELBASA: But not the service, itself?

DR. FRANCIS: There is no resale provision for services in 36-166.

MR. KIELBASA: I don't think in a real estate transaction, though, that a Realtor pays an appraiser out of pocket. Isn't that paid at the closing?

A VOICE: Yes, sir, it is done like that frequently, because the real estate agent is the one that is more conversant in dealing with appraisers, and he is the one that comes out and he contracts for the services and all and passes it straight on through to his client.

MR. VICKERS: I think they have answered your question on the other rule. They say both are taxable.

A VOICE: Isn't that a pyramiding of the tax?

DR. FRANCIS: Yes.

MR. KIELBASA: Well, there is more pyramiding, as Dr. Hellerstein pointed out, for services than there is for tangible personal property.

Again, the case law kind of takes a look at the pyramiding notion and talks about separate transactions. We are sensitive to that, and know that pyramiding exists more when you don't have a separation of transactions, and to the extent that you have a single transaction, we would not try to make a single
transaction as a multiple transaction by taxing it several times.

But to the extent you have clearly separated transactions and they have been structured as such for various reasons, then we would have, we think, little choice but to impose the tax in each case, unless we can determine a way that the statute specifically provides for us not to.

But again, that is some of these situations that we are still reviewing. Again, when you look at these rules, look at these with the full understanding that they have not completely been reviewed, and even we, ourselves, after we get them down and sit down together, will find it more advisable after going back and looking at 86-166 and maybe reading a couple of court cases that say we really can't go this far, or we have not gone far enough here, or whatever, they will be adjusted based on what we are doing, as a result of what we have learned from doing this and all of these exercises.

So, you know, I understand full well that the rule, this is a first draft. I think a normal situation, there probably -- if it weren't for the time constraints and us feeling obligated to get everybody involved and get this stuff out in the open and get going, this is something that we would probably sit on for a while and
review and pass it around and rethink and reread a few
times and get it down.

That is the normal process, and a lot of times
rules take several years to evolve into a situation
where, yes, that is it, we understand the intricacies,
we understand the transactions; yes, this is it, this is
what the law should be. And so we, you know, are in a
very preliminary stage here, but we recognize we have
got to move quickly, and that is why we appreciate
anything you can give us that will help us.

Let me give you an address to send your copies to.
Why don't you use -- my name is -- I will spell it out
carefully, slowly. My name is Jeff, J. E. F. F.,
Kielbasa, K. I. E. L. B. A. S. A., Deputy General
Counsel, Florida Department of Revenue, Room 202 Carlton

Again, we would appreciate any information that you
could give us based on what these rules say, and we
would appreciate if you could get them by March 2, and
also, there is -- here is a list of non-service
exceptions that expire July 1, for anyone that may like
them.

(Whereupon, the proceedings were adjourned at 11:30
A.M.)
CERTIFICATE

STATE OF FLORIDA  

COUNTY OF LEON  

I, JERRY L. ROTRUCK, CM, Court Reporter and Notary Public at Tallahassee, Florida, do hereby certify as follows:

THAT I correctly reported in shorthand the foregoing proceedings at the time and place stated in the caption hereof;

THAT I later reduced my shorthand notes to typewriting, or under my supervision, and that the foregoing pages 2 through 75, contain a full, true and correct transcript of the proceedings on said occasion;

THAT I am neither of kin nor of counsel to any parties involved in this matter nor in any manner interested in the result hereof;

THIS ____ day of ______________ , 1987.

JERRY L. ROTRUCK, CM  
Court Reporter and Notary Public  
State of Florida at Large