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Florida Sales Tax

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FLORIDA SALES TAX

Florida's sales tax¹ did not mushroom into existence overnight. During the past century a series of constitutional restrictions have been placed upon the taxing power of the Legislature. This inability to reach the more conventional sources of revenue, coupled with a quite natural legislative hesitancy to tax many types of property and privileges hitherto but lightly touched by the taxgatherer, made the eventual enactment of a sales tax a readily predictable event.

A brief summary of the specific restrictions on Florida's taxing power will serve to define the problem facing the 1949 Legislature. Ad valorem taxation of real and personal property for state purposes is prohibited,² with the single exception of the tax on intangibles.³ Homesteads are exempt from ad valorem taxation by counties and municipalities to an assessed valuation of \$5,000.⁴ Widows and disabled persons are granted exemption from taxation of property to a value of \$500.⁵ No tax on incomes is permitted to be levied in this state,⁶ and the head of a family is exempted from payment of taxes on \$500 of personal property.⁷ Taxation of motor vehicles is limited to a license for the operation thereof,⁸ and little revenue is to be gleaned from estates and inheritances.⁹ In addition, it has been only in the very recent past that a constitutional provision expired which exempted newly established industrial plants¹⁰ and motion picture studios¹¹ from all property taxation.

¹FLA. STAT. c. 212 (1949), as amended, FLA. STAT. c. 212 (1951).

²FLA. CONST. Art. IX, §2.

³FLA. CONST. Art. IX, §1, discussed in detail in Legis., 3 U. OF FLA. L. REV. 262 (1950).

⁴FLA. CONST. Art. X, §7.

⁵FLA. CONST. Art. IX, §9.

⁶FLA. CONST. Art. IX, §11.

⁷*Ibid.*

⁸FLA. CONST. Art. IX, §13.

⁹FLA. CONST. Art. IX, §11: ". . . the Legislature may provide for the assessment, levying and collection of a tax upon Inheritances, or for the levying of Estate taxes, not exceeding in the aggregate the amounts which may by any law of the United States be allowed to be credited against or deducted from any similar tax upon Inheritances, or taxes on estates assessed or levied by the United States on the same subject . . ."

¹⁰FLA. CONST. Art. IX, §12. This section was adopted in the general election of 1930.

¹¹FLA. CONST. Art. IX, §14. This section was adopted in the general election of 1934.

In this rapidly growing state the inevitable result has been an increasing dependency upon so-called consumer taxes in an endeavor to keep revenues abreast of normally rising costs of governmental services and functions. The Florida Legislative Reference Bureau has reported that 83.8 percent of the state's tax revenue was derived from consumer levies in the fiscal year 1950,¹² as compared with an average of 63.4 percent for the other 47 states of the nation.¹³

Governor Warren reported to the regular session of the Florida Legislature in 1949 that during the preceding biennium expenditures from the state's general revenue fund had exceeded income by \$17,000,000. He predicted a need for \$53,000,000 in new revenue, and recommended approximately 17 new or increased taxes. Most of these were to be applied to specific business and industrial operations, at that time taxed lightly or not at all for state purposes. The Governor contended that his program would exact a larger share of state revenue from "business," which he reported bore only 11.9 percent of the state tax burden.¹⁴ The Legislature yielded to overwhelming pressure from the enterprises sought to be taxed, with the result that none of the recommended revenue measures was enacted into law.

In 1949 an unprecedentedly large appropriation of \$240,000,000, of which \$99,793,000 was earmarked for the public school system, was approved by the Legislature,¹⁵ which concluded its regular session by leaving the state facing an estimated \$55,000,000 deficit¹⁶ for the 1949-1951 biennium. Complete collapse of state governmental services, including public education, the state universities, public welfare, and hospitals, impended.¹⁷ To aggravate matters, the state's municipalities were virtually destitute, this condition having been brought about in large part by the removal from taxation in 1934 of

¹²FLORIDA'S TAX STRUCTURE 6 (1950).

¹³FLORIDA'S TAX STRUCTURE 7 (1950).

¹⁴FLA. H.R.J. 6-9 (Regular Sess. 1949). Among taxes recommended were the following: commercial lodging, 5%; severance tax on phosphate, 50c per ton; severance tax on petroleum, increased from 5% to 10%; forest products, gross processing tax, ½ of 1% on retail sales; admissions, 5%; forest lands, 10c per acre; fuel oil, ½c per gallon except for private home heating and lighting; higher utility and insurance taxes; higher license fee on small loan companies; higher rate on intangibles and corporations; higher documentary stamp tax; constitutional amendment for a two-mill tax on real estate for flood control.

¹⁵Fla. Laws 1949, c. 25370.

¹⁶Message of the Governor, FLA. H.R.J. 5 (Extraordinary Sess. 1949).

¹⁷FLA. CONST. Art. IX, §6, prohibits the issuing of state bonds except for the purpose of repelling invasions or suppressing insurrection.

millions of dollars' worth of homestead-exempt property.¹⁸ The counties, though already enjoying considerable income from state gasoline and pari-mutuel tax sources, were demanding more and more aid to meet rising costs of operation.

Against this background the Legislature was called into extraordinary session September 7, 1949, for the purpose of raising revenue. Taxes on designated classes of businesses and industries having been rejected previously, the time had arrived for imposition of the ultimate in consumer taxes, the retail sales tax. At that point there appeared to be but two choices—either taxation or stagnation of all state governmental services and functions. The Revenue Act of 1949 was enacted and became effective November 1, 1949.¹⁹ It was amended in 1951²⁰ to incorporate administrative improvements and to revise some features of the law in order to provide additional revenue.

PROVISIONS OF THE ACT

In its general provisions the Florida sales tax law is cast in the same mold as those of other states using this type of consumer levy; and all of them, in the same or in an accompanying statute, provide for a compensating use tax applying to taxable items purchased outside the state for consumption, or for storage for later consumption, within the state.²¹ Application of the levies to sales, services, and privileges, however, varies somewhat from state to state, depending apparently upon the nature of each state's resources, industries, and other factors. In each instance, as in Florida, the levy has been denominated an excise or privilege tax.²² Generally, the acts make retailers that fail or refuse to maintain adequate records, or to remit the tax along with the required reports, guilty of a misdemeanor.²³

Two sections of the Florida act are declarative of legislative intent. The first includes the usual severability clause,²⁴ and declares the

¹⁸FLA. CONST. ART. X, §7.

¹⁹FLA. STAT. §212.23 (1949).

²⁰FLA. LAWS 1951, c. 26871, now FLA. STAT. §212.23 (1951).

²¹*E.g.*, FLA. STAT. §212.05 (1951).

²²FLA. STAT. §§212.03, 212.05, 212.07 (1951); *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Wiseman v. Phillips*, 191 Ark. 63, 84 S.W.2d 91 (1935); *State ex rel. Missouri Portland Cement Co. v. Smith*, 338 Mo. 409, 90 S.W.2d 405 (1936); *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935).

²³*E.g.*, FLA. STAT. §§212.07, 212.13 (1951).

²⁴FLA. STAT. §212.21 (1951).

legislative intent to exempt such items as are not subject to the tax under the Florida or United States Constitutions, and to tax every sale, admission, storage, consumption, or rental set forth except those specifically excepted. The second section relative to intent declares the chapter to be "an integral part of a revenue program,"²⁵ and made the act effective November 1, 1949, only if two other acts then pending, and enacted at the same session, were approved. Those measures, now on the statute books, allocate back to cities where collected the proceeds from the state's five-cent cigarette tax, and to the counties the proceeds, under a formula, from the seventh cent of state gasoline tax proceeds.

The Florida sales and use tax is applied at a uniform rate of three percent to the gross proceeds of sales made for any purpose other than resale.²⁶ A "sale" is defined in the act as any transfer of title or possession or of both, exchange, barter, and lease or rental of tangible personal property.²⁷ When the sale involves a trade-in, however, the tax applies only to the actual amount of cash paid to the vendor.²⁸ The act is explicit as to the meaning of "tangible personal property," which is such as "may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses."²⁹ Intangible personal property, not taxed under provisions of the act, means stocks, bonds, notes, insurance, or other obligations or securities.³⁰ Likewise, the definition includes gross proceeds from rentals of living quarters, sleeping or housekeeping accommodations in hotels, apartment or rooming houses, and tourist or trailer camps.³¹ Fabrication of tangible personal property for consumers who furnish materials used is also a taxable transaction.³²

That portion of the levy applied against rental accommodations is unique among the state sales tax laws studied. It applies to payments for lease or rental to transient or permanent tenants occupying the same location for periods of less than six months.³³ An apartment house is defined as any building providing accommodations for more

²⁵FLA. STAT. §212.23 (1951).

²⁶FLA. STAT. §§212.03-212.05 (1951).

²⁷FLA. STAT. §212.02 (2) (1951).

²⁸FLA. STAT. §212.09 (1951).

²⁹FLA. STAT. §212.02 (12) (1951).

³⁰*Ibid*; see also note 3 *supra*.

³¹FLA. STAT. §212.02 (2) (1951).

³²*Ibid*.

³³FLA. STAT. §212.03 (4) (1951).

than two families living independently;³⁴ the all-inclusive statutory definition of rooming house incorporates "every house, boat, vehicle, motor court, trailer court or other structure . . . where living quarters, sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings"³⁵

Few states apply the tax to rental of living accommodations on so broad a scale as Florida. For example, the Arizona levy is placed on hotel room rentals.³⁶ Missouri applies the tax to rentals of accommodations in hotels, inns, tourist cabins, tourist camps or other places "in which rooms, meals or drinks are regularly served to the public."³⁷ The Missouri tax appears to approach closely the Florida levy in its application to such rentals, and the New Mexico statute is quite similar.³⁸ Statutes of other states refer to rentals, but the apparent application in most instances is to rentals of tangible personal property.³⁹

As originally enacted in Florida, the tax on proceeds from rental of living accommodations provided for refund of any sales tax paid after six months of continued occupancy in one place, and exempted the tenant from any further such tax while occupying the same premises.⁴⁰ An amendment by the 1951 Legislature eliminated the refund provision but retained the exemption of rentals after six months of occupancy by the same party.⁴¹ A tenant eligible for the exemption but desiring to move to another place is required to obtain from the state comptroller a certificate of residence in order to qualify for this exemption in the new location.⁴²

Admission charges to numerous types of entertainments are taxed on the basis of the gross admission price after deducting the federal tax of 20 percent.⁴³ The tax begins at admission prices of 40 cents,⁴⁴ but will apply to all admissions should the federal tax be

³⁴FLA. STAT. §212.02 (6) (b) (1951).

³⁵FLA. STAT. §212.02 (6) (c) (1951).

³⁶ARIZ. CODE ANN. c. 73, §1303 (1939).

³⁷MO. REV. STAT. ANN. §11407 (1943).

³⁸N.M. STAT. ANN. c. 76, §1404 (1941).

³⁹E.g., CAL. REV. & TAX. CODE §6012 (Deering 1944).

⁴⁰FLA. STAT. §§212.03, 212.04 (1951).

⁴¹FLA. STAT. §212.03 (4), (5) (1951).

⁴²*Ibid.*

⁴³FLA. STAT. §212.02 (16) (1951).

⁴⁴*Ibid.* The tax began at 41c under the 1949 act.

reduced to ten percent or less.⁴⁵ Admissions to shows, pageants and plays, even though the entire proceeds inure to religious, charitable, or educational institutions, were originally exempt⁴⁶ but are now taxable under a 1951 amendment to the act.⁴⁷ Admissions to football games, exempt through 1950, are likewise taxable now.⁴⁸

Sale, use, storage, or other consumption in Florida of machinery and parts used in furnishing transportation and communication facilities, as well as in farming, mining, quarrying, compounding, processing, producing, manufacturing, storing, or refrigerating tangible personal property, is taxable at the uniform rate of three percent.⁴⁹ Here again the Florida tax is unique in that a ceiling of \$300 is placed on the tax applicable to such purchases.⁵⁰ This figure was increased in 1951 from the \$100 provided by the original act,⁵¹ in which the ceiling was inserted in response to arguments that it would aid in the development of state resources.⁵²

EXEMPTIONS FROM THE TAX

In its numerous exemptions of specific items from application of the tax the Florida law is again unique, although some of these exemptions are common to most states.⁵³ Specifically listed in the Florida law are numerous food products,⁵⁴ including candies costing fifty cents or less.⁵⁵ The "courtin'" candies, selling for above that amount, are taxed under a 1951 amendment⁵⁶ though tax-free in the 1949

⁴⁵FLA. STAT. §212.04 (2) (1951).

⁴⁶*Ibid.*

⁴⁷FLA. STAT. §212.04 (2) (1949), as amended by deleting these exemptions, FLA. STAT. §212.04 (2) (1951).

⁴⁸FLA. STAT. §212.04 (2) (1951).

⁴⁹FLA. STAT. §212.05 (1951).

⁵⁰FLA. STAT. §212.08 (2) (1951).

⁵¹FLA. STAT. §212.08 (3) (1949).

⁵²Such machinery is accorded a complete exemption from the sales-use tax in Alabama, where there is much mining and accompanying heavy industry, ALA. CODE tit. 51, §755 (1940). Some states tax total proceeds from sale of such machinery, e.g., ARIZ. CODE ANN. c. 73, §1303 (1939).

⁵³E.g., school books and lunches, farm products sold by the producer, motor fuel, and fertilizer.

⁵⁴FLA. STAT. §212.08 (1) (1949), as amended, FLA. STAT. §212.08(1) (1951).

⁵⁵FLA. STAT. §212.08 (1) (1951).

⁵⁶*Ibid.*

enactment.⁵⁷ Food sales, however, when made in restaurants, hotel dining-rooms and other places, in the form of meals for consumption, are taxed whether served on or off the premises. Another important exemption provided to minimize the regressive character of the sales tax is that allowed for sales of clothing amounting to \$10 or less.⁵⁸ Here again the Florida law is at variance with those of other states. The only comparable provision is the Connecticut statute, which exempts sales of children's clothing.⁵⁹ The Florida act further includes wearing apparel fabrics as "articles of clothing."⁶⁰

Alcoholic beverage and cigarette sales are excluded because of the separate excise levies on those products.⁶¹ The reasons underlying these exemptions apply with equal force to gasoline, already taxed by the state at the near-record rate of seven cents a gallon and accordingly specifically exempted from this tax.⁶² Other fuels, including crude and fuel oil, kerosene, lubricating and diesel oil, coal, coke, and cordwood,⁶³ are likewise tax-free.

The list of exemptions is long. It includes, for example, ice, medicine compounded in a retail establishment by a licensed pharmacist on individual prescriptions, "common household medicinal remedies" listed and approved by the state board of health, electric power, communications services, nets and ships used directly by licensed commercial fisheries, feeds, fertilizers, insecticides, fungicides, and containers used for processing farm products; also field and garden seeds, film rentals, schools books, and school lunches.⁶⁴ Radio and television advertising is not taxed; nor are newspaper sales and advertising;⁶⁵ nor cheesecloth for shading West Florida's cigar-wrapper tobacco crops.⁶⁶ Also exempt are articles sold or leased to churches or other religious, educational, or charitable institutions in the course of their customary activities,⁶⁷ artificial eyes, limbs, crutches, eye

⁵⁷FLA. STAT. §212.08 (1949).

⁵⁸FLA. STAT. §212.08 (8) (1951).

⁵⁹CONN. REV. GEN. STAT. c. 104, §2096 (j) (1949).

⁶⁰FLA. STAT. §212.08 (8) (1951).

⁶¹FLA. STAT. §212.08 (4) (1951).

⁶²*Ibid.*

⁶³*Ibid.*

⁶⁴*Ibid.*

⁶⁵FLA. STAT. §212.08 (4), (7) (1951).

⁶⁶FLA. STAT. §212.08 (6) (1951).

⁶⁷*Ibid.*

glasses, dentures, hearing devices, and prosthetic and orthopedic appliances.⁶⁸

Soap, soap powders and detergents, exempt from the tax as originally enacted,⁶⁹ were brought under the levy by the 1951 Legislature in one of several amendments designed to increase the revenue derived from the tax. Sales of Bibles,⁷⁰ unintentionally omitted from the list of specific exemptions in the 1949 act, were added to that favored category in 1951. Sales of poultry and livestock by the producer direct from the farm⁷¹ are not taxed. Neither does the use tax apply to the value of farm products grown by the farmer and used by him.⁷² Processors of farm products, except on sales to ultimate consumers, are not taxed on their sales.⁷³

Another exemption is that placed upon funerals⁷⁴ costing \$500 or less in full. This is a significant amendment to the 1949 act,⁷⁵ which exempted "coffins or caskets" costing less than \$500. The new provision applying to "funerals" closes a loophole afforded by the former provision under which the cost of a casket could be kept below \$500 by shifting the charge to other services in connection with the funeral.

Thus in Florida, as well as under federal law, the conjunction is replaced by a preposition in the old truism, and we may truthfully say that we have here the inevitability of death *with* taxes.

THE RATE OF TAXATION

Florida and many other states apply the tax at the uniform rate of three percent to gross proceeds of taxable sales.⁷⁶ It is interesting to note, however, that on Florida sales involving fractional parts of a dollar the effective rate of taxation may sharply exceed the three percent rate established by the act. This arises from the use of so-called bracket charges.⁷⁷ Thus, an 11-cent sale is taxed to the pur-

⁶⁸*Ibid.*

⁶⁹FLA. STAT. §212.08 (11) (1949), as amended, FLA. STAT. §212.08 (1951), wherein the former subsection 11 is deleted.

⁷⁰FLA. STAT. §212.06 (9) (1951).

⁷¹FLA. STAT. §212.07 (5) (1951).

⁷²FLA. STAT. §212.07 (6) (1951).

⁷³FLA. STAT. §212.07 (7) (1951).

⁷⁴FLA. STAT. §212.08 (6) (1951).

⁷⁵FLA. STAT. §212.08 (10) (1949).

⁷⁶*E.g.*, CAL. REV. & TAX. CODE §6051 (Deering 1944); FLA. STAT. §§212.03-212.05 (1951); OHIO GEN. CODE ANN. §5546-2 (1945).

⁷⁷FLA. STAT. §212.12 (10) (1949), as amended, FLA. STAT. §212.12(10) (1951). The

chaser at one cent, making the tax 9.09 percent on the transaction. The rates are equalized somewhat within the brackets, however, as the following figures will indicate. The tax on a 35-cent purchase is 2.85 percent. In the 36 through 65-cent category the tax ranges from 5.56 to 3.08 percent, and on sales from 66 cents through \$1.00 the range is from 4.55 to an even 3 percent. These percentages substantiate claims by operators of "dime stores" and similar establishments that their collections far exceed on a percentage-of-sales basis those of other business enterprises.

THE TAX COLLECTOR

The Florida "retailer"⁷⁸ or "dealer,"⁷⁹ which terms embrace all individuals and corporations operating enterprises subject to sales tax on their receipts, is constituted a collector for the state and made responsible for obtaining the tax from the purchaser.⁸⁰ For this involuntary service he is permitted to retain three percent of the tax collected.⁸¹ To qualify as a licensed vendor the retailer must obtain, at an original cost of one dollar, a registration certificate from the state comptroller.⁸² He is required to remit to the comptroller by the twentieth of each month taxes collected during the preceding month,⁸³ and must accompany the remittance with a return in accordance with rules promulgated by the comptroller.⁸⁴ Penalties for failure to report and remit promptly begin at five percent for a delinquency not exceeding thirty days,⁸⁵ and an additional five percent penalty is assessed for each subsequent 30-day period up to a maximum of 25 percent. For making a false or fraudulent return, or a willful attempt to evade payment of the tax, the penalty soars to

1949 statute set the bracket charges at 1c on sales from 9c through 40c, 2c on sales from 41c through 70c, 3c on sales from 71c through \$1.00. The 1951 version is as follows: sales totaling less than 11c, no tax; 11c through 35c, 1c; 36c through 65c, 2c; 66c through \$1.00, 3c. Sales in excess of \$1.00 are taxed at 3% of the whole dollars, plus the bracket charges on fractional parts of one dollar.

⁷⁸FLA. STAT. §212.02 (10) (1951).

⁷⁹FLA. STAT. §212.06 (2) (1951).

⁸⁰FLA. STAT. §212.07 (2) (1951).

⁸¹FLA. STAT. §212.12 (1) (1951).

⁸²FLA. STAT. §212.18 (3) (1951).

⁸³FLA. STAT. §212.11 (1951).

⁸⁴*Ibid.*

⁸⁵FLA. STAT. §212.12 (2) (1951).

50 percent,⁸⁶ and arrest on a misdemeanor charge may follow.⁸⁷ It is also a misdemeanor for the dealer, vendor, or landlord to absorb the tax as a cost of doing business or to advertise that he will pay the tax on purchases made from him.⁸⁸

A significant provision prohibits the use of "tokens" in collecting the tax.⁸⁹ Such tokens, in denominations of fractional parts of a cent, are utilized in some states to evidence payment of the tax,⁹⁰ but in Florida the necessity for this cumbersome device is obviated by the use of tax brackets for sales involving fractional parts of a dollar. Those states that do not use tokens generally follow Florida in their silence on the matter of devices for collecting from the purchaser. The one exception is the Ohio system,⁹¹ discussed below at some length. Bottles, jars, cigar boxes, and other containers are commonly used as depositories of taxpayers' pennies in thousands of Florida retail establishments, with obvious possibilities for misappropriation and mismanagement. It is in this regard that the act appears to be most seriously deficient.

The general practice in states using the sales tax is to entrust its administration to some administrative agency with authority to promulgate rules and regulations for collection and enforcement.⁹² In Florida the comptroller is authorized to administer the act, and he is armed with powerful weapons of coercion to enforce collection of the tax. He is empowered to issue a warrant for the full amount of the tax due "or estimated to be due,"⁹³ together with interest, penalties, and cost of collection, and to have such warrant recorded by the sheriff in the office of the clerk of the circuit court of any county wherein any property of the taxpayer is located. The warrant then becomes a lien upon the title to any real or personal property of the taxpayer situated in the county "in the same manner as a judgment duly docketed and recorded . . ."⁹⁴ The circuit court clerk is required to issue execution, and the sheriff then proceeds to enforce

⁸⁶*Ibid.*

⁸⁷*Ibid.*

⁸⁸FLA. STAT. §212.07 (4) (1951).

⁸⁹FLA. STAT. §212.18 (2) (1951).

⁹⁰*E.g.*, ILL. ANN. STAT. c. 120, §441 ½ (1935); N.M. STAT. ANN. c. 76, §1407 (1941).

⁹¹OHIO GEN. CODE ANN. §§5546-3, 5546-4, 5546-7, 5546-8, 5546-26a (1945).

⁹²*E.g.*, FLA. STAT. §212.18 (2) (1951); OHIO GEN. CODE ANN. §5546-7 (1945).

⁹³FLA. STAT. §212.15 (3) (1951).

⁹⁴*Ibid.*

collection.⁹⁵ Appeals may be made to the comptroller, who is required to conduct hearings for aggrieved taxpayers. His findings are reviewable in the circuit court, "where there shall be no presumption in favor of the comptroller's findings."⁹⁶

The comptroller has additional power and responsibility in connection with collection of the compensating use tax,⁹⁷ levied on the gross purchase or sales price of tangible personal property imported into the state for use or consumption, whether immediate or later, although importation for resale, even with intervening storage, is not taxed. A system of permits is authorized for those, other than common carriers, engaged in transporting taxable tangible personal property into the state; and such importation is prohibited unless a permit is first obtained. With the exception of the personal effects of the driver, owner, or passenger of a private vehicle not engaged in carrying goods for resale within Florida, the act declares property brought into the state without a permit from the comptroller to be contraband and subject to confiscation. Furthermore, trucks as well as contraband goods seized may be sold at auction pursuant to the terms of the statute.

Provision is made for a hearing conducted by the comptroller prior to sale. His action may be reviewed by the circuit court on "common law writ of certiorari" applied for within ten days from the date of the comptroller's order. No additional evidence is permitted to be introduced in the circuit court, which makes its determination from a transcript of the proceedings supplied by the comptroller.⁹⁸ During the pendency of proceedings under this section the comptroller is granted discretion to award the claimant possession of confiscated goods, upon posting of a bond by the claimant in an amount double the value of the property seized.⁹⁹

COMPARISON OF FLORIDA ACT WITH SALES TAX AND RELATED TAXES OF OTHER STATES

A few typical provisions from the tax laws of other states, many of which are included in the same chapter with the sales tax, will

⁹⁵*Ibid.*

⁹⁶FLA. STAT. §212.15 (4) (1951).

⁹⁷FLA. STAT. §212.16 (1951); see also §212.05 (7), which sets forth the "compensating" feature.

⁹⁸FLA. STAT. §212.16 (8), (9), (10) (1951).

⁹⁹FLA. STAT. §212.16 (11) (1951).

indicate the close interplay between the sales tax and other related taxes in the overall revenue structure.

Those Floridians who oppose even the multi-exemption sales tax law of this state would doubtless be aghast at the list of taxed sales and services in our neighbor Mississippi. That state has the most all-inclusive schedule of levies on business, sales, and services in the Union; these are applied at rates varying from one eighth of one percent to ten percent on various classes of transactions.¹⁰⁰

New Mexico levies a tax on oil, natural gas, and products of mines and quarries, as well as a tax of two percent on the gross receipts of "any person engaged in the practice of any profession."¹⁰¹ Gross receipts of hotels, camp grounds, rooming and boarding houses are likewise taxed at two percent.¹⁰² Unlike Florida, New Mexico provides for the issuance of tokens, tickets, or stamps of nominal value of one mill or multiples thereof.

Arizona taxes proceeds of mining operations.¹⁰³ California presents a fairly wide coverage in its sales and use tax,¹⁰⁴ which is applied at a uniform rate of three percent. North Carolina applies the retail sales and use tax widely, and also taxes the gross proceeds of sales by wholesalers to others than retailers at one twentieth of one percent.¹⁰⁵ The coverage includes sales of new or used motor vehicles, constitutionally exempt in Florida.¹⁰⁶ Most states make unpaid sales and use taxes a lien on property of the delinquent taxpayer.¹⁰⁷

Ohio has adopted a unique system to reduce misappropriation

¹⁰⁰A partial list of items covered by the Mississippi levy, MISS. CODE ANN. §§10106-10167 (Supp. 1950), includes: a 1.5% severance tax on gross proceeds from mining, quarrying, oil, gas, limestone and other products; a sales tax of .25% on most manufactories; a gross receipts tax on cotton-seed oil at .125%; a 2% tax on gross proceeds from the sale of "any tangible property whatsoever, real or personal," as well as on gross revenues of all public utilities, including electric, gas, express, telegraph, and telephone companies, railroads, sleeping car operators, street railways, bus companies and pipe line companies; a 1% tax on the amount involved in contracts for construction; and a 1% tax on sales of fluid milk. An interesting provision of this law is the 10% levy on the sale of tangible property "sale of which is prohibited by law."

¹⁰¹N.M. STAT. ANN. c. 76, §1404 (1941).

¹⁰²*Ibid.*

¹⁰³ARIZ. CODE c. 73, §1303 (1939).

¹⁰⁴CAL. CODE REV. & TAX. §§6012, 6051, 6053 (Deering 1944).

¹⁰⁵N.C. GEN. STAT. c. 105, §168 (1950).

¹⁰⁶FLA. CONST. ART. IX, §13.

¹⁰⁷*E.g.*, ALA. CODE tit. 51, §769 (Supp. 1949); FLA. STAT. §212.15 (1) (1951).

and to assure collection of the sales levy.¹⁰⁸ The retailer buys pre-paid tax receipts in different colors and designs for each denomination. Upon receiving the tax from a customer, he tears into two parts tax receipts equivalent to the tax paid; and the consumer is handed one part, which is redeemable upon presentation to the state tax commission at the rate of three percent of the amount of tax represented. For convenience of administration, the Ohio statute limits the taxpayer seeking such redemption to a minimum presentation of \$100 of tax receipts at any one time, whereupon he receives \$3.00. The state meanwhile has obtained its stamp revenue directly from the retailer, who normally will have purchased stamps from his county treasurer at a discount of three percent of face value. The treasurer retains one percent for the county's general revenue fund and remits the remaining proceeds to the state.

The Ohio plan has been looked upon with favor by many Florida legislators, but no well-defined movement toward its adoption here has yet developed. The plan offers the advantage of more efficient collection, supported by the natural tendency of the taxpayer to collect his redemption values himself or to donate them to charitable institutions for redemption.¹⁰⁹ There is no need for the tax-receiving jars and boxes commonly utilized in Florida. The state gets its share of the tax promptly from the vendor, who in turn recovers his investment from the purchaser along with the small recompense resulting from his original purchase of the receipts at the three-percent discount. Costs of collection, exclusive of administration expenses, run to a minimum total of seven percent of the tax collected. This fact would constitute the greatest single objection to adoption of the plan in Florida, where during the first two years of sales tax operation the comptroller was allowed to use, for all collection expenses, only three percent of the revenue produced. His actual expense was less than this three percent. The fact remains, however, that a higher percentage of collection cost is justified when the somewhat more expensive system produces substantially more net revenue by plugging loopholes.

VALIDITY OF THE SALES TAX

Sales tax acts in most of the states have been enacted in response to fiscal emergencies; many were adopted during the depression years

¹⁰⁸See note 91 *supra*.

¹⁰⁹In many stores charitable institutions maintain containers in which customers can deposit the torn receipts.

of the 'thirties.¹¹⁰ Attacks on them in the courts have been based upon many grounds, most of which were adopted in the one frontal assault thus far made upon the 1949 Florida levy. In each instance, as in Florida, the attack has failed and the law has been upheld.¹¹¹

The Florida Supreme Court upheld the tax in *Gaulden v. Kirk*¹¹² on July 7, 1950. Gaulden, a landlord, was charged with a misdemeanor for failure to collect the tax and maintain records, as well as for refusal to file reports and remit the tax proceeds to the comptroller. On a petition for habeas corpus the circuit court entered a judgment of remand, which the Supreme Court affirmed in an able opinion by Justice Hobson. Gaulden contended that the act was unconstitutional (1) because it was a property tax as distinguished from an excise, (2) because its effective date was made dependent upon the passage of two other acts, (3) because arbitrary discretion was accorded the comptroller, (4) because exemptions were "arbitrary and discriminatory," (5) because it provided for imprisonment for debt, and (6) because it denied due process.

Writing for a unanimous Court, Justice Hobson took the position that the tax was an excise or privilege levy, as distinguished from a property tax, and that as such it did not have to be uniform in the sense of applying to all property sold:¹¹³

" . . . we have no difficulty in declaring it to be the express legislative intent that this tax is a privilege or occupation tax and the subject of taxation or the thing taxed is the privilege of engaging in business within the State of Florida. . . . Privilege and occupation taxes are catalogued uniformly under the general heading of excise taxes. . . . Although the privilege of engaging in business . . . may be classified as a species of property, it is not property in the usual, customary and commonly accepted sense of the word."

The Court further held that the levy does not contravene the constitutional prohibition of an income tax; that it is not a tax "upon the personal property or services but upon the privilege of selling the same, and it is measured by the extent to which the privilege is

¹¹⁰*E.g.*, California, Illinois, Mississippi, New Mexico.

¹¹¹For examples see note 22 *supra*.

¹¹²47 So.2d 567 (Fla. 1950).

¹¹³*Id.* at 573.

enjoyed";¹¹⁴ that the effective date of a statute can be pegged to the happening of certain contingencies, one of which may be the enactment of another statute; and that the tax is not discriminatory merely because it does not embrace proceeds from rentals of accommodations for fewer than two families and of hotel rooms or apartments occupied for more than six months. This last is a "permissible classification and is not unreasonable, arbitrary or unjustly discriminatory."¹¹⁵

Although ignoring the somewhat feeble argument that to pass the tax on to the tenant does violence to due process, the opinion meets squarely the contention that the tax is a debt in the sense in which the term is used in our Declaration of Rights: "no person shall be imprisoned for debt, except in cases of fraud."¹¹⁶ The consumer does not pay any "debt" of the retailer, for the reason that:¹¹⁷

"The only debt as contemplated by our Bill of Rights which may be said to be created by law is the one arising from the contractual relationship between the merchant or landlord and the consumer or tenant. . . . Such payment or contribution does not amount to the satisfaction of a civil debt in the legal significance of that term. It is more in the nature of a privilege, or the fulfillment of a moral obligation of citizenship. Such privilege . . . may be enforced . . . through the exercise of inherent sovereign power."

The complete failure of the numerous attacks made upon sales and use taxes in other states and the Florida holding in the *Gaulden* case strongly indicate that the Florida tax is legally secure. Constituting the vendor a collector of the tax, even though he be an unwilling one, has been held permissible and in accord with due process.¹¹⁸ Neither is there any constitutional objection to deducting the federal tax imposed on the sale of an article in computing the state taxable base.¹¹⁹ Furthermore, a sales tax that does not discriminate against products of other states is not a burden on interstate commerce.¹²⁰

¹¹⁴*Id.* at 574.

¹¹⁵*Id.* at 576.

¹¹⁶FLA. CONST. Decl. of Rights, §16.

¹¹⁷*Gaulden v. Kirk*, 47 So. 2d 567, 579 (Fla. 1950).

¹¹⁸*E.g.*, *Tanner v. State*, 28 Ala. App. 568, 190 So. 292 (1939).

¹¹⁹*Standard Oil Co. v. State Tax Comm'r*, 71 N.D. 146, 299 N.W. 447 (1941).

¹²⁰*McGoldrick v. Berwind-White*, 309 U.S. 33 (1940).

The Florida Supreme Court recently held that a retailer who keeps sales tax collections in his place of business and separates them from other funds is not liable for them in the event of theft;¹²¹ but it expressly declined to predict its conclusion as to theft following commingling of sales tax collections and other monies. With reference to the legal position of the seller as collector the opinion states:¹²²

“The seller is required to collect it from the buyer. The buyer is liable for it. We conclude that it is a tax against the buyer. The seller is coerced to collect the tax and remit. To say that it is a tax on the seller is overcome by the fact that he is required to exact it of the purchaser. The spirit and intent of the law is that the purchaser, and not the seller, shall pay it.”

The Court carefully distinguished the liability of a public officer for public funds stolen from his custody on the ground that he is a “voluntary trustee,” since he is not required to hold public office,¹²³ whereas the retailer is, after all, an involuntary collector for the state.

CONCLUSION

The Florida sales and use tax is quite obviously the result of political compromise, and like the Florida tax structure as a whole, favors by its exemptions the farmer, the citrus grower, the quarry and mine operator, the cattleman, the lumberman, the commercial fisherman, and the individual who eats at home and purchases clothing in small quantities at any one time. Despite the exemption given at one end of the economic scale for most of those items that constitute the chief purchases of the small wage earner, and at the other for Florida’s leading business enterprises other than tourist trade, the Florida sales and use tax is established as a fairly heavy revenue producer¹²⁴ and will almost certainly remain a permanent feature of our tax structure. As

¹²¹Spencer v. Mero, 52 So.2d 679 (Fla. 1951).

¹²²*Id.* at 680.

¹²³*Ibid.*

¹²⁴The importance of this tax is evidenced by the fact that it produced \$23,569,081 in only eight months of application within the fiscal year ending June 30, 1950; see FLORIDA’S TAX STRUCTURE 6 (1950).

part of a revenue program it constitutes assumption by the state of partial responsibility for aiding municipalities in meeting their fiscal obligations, which have become unduly burdensome since 1934 by virtue of constitutional narrowing of the available tax base for those units of government.¹²⁵ The political considerations that prompted the original inclusion of numerous specific exemptions will probably, for a few years at least, remain sufficiently persuasive to block expansion of the tax to the classes specially favored at present.

The aspect of enforcement and accurate reporting of collections by licensed vendors may accordingly be regarded as the feature most in need of legislative study at this time. Some adaptation of the Ohio scheme to the Florida governmental system may recommend itself to the Legislature as a means of closing the doors, at least partially, to opportunities for misappropriation of tax funds collected, and of thereby increasing painlessly the revenue produced by this tax.

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¹²⁵See notes 4, 7 *supra*.