

STORAGE NAME: h0415.rpp
DATE: January 28, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
REAL PROPERTY AND PROBATE
ANALYSIS**

BILL #: HB 415
RELATING TO: The tax on intangible personal property
SPONSOR(S): Representatives Cantens and Argenio
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) FINANCIAL SERVICES YEAS 9 NAYS 0
 - (2) REAL PROPERTY AND PROBATE
 - (3) FINANCE AND TAXATION
 - (4) GENERAL GOVERNMENT APPROPRIATIONS
 - (5)
-

I. SUMMARY:

Florida Law imposes an intangible personal property tax (called "annual tax") on assets that are "owned, managed, or controlled" by a person domiciled in Florida. Thus, for example, if a non-resident hires a Florida company to trade securities (which is intangible personal property), such constitutes "control" over those securities sufficient to require taxation. With regard to trusts, the trustee of a "Florida-situs trust" (trust located in Florida) is responsible for paying any annual tax on intangible personal property in the trust; whereas, a Florida resident with a "beneficial interest" in a trust, the situs (location) of which is outside of Florida, is responsible for paying any applicable annual tax.

This bill removes reference to "Florida-situs trust", and makes trustees exempt from paying the annual tax and from all the requisite filing requirements. With regard to a Florida resident with a "beneficial interest" in a trust, the requirement that the trust situs be outside the state is removed. Accordingly, any Florida resident with a "beneficial interest" in a trust, irrespective of whether the location of the trust is inside or outside of Florida, is responsible for paying any annual tax. This bill further provides that a bank or savings association acting as a fiduciary or agent of a trust, other than as a trustee, is not required to pay annual tax on the trust, and the management or control of the bank or savings association may not be used as a basis for imposing annual tax on any person or on the assets of the trust. This bill also excludes a trust commercially domiciled in the state from the payment of annual tax. As a result of these changes, an intangible personal property tax will not be imposed upon intangible personal property owned by a non-resident simply because the property is managed or controlled by a person domiciled in Florida.

Based on figures released by the Fiscal Impact Conference on December 3, 1999, the medial fiscal impact of this bill is estimated to be a negative (\$21.78 million) for FY 2000-2001 and a negative (\$21.78 million) for FY 2001-2002.

The Committee on Financial Services adopted one amendment which exempts Florida investment advisors from paying the annual tax on accounts owned by non-residents of the state. The estimated fiscal impact of the amendment is an additional \$1.8 million annually. For further information, see Section VI of this analysis.

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Staff of the Committee on Real Property and Probate identified unintended consequences which would result from the existing language in the bill. The sponsor of the bill will be filing an amendment to address these concerns.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|-----------------------------------------|-----------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

"Florida's intangibles tax is unique. While a few states tax intangible assets to some degree, no state has a tax similar to Florida's. Four states have repealed intangible taxation since 1995 -- North Carolina, Georgia, Kentucky, and West Virginia."¹

Chapter 199, F.S., relates to "Intangible Personal Property Taxes." There are two types of intangible personal property tax. One type is the "nonrecurring" intangible personal property tax imposed by Part II of Chapter 199, F.S. That tax is imposed on the value of a note, bond, or other obligation for payment of money which is secured by mortgage, deed of trust, or other lien upon real property.² That tax is not affected by this bill. The other type is generally referred to as the "annual tax" because it is payable annually. In general, the state imposes a tax of 1.5 mills³ annually on any person, regardless of domicile, and every corporation that "owns, controls, or manages intangible personal property which has a taxable situs in this state."⁴ Section 199.023(1) defines "intangible personal property" as

All personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents, including, but not limited to, the following: (a) All stocks or shares of incorporated or unincorporated companies, business trusts, and mutual funds. (b) All notes, bonds, and other obligations for the payment of money. (c) All condominium and cooperative apartment leases of recreation facilities, land leases, and leases of other commonly used facilities. (d) Except for any leasehold or other possessory interest described in s. 4(a), Art. VII of the State Constitution or s. 196.199(7), all leasehold or other possessory interests in real property owned by the United States, the state, any political subdivision of the state, any municipality of the state, or any agency, authority, and other public body corporate of the state, which are underdeveloped or predominantly used for residential or commercial purposes and upon which rental payments are due.

The taxable situs of intangible personal property is defined at s. 199.175, F.S. In general,

¹Final Report of the Florida Intangibles Tax Task Force, March 1998, at www.floridatwatch.org/ITREP.htm.

²Section 199.133(1), F.S.

³Section 199.032, F.S. The rate was reduced in last year's session from 2.0 mills by Chapter 99-242, L.O.F.

⁴Section 199.052(1), F.S.

Intangible personal property shall have a taxable situs in this state when it is owned, managed, or controlled by any person domiciled in this state on January 1 of the tax year. Such intangibles shall be subject to annual taxation under this chapter, unless the person who owns, manages, or controls them is specifically exempt or unless the property is specifically exempt. This provision shall apply regardless of where the evidence of the intangible property is kept; where the intangible is created, approved, or paid; or where business may be conducted from which the intangible arises. The fact that a Florida corporation owns the stock of an out-of-state corporation and manages and controls such corporation from a location in this state shall not operate to give a taxable situs in this state to the intangibles owned by the out-of-state corporation, which intangibles arise out of business transacted outside this state.

(a) For the purposes of this chapter, "any person domiciled in this state" means:

1. Any natural person who is a legal resident of this state;
2. Any bank or financial institution, business, business trust as described in chapter 609, company, corporation, insurance company, partnership, or other artificial entity organized or created under the law of this state, except a trust;⁵ or
3. Any person, including a trust, who has established a commercial domicile in this state.

A Florida resident is required to pay the intangible personal property tax regardless of where the resident's asset manager is physically located. Additionally, if a non-resident hires a Florida asset manager to manage the account (i.e., to trade securities), that discretion constitutes "control" over the assets sufficient to require Florida taxation on the assets, according to the Department of Revenue. It is believed that non-residents may be less likely to seek the services of a Florida asset manager if to do so triggers a tax consequence not imposed in other states.

For instance, Bank A, a Florida institution, operates as a trustee for a trust whose beneficiaries live in Florida, Georgia, and Alabama. Bank A pays the intangible personal property tax on the assets of the trust to the Department of Revenue as part of its trust management, and charges a fee against the trust for this service. Bank B, an Alabama institution, operates as a trustee for a trust in that state, with beneficiaries in Florida, Alabama, and Georgia. Bank B pays no intangible personal property tax on the assets of the trust, however, the Florida beneficiary must pay intangible tax on his or her beneficial interest in the foreign trust.

As to trusts, s. 199.052(5), F.S., provides that the trustee of a Florida-situs trust is primarily responsible for returning the trust's intangible personal property and paying the annual tax on it. The section further provides that a trust has a Florida situs when all trustees are residents of the state; there are three or more trustees sharing equally in the ownership, management, or control of the trust's intangible property, and the majority of the trustees are residents of this state; or trustees consist of both residents and nonresidents and management or control of the trust is with a resident trustee. When trustees consist of both residents and nonresidents and management or control is with a nonresident trustee, the trust does not have Florida situs and no return is necessary by any resident trustee. A portion of the trust has Florida situs when there are two trustees, one a resident of this state and one a nonresident, and they share equally in the ownership, management, or control of the trust's intangible property. The tax on such property shall be based on the value apportioned between them. If there is more than one trustee in the state, only one tax return for the trust must be filed. The trust's beneficiaries, however, may individually

⁵ As of July 1, 2000, this subparagraph will read: "Any business, business trust as described in chapter 609, company, corporation, partnership, or other artificial entity organized or created under the law of this state, except a trust; or".

return their equitable shares of the trust's intangible personal property and pay the tax on such shares, in which case the trustee need not return such property or pay such tax, although the Department of Revenue may require the trustee to file an informational return.

Section 199.052(9), F.S., provides that, where an agent has control or management of intangible personal property, the principal is primarily responsible for returning such property and paying the annual tax on it, but the agent shall return such property on behalf of the principal and pay the annual tax on it if the principal fails to do so. Although the section does not specifically state that a trustee of a trust is an agent, the general law of agency holds that a trustee is an agent of the principal.

Section 199.052(15), F.S., provides that if a bank or savings association acts as a fiduciary or agent of a trust other than as a trustee, intangible personal property of the trust shall not have taxable situs in this state pursuant to s. 199.175, F.S., solely by virtue of the management or control of the bank or savings association.

Section 199.183, F.S., provides that certain taxpayers are exempt from the annual intangible personal property tax.

Section 199.023, F.S., is the definition section of the Chapter. Section 199.023(7), F.S., provides that a "resident has a 'beneficial interest' in a foreign trust if the resident has a vested interest, even if subject to divestment, which includes at least a current right to income and either a power to revoke the trust or a general power of appointment, as defined in 26 U.S.C. s. 2041(b)(1)." A "general power of appointment" is defined by 26 U.S.C. § 2041(b)(1) as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment."⁶

Chapter 658, F.S., relates to "Banks and Trust Companies." "Trust business" is defined therein as the business of acting as a fiduciary.⁷ Section 658.12(8), F.S., defines fiduciary as meaning a trustee, committee, guardian, custodian, conservator, or other personal representative of a person, property, or estate; registrar or transfer agent for evidences of indebtedness, and stocks and bonds; fiscal or financial agent; investment adviser; trustee in bankruptcy; assignee for creditors; or holder of any other position of trust. Commercial

⁶There are other limited situations that are not considered a general power of appointment: A power of appointment created on or before October 21, 1942, which is exercisable by the decedent only in conjunction with another person shall not be deemed a general power of appointment; or in the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person - (i) If the power is not exercisable by the decedent except in conjunction with the creator of the power - such power shall not be deemed a general power of appointment. (ii) If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent - such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power. (iii) If (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person - such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable. For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

⁷Section 658.12(20), F.S.

trust operations have long been regarded as a key service provided by financial institutions and, according to representatives in the financial services industry, trusts have grown in popularity as an estate planning vehicle.

C. EFFECT OF PROPOSED CHANGES:

This bill removes reference to "Florida-situs trust", and makes trustees exempt from paying intangible personal property tax and from all the requisite filing requirements. With regard to a Florida resident with a "beneficial interest" in a trust, the requirement that the trust situs (location) be outside the state is removed. Accordingly, any Florida resident with a "beneficial interest" in a trust, irrespective of whether the location of the trust is inside or outside of Florida, is responsible for paying any annual tax. Furthermore, as a result of these changes, an intangible personal property tax will not be imposed upon intangible personal property owned by a non-resident simply because the property is managed or controlled by a person domiciled in Florida.

This bill further provides that banks or savings associations acting as a fiduciary or agent of a trust, other than as a trustee, are not required to pay annual tax on the trust, and the management or control of the bank or savings association may not be used as a basis for imposing annual tax on any person or on the assets of the trust. An agent, *other than a trustee*, who manages or controls intangible personal property will still be required to pay the annual tax out of the trust if the principal fails to do so.

This bill also excludes a trust commercially domiciled in the state from the payment of annual intangible personal property tax.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 199.023, F.S., to redefine "beneficial interest" so that the definition would apply to a *person* (as opposed to a resident) with a vested interest in any trust rather than just a foreign (out-of-state) trust.

Section 2. Amends s. 199.052, F.S., to exempt a trustee from paying annual tax on trust property, and providing that if a bank or savings association acts as a fiduciary or agent of a trust other than as a trustee, the bank or saving association is not responsible for paying any annual tax on the trust's intangible personal property and the management or control of the bank or savings association may not be used as the basis for imposing any annual tax on any person or any assets of the trust; and to remove language that requires a Florida resident with a beneficial interest in a trust to pay the annual tax on the trust only if it is a "foreign-situs" trust, thus making the beneficiary responsible for payment irrespective of whether the trust is a "foreign-situs" trust or a "Florida-situs" trust.

Section 3. Amends s. 199.175, F.S., to exclude a trust commercially domiciled in the state from the payment of annual intangible personal property tax.

Section 4. Amends s. 199.183, F.S., to provide that intangible personal property owned, managed, or controlled by a trustee of a trust is exempt from the annual tax; except that a person who owns, manages, or controls intangible personal property for a trustee, or a Florida resident with a beneficial interest in a trust,

is not exempt from payment of the tax. This section has unintended consequences. The sponsor will file an amendment to address these concerns.

Section 5. Provides an effective date of July 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

<u>Intangible Tax on Trusts</u>	<u>FY 2000-01</u>	<u>FY 2001-02</u>
General Revenue	(\$13.57m)	(\$13.57m)
<u>Local</u>	<u>(\$ 8.21m)</u>	<u>(\$ 8.21m)</u>
Total	(\$21.78m)	(\$21.78m)

2. Expenditures:

none

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See, Part III.A.1., above.

2. Expenditures:

none

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The direct economic impact on the private sector would be that certain intangible assets would be exempt from the intangible personal property tax. It is believed that financial services industries may receive an indirect economic benefit if they can capture more trust business because the trust properties are no longer subject to the annual intangible personal property tax. In addition, by exempting trustees from paying intangible tax, beneficiaries may see a decrease in trustee fees since that duty is no longer required of the a trustee.

D. FISCAL COMMENTS:

none

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill will not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill will not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

none

B. RULE-MAKING AUTHORITY:

none

C. OTHER COMMENTS:

The Florida Intangibles Tax Task Force, of Florida TaxWatch, has recommended amending the intangible tax law so that simply managing other people's money is not a basis for imposing a tax.⁸ "The taxation of the management of assets owned by non-residents of Florida, puts Florida businesses, such as commercial trust and investment advisement companies, at a competitive disadvantage."⁹ The Second Florida Intangibles Tax Task Force recommends that Florida exempt from intangible tax "any trust administered by any Florida-domiciled fiduciary," and that "the exercise of discretion over intangible assets owned by a non-resident of Florida should not be subject those assets to the tax."¹⁰

According to representatives of the Florida Banker's Association, this bill is an economic development bill with the focus of increasing trust business in the state. For instance, a trust with \$10 million worth of intangible property incurs a \$20,000 intangible tax liability annually if the situs of the trust is Florida. Consequently, a multi-state bank with branches in Florida will advise a client to place their trust in a state which does not have an intangible

⁸Final Report of the Florida Intangibles Tax Task Force, March 1998, at www.floridatwatch.org/ITREP.htm.

⁹Id.

¹⁰Improving Florida's Competitive Position by Eliminating the Intangible Personal Property Tax, March 1999, at www.floridatwatch.org/ittf2.html.

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personal property tax. This bill, according to the banking industry, hopes to reverse that practice.¹¹

This bill is similar to SB 192, by Senator Horne.

There is a concern that the intangible tax is administered on an annual basis but the effective date of this bill is July 1, 2000.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 18, 2000, the Committee on Financial Services adopted one amendment offered by Representative C. Green. The amendment exempts Florida investment advisors from paying the annual tax on accounts owned by non-residents of the state. Florida beneficiaries must still pay the tax. The estimated fiscal impact of the amendment is a decrease in revenue of \$1.8 million annually.

VII. SIGNATURES:

COMMITTEE ON FINANCIAL SERVICES:

Prepared by:

Michael A. Kliner

Staff Director:

Susan F. Cutchins

AS REVISED BY THE COMMITTEE ON REAL PROPERTY AND PROBATE:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

J. Marleen Ahearn, Ph.D, J.D.

¹¹Telephone conference with Anthony DeMarco of the Florida Bankers Association, December 16, 1999.