IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE,
an agency of the State of Florida,
and GERALD A. LEWIS, Comptroller
of the State of Florida,

Appellants,

vs.

FIRST UNION NATIONAL BANK OF
FLORIDA, a national bank, and
FIRST UNION CORPORATION OF
FLORIDA, a bank holding
company,

Appellees.

CASE NO. 70,186

(Appeal from the First
District Court of Appeal
Case No. BK-432)

ANSWER BRIEF OF APPELLEES

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CORPORATION OF FLORIDA

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ANSWER BRIEF OF APPELLEES

PRELIMINARY STATEMENT

In this case the District Court of Appeal, First District, correctly held that Part VII of Chapter 220, Florida Statutes, though legislatively labeled a "franchise" tax, was in law and fact an income tax and was, therefore, invalid under 31 U.S.C. §3124 to the extent it included, and taxed, interest on federal instrumentalities. First Union Nat. Bank, et al. v. Fla. Dept. of Revenue, et al., 502 So.2d 964 (Fla. 1st DCA 1987) (A 1-5).

In this brief appellants and appellees will be referred to by those respective terms. Appellees submit no separate appendix and will refer to appellants' appendix by the reference "A" and appropriate page number or numbers. Appellees will refer herein to the record on appeal as prepared and used in district court proceedings, and will use the reference "R" and appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Appellees do not disagree with that portion of appellants' statement of the case and facts appearing at pages 1-3 of Initial Brief of Appellants, except that appellees submit that said statement is not adequate and must, therefore, be supplemented as set forth below.

As to that portion of appellants' statement appearing at pages 4-5 of Initial Brief of Appellants, it is respectfully submitted that said statement goes well beyond the record in this action in alleged quantification and generalization regarding arrangements with non-party banks and potential fiscal impact. It is further respectfully submitted that allegations of potential fiscal impact, while relevant to an earlier motion for "pass through" certification, are wholly irrelevant and improperly included as to the pending issue of validity, under federal law and the Supremacy Clause, of the tax at issue.

Appellees submit the following supplement to the statement of appellants. From a pleading and procedural standpoint, this is an uncomplicated case with a district court record on appeal of only 114 pages, excluding case copies placed in the record by appellants (R 106-287).

On September 14, 1984, appellees filed a Complaint for Declaratory Judgment, Refund of Taxes, and Other Relief (R 1-13). After several initial amendments to pleadings, the matter went forward on appellees' Second Amended Complaint (R 39-54) and appellants' answer thereto (R 55-60). At issue was appellees' entitlement to refund for 1981, 1982, 1983 and 1984 taxes.

After discovery proceedings not relevant to the issues in this appeal, appellees filed a Motion for Partial Summary Judgment Based Upon Patent Invalidity of Tax (R 62-83). Appellants filed their response (R 84-102) accompanied by two affidavits (R 103-105) and copies of case authorities cited by appellants (R 106-287).

By this action, appellees challenged the validity of Part VII of Chapter 220, Florida Statutes, which purports to impose a "franchise tax measured by net income" on banks. Chapter 220, Florida Statutes, is the "Florida Income Tax Code" (§§220.01, *et seq.*) and Part VII thereof is entitled "Special Rules Relating to Taxation of Banks and Savings Associations."

Appellees challenged the validity of Part VII to the extent that it imposes a tax on net income of banks without deduction for interest income earned on stocks and obligations of the United States government. Appellees' challenge was based upon 31 U.S.C. §3124 (formerly 31 U.S.C. §742), which provides in pertinent part:

> §3124. Exemption from taxation
>
> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except --
>
> (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax.

By Motion for Partial Summary Judgment, appellees urged that:

1. The tax imposed on earnings by Part VII of Chapter 220, Florida Statutes, requires the interest on United States government obligations to be considered, and included, in computing the tax and is, therefore, prohibited by subsection (a) of 31 U.S.C. §3124;

2. The tax imposed on earnings by Part VII of Chapter 220, Florida Statutes, is in law and fact an income tax rather than a franchise tax and, therefore, is not authorized by the exception of subsection (a)(1) of 31 U.S.C. §3124; and

3. The tax imposed on earnings by Part VII of Chapter 220, Florida Statutes, is not nondiscriminatory but in law and fact discriminates through tax credits in favor of certain in-state forms of investment, and discriminates through tax exemptions in favor of certain state and local government bonds and, therefore, is not authorized by the exception of subsection (a)(1) of 31 U.S.C. §3124.

Appellants, the Florida Department of Revenue and Gerald A. Lewis, Comptroller of the State of Florida, did not deny or challenge that Part VII of Chapter 220, Florida Statutes, requires that interest on obligations of the United States government be considered, and included, in computing the tax.

Appellants, however, denied that the subject tax is an income tax and asserted that it is, rather, a "franchise tax measured by net income" (R 56-57; R 59) (paragraphs 10-14 and 26, defendants' Answer to Second Amended Complaint). Appellants

also denied that the subject tax is discriminatory and asserted that it is nondiscriminatory (R 58) (paragraph 18, defendants' Answer to Second Amended Complaint).

For purposes of the Motion for Partial Summary Judgment then, the only issues before the trial court were:

1. Whether the tax imposed on appellees by Part VII of Chapter 220, Florida Statutes, constitutes an income tax rather than a franchise tax; and

2. Whether said tax, through authorized Florida tax credits or exemptions, discriminates against investment in United States government obligations and in favor of investment in state or local projects or obligations.

Both issues before the trial court were clearly issues of law, subject to consideration and determination on motion for summary judgment. Upon affirmative answer to either issue, the tax imposed by Part VII of Chapter 220 was required to be held violative of 31 U.S.C. §3124, and invalid, to the extent that it requires interest on United States government obligations to be considered, and included, in computing the tax.

Chapter 220, Florida Statutes, is the "Florida Income Tax Code," and Part VII of that chapter is entitled "Special Rules Relating to Taxation of Banks and Savings Associations." In Part VII, Section 220.63, Florida Statutes, provides in pertinent part:

> **220.63 Franchise tax imposed on banks and savings associations.** ---
>
> (1) A franchise tax measured by net income is hereby imposed on every bank and savings association

> for each taxable year commencing on or after January 1, 1973, and for each taxable year which begins before and ends after January 1, 1973. The franchise tax base of any bank for a taxable year which begins before and ends after January 1, 1972, shall be prorated in the manner prescribed for the proration of net income under s. 220.12(2).
>
> (2) The tax imposed by this section shall be an amount equal to 5 percent of the franchise tax base of the bank or savings association for the taxable year.
>
> (3) For purposes of this part, the franchise tax base shall be adjusted federal income, as defined in s. 220.13, less the deduction allowed in subsection (5) and less $5,000.
>
> (Emphasis supplied.)

Section 220.13, Florida Statutes, which is adopted by reference in above-quoted Section 220.63, Florida Statutes, includes within "adjusted federal income" interest income earned on United States government bonds and obligations.

The trial court ruled in favor of appellants and held, as a matter of law, that Part VII of Chapter 220 constituted a franchise tax rather than an income tax, and did not, by exemptions or credits, discriminate against investment in federal stocks or obligations (R 288-292; A 6-10). By reason of said holdings, the trial court further held that Part VII of Chapter 220 did not violate 31 U.S.C. §3124, but was authorized by subsection (a)(1) of said law (R 291; A 9).

On timely appeal by appellees, the District Court of Appeal, First District, reversed. First Union Nat. Bank, et al. v. Fla. Dept. of Revenue, et al., 502 So.2d 964 (Fla. 1st DCA 1987) (A 1-5). The district court held that the tax at issue, though labeled a "franchise" tax, was an income tax and, therefore,

invalid under 31 U.S.C. §3124 to the extent it included, and taxed, interest earned on stocks and obligations of the United States government (A 1-5).

Having so held, the district court noted that it need not, and did not, reach or address the issue of whether Part VII of Chapter 220, Florida Statutes, was discriminatory and, therefore, invalid under 31 U.S.C. §3124 on this ground as well (A 3). The district court, upon reversal, remanded to the trial court for further proceedings to determine the amount of refund to which appellees are entitled (A 5).

Appellants thereafter did not file any motion for rehearing in the district court proceedings, but timely instituted these proceedings for review.

SUMMARY OF ARGUMENT

The tax imposed by Part VII, Chapter 220, Florida Statutes, is clearly an income tax rather than a franchise tax. As such, the Florida tax is invalid under 31 U.S.C. §3124 to the extent it includes and taxes interest on United States stocks and obligations. The district court properly so held.

The Florida tax is laid directly upon, and calculated as a percentage of, adjusted federal income of the bank, including federal interest earnings, as they are earned. §220.63, Fla. Stat. In 1959 31 U.S.C. §3124 was amended, with one of the specific purposes of the amendment being to make clear that an income tax (whether described as "on" or "measured by" income) was thereby prohibited. American Bank & Trust Company v. Dallas County, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072 (1983).

It is clear that mere legislative labeling or terminology does not determine the nature of a tax, or save a tax which is otherwise prohibited. Owens v. Fosdick, 153 Fla. 17, 13 So.2d 700 (1943). The trial court erred in holding the subject tax to be a valid "franchise" tax, and the district court correctly reversed and recognized the tax to be an income tax.

If the instant tax, on and measured by income, is not an income tax, then the 1971 amendment to the Florida Constitution, Article VII, Section 5, authorizing a corporate income tax was a total waste of effort. The legislature could have simply imposed a corporate income tax and labeled it a "franchise tax measured by net income."

Indeed, if the subject tax is not by nature an income tax, then the legislature can circumvent the Florida constitutional proscription against a personal income tax by simply imposing such an income tax on any personal business or profession and calling it a franchise or excise tax.

The present Florida "franchise" tax on banks is indistinguishable from the Florida corporate income tax, except by label. The trial court clearly misunderstood and misapplied Educational Films Corp. v. Ward, 350 U.S. 492, 76 S.Ct. 170, 75 L.Ed. 400 (1931), in citing that decision as authority.

In fact and law, Educational Films Corp. v. Ward, supra, recognizes and holds that a tax measured by income is a franchise tax only if the tax is imposed for the privilege of doing business during a second year but is measured by income for the preceding tax year. See 75 L.Ed. 404-405. It is this characteristic that distinguishes a franchise tax, measured by income, from an income tax. The tax imposed by Part VII, Chapter 220, does not possess this quality. It is imposed upon, and measured by, income earned during the taxable year. §220.63, Fla. Stat. It is, therefore, an income tax prohibited by 31 U.S.C. §3124, as the district court properly recognized and held.

The trial court also erred in holding that the tax in question did not discriminate against interest earned on federal obligations. In this respect, the trial court held in pertinent part:

> Language routinely employed by the Legislature in granting exemption from taxation for state and local debt obligations specifically states that the exemption 'shall not be applicable to any tax imposed by Ch. 220.' The tax on banks and savings associations imposed

> by Part VII, Ch. 220 is inescapably a tax imposed by Ch. 220 and thus the exemption does not apply. Interest earned on all state and local debt obligations must be included in the tax base. The Florida tax is nondiscriminatory and does not violate 31 U.S.C. §3124.

(R 291; A 9)

This holding was clear error, and constituted fundamental misunderstanding by the trial court. The language routinely employed by the legislature is that exemption for state and local obligations "shall not be applicable to any tax imposed by Chapter 220 on interest, income or profits on debt obligations owned by corporations" (emphasis supplied). *See* §§159.15, 159.31, 159.50, 159.621, 159.708, 215.76, 240.497, 423.03, 243.33, 315.11, 348.65, 348.762, 348.96, 349.13, 403.1834, Fla. Stat.

The trial court omitted the important latter part of the "routine" exemption language, which latter part establishes that the exemption is removed *only* for taxes *on* income, *not* for taxes purportedly only "measured by" income. Thus, the exemptions for state and local obligations are *not* removed from the tax imposed by Part VII unless it is a tax "on" income, in which event it is a prohibited income tax. Neither appellants, nor the trial court, can have it both ways. For these, and other reasons, the trial court erred.

The district court found it unnecessary to reach this second issue, the discriminatory aspect of Part VII, Chapter 220, because the nature of the tax as an income tax rendered it invalid under 31 U.S.C. §3124. A like decision, and affirmance of the district court, is called for herein. If, however, this Court reaches

this secondary issue, then the inherent discrimination of Part VII, Chapter 220, against investment in federal obligations provides an alternative basis for affirmance of the decision of the district court.

The decision of the district court is, therefore, entirely correct and must be affirmed.

ARGUMENT

ISSUE I

THE DISTRICT COURT CORRECTLY HELD THAT THE TAX IMPOSED ON BANKS BY PART VII, CHAPTER 220, FLORIDA STATUTES, IS AN INCOME TAX RATHER THAN A FRANCHISE TAX AND, THEREFORE, VIOLATES 31 U.S.C. §3124.

It is clear, as the district court held, that the tax imposed by Part VII of Chapter 220, Florida Statutes, is an income tax. As such, the Florida tax is prohibited by 31 U.S.C. §3124.

It is first appropriate to consider the history of Part VII of Chapter 220, Florida Statutes. Prior to November 2, 1971, the Florida Constitution, in Article VII, Section 5, prohibited the imposition of either corporate or personal income tax in Florida.

The courts of Florida had held that the proscription against income taxes could not be circumvented by artful legislative terminology or indirection. In Owens v. Fosdick, 153 Fla. 17, 13 So.2d 700 (1943), the Court held in pertinent part at page 703:

> The people of the State of Florida have declared that there shall be no tax on incomes levied by the State, or under its authority. Const.Fla. Art. IX, Sec. 11. This section is a definite positive proscription against such taxation by the Legislature. It operates as a limitation upon the power to tax all real and personal property owned by citizens and residents of the State, which otherwise is recognized under Section 1 of Article IX of the Constitution. If in its practical application, therefore, a tax falls upon that which is prohibited by this section of the Constitution of the State it can not be upheld, no matter in what terminology the taxing statute is couched, or what the Legislature has declared the tax to be. To be guided by any other view is to concede that what may not be done directly because of constitutional restrictions, may be done indirectly by legislative

> means accomplishing the same result, the Constitution notwithstanding. Fairbank v. United States, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862. Constitutional prohibitions may not thus be so lightly evaded or circumvented. Their mandates are imperative, and they must be so construed as to give full force and effect to their manifest purpose. City of Jacksonville v. Continental Can Company, 113 Fla. 168, 151 So. 488.

(Emphasis supplied.)

The foregoing decision of the Supreme Court of Florida made clear that neither legislative label, nor indirect legislative means, would serve to change the inherent nature of an income tax, nor save it from recognition as a prohibited form of tax. See also, Mahan v. Lummus, 160 Fla. 505, 35 So.2d 725 (1948); State ex rel. McKay v. Keller, 140 Fla. 346, 191 So. 542 (1939).

The income tax prohibition was carried forward as Article VII Section 5, of the 1968 Florida Constitution. In early 1971, at the request of then-Governor Askew for advice, the Florida Supreme Court made clear that the constitutional proscription extended to an income tax on artificial "persons" or entities, including corporations. In Re Advisory Opinion to the Governor, 243 So.2d 573 (Fla. 1971).

Thereafter, a proposed constitutional amendment was submitted to the electors of Florida, and was approved at the general election of November 2, 1971. As thus amended, Article VII, Section 5, of the Florida Constitution provided in pertinent part:

> **§5. Estate, inheritance and income taxes**
>
> **(a) Natural Persons.** No tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, in excess

of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.

(b) Others. No tax upon the income of residents and citizens other than natural persons shall be levied by the state, or under its authority, in excess of 5% of net income, as defined by law, or at such greater rate as is authorized by a three-fifths (3/5) vote of the membership of each house of the legislature or as will provide for the state the maximum amount which may be allowed to be credited against income taxes levied by the United States and other states. There shall be exempt from taxation not less than five thousand dollars ($5,000) of the excess of net income subject to tax over the maximum amount allowed to be credited against income taxes levied by the United States and other states.

Thus, the prohibition upon an income tax on the income of natural persons was retained, but a tax upon the income of corporations was authorized, with limitations.

Given this new taxing authority, the Florida Legislature did not tarry. It promptly enacted Chapter 71-984, Laws of Florida, which appearing as Chapter 220, Florida Statutes, was the Florida Income Tax Code.

As originally enacted, Chapter 71-984, Laws of Florida, provided in pertinent part that:

There shall be subtracted from such taxable income all amounts included therein which are derived from stocks, bonds, Treasury notes, and other obligations of the United States.

As will be readily seen, this provision would have kept the Florida Income Tax Code in full compliance with 31 U.S.C. §3124 (then 31 U.S.C. §742) by exempting from the Florida income tax interest earned on United States stocks and obligations.

In 1972, however, the Florida Legislature enacted Chapter 72-278, Laws of Florida, and in so doing, struck the foregoing

express exemption of income derived from United States obligations, and added Part VII of Chapter 220, Florida Statutes, purporting to impose a "franchise tax measured by net income" (§220.63, Florida Statutes, 1972 Supp.) on banks.

Section 220.63, Florida Statutes (1983), provides as follows, in pertinent part:

> **220.63 Franchise tax imposed on banks and savings associations.** ---
>
> (1) A franchise tax measured by net income is hereby imposed on every bank and savings association for each taxable year commencing on or after January 1, 1973, and for each taxable year which begins before and ends after January 1, 1973. The franchise tax base of any bank for a taxable year which begins before and ends after January 1, 1972, shall be prorated in the manner prescribed for the proration of net income under s. 220.12(2).
>
> (2) The tax imposed by this section shall be an amount equal to 5 percent of the franchise tax base of the bank or savings association for the taxable year.
>
> (3) For purposes of this part, the franchise tax base shall be adjusted federal income, as defined in s. 220.13, less the deduction allowed in subsection (5) and less $5,000.

Section 220.13, Florida Statutes, which is adopted by reference in above-quoted Section 220.63, Florida Statues, includes within "adjusted federal income" interest income earned on United States government bonds and obligations.

Thus, interest on stocks and obligations of the United States Government are considered and included in the bank's "franchise tax base" and a 5% per year tax (subsequently increased to 5 1/2%) is imposed on the tax base, including interest earnings on United States government obligations.

In evaluating the nature of the tax imposed by Part VII of Chapter 220, Florida Statutes, a number of factors are relevant. First, it is pertinent that Part VII of Chapter 220, Florida Statutes, is a part of the Florida Income Tax Code. Section 220.01, Florida Statutes, expressly provides "this chapter shall be known and may be cited as the 'Florida Income Tax Code.'" Part VII (§§220.62, *et seq.*) is clearly a part of the "chapter," and of the Florida Income Tax Code.

The tax imposed on banks under Part VII is labeled in Section 220.63(1), Florida Statutes, as a "franchise tax measured by net income" and is stated in Section 220.65, Florida Statutes, to be "in lieu of" the tax imposed by Part II, or the Florida income tax.

In fact and law, as the Court will see, the alleged "franchise" tax imposed by Part VII of Chapter 220 is legally indistinguishable (except for certain discriminatory exemptions treated hereinafter) from the Florida income tax.

The "franchise" tax is calculated and imposed in the same manner, and at the same rate, as the "income" tax. The income tax is imposed upon a corporation's "adjusted federal income" as defined in Section 220.13, Florida Statutes. The "franchise tax" under Part VII is, likewise, imposed upon the bank's "adjusted federal income" for, by definition under Section 220.63, Florida Statutes, the bank's "franchise tax base" *is* "adjusted federal income" as defined in Section 220.13, Florida Statutes.

Effectively, the alleged "franchise tax" is nothing other than a mislabeled income tax. It is clear under the principles

announced in <u>Owens v. Fosdick</u>, 153 Fla. 17, 13 So.2d 700 (1943), and other Florida decisions that legislative labeling does not change the nature of the law.

Before turning to federal authorities, it is pertinent to consider two questions as an aid to determining the nature of the alleged "franchise" tax imposed by Part VII of Chapter 220, Florida Statutes.

The first question is simply put. Could a "franchise" tax measured by net income, such as that imposed by Part VII, have withstood Florida constitutional scrutiny if Article VII, Section 5, of the Florida Constitution had not been amended to authorize the corporate income tax? The answer is obvious and clear! Absent amendment of the Florida Constitution, the tax imposed by Part VII would have been forthwith stricken as violative of the Florida constitutional proscription of state income tax. It is an income tax, pure and simple.

It is also pertinent to observe that Governor Askew, the Florida Legislature, and the electors of Florida went to a great deal of unnecessary trouble enacting the 1971 amendment to Article VII, Section 5, if the tax imposed by Part VII of Chapter 220 is a "franchise" tax and not an "income" tax. The legislature could have simply circumvented the income tax prohibition of the Florida Constitution by enacting an identical "franchise tax measured by net income" on all corporations. It is respectfully submitted that such an enactment would have survived only until first judicial review, at which time it would have been stricken as a prohibited income tax.

The second helpful question is even more pertinent. As the Court is aware, Article VII, Section 5, of the Florida Constitution continues to prohibit a Florida income tax on natural persons. If the tax imposed by Part VII of Chapter 220 is not an "income tax," but only a "franchise tax measured by net income," then could the legislature circumvent the constitutional prohibition against a personal income tax by imposing on natural persons engaged in any business or profession a "franchise tax measured by net income"? Could such a label and device be used to constitutionally impose a 5% "franchise" tax on the personal net income of the farmer, or oyster boat owner, or accountant?

The answer to the questions posed above is dictated by the nature of the tax before the Court. The tax is, by its characteristics and nature, an income tax. Because it is an <u>income</u> tax, it could not have been imposed on corporations prior to amendment of Article VII, Section 5, and could not now be imposed on natural persons. By like measure, because it is an <u>income</u> tax, it is <u>not</u> a franchise tax authorized by subsection (a)(1) of 31 U.S.C. §3124.

Federal authorities make it equally clear that the tax in question is an income tax which is prohibited by 31 U.S.C. §3124. In 1959 the federal statute was amended to add the second full sentence, which provides:

> The exemption [from state taxation] applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except --

(1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; . . .

(Bracketed information added.)

The legislative history and intent of this revision have not gone without comment. In American Bank and Trust Company v. Dallas County, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072 (1983), the court held that a state property tax on bank shares, without deduction for tax-exempt United States obligations, was invalid as violative of 31 U.S.C. §3124. In so holding, the court explained the history, purpose and operation of the aforementioned amendment as follows:

> The catalyst for the amendment was an Idaho tax 'upon every individual . . . which shall be according to and measured by his net income.' See Idaho Code §63-3011 (1948). Despite this Court's holding that §3701 precluded direct state taxation of the interest on federal obligations, as well as taxation of the underlying obligations, see New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 US, at 675-676, 94 L Ed 439, 70 S Ct 413, Idaho's position was that its tax need not exempt the interest received on federal obligations, because it was imposed on the individual and was merely measured by his net income, rather than being imposed on the income itself. See Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before the House Committee on Ways and Means, 86th Cong, 1st Sess, 69-70 (1959) (supplemental statement of Secretary of the Treasury Anderson) (Hearings). In presenting the 1959 amendment to Congress, the Secretary described Idaho's position as 'resting upon a distinction of words which is without substance.' Id., at 71. Similar accusations had been leveled at this Court's analogous distinctions between shares taxes and franchise taxes on the one hand, and taxes on corporate assets on the other. (Footnote omitted.)
>
> Respondents suggest, however, that the 1959 amendment was intended only to make clear that income taxes like Idaho's, on interest from federal obligations, were unlawful. Congress, according to respondents, did not mean to set aside this Court's well established distinction between taxes on assets and taxes on shares.

We, however, have found no evidence whatsoever in the legislative history to suggest that Congress considered shares taxes to fall outside the scope of the prohibition. The fact that the 1959 legislative history refers to the Idaho tax, but not specifically to bank shares taxes, does not raise a 'negative inference' limiting the amendment to this specific problem. Newport News Shipbuilding & Dry Dock Co. v. EEOC, ____ US ____, 77 L Ed 2d ____, 103 S Ct ____ (1983). The amendment plainly did more than make clear that the interest on federal obligations was tax exempt. Idaho relied on the formal distinction between a tax on an individual, measured by his net income, and a tax on the income itself. See Hearings, at 70. To answer this argument, the amendment abolished the formalistic inquiry whether the tax is on a distinct interest, and replaced it with the inquiry whether 'computation of the tax' requires consideration of federal obligations.

Nor can the 1959 amendment be read to apply only to income taxes; it reaches '**every** form of tax . . .'

(Emphasis supplied.) 77 L.Ed.2d 1081-1082.

Appellants have cited American Bank and Trust Co. v. Dallas County, supra, 77 L.Ed.2d 1072, at pages 18-19 of their brief. In so doing, however, appellants have failed to note that the state tax at issue in that case was held invalid as violative of 31 U.S.C. §742, even though labeled a "franchise" tax. Appellants have also failed to note the specific pronouncement of the United States Supreme Court, quoted above, that one of the specific purposes of the 1959 amendment to 31 U.S.C. §3124 was to abolish the formalistic "measured by" inquiry or ploy championed by appellants and "make clear that . . . income taxes . . . on interest from federal obligations, were unlawful." Id. at 1081-1082.

More recently, in First Nat. Bank v. Bartow County Board of Tax Assessors, 470 U.S. ____, 106 S.Ct. ____, 84 L.Ed.2d

535 (1985), the United States Supreme Court again considered this subject, stating in pertinent part:

> We noted in American Bank, 463 US, at ____, 77 L Ed 2d 1072, 103 S Ct 3369, that the catalyst for the amendment was an Idaho tax imposed upon an individual 'according to and measured by his net income.' See Idaho Code §63-3011 (1948). Even though this Court had ruled that §3701 precluded the States from taxing interest on federal obligations, Idaho took the position that it need not exempt the interest received on federal obligations from the 'gross income' from which taxable net income was derived. Noting Idaho's stance, the Senate and House Reports on the 1959 addition stated: 'The bill . . . makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax.' S Rep No. 909, 86th Cong 1st Sess 8 (1959); HR Rep No. 1148, 86th Cong 1st Sess 8 (1959). The discussion of the addition in the ensuing hearings confirms that Congress intended to abolish the formalistic distinction between taxes on income and taxes **measured by** income that underlay Idaho's arguments. See Public Debt Ceiling and Interest Rate Ceiling on Bonds. Hearings Before the House Committee on Ways and Means, 86th Cong, 1st Sess, 69-72 (1959) (supplemental statement of Secretary of the Treasury Robert B. Anderson). Appellant points to nothing in the legislative history indicating that Congress understood the addition actually to broaden the scope of the exemption, as well as to clarify the forms of taxes to which the exemption applied.
>
> (Emphasis supplied.) 84 L.Ed.2d 544

From the foregoing it is respectfully submitted that 31 U.S.C. §3124 is intended to, and was amended in part for the purpose of, prohibiting any state income tax to be imposed on earnings from United States government obligations. The United States Supreme Court has so observed and, in so doing, has specifically held that neither formalistic labels nor the old "measured by" distinction will save a prohibited tax.

Just as the "franchise" label would not save a prohibited income tax under the Florida Constitution, the "franchise" label will not save a prohibited income tax under 31 U.S.C. §3124. Appellants, and even the trial court, have noted that there is a long recognized distinction between a tax laid directly on income and an excise tax on corporate franchises (A 2-3).

Initial error arose because the trial court, having recognized that there was a distinction, then overlooked the very nature of the distinction as recognized in Educational Films Corp. v. Ward, 350 U.S. 492, 76 S.Ct. 170, 75 L.Ed. 400 (1931). In that case a franchise tax measured by net income was upheld. But in so holding, the Supreme Court specifically discussed the aspect of the tax which distinguished it from an income tax and rendered it a franchise tax, to wit in pertinent part:

> But the nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it. As was said in Macallen Co. v. Massachusetts, 279 U.S. 620, 625, 626, 73 L. ed. 874, 878, 879, 65 A.L.R. 866, 49 S. Ct. 432, 'neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. . . . This court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be.' On appeal from the state court in People ex rel. Bass, Ratcliff & Gretton v. Tax Commission, 232 N. Y. 42, 46, 133 N. E. 122, this court upheld the tax and defined its nature, saying, 266 U. S. 271, 280, 69 L. ed. 282, 286, 45 S. Ct. 82: 'It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year. See New York v. Jersawit, 263 U. S. 493, 496, 68 L ed. 405, 406, 44 S. Ct. 167.' See also Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593; People ex rel. United States Aluminum Printing Plate Co. v. Knight, 174

> N. Y. 475, 63 L.R.A. 87, 67 N. E. 65; Anderson v. Forty-two Broadway Co. 239 U. S. 69, 60 L. ed. 152, 36 S. Ct. 17.
>
> If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise.
>
> Educational Films Corp. v. Ward, supra, 75 L.Ed. 400, 404-405 (1931). (Emphasis supplied.)

From the foregoing it is clear that the distinction between the two types of taxes is whether the tax is imposed "on" the earnings during the year earned (as in Florida), or is imposed for the following year's franchise or privilege, and merely measured by the preceding year's income. Florida's tax is of the former type. It is an income tax, and was correctly recognized as such by the district court.

It is respectfully submitted that the trial court erred in recognizing that a distinction between an income tax and a franchise tax existed, but then failing to recognize the very nature of the distinction. The district court corrected the error. The Florida tax imposed by Part VII of Chapter 220 is an income tax, pure and simple. The present language of 31 U.S.C. §3124 was adopted in response to, and in rejection of, such attempted income taxes on federal earnings. American Bank and Trust Co. v. Dallas County, supra, 77 L.Ed.2d 1072, 1081-1082

(1983); 1st Nat. Bank v. Bartow County Board of Tax Assessors, supra, 84 L.Ed.2d 535, 544 (1985).

Appellees have carefully searched appellants' initial brief for recitation of a single difference or distinguishing characteristic between the Florida income tax and the purported "franchise" tax on banks. As this Court will see, absolutely no difference or distinction is cited by appellants other than the "franchise" label tacked on to Part VII. As noted above, a legislative label will not change the nature of, or save, a prohibited tax. Owens v. Fosdick, 153 Fla. 17, 13 So.2d 700 (1943); Educational Films Corp. v. Ward, 350 U.S. 492, 76 S.Ct. 170, 75 L.Ed. 400 (1931).

Appellants have relied heavily on two state court decisions respecting which review was subsequently denied by the United States Supreme Court. The reliance is, however, misplaced. In Garfield Trust Co. v. Director, Division of Taxation, 508 A.2d 1104 (N.J. 1986) (A 11-19), the state court did uphold a state franchise tax which included, as one portion of a tax base, income on federal obligations. Reading that decision, however, demonstrates that the inclusion was a small part of an overall larger franchise tax, not a specific attempt as in the instant case, to impose a "pure" income tax and merely re-label it as a "franchise." See Macallen Company v. Commonwealth of Massachusetts, 279 U.S. 620, 625, 49 S.Ct. 432, 434, 73 L.Ed. 874, 879 (1929).

Moreover, in the Garfield Trust Co. case, supra, there is no indication that the court had called to its attention

or even considered the distinction between an income tax (imposed on current income) and a franchise tax (based upon prior years' income) announced by the Supreme Court in Educational Films Corp. v. Ward, supra.

Appellants' heavy reliance on Reuben L. Anderson-Cherne v. Com'r of Education, 226 N.W.2d 611 (Minn. 1975), is equally misplaced. A reading of that state court decision (A 21-25) demonstrates an announced judicial adherence or abdication to legislative labels which has been long rejected in this state. Furthermore, the decision (and denial of subsequent federal review) was issued in 1975, long prior to the United States Supreme Court's 1983 and 1985 pronouncements in American Bank and Trust Co. v. Dallas County, supra, and 1st Nat. Bank v. Bartow County Board of Tax Assessors, supra, disapproving state income taxes on federal obligations even if camouflaged by a "franchise" label and "measured by" legislative ploy.

Appellants have attempted to elevate these and other secondary (and erroneous) state decisions to a higher level of authority by citation of Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975), for the proposition that denial of Supreme Court review (see A 20; A 26) creates binding precedent on all courts.

This contention is without merit. First, the doctrine in Hicks v. Miranda, supra, would be an adjudication on the merits "binding on all courts," including this Court only if the Florida act (or arguably an identical act) had been so upheld. Indeed, Hicks v. Miranda, supra, specifically recognizes that

the doctrine applies only to issues properly presented and considered in the earlier proceedings. Equally importantly, in Hicks v. Miranda, supra, the Court specifically recognized the "binding effect" doctrine had no application where subsequent doctrinal developments indicate otherwise. See 45 L.Ed.2d 236. The pronouncements of the Supreme Court regarding rejection of the "measured by" device in American Bank and Trust Co. v. Dallas County, supra, and 1st Nat. Bank of Bartow County Board of Tax Assessors, supra, clearly indicate to the contrary.

There are other pertinent cases which approve "franchise" taxes measured by income but, as appellants wish not to recognize, these decisions approved taxes where the tax was imposed for doing business in a second year, and was measured by the preceding year's income. Tradesmens National Bank v. Oklahoma Tax Commission, 309 U.S. 560, 60 S.Ct. 688, 84 L.Ed. 947 (1940); Pacific Company Limited v. Johnson, 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893 (1932); Educational Films Corp. v. Ward, supra; Schwinden v. Burlington Northern, Inc., 691 P.2d 1351 (Mont. 1984).

Appellants' final decisional buttress is Werner Machine Co. v. Director of Div. of Taxation, 350 U.S. 492, 76 S.Ct. 534, 100 L.Ed. 634 (1956). In misplaced reliance, however, appellants overlook that Werner Machine Co., supra, dealt with a "net worth" franchise tax and did not purport to address the income tax issue. Furthermore, Werner Machine Co., supra, was announced and decided in 1956, three years before the 1959 amendment to 31 U.S.C. §3124, which clearly made unlawful a state income

tax on federal obligations even if clothed in the old "measured by" language or "franchise" label.

The decision of the district court comes to this Court with a presumption of correctness. Review and the foregoing authorities demonstrate that the decision is entirely correct.

The Florida Legislature has many authorized sources of revenue. One of those sources was properly tapped in 1971 when the legislature enacted the Florida Income Tax Code, but exempted from its application interest earned on federal obligations.

Subsequently, however, Florida's taxing authority was exceeded, and 31 U.S.C. §3124 transgressed, when Florida sought to apply its state income tax to interest on federal obligations and to lend legitimacy to the prohibited income tax by application of a "franchise" label.

Under these circumstances, the district court was entirely correct in holding that the purported "franchise" tax is "substantively indistinguishable" from the Florida income tax and that the only cognizable difference between the two taxes are the statutory labels (A 1-5). The decision of the district court must be upheld.

ISSUE II

THE TRIAL COURT ERRED IN HOLDING THAT THE TAX IMPOSED ON BANKS BY PART VII, CHAPTER 220, FLORIDA STATUTES, DOES NOT DISCRIMINATE AGAINST INTEREST EARNED ON FEDERAL OBLIGATIONS, CONTRARY TO 31 U.S.C. §3124.

This point deals with an issue which was erroneously decided by the trial court, and not addressed by the district court. It is clear that the tax imposed by Part VII of Chapter 220, Florida Statutes, is not a nondiscriminatory franchise tax or another nonproperty tax. Because the tax is discriminatory, it is prohibited by 31 U.S.C. §3124.

It should first be noted that the legislative history to the 1959 Amendment of 31 U.S.C. §3124 indicates that the federal nondiscrimination requirement applies to both franchise taxes and other nonproperty taxes. Cf. S REP No. 909, 86th Cong., 1st Sess. §8 (1959). Therefore, should this Court hold that the Florida Bank Tax discriminates against federal obligations, the Florida tax would have to be held violative of 31 U.S.C. §3124, even if this Court ultimately classified the tax as a franchise tax or another nonproperty tax.

Appellants argue that the term "nondiscriminatory" as used by Congress in 31 U.S.C. §3124 only pertains to the treatment for tax purposes of federal obligations as compared with state obligations. Though the prohibited discrimination found in Memphis Bank & Trust Company v. Garner, 459 U.S. 392, 103 S.Ct. 692, 74 L.Ed.2d 562 (1983), was due to Tennessee's favorable treatment accorded its own obligations, nothing in the statute suggests that the interpretation should be so limited. A broader reading

finds support in the United States Supreme Court's recent refusal to review a decision of the New York Court of Appeals which invalidated the method of taxation of investment income under the New York City general corporation tax. In the Matter of Forbes, Inc. v. Department of Finance of City of New York, 66 N.Y.2d 243, 496 N.Y.S.2d 394 (Ct. App. 1985), cert. denied, ____ U.S. _____ (U.S. April 7, 1986) (No. 85-1371). In Forbes, Inc., supra, the court held that New York City's method of taxation discriminated against Federal obligations within the meaning of 31 U.S.C. §3124. The court found that the City tax law placed a greater burden on taxpayers holding federal obligations, thus making them less attractive investments, in two ways. First, the law discriminates in favor of the obligations of the other forty-nine states. Second, the law discriminates in favor of corporate obligations. Id. at 397.

The City conceded these effects, but argued that the tax is not discriminatory because it did not favor New York state obligations over federal obligations. This argument did not save the tax when the court held:

> It is also beside the point that the tax scheme does not discriminate in favor of obligations of the State of New York. Typically, cases raising the issue of discrimination have involved situations in which states favored their own obligations. . . . But nothing in the statute suggests that it should be so limited. To the contrary, the statutory goal of preserving federal borrowing power is threatened whenever any other class of obligations is taxes more leniently than Federal obligations.

(Emphasis supplied.) Id. at 400.

In addition, the Supreme Court in discussing how the Tennessee tax discriminated in Memphis Bank, supra, concluded:

> The State does so by including in the tax base income from federal obligations while excluding income from otherwise comparable state and local obligations.

(Emphasis supplied.) 74 L.Ed.2d at 568.

Therefore, the manner in which the tax imposed on banks by Part VII, Chapter 220, discriminates against federal obligations is a violation of 31 U.S.C. §3124, even if the discrimination is in favor of investment in local bonds or corporate projects rather than state bonds.

The Florida tax discriminates against federal obligations in violation of the exception of subsection (a)(1) of 31 U.S.C. §3124 in several ways. The following is an analysis of the several ways in which the Florida tax does discriminate against federal obligations.

First, the Florida tax discriminates in favor of certain state-authorized bonds in that:

(a) Water and sewer system bonds issued pursuant to Sections 153.62 and 153.63, Florida Statutes, and interest thereon, are exempt from all taxation by the specific terms of Section 153.76, Florida Statutes; and

(b) Pasco County Expressway obligations issued pursuant to Section 348.84, Florida Statutes, and interest thereon, are exempt from all state taxation by the specific terms of Section 348.91.

Analysis will first be directed to the provision dealing with water and sewer bonds. Section 153.76, Florida Statutes, wholly provides:

> As the exercise of the powers conferred by this law constitutes the performance of essential public functions and as any water system or sewer system or both constructed under the provisions of this law constitute public property used for public purposes such districts and all properties, revenues or other assets thereof, and **all bonds issued hereunder and the interest thereon, shall be exempt from all taxation by the state, or any political subdivision, agency or instrumentality thereof.**

(Emphasis supplied.)

This is a classic case of discrimination. The legislature, by enacting this section, has decided that the upgrading of water and sewer systems is such an essential public function that a tax exemption will be granted for anyone that invests in such a project.

The prohibited discrimination in this section lies in the fact that any bond, and the interest earned thereon, issued by a federal agency to upgrade any water system or sewer system would **not** be exempted from taxation. Specifically, such interest would be included in the tax base pursuant to Section 220.13, Florida Statutes, whereby such interest would be included in "adjusted federal income" to obtain the Florida tax base.

The discrimination in this case is similar to the discrimination found by the United States Supreme Court in the well-known case of Memphis Bank and Trust Co. v. Garner, 459 U.S. 392, 103 S.Ct. 692, 695, 74 L.Ed.2d 562 (1983).

In Memphis Bank, supra, a Tennessee statute imposed a tax on the net earnings of banks doing business in the state. The statute defined net earnings to include interest received on obligations of the United States and its instrumentalities in other states, but not interest earned on obligations of Tennessee and its political subdivisions. This case was brought under the predecessor of 31 U.S.C. §3124, which exempted obligations of the United States from state and local taxation except where the taxes were nondiscriminatory franchise taxes. The United States Supreme Court held that the bank tax violated the immunity of obligations of the United States under this statute. Furthermore, it discriminated in favor of securities issued by Tennessee and its political subdivisions and discriminated against federal obligations by including in the tax base income from federal obligations while excluding income from state and local obligations.

The Supreme Court in Memphis Bank, supra, noted that the predecessor of 31 U.S.C. §3124 essentially restated the constitutional rule established in McCulloch v. Maryland, 4 Wheat 316, 4 L.Ed. 579 (1819), that:

> States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government.
>
> 459 U.S. at 397.
>
> A state tax that imposes a greater burden on holders of federal property than on holders of similar state property impermissibly discriminates against federal obligations.
>
> Id.

The Supreme Court stated that it was clear that under the principles established in previous cases that the Tennessee bank tax, measured by the bank's net earnings for the preceding fiscal year, could not be characterized as nondiscriminatory under the federal statute because it discriminated in favor of securities issued by Tennessee. As such, the Tennessee excise tax was in violation of the federal statute. Id. at 398.

In Memphis Bank all obligations of Tennessee and its political subdivisions were excluded from taxation. While the Florida tax does not discriminate in such a sweeping manner, the federal statute, 31 U.S.C. §3124, does not present the phrase "nondiscriminatory franchise tax or another nonproperty tax" in terms of degrees. The plain language of the statute indicates that any discrimination whatsoever would remove the tax from the exemption provided in subsection 1 of the federal statute. By granting exemptions from all state taxation for these obligations, while requiring the interest earned on federal obligations to be considered in computing the tax, the Florida Legislature has placed federal obligations at a disadvantage vis-a-vis similar state property in computing the tax. As the Supreme Court has stated, "a state tax that imposes a greater burden on holders of federal property than on holders of similar state property impermissibly discriminates against federal obligations." Memphis Bank and Trust Co., supra, at 397.

It must be re-emphasized that the federal statute does not express discrimination in terms of degrees. Were the Florida tax to be found discriminatory in **any** way, the Florida tax would

be pulled from within the purview of the exemption provided for in 31 U.S.C. §3124. The Supreme Court in footnote 8 to their opinion in _Memphis Bank_, _supra_, mentions the question, whether or not the impact of the discrimination is _de minimis_. The court held that the violation in this case did not have a _de minimis_ impact because if all fifty states enacted similar provisions comparable to the Tennessee Bank tax, the United States would incur additional annual borrowing costs estimated at $280,000,000. _Memphis Bank_, _supra_, at 398.

Recognition that a "de minimis" defense is precluded by _Memphis State_, _supra_, was afforded in _State ex rel. Douglas v. Karnes_, 346 N.W.2d 231 (Neb. 1984). While also holding the questioned part of the Nebraska franchise tax discriminatory, the Nebraska Supreme Court stated:

> The degree of impaired marketability of federal obligations **cannot** be viewed as casual or incidental and, therefore, de minimis--a matter of triviality to the federal government. Buried in one of those fuzzy footnotes of _Memphis_ is the U.S. Supreme Court's dismissal of de minimis in considering the impact of federal securities by a state's discriminatory tax condemned under 31 U.S.C. §742. In order that a discriminatory state tax may be intolerable under federal law, how much burden on federal obligations is permissible? Implicit in _Memphis_ is the conclusion: Any burden is too much! In the more fundamental analysis a discriminatory state tax on federal securities is intolerable because the tax is impermissible. (Emphasis supplied.) _Id._ at 235.

The Supreme Court further provided:

> Congress enacted 31 U.S.C. §742 to protect federal obligations against discriminatory state taxation when federal obligations are offered for sale in competition with state securities. In an effort to secure and protect credit, Congress provided federal obligations with immunity from discriminatory state taxes and

> sought to prevent the **slightest** diminution of market value or investment attractiveness of federal obligations.
>
> (Emphasis supplied.)
>
> Id. at 234. Cf. N.J. Ins. Co. v. Div. of Tax Appeals, 338 U.S. 665, 70 S.Ct. 413, 94 L.Ed. 439 (1950).

It is clear from Memphis Bank and the discussion above, that Florida's bank franchise tax found in Part VII, Chapter 220, Florida Statutes, should be condemned based on the discrimination found in Section 153.76, Florida Statutes. As the court stated in Douglas v. Karnes, "Memphis Bank was the death knell for state franchise taxes discriminating against federal obligations . . . ." Id. at 236.

The Florida bank franchise tax is also discriminatory in several other ways. Section 348.91, Florida Statutes, is similar in application to the above-discussed Section 153.76, Florida Statutes. Section 348.91 provides in pertinent part:

> The effectuation of the authorized purposes of the authority created under this part is, shall, and will be in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and since such authority will be performing essential governmental functions in effectuating such purposes, . . . **the bonds issued by the authority, their transfer, and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation of any kind, by the state, or by any political subdivision, or taxing agency or instrumentality thereof."**
>
> (Emphasis supplied.)

The obvious discrimination in this section relating to Pasco County expressway bonds is identical to the discrimination found in the water and sewer system bonds mentioned above. In both statutes state obligations issued for these projects

are exempted from the bank franchise tax in Chapter 220, while comparable federal obligations would be included in the Florida bank franchise tax base under Chapter 220. The income earned from these bonds would not be added back to the franchise tax base pursuant to Section 220.13, Florida Statutes. Again, the bank franchise tax must be struck as a violation of 31 U.S.C. §3124 due to this discrimination.

Appellants erroneously contend that these specific, unlimited exemptions are overridden by the general terms of Section 220.13(1), Florida Statutes.

It is a fundamental rule of statutory construction that a statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. Adams v. Culver, 111 So.2d 665 (Fla. 1959); American Bakeries Co. v. Haines City, 131 Fla. 790, 180 So. 524 (1938). Therefore, the specific statutes listed above control over the general add-back provision under Section 220.13(1)(a)2.

Also, taxing statutes with penal provisions (as is the tax under Part VII, Chapter 220, Florida Statutes) are subject to strict construction and must be construed in favor of the taxpayer and against the taxing power. Maas Bros., Inc. v. Dickinson, 195 So.2d 193 (Fla. 1967); Florida S&L Services, Inc. v. Department of Revenue, 443 So.2d 120 (Fla. 1st DCA 1983). If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of exemption, because a tax cannot be imposed without clear and express words for

that purpose. Lee v. Quincy State Bank, 127 Fla. 765, 173 So. 909 (1937).

It is clear that the above-cited water and sewer system bonds and Pasco County Expressway bonds are exempt from all taxation. Assuming, arguendo, that the general add-back provision in §220.13(1)(a)2 casts any doubt on the taxability of these bonds, this Court must find in favor of exemption. Lee v. Quincy State Bank, supra.

Further evidence in support of the tax exemption of the Pasco County Expressway bonds is the fact that the exemption provided under Section 348.91, Florida Statutes, from all state taxation became law on October 1, 1973. Ch. 73-226, Laws of Fla. This is nearly two years after the effective date of the general add-back provision under Section 220.13(1)(a)2 enacted by Chapter 72-278, Laws of Florida, and Section 10 of such chapter, which appellees claim was enacted to ensure a nondiscriminatory tax. It is also over three months later than the effective date of Chapter 73-327, Laws of Florida. It is a fundamental rule of statutory construction that the last expression of legislative will prevails. Askew v. Schuster, 331 So.2d 297 (Fla. 1976); Kiesel v. Graham, 388 So.2d 594 (Fla. 1st DCA 1980). The last expression of legislative will is that Pasco County Expressway obligations, and interest thereon, are exempt from all state taxation.

In the above instances the Florida bank franchise tax discriminates against federal obligations and in favor of Florida state and local obligations. Florida taxes all federal obligations

but does not tax all state and local obligations. Therefore, the Florida bank franchise tax found in Chapter 220 is a discriminatory tax and, thus, does not fall within the exemption provided in subsection (a)(1) of 31 U.S.C. §3124, and must be stricken.

The Florida tax also discriminates in favor of investment in certain local or in-state projects by tax credits granted under Sections 220.18, 220.181, 220.182, 220.183 and 220.184, Florida Statutes, while affording no corresponding or offsetting tax credits or exemption for investment in, or earnings from, obligations of the United States government. It is clear that the credits of Sections 220.18, 220.181, 220.182, 220.183 and 220.184, Florida Statutes, are applicable to Part VII of Chapter 220, Florida Statutes. Section 220.64, Florida Statutes, does not expressly make any of these sections applicable to Part VII. As can be seen, however, each section provides in its own terms that the section is applicable to Part VII of Chapter 220, Florida Statutes.

> 220.18 Gasohol Development Tax Incentive Credit.--
>
> (1) There shall be allowed a credit against the tax imposed **by this chapter** . . . (Emphasis supplied.)
>
> 220.181 Enterprise Zone Jobs' Credit.--
>
> (1)(a) There shall be allowed a credit against the tax imposed **by this chapter** . . . (Emphasis supplied.)
>
> 220.182 Enterprise Zone Property Tax Credit.--
>
> (1)(a) There shall be allowed a credit against the tax imposed **by this chapter** . . . (Emphasis supplied.)
>
> 220.183 Community Contribution Tax Credit.--

* * *

> (3) Authorization to grant Community Contribution Tax Credit; Limitations on Individual Credits and Program Spending.--
>
> (a) There shall be allowed a credit of fifty percent 50% of a community contribution against any tax due for a taxable year **under this chapter.** (Emphasis supplied.)
>
> 220.184 Hazardous Waste Facility Tax Credit.--
>
> (1) A credit against the tax imposed **by this chapter** shall be allowed . . . (Emphasis supplied.)
>
> (2) A credit against the tax imposed **by this chapter** shall be allowed . . . (Emphasis supplied.)

The tax imposed by Part VII of Chapter 220, Florida Statutes, is a tax imposed **"by this chapter,"** and is a tax imposed **"under this chapter."** Therefore, the sections just mentioned do provide credits to the bank franchise tax.

It is clear that each of these sections discriminates. For example, the granting of a tax credit under Section 220.18, Florida Statutes, for investment in Florida in-state ethyl alcohol distillation facilities while imposing a tax on, or measured by, interest on stocks and obligations of the United States government discriminates in favor of selected in-state investment devices and against stocks and obligations of the United States government. Appellees urge, therefore, that the tax imposed by Part VII of Chapter 220, Florida Statutes, is discriminatory and prohibited by 31 U.S.C. §3124.

A similar analysis can be made for the other sections mentioned above as well. The granting of a tax credit under Section 220.181, Florida Statutes, for investment in Florida in-state economic

revitilization while imposing a tax on, or measured by interest on stocks and obligations of the United States government, discriminates in favor of selected in-state investment devices and against investment in stocks and obligations of the United States government.

Even if it were to be found by this Court that Sections 220.18 - 220.184, Florida Statutes, are not applicable to the tax imposed on banks by Part VII of Chapter 220, Florida Statutes, then the said Part VII is still a discriminatory franchise tax.

If these investment tax credit sections are not part of the bank franchise tax section of Chapter 220, then the franchise tax is a discriminatory tax favoring other forms of corporations by tax credits and singling out banks, with their higher level of investment in, and earnings from, United States obligations, for a discriminatory and elevated level of taxation.

A case that is helpful to analysis here is Delta Air Lines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984). In this case the Florida Supreme Court held Section 220.189, Florida Statutes (1983), unconstitutional. Upon application for review to the United States Supreme Court, the appeal was dismissed for want of a substantial federal question. Delta Air Lines, Inc. v. Florida Department of Revenue, 88 L.Ed.2d 214 (1985).

Section 220.189 provided a credit against the Florida corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1,200 employees in the state. The credit offsets up to

one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

The Supreme Court phrased the issue in this case:

> whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce.

455 So.2d at 320.

The Supreme Court then held that this credit provision clearly discriminates against interstate commerce because the corporate tax credit provides a direct commercial advantage to Florida-based air common carriers over non-Florida based carriers. Id.

The comparison to the credits in the instant case is clear. By providing tax credits for investment in these state projects, there is a direct advantage in favor of investment in these projects and against similar federal projects or investment in federal obligations. This discrimination is not allowed under the exemption provided for in 31 U.S.C. §3124.

Finally, the Florida tax further discriminates in favor of certain state-authorized bonds in that the state and local bonds referred to in the following listed statutes, and interest thereon, are exempt from all state taxation, save and except the state corporate income tax, and are thereby exempted from and favored by the alleged "franchise" tax on banks:

Section 159.15, Fla. Stat.
Section 159.31, Fla. Stat.
Section 159.50, Fla. Stat.
Section 159.621, Fla. Stat.
Section 243.33, Fla. Stat.
Section 315.11, Fla. Stat.
Section 348.65, Fla. Stat.
Section 348.762, Fla. Stat.

Section 159.708, Fla. Stat.

Section 215.76, Fla. Stat.

Section 240.497, Fla. Stat.

Section 423.03, Fla. Stat.

Section 348.96, Fla. Stat.

Section 349.13, Fla. Stat.

Section 403.1834, Fla. Stat.

Each of the above-cited statutes includes an express exemption of interest on the referenced state or local bonds from all state taxation, and then provides in pertinent part:

> The exemption granted by this section shall not be applicable to any tax imposed by Chapter 220 **on interest, income, or profits on debt obligations owned by corporations.**

(Emphasis supplied.)

The limitation of exemption set forth above only extends to taxes imposed "on **interest, income, or profits on debt obligations** . . . ." The trial court erroneously overlooked the latter portion of the above-quoted statutory language (A 9). The statutorily granted exemption from all state taxation is removed for state income tax (i.e., tax "on" income) but remains in effect for the tax imposed by Part VII of Chapter 220.

Evidence of the Florida Legislature's intent in the enactment of several of these statutes (and limitation of exemptions) can be found in the title to Chapter 73-327, Laws of Florida. The title to Chapter 73-327, Laws of Florida, provides in pertinent part:

> AN ACT relating to taxation, . . . making said sections inapplicable to corporation **income** tax imposed by Chapter 220, Florida Statutes; . . .

(Emphasis supplied.)

Thus, if the limitation of exemption applies to the tax imposed by Section 220.63, Florida Statutes, then the state bonds referred to above are subject to taxation under Part VII, but the tax imposed by Part VII, Chapter 220, Florida Statutes, must be recognized to be an "income" tax, rather than a "franchise" tax. The bank tax would then have to be condemned as the exemption provided for in 31 U.S.C. §3124 is not available to "income" taxes.

On the other hand, if the limitation of exemption does not extend to the tax imposed by Part VII, Chapter 220, Florida Statutes, then the state bonds referred to above are exempt from taxation under Part VII of Chapter 220, and the tax clearly discriminates in favor of the state or local obligations listed above. The interest earned by holders of similar federal obligations would be included in the franchise tax base, while the interest earned by holders of state obligations in these projects would not be included in the franchise tax base.

As was stated in Memphis Bank, supra:

> A state tax that imposes a greater burden on holders of federal property than on holders of similar state property impermissibly discriminates against federal obligations.

Id. at 397.

Further, in Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113, 119-120, 56 S.Ct. 31, 80 L.Ed. 91 (1935), the Supreme Court held invalid a Pennsylvania tax levied upon the shares of a trust company that was measured by the company's net assets. In calculating net assets, the statute excluded shares owned

by the trust company in Pennsylvania but included shares owned in United States obligations. The court found that the tax statute discriminated in favor of securities issued by Pennsylvania corporations and against United States bonds or other obligations.

With respect to the foregoing, and to this issue, it is pertinent that it is appellants who seek to fall into an exception to 31 U.S.C. §3124, thereby allowing them to elude the general federal prohibition and the grasp of the Supremacy Clause of the federal Constitution. This is where the Court's attention should be directed. A clear rule of statutory construction is that an exception will be strictly construed against the party seeking the exception. State v. Nourse, 340 So.2d 966 (Fla. 3d DCA 1976); Coe v. Broward County, 327 So.2d 69 (Fla. 4th DCA 1976). One who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception. U. S. v. First National Bank of Houston, 386 U.S. 361, 87 S.Ct. 1088, 18 L.Ed.2d 151, 155 (1967). Appellants have failed to meet this high burden.

It is clear from the principles established in these cases that the Florida bank tax cannot be characterized as nondiscriminatory under 31 U.S.C. §3124. Florida discriminates in favor of obligations issued by Florida and its political subdivisions and against federal obligations. The State does so by including in the tax base income from federal obligations while excluding income from otherwise comparable state and local obligations.

This point, as noted above, was not reached by the district court. The district court stated that consideration was unnecessary because the ruling on the first issue (income tax) rendered the challenged tax invalid.

Appellees respectfully urge that this disposition was entirely correct, for the tax imposed by Part VII, Chapter 220, is clearly a prohibited income tax. Thus, this Court need not address this discrimination point upon affirmance of the district court. If, however, the income tax issue is somehow found non-dispositive, then appellees are, indeed, entitled to full appellate consideration of this second basis and ground for invalidity of the challenged tax.

Upon such consideration, it is clear that the Florida statutory discrimination against investment in federal obligations provides an alternative basis for affirmance of the district court. The decision of the district court is, therefore, entirely correct and must be affirmed.

Finally, it is noted that by footnote 12, at page 35, appellants have suggested that any holding of invalidity be given pure prospective effect only. This suggestion is truly absurd. Appellees have, in accordance with Florida law, timely challenged taxes which are directly contrary to federal law and the Supremacy Clause of the United States Constitution. To hold that the State may take and retain such sums, when timely challenged with demand for refund, would be no less violative of appellees' rights under federal law than simply ignoring the provisions of 31 U.S.C. §3124, as they have existed since 1959.

Appellants have cited no Florida authority for their novel "prospectivity" suggestion. This is understandable in that this Court has uniformly held in recent decisions that taxpayers who have timely challenged taxes are afforded remedy when the taxing provisions are held invalid. Colding v. Herzog, 467 So.2d 980, 983 (Fla. 1985); City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984); Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982).

Finally, appellees must note that appellants cannot seriously argue "pure prospective effect" in good faith at this point. Appellants' own initial brief, at pages 4 and 5, recites in the statement of the case and facts:

> Institutions wishing to preserve their right to refunds in the event the law is declared invalid have continued through the pendency of this lawsuit to file requests for refunds. In order to avoid each institution having to file its own separate appeal of the denial of the request for refund, the Florida Department of Revenue agreed to enter into stipulations with individual institutions filing such applications. Pursuant to the stipulation, the Department of Revenue would accept the application for refund and agree not to render a decision on it until this challenge to the taxing statute is resolved. This allowed the institution to preserve its right to contest a denial of refund without having to immediately file its own appeal of the denial.

Where such arrangements are acknowledged by appellants, it is untenable that "equitable considerations" are now urged by appellants in favor of pure prospectivity. As so aptly stated by the court in Mohammed v. Mohammed, 371 So.2d 1070, 1072 (Fla. 1st DCA 1979), a party:

> will not be permitted to gather fruit out of season in a garden of equity.

It is respectfully submitted that appellants' prospectivity argument is <u>wholly</u> without merit and, if actively pursued, would represent an impermissible deprivation of rights of persons who have acted in good faith in agreeing with the State to delay further action pending final disposition of this appeal.