IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE AND OFFICE OF THE COMPTROLLER,

Appellants,

vs.

CASE NO. 70,186

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

Appellees.
_____/

On Appeal from the District Court of Appeal, First District, State of Florida, Case No. BK-432

INITIAL BRIEF OF APPELLANTS FLORIDA DEPARTMENT OF REVENUE AND OFFICE OF THE COMPTROLLER

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PRELIMINARY STATEMENT

The Appellants, Florida Department of Revenue and Gerald A. Lewis, Comptroller of the State of Florida will be referred to collectively and interchangeably as the "Appellants" or the "State."

The Appellees, First Union National Bank of Florida, a national bank, and First Union Corporation of Florida, a bank holding company will be referred to collectively and interchangeably as the "Appellees" or the "Banks."[1]

The trial court in this case was the Honorable Charles E. Miner, Jr., of the Second Judicial Circuit, in and for Leon County, Florida, which court will be referred to as the "trial court." The First District Court of Appeal of Florida will be referred to as the "District Court." The symbol (A) followed by a page number will refer to the separate Appendix of the Appellants' Initial Brief. The symbol (R) followed by a page number will refer to the Record on Appeal as established by the Clerk of the trial court.

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[1] In the trial court Appellees were known as Atlantic National Bank of Florida and Atlantic Bancorporation, respectively. The Final Summary Judgment of the Circuit Court bears that caption (R 288-292; A 6-10). Pursuant to Notification and Suggestion of Change of Corporate Names and Order of the District Court, the style of the case was changed to reflect the new corporate names.

STATEMENT OF THE CASE OF THE FACTS

This case is before the Supreme Court on direct appeal from a decision of the District Court, which reversed the trial court, and declared invalid the corporate franchise tax imposed on banks and savings associations by Part VII, Chapter 220, Fla. Stat., as violative of the Federal Public Debt Statute, 31 U.S.C. §3124. In its decision the District Court held as follows:

> We hold, therefore, that the tax imposed by Part VII, Chapter 220, Florida Statutes, is an income tax for purposes of Title 31, Section 3124, United States Code, and invalid to the extent it purports to include federal instrumentalities in its measure.
>
> Accordingly, we reverse and remand to the trial court for further proceedings to determine the refund to which appellants are due.

Part VII, Chapter 220, Fla. Stat., sets forth Special Rules Relating to Taxation of Banks and Savings Associations and imposes a "franchise tax measured by net income" which is defined to include interest earned on United States government bonds and obligations in the franchise tax base for purposes of measuring the tax. By declaring the Florida tax violative of the Federal Public Debt Statute, 31 U.S.C. §3124, the District Court has effectively declared the tax unconsitutional under the Supremacy Clause, Art VI, cl. 2 of the United States Constitution.

From a pleading and procedural standpoint this has been an uncomplicated case. Suit was initiated in Circuit Court, Leon County on September 14, 1984 by Appellees' filing a Complaint for Declaratory Judgment, Refund of Taxes, and other Relief (R 1-13). After several initial amendments to the Complaint, Appellees filed a Motion for Partial Summary Judgment Based Upon Patent Invalidity of Tax (R 62-83). The State filed its Response in support of the validity of the taxing statute (R 84-102) accompanied by two affidavits regarding the nondiscriminatory aspects of the tax (R 103-105).

Final Summary Judgment was entered by the Circuit Court on December 16, 1985, upholding the validity of the tax (R 288-292; A 6-10). The trial court rejected the Banks' argument that the tax imposed by Part VII, Chapter 220, Fla. Stat., is a direct tax on income and particularly on income derived from U.S. obligations in violation of the Federal Public Debt Statute. Instead, the trial court found the tax to be a classic "franchise tax, i.e., an excise or privilege tax imposed on a corporation or artificial entity for the privilege of doing business in corporate or artificial capacity in the state." The trial court also found the tax to be "nondiscriminatory" as defined by the United States Supreme Court for purposes of the Federal Public

Debt Statute. In accordance with the above findings, the trial court ruled that the franchise tax on banks and savings institutions imposed by Part VII falls squarely within the purview of the exception to the Federal Public Debt Statute, 31 U.S.C. §3124: a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation. As such, the trial court held that the State may include in the franchise tax base, for purposes of measuring the tax, interest earned on federal, state, and local debt obligations. The Banks timely filed an appeal to the First District Court (R 293-294).

The District Court reversed the decision of the Circuit Court declaring the tax to be a direct income tax and thus violative of the Federal Public Debt Statute by including interest earned on U.S. obligations in the computation of the tax. The District Court remanded to the trial court for further proceedings to determine the amount of refund due the Banks (A 5).[2] The State timely filed a Notice of Appeal to the Supreme Court.

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[2] The District Court in footnote 2 of its decision stated that the taxes were paid under protest. There is no support for this statement in the Record. Moreover, refunds for tax year 1985 are not yet at issue.

This appeal is of great public importance. The fiscal impact of the District Court's decision is very significant. The Appellees are the holders of a very large amount of stocks and obligations of the United States Government. Should the tax ultimately be found to be unconstitutional, Appellees would be entitled to a substantial refund of prior taxes paid. According to the State's calculations, the amount of refund demanded in the Complaint constitutes a little more than 99% of the Banks' original tax liability. Conversely, less than 1% of their original tax liability would remain for the tax years at issue if interest earned on federal obligations is removed from the base of this tax. Moreover, all banks and savings associations in Florida are similarly affected. 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. [3]

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[3] This paragraph constitutes largely of excerpts from the Suggestion that Judgment be Certified to Supreme Court and Certificate of Counsel filed by Appellees' attorneys in the District Court. Because of the expedited briefing schedule in a direct appeal, the Record in the District Court has not yet been prepared and reference to the Suggestion in the Record cannot be made. Therefore the Suggestion has been made a part of the Appendix to this Brief (A 27-31).

SUMMARY OF ARGUMENT

There is an abundance of dispositive legal authority to support reversal of the District Court's decision declaring Florida's franchise tax on banks and savings associations invalid as violative of the Federal Public Debt Statute, 31 U.S.C. §3124. The United States Supreme Court has **twice** upheld state corporate taxes legally indistinguishable from the tax before this Court. Other state Supreme Courts have also upheld taxes strikingly similar to the Florida tax. There is even precedent from this Court recognizing the difference between a direct property tax and a nonproperty excise tax imposed on the exercise of certain privileges. The District Court, however, ignored these controlling and persuasive authorities and declared the tax violative of the federal statute.

The Federal Public Debt Statute is not a complete bar to state taxation of stocks and obligations of the United States Government. There is an express exception in this federal statute. Congress has specifically provided, in the exception clause, that states may include federal obligations, interest earned on federal obligations, or both, in the computation of a "nondiscriminatory franchise tax, or another nonproperty tax instead of a franchise tax, imposed on a corporation."

Florida has taken the cue from Congress and has imposed a tax which fits precisely within the purview of this exception.

Over a decade ago, the Florida Legislature took extraordinary care in fashioning the tax before this Court to fall within the purview of the exception set forth by Congress. The Legislature, in express findings and declarations of intent, recognized (1) that the privileges, rights and immunities conferred by law on banks doing business in Florida are very unique and valuable rights; (2) that banks are governed by special and unique federal rules; and (3) that it was faced with the dilemma of finding an equitable method which would effectively tax financial institutions to truly reflect their fiscal responsibilities to the State and to fellow citizens. The Legislature concluded that the most appropriate and equitable form of taxation would be a "nonproperty franchise tax as described in the Federal Public Debt Statute." It was with that in its collective mind that the Legislature structured the tax sub judice. The Legislature intended to impose and did impose a nonproperty franchise tax.

The tax before this Court is clearly a nonproperty tax (i.e. an excise or franchise tax) imposed on banks for the privilege of conducting business, deriving income, or existing within this

State in corporate or artificial capacity. The tax measures the value of that privilege by computing the tax based upon the net income of the bank. The fact that the tax is measured by net income does not, however, convert the tax into a direct tax on income. The use of a "net income" base as the "measure" of a franchise tax is a legitimate and common facet of a state corporate tax statute and clearly does not transform the tax into a direct imposition on the net income. It is a very reasonable and accurate method for measuring the value of the privilege being taxed.

The tax is also nondiscriminatory. By its express terms, Part VII mandates inclusion of all interest earned on federal, state, and local debt obligations in the tax base for computing the tax. Thus, there is parity of treatment for all debt obligations. The tax does not violate the Federal Public Debt Statute.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT AND DECLARING THE CORPORATE FRANCHISE TAX IMPOSED ON BANKS AND SAVINGS ASSOCIATIONS BY PART VII, CHAPTER 220, FLA. STAT., INVALID AS VIOLATIVE OF THE FEDERAL PUBLIC DEBT STATUTE, 31 U.S.C. §3124.

A. The tax imposed on banks by Part VII, Ch. 220, Fla. Stat., is "a franchise tax or another nonproperty tax . . . imposed on a corporation" within the purview of the exception contained in the federal statute.

This appeal presents the question whether Florida's corporate franchise tax on banks and savings associations imposed by Part VII, Chapter 220, Fla. Stat., violates the Federal Public Debt Statute, 31 U.S.C. §3124, by including stocks and obligations of the United States Government in the tax base for purposes of measuring the tax liability. For the first time this Court is being asked to examine the provisions of Part VII to determine whether the Legislature imposed a property tax or a nonproperty tax. If the Court finds that the tax is a property tax (i.e., a direct tax on income) than Part VII is invalid as it violates the Federal Public Debt Statute. If the Court finds that the tax is a nonproperty tax (i.e., an excise or franchise tax imposed on corporations for the exercise of certain privileges) then Part VII falls within the purview of an exception to the Federal Public Debt Statute and is valid.

The Federal Public Debt Statute, 31 U.S.C. §3124 (formerly 31 U.S.C. §742) provides, in pertinent part, as follows:

> 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. (e.s.)

By this federal statute Congress has exempted stocks and obligations of the United States Government from state taxation. The exemption, however, is not without exception. Stocks and obligations of the United States Government (and interest earned therefrom) may be considered in computing "a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation." In short, to come within this exception and include the principal and interest income of federal debt obligations in the bases(s) for computing a tax, the state tax must be (1) a franchise tax or another nonproperty tax imposed on a corporation and (2) nondiscriminatory. The Florida

Legislature took extraordinary care to fashion such a tax. The tax imposed by Part VII, Chapter 220, Fla. Stat., is an excise or privilege tax, i.e., a nonproperty tax imposed on banks and savings associations for the privilege of doing business in a corporate or artificial capacity in the State. As such it falls precisely within the purview of the exception to the Federal Public Debt Statute as set forth by Congress and federal obligations and interest earned on those obligations may be included in the tax base for purposes of measuring the tax liability.

The trial court found the tax to be "a classic franchise tax, i.e., an excise or privilege tax imposed on a corporation or other artificial entity for the privilege of doing business in corporate or artificial capacity in the state." (A 7) The trial court's opinion cited decisions of the United States Supreme Court and at least five (5) other state Supreme Courts upholding the validity of taxes legally indistinguishable from the Florida tax at issue against similar challenges premised on the Federal Public Debt Statute. The District Court, however, ignored the expressed legislative intent regarding the tax and without comment on or distinction of the numerous authorities cited reversed the trial court striking down Florida's fifteen (15)

year old bank franchise tax. The District Court's decision must be reversed. It is wrong.

The State respectfully submits that there is an abundance of dispositive legal authority to support the validity of Florida's tax on banks. Moreover, there is an abundance of legal authority to support reversal of the District Court's decision. Very recently, the United States Supreme Court dismissed for want of a substantial federal question an appeal by a bank challenging New Jersey's similar corporate business tax on the same grounds, i.e., that it was a direct tax on income and therefore violated the Federal Public Debt Statute by including interest earned on federal obligations in the tax base.[4] In Garfield Trust Co. v. Director, Div. of Taxation, 508 A.2d 1104 (N. J. 1986) appeal dismissed, _____U.S.____, 107 S.Ct. 390, _____L.Ed.2d_____ (1986) the Court held that a corporate business tax computed by adding prescribed percentages of both a **net worth** tax base (which includes the face value of federal obligations) and an entire **net income** tax base (which includes, like the tax sub judice, interest earned on federal obligations) was not a direct tax upon

[4] Dismissal by the United States Supreme Court of an appeal for want of a substantial federal question constitutes an adjudication on the merits of the case and concomitantly binding precedent for all courts. Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975); State v. Bales, 343 So.2d 9 (Fla. 1977).

a corporation's net worth or net income but rather was a franchise tax and therefore did not violate the Federal Public Debt Statute by including federal obligations or interest earned on the obligations in the respective tax bases.

The tax in Garfield Trust is legally indistinguishable from the tax before this Court. Like Florida's tax, the **net income** base was defined to be the amount of taxable income reported for federal income tax purposes.[5] Like Florida, in classic franchise or privilege tax terms, the tax was imposed annually "for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State."

The Garfield Trust case presents very controlling and important precedent.[6] It represents approval by the United

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[5] It is important to note that the tax is, like Florida's, measured by the **current** year's corporate income. For reasons unclear, the District Court found the fact that Florida's tax was not measured by the **preceding** year's corporate income fatal to the validity of the tax. The issue regarding current vs. preceding year's income will be more thoroughly discussed later in this Brief.

[6] Two Notices of Supplemental Authority were filed by the Appellants in the District Court regarding this case. The first Notice was filed on September 11, 1986 when the New Jersey Supreme Court, in a comprehensive opinion reported at 508 A.2d 1104, affirmed the Tax Court and lower appellate court decisions

States Supreme Court of a state tax on corporations which includes in the computation not only the net income from federal obligations but also the face value of those obligations. It represents approval by the United States Supreme Court of a tax so strikingly similiar that the only fundamental difference between the New Jersey tax and the Florida tax is that Florida does not include the face value of federal obligations (net worth) in computation of the tax. Moreover, the issue before the Court was precisely the same issue before this Court: whether a particular corporate tax **measured by current net income** constitutes a direct tax on income or a nonproperty franchise tax for purposes of the Federal Public Debt Statute. If the tax is a direct tax on income (i.e., a property tax) then it violates the federal statute by including federal obligations in its measure. If the tax is a "franchise tax" or "another nonproperty tax" (i.e., an excise or privilege tax) then it falls within the

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[6] cont'd.
upholding the tax. The second Notice was filed on December 19, 1986, when the United States Supreme Court dismissed the appeal for want of a substantial federal question. The Notices were filed because the State had relied on Garfield Trust in the trial court, in the brief and at oral argument in the District Court. Inspite of two (2) Notices, the District Court made no mention of Garfield Trust in its decision. The Garfield Trust case is included in the Appendix to this Brief (A 11-20).

purview of the exception to the federal statute and federal obligations (and interest earned on those obligations) may be included in the computation or measure of the tax. Secondly, the case is important because it reaffirmed the vitality of a line of cases which have recognized the difference between a direct tax on income and a franchise or excise tax imposed for a granted privilege such as operation in corporate form.[7] For purposes of the Federal Public Debt Statute the difference is very important for it determines whether federal obligations and/or interest earned on those obligations may properly be included in computation of a particular state tax.

Another case of controlling precedent ignored by the District Court is Reuben L. Anderson-Cherne v. Com'r. of Taxation, 226 N.W.2d 611 (Minn. 1975) appeal dismissed 423 U.S. 886 (1975) wherein it was held that the annual excise tax imposed on corporations for certain privileges (such as existing as a corporation or transacting business in corporate form during any

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[7] Unfortunately the District Court's decision did not recognize the difference and in fact found the tax at issue to be **both**. On page 4 of its decision the District Court stated that the taxes imposed by Chapter 220, Fla. Stat., "are levied upon corporations for the privilege of doing business in the state." From that point the Court should have affirmed the trial court in finding the tax to be "a classic franchise tax, i.e., an excise or privilege tax imposed on a corporation or artificial entity for the **privilege** of doing business in corporate or artificial

part of its taxable year) measured by net income for the taxable year for which the tax is imposed (i.e., **current net income**) was not an income or property tax but rather a franchise tax. Thus, income from interest on federal securities was includible in the net income of a corporation for the purpose of determining the amount of tax due. Again, Appellants wish to emphasize that the tax was measured by the **current** net income of the corporation and the tax was upheld.[8]

In Werner Machine Co. v. Director of Div. of Taxation, 350 U.S. 492, 76 S.Ct. 534, 100 L.Ed. 634 (1956) the Supreme Court considered whether the New Jersey corporate tax which imposed "an annual franchise tax . . . for the privilege of having or exercising its corporate franchise" in the state violated the Federal Public Debt Statute. The New Jersey tax at that time was measured only by the corporation's current "net worth" and

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[7] cont'd.
capacity in the state." (A-7) Instead, the District Court looked to the name given Chapter 220, (Florida Income Tax Code) and on the next page declares the tax to also be an income tax. Not only is this simplistic and a contradiction in terms, it is wrong. The tax cannot be both.

[8] This involved another dismissal of an appeal by the United States Supreme Court for want of a substantial federal question thus constituting an adjudication of the merits of the case. See, supra note 4. The Reuben L. Anderson-Cherne case is included in the Appendix to this Brief (A 21-26).

included in the net worth base the face value of all federal and state debt obligations.[9] In response to the contention that the tax was not in reality a franchise tax, but rather in the nature of a direct property tax on the exempt federal obligations, the Court stated at 493-494, in pertinent part, as follows:

> Corporate franchises granted by a State create a relationship which may legitimately be made the subject of taxation, (authorities omitted) and the statute expressly declares this to be a franchise tax. Moreover, the Supreme Court of New Jersey has, on independent examination, found this to be "a bona fide franchise tax." While this is, of course, not conclusive here, (authorities omitted) we find no basis in this instance for not accepting the state court's conclusion that this tax is not imposed directly on the property held by the corporation. (authority omitted)
>
> Appellant argues further that even if this is a franchise tax, it must fall because its effect is the same as if it had been imposed directly on the tax-exempt federal securities. Since the tax remains the same whatever the character of the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations. And since this is a tax on the corporate franchise, it is valid despite the inclusion of

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[9] The New Jersey tax has since been amended to include not only a current net worth measure but also a current net income measure. Its validity was affirmed in Garfield Trust, supra.

> federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, e.g., Society for Savings v. Coite (US) 6 Wall 594, 18 L.ed 897; Provident Institution v. Massachusetts (US) 6 Wall 611, 18 L. ed 907; Hamilton Mfg. Co. v. Massachusetts (US) 6 Wall 632, 18 L.ed 904; Home Ins. Co. v. New York, 134 US 594, 33 L.ed 1025, 10 S.Ct. 593, supra; Educational Films Corp. v. Ward, 282 US 379, 75 L.ed 400, 51 S.Ct. 170, 71 ALR 1226, supra; Pacific Co. v. Johnson, 285 US 480, 76 L.Ed. 893, 52 S.Ct. 424, supra. (e.s.)

In 1983 the United States Supreme Court reaffirmed the holding in Werner Machine leaving no doubt that federal obligations may be considered and included, directly or indirectly, in the computation of certain taxes. In American Bank & Trust Co. v. Dallas County, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed. 2d 1072 (1983), the Court considered the validity of a Texas tax on bank shares, a property tax, in light of the 1959 amendment to §3124 which added the specific exceptions to the tax exemption statute. In looking at the 1959 amendment, the Supreme Court stated:

> Prior to the 1959 amendment, franchise and estate and inheritance taxes measured by the value of federal obligations, like bank shares taxes, were upheld on the theory that the tax was levied on the franchise or the transfer of property, rather than on the ownership interest in the federal securities themselves. By expressly exempting franchise and estate and inheritence taxes from the amended §3701, Congress manifested its awareness that the new language would broaden significantly the prohibition as it had been construed by the courts. Congress must have believed that franchise and estate and inheritance taxes required federal obligations to "be considered directly, or indirectly, in the computation of the tax"; otherwise, the specific exemptions for these taxes would have been superfluous. . . . (e.s.) 103 S.C. 3375.

Congress has specifically provided that federal obligations and interest earned on federal obligations may be considered and included in computing a "nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation." **Moreover, the United States Supreme Court has twice upheld corporate taxes which, similar to the tax sub judice, utilized a current net income measure for computing the tax.** See, Garfield Trust Co. v. Director, Div. of Taxation, supra; Reuben L. Anderson-Cherne v. Com'r. of Taxation, supra. (A 11-26) In both these cases the taxes included interest earned on federal obligations in the current "net income" base.

Contrary to the District Court's rationale in striking down the tax, the State is not attempting to accomplish indirectly that which it cannot accomplish directly. Congress has specifically given the States permission to impose certain taxes on corporations and to include in those taxes federal obligations and interest earned on those obligations. Florida has simply taken the cue and imposed such a tax.

In addition to the above, other state Supreme Courts have upheld taxes measured by "net income" which include interest earned from federal obligations in the base as a nonproperty or franchise tax imposed on a corporation. In Schwinden v. Burlington Northern, 691 P.2d 1351 (Mont. 1984) the Montana Supreme Court resurrected and upheld a Montana corporation license tax which imposed a tax measured by certain percentages of net income for the preceding taxable year. The tax was imposed "for the privilege of carrying on business in this State." The Court found the tax to be a nondiscriminatory franchise tax which did not violate federal law even though, in computing the tax, interest income from federal obligations was included in computing the tax.

In National Bank of Alaska v. State, Dept. of Revenue, 642 P.2d 811 (Alaska, 1982) the Alaska Supreme Court considered the

validity of a business license tax or tax on banks which provided that the tax liability for each bank was seven (7) percent of its "net income" for the current taxable year. Net income included interest earned on federal obligation. The tax was found not to violate the Federal Public Debt Statute.

In Connecticut Bank & Trust Co. v. Tax Commissioner, 423 A.2d 883 (Conn. 1979) the Connecticut Supreme Court considered the validity of a corporate business tax on banks "measured by the entire net income . . . received by such corporation or association from business transacted during the income year." Interest earned on federal obligations was included in the definition of net income. The tax was imposed for the "privilege of carrying on or doing business . . . within the state." Id. at 884. The Court noted that the tax was:

> . . . in the nature of an excise tax levied against domestic and foreign corporations alike for the privilege of doing business in a corporate capacity within this state. (citations omitted) It is not a direct tax upon the allocated income of the corporation in a given year but a tax for the privilege of exercising its franchise within the state "measured by the entire net income . . . received by such corporation . . . from business transacted within the state during the income year . . . . " (citations omitted) (e.s.) Id. at 885.

The Court recognized the distinction between a property tax (i.e., a tax laid directly on governmental instrumentalities or income derived from them) and a nonproperty or excise tax imposed upon corporate franchises for certain privileges (even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income.) The Court found the tax to be a nondiscriminatory nonproperty or excise tax on a corporation within the exception in the Federal Public Debt Statute. As such, interest earned on federal obligations was properly includible in the tax base so long as interest earned on state and local obligations was also included.

Of all the cases cited so far in this Brief only one (1) of the state taxes analyzed was measured by the preceding year's corporate income, to-wit: Montana. The rest of the authorities, **including the two cases reviewed by the United States Supreme Court,** concern taxes measured by the current year's corporate income. Yet, the District Court found the fact that the Florida tax was measured by the current year's corporate income fatal to the validity of the tax. The State respectfully submits that use of the current year's corporate income is a more precise measure for this tax because it is more directly related to the period in which the privilege triggering imposition of the tax is

exercised. Using the current year's corporate income more precisely measures the value of the privilege or franchise for the period for which the tax is imposed. The advantage to using a current measure is that the resultant tax burden more closely resembles the actual amount of privilege enjoyed during the tax period. It is not only more equitable, it is the more modern way of calculating the tax. The use of a preceding year's corporate income is an anachronism from pre-computer days. For purposes of the Federal Public Debt Statute it is a meaningless distinction.

B. Analysis of the legislative history and a reading of the face of the statute evince a clear expression of intent to impose a franchise tax or another nonproperty tax (i.e., an excise or privilege tax) on on banks and savings associations.

Initially, Appellants wish to emphasize that it is a fundamental rule of construction that a statute be construed in such a way so as to effectuate the legislative intent and that all doubts as to the validity of a statute be resolved in favor of its validity, McKibben v. Mallory, 293 So.2d 48 (Fla. 1974); that the legislative intent is the pole star by which courts must be guided in construing a statute and that such intent must be given effect. Ervin v. Peninsular Telephone Co., 53 So.2d 647 (Fla. 1951). It is also a fundamental rule of constitutional law frequently cited by this Court that acts of the Legislature are presumed to be valid, and that the courts should indulge every presumption in favor of the constitutional validity of a challenged statute. Eastern Airlines, Inc. v. Dept. of Revenue, 455 So.2d 311 (Fla. 1984); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229 (Fla. 1968); Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950). The State very respectfully submits that the District Court did not accord the taxing statute before this Court the benefit of any of these guidelines.

The decision of the District Court simply disregards the statutory language and legislative intent expressed in Part VII, Ch. 220, Fla. Stat. Instead of paying heed to the operative language of the taxing statute and the expressed legislative findings and declarations of intent, the District Court only looked to the "measure" of the tax and the Chapter's name (i.e., Florida Income Tax Code) and then recharacterized the tax from a nonproperty privilege tax to a direct property tax on a bank's income.[10] This finding and recharacterization is bereft of any merit and confuses the measure of the tax with the incidence or privileges triggering the tax. In addition to ignoring the legislative intent and statutory language, the District Court gave no deference to controlling legal precedent regarding the distinction between a property tax and a nonproperty tax.

There can be no doubt that the Legislature intended to impose and in fact did impose a nonproperty tax (i.e., an

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[10] The mere fact that the tax is placed in what is referred to as the Florida Income Tax Code does not make the tax an income. Additionally, see, §220.52, Fla. Stat., wherein the Legislature specifically stated that:

> [no] inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular sections or provisions of this code, nor shall any caption be given any legal effect.

excise or privilege tax) on banks and savings institutions doing business in Florida. Part VII setting forth Special Rules Relating to Bank Taxation became part of Chapter 220, by §8, Chapter 72-278, Laws of Florida. The Legislature made the following findings and declarations of intent:

> Legislative Findings and Declarations of Intent.- It is hereby declared:
>
> (1) that banks are governed by special and unique statutory rules under the laws of the United States, as a result of which the State of Florida is prohibited from imposing the same taxes on banks as are imposed on other business enterprises in the state;
>
> (2) that so long as federal law prevents the State of Florida from including banks in the general scheme of taxation established by the legislature from time to time, it will be equitably necessary to impose special taxes on banks doing business in the state;
>
> (3) that the privileges, rights, immunities and prerogatives conferred by law on banks doing business in this state are unique and valuable rights;
>
> (4) that the most appropriate and equitable form of taxation which can be imposed on banks is a non-property franchise tax, as described in the public debt statute of the United States (31 U.S.C. 742), [now 31 U.S.C. 3124] which is measured by actual net income; and
>
> (5) that the tax imposed by this Part Seven shall be in lieu of all other taxes imposed by this state on banks if and to the extent that federal law is construed to limit the types of taxation which the state may cumulatively impose. (e.s.)

The Legislature recognized that the privileges, rights, immunities, and prerogatives conferred by law on banks doing business in this state are very unique and valuable rights. In addition, the Legislature acknowledged that banks are governed by special and unique federal rules and that it was faced with the dilemma of finding an equitable method which would effectively tax financial institutions engaged in business within the state to truly reflect such institutions' fiscal responsibilities to the state and to its fellow citizens. There is no clearer evidence of the correctness of these findings and declarations than the fact that the Appellees' liability for the tax years at issue would be reduced to less than 1% of their original tax liability. Removal from the tax base of interest from federal obligations would be a virtual emasculation of the corporate tax on banks. The Legislature concluded that the most appropriate and equitable form of taxation would be a nonproperty franchise tax as described in the Federal Public Debt Statute, 31 U.S.C. §3124. It was with that in its collective mind that the Legislature fashioned the tax sub judice. Succinctly, the State sought to do only that which Congress permitted by the express exception to the Federal Public Debt Statute.

In addition to the aforecited legislative findings, the

operative words of the taxing statute clearly evince the imposition of a nonproperty or franchise tax (i.e., an excise or privilege tax). Section 220.02, Fla. Stat., which pursuant to the provisions of §220.64, applies to the franchise tax imposed by Part VII, specifically states:

> (1) It is the intent of the Legislature in enacting this code to impose a tax upon all corporations, organizations, associations, and other artificial entities which derive from this state or from any other jurisdiction permanent and inherent attributes not inherent in or available to natural persons, such as perpetual life, transferable ownership represented by shares or certificates, and limited liability for all owners . . . . It is the intent of the Legislature to subject such corporations and other entities to taxation hereunder **for the privilege of conducting business, deriving income, or existing within this state**. . . .
>
> (2) It is the intent of the Legislature that the tax levied by this code be construed to be an **excise or privilege tax measured by net income** and that such tax not be deemed or construed to be a property tax or a tax on property or a tax measured by the value of property for any purpose. (e.s.)

As evidenced by the above language, the tax at issue is imposed upon all corporations and other artificial entities for the **privilege** of doing business in a corporate or artificial capacity in this State. The tax measures the value of that privilege by computing the tax based upon the net income of the corporation.

The fact that the tax is measured by net income does not convert the tax into a direct tax on that income. The tax is on the exercise of certain privileges, i.e., conducting business, deriving income, or existing within this state in a corporate or artificial capacity.[11]

This Court has on numerous occasions recognized the difference between a property tax and a nonproperty excise or franchise tax. In Rutledge v. Chandler, 445 So.2d 1007 (Fla. 1983) this Court held that the so-called "floor tax" on Florida dealers of alcoholic beverages measured by the amount of alcoholic beverages in inventory was not a property tax on the inventory but rather an **excise tax based on the exercise of a privilege**: the possession of alcoholic beverage for retail. The privilege was simply measured by the inventory. This Court held:

> Under City of Deland and section 192.001(1), section 17's floor tax is not a property tax because it is not

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[11] The fact that the Florida Constitution was amended to authorize a direct corporate income tax does not make the tax sub judice a direct tax on income nor does it mean that the Florida Legislature in fact enacted into law a direct income tax. That amendment, however, does insure that the tax will pass Florida constitutional muster. If a direct property tax on a corporation's income is permissible under the Florida Constitution, then surely an indirect nonproperty excise or franchise tax measured by net income is permissable.

> levied on value assessed by assessors. Section 17 also affirmatively satisfies the **criteria for an excise tax.** It is imposed directly by the legislature, without assessment, and is based on the exercise of a privilege: the possession of alcoholic beverage for retail sale. The exercise of this privilege is measured by the amount of alcoholic beverages in inventory on September 1, 1983. **In the past, this Court has found a tax on a privilege, measured by inventory, to be an excise tax.** Smith v. City of Miami, 160 Fla. 306, 34 So.2d 544 (1948) (**tax on tobacco, measured by quantity handled, is an excise tax**; Jerome H. Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699 (1930) (**tax on privilege to store gasoline, measured by amount stored, is an excise tax**). (e.s.)
>
> * * *
>
> . . . the tax at issue here is not **on** inventory, but on a privilege as **measured by** inventory.
> (emphasis supplied by Court)

Likewise the tax before this Court affirmatively satisfies the criteria for an excise tax. The tax is: (1) imposed directly by the Legislature, without assessment and (2) based on the exercise of a privilege (i.e., conducting business, deriving income, or existing within this State in corporate or other artificial capacity). The tax at issue here, as in Rutledge, is not on net income, but on a privilege **as measured** by net income.

The reference to City of Deland in the above cite is to a case in which this Court delineated the difference between ad valorem and excise taxes. The difference is relevant to the case at hand. In City of Deland v. Florida Public Service Commission, 161 So. 735, 738 (Fla. 1935) it was stated:

> All taxes, other than polls, are either direct or indirect property taxes. A direct tax is one that is imposed directly upon property, according to its value. It is generally spoken of as a property tax or an ad valorem tax. **An indirect tax is a tax upon some right or privilege, or corporate franchise, and is most often called an excise or occupational tax.**
>
> An excise and property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted for laying them and fixing their amounts. If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done, income previously received, **or** by the extent to which a taxable privilege may have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of such taxpayer's assets or his investments in business, it is to be regarded as an excise tax. But if the tax is computed upon the valuation of the property, and assessed by assessors, either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax. (e.s.)

In Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950) this Court considered the validity of a tax placed on the "privilege of renting, leasing, or letting any living quarters" measured by the amount charged for the accommodations. With deference to the expressed legislative intent that the tax was a privilege or occupation tax and that the subject of taxation or the thing taxed was the privilege of engaging in business within the State of Florida, the Court held:

> Although the privilege of engaging in business may be classified as a species of property, it is not property in the usual, customary and commonly accepted sense of the word. Courts should always give words in the statutes and constitutional provisions the meaning accorded them in common usage unless a different connotation is expressed in or necessarily implied from the context of the statute or constitutional provision in which they appear. (citations omitted)
>
> * * *
>
> For the sake of clarity we repeat that the tax provided in the Revenue Act of 1949 is not a property tax as contemplated in and prohibited by Article IX, Section 2 of the Constitution of Florida. This being true, it matters not whether it be classified as a state privilege or a state occupation tax for we know of no constitutional provision inhibiting the levy of either as

> such if it be reasonable and not unjustly discriminatory or arbitrary. **Privilege and occupation taxes are catalogued uniformly under this general heading of excise taxes**. . . .
>
> * * *
>
> The tax levied by the statute here under attack is none the less an excise tax, because the amount of the tax to be paid is measured by the compensation received for the merchandise sold or services rendered. (citations omitted) Moreover, the tax here involved is not an income tax. Although the tax is determined upon the price charged for the merchandise or services, it is not a tax upon the personal property or services, but upon the privilege of selling the same, and it is measured by the extent to which the privilege is enjoyed. (citations omitted) (e.s.) Id. at 574.

Like the instances cited above, the tax sub judice is a tax imposed for the exercise or enjoyment of certain privileges. It is an excise or franchise tax, a nonproperty tax. The Legislature specifically called it a "franchise tax" and it fits the label. As defined in 84 C.J.S. Taxation, §134, page 260 a

> [f]ranchise tax is a tax imposed on a corporation for the right or privilege of being a corporation or doing business in a corporate capacity in the state, or for the privilege of exercising its corporate powers. It confers on the corporation no more than the privilege

> of juristic personality and limited corporate liability. . .

In addition, the Legislature specifically imposed the tax for the privilege of conducting business, deriving income, or existing within this State in corporate or artificial capacity. As noted in 1 Hellerstein, State Taxation, (1983) Ch. 6.3 at 213, various different privileges constitute the basis for imposing franchise taxes by states.

> State franchise statutes typically impose a tax, as in California, on "every corporation doing business within . . . this State . . . for the privilege of exercising its corporate franchises within this State." Unlike many statutes, the California provision goes on to define "doing business" as "actively engaging in any transaction for pecuniary profit." In other States, such as New York, the imposition clause defines the subject of the tax as embracing not only "the privilege of exercising its corporate franchise, or of doing business," but also specifies "employing capital or . . . owning or leasing property . . . or maintaining an office in this state" among the subjects taxed.

The Florida Legislature took care to impose a tax that would fall within the purview of the exception to the Federal Public Debt Statute. The tax before this Court should pass the test. It is clearly an excise or franchise tax imposed on artificial entities for the exercise of certain privileges in the State.

The use of "net income" base as the "measure" of a franchise tax is a legitimate and common facet of a state corporate tax statute and clearly does not transform the tax into a direct imposition on the net income. It is a very reasonable and accurate method for measuring the value of the privilege being taxed. However, if for some reason at this point in time, the tax is somehow now construed not to be a franchise tax,[12] at the very least it constitutes "another nonproperty tax instead of a franchise tax" imposed on a corporation or artificial entity and still falls within the purview of the exception to the Federal Public Debt Statute.

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[12] Equitable considerations would favor giving such a decision of invalidity pure prospective effect. The "Sunburst Doctrine" would clearly apply in this case. See, e.g. Metropolitan Life Insurance Co. v. Commissioner of Insurance, 373 N.W.2d 399, 408-412 (N.D. 1985); Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973).

II. THE TRIAL COURT WAS CORRECT IN FINDING THE TAX NONDISCRIMINATORY.

As previously discussed there is essentially a two-prong test in determining whether a particular state tax falls within the purview of the exception contained in the Federal Public Debt Statute. In addition to constituting a "franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation," the tax must also be "nondiscriminatory." The trial court analyzed the tax at issue and found it to be nondiscriminatory. The Court held:

> . . . The Florida tax does not discriminate. It treats federal, state, and local obligations equally. All interest earned from federal, state, and local debt obligations must be included in the tax base for computation of the tax. By its express terms the tax mandates inclusion in the franchise tax base of interest earned from federal obligations and interest earned from state and local obligations. See, §§220.63 and 220.13(1)(a)2, Fla. Stat. In addition, contemporaneous with the passage of the tax, the Legislature repealed all statutes of tax exemption for state and local debt obligations to the extent they would exempt interest, income, or profits on debt obligations from any tax imposed by Ch. 220, Fla. Stat. See, §10, Ch. 72-278, Laws of Florida. 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. (A 8,9).

The District Court did not rule on the discrimination issue raised by the Banks below in challenging the validity of the tax. The District Court opined that due to its disposition of the first issue (i.e., whether the tax is a property vs. nonproperty tax) it was unnecessary to address the second issue (i.e., whether the tax is "nondiscriminatory"). This Court has jurisdiction to answer both questions presented by this appeal regarding the validity of the tax. Piecemeal determination of a cause by our appellate courts should be avoided and when a case is properly lodged in the Supreme Court there is no reason why it should not then be terminated there. The efficient and speedy administration of justice is promoted by doing so. P.C. Lissenden Co. v. Board of County Commissioners, 116 So.2d 632 (Fla. 1959); Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961).

The United States Supreme Court has specifically ruled that the term "nondiscriminatory" as used by Congress in the Federal Public Debt Statute, 31 U.S.C. §3124, pertains to the treatment for tax purposes of federal obligations as compared with state

obligations. In Memphis Bank & Trust Company v. Garner, 459 U.S. 392, 103 S.Ct. 692, 74 L.Ed. 2d 562 (1983), the Court considered a Tennessee statute which imposed a tax on the "net earnings" of banks doing business in the state. The term "net earnings" was defined to include interest received from federal obligations but not interest earned on obligations of Tennessee and its political subdivisions.[13] In finding this treatment discriminatory, the Court defined the term "nondiscriminatory" in the context of the federal statute as follows:

> 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. See e.g. United States v. County of Fresno, supra, 429 U.S., at 462, 97 S.Ct., at 704 ("a state tax on those who deal with the Federal Government" is unconstitutional if the tax "is imposed [un]equally on similarly situated constituents of the State"). Our cases establish, however, that if the "tax remains the same whatever the character of the [property] may be, no claim can be sustained that this taxing statute discriminates against federal obligations."

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[13] Finding the Tennessee bank tax to discriminate against federal obligations, the Supreme Court did not reach the question whether the tax may be characterized as a "franchise tax or other nonproperty tax in lien thereof." Memphis Bank, supra, at 696, n. 6.

> Werner Machine Co. v. Director of Division of Taxation, supra, 350 U.S., at 493-94, 76 S.Ct., at 535 (1956) . . . . Id., 103 S.Ct. at 696.

Simply put, a state tax that accords its own state's bonding obligations a greater tax preference than applicable to United States obligations is discriminatory for purposes of the Federal Public Debt Statute. In accordance with this standard, the Court found the Tennessee tax discriminatory:

> It is clear that under the principles established in our previous cases, the Tennessee bank tax cannot be characterized as nondiscriminatory under §742. Tennessee discriminates in favor of securities issued by Tennessee 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. We conclude, therefore, that the Tennessee bank tax impermissibly discriminates against the Federal Government and those with whom it deals. Id. 103 S.Ct. 697 (e.s.)

The tax at issue treats federal, state, and local debt obligations the same. The statute mandates inclusion of all interest earned on federal, state, and local debt obligations in the tax base for purposes of measuring the tax. As correctly found by the trial court, federal obligations are included in the tax base by §220.63, Fla. Stat., which adopts the definition of

"adjusted federal income" codified in §220.13, Fla. Stat.[14] State and local obligations are included in the tax base by §220.13(1)(a)2, Fla. Stat., which mandates the addition or inclusion of all interest which is "excluded from taxable income under §103(a) of the Internal Revenue Code."[15] Thus, there is parity of treatment for all federal, state, and local debt obligations. All are treated the same. All are included in the tax base for measuring the tax liability. There is no discrimination. See also, Rule 12C-1.13(1)(a)2., Fla. Admin. Code, which provides as follows:

> Pursuant to legislation enacted during the 1972 regular session of the legislature and retroactive to January 1, 1972, taxable income as defined in Code Section 220.13(2) shall be adjusted under Code section 220.13 (1)(a)2. by adding thereto all interest which is excluded from federal taxable income. This addition shall include interest income excluded under section 103(a) of the Internal Revenue Code, principally interest from state and local debt obligations, and interest income derived from other obligations which are exempt from federal income tax by federal law, by state law or by the terms of their issue. (e.s.)

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[14] "Adjusted federal income," as conceded by Appellees, includes interest income earned on U.S. bonds and obligations.

[15] Section 103(a) of the Internal Revenue Code excludes interest on the obligations of a state or political subdivision thereof.

Since enactment of the tax at issue the Florida Department of Revenue has consistently maintained that all interest income from state and local debt obligations should be included in the franchise tax base for purposes of measuring and computing the tax. By affidavit, Thomas H. Swindal, Assistant Director, Division of Audits, Florida Department of Revenue, attested that the Department, since inception of the franchise tax on banks, has consistently maintained the policy that interest income from debt obligations issued by the federal government or by any state or local authority are subject to inclusion in the franchise tax base (R 103-104). The contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation, although not necessarily controlling, is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788 (Fla. 1952); Boca Raton Pub. Co., Inc. v. Dept. of Revenue, 413 So.2d 106 (Fla. 1st DCA 1982).

Moreover, Ch. 72-278, Laws of Florida, which created Part VII of Ch. 220 to impose a franchise tax on banks, specifically provided in §10 as follows:

> Sections 125.019, 159.15, 159.31, 159.50, 183.14, 215.76, 243.33, 315.11, 340.20, 348.122, 348.65, 348.762, 349.13, 403.1834, 423.03 and 554.102, Florida Statutes, and all other comparable statutes of tax exemption, are hereby repealed to the extent that they would exempt interest, income or profits on debt obligations from the tax imposed by chapter 220, Florida Statutes. (e.s.)

Thus, contemporaneous with the passage of the tax at issue, the Legislature, to insure the tax was nondiscriminatory, repealed all statutes of tax exemption for state and local debt obligations to the extent they would exempt interest, income, or profits on local debt obligations from the tax imposed by Ch. 220, Fla. Stat. The tax sub judice is clearly a tax imposed by Chapter 220. In addition, the State Bond Act, §§215.57 - 215.83, Fla. Stat., specifically provides in §215.76 that the exemption from taxation for state and local bonds shall not be applicable to any tax imposed by Ch. 220. Banks (and other associations) deriving interest income from state and local bonds would be hard pressed to substantiate an entitlement to exempt or exclude that interest from the tax base for computing the taxes imposed by Chapter 220, particularly in light of the fundamental rule of statutory construction which provides that exemptions from taxation must be strictly construed against the taxpayer seeking the benefit of the exemption. Housing By Vogue, Inc. v. State,

Dept. of Revenue, 403 So.2d 478 (Fla. 1st DCA 1981); U.S. Gypsum v. Green, 110 So.2d 409 (Fla. 1959).

The Appellees have failed to find a single instance where Florida grants a state or local debt obligation preference over the treatment given a federal obligation. Even assuming for argument that Appellees can find one example of discrimination as defined by the United States Supreme Court, this Court should still find that interest earned from such a bond is includible in the tax base in order to uphold the validity of the tax. Other state Supreme Courts have so held in order to uphold the validity of their tax against challenges of discrimination under the Federal Public Debt Statute.

In Connecticut Bank and Trust Co. v. Tax Commissioner, 423 A.2d 883 (Conn. 1979) the Court considered whether interest earned from certain state bonds should be included in the tax base for measuring the bank's tax liability under the Connecticut corporate business tax. Like Florida, the tax was measured by "net income" during the current taxable year. Unlike Florida, the legislation creating the Connecticut obligations on which interest was earned provided that the bonds and any interest earned therefrom were exempt from "any" and "all" taxation. The Court noted that the Connecticut business tax was in the nature

of an excise tax levied for the privilege of doing business in corporate capacity within the state and was "not a direct tax upon the allocated income of the corporation in a given year but a tax for the privilege of exercising its franchise within the state 'measured by the entire net income . . . received by the corporation . . . from business transacted within the state during the income year . . .'" Id. at 885. The Court also noted that a conclusion that interest from state and local bonds should be included in the measure of net income, **in spite of the unconditional exemption,** was consistent with federal law, i.e., 31 U.S.C. §3124, prohibiting discrimination against federal securities. To uphold the validity of the tax, the Court ruled that interest from state and local bonds must be included in the measure of net income.

A similar analysis and conclusion was made by the Alaska Supreme Court in National Bank of Alaska v. State, Department of Revenue, 642 P.2d 811 (Alaska, 1982) where the question was whether the interest received from certain state and local bond interest should be included within the tax base for the purpose of determining the bank's business license fee or tax. Like Florida, the tax was measured by "net income" during the current taxable year. Again, unlike the situation in Florida,

certain state statutes appeared to exempt from state taxation interest income earned on state and local bonds. The Court held that the state and local bond interest must be included in the net income of banks for purposes of determining the banks' business license tax liability, in order to avoid any unlawful discrimination against federal securities.

The tax before this Court does not require the same analysis and treatment given by the Connecticut and Alaska Supreme Courts to uphold the validity of their taxing statutes. The tax before this Court specifically includes in the tax base for measuring the tax liability all interest earned on federal, state, and local debt obligations. Contemporaneous with the passage of the tax sub judice, the Legislature repealed all statutes of tax exemption for state and local debt obligations to the extent they would exempt interest on debt obligations from any tax imposed by Chapter 220. See, §10, Ch. 72-278, Laws of Florida. Since enactment of the tax the Florida Department of Revenue has consistently maintained (by rule and policy) that all interest from all debt obligations must be included in the base for computing tax liablity. Moreover, language routinely and consistently employed by the Legislature in granting an 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. There is parity of treatment for all federal, state, and local debt obligations. The tax is nondiscriminatory.

CONCLUSION

There is an abundance of dispositive legal authority to support reversal of the District Court's decision declaring Florida's franchise tax on banks and savings associations invalid as violative of the Federal Public Debt Statute. The United States Supreme Court has twice upheld corporate taxes which, like the tax sub judice, utilized a current net income measure for computing the tax. Other state Supreme Courts have also upheld similar taxes. The tax before this Court clearly falls within the purview of the exception contained in the federal statute: this tax constitutes "a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation." Interest earned on federal obligations may therefore be included in the tax base without violating the Federal Public Debt Statute.

The decision of the District Court should be quashed, with directions that the Final Summary Judgment of the trial court upholding the validity of the tax be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellants has been furnished by U.S. Mail to THOMAS M. ERVIN, JR., Esq., Ervin, Varn, Jacobs, Odom & Kitchen, P. O. Box 1170, Tallahassee, Florida, 32302, this 26th day of March, 1987.

Linda Lettera

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