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BANKING REPORT

Application of Florida State Tax Laws to Edge Act Corporations: Encouragement of International Banking in Florida

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The first Florida based Edge Act Corporation ("Edge") was registered with the Federal Reserve Board in 1969. Since then, some twenty-seven Florida based Edges have been formed by major non-Florida bank holding companies, such as Bank America, and foreign banking institutions, such as Banco de Venezuela. Florida is truly coming of age as an international banking center and Edges, which primarily engage in international banking transactions, have become a significant part of this growth.¹ In 1980 and 1981, the Florida legislature enacted three "great exemptions" from state taxation of international banking transactions. Thus, the favorable tax treatment afforded Edges headquartered in Florida will further encourage such corporations to locate in Florida. This report discusses the effect which these three exemptions will have on the Florida Edges.

I. EXEMPTION FROM DOCUMENTARY STAMP TAX

Section 201 of the Florida Statutes imposes an excise tax on documents which are "made, signed, executed, issued, sold, removed, cosigned, assigned, recorded, or shipped in the state."² Chapter 12B-4, Volume VII of the Florida Administrative Code implements regulations under this section. The documentary stamp tax attaches to the following five instruments: 1. deeds and

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1. See, Roussakis, *Miami's Surge in International Banking* 13 LAW. AM. — (1982). For general discussions of the powers and authority of Edges see, M. Cobb, *A Shot In The Dark For Edge Act Corporations*, 97 BANK L.J. 236 (1980), and E. ROUSSAKIS, *MIAMI'S INTERNATIONAL BANKING COMMUNITY: FOREIGN BANKS, EDGE ACT CORPORATIONS AND LOCAL BANKS*, Ch. 3 (1981).

2. FLA. STAT. § 201.01 (1981).

other instruments conveying an interest in realty;³ 2. bills of sale, agreements, and transfers of stock of shares in a corporations;⁴ 3. issuance of stock certificates;⁵ 4. bonds, indentures, and certificates of indebtedness;⁶ and 5. promissory notes, written obligations to pay money, and assignments of wages.⁷

Florida Statute section 201.23(4), effective July 1, 1980, sets forth the first "great exemption" for Edge banks. Prior to 1980, Edges were exempt from certain documentary stamps, such as the tax on promissory notes evidencing loans from Edges to foreign borrowers. The new section 201.23(4) significantly broadens this exemption by excluding the excise tax on instruments sold by or to a banking organization⁸ in the conduct of an international banking transaction.⁹

3. *Id.* § 201.02.

4. *Id.* § 201.04.

5. *Id.* § 201.05.

6. *Id.* § 201.07.

7. *Id.* § 201.08.

8. Section 199.023(9) of the Florida Statutes defines a banking organization as:

(a) A bank organized and existing under the laws of this state;

(b) A national bank organized and existing as a national banking association pursuant to the provisions of the National Bank Act, 12 U.S.C. § 21 *et. seq.*, and maintaining its principal office in this state;

(c) An Edge Act corporation organized pursuant to the provisions of § 25(a) of the Federal Reserve Act, 12 U.S.C. § 611 *et. seq.*, and maintaining an office in this state;

(d) An international bank agency licensed pursuant to the laws of this state; or

(e) A federal agency licensed pursuant to §§ 4, 5 of the International Banking Act of 1978 to maintain an office in this state;

(f) A savings association organized and existing under the laws of this state; or

(g) A federal association organized and existing pursuant to the provisions of the Home Owner's Loan Act of 1933, 12 U.S.C. § 1461 *et. seq.*, and maintaining its principal office in this state.

[Underlining shows 1981 Legislative revisions.]

9. FLA. STAT. § 199.023 (10), (11) (1981) provides:

(10) "*International banking facility*" means a set of asset and liability accounts, segregated on the books and records of a banking organization, that includes only international banking facility deposits, borrowings, and extensions of credit as those terms are defined pursuant to § 655.071(2).

(11) "*International banking transaction*" means:

(a) *The financing* of the exportation from, or the importation into, the United States or between jurisdictions abroad of tangible personal property or services;

(b) *The financing* of the production, preparation, storage, or transportation of tangible personal property or services which are identifiable as being directly and solely for export from, or import into, the United States or between jurisdictions abroad; or

(c) *The financing* of contracts, projects, or activities to be performed substantially abroad, except those transactions secured by a mortgage, deed of trust, or other lien upon real property located in the state;

(d) *The receipt of deposits or borrowings or the extensions of credit by an international banking facility, except the loan or deposit of funds secured by mortgage, deed of*

Section 201.23(i) of the Florida Statutes also exempts Edges from the payment of the documentary stamp tax on promissory notes made to individuals residing outside the United States and to foreign corporations. The exemption provided under subsection (ii) will prove to be of particular significance to Edge Banks. That subsection provides exemptions for

all drafts or bills of exchange dated after July 1, 1977, arising out of transactions involving the importation or exportation of goods or storage of goods abroad or for the purpose of furnishing dollar exchange as required by the usage of trade in the respective countries, dependencies, or insular possessions if at the date of acceptance of the instrument the drawer of the draft or bill of exchange or person for whose benefit the financing is conducted is an individual residing outside the United States or business organization or other person located outside the United States.¹⁰

The section 201.023(1) exemption does not apply, however, to instruments relating to the transfer of real property located in Florida,¹¹ or for the purpose of financing a purchase of Florida real estate.¹²

II. EXEMPTION FROM INTANGIBLE PERSONAL PROPERTY TAX

Section 199 of the Florida Statutes imposes a tax on all intangible personal property held as of January 1 of the calendar year in which it was purchased. Intangible personal property is defined as "all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents."¹³

The definition of intangible property includes, but is not limited to, money;¹⁴ stocks or shares of incorporated or unincorporated companies, business trusts; notes, bonds and other obligations for the payment of money; and condominium and cooperative

trust, or other lien upon real property located in the state; or

(e) Entering into foreign exchange trading or hedging transactions in connection with the activities described in paragraph (d).

10. Section 201.23(iii) exempts promissory notes secured by a mortgage on realty outside the state of Florida from the tax.

11. FLA. STAT. § 201.23(2)(a) (1981).

12. *Id.* § 201.23(2)(b).

13. *Id.* § 199.023(1).

14. Although money is classified as intangible personal property, it is no longer taxable under this statute. The annual one-tenth of one mil on the dollar tax on money was repealed July 1, 1972.

apartment leases of recreation facilities.¹⁵ The annual intangible tax return is also required to separately list the character, description, location and "just valuation" of all such property. Under new section 199.052(1), effective as of July 1, 1981, nonresidents who own, manage, have custody over, or control intangible personal property which has acquired a business situs in Florida must file intangible tax returns.

The corporate income tax statute, section 220 of the Florida Statutes, provides a tax credit¹⁶ for Edges and other organizations involved in banking type services against state corporate income tax. This credit is in an amount equal to the lesser of the annual one-mil intangible tax paid or forty percent of the corporate tax. Since the revisions to section 199.072 largely eliminate the intangible tax on most Edge transactions, this credit will be of limited significance.

Under section 199.062, any company or corporation, including a financial institution qualified to do business in Florida, is required to forward to the Department of Revenue a record of all registered holders of its securities of record as of December 31 of the proceeding year whose mailing address on the records of the Company is within Florida. Further, upon promulgation of regulations, the Department is authorized to require financial corporations, such as an Edge, to furnish to the Department, on or before April 1 of each year, the name, address, and social security number or federal identification number of depositors who have deposits on January 1 of each year, and whose mailing address is in Florida. To the extent that the Edge pays the intangible tax as agent for any such depositor, this requirement is not applicable.

Section 199.072(4) of the Florida Statutes, effective as of July 1, 1980, is the second "great exemption" for Edges. Under this provision, all intangible personal property issued in or arising out of any international banking transaction and owned by a banking organization is exempt from the annual one mil tax of section 199.032(1). As a practical matter, Edges will not be responsible for payment of intangible tax other than the one-time two mil tax on obligations secured by mortgages, deeds of trust or other liens on Florida real property. Since the Edge banking activities largely in-

15. FLA. STAT. § 199.023(1) (1981).

16. The intangible personal property tax, like the corporate tax, but unlike the documentary stamp tax, is deductible for federal income tax purposes pursuant to § 164(a) of the Internal Revenue Code.

volve "international banking transactions"¹⁷ where the collateral, if any, is not usually Florida real property, the impact of the intangible personal property tax on Edges and other taxpayers as of June 1, 1980, will be relatively slight. Edges, like all other Florida taxpayers, are nonetheless required to file the annual intangible personal property tax return whether or not any intangible personal property tax is due.

Other exemptions from the intangible personal property tax set forth in section 199.072 include property owned by a political subdivision or municipality; franchises; any interest in a partnership; United States or Florida municipal or county bonds; any intangible property held in trust pursuant to an employee welfare benefit plan qualified under section 401 of the Internal Revenue Code ("Code"); any note, bond or other obligation secured by a mortgage on real property situated outside the State on which a documentary stamp tax has been paid; and intangible property held by non-profit religious, educational, or charitable institutions. Individual taxpayers have an exemption on the first \$20,000 of property.

The business situs provision of the statute, section 199.112, is very broad, and covers all bills, notes, or accounts receivable, obligations or credits which in any way are connected with the sale, leasing, or servicing of real or personal property in the state. Whether other types of intangibles, such as stocks and bonds, have a taxable Florida situs is determined by the "control, management, or custody" test of section 199.052(1) and Regulation 12C-3.06. Notes or bonds and other receivables secured by a mortgage on Florida real property and held by an Edge, on which a domestic or foreign person or corporation is the obligor, are therefore subject to the one-time two mil intangible personal property tax, whether or not the Edge physically holds them within the State. In view of this second great exemption for Edges, section 199.122, which provides valuation guidelines for intangible personal property, is largely of historical interest only. In this regard, under section 199.122(7), secured notes are valued at the principal amount of the indebtedness evidenced by the obligation.

III. EXEMPTIONS FROM THE STATE CORPORATE INCOME TAX

Section 220 of the Florida Statutes imposes a five percent tax

17. *Supra* note 9.

on income derived from corporations and business entities taxed as corporations. The informal position of the Department of Revenue is that the Edge falls within section 220,¹⁸ notwithstanding the fact that the term bank, as defined in section 220.62 does not strictly include a United States corporation, such as an Edge.¹⁹ The definition provided in section 220.62 includes

[a] bank holding company . . . or a bank or trust company incorporated or doing business under the laws of the United States . . . of any state, or of any territory, a substantial part of the business of which consists of receiving deposits and making loans and discounts or of exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency and which is subject by law to supervision and examination by state, territorial, or federal authority having supervision over banking institutions . . .

The third "great exemption" is set forth in section 220.63(5) which became effective July 1, 1981. It provides that the "eligible net income" of an international banking facility²⁰ may be deducted

18. See 077-126 Op. Att'y Gen. (1979).

19. Section 607.367 of the Florida Statutes imposes a tax on "foreign corporations" (i) applying and qualifying to "transact business" in Florida (ii) filing articles of amendment to increase the number of authorized shares, or (iii) filing articles of merger or consolidation. The rate of tax is equivalent to what a "domestic corporation" would pay under section 607.364, except that it is based solely upon the capital stock represented in Florida. The Florida Secretary of State, Division of Corporations, and the Florida Division of Banking and Finance of the Office of the Comptroller have not taken a formal position on whether this tax is applicable to an Edge. Similarly, no Attorney General's opinion exists which is specifically on point. Section 607.004(2) defines a "foreign corporation" as a "corporation organized under laws other than the laws of this state for a purpose or purposes for which a corporation may be organized under this chapter." A literal reading of this definition would include an Edge, which is organized under the laws of the United States—"laws other than the laws of this state." However, a more reasonable view would characterize an Edge in the nature of a national bank, as is the case under the corporate income tax statute, for example, and would therefore exclude an Edge from being required to comply with section 607.367.

Edges owned by national banks have not been filing with the Florida Secretary of State to qualify to do business in Florida, although at least one Edge incorporated under a foreign chartered bank, Banco Santander International, Inc., a Spanish bank, has filed with the Secretary of State under section 607.367. Federal Reserve Board Staff have informally taken the position that any inconsistent state laws in the area of qualification to do business are preempted by the Federal Reserve Act. Further, since it does not appear that an Edge is required to "qualify to do business in Florida" under section 607.367, this provision probably does not apply to an Edge.

20. New section 220.62(3) states:

Definitions—For purposes of this part:

(3) The term "international banking facility" means a set of asset and liability accounts segregated on the books and records of a banking organization that includes only interna-

from adjusted federal income for purposes of computing the franchise tax imposed on banks and savings associations. As a practical matter, this eliminates all Florida corporate income tax on Edges.

Under part four of section 220, an Edge is taxed at the same rate as other corporations. Section 220.63 imposes a franchise tax measured by net income equal to five percent of the bank or savings association's franchise tax base for the taxable year. Under section 220.63(3), the franchise tax base is the taxpayer's adjusted federal income, as defined in section 220.13, less the deduction allowed in section 220.63(5), and less an exemption of \$5,000. Florida Statute 220.68 creates a special credit equal to the lesser of either (i) the intangible tax imposed and paid under section 199.032(1)²¹ or (ii) forty percent of the tax otherwise due under section 220.63.²² To the extent it is applicable, this credit is further conditioned on the Department of Revenue being permitted by appropriate federal agencies to "audit the accounts and records of the bank [Edge] or savings association claiming the credit, in order to determine that all taxes due to the State of Florida are in fact paid." A proviso to section 220.68 adds that this credit shall not be granted for any taxable year in which the Department has been denied access to such accounts and records.

Other benefits to banking Edges include (1) exemption of "international banking facility deposits, borrowings, or extensions of credit" from state usury law limitations,²³ amending 67.13, and (2) exclusions of international banking facility deposits from computation of deposit assets for the purposes of liquidating requirements for banks²⁴ and for savings and loan associations.²⁵

tional banking facility deposits, borrowings, and extensions of credit, as those terms are defined by the Department of Banking and Finance, taking into account all transactions in which international banking facilities are permitted to engage by regulations of the Board of Governors of the Federal Reserve System, as from time to time amended. When providing such definitions, the Department of Banking and Finance shall also consider the public interest, including the need to maintain a sound and competitive banking system, as well as the purpose of this act, which is to create an environment conducive to the conduct of an international banking business in the state.

[Underlining shows 1981 Legislative text.]

21. Under section 199.073(4), Edges are largely exempt from the one mil intangible tax.

22. The one mill intangible personal property tax exemption for most Edge transactions under section 199.072(4) is more useful to banking Edges than elimination of the resultant credit against the franchise tax due since the impact of the franchise tax has effectively been eliminated by the operation of new section 220.63(5).

23. FLA. STAT. § 687.68(1) (1981).

24. *Id.* § 658.68(1).

Subject to the third great exemption for banking Edges, the taxpayer's adjusted federal income is computed under section 220.13. Taxable income as defined in section 63 of the Code is subject to the provisions of section 220.13(2).²⁵

In determining foreign source income which is deductible from taxable income, the Code is used as the guiding authority. The Code indicates that the situs of the debtor determines the source of the income (section 861(a)(1)). Where the debt is paid or incurred or where the security is physically located is therefore not determinative of whether income is foreign source income. Specific exemptions from this general rule are allowed by Florida administrative regulations, however, and exclude from the definition of United States source income (i) interest paid by a resident alien individual or United States corporation deriving less than twenty percent of its gross income from United States sources for a specified period, and (ii) interest income received from a territory or possession of the United States.²⁷

The source of commission income or fees for services is determined to be where the services are performed (section 861(a)(3)). As a result, if an Edge services a foreign borrower by closing a loan in its offices in Miami, commission fees would be taxable as part of its otherwise taxable income base, whereas interest derived from a loan to that borrower would be exempt to a foreign situs borrower, and would therefore constitute foreign source income. Should an Edge receive compensation for services or commissions rendered outside the United States, these services would not be subject to taxation under section 220. As noted above, costs and expenses which are attributable, either directly or indirectly, to income not subject to Florida taxation reduce the excludable foreign source income.

CONCLUSION

The number of banking Edges and the variety and size of transactions in the international banking community in which Edges engage in Florida continues to grow significantly. As Florida,

25. *Id.* § 665.083.

26. Due to a time-lag in the revision of the Florida statutes, section 220 does not reflect the most current amendments to the Code. It is frequently one-year or more behind related federal tax law. For discussion of this problem, see Tanen and Golden, *Florida Corporate Taxes: The Legislature Abandons the Internal Revenue Code*, 50 FLA. BAR J. 606 (1981).

27. I.R.C. § 861(a)(1)(B).

and cities such as Miami assume even larger roles as centers of international trade and commerce, the importance of the Edge with its infusion of foreign capital—both in terms of non-Florida banking institutions owning Edges and foreign borrowers and bankers doing business with them—becomes an even more important element in economic growth. The three great exemptions from state documentary stamp tax, intangible personal property tax and corporate income tax laws are a step in the right direction in promoting such economic growth.

