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Corporations -- Stock Transfer Tax

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CORPORATIONS — STOCK TRANSFER TAX

The appellant, a subsidiary corporation, issued directly to the shareholders of the parent corporation 104,000 shares of no par value stock, in exchange for 104 shares of its own no par value stock. The Florida Comptroller determined that this transaction was an "original issue" under section 201.05 of the Florida Statutes,[1] or in the alternative, that it was a transfer of a right to receive shares of stock under section 201.04 of the Florida Statutes,[2] and in either event was taxable at the rate of ten cents per share. The circuit court affirmed the transfer as a taxable right to receive 104,000 shares of stock. The appellant contended that the transaction was merely a transfer of 104 shares of no par value stock and that only that number of shares was taxable. On appeal, *held*, affirmed: the transaction constituted a transfer of a right to receive 104,000 shares of stock and was taxable at the rate of ten cents per share under section 201.04,[3] and the resulting acquisition of the stock by the transferees brought the statute into operation. *North American Co. v. Green*, 120 So.2d 603 (Fla. 1959).

The Florida Documentary Stamp Tax is patterned after a very similar federal statute,[4] but, section 201.04 of the Florida statutes is unique in that it taxes no par value stock at a flat rate per share regardless of actual value.[5] This section levies a tax on a transfer of a right to receive

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1. FLA. STAT. § 201.05 (1959) provides: "On each original issue, whether organization or reorganization, of certificates of stock issued in the state, or profits, or of interest in property or accumulations, by any corporation, on each one hundred dollars of face value, or fraction thereof, the tax shall be ten cents; provided, that where a certificate is issued without face value, the tax shall be ten cents per share, unless the actual value is in excess of one hundred dollars per share, in which case the tax shall be ten cents on each one hundred dollars of actual value or fraction thereof."

2. FLA. STAT. § 201.04 (1959) provides: "On all sales, agreements to sell, or memoranda of sales or deliveries of, transfers of legal title to shares, or certificates of stock . . . whether entitling the holder in any manner to the benefit of such stock interests rights or not, on each one hundred dollars of face value or fraction thereof the tax shall be ten cents; and where such shares are without par or face value, the tax shall be ten cents on the transfer or sale or agreement to sell on each share. . . ."

3. FLA. STAT. § 201.04 (1959); for text, see note 2 *supra*.

4. INT. REV. CODE OF 1954, § 4301: "There shall be imposed a tax on each original issue of shares of certificates of stock, issued by a corporation, whether on organization or reorganization, at the following rates: (1) Par Value Stock, Eleven cents on each $100.00 or fraction thereof of the par or face value of each certificate (or of the shares where no certificate is issued). (2) No Par Value Stock, (a) Actual value of $100.00 or more per share —Eleven cents on each $100.00 or fraction thereof of the actual value of each certificate. . . . (b) Actual value of less than $100.00 per share — Three cents on each $20.00 or fraction thereof of the actual value of each certificate. . . ."; INT. REV. CODE OF 1954, § 4321: "There shall be imposed a tax on each sale or transfer of shares or certificates of stock, or of rights to subscribe for or to receive such shares or certificates, issued by a corporation. . . ."

5. [1957-1958] FLA. ATT'Y GEN. BIENNIAL REP. 115: "[T]here is no reported case involving a statute making the number of shares, and not the total value of the shares, the basis for the tax as do the Florida statutes. . . ."

shares of a corporation,[6] while section 201.05 imposes a tax on the original issue of shares of stock.[7]

Since Florida's statute closely parallels the federal law, a brief survey of cases interpreting the federal statute would seem to be in order.[8]

The transfer of the right to receive shares of stock of a corporation has been held by the United States Supreme Court to include the issuance of stock in the name of one who has no beneficial interest therein,[9] and the issuance to an employee who merely held the stock for his employer.[10] However, the majority of fact situations, as in the instant case, involved stock issued under a reorganization or merger agreement in which the parent company transferred its assets to a second company and the second company issued the new stock directly to the stockholders of the parent company.[11]

On the other hand, the United States Supreme Court has held a transaction to be an original issue when there was an introduction of new capital,[12] or a change in the capital structure.[13] A mere change in the capital of a corporation by a transfer to surplus for its outstanding shares of no par value stock does not of itself require the corporation to pay stamp taxes when no certificates are issued.[14] It also has been held that when no change was made in the total amount of the capital stock, or in the character of the stock, but merely in the number of shares, there was no original issue;[15] nor was an exchange between a corporation and a stockholder of no par value stock for stock having par value taxable as an original issue.[16] The significant element of an

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6. FLA. STAT. § 201.04 (1959); for text, see note 2 *supra.*

7. FLA. STAT. § 201.05 (1959); for text, see note 1 *supra.*

8. Pursuant to familiar rules of statutory construction, the common law interpretation surrounding parent legislation is usually adopted by the enacting state. See Note, *Construction of a Statute Adopted from Another Jurisdiction*, 43 HARV. L. REV. 623 (1930).

9. H. J. Heinz Co. v. Driscoll, 37 F. Supp. 803 (W.D. Pa. 1941); Central Life Assur. Soc'y v. Birmingham, 48 F. Supp. 863 (S.D. Iowa 1943), *aff'd*, 141 F.2d 116 (8th Cir. 1944).

10. Founders General Corp. v. Hoey, 300 U.S. 268 (1937).

11. American Processing & Sales Co. v. Campbell, 164 F.2d 918 (7th Cir. 1947); United States v. Revere Copper & Brass, Inc., 100 F.2d 391 (2d Cir. 1938); American Gas Mach. Co. v. Willcuts, 87 F.2d 924 (8th Cir. 1937).

12. Iron Fireman Mfg. Co. v. United States, 106 F.2d 831 (9th Cir. 1939).

13. W. T. Grant Co. v. Duggan, 94 F.2d 859 (2d Cir. 1938) (after the transfer from surplus to capital, new stock was issued).

14. F. & M. Schaefer Brewing Co. v. United States, 130 F. Supp. 322 (E.D.N.Y. 1955) (the transfer from surplus to capital was not followed by an issuance of stock certificates); Cleveland Provision Co. v. Weiss, 4 F.2d 408 (N.D. Ohio 1925).

15. American Laundry Mach. Co. v. Dean, 292 Fed. 620 (S.D. Ohio 1923). The exchange in this case was directly between the company and the shareholder and is to be distinguished from the result in other cases where the exchange is effected by the surrender to a new company of the stockholders' old par value shares for the new company's no par value shares. The latter situation will result in a taxable right to receive shares of stock.

16. United States v. Pure Oil Co., 135 F.2d 578 (7th Cir. 1943); American Laundry Mach. Co. v. Dean, 292 Fed. 620 (S.D. Ohio 1923).

original issue has been the introduction of new capital. There have been few decisions contrary to this interpretation.[17]

The application of section 201.05 of the Florida Documentary Stamp Act was considered in *Gay v. Inter County Tel. & Tel. Co.*,[18] when the taxpayer contended "that the corporation was not liable for the tax on the new stock and bonds issued by the corporation pursuant to their plan of reorganization because it did not acquire any new capital or add any earned surplus to its capital structure."[19] After detailing the plan of reorganization and demonstrating that under the plan and upon issuance of the new stock there was newly dedicated capital, the court held the transaction taxable as an original issue.[20]

The Florida Attorney General in an opinion to the Comptroller on the tax effect of the transfer in the instant case, placed heavy emphasis on the fact of reorganization,[21] which term is expressly used in section 201.05.[22] His conclusion was that the fact of reorganization was controlling and the transaction in the instant case was an original issue. However, the Florida Supreme Court held that the mere fact of reorganization of the company was not determinative as to which section of the statute was activated. If the reorganization introduced new capital, as in the *Gay* case, it resulted in an original issue and was taxable under section 201.05, whereas if it created a right to receive shares of stock, as in the instant case, it was taxable under section 201.04. In either event the point was academic in the present situation since the same liability attached under either section of the statute.

Appellant's primary argument rested on the proposition that all that had occurred was a transfer by the parent company through appellant of the 104 shares of appellant's stock which the parent company was holding, and that the same thing could have been effected by a direct transfer from the parent to the stockholders with a tax attaching only to the 104 shares transferred. This argument failed to impress the court. It was conceded that had the appellant actually chosen the procedure which he now suggested, the tax liability might have been avoided.[23] However,

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17. American Processing & Sales Co. v. Campbell, 164 F.2d 918 (7th Cir. 1947); United States v. Revere Copper & Brass, Inc., 100 F.2d 391 (2d Cir. 1938); Ladner v. Pennroad Corp., 97 F.2d 10 (3d Cir. 1938); *In re* Grant-Lees Gear Co., 1 F.2d 393 (N.D. Ohio 1924); West Va. Pulp & Paper Co. v. Bowers, 293 Fed. 144 (S.D.N.Y. 1923); Marconi Wireless Tel. Co. v. Duffy, 273 Fed. 197 (D.N.J. 1921). *Contra.* Westmoreland Coal Co. v. MacLaughlin, 8 F. Supp. 963 (E.D. Pa. 1934).

18. 60 So.2d 22 (Fla. 1952).

19. *Id.* at 25.

20. *Id.* at 26.

21. [1957-1958] FLA. ATT'Y GEN. BIENNIAL REP. 116.

22. FLA. STAT. § 201.05 (1959): "[W]hether organization or reorganization. . . ." (Emphasis added.)

23. It is advisable to proceed cautiously, with an eye directed toward potential tax liability, when determining amounts of stock to be issued. In situations when large numbers of shareholders are involved it may be necessary to split the stock or issue a larger number of shares to avoid fractional distributions. However, the issuance of

it was indicated that once the particular taxable course of action had been chosen, the court would not make the taxability of a transaction dependent upon an alternative procedure which might not have been taxable.[24] What was done, and not what might have been done, determined the tax liability.[25]

The interpretation of the Florida court is clearly in line with the construction of the parent federal statute by the United States Supreme Court, and with the tendency of all courts to attach tax liability upon a particular course of action even though non-taxable avenues are open but unused by the taxpayer.

The case illustrates the high degree of care and foresight required by today's complex tax statutes. The engaging in transactions without a full awareness of potential tax consequences may well result in a more burdensome tax liability than is necessary within the framework of the law.

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INTERPLEADER ACTIONS — PLAINTIFF'S ATTORNEY'S FEES

In an interpleader action to determine which of two defendant-claimants was entitled to a disputed fund, the chancellor, in his discretion, awarded attorney's fees to the plaintiff-stakeholder and court costs to the successful defendant, both to be paid directly by the losing defendant. On appeal, *held*, affirmed: an award of costs and fees to be paid directly by an unsuccessful claimant rather than from the interpleaded fund was not an abuse of the court's discretion. *Lucco v. Treadwell*, 127 So.2d 461 (Fla. App. 1961).

While the rule as to the assessment of costs varies between jurisdictions, in at least a plurality of states,[1] including Florida,[2] the "disinterested" stakeholder who brings an interpleader action is entitled to be reimbursed

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10,000 shares, simply to provide each holder with more shares of stock, when 100 will serve the same end, is an unnecessary accrual of tax liability. This is particularly true of nonpublic corporations.

24. Founders General Corp. v. Hoey, 300 U.S. 268 (1937).

25. American Gas & Elec. Co. v. United States, 69 F. Supp. 614 (S.D.N.Y. 1946).

1. While articles and decisions dealing with the precise subject matter of this note are rather scarce, for an exhaustive study of the general subject of attorney's fees in interpleader suits, see Annot., 48 A.L.R.2d 190 (1956).

2. See Miller v. Gulf Life Ins. Co., 148 Fla. 1, 3 So.2d 519 (1941); Brown v. Marsh, 98 Fla. 253, 123 So. 762 (1929).