

## The Florida Intangibles Tax — Do I Really Have to Pay It?

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In 1998, Florida adopted amendments to its Rules with respect to the Intangible Personal Property Tax (the "Intangibles Tax"). The amendments provide guidelines which may be used by Florida residents to reduce or eliminate their Intangibles Tax. In 1999, the Florida Legislature amended the Intangibles Tax statute to reduce the tax rate, as discussed below, but left the 1998 guidelines intact.

### The Basics

Currently, Florida imposes a tax on certain intangible assets owned by a Florida resident on January 1 of each year.<sup>1</sup> The tax is \$2 per \$1,000 of fair market value (on December 31 of the prior year) of stocks, bonds and interests in limited liability companies and is payable on June 30 of each year (e.g., the tax on intangibles held on January 1, 1999 is due on June 30, 1999).<sup>2</sup> Beginning January 1, 2000, Florida has reduced the tax to \$1.50 per \$1,000 of intangibles.<sup>3</sup>

Traditionally, many Florida residents have sought to avoid or minimize the impact of the Intangibles Tax by converting a portion of their portfolio to cash on December 31 or by holding Florida or United States government obligations.<sup>4</sup> However, for residents who held stock or interests in limited liability companies, neither of these techniques presented attractive alternatives.

In recent years, many Florida residents have created out-of-state limited partnerships or out-of-state irrevocable trusts in order to reduce their Intangibles Tax obligations. These techniques, while effective, added a great deal of complication

and were easier to administer in theory than in actual practice.

### New Rules

From September 1997 through December 1997, the Florida Department of Revenue (the "Department") held a series of meetings with various law firms to discuss the Intangibles Tax and the traditional avoidance methods. The Department then floated proposed guidelines to revise the manner in which the Department would treat limited partnerships, corporations and trusts with respect to the Intangibles Tax. The first round of guidelines was very unfavorable from the taxpayers' perspective and would have essentially eliminated avoidance methods. However, in early December 1997, the Department issued proposed guidelines on how limited partnerships, corporations and trusts could avoid the Intangibles Tax. *In essence, the Department created safe harbors under which assets held in limited partnerships, corporations and trusts would not be subjected to Intangibles Tax by Florida.*

When the proposed amendments were finally issued in early December 1997, it was obvious that the new rules for corporations were too stringent to be useful in avoiding the Intangibles Tax. Further, the new rules for limited partnerships were not much better, but left room for those residents who were using limited partnerships to avoid the intangibles tax to continue using them if they were very careful in how the limited partnerships were managed. The real safe-harbor, however, was created through the use of trusts.

The proposed rules created a workable safe-harbor by which if a trust:

(1) was irrevocable for a period of time; (2) had an out-of-state Trustee; (3) was totally discretionary — that is the out-of-state Trustee had complete discretion over distributing income and principal to the grantor; (4) had all of its assets located outside of Florida; and (5) did not mandate that the same assets which went into the trust were to be returned to the grantor, then there would be no Intangibles Tax liability.<sup>5</sup>

On April 28, 1998, the Governor of Florida and his Cabinet approved the proposed rules without substantial change.<sup>6</sup> Shortly thereafter, the proposed rules were effectively amended by a change to the Florida Intangibles Tax statute. The change provides that the mere fact that a Florida bank or trust company acts as an agent for a trust (but not a Trustee), does not cause the trust assets to be subject to the Intangibles Tax.

To illustrate, a Florida resident can utilize this safe-harbor to avoid the Florida Intangibles Tax by creating and funding an irrevocable trust with a term of 30 days (including January 1) prior to the end of the year, having

the resident's child who lives in New York state act as Trustee, giving the Trustee discretion to distribute income and principal to the resident during the trust term and providing that the remaining trust assets will be distributed to the resident at the end of the trust term. The trust assets should be held at either institutions located outside of Florida or with a Florida bank or trust company. Based on this safe-harbor, any assets held by such a trust on January 1, 2000 would not be subject to Intangibles Tax.

#### Conclusion

The new rules and the statute present an extraordinary opportunity for wealthy Florida residents to reduce or even eliminate their Intangibles Tax bill.

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#### ENDNOTES

1. F.S. § 199.032.
2. The tax does not apply to intangible property which is secured by a lien upon real property located in Florida, F.S. § 199.032.
3. Small additional discounts are provided if the tax is paid in March, April or May.
4. Cash, Florida and United States government obligations and interests in foreign (non-Florida) limited partnerships are specifically exempt from the tax, F.S. § 199.185.
5. F.A.C. 12C-2.0063.
6. The proposed rules as adopted may be found at F.A.C. 12C-2.0061, 12C-2.0062, and 12C-2.0063.