SAM J. COLDING, as Collier County Property Appraiser, and the DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Petitioners,

vs. CASE NO. 64,366

PETER W. HERZOG AND JOAN L. HERZOG,

Respondents.
_____/

Second District Court of Appeal of Florida
Case No. 82-2013

RESPONDENTS' ANSWERING BRIEF

PETER W. HERZOG
411 North Seventh Street, Suite 1300
St. Louis, Missouri 63101
(314) 231-6700
and
3160 Fort Charles Drive
Naples, Florida 33940
(813) 263-1149

LEO J. SALVATORI
QUARLES & BRADY
The Four Hundred Building
400 Fifth Avenue South, Suite 301
Naples, Florida 33940
(813) 262-5959

ATTORNEYS FOR PLAINTIFFS/RESPONDENTS

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondents adopt the references made by the Petitioners in their Preliminary Statement and the Brief following same.

STATEMENT OF THE CASE AND FACTS

Respondents concur, generally, with the Statement of the Case and Facts enumerated on pages 1 and 2 of the Petitioners' Brief. However, Respondents disagree with the characterization of their residence in Collier County as a "vacation" residence or a "part-time" dwelling. Suffice it to say that Respondents are voting and tax-paying residents of the State of Missouri and are present at their residence in the State of Missouri on a more frequent basis than they are present in their residence in Collier County, Florida.

Also, Respondents wish to re-emphasize the bifurcated nature of their case. The Court below found in Respondents' favor based on their statutory construction of the Statutes of the State of Florida. Respondents' support and agree with that construction. However, even if an opposite statutory construction be followed, then Respondents still must prevail, since the tax in question is manifestly discriminatory and violates the Privileges and Immunities Clause of the United States Constitution.

STATEMENT OF ISSUES

POINT I

ARE HOUSEHOLD GOODS AND PERSONAL EFFECTS SUBJECT TO AD VALOREM TAXATION UNDER THE STATUTES AND CONSTITUTION OF THE STATE OF FLORIDA?

POINT II

WHETHER THE AD VALOREM TAX HERE IN QUESTION, AS APPLIED ONLY TO NON-RESIDENTS OF FLORIDA, IS VOID BECAUSE IT VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE CONSTITUTION OF THE UNITED STATES: ARTICLE IV, § 2?

ARGUMENT

POINT I

THE HOUSEHOLD GOODS AND PERSONAL EFFECTS OF BOTH RESIDENTS AND NON-RESIDENTS ARE NOT PROPER SUBJECT MATTERS OF AD VALOREM TAXATION IN THE STATE OF FLORIDA.

The District Court in a unanimous decision below determined that the household goods and personal effects of both residents and non-residents were not proper subject matters of taxation in the State of Florida. They did so after a full review of the Briefs by both parties and after a full analysis of the decision of the First District Court of Appeals in Department of Revenue v. Markham, 381 So.2d 1101 (Fla. 1 DCA 1979). Petitioners' Argument with respect to their Point I necessarily involves an analysis of the Markham case. Petitioners have consistently in this litigation attempted to distinguish and to disparage the decision in Markham because this Court quashed that opinion as there was no standing by the Plaintiff in that case. Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981). However, as the District Court below pointed out, there is standing in this case and the rationale of the Markham 1 DCA decision is fully dispositive of the issues and its conclusions were adopted by the District Court below.

Respondents would, indeed, have a difficult task improving upon the reasoning by the First District Court of Appeals in Markham as adopted by the District Court below. Respondents respectfully suggest that the well reasoned and comprehensive opinion in Markham is fully and adequately dispositive of the statutory construction issues and in the interest of brevity will not attempt to restate the logical progression outlined by the Court in the Markham decision. The essential holding of Markham, reached on Florida statutory construction grounds, is that Chapter 67-377, Laws of Florida (1967), eliminates household goods and personal effects as a proper subject of ad valorem taxation in Florida, rather than such property being taxable and then exempted. The distinction between classification of taxables and exemption is a vital one to this action. While Respondents rely on Chapter 67-377, now codified as § 192.001(11)(d), Florida Statutes, Petitioners contend that § 196.181, an exemption statute, is controlling, and restricts the non-taxation of household goods and personal effects to residents of Florida. The Markham opinion carefully considers the classification issue which Petitioners attempt to avoid in their Brief.

The Markham Court was careful to conclude that the classification power of the Legislature was supreme over its exemption power. This Court has recognized the power of the Legislature to classify and of the common sense results flowing therefrom in light of the fact that the Constitution of Florida

cannot in all instances define and set forth each and every answer to an infinite number of problems. In Ammerman v. Markham, 222 So.2d 423 (Fla. 1969), this Court construed a statute wherein the Legislature had applied the homestaed exemption to condominiums and cooperative apartments and had considered those types of ownerships to be the equivalent of real property and a "dwelling house" as specified in the Constitution. In so doing, this Court quoted with approval its prior decision in Jasper v. Mease Manor, Inc., 202 So.2d 821 (Fla. 1968), to the following extent:

> "In Jasper v. Mease Manor, Inc. (Fla. 1968), 208 So.2d 821, the Court considered a statute defining the word 'charitable' as used in Fla.Const. 1885, Art. IX, § 1, limiting tax exemption statutes to those properties used for 'municipal, education, literary, scientific, religious or charitable purposes.' The statute in question included within the exemption homes operated for aged persons without regard to such persons' financial dependence or independence. Earlier definitions by the Court of the word 'charitable' as used in the Constitution were more limited. This Court, in sustaining the validity of the legislative act extending the definition, said:
>
> "'The test for measuring such legislation against the constitutional restraints must be that of reasonable relationship between the specifically described exemption and one of the purposes which the Constitution requires to be served. The problem therefore differs significantly from that which has been presented in cases requiring judicial definition of the constitutional concepts in the absence of an explicit statute. Application in those cases of a more limited definition of charitable use, in the primary sense of relief for the indigent or helpless, does not require or justify rejection of the current statute on constitutional grounds.' (Emphasis supplied.)
>
> . . .

"This legislative approval of individual ownership of units in a multiple-dwelling structure bears a resonable relationship to the purposes of Art. X, § 7, Fla.Const. 1885. Ch. 67-339 is a valid legislative definition of 'real property' and 'dwelling house,' as used in the Constitution, . . ."

Id. at p. 426

Following the precepts enunciated above, the Markham Court, First District, moved on to a consideration of its duties. It stated:

" . . . Therefore, this court's task, under the circumstances, is to interpret the statutes in accordance with the legislative intent. In so doing, to the extent that the legislative intent is in doubt, or if the statutes are so ambiguous as to render legislative intent questionable or unclear, it is the duty of the taxing authority and the court to construe them liberally in favor of the taxpayer and strictly against the taxing authority. Department of Revenue v. Brookwood Associates, Ltd., 324 So.2d 184 (Fla. 1st DCA 1975). The courts indulge the further presumption that, if any state of facts can be conceived of which would sustain the reasonableness and validity of an act of the legislature, such state of facts exists and justifies the enactment. Ex Parte Lewis, 101 Fla. 624, 135 So. 147 (Fla.1931)."

Id. at pp. 1109, 1110

Applying these principles and performing its duty of statutory construction, the Markham Court, First District, concludes:

" . . . We do conclude, however, that there is adequate basis in the record before us to indicate that exclusion of such property from consideration by taxing officials and taxpayers alike serves a legitimate, though different, public purpose than the exemption statute, namely, the elimination of the useless expenditure of manpower and resources not justified by adequate return to the public treasury. We also think it is

> not inconceivable to assume that once the legislature determined that the exemption conferred upon residents should be unlimited as to value, it saw no reasonable distinction to be made between total absence of taxation with respect to household goods and personal effects of residents, and total absence of taxation of such property owned by non-residents. Cf. Shevin v. Kahn, 273 So.2d 72 (Fla.1973), affirmed on appeal Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189; Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla.1978)."
>
> (Emphasis supplied.)
>
> Id. at p. 1111

Petitioners would distinguish the Markham decision by maintaining that the Florida Legislature had no authority to exempt from ad valorem taxation by general law any class of real or personal property for which the Constitution makes no provision for exemption. In support of this proposition, Petitioners cite a number of cases which Respondents submit are not in point.

Am Fi Inv. Corp. v. Kinney, 360 So.2d 415 (Fla. 1978), held that a private tax exemption was not valid. The exemption granted by the Legislature in Kinney was applicable to the peculiar circumstances arising from the development of Santa Rosa Island. It was clearly a special act limited to the residents of that island and was properly stricken by this Court for just that reason.

To the same effect is Archer v. Marshall, 355 So.2d 781 (Fla. 1978), a case likewise applicable to the Santa Rosa Island Development and in essence a tax relief bill. This Court,

in responding to the Legislature's attempt to pass special legislation, stated:

> "It is fundamentally unfair for the Lesiglature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others."
>
> Id. at p. 784

The special legislation enacted by the Legislature of Florida in an effort to solve the Santa Rosa Island problems, and the proper invalidation of that legislation by this Court, is quite different from the issues in this case. Perhaps, the admonition of this Court as quoted above is more to the point than is the principal for which the Petitioners cite these two cases.

In Volusia County v. Daytona Beach Racing, Inc., 341 So.2d 498 (Fla. 1976), this Court held that public property which a private corporation leased from a legislatively created district was not exempt from ad valorem taxation inasmuch as it was used for proprietary and private purposes.

The reliance of Petitioners on Dept. of Revenue v. Fla. Boaters Assoc., Inc., 409 So.2d 17 (Fla. 1981), is likewise inappropriate. In that case, the Department of Revenue took the position that the "live-aboard vessels" were taxable because they were not being utilized as boats. Both the District Court and this Court in Florida Boaters held that the Legislature had not properly defined the term "boats" and sustained the position of the taxpayer rather than the Department of Revenue. Certainly, Florida Boaters cannot be cited for the proposition urged by

Petitioners. This Court, in holding that the exemption given to owners of boats must be strictly construed in favor of the taxpayer, held:

> "In the instant case, the legislative words fall short of language sufficient to take 'live-aboard vessels' out of the constitutionally excluded class." Id. at 19, 20.

In short, it was a victory for the taxpayer and did not represent a limitation placed by this Court in the manner inferred by Petitioners.

The case of Palethorpe v. Thomson, 171 So.2d 526 (Fla. 1974), involved the construction of the Florida Constitution exemption for motor vehicles from ad valorem and other taxation and analyzed whether or not a house trailer might be considered a motor vehicle under the Constitutional proscriptions. The Court did not reject the Legislature's attempt to provide a statutory definition of house trailers but considered the use of that term and found that the taxing authorities were making a proper construction of the term "motor vehicle" as excluding house trailers and that such was in harmony with the Constitutional principles. The case did not, as represented by Petitioners on Page 8 of their Brief, represent a rejection of the Legislature's attempt to provide a statutory scheme to obviate the meaning of the Florida Constitution.

The rationale of the First District Court of Appeals in Markham as adopted by the District Court below, is correct and dispositive fully of this single question. The cases relied upon by the Petitioners do not stand for the propositions for which

they are cited and should not change the result reached by the Markham Court and the District Court below. There is something manifestly unfair in the taxation of household goods and personal effects of non-residents and the total exemption therefrom of residents. The Markham Court recognized that fundamental unfairness and concluded that the Legislature had done likewise. So did the District Court below and Respondents respectfully submit that this Honorable Court should do likewise.

POINT TWO

THE AD VALOREM TAX HERE IN QUESTION, AS APPLIED ONLY TO NON-RESIDENTS OF FLORIDA, IS VOID BECAUSE IT VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE CONSTITUTION OF THE UNITED STATES: ARTICLE IV, § 2.

In an attempt to shift the burden of the "unfairness" argument, Petitioners characterize the tax in question as one directly related to activities of leisure, recreation and vacation. Petitioners mis-characterize the nature of the tax. Make no mistake about it; the tax applies to property - not leisure - to the necessities of life, namely, the ownership of household goods and personal effects. But it applies only to non-residents. Because these Respondents maintain the majority of their time in Missouri, Petitioners would characterize the tax on their necessities as a type of surtax on a recreational activity. There is no evidence in the Record to make these assumptions and it is just as reasonable to assume from the evidence in the Record that the necessities of life to which this tax attaches are used and enjoyed by the Respondents in discharging their daily and normal activities of life while occupying a second residence in Collier County, Florida. It is just as probable, and indeed, highly likely that a number of the non-residents of Florida affected by this tax are retirees, who still maintain their "residence" elsewhere but who maintain the majority of their household goods and personal effects in the State of Florida.

A DISPROPORTIONATE TAX ON THE OWNERSHIP OF THE NECESSITIES OF LIFE IS NOT THE SAME AS A DISPROPORTIONATE TAX ON THE HUNTING OF ELK.

The Supreme Court of the United States has repeatedly held that the principal purpose of the Privileges and Immunities Clause of Article IV, § 2, of the Constitution of the United States, is to "help fuse into one nation a collection of independent, sovereign states." Its purpose was to fuse a nation of individual states into a collected and federal body. The clause here applicable finds its source in the Articles of Confederation, Article IV, Paragraph 1. In part, too, it must derive its fundamental fairness from the Colonial principles of "no taxation without representation." It requires the state to treat non-residents in the same manner that it treats residents. It prohibits compacts designed to interfere with the free flow of citizens among the several states and it prevents taxation wars between the various states. Its fundamental purpose is to insure to a citizen of State "A" who ventures into State "B" the same privileges that the citizens of State "B" enjoy. Toomer v. Witsel, 334 U.S. 385, 395, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, 1471 (1948). The United States District Court for the Eastern District of Virginia in Tangier Sound Watermen's Assoc. v. Douglas, 541 F.Supp. 1287 (1982), summarized quite accurately the judicial history found to exist by Justice Blackmun in his opinion, most frequently quoted and relied upon by Petitioners, in Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d (1978):

"Justice Blackmun noted three major developments in the interpretation of the clause. In Paul v. Virginia, 19 U.S. (8 Wall.) 168, 180, 19 L.Ed. 357 (1869), the Court had said that the clause 'insures to [nonresidents] in other States the same freedom possessed by citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States an equal protection of their laws.' 436 U.S. at 380, 98 S.Ct. at 1859, quoting Paul v. Virginia, supra, 19 U.S. at 180, 19 L.Ed. 357. The second development was in Hague v. CIO, 307 U.S. 496, 511, 59 S.Ct. 954, 962, 83 L.Ed. 1423 (1939), where the Court stated that the clause did not so much allow a citizen to carry the rights he had in his own State into other States, 'but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.' 436 U.S. at 382, 98 S.Ct. at 1859, quoting Hague v. CIO, supra, 307 U.S. at 511, 59 S.Ct. at 962. The third development, according to Justice Blackmun, was in Austin v. New Hampshire, 420 U.S. 656, 660-661, 95 S.Ct. 1191, 1194-95 (1975), where it was said that the clause 'establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment.' 436 U.S. at 382, 98 S.Ct. at 1859, quoting Austin v. New Hampshire, supra."

Id. at pp. 1297, 1298

In June of this year, the New Jersey Supreme Court struck down an Emergency Transportation Tax Act which had imposed the greater percentage of its burden on New York residents commuting into New Jersey. It did so for the reason that said tax violated the Privileges and Immunities Clause of the Constitution of the United States, Article IV, § 2, Solario et al. v. Glaser,

461 A2d 1100 (N.J. 1983). In analyzing the New Jersey Statute and determining its constitutionality, the Supreme Court of New Jersey, as had this Court in the Dept. of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978), set forth the requirements which the Statute must meet to pass Constitutional muster. The New Jersey Supreme Court observed:

> "In analyzing a statute challenged under the Privileges and Immunities Clause, it is necessary to determine if the statute discriminates against nonresidents, to identify the nature and extent of that discrimination, and to decide whether the discrimination is reasonably related to legitimate purposes that are the bases for the discrimination. If there is no substantial reason for the discrimination, the clause is violated and the inquiry is at an end. Austin v. New Hampshire, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975). If there are one or more substantial reasons for the discrimination, then the discrimination must bear a close relationship to them. Put another way, the nonresident must 'constitute a peculiar source of the evil at which the statute is aimed,' Hicklin v. Orbeck, 437 U.S. 518, 525-26, 98 S.Ct. 2482, 2488, 57 L.Ed.2d 397, 404 (1978) (quoting Toomer v. Witsell, 334 U.S. at 398, 68 S.Ct. at 1163, 92 L.Ed. at 1472), and there must be a 'substantial relationship' between the evil and the discrimination practiced upon them, id. at 527, 98 S.Ct. at 2488, 57 L.Ed.2d at 405; see also Mullaney v. Anderson, 342 U.S. 415, 418, 72 S.Ct. 428, 96 L.Ed. 458, 462 (1952).
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> "When a state is exercising its taxing power, there should be substantial equality of treatment, unless a justification is advanced supportive of the discrimination. Such justifications must be linked to some evil or problem caused by the nonresident, and, if linked, the revenue derived from the tax should bear a substantial relationship to the cost of amelioration of the evil or the solution of the problem. The correlation need not be perfect and a state has 'considerable leeway in analyzing local evils and in prescribing appropriate cures.' Toomer v. Witsell, 334 U.S. at

396, 68 S.Ct. at 1162, 92 L.Ed. at 1471; see, e.g., Shaffer v. Carter, 252 U.S. 37, 56-57, 40 S.Ct. 221, 227, 64 L.Ed. 445, 458-59 (1920)."

Id. at pps. 1103-1104

Applying the facts in the instant case to the criteria set forth in the foregoing analysis, Respondents observe:

1. The Florida tax on household goods and personal effects applicable only to non-residents is discriminatory solely on the basis of citizenship - it taxes non-residents and it wholly and totally exempts residents;

2. The extent of the discrimination is One Hundred Percent - there is absolutely no attempt to have the Florida residents bear any burden of the tax and hence, there is no incentive to the Florida Legislature to do anything other than to increase the tax;

3. No showing has been made by the State of Florida that the tax serves any legitimate purpose or that there is any particular evil sought to be eliminated - in fact, non-residents would seem to have been historically more of a boon, rather than a scourge, to the State of Florida.

Petitioners, however, urge that the tax is not one applicable to fundamental rights and, therefore, Article IV, § 2, of the United States Constitution, does not apply. Petitioners cite no case wherein the Supreme Court of the United States or a Federal Appellate Court has permitted a discriminatory tax to apply to the ownership of personal property. A discriminatory tax on the

right to hunt elk as determined by the Baldwin Court is certainly not analagous to the ownership of the necessities of operating a household in Collier County, Florida. The Supreme Court of the United States in Blake v. McClung, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432 (1898), struck down a Tennessee Statute which preferred creditor corporations incorporated in Tennessee over corporations incorporated elsewhere in the distribution of insolvent estates. In so doing, Mr. Justice Harlan observed:

> "The Court has never undertaken to give any exact or comprehensive definition of the words 'privileges and immunities,' in article 4 of the constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in Conner v. Elliott, 18 How. 591, 593, said: 'We do not deem it needful to attempt to define the meaning of the word "privileges" in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.' Nevertheless, what has been said by this and other courts upon the general subject will assist us in determining the particular questions now pressed upon our attention.
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> "One of the leading cases in which the general quesiton has been examined is Corfield v. Coryell, 4 Wash. C.C. 371, 380 Fed.Cas. No. 3,230, decided by Mr. Justice Washington at the circuit. He said: 'The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no

hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, --subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state,--may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."'"

Id. at p. 169

(Emphasis supplied)

The fundamental right asserted by Respondents in this case is clearly addressed by Mr. Justice Washington in the Corfield case cited above, and is the right to take, hold and dispose of household goods and personal effects on the same basis as do residents of the State of Florida and the right to do so without being subjected to higher taxes or impositions than are paid by the citizens of the State of Florida. Justice Blackmun in the Baldwin case refers to the Corfield case in the following manner: "In Corfield, a case the Court has described as 'The first, and long the leading, explication of the [Privileges and Immunities] clause . . .'" 98 S.Ct. at 1860.

Perhaps a short scenario as to the facts in this particular case would demonstrate the fundamental rights that are affected by this discriminatory tax. When the tax was first enacted, Respondents received a tax bill with an assessed value thereon for their household goods and personal effects of $6,289.00 producing a total tax levy of $85.58. As the record herein indicates, Respondents challenged the validity of this tax by filing a suit in the Circuit Court of Collier County, now before this Honorable Court. In spite of this lawsuit, or perhaps in response to it, in July of this year, Respondents received a Warrant Notice informing them of the delinquency of this tax and assessing penalties and warning Respondents that if the tax and penalties were not paid, "the property (would be) seized, levied upon and sold following that date (the date being August 1, 1983)." The

Warrant Notice further stated "this delinquent item bears interest from April 1st until paid, and such property belonging to you is now subject to seizure and sale in an amount to discharge this lien." Respondents were unable to obtain any stipulation from Petitioners that their property not be levied upon and sold pending the outcome of this litigation. Respondents were required to go to the Circuit Court of Collier County, Florida, and therein obtain an Order staying the levy if Respondents paid the money into the registry of the Court which they did. Finally, a few days ago, Respondents received their 1983 tax bill for their household goods and personal effects in Collier County, Florida. In this tax bill the assessment now is $13,650.00 and the tax, $192.58; more than double the amount of tax in one year. A copy of Respondents' 1982 tax bill is attached as Exhibit "A"; a copy of the Warrant Notice is attached as Exhibit "B"; and a copy of Respondents' 1983 Tax Bill is attached as Exhibit "C".

Two things are abundantly clear from this set of facts. First, the tax is substantial; the assessment has doubled and the amount of the tax has more than doubled. Non-residents simply have no power or recourse to control the actions of the taxing authorities. Second, the failure by the Respondents to pay this tax subjects their household goods and personal effects - their necessities of life in Collier County, Florida - to seizure, levy and sale to satisfy the tax. The seizure and sale of Respondents' household goods and personal effects is a far cry from a denial

to a non-resident of Montana of a hunting license for elk; it affects a fundamental right far different from the discriminatory taxation on the privilege of mooring pleasure boats in recreational boat harbors in Hawaii, Hawaii Boating Ass'n. v. Water Trans. Facilities, 651 F.2d 661 (9th Cir. 1981) cited by Petitioners and is substantially different from the denial to a non-resident of the right to qualify as a personal representative of a decedent's estate as decided by this Court in In Re Estate of Greenberg, 390 So.2d 40 (Fla. 1980) and cited by Petitioners.

In further support of their position, Respondents cite to this Honorable Court the following series of cases construing the Privileges and Immunities Clause in the fashion and with the result urged by these Respondents. Austin v. New Hampshire, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed. 530 (1975); Ward v. Maryland, 12 Wall. 418, 20 L.Ed. 449 (1871); Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482; 57 L.Ed.2d 397 (1978).

This Court, in Dept. of Revenue v. Amrep Corp., supra, observed:

> "When a non-resident makes a challenge to a state's tax scheme, it must first be determined whether the classification discriminates against the non-resident in such fashion as to unduly impinge our system of federalism which the Equal Protection Clause is intended to foster and protect along with the Commerce Clause and the Privileges and Immunities Clause. If no such impediment is found, the traditional test of a rational basis for classification must then be applied. If the tax scheme fails to pass muster under either test, the Statute must fall."
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> Id. at 1353

Respondents respectfully submit that, indeed, this tax must fall because it fails both tests. The strict scrutiny test as applied to facts herein and analyzed in the foregoing argument reflects a complete failure on the part of this tax to pass constitutional muster. Finally, applying the rational basis test, the State of Florida has not advanced one single solitary reason why a rational basis exists for the discriminatory taxation and, indeed, Respondents know of none.

Recently, applying the proscriptions quoted above, the Fifth District Court of Appeals in Randy Miller v. Board of Pensions of the United Presbyterian Church, E.S.A., 431 So.2d 350 (Fla. 5 DCA 1983), held the tax exemption statutes of Florida requiring that the applicant be a Florida corporation, not for profit, unconstitutional and quoted with approval the language of this Court in Amrep cited above. See also Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982) for an analagous application of the Florida constitutional proscriptions.

CONCLUSION

The District Court below was correct in holding that the household goods and personal effects of both residents and non-residents are totally exempted from taxation in Florida. The reasons therefor and the legislative history supporting same is fully described in the Markham decision by the First District Court of Appeals. Should this Court see fit to disagree with the decisions reached by the District Court below and the Markham Court, the tax here in question is still void for the reason that it fails to satisfy the Constitutional requirements of strict scrutiny applicable to discriminatory taxes wherein the discrimination is solely related to citizenship and for the further reason that it fails to offer any rational basis for the discrimination herein sought to be practiced.

Respondents respectfully submit that the decision of the District Court below should be affirmed.

Respectfully submitted,

PETER W. HERZOG, ESQUIRE
411 North Seventh Street, Suite 1300
St. Louis, Missouri 63101
(314) 231-6700
and
3160 Fort Charles Drive
Naples, Florida 33940
(813) 263-1149

By _____
Peter W. Herzog

QUARLES & BRADY
The Four Hundred Building
400 Fifth Avenue South, Suite 301
Naples, Florida 33940
(813) 262-5959

By _____
Leo J. Salvatori

ATTORNEYS FOR PLAINTIFFS/RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Brief has been furnished by regular United States Mail to J. Terrell Williams, Assistant Attorney General, Department of Legal Affairs, The Capital LL04, Tallahassee, Florida 32301, and John M. Hathaway, Esquire, Post Office Drawer 1537, Punta Gorda, Florida 33950, this 15TH day of November, 1983.

Peter W. Herzog, Attorney for
Plaintiffs/Respondents