IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Petitioners,

vs.

CASE NO. 64,366

PETER W. HERZOG, & JOAN L. HERZOG,

Respondents.
_____/

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

REPLY BRIEF OF PETITIONERS

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INDEX

TABLE OF CASES

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

In this brief, the Petitioner, Department of Revenue, State of Florida, will be referred to as the "Department." The Co-Petitioner, Sam J. Colding, as Property Appraiser of Collier County, Florida, will be referred to as the "Property Appraiser." The Respondents, Peter W. Herzog & Joan L. Herzog, will be referred to as the "Respondents." The Appellate Court in this case was the Second District Court of Appeal of Florida, which Court will be referred to herein as the "district court." The trial court in this case was the Twentieth Judicial Circuit in and for Collier County, Florida, which court will be referred to as the "trial court." The Symbol "A" followed by a page number will refer to the Appendix located at the back of the Petitioners' Initial Brief.

ARGUMENT

POINT I

THE HOUSEHOLD GOODS AND PERSONAL EFFECTS OF NONRESIDENTS ARE SUBJECT TO AD VALOREM TAXATION BY MANDATE OF THE FLORIDA CONSTITUTION AND THE GENERAL LAWS OF THIS STATE.

Under Point I of their reply brief, the Respondents cite two decisions of this Court as purported authority for the contention that household goods and personal effects of both residents and nonresidents are not subject to ad valorem taxation in this state. See, Ammerman v. Markham, 222 So.2d 423 (Fla. 1969); and Jasper v. Mease Manor, Inc., 208 So.2d 821 (Fla. 1968). However, Petitioners submit that the holdings of this Court in the Ammerman and Jasper cases are clearly not controlling with respect to the issue of the ad valorem taxability of household goods and personal effects owned by nonresidents and located in the State of Florida.

In the Ammerman case, this Court merely ruled that condominiums and cooperative apartments as defined by general law are within the purview of the constitutional terms "real property" and "dwelling house," as set forth in former §7, Art. X, Fla. Const. (1885). In the Jasper case, this Court ruled that the statutory exemption from ad valorem taxation of property used exclusively for 'homes for the aged' under the specified conditions was properly within the purview of the former charitable exemption provisions of §1, Art. IX, and §16, Art. XVI, Fla. Const. (1885).

Thus, in the Ammerman and Jasper cases, the taxpayers successfully contended that the type or use of the subject property was within the purview of the respective constitutional tax exemption provisions in question. In contrast, the Respondents here have never contended that they come within the purview of the controlling constitutional provisions of Art. VII, §3(b), Fla. Const., authorizing an exemption from ad valorem taxation of household goods and personal effects of every head of a family "residing in this state."

The Respondents' "answer" brief is conspiciously silent as to any discussion of the subject provisions of Art. VII, §3(b), Fla. Const., even though said constitutional provisions are the primary authority relied upon in Petitioners' initial brief for their position that household goods and personal effects of non-residents are subject to ad valorem taxation in this state. In fact, there is not even one single reference to the constitutional provisions of Art. VII, §3(b) under Point I of the Respondents' "answer" brief.

The Petitioners suggest that there is an obvious reason for the Respondents' conspicuous failure to address the controlling provisions of Art. VII, §3(b), Fla. Const. The Respondents were obviously unable to formulate any plausible argument that they are included within the scope and purview of said constitutional

provisions authorizing an exemption from ad valorem taxation of household goods and personal effects of a head of a family residing in the state only.

The Respondents once again place primary reliance on the decision of the First District Court of Appeal in the case of Department of Revenue v. Markham, 381 So.2d 1101 (Fla. 1 DCA 1979). However, such reliance by the Respondents on the decision of the First District Court of Appeal in the Markham case is misplaced because of the similar failure of the First District Court to harmonize its opinion with the controlling constitutional provisions of Art. VII, §3(b).

The paradoxical reasoning of the First District Court of Appeal in the Markham case is illustrated by the fact that the court recognized in its opinion that the revised constitutional provisions of Art. VII, §3(b), Fla. Const. (1968) retained the limitation on the exemption from taxation of household goods and personal effects to the head of a family residing in this state. Notwithstanding this acknowledgment, the First District Court went on to reach the inexplicable conclusion that:

> Given the above history and comparison of the statutes with the organic provisions of the Constitution, we think it is obvious that the legislature (and presumably the taxpayers and general public) has considered it within its power to provide for expansion of the exemption

> both with respect to the amount and the class of persons entitled to claim the benefit of it. By logical extension of the same assumption we find that it was not unreasonable for the legislature to further extend the nontaxable status of household goods and personal effects, by providing for the exclusion of such property for tax purposes, whether owned by residents or nonresidents.
>
> Id. at pages 1110-1111.

The apparent weakness of the above-cited conclusion of the First District Court in the Markham case is illustrated by the fact that the Court attempted to justify its conclusion that the Legislature has the authority to extend by general law a tax exemption beyond the constitutional grant by citing, on page 1110 of the Markham opinion, other statutory tax exemption provisions that may also be constitutionally suspect. The suggestion that the existence of other questionable exemption statutes which have not been judicially challenged somehow constitutes precedent for supporting an otherwise untenable legal position is so devoid of merit as to warrant summary rejection by this Court.

POINT II

THE FLORIDA CONSTITUTIONAL AND STATUTORY PROVISIONS LIMITING THE EXEMPTION FROM AD VALOREM TAXATION OF HOUSEHOLD GOODS AND PERSONAL EFFECTS TO FLORIDA RESIDENTS ONLY ARE NOT VIOLATIVE OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION.

Under Point II of thier answer brief, the Respondents cite a number of U.S. Supreme Court decisions as purported authorities for their contention that the challenged personal property ad valorem tax assessment is void because it violates the Privileges and Immunities Clause of the U.S. Constitution. However, none of the federal cases cited by the Respondents involve a factual situation wherein the subject state tax was imposed on a type of activity or property not connected with the "commercial livelihood" of the nonresident. Consequently, the Respondents still have not cited (nor are the Petitioners aware of) one single case where the U.S. Supreme Court has ever declared violative of the Privileges and Immunities Clause a state law dealing with the ad valorem taxation of property used by a nonresident other than in direct pursuit of earning a "commercial livelihood."

Typical of the decisions cited by the Respondents in their answer brief is the case of Salorio v. Glaser, 461 A.2d 1100 (N.J. 1982). In the Glaser decision, the New Jersey Supreme Court did hold as violative of the Privileges and Immunities Clause a tax

imposed on New York residents who commuted to work in New Jersey. The New Jersey Supreme Court made an express finding, however, that the challenged tax affected the pursuit by the nonresidents of their livelihood in the State of New Jersey, which was a fundamental activity protected by the Privileges and Immunities Clause.

Similar factual situations were involved in the U.S. Supreme Court decisions in Hickland v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 937 (1978); and Austin v. New Hampshire, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975). In the Hickland case, supra, the Supreme Court held that an Alaskan statute requiring that all oil and gas leases contain a provision that qualified permanent residents of Alaska be hired in preference to nonresidents was violative of both the Privileges and Immunities Clause and the Equal Protection Clause of the Federal Constitution. In the Austin case, the Supreme Court also held as violative of the Privileges and Immunities Clause and Equal Protection Clause of the U.S. Constitution a New Hampshire commuters' income tax imposed upon the New Hampshire derived income of nonresidents.

It is apparent that the factual situations involved in both the Hickland and Austin cases dealt with taxation or restrictions on the rights of nonresidents to earn a livelihood within the nondomicilary state. The Petitioners would once again emphasize that it is uncontroverted in this proceeding that the Respondents' part-time dwelling was not used as rental property

and that household goods and personal effects were not used commercially during the tax year in question (A. 2). Therefore, the cases typified by the Supreme Court decisions in Hickland and Austin, supra, involving the nonresidents' "commercial livelihood" are readily distinguishable and are clearly not controlling on the disposition of the case before this Court.

Another case relied heavily upon by the Respondents in their answer brief is the old case of Blake v. McClung, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432 (1898), wherein the Supreme Court held that a Tennessee statute giving priority to domestic corporations over foreign corporations with respect to the distribution of the assets of insolvent estates was violative of the Privileges and Immunities Clause of the U.S. Constitution. However, the Supreme Court ruled in the Blake decision that it was not within the power of the state, when establishing regulations for conduct of a private business of a particular kind, to give its own citizens essential privileges connected with that business, which is denied citizens of other states.

Thus, the Respondents once again rely upon a federal case involving the business activity of a nonresident with another state. Consequently, the Petitioners submit that the facts in the Blake decision are readily distinguishable from those presented here involving the ad valorem taxation of personal property located in a residental vacation dwelling owned by Respondents.

The Respondents also cite two decisions of the appellate courts of this state as purported authority supporting their privileges and immunities claim. See, Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978); and Miller v. Board of Pensions of U.S. Presbyterian Church, 431 So.2d 350 (Fla. 5 DCA 1983). However, the Amrep Corp. and the Board of Pensions cases are not applicable here, since both cases were decided on the basis of the Equal Protection Clauses of the state and federal constitutions. The Respondents have not asserted a claim in the district court below or in this Court based on the Equal Protection Clauses of the federal or state constitutions.

The courts in the Amrep Corp. and Board of Pensions cases were not even faced with a claim that the statutes in question were violative of the Privileges and Immunities Clause of the U.S. Constitution. In fact, the taxpayers in both of these cases were foreign corporations transacting business in this state and it is now well established that a corporation is neither a citizen of a state nor the U.S., and thus is not within the protection of the Privileges and Immunities Clause of the U.S. Constitution. See, Asbury Hospital v. Cass County, 326 U.S. 207, 210-211, 66 S.Ct. 61, 90 L.Ed. 6 (1945); and 16 Am. Jur.2d, Corporations, §21.

In contrast, the challenged tax here is an ad valorem tax on personal property owned by a Michigan resident and located in a

dwelling in Collier County, which is admittedly only a temporary residence owned and used by the Respondents during a portion of the tax year. (A. 2). The Respondents do assert in their Statement of the Case and Facts that "they disagree with the characterization of their residence in Collier County as a 'vacation' or 'part-time' dwelling." However, this appears to be an inconsistent position belatedly asserted by the Respondents, since the Respondents' initial brief in the district court contained an assertion on page 4 of their Statement of the Case and Facts that, "Appellants' real property is not rental property and is used as a part-time dwelling by Appellants as nonresidents of the State of Florida." Furthermore, the subject decision of the district court below contained an express finding by the district court in the first sentence of the opinion that the structure in question was used by the Respondents as a part-time dwelling. (A.2).

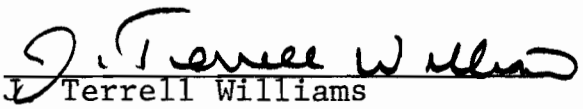
In conclusion, the Petitioners note that the Respondents allege on page 14 of their answer brief "there is absolutely no attempt to have the Florida residents bear any burden of the tax, and hence there is no incentive to the Florida Legislature to do anything other than to increase the tax." The Petitioners would direct the Court's attention to the crucial fact that there is absolutely nothing in the record in this proceeding to support a finding by this Court that there was any evidence before the

trial court that the Property Appraiser made no attempt to assess a personal property tax on similar items located in a Collier County beach dwelling owned by Florida residents having their permanent residences in another city or county.

The issue of whether the "household goods and personal effects" tax exemption applies to personalty located in a second dwelling owned by a Florida resident having his or her permanent residence in another city or county in this state has apparently never been resolved by the appellate courts of this state. However, the Attorney General did conclude in AGO 055-213 that the tax exemption in question of the taxpayer "used in the maintenance of his or her permanent home in this state, and may not be extended to other property of the taxpayer although of the same type and kind." (e.s.)

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners has been furnished by mail to PETER W. HERZOG, Esq., 411 North 7th St., Suite 1300, St. Louis, Missouri 63101 and to LEO J. SALVATORI, Esq., 1169 Eighth St., South, Naples, Florida 33940, this 29th day of December, 1983.

J. Terrell Williams
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