O/a 10-3-84

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 65,324

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THE GOLDEN NUGGET GROUP, et al.,

Petitioners,

vs.

METROPOLITAN DADE COUNTY, and STEPHEN L. SMITH, Acting Tax Collector, CITY OF MIAMI, and CITY OF MIAMI BEACH,

Respondents.

PETITIONER'S REPLY BRIEF

GERALD F. RICHMAN
BRUCE A. CHRISTENSEN
FLOYD PEARSON RICHMAN GREER
WEIL ZACK & BRUMBAUGH, P.A.
One Biscayne Tower
Twenty-Fifth Floor
Miami, Florida 33131-1868
Phone: (305) 377-0241

Attorneys for Petitioners

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I. THE ACT IS AN UNCONSTITUTIONAL LOCAL OR SPECIAL ACT.

A. Prohibited Special Act Without Referendum or Notice.

Chapter 83-354, Florida Statutes, is plainly a local or special act allowing Dade County alone in the state to impose a 3% tax for local convention center development. Respondents continue to try to disguise it as a general law since as a special law it is unconstitutional, lacking referendum and notice provisions required by Article III, Section 10 of the Florida Constitution. The disguise does not fit.

Respondents' Brief fashions four subpoints to support their argument that this statute is a valid general law. Yet they lose sight of the basic well-established criteria regarding a valid general law Waybright v. Duval County, 196 So. 430 (Fla. 1940). It is a two-pronged test. First there must be a rational basis for the classification of the subjects of the act. Differences between the subjects and those excluded must "inhere" to the classification and not be arbitrary. State v. Daniel, 99 So. 804 (Fla. 1924); Cesary v. Second National Bank of North Miami, 369 So. 2d 917 (Fla. 1983); Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983); Carter v. Norman, 38 So. 2d 30 (Fla. 1941). Simply put, some logical basis must exist for choosing the group to which the law applies. Secondly, this classification must bear a rational relationship to the purpose of the law.

There is no logic to limiting this Statute to home rule counties under the 1885 constitution. Whether the grouping really contains one county [Dade] or upon a change of government three, [Dade, Hillsborough and Monroe] it makes no sense. What rational relationship exists between counties with home rule government under the former Constitution and the purpose of developing

convention centers? Respondents' Brief does not demonstrate such a rational relationship and ignores the examples which make the arbitrary special act nature of this Statute so apparent.

Respondents first suggest the Statute is a general one because it operates uniformly on its subject [Dade County]. This avoids the whole point that the subject was not rationally selected in the first place, relating to "things as a class based upon proper distinctions and differences that are inherent in or peculiar or appropriate to the class." [Respondents' Brief p.7] Moreover, the statement itself is factually inaccurate since the tax allows certain municipalities in the county to "opt out" of the tax, thus enjoying a lower tax rate on the type of rentals affected. It also does not operate uniformly on rentals of accommodations as it includes certain types (hotel, apartment hotel, motel, apartment, apartment motel, rooming house, tourist or trailer camp, or condominium) while excluding others (houses, duplexes and cooperatives). No rational basis exists for this distinction concerning the scope of operation of the tax, nor do Respondents ever attempt to suggest one.

The next subpoint of Respondents' Brief argues Ch. 83-354 is a general law because it is potentially applicable to more than just Dade County. It can "grow" to include Monroe and Hillsborough Counties too (only if they change their form of government by referendum). It is not merely a limitation to one county or even three which makes a law an invalid special act, as the cases cited by Respondents themselves demonstrate. Respondents state that since the decision in Ex Parte George S. Wells, 21 Fla. 280 (1885) "a substantial number of cases have held that where the classification is reasonably related to the purpose of the act," a statute will be a general law even if limited to one county at enactment, if it can potentially grow to include others. Respondents miss the very point that no

rational relationship exists in the first place between the 1885 Constitution's home rule provisions and the Statute whose purpose is to develop convention centers.

The notion that Chapter 83-354 potentially can expand to include two other counties stretches logic very thin. Such an expansion of the class can only occur if the citizens of Monroe and Hillsborough Counties choose by referendum to change their government. Yet it is the very lack of a referendum or proper notice that is the constitutional defect in this statute, denied to the citizens of Dade County.

A case frequently cited by Respondents manifestly demonstrates this point and the defect of Chapter 83-354. In Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., surpa, the act's benefits applied to any harness track which generated a particular daily "handle" [revenue] or less. The purpose was to aid harness tracks and enhance tax revenues. Any track could "grow" into this act's benefits if it fell below the handle. The classification and the purpose of the act are logically related. By contrast Chapter 83-354 is arbitrarily limited as to certain counties, none can "grow" into it, and its purpose (building convention facilities) has nothing to do with the classification based upon form of government.

Respondents' third attempt to disguise this Statute as a general law suggests it must be such because it relates to a state function. This does not, of course, excuse the act from the tests of a rationally based class and a logical relationship of the class to the purpose of the law. If an act relates to a state function, presumably it does so state wide wherever that function operates. Certainly that is true of the state function pointed to by Respondents, "raising state revenue." What logic there is to limit a law pertaining to that state function to Dade County is not suggested, nor apparent. Moreover, the function of raising state revenue is a stretch of imagination since the expenditure portion of the

statute is tailored to the use of the revenue in Dade County, specifically in Miami Beach (2/3) and Miami (1/3).

In stark contrast to Ch. 83-354 is Florida Statute 125.0104, the Tourist Development Tax, the subject of the case of Miami Dolphins v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981). That tax used for a similar tourist related purpose may be imposed by "any county" after certain adoption procedures and a referendum.

The fourth subpoint of Respondent's Brief finally discusses the relationship between the classification system and the Statute. Yet nowhere in this discussion is any demonstration of how a classification system based on form of county government (under the 1885 constitution) rationally relates to an act whose purpose is convention center development. Also absent from the Brief is any answer to the examples posed by Petitioners which demonstrate the complete lack of any logical nexis between the class and the purpose.

Respondents cite the history of the 1945 Dade County Port Authority Act which was changed in 1971 from a population classification to the one also used now by Ch. 83-354, (the 1885 home rule county provisions). However, there is no point to the Respondents discussion of this act since its purpose is not the same as that of Chapter 83-354, nor is it even shown the classification related logically to the purpose of the Port Authority Act. No case is cited where that act was upheld upon such a challenge.

Respondents argue the three (3) counties (Monroe, Dade and Hillsborough) have 4 characteristics in common, three so pointless the District Court chose not to comment on them. The fourth claimed common characteristic, "tourist-oriented economics," brings us to the nub of Respondents argument and the clearest demonstration of this special law's arbitrary classification scheme.

The District Court seized upon the "tourist oriented economies" as the rationality for the classification. Indeed, had this Statute been written to allow the convention tax to be imposed by all counties with tourist oriented economics, this action never have arisen. This was not the classification chosen by the legislature, but one concocted by the District Court at Respondent's urging. It is not in the Statute and not in the record below. Respondents ducked the inquiry of what evidence in the record supported the notion that Monroe, Dade and Hillsborough counties all have tourist oriented economies. No such record exists. Indeed Hillsborough County may be most noted for its business and commercially oriented economy.

The distinction of having tourist oriented economies does not inhere to these three counties, contrasting them from other Florida counties. Other excluded counties clearly possess this criteria. Broward, Palm Beach, Orange and Pinellas Counties are well known for tourist oriented economies, yet are excluded from the class and cannot grow into it. What logic supports this? On this critical issue Respondents fail to respond.

Respondents also did not suggest any rational link between the actual legislatively mandated classification system, home rule government (under the 1885 provisions) and the purpose of developing convention centers. The link does not exist. Even if it did, the example of Pinellas County was not and cannot be explained by Respondents. It has home rule government, adopted pursuant to a special act of the legislature, Chapter 80-590, Law of Florida, not under the 1885 provisions. It clearly meets the District Court's tourist oriented economy notion, for more so than Hillsborough, and even satisfies the Respondents other three criteria, being riparian, in the Southern half of Florida and having developed airport and seaport facilities. It also has a convention center. What possible logic exists to justify its exclusion from this act? Respondents remain silent.

Chapter 83-354 includes a circuitous definition of the counties it applies to so as to limit its effect to Dade County. If this special local tax act can pass with this disguise as a general law, then any local act can be so disguised in the future and the constitutional protections of referendum and notice are dead. Dade County can with impunity avoid the referendum process forever and the legislature could always use the "classification" to enact special Dade County laws. This Court must reverse the District Court to preserve the Constitutional rights of the citizens of Dade County.

B. **The act is unconstitutional as a special or local act concerning a prohibited subject.**

Respondents have completely skirted the thrust of this issue on appeal. The fundamental constitutional change in the 1968 Florida Constitution pertinent here was not to Article III, Section 11, concerning prohibited special laws, but with another constitutional provision which must be read in conjunction therewith concerning this subject. This provision under the 1885 Constitution, applicable to and discussed in the decisions of Wilson and McMullen[1] erroneously relied on by the District Court, was Article IX, Section 5. It provided the general enabling provision for the Legislature to authorize county and local taxes and did not require that those taxes be enacted only by general law. Thus Wilson and McMullen decisions correctly did not address such a requirement.

It is the successor to Article IX, Section 5 wherein the substantial change which affects this argument occurred. The new provision is Article VII, Section 9 which requires legislative authorization for county taxes be only by general law:

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[1] Wilson v. Hillsborough County Aviation Authority, 138 So. 2d 65 (Fla. 1962), and McMullen v. Pinellas County, 106 So 73 (1925).

> **§ 9 Local Taxes.**
> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes. . . (Emphasis added).

Respondents cite two additional cases which not only do not support their position, but are illustrative of this change in the law and are supportive of Petitioner's position. Both Contractors & Builders Association of Pinellas County v. City Dunedin, 329 So. 2d 314 (Fla. 1976) and Belcher Oil Company v. Dade County, 271 So. 2d 118 (Fla. 1972), specifically discuss and recognize that the new constitutional provisions require authorization for levy and assessment of county and local taxes only by general law, a change from the 1885 Constitution. This Court in Belcher stated this "constitutes a substantial change in language from the 1885 Constitution, Article IX, Section 5." Belcher Oil Company v. Dade County, supra, at p. 122. Respondents continually sidestep this fundamental change and the erroneous reliance of the District Court on the two cases preceding this "substantial change" in the Constitution.

Respondents neglect to reply at all to the second basis upon which this Act is prohibited and the case of State ex rel Maxwell Hunter, Inc. v. O'Quinn, 154 So. 166 (Fla. 1934). That case held that "any enactment covering less than the entire state and related to the collection of taxes for state and county purposes may, in its operation and effect, be a violation of the provisions of the State Constitution" and that "there appears to be no permissible classification by population or otherwise for statutory regulations which directly affect the assessment and collection of taxes for state and county purposes." O'Quinn, supra at 168-169.

The District Court's error should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THE COLLECTION PROVISIONS OF CHAPTER 83-354 VALID.

As to the collection provisions of Chapter 83-354, Respondents are attempting to have their cake and eat it too. First, in a tortured reasoning Respondents claim that the District Court was correct in its reversal of the trial court's order that the collection provisions of the Statute were invalid. In doing so Respondents never answered the Petitioner's point on appeal. They cannot. Then Respondents turn around and suggest that all of these "non-defects" in Chapter 83-354 were corrected by Chapter 84-67 enacted during the most recently completed legislative session. If anything, that only proves that 83-354 was defective as Petitioners contend and as now clearly recognized by the Legislature. Respondents neglect to point out to this Court that Chapter 84-67 is not before this Court in this case. Challenges to the validity of the new law await other parties and a later day.

No matter how tortured the reasoning, Respondents cannot find a way to make Section 1 of the Statute imposing the tax mesh with Section 2 of the Statute mandating the expenditure of the revenues. Under the Respondents' theory that the revenues could be collected by the Department of Revenue (nowhere provided for in the Statute), there is no way that the Department of Revenue is authorized to expend the money or return it to Dade County. Thus, Respondents' theory lacks a means to expend the revenues on the purposes of the Statute set forth in Section 2, dividing the monies two thirds to the City of Miami Beach Convention Center and one third to the City of Miami. Any subsequent appropriation measure of the Legislature, whether by Chapter 84-67 or otherwise, does not correct the defects of Chapter 83-354, but merely sidesteps the issues by providing a "band-aid" remedy.

Plainly Chapter 83-354 was so ill conceived, poorly drafted and hastily enacted that "all the king's soldiers and all the king's men could not put this Humpty Dumpty back together again". The trial court and the Attorney General of Florida were correct in holding that Chapter 83-354 was invalid.

III. THE ACT IS UNCONSTITUTIONAL AS A VIOLATION OF EQUAL PROTECTION GUARANTEES.

As to the constitutional equal protection defects in Chapter 83-354, Respondents again seek refuge in the recent act of the 1984 Legislature which is not before this Court for review nor in the record or decisions below. They do so only to avoid meeting this issue, not because the 1984 law corrects the defects Respondents say do not exist anyway in the 1983 law. Respondents meet themselves coming and going.

What Respondents fail to inform this Court is that the only change effected by the 1984 statute pertaining to the equal protection argument is that the taxable "period" is no longer 30 days, but 6 months. Oddly, the length of the period subject to the tax was about the only portion of the Statute not attacked on equal protection grounds. The serious defects in the Statute were not altered by the Legislature nor addressed by Respondents. Yet instead of meeting these issues head on, Respondents discourse about how wonderful building convention centers would be, itself not a legal issue nor pertinent to the appeal.[2]

The basis of the equal protection attack concerning the duration of residence in Florida dealt not with the length of the duration chosen, but with a distinction drawn on duration itself. A 5 year length to a durational distinction

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[2] Curiously Respondents never reveal why these benefits should apply only to those in Dade County and not to the 8 million Floridians in the other 66 Counties not subject to the tax.

was held arbitrary and invalid by this Court in Osterndorf v. Turner, 426 So. 2d 539 (Fla. 1982), not even discussed by Respondents.

Likewise Respondents are silent as to what possible rational basis exists to impose the tax on renters of certain types of accommodations (hotels, motels, condominiums et cetera), while excluding others (cooperatives, duplexes and single family homes). Again we ask what possible reasonable basis exists to impose a tax to build convention centers on a trailer lot in rural Homestead while excluding a cooperative apartment in Miami Beach, perhaps in walking distance to the center?

Silence again is the response to the inquiry of what valid equal protection rationale exists to impose the tax on Dade County accommodations and not on those elsewhere in Florida. Our national and state constitutions guarantee protection against such arbitrary classifications. Respondents do not even attempt to justify theirs.

IV. THE ACT IS UNCONSTTITUTIONAL AS A VIOLATION OF DUE PROCESS REQUIREMENTS.

Respondents again turn to the 1984 act not before this Court to avoid responding to the key issues involved in the due process challenge of this appeal. Cavalierly they assert the questioned language imposing the tax on some but not all rentals "for a period of 30 days or less" used in the Statute was changed. What they ignore is that the change was only from 30 days to six months. This did not alleviate or even touch the due process defect; it actually made it worse.

Consider the example used in our Brief. Pursuant to Florida law[3] in absence of an agreement, the duration of a residential tenancy depends on the "period" [the term not altered by the 1984 act] for which the rent is payable. If

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[3] Fla. Stat. Section 83.46

the rental period is monthly, the tenancy is from month to month. Under the 30 day provision of Chapter 83-354 one renting month to month (in one of the types of accommodations subject to the tax) would pay the tax in those 5 months where the rental "period" was "30 days or less", but not in the 7 months of 31 days. Under the 1984 act these people apparently must pay the tax in all 12 months because under Florida law the "period" of their rental is always less than 6 months. The absurdity of this result is not addressed in the Answer Brief.

V. THE ACT IS UNCONSTITUTIONAL AS A VIOLATION OF UNIFORM TAXATION PROVISIONS.

Respondents duck this issue in their Answer Brief in much the same way as did the District Court. Both rely on the notion that Article VII, Section 2, of the Florida Constitution is limited as to its uniform taxation requirements to ad valorem taxes, of which this tax is not one. This is irrelevant since it is neither the basis of the attack on uniform taxation principles before this nor the District Court. Uniform taxation principles are founded upon the Equal Protection clauses of the United States Constitution as well as similar Florida constitutional protections. The District Court erred in not applying or discussing these. Respondents apparently cannot address this issue nor the cases cited in Petitioners Brief.

Uniform rates of taxation in the taxing district have long been required by our law. See Gilman v. City of Sheboygan, 2 Black (U.S.) 510, 17 L.Ed. 305 (1863); Pine Grove Township v. Talcott, 19 Wall (U.S.) 666, 22 L.Ed. 227 (1874); Foster v. Pryor, 189 U.S. 325, 23 S.Ct. 549, 47 L.Ed. 835 (1903); Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189 (1974). This principal has long been

applied to county taxes. Foster v. Pryor, supra. Respondents do not mention these United States Supreme Court cases nor spare a single word in reply to their principles and holdings.

Respondents erroneously state this tax is a uniform 3% throughout Dade County. It most certainly is not. Under the Statute municipalities may "opt out" of the tax if they have a municipal resort tax, regardless of the rate of taxation. Bal Harbour and Surfside, the closest municipalities with such a tax to the "Sunny Isles" unincorporated area in which Petitioners operate their facilities, have so exempted themselves. Thus, as a result of the Act non-uniform rates are created. Operators in the exempted areas charge a total of 7% tax while others must charge 10%.

Respondents obviously have no justification for this blatant violation of constitutional equal taxation principles, so they do not respond at all.

CONCLUSION

This special local tax law violates several substantial constitutional guarantees designed to protect the citizens of our State. The decision below must be reversed.

FLOYD PEARSON RICHMAN GREER
WEIL ZACK & BRUMBAUGH, P.A.
Attorneys for Petitioner
One Biscayne Tower
Twenty-Fifth Floor
Miami, Florida 33131-1868
Phone: (305) 377-0241

By: Gerald F. Richman
Gerald F. Richman

By: Bruce A. Christensen by LT
Bruce A. Christensen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail, this 3 day of September, 1984, to: Lucia A. Dougherty and Robert N. Sechen, City of Miami Attorney, 169 East Flagler Street, Suite 1101, Miami, Florida 33131; Robert A. Ginsbury, Dade County Attorney and Vicki Jay, Esquire, Assistant County Attorney, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130 and M. Louis Barrett and Christopher G. Korge, Esq., City of Miami Beach Attorney, 1700 Convention Center Drive, Miami Beach, Florida 33139.

By: Bertha Claire Lee
Bertha Claire Lee