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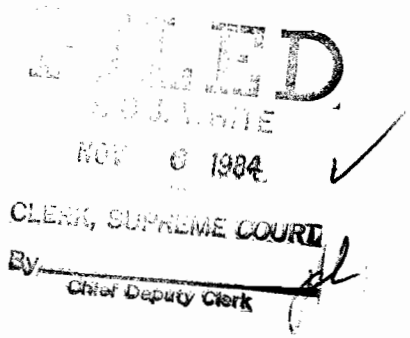

IN THE SUPREME COURT OF FLORIDA

CAMPUS COMMUNICATIONS, INC., a Florida corporation not for profit,

Petitioner,

vs.

CASE NO. 65,786
DCA CASE NO. AW-352

DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Respondent.

ON PETITION TO REVIEW A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF AUTHORITIES

INTRODUCTION

The Department of Revenue agrees with the Statement of Facts and Statement of the Case as presented in Petitioners Brief. The Department takes this opportunity to point out to this Honorable Court the apparent misconstruction of the issue facing the First District Court of Appeals. The question certified to this Court was:

> Is Rule 12A-1.08, Fla. Admin. Code, which requires taxation of all publications which are not sold but given away, unconstitutional as applied to the Alligator and similarly situated school publications?

The Department would point out that Rule 12A-1.08 does not require the taxability of all publications which are given away. Said Rule is concerned with the taxability of, and exemptions to, certain magazines, newspapers and other type of publications. As will be elaborated in Point I of this brief, §212.05 F.S. is the specific authority imposing a tax on the privilege of selling or distributing tangible personal property in this state.

Furthermore, as was pointed out in Petitioner's original brief, the Alligator <u>is not</u> a school publication. If it were, the publication would be entitled to an exemption under Section 212.08(7)(a).

ARGUMENT

POINT I

THE EXEMPTION AFFORDED BY SECTION 212.08(6), F.S., IS ONLY APPLICABLE TO THE RECEIPTS FROM THE SALE OF NEWSPAPERS.

In order to understand the exemption provided for by Section 212.08(6), F.S., it is important to understand the basic nature of Florida's sales tax law. Although the sales tax is computed on the price of the commodity sold or the service rendered, it is really an excise tax on a taxable privilege, to wit; the sale of tangible personal property.

The landmark case in Florida explaining this definition is Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950), in which the Supreme Court stated:

> The real test as to whether the tax provided in the instant law is a property tax involves not merely a consideration of the purpose of the act but rather a consideration of the subject of taxation or the thing actually taxed. The Florida Revenue Act of 1949 does not levy a tax upon the goods, wares, or merchandise sold by the retailer, or upon the services rendered by a landlord. The tax which is provided in said act is levied upon the privilege of engaging in certain business or occupations although it is computed upon the sales price of the commodity sold or upon the price charged for the services rendered. (e.s.)

The taxes provided for in the sales and use tax statute are not taxes against individuals or property, but taxes against business transactions or taxes for the privilege of engaging in a business or occupation. Ryder Truck Rental Inc. v. Bryant, 170 So.2d 882 (Fla. 1964).

This important principle of Florida tax law is codified in F.S. 212.05, which states:

> 212.05 Sales, storage, use tax. - It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property in this state. . .
> (1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
> (a)1. At the rate of 5 percent of the sales price of each item or article of tangible personal property when sold at retail in this state. . .
> (b) At the rate of 5 percent of the cost price of each item of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state. (emphasis added)

Petitioners have argued that the purchases of printed matter made by them are exempted by virtue of section 212.08(6) Florida Statutes, which reads, in pertinent part:

> (6) EXEMPTIONS; POLITICAL SUBDIVISIONS, COMMUNICATIONS. -There are also exempt from the tax imposed by this Chapter sales made to the United States Government, the state, or any county, municipality, or political subdivision of this state;. . . LIKEWISE EXEMPT ARE NEWSPAPERS. . . . (e.s.)

The clear language of the above statute only exempts sales of newspapers. In accord with the intent and meaning of this section is the administrative rule which implements this statute, 12A-1.08 F.A.C. the first sentence of which states: "Receipts from the sale of newspapers are exempt".

The assessment of tax, penalty and interest filed by the Department of Revenue against the Petitioner was based on the purchases of tangible personal property, not for resale, made from its printer. Since Petitioner did not sell its publication, it was the ultimate consumer of said publication. Rule 12A-1.27, F.A.C. applies to this situation, by providing, in pertinent part:

> (1) Sales to ultimate consumers for printing of tangible personal property are taxable.

Petitioner has also attempted to argue (R-93) that the exemption language of §212.08(6) not only refers to sale of newspapers, but that it also means that newspapers are exempt from all taxes imposed by Chapter 212. Such an expansive construction of the exemption violates the long-standing and well settled rule that tax exemption statutes are strictly construed against the taxpayer. Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); Housing by Vogue, Inc. v. Department of Revenue, 422, So.2d 3(Fla. 1982); State ex rel Szabo Food Services Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973). Furthermore, when newspapers such as the Miami Herald purchase printing materials which become part of the finished product for resale, they do not pay tax on those materials because they extend a resale certificate to the vendor at the time of purchase. Rule 12A-1.28 F.A.C. provides in pertinent part:

> (1) The purchase by a printer, including publishers of newspapers, magazines, periodicals, etc., of materials and supplies which become a component of the printed matter for resale, are exempt from the tax. . . .(e.s.)

It cannot be fairly disputed that, should a newspaper fail to extend a resale certificate at the time of purchase, as required by Rule 12A-1.38 F.A.C., the purchase of the materials would be taxable under the strict compliance rationale of the Anderson decision. If the exemption found in §212.08(6) F.S. were as expansive as Petitioners argue, no resale certificate would be necessary. The sales tax exemption provided for in §212.08(6), F.S. relates to the next transaction, the sale of newspapers to readers.

In analyzing the validity of the Department's assessment, the following statutes should be kept in mind: §212.21, F.S., which expresses the legislative intent that every sale be taxed unless specifically exempted in Chapter 212; §212.02(3) F.S. which defines retail sale; §212.12(12) which imposes tax on last retail sale; and §212.07(9) F.S. which imposes liability to the purchaser for the tax when not paid to the dealer. All of these statutes and the principles of law cited in this section of the brief lead to the conclusion that the sales tax exemption found in §212.08(6) F.S. is a limited exemption for sales of newspapers, and Petitioners cannot avail themselves of that limited exemption since they do not engage in the sale of newspapers.

POINT II

RULE 12A-1.08 FLORIDA ADMINISTRATIVE CODE, IS A VALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY.

Although the Florida legislature has provided a limited exemption from the sales tax to newspapers, the legislature did not undertake to define the word "newspaper". Pursuant to the rulemaking power granted to the Department of Revenue by §§212.17 and 212.18, Florida Statutes, the Department promulgated Rule 12A-1.08 F.A.C. which sets out certain minimum qualifications which a publication must meet to be considered a newspaper and qualify for the limited exemption afforded by Section 212.08(6).

Rule 12A-1.08, F.A.C., provides, in pertinent part:

> (1) Receipts from the sale of newspapers are exempt.
>
> * * *
>
> (3) In order to constitute a newspaper, the publication must contain at least the following elements:
>
> * * *
>
> (d) It must have been entered or qualified to be admitted and entered as second class mail matter at a post office in the county where published.
>
> * * *
>
> (4) To qualify for exemption as a newspaper, a publication must be sold and not given to the reader free of charge. So-called newspapers which are given away for advertising and public relations purposes are taxable (e.s.)

The Courts of this state have consistently recognized the authority of the Department of Revenue to promulgate rules and regulations defining the term "newspaper". This authority was first judicially recognized in the Florida Supreme Court case of Gasson v. Gay, 49 So.2d 525 (Fla. 1950).

In that case, the Court rejected the taxpayer's contention that certain news magazines qualified for the exemption because they met the regulatory criteria. The Court held that to be entitled to the exemption, a publication must be a newspaper within the "natural, plain and ordinary significance of the word." However, in its holding the Court did not set aside the applicable administrative test. Instead, the Court held that the exemption is available to a publication only if it: (1) meets the minimum criteria of the administrative regulations, and (2) is a newspaper within the general and common understanding of the word. The Supreme Court in Gasson stated:

> The said rule does not purport to contain all elements necessary to constitute a newspaper nor to embrace a complete, full and comprehensive definition of a newspaper. It simply provides specific minimum requirements and states, in effect, that in order for a publication to constitute a newspaper, the publication must embrace at least the stated elements. 49 So.2d at 526. (e.s.)

Thus, it is clear that the Court approved the administrative rules in defining the minimum criteria for the exemption.

In Green v. Home News Publishing Co., 90 So.2d 525 (Fla. 1956), the Florida Supreme Court reversed a lower court decision holding that the publication under consideration did qualify for the exemption as a newspaper. In ruling against the taxpayer, the Court in Home News emphasized that the administraive construction of the statute would be upheld by the courts unless clearly erroneous or unauthorized. It is important to note that the Gasson and Green cases had to focus on the primary purpose of the publication at issue, since those publications did meet the minimum requirements of the then existing regulation, which did not include a sale requirement.

In Department of Revenue v. Skop, 383 So.2d 678 (Fla. 5th DCA 1980), the Fifth District found Rule 12A-1.08, F.A.C., to be a valid exercise of the Department's rulemaking powers. At issue in Skop were the same specific requirements that plaintiff challenges in the instant case. The primary characteristics of the Skop publication which disqualified it for the exemption were that it was distributed free of charge and it did not have second class mailing privileges. The Fifth District clearly endorsed these requirements of the Department's regulation as proper constructions to place on the statutory exemption for newspapers.

As recently as 1983, the First District Court of Appeals reaffirmed the validity of Rule 12A-1.08 F.A.C. in the case of North American Publication Inc. and Neighbor Newspaper v. Department of Revenue and Office of the Comptroller, State of Florida, 436 So.2d 954 (Fla. 1st DCA 1983). Rev. denied, 449 So.2d 265 (Fla. 1984) One of the issues raised on appeal was:

> (1) Whether Rule 12A-1.08, Fla. Admin. Code is an invalid exercise of delegated legislative authority or an erroneous interpretation of Section 212.08(6), Fla. Stat., and the denial of appellant's refund was erroneous as based on an invalid rule?

436 So.2d at 955.

The Neighbor Court specifically upheld the validity of Rule 12A-1.08, F.A.C. and in particular, subparagraphs 3(d) and 4 of that rule, finding that the administrative construction of §212.08(6) found in said rule is not clearly erroneous or unauthorized.

This Administrative Rule was necessary to assist in the interpretation of the term "newspaper", since the term newspaper can be ambiguous. In Boca Raton Publishing Co. v. Department of Revenue, 413 So.2d 106 (Fla. 1st DCA, 1982). The First District Court of Appeal recognized this ambiguity and the need for the administrative construction with the following language:

> We disagree with Appellant's fundamental premise that the word newspaper is unambiguous. Having reached this determination, we next conclude that the administrative construction of the statute is not clearly erroneous or unauthorized.

413 So.2d 106 at 107.

The administrative construction of the word newspaper found in Rule 12A-1.08 reflects the intent of the legislature, since as was elaborated on Point I of this brief, the exemption found in §212.08(6) is an exemption for sales of newspapers. Furthermore, this administrative construction is entirely consistent with the only statutory definitions of the word newspaper found in §50.011, F.S., as well as §165.031.

It is settled law in this state that a construction placed on a statute by a state administrative officer is a persuasive force and influential with the courts when not in conflict with the Constitution or the plain intent of the statute. Volunteer State Life Insurance Co. v. Larson, 2 So.2d 386 (Fla. 1941); Green v. House News Publishing Co. Inc., supra. Furthermore, the administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. Odham v. Foremost Dairies, Inc., 128 So.2d 586 (Fla. 1961); Boca Raton, supra.

Finally, it is important to keep in mind the standard for determining whether an administrative rule is a valid exercise of delegated legislative authority. This standard has been announced in State Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407

So.2d 238 (Fla. 1st DCA 1981) as follows:

> Permissible interpretations of a statute must and will be sustained, through other interpretations are possible and may even seem preferable according to some news.

All that Petitioners are saying here is that they have another interpretation, and that in their view, their interpretation is better. In light of all the cases cited in all preceeding pages, which have consistently held that this same rule is a valid exercise of delegated legislative authority, it becomes clear that Petitioner simply cannot carry the burden of proving that the interpretation of the word newspaper found in Rule 12A-1.08 F.A.C. is clearly erroneous or unauthorized.

POINT III

THE APPLICATION OF RULE 12A-1.08 TO THE ALLIGATOR AND SIMILARLY SITUATED FREE DISTRIBUTION PUBLICATIONS DOES NOT VIOLATE THE CONSTITUTION.

Petitioners cite the case of Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, __U.S.__, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) as controlling in this case. A reading of the first sentence of that opinion is enough to put that argument to rest:

> "This case presents the question of a State's power to impose a special tax on the press and by enacting exemptions, to limit its effect to only a few newspapers". (e.s.).

103 S.Ct. 1365 at 1367

The State of Florida has not imposed a special tax on the press. The sales taxes which have been assessed against the Alligator are the same sales taxes applicable to businesses of all kinds. There can be no suggestion that the Alligator or similarly situated free distribution publications are targeted or singled out. The tax which was struck down by the Supreme Court in the Minneapolis Star and Tribune case was a different tax.

> "By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment".

103 S.Ct 1365 at 1370.

In the State of Florida, the legislative intent as expressed in §212.12(12), F.S. is to tax the last retail sale. Unless specifically exempted, all free distribution publications have to pay tax on the cost of materials and labor used to produce them, because when a free distribution publication acquires the printed matter, it is the end consumer. The State of Florida has not granted an exemption to any newspaper for the cost of materials or printing. Newspapers, like other publishers or businesses, do not pay taxes on the materials or labor costs because they are going to sell the finished product, and the tax will be due at that time.

In the Neighbor decision, the First District Court of Appeal had the opportunity to analyze Rule 12A-1.08 and Florida's tax scheme, in light of the Minneapolis Star and Tribune decision:

> Appellant relies heavily on the recent decision by the United States Supreme Court in Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, ___ U.S. ___, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) contending that the situation determined in that case to violate the First Amendment, particularly insofar as the tax involved was found to single out a small group of newspapers, is indistinguishable from the present case. In the present case, in contrast to Minneapolis Star, appellant is subject to a sales tax which is widely applicable to businesses of all kinds as part of the general scheme of sales and use taxes prescribed in Chapter 212, Florida Statutes. In no way does the tax imposed in the present case resemble a

> penalty directed only at a few publications. The nondiscriminatory denial of a tax exemption does not infringe upon First Amendment activities, see Cammarano v. United States, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959); Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C.Cir. 1980).

436 So.2d 954, at 956.

The Alligator claims to be engaged in activities protected by the First Amendment. This should not overshadow the fact that this case involves a taxation matter. The Supreme Court has consistently upheld the broad discretion in classification on tax matters. Frank Walters v. City of St. Louis, 347 U.S. 231, 98 L.Ed 660, 74 S.Ct. 505; Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406 84 L.Ed 590. As the Supreme Court stated in the Frank Walters case:

> Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.

347 U.S. 231 at 237.

In this instance the distinction created by Rule 12A-1.08 between newspapers which are sold, and publications which are given away, is extremely relevant, since the exemption under 212.08(6) applies to the sale of newspapers.

It must also be borne in mind that this case involves an exemption from sales tax. Exemptions, like deductions, are a matter of grace, not right. The following passage of Justice Douglas' concurring opinion in Cammarano v. United States, 358 U.S. 498, 3 L.Ed.2d 462, 78 S.Ct. 524 (1959) is very applicable to this case:

> Congress, however, has taken no such action here. It has not undertaken to penalyze taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. Deductions are a matter of grace, not right. Commissioner v. Sullivan, 356 U.S. 27, 2 L.Ed.2d 559, 78 S.Ct. 512. To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment Rights are somehow not fully realized unless they are subsidized by the State. Such a motion runs counter to our decisions. . . .

358 U.S. 498 at 515.

Since the Alligator, like every other person in this state, is subject to the taxes imposed by Chapter 212, unless specifically exempted thereunder, granting an exemption to the Alligator under the facts and law of this case would amount to a judicially created exemption without parallel in Florida's statutory tax scheme. The Department of Revenue respectfully submits that the Alligator has no right to be subsidized by the state.

CONCLUSION

The Appellate Courts of Florida have consistently upheld Rule 12A-1.08 as a valid exercise of delegated legislative authority. Petitioner's constitutional challenges to this rule, based on the Minneapolis Star and Tribune decision, have already been argued and decided against Petitioner by the First District Court of Appeal in the Neighbor case. The First Amendment protections to which Petitioner may be entitled to cannot insulate it from the same sales tax applicable to everyone else. The assessment of tax, penalty and interest filed against the Alligator is both proper and lawful, and this Court should therefore hold that the application of Rule 12A-1.08 to the Alligator and similarly situated free distribution publication is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner has been furnished by U.S. Mail to Lee S. Johnson, Esquire, 4010-G Newberry Road, P. O. Box 13502, Gainesville, Florida 32604 and to Thomas R. Julien, 4000 Southeast Financial Center, Miami, Florida 33131-2398, this 6th Day of November, 1984.

Edwin Bayo

Edwin A. Bayo