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IN THE SUPREME COURT OF FLORIDA

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

Petitioner

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Respondent

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

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This reply brief is primarily directed to the Department's argument under Point I of its brief, that Section 212.08(6), Florida Statutes (1979), exempts only sales of newspapers to readers. It will first be shown that such a restrictive interpretation is clearly erroneous and, in fact, is contrary to the Department's own rules and interpretations thereof as stated in the record itself. Second, this brief will demonstrate that the interpretation asserted by the Department must be rejected because its acceptance would render the statute unconstitutional as applied to The Alligator and similarly situated newspapers.

As for the Department's argument under Point II of its brief, that the administrative rule defining the term "newspaper" is valid, it should again be emphasized that the previous cases upholding the rule dealt exclusively with "shoppers", not bona fide newspapers. This Court's holdings in Gasson v. Gay, 49 So.2d 525 (Fla.1950), and Green v. Home News Publishing Co., 90 So.2d 295 (Fla. 1956), compel the conclusion that a publication which is a newspaper within the

common understanding of the word is entitled to exemption under the statute.[1]

Finally, the Department's argument under Point III of its brief, that the rule is not unconstitutional, fails to recognize the practical effect of the rule, i.e., that some newspapers are taxed while others are not. The Department does not suggest a rational basis for this discriminatory treatment, much less the compelling interest which must be shown here.[2]

1/ For further discussion on this point, reference should be made to Point I of The Alligator's initial brief.

2/ For further discussion on this point, reference should be made to Point II of The Alligator's initial brief, as well as Point II of this reply brief.

POINT I

THE DEPARTMENT'S ASSERTION THAT THE STATUTORY TAX EXEMPTION GRANTED NEWSPAPERS IS CONFINED TO SALES TO READERS IS ERRONEOUS.

In its brief, the Department has argued that Section 212.08(6), Florida Statutes (1979), only exempts sales of newspapers to readers. This argument misinterprets the language of the statute itself and, moreover, ignores the judicial construction of the statute as well as the Department's own rules. Perhaps most significant, however, is the fact that the record does not support the existence of such an interpretation by the Department.

Initially, if it is assumed that the statute exempts only sales of newspapers, then the transactions which are the subject of the Department's assessment are exempt.[3] The Alligator purchased finished products from the printer. If

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3/ The Alligator does not concede that only sales of newspapers are exempt, however. The preamble of Section 212.08 refers to distribution, as well as sales, and subsection (6) provides: "There are also exempt from the tax imposed by this chapter sales made to the United States Government,... Likewise exempt are newspapers...." (emphasis supplied) The words "likewise exempt" obviously refer to the phrase "from the tax imposed by this chapter." Thus, the confinement of the exemption to "receipts from the sale of newspapers," Rule 12A-1.08(1), Fla. Admin. Code, is questionable, at best. Regardless, the constitutional infirmity of such a restriction will be discussed under Point II, infra.

those finished products are newspapers, within the common understanding of the word, then Section 212.08(6), Florida Statutes (1979), exempts the sale thereof.

The case of Greenfield Town Crier, Inc. v. Commissioner of Revenue, 433 N.E.2d 898 (Mass. 1982), is directly on point. There, taxes were assessed on purchases by a publisher from a printer. The Commissioner argued that the purchases were not purchases of newspapers because prior to distribution the Town Crier was not a newspaper but only a composite of the printing, art work, and other component parts. Thus, the publisher could only rely upon exemption under a component parts exemption, and such reliance was misplaced because that exemption applied only if the paper was ultimately resold. Like The Alligator, that newspaper was distributed free of charge and, so the Commissioner argued, it was not entitled to exemption either under the component parts exemption statute or a statute exempting the sale of newspapers. The Court rejected that argument, stating:

> We hold, therefore, that if the Town Crier was a newspaper when it was distributed to its readers, it was also a newspaper when it was purchased by Greenfield from Shaw Press, Inc.... Id. at 901.

Likewise, if The Alligator was a newspaper when it was distributed to its readers, it was also a newspaper when

purchased, as a finished product, from the printer.

Furthermore, the Department's own rules, as well as the interpretation thereof as stated in the Department's sworn answers to interrogatories propounded by The Alligator, absolutely fail to support the assertion that only sales of newspapers to readers are exempt. In fact, the record flatly contradicts such an assertion.

According to the Department, the reason for the paid circulation requirement is "to limit the exemption to those publications generally recognized by the public as a newspaper" (emphasis supplied) (R. 15) and "to clarify those publications which meet the exemption afforded by 212.08(6), Fla. Stat." (emphasis supplied) (R. 16) In other words, the limitation is definitional and is not a limit on the transactions to which the exemption applies. This characterization is further supported by the Department's description of the rule as emphasizing "the distinction between newspapers as described in 12A-1.08 and direct mail advertising matters, handouts, throw-aways and circulars as described in 12A-1.34." (R. 16) Rule 12A-1.34, Florida Administrative Code, provides:

> (1) Upon final sales to ultimate consumers of direct mail advertising pieces, circulars, handouts, throw-aways and similar advertising matter, the dealer shall collect the sales tax upon the selling price thereof from his purchaser.

> (2) Advertising pieces, circulars, handouts, and similar advertising matter are taxable....
> ....(4) Although a publication may contain matters of general interest and reports of current events, it does not necessarily constitute a newspaper.

Thus, because The Alligator does not have a paid circulation and therefore fails to meet the Rule 12A-1.08 definition of "newspaper", it is considered a "handout", "throw-away" or "circular" under Rule 12A-1.34 and the purchases are taxable. The reference to newspapers in subsection (4) of Rule 12A-1.34 further supports this interpretation. Finally, subsection (4) of Rule 12A-1.08 also belies the Department's assertion that no free-distribution newspaper is entitled to exemption. After stating that a publication must be sold and not given to the reader free of charge in order to qualify for exemption as a newspaper, the rule goes on to say that " [s]o-called newspapers which are given away for advertising and public relations purposes are taxable." This is clearly an explanation of the Department's intention to exclude "shoppers" from the definition of "newspaper" and, when considered in conjunction with Rule 12A-1.34 and the record herein, the Department's contrary assertion in its brief is clearly untenable.

If the Department's assertion regarding the limited scope of the exemption is correct, it becomes impossible to rationalize this Court's decision in the Home News case, supra, as well. That is, a free-distribution publication was at issue, yet the focus was on the primary purpose of the publication. Discussion about whether a publication is a bona fide newspaper would seem irrelevant if a free-distribution newspaper cannot qualify for exemption under any circumstances. In fact, the parties there had stipulated that if the publication was not a "newspaper" within the meaning of the statute, the tax was valid. 90 So.2d at 296. Implicit in that stipulation is the fact that the tax would have been invalid if the publication had been a bona fide newspaper.[4] It is simply not possible to reconcile the judicial interpretation of the statute with the interpretation now urged by the Department.

Finally, and perhaps most indicative of the

4/ Furthermore, the decisions in Department of Revenue v. Skop, 383 So.2d 678 (Fla. 5th DCA 1980), Boca Raton Publishing Co., Inc. v. Dept. of Revenue, 413 So.2d 106 (Fla. 1st DCA 1982), and North American Publications, Inc. v. Dept. of Revenue, 436 So.2d 954 (Fla. 1st DCA 1983), rev. denied, 449 So.2d 265 (Fla. 1984), all involved free-distribution publications yet none of those decisions support the interpretation urged by the Department. Likewise, the First District's decision below certainly provides no support for that interpretation.

Department's interpretation of the exemption afforded newspapers by Section 212.08(6), Florida Statutes (1979), is the admission by the Department that free "promotional" copies of an otherwise exempt newspaper may be distributed and yet not result in liability for sales taxes. (R. 17) It is submitted that this admission unequivocally establishes the fact that the Department has never applied its rules regarding free-distribution publications in an effort to promote the interpretation of the exemption it now seeks this Court to approve. That interpretation would absolutely preclude the distribution of even a single free copy of a newspaper without liability for sales tax. The restrictive interpretation now urged by the Department is clearly erroneous.

POINT II

THE DEPARTMENT'S ASSERTION THAT THE STATUTORY TAX EXEMPTION GRANTED NEWSPAPERS IS CONFINED TO SALES TO READERS, IF ACCEPTED, WOULD RENDER THE STATUTE UNCONSTITUTIONAL.

It can hardly be questioned that when an interpretation upholding the constitutionality of a statute is available, the courts must adopt that construction. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983). The Alligator submits that the statutory exemption afforded newspapers cannot be limited to sales of newspapers to readers, for to do so would render the statute unconstitutional, as violative of The Alligator's First Amendment, equal protection and due process rights.

In its brief, the Department cites several general principles of law which The Alligator certainly does not dispute. There is no doubt that legislatures possess great freedom of classification in the field of taxation, Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940), but "when a tax measure is challenged as an undue burden on an activity granted special constitutional recognition...the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion." Austin v. New Hampshire, 420 U.S. 656, 662, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975). Likewise, although the courts must narrowly

construe tax exemption statutes, such statutes must be construed in accordance with the United States Constitution. Tropical Shipping & Construction Company, Ltd. v. Askew, 364 So.2d 433 (Fla. 1978). In other words, the fact that this case involves a tax exemption matter should not overshadow the fact that The Alligator's First Amendment rights are at stake. Finally, as the Department has noted, tax exemptions are a matter of grace, not right, but it does not follow that denial of a tax exemption never implicates constitutional values. Discriminatory denial of tax exemptions can impermissibly infringe free speech, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980), and the confinement of the exemption to sales to readers would constitute such an impermissible infringement by discrimination based solely upon the method of distribution chosen by a newspaper publisher.

Contrary to the Department's suggestion, The Alligator does not claim any right to be "subsidized by the state." What is urged is its right to treatment by the state which comports with the state and federal constitutions. Cammarano v. United States, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959), cited by the Department for the proposition that

First Amendment rights need not be subsidized by the state, has no application here because a nondiscriminatory denial of a tax deduction was involved there. 358 U.S. at 513. Here, the only way that the denial of the statutory exemption to The Alligator could be viewed as nondiscriminatory would be to completely ignore the practical effect of such a denial. This, however, is not permitted because:

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. (citations omitted) This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax. American Oil Company v. Neill, 380 U.S. 451, 455, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965).

If only sales to readers are exempted, then newspaper publishers which choose to distribute their newspapers to readers free of charge are forced to pay sales tax on purchases from printers, or on purchases of component parts such as paper and ink if they do their own printing. Publishers who choose to charge readers for their newspapers would pay no such tax. This is the "practical operation" of the statute under the interpretation urged by the Department. The difficulty with such an "operating incidence" of the tax is that it depends solely upon the method of distribution chosen by a publisher. The state has offered no compelling,

nor even rational, reason for taxing free-distribution newspapers but not those with paid circulations. The taxing scheme, as interpreted by the Department, fails even minimal scrutiny. It grants a benefit to some newspapers while denying that benefit to others. If the state is permitted to base such a distinction on the price, or lack of price, paid by a reader, then a substantial threat to First Amendment rights exists. If the state wishes to tax all newspapers, then it may do so. But it may not tax only those which are distributed to readers free of charge. To suggest otherwise "ignores the reality that in a competitive intellectual environment assistance to one competitor is necessarily a relative burden to the other." Greenberg v. Bolger, 497 F. Supp. 756, 778 (E.D.N.Y. 1980).

Finally, the Department has argued that Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, __U.S.__, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), is not controlling because a special tax on the press is not involved here. This argument ignores the second basis for the holding in Minneapolis Star:

> Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax....Whatever the

> motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. (emphasis supplied) __U.S. at__.

Thus, it is clear that the Court was again concerned with the practical effect of the taxing scheme and this is the point to be gleaned from the case. In fact, Justice White, concurring in part and dissenting in part, found that the exemption's effect of limiting the tax to only a few papers was sufficient reason to invalidate the tax. __U.S. at__. Here, although the tax is a generally applicable sales tax, the effect of the exemption, as interpreted by the Department, is to limit newspaper taxation to only free-circulation newspapers. The state can offer no sufficient justification for such discriminatory treatment and therefore the statute would be unconstitutional if the Department's interpretation is upheld.

CONCLUSION

The statutory exemption granted newspapers is not limited to sales to readers. The statute, the judicial construction thereof, the Department's own rules and the record all demonstrate that if a publication is a newspaper within the common understanding of the word, it is exempt from the tax imposed by Chapter 212, Florida Statutes. A contrary interpretation would render the statute unconstitutional and should therefore be rejected.

The Alligator, being a bona fide newspaper, is entitled to the statutory exemption and the decision of the First District Court of Appeal should be quashed with directions to affirm the order of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER has been furnished by United States Mail to Edwin A. Bayo, Assistant Attorney General, The Capitol, Room LL04, Tallahassee, Florida 32301 and Thomas R. Julin, Esquire, Steel, Hector and Davis, Southeast First National Bank Building, Miami, Florida 33131 this 26th day of November, 1984.

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