OA 10-2-84

IN THE SUPREME COURT
STATE OF FLORIDA

RANDY MILLER, EXECUTIVE DIRECTOR
OF THE DEPARTMENT OF REVENUE OF
THE STATE OF FLORIDA,

Appellant,

vs. CASE NO. 65,839

PUBLICKER INDUSTRIES, INC., and
PUBLICKER CHEMICAL CORPORATION,

Appellee,

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellant,

vs.

JUAN GRANADOS,

Appellee,

RANDY MILLER, EXECUTIVE DIRECTOR,
DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Appellant,

vs.

INTERNOOR TRADE, INC.,

Appellee.

---/

APPELLANTS' INITIAL BRIEF

JIM SMITH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
ASSISTANT ATTORNEY GENERAL

LINDA LETTERA
ASSISTANT ATTORNEY GENERAL
Department of Legal Affairs
Rm. LL04, The Capitol
Tallahassee, Florida 32301
(904) 487-2142

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STATEMENT OF THE CASE

A. Nature of the Case.

This case concerns the constitutionality of Florida's tax exemption for gasohol blended with ethyl alcohol which is distilled from United States agricultural products or by-products. The Florida legislature has provided that each gallon of such gasohol sold in Florida is exempt from four cents of the tax of five cents per gallon generally imposed on the sale of motor fuel in Florida. Fla.Stat. §212.63 (1984 Supp.); Ch. 84-353, Laws of Florida. Gasohol is made by blending fuel-grade ethyl alcohol with unleaded gasoline, ordinarily in proportions of one part ethyl alcohol to nine parts unleaded gasoline. The trial court held that Ch. 84-353, Laws of Florida, for indirect reasons, was unconstitutional.

B. Legal and Factual Background

1. The Evolution of Florida's Sales Tax Exemption for Gasohol

In 1980, the Florida legislature initially enacted a tax exemption for gasohol. Fla.Stat. §206.415 (1981). The statute exempted each gallon of gasohol from the entire $.04 tax on motor fuel. The full exemption was to remain in effect through June 30, 1984. Beginning on July 1, 1985, gasohol was to be exempt from $.02 of the $.04 tax; and on

July 1, 1987, the exemption was to be removed. When the tax on motor fuel and special fuel was increased in 1983, the Florida legislature retained a $.04 per gallon exemption for gasohol, to be reduced to a $.02 exemption beginning on July 1, 1985. Fla.Stat. §212.63 (1984 Supp.).

The objective of the tax exemption was to reduce dependence on foreign sources of fuel, which had been cut off at the time of the Arab oil embargo and which it was feared might be cut off again. As an analysis prepared by the staff of the House Select Committee on Energy explained, "[a] predicted tightening of non-renewable fuel supplies and unpredictable geo-political events makes imperative the encouragement of alternative fuel sources." Staff Analysis, House Select Committee on Energy, Feb. 8, 1980. The Legislature contemplated that the exemption would encourage use of gasohol, thereby diminishing reliance on imported fuel. The Legislature recognized that dependence on foreign fuel would be particularly dangerous for Florida, since the State's tourism industry -- a critical part of the State's economy -- depends heavily on the ready availability of motor fuel and thus would be seriously damaged by a fuel shortage. (R- 512, 480)

The recent amendment to the statute, which took effect on July 1, 1984, retained the exemption for gasohol, but limited the exemption to "motor fuel which contains a minimum of 10 percent blend by volume of ethyl alcohol which is distilled from U.S. agricultural products or

by-products with a purity of 99 percent." The object of the amendment was to ensure that the tax exemption served its original purpose: to reduce dependence on foreign sources of fuel that experience had shown to be unreliable. Experience with the original statute had demonstrated that it failed to eliminate Florida's dependence on foreign fuel supplies. As a result of a variety of factors, the majority of the gasohol consumed in Florida contained imported ethyl alcohol. (R- 289, 329, 352)

In a further effort to avoid the continuing and increasing dependence on foreign sources of fuel -- with the resulting susceptibility to unpredictable interruptions caused by world tensions -- the Florida legislature limited the tax exemption to "motor fuel which contains a minimum of 10 percent blend by volume of ethyl alcohol which is distilled from U.S. agricultural products or by-products with a purity of 99 percent." Gasohol containing imported ethyl alcohol can of course still be sold in Florida; the only change is that such gasohol is now subject to the same tax as other motor fuels.

2. Federal Treatment of Imported Ethyl Alcohol

During the last several years, the federal tariff on ethyl alcohol imported for use in fuel has increased substantially. Pursuant to §1161 of the Omnibus Reconciliation Act of 1980, 94 Stat. 2599, Pub. L. No. 96-499, the tariff on imported ethyl alcohol was increased from $.10 per gallon to $.20 per gallon effective January 1, 1982, and to $.40 per gallon effective January 1, 1983. The tariff on imported ethyl alcohol was raised again, from $.40 to $.50 per gallon on April 1, 1983, by §511(d)(5) of the Surface Transportation Act of 1982, 96 Stat. 2197, Pub. L. No. 97-424. Section 912 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369 (1984), will increase the tariff to $.60 per gallon effective January 1, 1985.

Section 232 of the Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 229, Pub. L. No. 96-223, exempted gasoline containing at least 10% alcohol from the $.04 per gallon federal excise tax on gasoline. On April 1, 1983, the federal excise tax on gasoline was increased from $.04 to $.09 per gallon, and gasoline containing at least 10% alcohol was exempted from $.05 per gallon of the increased tax. Surface Transportation Act of 1982, §511(d)(1)(A). The exemption for gasohol will be increased to $.06 per gallon as of January 1, 1985, by §912 of the Deficit Reduction Act of 1984.

As evidenced by the Congressional Record (R- 196-206), it was not the intent of Congress that foreign produced alcohol benefit from the exemption from federal excise tax granted to gasohol. The Congressional Record is replete with evidence to the effect that (1) the purpose of the federal excise exemption was to provide the encouragement for the development of a domestic gasohol industry; (2) that the United States does not need to replace its dependence on OPEC oil with a dependence on foreign alcohol; and (3) that in the first seven months of 1980 there had been a threefold increase over the gallons imported in 1979 and if that current rate was permitted to continue, imports could equal 50% of the total domestic consumption for 1980.

During the time period 1981 through 1984, ethyl alcohol imports to the United States have jumped sharply and have remained at very high levels. Brazilian sales account for virtually all of the imports to the United States and they too have risen dramatically. (R- 342, 477)

In spite of the increasing federal tariffs for each of the last four years the volume of ethyl alcohol exported from Brazil has also increased. (R- 478) Moreover, as federal tariffs increase, the landed price of Brazilian ethyl alcohol has decreased over the past four year period. (R- 479)

Brazil's willingness and ability to reduce the price of its product can be ascribed to a number of factors. First, there is strong evidence that Brazil is subsidizing its ethyl alcohol industry, so that the price of those exports does not reflect a free market. Second, the value of the Brazilian cruzeiro has dropped dramatically relative to the American dollar, with the result that a sharply reduced price for Brazilian ethyl alcohol in American dollars may still be a profitable sale from the standpoint of the Brazilian producer. Third, Brazil reportedly has excess ethyl alcohol production capacity, which is a strong incentive to pursue the American market. (R- 348, 358, 359)

C. Course of the Proceedings

Appellees, Publicker, Granados, and Internoor Trade, Inc., brought 3 separate actions challenging Chapter 84-353, Laws of Florida under the Import-Export Clause and the Commerce Clause of the United States Constitution. Internoor also challenged the title to Chapter 84-353, Laws of Florida as being in violation of Art. III, §6, Florida Constitution. The Plaintiffs therein sought a declaratory judgment that Ch. 84-353 is unconstitutional and an injunction barring the Florida Department of Revenue from applying the full state sales tax on motor fuel to gasohol blended with ethyl alcohol which is not distilled from U.S. agricultural products or by-products. The cases were consolidated. (R- 504-505)

The Department of Revenue contested the standing of all plaintiffs to challenge Chapter 84-353, asserting that a tax may be challenged only by those who are required to pay it and that plaintiffs' alleged injuries were indirect and speculative. On the merits, the Department of Revenue contended that Chapter 84-353 did not violate either the Import-Export Clause or the Commerce Clause. NCGA filed a brief as amicus curiae in support of the Department's positions on both standing and the merits.

A final hearing was held in the trial court on July 30, 1984, at which the trial court permitted the plaintiffs to present evidence purporting to establish their standing despite the fact that they are not required to pay the challenged tax. Gerald M. Tierney, Jr., a Publicker executive, testified that Publicker imports ethyl alcohol from Brazil, denatures the ethyl alcohol at its facility in Tampa, and sells the denatured ethyl alcohol to firms that blend it with unleaded gasoline to make gasohol, which is eventually sold to consumers. (R- 302, 306)

Paul C. McDaniel, vice president of Publicker's petroleum products division, testified that, prior to the enactment of Chapter 84-353, Publicker had purchased ethyl alcohol from Brazil for approximately $1.42 per gallon, including the federal tariff of 50 cents per gallon, and after denaturing the ethyl alcohol, had sold it to blenders

for $1.56 per gallon. (R- 308) McDaniel testified that after Chapter 84-353 went into effect on July 1, 1984, blenders who had previously purchased ethyl alcohol from Publicker called him to inquire as to whether gasohol blended from Publicker's ethyl alcohol would continue to qualify for the state tax exemption for gasohol. (R- 309) These individuals told McDaniel that if gasohol blended with Publicker's ethyl alcohol did not qualify for the tax exemption, they would only be willing to pay Publicker $1.16 per gallon, rather than $1.56 per gallon. (R- 314-15)

McDaniel testified that Publicker had consequently stopped purchasing ethyl alcohol from Brazil. (R- 320) He explained that he had "not made an attempt to purchase imported [ethyl alcohol] because of the current standing of the Florida law," which he believed would have prevented Publicker from selling imported ethyl alcohol at the price that it would have had to pay for it. (R- 320)

Plaintiff Granados testified that he is a broker who has arranged sales between Brazilian exporters of ethyl alcohol and American importers such as Publicker. (R- 279, 281) Prior to the enactment of Chapter 84-353 he had arranged for the sale of Brazilian ethyl alcohol at the price of 92 cents per gallon, exclusive of the federal tariff of 50 cents per gallon. (R- 287) To continue to offer Brazilian ethyl alcohol to prospective purchasers in

Florida after the enactment of Chapter 84-353, he said he would have to find a Brazilian exporter willing to compensate for the 40 cents per gallon that a prospective purchaser would have to pay in state sales tax upon selling gasohol made from the ethyl alcohol. (R- 186-87) Granados testified that he had been unable to find a Brazilian exporter willing to sell ethyl alcohol at that price. (R-287)

The Department of Revenue sought dismissal of plaintiffs' actions for lack of standing, stressing that plaintiffs are not required to pay the tax at issue. The Department urged that the tax can only be challenged by those parties required to pay it. The Department also presented evidence illustrating the indirect and speculative nature of the injuries alleged by plaintiffs. Frederick L. Potter, the President of Information Resources Incorporated and an expert in the marketing of fuel-grade ethyl alcohol, testified that during the period from 1980 to 1984, the quantity of ethyl alcohol imported from Brazil had increased even though the federal tariffs on imported ethyl alcohol had jumped from $.10 to $.50 during that period. (R-343-44, 477-78) Mr. Potter explained that the volume of ethyl alcohol imported from Brazil had increased because Brazilian exporters had reduced their prices, thereby offsetting the sharp increases in the federal tariff. (R-347-48, 369, 479) The Department of Revenue argued that the plaintiffs would suffer no injury if Brazilian exporters

again reduced their prices.

The trial court rendered its decision on August 22, 1984. The court began by holding that the plaintiffs had standing to challenge the constitutionality of Chapter 84-353 even though they are not required to collect, remit or pay the tax at issue. (R- 515) The court found that the adoption of Chapter 84-353 would have an adverse effect on plaintiffs and that this was sufficient to establish their standing. (R- 515)

On the merits, the court concluded that Chapter 84-353 did not violate the title requirements of Art. III, §6, Florida Constitution. (R- 515-17) However, the court concluded that Chapter 84-353 violates both the Import-Export Clause and the Commerce Clause of the United States Constitution. Although the court recognized that Florida's fuel tax is not assessed against imported ethyl alcohol, it concluded that the tax nevertheless constituted an impost on imported ethyl alcohol because of the indirect impact of the tax on importers of ethyl alcohol. (R- 519) In reaching this conclusion, the trial court erred in relying chiefly on Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), which it interpreted to shift "analysis away from the question of whether an item is an import to the question of whether the tax imposed is an 'impost or duty.'" (R- 519) The trial court also ruled that Chapter 84-353 violates the Commerce Clause, rejecting the contention of

the Department of Revenue and the National Corn Growers Association that the disparate treatment of imported and domestically produced ethyl alcohol is justified by the particular susceptibility of the supply of imported ethyl alcohol to interruptions caused by unpredictable political events. The court stressed that "economic protectionism is just that whether the tourist industry or the local ethyl alcohol production industry is sought to be protected." (R-523) The court also found that the Department of Revenue had failed to show that non-discriminatory alternative means of achieving the State's objectives were unavailable. (R-524)

The trial court declared Chapter 84-353 unconstitutional, ordered the words "which is distilled from U.S. agricultural products or by-products" stricken from Florida's exemption for gasohol, and permanently enjoined the Department of Revenue from collecting four cents per gallon of the state fuel tax with respect to sales of gasohol blended with ethyl alcohol not distilled from United States agricultural products or by-products. (R- 524, 528-29) The Court entered an Order correcting a clerical error in the Final Judgment on August 28, 1984. (R-528-529)

On August 31, 1984, the Department of Revenue filed a notice of appeal to the District Court of Appeal for the First District. (R- 530-31) On September 13, 1984, the District Court of Appeal certified the case to this Court.

ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEES HAD STANDING TO CHALLENGE THE CONSTITUTIONALITY OF CHAPTER 84-353, LAWS OF FLORIDA

It is the Appellants' position that the Appellees lack the requisite standing to challenge the constitutionality of the taxing statute at issue and this Court need not and should not reach the merits of the constitutional issues decided below. The Appellees herein are not the taxpayers obligated to pay the tax they allege to be unconstitutional. The taxes imposed pursuant to Chapter 212, Florida Statutes, are those taxes commonly referred to as sales and use taxes and are taxes imposed for the privilege of engaging in certain businesses. The tax at issue, as the statute expressly states, is "imposed for the privilege of the sale at retail in this state of motor fuel and special fuel" and is levied "upon the ultimate retail consumer." As a matter of administrative convenience, the tax is collected and paid upon the first sale or transfer of motor fuel or special fuel within the state. Sections 212.62(1) and (2)(a), Fla.Stat., Department of Revenue v. Air Jamaica Ltd., 9 F.L.W. 229, 230 (Fla. 1984). None of the Appellees sell motor fuel or special fuel at retail in this state. None of the Appellees herein collect and remit the state sales tax provided by §212.62, F.S., on the sale of motor fuel or special fuel in Florida. (R- 513) Pure ethyl alcohol is not a motor fuel subject to the tax imposed in §212.62, Fla.Stat.

Appellee, Publicker is engaged in the business of importing foreign source fuel grade ethyl alcohol into the State of Florida and has a receiving and distribution facility for such alcohol in Tampa, Florida. It sells the imported foreign source ethyl alcohol to distributors of gasohol. These distributors, not Publicker, blend gasoline and alcohol to produce gasohol for distribution and sale in this state. It is the distributor, i.e., Publicker's buyer, that is required under the statute at issue to collect and remit the tax. Publicker is not a distributor or a retail dealer of motor fuel in the State and neither collects nor remits any state tax on the sale of motor fuel or more particularly - gasohol to the State of Florida pursuant to Part II, Chapter 212, Fla.Stat. (R- 513)

Appellee, Juan Granados is a broker of imported ethyl alcohol, who simply arranges for the sale and purchase of shipments of imported ethyl alcohol to both in-state and out-of-state businesses to be used in the blending of gasohol. He also is not a distributor or retail dealer of motor fuel in the State and neither collects nor remits any state tax on the sale of motor fuel or more particularly - gasohol, to the State of Florida pursuant to Part II, Chapter 212, Fla.Stat. (R- 513)

Appellee, Internoor alleges that it is the U.S. subsidiary of Petrobras which is a refiner, shipper and

producer of ethyl alcohol in Brazil. Internoor also alleges that it markets fuel-grade ethyl alcohol in the State of Florida. No evidence, however, was presented at the final hearing to substantiate these allegations. However, evidence was presented to the effect that Internoor is not registered with the Florida Department of Revenue as a dealer of special fuels or as a distributor of motor fuels. (R-680) Accordingly, like the other two Appellees, Internoor neither collects nor remits any state tax on the sale of gasohol to the State of Florida pursuant to Part II, Chapter 212, Fla.Stat. (R- 513)

It is the Appellants' position that due to the uncontroverted fact that the Appellees are not the taxpayers obligated to collect, remit, and/or pay the tax they challenge as being unconstitutional, they lack the requisite standing to challenge the statute at issue. See, State, Dept. of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979), wherein this Court held that since the challengers therein would not be subject to the tax imposed by the challenged taxing statute and because the statute in its present form was simply not applicable to the challengers, they lacked standing to constitutionally challenge the prospective application of the statute. See also, State ex. rel. Szabo Food Service, Inc., of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1973) wherein this Court held that "[o]ne

who does not himself bear the financial burden of a wrongfully extracted tax suffers no loss or injury, and accordingly, would not have standing to demand a refund." This Court in Szabo noted that the sales tax imposed by Chapter 212, F.S., requires that the tax be collected by the dealer from the purchaser or consumer and thus denied the dealer standing to seek a refund of the sales tax monies collected and remitted to the State. Likewise, the Appellees herein do not and could not suffer the financial burden of the taxing statute at issue and thus lack the requisite standing to challenge the constitutionality of the statutory amendment at issue. The Appellees are not subject to the tax they challenge and the statute is simply not applicable to Appellees.

As previously stated, the taxes imposed pursuant to Chapter 212, F.S., are those taxes commonly referred to as sales and use taxes and are imposed for the privilege of engaging in the business of selling tangible personal property at retail in the State of Florida. This principle has long been recognized and the legal imposition of the tax has been established since 1950 when the law as originally passed was subjected to attack in the case of Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950). In Gaulden, this Court held that the tax was a privilege tax levied on persons who engage in certain businesses set forth in the statute. Since the Gaulden case, numerous other cases have reiterated

the principle relating to the imposition of the tax on the privilege of engaging in certain business activities as set forth in the statute. See, Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964); Kirk v. Western Contracting Company, Inc., 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535, app. dism. 226 So.2d 815; Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1970), cert. den. 237 So.2d 177; Zero Food Storage, Etc. v. Department of Revenue, 330 So.2d 765 (Fla. 1 DCA 1976), cert. den. 339 So.2d 1174. The Appellees herein are not engaged in the business of selling gasohol and thus are not taxed for the privilege of selling gasohol at retail in the State. The legal imposition of the tax does not fall on any of the Appellees, nor do any of the Appellees suffer the financial burden of said tax.

The trial court erred in holding that the Appellees have standing because the tax may have an indirect and adverse effect upon their businesses. The constitutionality of a statute may be challenged only by a party who has suffered or will suffer injury resulting directly from the enforcement of the statute. In the case of a taxing statute, only those persons required to pay the tax have standing to challenge the tax. State, Department of Revenue v. Swinscoe, supra.

In an attempt to establish their standing to challenge the constitutionality of the statute in question, the

Appellees seek to establish that they will suffer an economic or competitive injury as a result of the recent legislative enactment. The Appellees, however, have not sufficiently demonstrated that they have or will actually incur economic injury so as to give them non-taxpayer standing to challenge Chapter 84-353, Laws of Florida. Their alleged injury depends upon assumptions the validity of which are highly questionable in light of the experiences of the past four years. For example, the Appellees postulate that Florida blenders will refuse to purchase foreign-source ethyl alcohol because of the additional tax liability on the gasohol ultimately sold. However, if the price of ethyl alcohol to the Appellees is reduced by its Brazilian supplier, the Appellees could offer the ethyl alcohol to Florida blenders at a price that would offset the tax and allow foreign-source and domestic-source ethyl alcohol to compete on an equal basis. It has been shown that Brazil has historically taken measures to ensure that the price of its exported ethyl alcohol remains competitive for the American dollar. Over the past four years, federal tariffs on imported ethyl alcohol have risen significantly and yet, over this same period of time, the volume of ethyl alcohol coming into the United States, and more particularly the State of Florida, has also increased significantly. (R-289, 342, 477, 478, 479). Thus, while it would seem to

be the logical conclusion that the rise in federal tariffs would in and of itself have negatively impacted on Appellees' business, the opposite is true. Brazil has dominated the Florida ethyl alcohol market by reducing its price enough to make the total price paid by importers as low as, or lower than, the price those importers would have to pay to obtain ethyl alcohol from domestic producers. (R-351, 347-48)

In addition, the record bears out the fact that Appellee - Granados appeared in front of a Congressional Subcommittee back in 1981 to speak in opposition to the rising federal tariffs with essentially the same story that he advances today, i.e., that he would not be able to broker the importation of even a single gallon of Brazilian fuel alcohol into this country and that his business would be ruined, to-wit:

> . . . since the imposition of the surtariff as of the first of this year, I have not been able to broker the importation of even a single gallon of Brazilian fuel alcohol into this country. In effect, my own government, the U.S. government, has totally eliminated my livelihood, severely constricted the fledgling alcohol industry's market development program and put my customers at the mercy of one principal domestic producer. (R- 291, 466)

However, at the final hearing Mr. Granados admitted that he is still a broker in imported ethyl alcohol some three years after the above quoted testimony, (R- 293) and the record in this case reflects that the quantity of ethyl alcohol

imported from Brazil has increased during the period from 1980 to 1984. (R- 342, 477, 478)

Florida's motor fuel tax has no direct effect upon the Appellees. The tax imposes no obligation on them, nor does it abrogate or in any way limit their right to continue to conduct their business in this state. In short, Appellees will suffer no injury directly attributable to the collection of the tax. Standing must be based upon "injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). In concluding that the Appellees have standing, the trial court apparently assumed that collection of the tax would cause a chain of events that would ultimately cause harm to Appellees' businesses. However, any harm that Appellees' might suffer would only be an indirect consequence of the collection of the motor fuel tax, contingent upon the intervening decisions of parties independent of the State, i.e., purchasers of Appellees' imported product and Brazilian exporters. Such harm caused by the intervening acts of third parties does not constitute the sort of direct injury necessary to afford standing.

A party has standing to challenge governmental action only if he has suffered or will suffer some injury directly attributable to the challenged action. As the Supreme Court

explained in Linda R.S. v. Richard D., 410 U.S. 614 (1973), "the bare existence of an abstract injury meets only the first half of the standing requirement." Id. at 618. To demonstrate standing to challenge a statute, "the party who invokes [judicial] power must be able to show. . . that he has sustained or is immediately in danger of sustaining some direct injury, as the result of enforcement [of the statute]." Id. (emphasis and brackets supplied by the Court) (citation omitted). See City of Los Angeles v. Lyons, 461 U.S. 95; 103 S.Ct. 1660, 1665 (1983) (plaintiff must show "some direct injury as the result of the challenged official conduct").

In Meyer Const. Co. v. Corbett, 7 F.Supp. 616 (N.D. Cal. 1934), the court rejected a similar effort by parties to challenge a tax that they were not required to pay. There consumers sought to challenge a tax levied upon retail sales even though the duty to pay the tax was imposed by law upon the retailer. Id. at 618. The court held that the plaintiffs had no standing, ruling that "the proper parties to raise the constitutional question are the parties upon whom the tax is levied." Id.

Other courts faced with comparable claims of indirect injury have likewise found them insufficient to establish standing. In Ex-Cell-O Corp. v. City of Chicago, 115 F.2d 627 (7th Cir. 1940), a manufacturer of paper milk bottles

challenged the validity of a city milk ordinance that ostensibly prohibited the use of paper milk containers in Chicago. The Seventh Circuit held that the plaintiff lacked standing since the ordinance did not directly restrict its business:

> "Here plaintiff is not using milk bottles in the distribution of milk in Chicago. It is manufacturing and selling them. Its market in Chicago, by the actions complained of, may be removed and destroyed. Yet it may proceed to manufacture and sell wherever it desires including Chicago. It is only indirectly and remotely interested and the damage accruing to it is only remotely consequential and incidental." Id. at 631 (emphasis supplied).

If the plaintiff in Ex-Cell-O had no standing, it necessarily follows that the Appellees here have no standing. In Ex-Cell-O Chicago's ban on the use of paper milk bottles was virtually certain to eliminate the plaintiff's ability to market its products in the city. Id. at 629. The Seventh Circuit nevertheless dismissed the challenge on the ground that the alleged injury was only "incidental, consequential and indirect." Id. at 629. Here, gasohol is merely taxed, not banned, and it is entirely possible that Brazilian producers of ethyl alcohol will cut their prices enough to prevent any harm to Appellees. Any injury Appellees may suffer from collection of the full fuel tax would be "incidental, consequential and indirect" and is thus inadequate to confer standing.

In each of the cases discussed above, the plaintiff alleged that the challenged governmental action had reduced or would reduce the demand for the product or service that the plaintiff provided. In each case, the plaintiff's challenge was dismissed for lack of standing on the ground the injury claimed was not directly attributable to the challenged governmental action. Here, Appellees similarly predicate their standing on allegations that Florida's motor fuel tax will reduce the demand for their product. Because any such injury would not be the direct result of the collection of the fuel tax, Appellees have no standing.

Even if it were certain that Appellees would suffer harm if the fuel tax were enforced, their injury would be too indirect to afford them standing. In fact, it is unclear whether collection of the tax will ultimately cause Appellees any harm. The evidence presented by the Appellants indicate that it is entirely possible that Brazilian exporters of ethyl alcohol may cut their prices enough to permit Appellees to maintain their existing profit margins. An examination of Brazil's response to a series of increases in the federal tariff on imported ethyl alcohol reveals that Brazil has historically taken measures to ensure that its products remain competitive in the United States. Evidence introduced by the Appellants at trial indicated that while the federal tariff on imported ethyl

alcohol was increased from $.10 to $.50 per gallon from 1981 to 1983, the actual sales price for Brazilian ethyl alcohol remained roughly the same, a result due entirely to Brazil's reduction of its price to offset the $.40 increase in the federal tariff. (R- 479)

Of course, it is impossible to predict what Brazilian exporters would do if Chapter 84-353 actually went into effect. Their actions would ultimately depend upon a variety of factors, including their costs and the availability of alternative markets. The critical point, however, is that if Appellees were to suffer any harm as a result of the collection of the tax, as the trial court predicted they would (R- 514), the infliction of such harm would depend upon the independent actions of third parties.

II. THE TRIAL COURT ERRED IN HOLDING THAT CHAPTER 84-353, LAWS OF FLORIDA VIOLATES THE IMPORT-EXPORT CLAUSE OF THE U.S. CONSTITUTION.

The trial court committed error in holding that the recent amendment to Florida's sales tax on motor fuel and special fuel violates the Import-Export Clause of the United States Constitution. The tax at issue does not constitute an impost upon an import and the Clause has no application at all to the situation at hand. Art. I, §10, of the U.S. Constitution provides, in pertinent part, as follows:

> No state shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports. . . .

By its very terms the aforesaid Clause prohibits only the imposition of "Imposts or Duties" on "Imports or Exports". The sales tax at issue here is not levied upon imports or exports. Florida's sales tax on motor fuel and special is levied upon the sale of motor fuel and special fuel at retail in the state. Moreover, ethyl alcohol is not a motor fuel or a special fuel. The state sales tax is not levied upon the importation of motor fuel, special fuel or ethyl alcohol; nor is the tax levied upon the importation of foreign ethyl alcohol into the State for use in blending gasohol. The tax is "imposed for the privilege of the sale at retail in this state of motor fuel and special fuel" and is levied "upon the ultimate retail consumer." As a matter of administrative convenience, the tax is collected and paid

upon the first sale or transfer of motor fuel or special fuel within the state. Sections 212.62(1) and (2)(a), Fla.Stat. Department of Revenue v. Air Jamaica Ltd., supra.

As previously stated, gasohol is produced by blending 9 parts unleaded gasoline with 1 part ethyl alcohol. Once the imported ethyl alcohol is blended with unleaded gasoline to make gasohol, the resulting product is separate and distinct and is a good manufactured in this country. The resulting gasohol is not an import and therefore the Import-Export Clause has no application.

It is a long established principle of law that the Import-Export Clause ceases to apply once goods have lost their distinctive status as imports. In Boston v. Maryland, 25 U.S. 419, 441-442 (1827) Chief Justice Marshall stated:

> "When the importer has so acted upon the thing incorporated that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State."

In Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928), the Court rejected an Import-Export Clause challenge to a Texas statute which required wholesale dealers in fish to be licensed by the State and to pay a tax on the fish they handled within the State. The Court held the Import-Export Clause inapplicable on the ground that "the tax is not laid until the fish have lost their alleged

distinctive character as imports and have become, through processing, handling and sale, a part of the mass of property subject to taxation by the State." (e.s.) Id. at 126.

In Youngstown Sheet and Tube Co. v. Bowers, 358 U.S. 534 (1959), the Supreme Court again reaffirmed the principle that the Import-Export Clause has no application once goods have lost their special status as imports. In Youngstown, the Court held that the Clause had no application to a tax levied on imported iron ores after the ores were put to use in manufacturing iron and steel, or to a tax levied on lumber and veneers after they were put to use in manufacturing veneer wood products. The Court explained that

> "[t]he constitutional design. . . is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the materials have been 'put to the use for which they [were] imported,' for in such a case they have lost their distinctive character as imports and are subject to taxation." Id. at 545. (Emphasis added.) (Citation omitted.)

Florida's tax does not come into play until all phases of importation of ethyl alcohol have definitely ended and the imported ethyl alcohol is blended with unleaded gasoline to be sold as gasohol at a Florida pump. At the point in time when gasohol is subject to Florida's sales tax, it has lost its distinctive character as an import.

Florida's sales tax on motor fuels and special fuels, including gasohol blended with imported ethyl alcohol, does not constitute the taxation of an import. Florida does not

tax the importation of ethyl alcohol. Florida merely taxes the retail sale of motor fuel and special fuel in the State. Once imported ethyl alcohol is blended with unleaded gasoline to make gasohol, the imported ethyl alcohol loses its distinctive character as an import and the Import-Export Clause no longer applies. A product manufactured or processed in this country does not constitute an import simply because one of its ingredients was imported. To follow the logic of the trial court to its ultimate conclusion would be to hold that all imported fuel sold for use in this state cannot be taxed by the state because it is an import. Such a result has been rejected by the U.S. Supreme Court in Youngstown and this Court in Department of Revenue v. Air Jamaica, Ltd., supra. As Youngstown Sheet and Tube Co. v. Bowers, supra, establishes, the Import-Export Clause is inapplicable once imported goods have reached their destination in the United States and have been stored for their intended use in domestic manufacturing. It is the Appellant's position that the Clause is also inapplicable where, as here, the imported goods have actually been used by a domestic manufacturer to make a new product. Whereas, the iron ores, lumber and veneers involved in Youngstown had only been stored for use in domestic manufacturing when they were taxed, the tax at issue here is levied only upon gasohol blended, distributed and sold in this state. Florida's sales tax on motor fuel and special fuel clearly does not levy an impost on an import.

III. THE TRIAL COURT ERRED IN HOLDING THAT CHAPTER 84-353, LAWS OF FLORIDA VIOLATES THE COMMERCE CLAUSE OF THE U. S. CONSTITUTION.

The Commerce Clause has no application to the taxing statute at issue. The challenged taxing statute imposes a tax on the privilege of engaging in the business of selling at retail motor fuel and special fuel in the State of Florida. Gaulden v. Kirk, supra; Ryder Truck Rental, Inc. v. Bryant, supra; Kirk v. Western Contracting Company, Inc., supra. As a matter of administrative convenience and necessity the tax is paid upon the first sale or transfer of title within this state. Department of Revenue v. Air Jamaica Ltd., supra. Fuel entering any Florida port for transport to other states in the United States is not subject to Florida's sales tax on motor fuel. Thus, the tax has no effect upon motor fuel passing through the State. It is only a Florida distributor or retail dealer who is taxed for the privilege of doing business in Florida. The entire imposition of the tax takes place wholly in the State of Florida. The Commerce Clause is not applicable.

In Monamotor Oil Company v. Johnson, 292 U.S. 86 (1934) a state statute imposing a motor vehicle fuel tax on motor vehicle fuel used in the State of Iowa was challenged as

imposing a burden upon interstate commerce contrary to the Commerce Clause of the U.S. Constitution. The challenger was an Arizona corporation whose business included, inter alia, the buying, manufacturing, blending and selling of gasoline and kindred products, including the importation into Iowa of gasoline for resale to consumers and to dealers who sell to consumers. The Arizona corporation was granted an Iowa distributor license and, as such, was required by the statute to pay and pass the tax on to the ultimate consumer of the motor vehicle fuel. The distributor argued that the tax was a direct tax on motor vehicle fuel imported in violation of the Commerce Clause. The Supreme Court, however, held that the tax was not laid upon the importer for the privilege of importing but rather "laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the State" and "falls on the local use after interstate commerce has ended." The Court also held that "[t]he levy was not on property but upon a specified use of property". Id. at 93. There was no burden on interstate commerce. Likewise, the taxing statute at issue here is imposed for the privilege of engaging in business in Florida, i.e., the sale at retail of motor fuel blended and sold in Florida.

Assuming, for the purposes of argument only, that the Commerce Clause is implicated as the trial court below ruled, it is the Appellants' position that the statute

does not impose an impermissible burden on foreign commerce. As correctly held by the trial court below, in recent years the United States Supreme Court has held that the Commerce Clause confers no immunity from state taxation, but "interstate commerce must bear its fair share of the state tax burden." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979); Washington Revenue Department v. Stevedoring Association, 435 U.S. 734 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). Under these Supreme Court decisions, the "balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity." Washington Revenue Department v. Stevedoring Association, supra. The Commerce Clause does not demand complete equality, but "substantially evenhanded treatment." Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 332, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). Thus, the fact that a state statute may discriminate against foreign or interstate commerce does not automatically make the statute unconstitutional under the Commerce Clause. Rather the alleged discriminatory tax treatment imposes upon the State the burden of demonstrating why the discrimination is necessary to serve a legitimate state purpose. In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 353 (1977), the Supreme Court held that "the burden falls on the State to justify [the discrimination] both in terms of the local

benefit flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." The State must show that "there is some reason, apart from their origin, to treat [the foreign products] differently" from domestic products. City of Philadelphia v. New Jersey, 437 U.S. 617, 626-627 (1978). The trial court erred in holding that the state had not justified the disparate treatment in terms of benefits flowing to the state and had not shown that non-discriminatory alternatives were not available.

A. Benefits Flowing to the State

The Appellants asked the lower court to take judicial notice of the importance of tourism to our state, and the fact that the tourist industry in Florida is one of its greatest assets citing Duval v. Thomas, 114 So.2d 791 (Fla. 1959) and State v. City of Miami Beach, 234 So.2d 103 (Fla. 1970). (R- 184) The Appellants also proffered as an Exhibit the Staff Analysis of the Florida House of Representatives Committee on Energy regarding the enactment of the initial tax exemption for gasohol dated February 8, 1980 in an attempt to show the court the Legislature's awareness and concern about Florida's motor fuel supply and the impact unpredicted geo-political events would have on the supply. (R- 373) The trial court excluded the Staff Analysis from consideration on the grounds that the validity

of the 1980 statutory exemption was not an issue. (R- 375) However, on page 2 (R- 512) of its judgment, the trial court recognized and acknowledged as fact, the very information contained in the proffered Staff Analysis. The Appellants submit that a Staff Analysis clearly prepared by the staff of a House Select Committee, which generally appears on the desk of every state legislator considering a bill, does provide the legislative intent behind a bill. Moreover, since Chapter 84-353 amended, some four years later, the original gasohol exemption, the Appellants sought to prove through the further submission of factual data that the 1984 amendment in question was designed to ensure that the tax exemption served its original purpose, i.e., to reduce dependence on foreign sources of fuel that experience had shown to be unreliable. The Staff Analysis should be considered and the Appellants ask this Court to consider said Analysis in its review of this case, as the trial court did in its finding of facts.

The record reflects that nearly all the gasohol sold in Florida contains imported ethyl alcohol (R- 289, 329, 352) In short, the original tax exemption on gasohol had failed to eliminate Florida's dependence on unreliable foreign fuel supplies and additional legislative action was necessary to encourage the use of reliable, domestically produced ethyl alcohol. The trial court characterized the protection of Florida's tourist industry as "economic protectionism" in violation of the Commerce Clause. However, the protection of the motoring public in Florida and the State's tourist

industry from reliance on undependable foreign sources of fuel is not what the United States Supreme Court has condemned as economic protectionism in its Commerce Clause decisions. See, e.g., Westinghouse Elec. Corp. v. Tully, 104 S. Ct. 1856, 1866 (1984); South-Central Timber Development, Inc. v. Wunnicke, 104 S.Ct. 2237, 2247 (1984); Bacchus Imports, Ltd. v. Dias, 104 S.Ct. 3049, 3055-56 (1984). The Supreme Court has used that term to refer to measures designed to shield local producers from competition in the marketplace. Chapter 84-353 may be intended to protect Florida's tourist industry, but only by encouraging use of a dependable source of fuel, not by shielding that industry from competition with the tourist industries of other states or countries. The Appellees never contended nor proved and the trial court did not find that the instant legislation was intended to protect any local Florida based manufacturer of ethyl alcohol. Thus, the type of protection Chapter 84-353 is intended to provide is not the type of protection that the Supreme Court has interpreted the Commerce Clause to preclude.

B. Unavailability of Non-Discriminatory Alternatives

The trial court held that the Appellants had failed to show that non-discriminatory alternatives to Chapter 84-353 were available. However, the Appellants have shown that the original exemption adopted in 1980, which exempted all gasohol from the sales tax regardless of the source of the

agricultural products used in distilling ethyl alcohol, had failed to achieve a reduction in Florida's dependence on foreign fuel supplies. The evidence shows that the original exemption had actually increased Florida dependence on foreign fuel supplies. The Legislature had no choice but to take further measures to encourage Florida to rely on domestic fuel products. Because there is no other adequate means of preventing reliance on unreliable sources of fuel that will not have a discriminatory effect upon foreign commerce, the statute satisfies the requirement that non-discriminatory alternatives be unavailable.

CONCLUSION

The Appellants submit that the Appellees herein lack the requisite standing to challenge the constitutionality of the taxing statute at issue and this Court therefore need not and should not reach the merits of their constitutional challenge. However, should the Court find that the Appellees have standing, Ch. 84-343, Laws of Florida does not violate either the Import-Export Clause or the Commerce Clause of the U.S. Constitution and thus is not unconstitutional.

Therefore, the Appellants request that this Court reverse the trial court's judgment, find Chapter 84-353, Laws of Florida to be constitutional and remand the case to the trial court with directions to enter an order in favor of the Appellants.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
ASSISTANT ATTORNEY GENERAL

LINDA LETTERA
ASSISTANT ATTORNEY GENERAL
Department of Legal Affairs
Rm. LL04, The Capitol
Tallahassee, Florida 32301
(904) 487-2142

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing APPELLANTS' INITIAL BRIEF, has been hand delivered this 20th day of September, 1984, to:

KENNETH R. HART and
STEVEN J. UHLFELDER of
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, Florida 32302

DOUGLAS L. STOWELL
MARY K. KRAEMER
Mang & Stowell, P.A.
Post Office Box 1019
Tallahassee, Florida 32302

ROBERT M. ERVIN
MELISSA F. ALLAMAN
Ervin, Varn, Jacobs, Odom & Kitchen
Post Office Box 1170
Tallahassee, Florida 32302

and

STEPHEN O'CONNELL
Cason & Henderson
320 Lewis State Bank Building
Tallahassee, Florida 32301

JOSEPH C. MELLICHAMP, III
ASSISTANT ATTORNEY GENERAL