O/A 10-2-84

IN THE SUPREME COURT
STATE OF FLORIDA

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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.

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APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

In this brief, the Appellants will reply to the Answer Briefs of the Appellees. The parties will be referred in the same manner as in the Initial Brief.

STATEMENT OF THE CASE

The Statement of the Case is as previously stated in the Initial Brief.

ARGUMENT

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

The Appellees rely heavily upon Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) in arguing they have standing in this case. The language they rely upon and cite in their briefs, however, is merely dictum in Boston Exchange. (Publicker Br. 10, Internoor Br. 9, 10) The language in the Supreme Court's decision which Appellees carefully and understandably neglect to cite immediately follows the language they quote and is the basis upon which the U.S. Supreme Court found standing. The Court held:

> Moreover, the Exchanges brought this action also on behalf of their members. '[A]n association may have standing solely as the representative of its members. . . [if it] allege[s] that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of a sort that would make out a justiciable case had the members themselves brought suit. . . . The Exchanges' complaint alleged that their members traded on their own accounts in securities subject to the New York transfer tax. The members therefore suffer an actual injury within the zone of interests protected by the Commerce Clause, and the Exchanges satisfy the requirements for representational standing. (e.s.)

429 U.S. at 320-21, n. 3. Thus, in Boston Exchange the Exchanges were found to satisfy the requirements for

"representational standing" on behalf of their members who traded on their own accounts and accordingly were directly subject to the tax at issue therein. Such is not the situation in the case at bar. None of the Appellees are subject to the tax they challenge. Contrary to Appellees' assertions, the Plaintiffs in Boston Exchange were not situated similarly to the Appellees herein.

Appellees also cite Bacchus Imports, Ltd. v. Dias, ____ U.S. ____, 104 S.Ct. 3049 (1984) in their standing argument. However, in Bacchus, the Appellants were the wholesalers who were liable for the tax and their standing was predicated upon that basis.

> The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills. 104 S.Ct. 3049, _____.

Bacchus is consistent with and supports the Appellants' position that it is the distributors and dealers who are the true parties in interest possessing the requisite standing to challenge the tax at issue. The Appellants in Bacchus had collected the tax from their customers and had remitted the same to the State of Hawaii. The Appellees before this Court do not collect or remit any state tax on the sale of gasohol to the State of Florida.

Appellees contend they have standing to challenge the amendment in question under the Florida Declaratory Judgment Statute even though they are not the taxpayers responsible for payment of the tax. Appellee-Publicker cites Archer Daniels Midland v. McNamara, 544 F.Supp. 99 (M.D. La. 1982) to support this contention. In that case the federal court ruled that the plaintiff producer, who did not have to pay the tax, could not maintain a federal action under the Federal Tax Injunction Act, 28 U.S.C. 1341, because of the availability of a state remedy under the Louisiana Declaratory Judgment Statute.

However, that case does not settle the question of standing in this case. The Archer Daniels Midland v. McNamara case states that such a plaintiff may have a remedy not barred by the Louisiana Constitution in the state courts. It does not state that the plaintiff has such a remedy, or that it is unnecessary for the plaintiff producer to join as parties any gasohol retailers. That case merely states that the plaintiff producers had improperly sued under federal legislation. The case simply does not indicate that plaintiff producer, in its capacity as a nontaxpayer, would be a proper party with standing in such capacity to sue under the state declaratory judgment act.

In Florida this Court has repeatedly held that the mere possibility of injury at same indeterminate time in the future does not supply standing under our Declaratory Judgment Act. Williams v. Howard, 329 So.2d 277 (Fla.

1976); May v. Holley, 59 So. 2d 636 (Fla. 1952); State ex rel. Fla. Bank and Trust Co. v. White, 21 So. 2d 213 (Fla. 1944). In addition, this Court has held that one who is not himself denied some constitutional right or privilege cannot be heard to raise constitutional questions on behalf of some other person who may at some future time be affected. Steele v. Freele, 25 So.2d 501 (Fla. 1946). The Appellees do not meet the above tests for standing and may not challenge the taxing statute in question.

Appellees further attempt to establish standing through a line of cases whereby an individual, as an ordinary citizen and a taxpayer of the state, challenges the unlawful expenditure of public funds. The cases are inapposite. In Dept. of Administration v. Horne, 269 So.2d 659 (Fla. 1972), Plaintiffs sought a declaratory judgment against various state agencies and the Comptroller to enjoin the disbursement of state funds authorized by various unconstitutional provisions in the General Appropriations Act. In Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982), this Court held that ordinary citizens and taxpayers had standing to challenge a proviso in an appropriations bill prohibiting state aid to postsecondary institutions in violation of the First Amendment to the U.S.

Constitution. Another case cited by Appellees is Paul v. Blake, 376 So.2d 256 (Fla. 3rd DCA 1979), which presented the question whether a county ad valorem taxpayer had standing to challenge the grant of certain tax exemptions given to other taxpayers in the county on the ground that such exemptions violated specific constitutional limitations on the county's authority to grant tax exemptions. It cannot be ignored or disputed, however, that every exemption from ad valorem taxes has an effect upon the tax rate of every other ad valorem taxpayer in that county. Thus, the grant of this exemption to other county ad valorem taxpayers had a direct effect upon the challengers' ad valorem tax in Paul v. Blake.

In short, not one brief of Appellees sets forth a single case where an individual or entity was found to have standing to challenge a taxing statute which imposes a tax upon others. Not one case has been cited which holds that an individual or entity has standing to challenge a tax they are not required to pay. The Appellees herein are not engaged in the business of selling gasohol and are not taxed for the privilege of selling gasohol in the State of Florida. 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 the tax. Florida's tax on motor fuel 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 conduct their businesses in the State of Florida.

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

It has been asserted in one of the Appellees' Briefs that the approach utilized in Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946), Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), and Gulf Fisheries Co. v. Mac Inerney, 276 U.S. 124 (1928), was "expressly overruled" by the decision of the United States Supreme Court in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). (Publicker Br. 10) Michelin, however, only overruled Low v. Austin, 13 Wall. 29 (1871), which had interpreted the Import-Export Clause to prohibit all taxes on imports so long as imports retained their character as imports. In Michelin, the U.S. Supreme Court held that the Import-Export Clause did not prohibit the assessment of a non-discriminatory ad valorem property tax on imported goods; it broadened the taxing power of state and local governments. The Supreme Court did not overrule its prior decisions establishing that once goods have lost their distinctive character as imports, they are no longer immune from taxation by the Import-Export Clause, and it did not "expressly overrule" the Youngstown

and Gulf Fisheries cases which Appellants have cited to this Court for the proposition that the Import-Export Clause has no application once goods have lost their distinctive and special status as imports through a manufacturing or blending process. In fact, the Court cited the Youngstown case several times with approval in footnotes and the body of the opinion. See, 423 U.S. at 285, 286, 287. Youngstown and Gulf Fisheries have not been overruled and are good law today.

The Appellees have not been able to cite to this Court a single case in which it has been held that a product was deemed to be within the purview and protection of the Import-Export Clause merely because an ingredient of the product was imported. Once imported ethyl alcohol is blended with unleaded gasohol to make gasohol, the imported ethyl alcohol loses its distinctive character as an import and the Import-Export Clause is no longer applicable. A product manufactured, processed or blended in this country does not constitute an import simply because one of its ingredients was imported. Moreover, an excise tax on a finished product manufactured, processed or blended in this country with an imported ingredient does not constitute an impost.

III. THE TRIAL COURT ERRED IN HOLDING THAT CHAPTER 83-353, LAWS OF FLORIDA, VIOLATES THE COMMERCE CLAUSE OF THE U. S. CONSTITUTION.

Various cases have been cited in Appellees' Briefs which condemn certain statutes as "economic protectionism" violative of the Commerce Clause. These cases, however, are not directly on point. In each case, a state had passed a statute which benefited only that state. For example, in Bacchus Imports, Ltd. v. Dias, 104 S.Ct. 3049 (1984), certain Hawaiian produced liquors were exempted from the excise tax imposed on sales of liquor at wholesale to encourage the development of the Hawaiian liquor industry. In South-Central Timber Devel., Inc. v. Wunnicke, 104 S.Ct. 2237 (1984), the State of Alaska attempted to impose a local-processing requirement on timber taken from certain land in Alaska. In Archer Daniels Midland Co. v. State, 315 N.W. 2d 597 (Minn. 1982), the State of Minnesota provided a tax exemption only for gasohol distilled in Minnesota from Minnesota farm products. Delta Air Lines, Inc. v. Dept. of Rev., 8 F.L.W. 236 (1984), a case recently before this Court, dealt with a corporate income tax credit only for Florida-based airlines. It is the Appellants' position that the statutory amendment at issue in the case before this Court is not the kind of economic protectionism the above

cases prohibit. Florida is not trying to protect or provide a benefit to Florida producers of ethyl alcohol. In fact, Florida's law subjects Florida producers to competition with all other U.S. producers and, in fact, invites their competition to help insure Florida a reliable domestic source of fuel supplies. Thus, the trial court erred in characterizing Chapter 84-353, Laws of Florida, as an exercise in economic protectionism.

Appellees' cite four new cases to advance their argument that the amendment at issue is an example of "economic protectionism". (Publicker Br. 33) However, like the above cases, these cases are not directly on point. In Philadelphia v. New Jersey, 437 U.S. 617 (1978), the Supreme Court struck down a New Jersey law which prohibited the importation of solid and liquid waste which originated or was collected outside the territorial limits of the State. Florida's law does not prohibit the importation of ethyl alcohol. In Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), the Supreme Court struck down a New York milk control provision which set up a system of minimum prices to be paid by dealers to producers the effect of which was to totally eliminate any competition for New York dairy farmers. Florida's law does not eliminate but rather encourages competition from other states. In Foster-Fountain Packing, Inc. v. Haydel, 278 U.S. 1 (1928),

the Supreme Court struck down a Louisiana statute which prohibited the exportation of raw and unshelled shrimp out of the state without first going through some local processing. The effect of the statute was to favor the canning industries of Louisiana over other states. The fourth cases cited, Edwards v. California, 314 U.S. 160 (1941), has no application to the case before this Court. In Edwards, the Supreme Court struck down a California statute which imposed a duty on every carrier engaged in interstate commerce to determine whether it had aboard persons traveling to California who might be deemed indigent.

Thus, none of the cases cited set forth a different kind of economic protectionism, they all stand for the principle that a state may not shield local producers from competition in the market place. 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 our tourist industry from competition with the tourist industries of other states or countries.

CONCLUSION

The Appellants submit that the lower court's decision should be reversed. The Appellees herein lack the requisite standing to challenge the constitutionality of the taxing statute in question. Appellees have not cited a single case wherein an individual or entity was found to have standing to challenge a statute which imposes a tax upon others. This Court, therefore, need not and should not reach the merits of the Appellees' Constitutional challenge.

Chapter 84-353, Laws of Florida, does not violate the Import-Export Clause of the U.S. Constitution. The Appellees have not been able to cite to this Court a case in which it had been held that a product was deemed to be within the purview and protection of the Import-Export Clause merely because an ingredient of the product was imported. An excise tax on a finished product manufactured, processed, or blended in this country with an imported ingredient does not constitute an impost.

Chapter 84-353, Laws of Florida, does not violate the Commerce Clause of the U.S. Constitution. The statute in question does not provide Florida with the kind of economic protectionism prohibited by the Commerce Clause cases cited by Appellees.

Therefore, Appellants request that this Court reverse the trial court's judgment, find that the Appellee's lack the requisite standing to challenge the taxing statute at issue or, in the alternative, find that Chapter 84-353, Laws of Florida is constitutional and remand the case to the trial court with instructions to enter an order in favor of the Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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