IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

JOHN W. MIKOS,

Petitioner,

v.

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., & HAGENBECK-WALLACE, INC.,

Respondents.

Case No. 67,766

INITIAL BRIEF OF AMICUS CURIAE DEPARTMENT OF REVENUE, STATE OF FLORIDA

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The Florida Department of Revenue, as amicus curiae, (hereinafter the Department) respectfully submits this brief supporting the position of John W. Mikos, Property Appraiser, Sarasota County, in this cause certified as being in direct conflict with the decision of the District Court of Appeal, Third District, in Autotote, Ltd., Inc., v. Bystrom, 454 So.2d 661 (Fla. 3rd DCA 1984). The Department was an active party in Autotote, but was not joined nor did it participate in this cause below. In this brief, this cause below will be referred to as Mikos and the Autotote decision referred to as Autotote.

Autotote and Mikos reached conflicting results in their construction of §192.032(5), F.S. (1983), as applied to the following facts believed to be undisputed: Autotote's computers were in Dade County at the Calder race track May, 1981 through January, 1982, and at the Hialeah track February, 1981 through April, 1981 and then December, 1981 through March, 1982. The circus property in Mikos is in Sarasota County November through January of each year.

ARGUMENT

Notably, the question presented here is not whether the assesments in Autotote and Mikos should be apportioned. No allegation has been made in either case that ad valorem taxes were paid or owed elsewhere, or that other states have tax situs. For various reasons unimportant here, apportionment or amount of tax is irrelevant. The question here is whether there is power to tax the subject properties in Florida because of §192.032(5), F.S. (1983) which provides:

> (5) For the purposes of this section and with respect to tangible personal property, the term "permanently located" means habitually located or typically present for the 12-month period preceding the date of assessment.

The Autotote Court held §192.032(5), F.S., was intended by the Legislature to:

> facilitate the resolution of multi-county disputes regarding entitlement to tax property physically present in one Florida county on January 1 but typically present in another Florida county during the preceding year.

The Mikos court on the other hand held §192.032(5), F.S. to require:

> that for the property to be taxable it must be habitually located or typically present for a period of twelve months

POINT I

§192.032(5) DOES NOT CREATE A DURATIONAL RESIDENCY REQUIREMENT AS A CONDITION PRECEDENT TO TAXATION.

The ruling of Autotote was that §192.032(5) does not create a durational residency requirement as a condition precedent to taxation. In examining legislative intent, Autotote held that such a condition "would ascribe to §192.032 a meaning clearly not intended by the legislature. (Court's emphasis) 454 So.2d 661, 662.

Mikos, on the other hand took the bull by the horns, so to speak, literally latching on to the words of §192.032(5) in a vacuum, ruling

that to be taxable, personal property must be present for a period of twelve months.

At the outset, §192.032(5), standing alone does seem to require the Mikos result for it states that ". . . permanently located" means "habitually located or typically present for the 12-month period preceding the date of assessment." However, ascribing the literal meaning of words in a statute in a vacuum is not a proper method of statutory construction. As this Court ruled long ago in Curry v. Lehman, 47 So.18 (Fla. 1908). (Quoted recently by this Court in State ex rel. School Board of Martin County v. Dept. of Education, 317 So.2d 68 (Fla. 1975))

> The intention of the Legislature, however, in enacting a law, is the law itself, and must be enforced, when ascertained, although it may not be consistent with the strict letter of the statute. The Court will not follow the letter of a statute when it leads away from the true intent and purposes of the Legislature and to conclusions inconsistent with the general purpose of the act.
>
> "Intent is the spirit which gives life to a legislative enactment." The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. Undoubtedly the general rule of statutory construction is that the intent of the lawmakers is to be found in the language that has been used, and the court have no function of legislation, but simply seek to ascertain the will of the Legislature. If, however, from a view of the whole law, or from other laws in pari materia, the evident intention is different

> from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the Legislature. 47 So. 18, 20

The facts[1] in the Curry decision are somewhat similar to those at bar. Apparently as a result of the great Jacksonville fire of 1901 destroying nearly all of Jacksonville including the courthouse, the legislature in May 1901 enacted the following statute:

> "Sec.1603. How Lien Lost When Record is Burned.--Whenever the records of any court in any county in this state showing the entry or rendition of any judgment or decree have been heretofore destroyed by fire, such judgment or decree, or any execution issued thereon, shall not be good and effectual as a lien on real estate as against creditors or subsequent purchasers for a valuable consideration and without notice, unless legal proceedings to re-establish the same shall be begun in the proper court within nine months from the passage of this act." (e.s.)

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[1] In Curry, a judgment was rendered and recorded in Duval County in 1897 and destroyed by fire in May 1901. §1603, enacted in the same month, provided that judgments so destroyed would be unenforceable unless proceedings to re-establish them were brought within 9 months (Feb. 1902). After the nine month period had expired and the Duval judgment became unenforceable (by operation of §1603), a certified transcript of the judgment was recorded in Manatee County in November, 1902 pursuant to §1601. Legal proceedings to re-establish the Duval judgment were not begun in Duval County until December 1903. The action in Curry was brought to enforce the judgment against property in Manatee County in 1908 while the suit to re-establish the Duval judgment was still pending.

The Court in Curry was faced with construing the above statute with two others in existence since 1834, all brought forward as sections 1600, 1601 and 1603 of the General Statutes of 1906. §1600 and §1601 provided:

> "Sec. 1600 (1173). In Counties Where Rendered.--Every judgment at law (and decree in equity) which shall be entered in any of the circuit courts of this state shall create a lien and be binding upon the real estate of the defendant in the county where rendered.
>
> "Sec. 1601 (1174). In Other Counties.--Such judgments and decrees shall create a lien upon the real estate of the defendant situated in any other county than the one in which the same shall have been rendered, when a certified transcript of the said judgment or decree shall have been recorded in the county in which the real estate so sought to be bound may be situated."

The appellant in Curry sought to enjoin enforcement of a judgment in Manatee county under §1601 as barred by §1603 arguing a literal construction of the statute rendering the judgment void since proceedings to re-establish it:

> . . . were not begun within the time provided by the act, and that a transcript of the judgment recovered in Duval county could not be recorded in Manatee county, so as to create a lien on lands in that county, at a time when the judgment entry itself in the county where recovered was no longer in existence, and under the statutes such judgment had ceased to be good and effectual as a lien . . . . Id @ 20

The Court in Curry correctly went beyond a literal construction of §1603 to validate the lien in Manatee County holding that the words

"such judgment or decree"[2] referred only to those in the County where the judgment was rendered and destroyed notwithstanding the additional language in §1603 "or any execution issued thereon." (e.s.) In so ruling, the Court held:

> The legal presumption is that the Legislature did not intend to keep really contradictory enactments in the statute books, or to effect so important a measure as the repeal of a law without expressing an intention to do so. An interpretation leading to such a result should not be adopted, unless it be inevitable. The rule of construction in such cases is that if courts can, by any fair, strict, or liberal construction, find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is their duty to do so.
>
> When the meaning of a statute is clear, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by the Legislature, and not by judicial construction. An interpretation of a statute, however, which must lead to consequences which are mischievous and absurd, is inadmissible, if the statute is susceptible of another interpretation by which such consequences can be avoided. For this purpose all parts of a statute are to be read and compared. Id @ 20

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[2] Here, the definition of permanently located in §192.032(5) relates to "in that county . . . in which it is permanently located" found in §192.032(2). (e.s.) Clearly, the adjective that above can be construed to indicate which of several counties, a construction which is certainly reasonable and consistent with Autotote.

It is the Department's position that a pari materia reading of §192.032 in its entirety will establish that the legislature did not intend to create a durational residency requirement by enacting §192.032(5) and that to so hold would lead to an improper repeal by implication, absurd results, and a legal doctrine clearly not intended by the legislature.

REPEAL BY IMPLICATION

Clearly, the provision in §192.032(2), F.S., which permits the taxation of property which enters the state for the first time between January 1 and April 1 of a tax year (to be taxable for that year) without regard to any consideration as to its presence in the preceeding year conflicts violently with the lower Court's ruling here below that a 12 month prior presence of some sort is a condition precedent to taxation.

This conflict is the most prominent of numerous flaws in the position of the lower Court here and should have signaled an immediate attempt to reconcile the conflicting provisions. Curry v. Lehman, supra @ 20. Instead, the 2nd District latched on to the later in time doctrine as referenced by this Court in Askew v. Schuster, 331 So.2d 297 (Fla. 1976) (though by way of dicta since the provisions of the acts there were not in conflict). Clearly, the later in time rule would only support a repeal by implication where provisions of statutes are irreconcilably repugnant. Curry v. Lehman, supra. Here §192.032(5), F.S., can be harmonized with the entirety of §192.032 by adopting the reasonable construction of the Autotote Court.

THE AUTOTOTE DECISION PROPERLY HARMONIZED THE APPARENT CONFLICT CREATED BY §192.032(5), F.S.

At the outset, some clarification is required.

First, the decision below misread Autotote. Mikos held:

> With all due respect, we cannot accept the rationale of Autotote. Department of Revenue Regulation 12D-1.03(1)(c) was issued in 1976 to aid in the interpretation of subsection 2 of the statute, a subsection dealing with the taxation of property located in more than one county within the state during the taxable year. This regulation could hardly clarify the intent of a separate subsection enacted three years later which contains different language and makes no reference to multicounty disputes over taxation.

Autotote did not hold that the regulation clarified §192.032(5). The regulation was simply identified as evidence of a problem §192.032 (5) was enacted to address or clarify.

Of significance is the fact that §192.032(5) was created by section 5, Ch. 79-334, Laws of Florida. That Chapter, contains several enactments dealing with live-aboard vessels (one is within section 5 of Ch. 79-334). It is no secret that at that time the legislature was preoccupied with trying to apply the ad valorem tax to boat dwellers who in the eyes of the legislature were freeloading in South Florida avoiding taxation simply by sailing up or down the intracoastal waterway. The attempt to tax live-aboard vessels has faded away with this Court's ruling in Department of Revenue v. Fla. Boaters, Inc., 409 So.2d 17 (Fla. 1982) which held that live-aboard vessels were constitutionally exempt as boats, notwithstanding their use and legislative attempts in Ch.

79-334 to define them otherwise. This historical reference is relevant to a determination of legislative intent here. As this Court noted in Curry:

> The evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject, are all properly considered by the court in arriving at the legislative intention. Id @ 20

It is not unlikely that the draftsman of §192.032(5), in attempting to capture the elusive live-aboards for taxation, approached the problem a little too zealously.

It has always been the Department's position that §192.032(5), F.S., addresses only inter-county situs disputes. Aside from the historical context in which it was enacted, and from the violence it would do to §192.032 if construed otherwise, absurd results would obtain by ruling that §192.032(5) is a durational residency requirement to taxation.

ABSURD RESULTS

While the 2nd District in Mikos receded from a 365 day presence test in the prior year, it failed to define presence other than recognizing nevertheless some sort of 12 month presence requirement. This requirement would lead to following absurd results not intended by the legislature[3] when considered with controlling law.

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[3]There is no question but that Florida may tax all property unless expressly exempted in the State except as limited by the Federal Constitution. Art. VII, §4, Fla. Const. The Federal limitation is best illustrated by the case Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 4, 78 L.Ed. 131 (1933). In Blasius, the Court held that the presence of 11 head of cattle in Minnesota for 2 days was a sufficient presence for state ad valorem taxation where the cattle had "come to rest" in Minnesota, the "coming to rest" not being incidental to transit. The cattle were brought to Minnesota to be sold and were sold.

First, tangible personal property would escape taxation in a subsequent year if it was only absent from Florida for only one or several months in the preceeding year, even though it was in Florida for the full 365 days in the subsequent tax year in question irrespective of all other considerations. Secondly, owners of tangible personal property could escape Florida taxation forever by merely removing their property one or several months a year every year.(And this could be done for specific business purposes without fraudulent intent.) Third, a property which came to rest in a county in March or April 1986 and remained there, would not be taxable until January 1, 1988, thus giving the property owner nearly two full years of benefiting from state protection and services without paying anything in return. Finally, to escape taxation, a property owner could remove his property across county lines a month a two a year and not be permanently located in any county for taxation purposes, thus indefinitely avoiding ad valorem taxation. This clearly could have not been the intention of the Legislature in enacting §192.032(5), F.S.

An additional absurd result from the construction of §192.032(5) by the 2nd District herein can be gleaned by reading the provisions of §192.032(6)(a) which provides:

> (6)(a) Notwithstanding the provisions of subsection (2), personal property used as a marine cargo container in the conduct of foreign or interstate commerce shall not be deemed to have acquired a taxable situs within a county when the property is temporarily halted or stored within the state for a period not exceeding 180 days.

Marine cargo containers are by their nature akin to instrumentalities of commerce and their presence in a jurisdiction is almost prima facie incidental to their transit thus rendering them non-taxable in deference to the commerce clause unless that transit is broken. What logic would support a construction of §192.032(5) that would have property such as marine cargo containers (at least prima facie incapable of acquiring tax situs) be nevertheless subject to ad valorem tax in this state as much as a year sooner than more permanent personal property?

Clearly, from the foregoing, a durational residency condition precedent to taxation could not have been intended by the legislature in enacting §192.032(5), F.S. The legislature could not have intended the absurd results of such a construction nor the repeal by implication of a county's power to tax property brought into a county after January 1 of the tax year. §192.032(2), F.S.

POINT II

§192.032(5), F.S. SHOULD BE STRICTLY CONSTRUED AS A DEROGATION OF SOVEREIGNTY

Art. VII, §4, provides that by general law regulations shall be prescribed which shall secure a just value of all property for ad valorem taxation . . .(subject to express exceptions and exemptions).

§196.001, F.S., implements this provision by providing:

> 196.001 Property subject to taxation.--Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:
>
> (1) All real and personal property in this state and all personal property belonging to persons residing in this state; and
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> * * *

As noted by this Court in Williams v. Jones, 326 So.2d 425, 435 (Fla. 1976) §196.001 functions to impose ad valorem taxes on all property unless expressly exempted. The express exemptions must be constitutional exemptions. Colding v. Herzog, 467 So.2d 980 (Fla. 1985).

While it is recognized that §192.032(5) is not an exemption provision, the construction of that section by the 2nd District herein will function to potentially remove a broad class of personal property in Florida from ad valorem taxation. This in turn will shift the burden of government to all other property. This shift, especially the tax-free second year for property not here the full preceding year, could not have been intended by the legislature and is in derogation

of the sovereign power of a state to tax all property within its borders not protected by the Federal Constitution.

While it is not necessary to argue here that the legislature is without power to do this, it is argued that Courts should avoid construing a legislative enactment which would obtain this result unless legislative intent to do so is abundantly clear, especially where a less drastic result would obtain from another reasonable construction as the one applied by the Autotote Court.

In 82 C.J.S. Statutes, §391 at page 936, it is stated:

> Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights or remedies, unless the intention of the legislature to effect this object is clearly expressed. (e.s.)
>
> * * *
>
> It has been pointed out that the rule has been borrowed from the English rule but that the terms used in the rules do not have the same meaning. Among the statutes in derogation of sovereignty and subject to the rule requiring strict construction in favor of the state are those allowing suits against the state or its representative, creating a claim against the state or waiving its immunity from liability, relinquishing public power or jurisdiction, conferring sovereign powers on corporations, or containing exemptions from taxation.

Again, while we are not concerned here with an exemption, we are nevertheless considering whether or not the legislature intended to significantly limit its sovereign power to tax personal property in this state. This power was recognized by the Supreme Court of the United States in Minnesota v. Blasius, supra, as enabling a state to tax property present only 2 days. For the legislature to have divested Florida of this power with the resultant shift in the tax burden to other properties by the enactment of §192.032(5) is inconceivable especially in light of the historical context of its enactment.[4] The legislature could not have intended to enact a statute which would give personable property which came into the state several months into the preceding year a full subsequent year "exemption" from ad valorem taxation. All reasonable interpretations of §192.032 establish that §192.032(5) is not a durational condition precedent to taxation, but as the Autotote Court held, a statute intended to "facilitate the resolution of multi-county disputes regarding entitlement to tax property physically present in one Florida county on January 1 but typically present in another Florida county during the preceding year." Autotote, supra @ 662.

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[4] §192.032(5) was enacted by the same act of the legislature which attempted to capture live-aboard vessels for tax purposes, a species of property highly movable. See Department of Revenue v. Fla. Boaters Ass'n, Inc., supra @ 19.

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully requested that this Court issue an Order disapproving of the Second District's decision below and upholding a construction of §192.032(5) consistent with the holding of the Court in Autotote.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished by mail to Granville H. Crabtree, Jr., Crabtree, Sanchez, Parker & Ingram, P.A., 100 South Washington Blvd., Sarasota, Florida 33577, Beth E. Antrim-Berger, Culverhouse & Dent, 1549 Ringling Boulevard, Suite 500, P. O. Box 3269, Sarasota, Florida 33578; and by hand delivery to J. Terrell Williams, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, this 5th day of November, 1985.

Jeff Kielbasa