1-18-86

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, Petitioner,	)	
v.	)	Case No. 67,766
RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., a Delaware corporation, et al., Respondents.	)	Second District Court of Appeal No. 84-2476

APPEAL FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

ANSWER BRIEF OF RESPONDENTS RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. and HAGENBECK-WALLACE, INC.

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STATEMENT OF THE FACTS AND OF THE CASE

In this answer brief, Petitioner JOHN W. MIKOS, as property appraiser of Sarasota County, Florida, will be referred to as the "Property Appraiser". Respondent RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. will be referred to as "Ringling", and Respondent HAGENBECK-WALLACE, INC. will be referred to as "Hagenbeck-Wallace". Amicus Curiae Franklin B. Bystrom and Department of Revenue, State of Florida, will be referred to collectively as Amicus Curiae.

The Property Appraiser's statement of the facts and of the case is uncontroverted.

SUMMARY OF THE ARGUMENT

The Property Appraiser and Amicus Curiae rely on judicial authority which has been superseded by subsequent statutory amendment. Since the legislature chose to define the meaning of the term "permanently located" by amendment effective for the tax year 1980, the statutory definition is controlling and must be followed by the courts. The Second District Court of Appeal correctly assumed that the legislature did not agree with the Second District Court's prior decision in the 1979 Mikos case, and that the purpose of the 1980 amendment to the statute was to change and restrict the meaning of the term "permanently located".

Amicus Curiae Franklin B. Bystrom's reliance on the affidavit of Legislator Pajcic is misplaced, since affidavits of former members of the legislature stating their views as to what the legislature intended by a certain statute is inadmissible evidence for the purpose of demonstrating legislative intent.

ARGUMENT

I. THE HISTORICAL OVERVIEW OF THE JUDICIARY'S INTERPRETATION OF THE TERM "PERMANENTLY LOCATED" IS NOT PERTINENT BECAUSE THE FLORIDA LEGISLATURE SPECIFICALLY DEFINED THAT TERM IN THE 1980 AMENDMENT TO SECTION 192.032, FLORIDA STATUTES.

The Property Appraiser and Amicus Curiae rely on an historical overview of the judicial interpretation of the term "permanently located" where that term has been used in taxing statutes. The initial briefs contain lengthy reviews of the line of authority which culminates with the 1979 decision of the Second District Court of Appeal in Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So.2d 884 (Fla. 2d DCA 1979), cert. den., 378 So.2d 348 (Fla. 1979), app. dism., 445 U.S. 939 (1980). However, the precedential value of Mikos v. Ringling and its predecessors was completely lost when the Florida legislature gave a clear and unambiguous definition of the term "permanently located" by the following 1980 amendment to §192.032:

> 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. (emphasis added)

Federal and state court cases rendered prior to this statutory amendment are no longer pertinent, and the courts of this state need look no further than the legislatively mandated definition

of the term. Where the language of a statute is unambiguous and conveys a definite meaning, the court is to look no further than that language to determine the statute's meaning. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983). A statutory definition of a word is controlling and will be followed by the courts. Ervin v. Capital Weekly Post, Inc., 97 So.2d 464 (Fla. 1957). It is presumed that when legislature amends a statute, it intends to accord the statute a meaning different from that accorded it before the amendment. Seddon v. Harpster, 403 So.2d 409 (Fla. 1981). In case of change in any statute, it should be assumed that the legislature accorded significance to the change and had a reasonable motive for it and that the change effected was intentional. Kelly v. Retail Liquor Dealers Ass'n of Dade County, 126 So.2d 299 (Fla. 3d DCA 1961).

The Property Appraiser relies on two cases which concern the taxation of marine cargo containers, Overstreet v. Sea Containers, Inc., 348 So.2d 628 (Fla. 3d DCA 1977), cert. den., 359 So.2d 1219 (Fla. 1978) and Integrated Containers Services, Inc. v. Overstreet, 375 So.2d 1146 (Fla. 3d DCA 1979). In these decisions, the Third District Court of Appeal found that marine cargo containers which were in the state for less than six months were taxable. The Florida legislature responded to these deci-

sions by amending the statute by the addition of subsection 6 to §192.032, Florida Statutes, effective in 1980. The amendment provides that marine cargo containers are not taxable when stored within the state for a period not exceeding six months. Similarly, the Property Appraiser relies on the decision of Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So.2d 884 (Fla. 2d DCA 1979), cert. den., 378 So.2d 348 (Fla. 1979), app. dism., 445 U.S. 939 (1980), in which the Second District Court of Appeal found that the circus animals and props were "permanently located" within the meaning of §192.032, Florida Statutes. The Florida legislature responded to this decision at the very same time it responded to the two Overstreet decisions discussed above, by the addition of subsection 5, which defines and constricts the meaning of "permanently located". Thus, the Property Appraiser's argument is based on a judicial authority which has been superseded by subsequent legislative amendments which restricted the taxation of tangible personal property.

The Property Appraiser and Amicus Curiae repeatedly misrepresent the ruling of the Second District Court of Appeal which is now before this Court. The Property Appraiser states "the Second District Court found that the requirement of 12-month presence applied to all tangible personal property located within

the state". To the contrary, the per curiam opinion by the Second District specifically states "we do not read this (the amendment defining the term "permanently located") to mean that the property must remain within the state for each and every day of the 12-month period". The argument that the decision imposes a 12-month presence requirement for taxation is a "red herring" argument because it misrepresents the holding of the court below.

In conclusion, the arguments of the Property Appraiser and Amicus Curiae are based on judicial authority which has been superseded by subsequent statutory amendment and on a misrepresentation as to the holding of the court below. Since the legislature chose to define the meaning of the term "permanently located" with the addition of subsection (5), effective for the tax year 1980, the statutory definition is controlling and must be followed by the courts.

II. THE SECOND DISTRICT COURT OF APPEAL'S CONSTRUCTION OF §192.032(5), FLORIDA STATUTES, IS CONSISTENT WITH §192.032(2), FLORIDA STATUTES AND FLORIDA LAW.

The Property Appraiser and Amicus Curiae argue that the decision before this Court renders portions of §192.032(2), Florida Statutes, inoperative. As demonstrated below, the Second District Court of Appeal's interpretation of subsection 5 is consistent with subsection 2 of the statute, as well as general Florida law pertaining to statutory construction.

The crux of the argument under this point is found in the first full paragraph on page 12 of the Property Appraiser's initial brief. The Appellant and Amicus attempt to discredit the Second District Court of Appeal's interpretation of subsection 5 by showing that it conflicts with subsection 2. In order to demonstrate this conflict, the Property Appraiser urges upon this Court an interpretation of subsection 2 which is erroneous because it ignores the plain language of the statute, which provides in pertinent part:

> All property shall be assessed according to its situs as follows:
>
> (2) Tangible personal property, in that county and taxing jurisdiction in which it is permanently located on January 1 of each year; except that tangible personal property brought into the state after January 1 and before April 1 of any year shall be taxable for that year if the property appraiser has reason to believe that such property will be removed from the state prior to January 1 of the next succeeding year.

The Property Appraiser states subsection 2 clearly demonstrates the legislature's intent to tax movable tangible personal property located in this state on January 1. This is true, but only if the movable tangible personal property is "permanently located" on January 1 of each year. The Property Appraiser states that the legislature provided that property brought into the state after January 1 but before April 1 was to be taxed when it was determined that the property would be removed from the state on or before December 31. This is also true, but only if the property is "permanently located" for a period of time during the year. Finally, the Property Appraiser stretches the argument to its ridiculous extreme by stating that under subsection 2, property brought into the state on March 31 and removed the following day, week, month, or any time prior to December 31, is to be taxed. This interpretation by the Property Appraiser is clearly erroneous, because it is an unconstitutional burden on interstate commerce. The well established rule in regard to taxation of interstate commerce is that property actually in transit through a nondomicilliary state is exempt from taxation. Kelley v. Rhoades, 188 U.S. 1 (1902); Minnesota v. Blasius, 290 U.S. 1 (1933). The correct interpretation of the statute is an interpretation which renders it constitutional. Gulfstream Park Racing Ass'n v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983).

The decision of the Court below is consistent with general Florida law pertaining to statutory construction. In interpretating a statutory provision, legislative intent is the polestar by which a court is to be guided. Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981); Parker v. State of Florida, 406 So.2d 1089 (Fla. 1981). This legislative intent is to be determined primarily from the plain language of the statute:

> If the language of the statute is clear and unequivocal, then legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think the legislators intended or should have intended.

Tropical Coach Line v. Carter, 121 So.2d 779 (Fla. 1960). See also St. Petersburg Bank & Trust Company v. Hamm, 414 So.2d 1071 (Fla. 1982). Where the language of a statute is unambiguous and conveys a definite meaning, the court is to look no further than that language to determine the statute's meaning. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983). A taxing statute should be construed in favor of the taxpayer, and strickly against the governmental entity seeking to impose the tax. Miller v. Agrico Chemical Company, 383 So.2d 1137 (Fla. 1st DCA 1980). If the taxing statute does not reveal with certainty the intent of the legislature and is susceptible of two meanings, the meaning most favorable to the

taxpayer should be adopted, particularly where one meaning results in imposing a tax and the other relieves imposition of tax. Department of Revenue v. Brookwood Associates, Ltd., 324 So.2d 184 (Fla. 1st DCA 1975).

The uncontested facts in the case at bar are that the subject property is brought to and departs from Sarasota County on trains operated by the Ringling Bros.-Barnum & Bailey Circus on preestablished dates in accordance with itineraries for each of the two Ringling traveling circus units. Each traveling circus is in Sarasota County approximately ten weeks, which time period happens to straddle the assessment date of January 1. During the remaining forty-two weeks, or approximately 80 percent of each calendar year, the circuses travel throughout the United States and Canada.

The uncontested facts show that the subject property is "habitually located or typically present" in Sarasota County for only a continuous 2½ month period, and was not interspersed over any of the other months in the 12-month period preceding the date of assessment, as required by the plain language of the statute. The property is not "habitually located or typically present for the 12-month period" under the clear and unambiguous meaning of these words.

The case most heavily relied on by the Property Appraiser and Amicus Curiae, Mikos v. Ringling Bros.-Barnum & Bailey Combined

Shows, Inc., 368 So.2d 884 (Fla. 2d DCA 1979), is inapplicable to the case at bar because it was decided prior to the amendment of §192.032, Florida Statutes, effective for the tax year 1980. The legislature deliberately changed the statute. The legislature knew of the prior Mikos case when it changed the law and policy of the state of Florida concerning this type property.

To argue that the legislature was merely "codifying" the results of the prior Mikos case as rendered by the Second District Court of Appeal is speculative and contrary to common legislative practice. Even the Second District Court of Appeal rejected this argument, stating in the instant case that the amendment "indicated to this court that the legislature did not agree with our interpretation of the word permanent as set forth in the 1979 case of Mikos". To adopt this contorted construction is to suggest that all of the thousands of decisions of the District Courts of Appeal and Florida Supreme Court of this state should be reenacted by the legislature. This is certainly a wasteful and useless act for various courts' decisions are the laws of this state until overruled or altered by the legislature. When a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded to the statute before the amendment. Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968). Seddon v. Harpster, 403 So.2d 409 (Fla. 1981). In

case of a change in a statute, it should be assumed that the legislature accorded significance to the change and had a reasonable motive for it, and that the change effected was intentional. Kelly v. Retail Liquor Dealers Ass'n of Dade County, 126 So.2d 299 (Fla. 3d DCA 1961).

This is precisely what happened to the announced law of the prior Mikos decision as rendered by the Second District Court of Appeal until 1980. The legislature elected to alter that law by the 1979 amendment to §192.032, Florida Statutes. Whether the Property Appraiser and Amicus Curiae disagree with this alteration of the law is unimportant. The Property Appraiser and Amicus Curiae may urge, lobby or protest this change of the law, but until changed by the legislature, they are sworn to abide by it.

The plain language of the 1980 amendment to §192.032, Florida Statutes, shows that the legislature intended to restrict the meaning of "permanently located". With respect to marine cargo containers, subsection (6)(a) of the same statute provides that the property is not taxable unless it is halted or stored in the state for a period of at least 180 days. This simple formula of 180 days, or one-half the year, should be considered in determining what the legislature meant by "habitually located or typically present for the 12-month period" in §192.032(5), Florida

Statutes. The plain meaning of the language of "habitually located or typically present for the 12-month period" refers to property that is in the state of Florida more than it is out of the state of Florida during the 12-month period. For instance, if the property came to Sarasota County, Florida, in October and left the state prior to January 1, there is no authority to impose a tax under any interpretation of §192.032, Florida Statutes.

The case of Autotote Limited, Inc. v. Bystrom, 454 So.2d 661 (Fla. 3d DCA 1984) is distinguishable from the case at bar. The position taken by the taxpayer in Autotote is that §192.032(5), Florida Statutes, requires the tangible personal property to be in the county attempting to impose a tax for the entire 12-month period preceding the assessment date. The taxpayers in the case at bar have never argued that such an interpretation is proper, nor is such an interpretation necessary in order for this Court to affirm the decision of the Second District Court of Appeal.

In Autotote, the Third District Court of Appeal specifically adopted the dicta of the written opinion of the trial court. The opinion indicated that the trial court relied heavily on the administrative ruling of the Department of Revenue in Fla. Admin. Code Rule 12D-1.03(1)(c), as an aid in interpreting §192.032(5),

Florida Statutes. Apparently, the trial court and the Third District Court of Appeal failed to note that this administrative ruling was enacted on October 12, 1976. It has not been changed since 1976, which is three years prior to the legislature's modification of §192.032, Florida Statutes, by the addition of the definitional language contained in subsection (5) of that statute as modified in 1979 effective for the 1980 tax year. Instead of relying on an administrative ruling which predated the amendment to the statute, the trial court and the Second District Court of Appeal properly determined the intent of the legislature based upon the plain meaning of the language contained in the statutory definition. A statutory definition of a word is controlling and will be followed by the courts. Ervin v. Capital Weekly Post, Inc., 97 So.2d 464 (Fla. 1957).

III. THE AFFIDAVIT OF LEGISLATOR PAJCIC IS NOT PROPER EVIDENCE OF THE INTENT OF THE LEGISLATURE.

The argument of Amicus Curiae Franklin B. Bystrom, as Property Appraiser of Dade County, Florida, relies on the affidavit of Legislator Steve Pajcic in an effort to establish the legislative intent of the 1980 amendment to §192.032, Florida Statutes. Under Florida law, affidavits of members or former members of the legislature stating their views as to what the legislature intended by a certain statute is inadmissible evidence for the purpose of demonstrating legislative intent. McLellan v. State Farm Mutual Automobile Insurance Company, 366 So.2d 811 (4th DCA Fla. 1979). Although this affidavit was filed with the trial court, Respondent RINGLING BROS. objected and moved to strike the affidavit on numerous grounds (R-306). A written order was not entered on the motion, but the trial court stated during oral argument that the court would not consider the affidavit (R-358).

The case of Department of Revenue v. Markham, 381 So.2d 1101 (Fla. 1st DCA 1979) does not stand for the proposition that an affidavit of a member of the legislature is admissible evidence. Markham stands only for the proposition that the admission of such evidence may not be reversible error under certain, very limited circumstances. The circumstances noted by the appellate

court in Markham was that the trial court stated in its final judgment that the statutes in question are "sufficiently clear to avoid the need for extrinsic aids to their construction", and therefore considered the affidavit to have little, if any, evidentiary weight.

Furthermore, Markham provides the following principle of construction, which is perhaps the strongest argument in support of the decisions of the trial court and Second District Court of Appeal in the case at bar:

> Therefore, this court's task, under the circumstances, is to interpret the statute in accordance with the legislative intent. In so doing, to the extent that the legislative intent is in doubt, or if the statutes are so ambiguous as to render legislative intent questionable or unclear, it is the duty of the taxing authority and the court to construe them liberally in favor of the taxpayer and strictly against the taxing authority. (emphasis added)

The decision of the Second District Court of Appeal is the decision which construes the statute in favor of the taxpayer and strictly against the taxing authority, and should be accordingly affirmed.

CONCLUSION

In conclusion, the Second District Court of Appeal's interpretation of the amendment contained in subsection (5) of §192.032, Florida Statutes, is consistent with subsection (2) of the statute, general Florida law pertaining to statutory construction, and the presumption that the legislature intended to accord the statute a meaning different from that accorded it before the amendment. Accordingly, the decision of the Second District Court of Appeal should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been mailed to BETH E. ANTRIM-BERGER, of Culverhouse & Dent, 1549 Ringling Boulevard, Suite 500, Sarasota, FL 33577; to Daniel A. Weiss, Assistant County Attorney, Metro-Dade Center Suite 2810, 111 N.W. 1st Street, Miami, FL 33128-1993; and to Jeffrey P. Kielbasa, Deputy General Counsel, Department of Revenue, 202 Carlton Building, Tallahassee, FL 32301, on December 24, 1985.

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