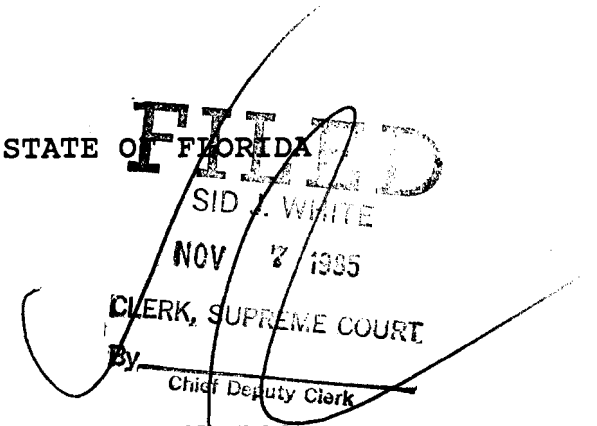
IN THE SUPREME COURT OF THE STATE OF FLORIDA



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

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

BRIEF OF PETITIONER, JOHN W. MIKOS, AS PROPERTY APPRAISER OF SARASOTA COUNTY, FLORIDA.

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STATEMENT OF THE FACTS AND OF THE CASE

Respondent, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., hereinafter referred to as Ringling, is a Delaware corporation. (R 1) Ringling consists of two circuses, the red and the blue units. (R 2-3) The circus units travel throughout the United States each year for the purpose of putting on circus performances. (R 3).

Respondent, Hagenbeck-Wallace, is a Delaware corporation, (R 6) which leases costumes and props to Ringling for its circus performances. (R 7) The leased property is carried by Ringling together with the property owned by Ringling. (R 7).

Both the red and the blue circus units are present in the City of Venice, Sarasota County, Florida, on January 1st of each year. (R 3) While in Venice, the circus employees spend their time preparing for the coming year's circus performances, maintaining and refurbishing the circus property, creating new costumes and floats and preparing circus acts. (R 336) The circus property is continuously located in Sarasota County for a period of approximately two and one-half months each year, including January 1. (R 335, 350)

In January of the year, the circus units leave the City of Venice to begin their annual tour of cities throughout the country. (R 350) At the conclusion of their annual tour sometime in November (R 350), the circus units return to Venice to prepare for the next year's performance.

At all times, both while traveling and while in Sarasota County, Ringling has in its possession, together with its other property, the costumes and props which it leases from Hagenbeck-Wallace. (R 7, 335) Both Respondents maintain permanent premises in Venice, Florida. (R 3,7).

Petitioner, John W. Mikos, as Property Appraiser of Sarasota County, has, for the tax years at issue and every year since 1972, assessed Respondents property at one hundred percent (100%) of its value for ad valorem tax purposes. Each year, Respondents have filed Complaints in the Sarasota County Circuit Court challenging the assessments, claiming that their property was not permanently located in Sarasota County.

In 1979, the District Court of Appeal, Second District, in Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So.2d 884 (Fla. 2d DCA 1979) held that Ringling's property had in fact acquired situs in Sarasota County and was therefore, taxable at one hundred percent (100%) of its value for ad valorem tax purposes. (R 336) In 1980, Section 192.032(6), now Section 192.032(5), was amended to provide a statutory definition of the term "permanently located." (R 336) Respondents claim that this change in the statute effectively nullified the earlier decision of the District Court of Appeal, Second District. (R 336) Therefore, Respondents filed suit against Petitioner challenging the 1981, 1982 and 1983 assessments. Eight suits were filed and have been consolidated as one action. (R 332)

Both parties filed motions for summary judgment, and after said motions were heard, summary judgment was granted in Ringling and Hagenbeck-Wallace's favor. (R 398) Mikos timely filed a Notice of Appeal seeking review of the trial court's decision by the District Court of Appeal, Second District. (R Vol. II, p. 92) The District Court of Appeal, Second District, affirmed the decision of the trial court and certified its decision as being in direct conflict with the decision of the District Court of Appeal, Third District, in Autotote Limited, Inc. v. Bystrom, 454 So.2d 661 (Fla. 3d DCA 1984). (Appendix, pp. i-ix).

Petitioner, Mikos, timely filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida, pursuant to Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure. (Appendix, at p. x).

SUMMARY OF THE ARGUMENT

Tangible personal property may be taxed by the jurisdiction in which it is located and has acquired situs for purposes of ad valorem taxation. In determining situs, the term "permanently located" is not synonymous with the word "always"; nor does it convey the idea of the characteristics of the permanency of real property. Rather, courts have found that property present for one day, ten weeks, or three months has acquired situs for purposes of ad valorem taxation.

The District Court of Appeal, Second District, erred in holding that property, in order to acquire situs, must be present for the twelve-month period preceding the date of assessment. In so holding, the Court construed Section 192.032, Florida Statutes, in such a manner as to render portions of the statute inoperative. In order to render all of Section 192.032, Florida Statutes, operative the decision of the District Court of Appeal, Third District, in Autotote Limited, Inc. v Bystrom should be adopted. There, the Court held that the requirement of twelve-month presence is to be applied only for purposes of settling multi-county disputes.

I. AN HISTORICAL OVER-VIEW OF THE JUDICIARY'S INTERPRETATION OF THE TERM "PERMANENTLY LOCATED," AS APPLIED TO TANGIBLE PERSONAL PROPERTY FOR PURPOSES OF AD VALOREM TAXATION.

The general rule with regard to the assessment of personal property for ad valorem tax purposes has long been that personal property may be assessed and taxed by the jurisdiction within which it is located. As stated by the United States Supreme Court in Southern Pacific Company v. Kentucky, 222 U.S. 63 (1911):

> [P]ersonal property, for most purposes, has no locality; in a qualified sense, it follows the owner wherever he goes. But, this does not stand in the way of the taxing power in the locality where the property has it's actual situs, and the requisite legislative jurisdiction exists. Southern Pacific Company, supra, at p. 68-69.

The rationale behind the rule is that the taxing jurisdiction, since it provides the property or property owner with the benefits and protections of its laws, should be compensated therefore. Currey v. McCanless, 307 U.S. 357, 364 (1938). As stated by the United States Supreme Court, in Union Refrigerator Transit Company v. Kentucky, 194 U.S. 151 (1905):

> The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, -- such, for instance, as roads, bridges, sidewalks, pavements and schools for the

education of his children. Union Refrigerator Transit Company, supra, at p. 202.

It is essential to the validity of a tax that the property be within the territorial jurisdiction of the taxing power. Union Refrigerator Transit Company, supra. Florida law provides that all real and personal property located within the state is to be taxed and the Property Appraiser of each county is to assess all property located within his county. Section 196.001, Fla. Stat. (1971) and Section 192.011, Fla. Stat. (1982). Tangible personal property is to be taxed by the county and municipality in which it has acquired situs, or where it is permanently located on January 1 of each year. Section 192.032(2), Fla. Stat. (1972).

The question, "Where is the situs of personal property for purposes of taxation?" was posed to Florida's State Comptroller in 1961. The State Comptroller reported that the situs of tangible property is "where it is more or less permanently located rather than where it is merely in transit or temporarily for no considerable length of time," (citing 2 Cooley on Taxation, 4th Ed., 982, Section 452); further, that "the word 'permanently' is apt to be misleading unless read in connection with the facts of the particular case, as it is impossible to lay down any general rule fixing the length of time or degree of permanency necessary to establish a taxable situs in the state." The State Comptroller refers to 84 C.J.S. 226, Section 115, wherein it is stated that the permanency necessary to establish a tax situs for tangible

personal property is not 'permanency' in the sense that it must be fixed like real property; rather, the property must have a more or less permanent location, as distinguished from a transient or temporary one. 1961 Att'y Gen. Fla. 061-195 (Dec. 19, 1961).

The Florida Courts have adopted the view that the term "permanent" is not synonymous with the word "always". In City of Lakeland v. Lawson Music Co., Inc., 301 So.2d 506 (Fla. 2d DCA 1974), the District Court of Appeals, Second District, stated that for purposes of ad valorem taxation the word "permanent" in a taxing statute does not always denote lasting forever, or have a meaning opposite to temporary:

> In tax cases the requirement of permanency has been found satisfied where presence is consistent with continuity and not sporadically or temporarily present. City of Lakeland, supra, at p. 508.

The view of the District Court of Appeal, Second District, was adopted by the District Court of Appeal, Third District, in Overstreet v. Sea Containers, Inc., 348 So.2d 628 (Fla. 3d DCA 1977), cert. den., 359 So.2d 1219 (1978), wherein the court reviewed a trial court's decision and found that the trial judge's interpretation of the term 'permanently' was much too narrow for purposes of ad valorem taxation. Overstreet, supra, at p. 631.

In the case of Integrated Container Services, Inc. v. Overstreet, 375 So.2d 1146 (Fla. 3d DCA 1979), the District Court of Appeal, Third District, adopting the final judgment entered by the trial court, found that three to six months of

presence was sufficient to constitute permanent location. Integrated Container Services, supra.

The District Court of Appeal, Second District, 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), found that the following principles applied to the term "permanent" with respect to tax situs:

> . . . a more or less permanent location for the time being . . . where (the property) is more or less permanently located rather than where it is in transit or temporarily and for no considerable length of time.
>
> . . . does not convey the idea of the characteristics of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state, as contrasted with a transient status -- viz., likelihood of being in one state today and in another tomorrow.
>
> . . . where presence is consistent with continuity and not being sporadically or temporarily present. Mikos v. Ringling, supra, at pp. 888-889.

Applying the above principles to the Ringling property, which arrived in Sarasota County in November of each of the four tax years reviewed by the Court, and remained in Sarasota County for ten weeks thereafter, the District Court of Appeal, Second District, found that the property had acquired situs in

Sarasota County, Florida.[1]

The District Court of Appeal, Third District, in Autotote Limited, Inc. v. Bystrom, 454 So.2d 661 (Fla. 3d DCA 1984); pet. for rev. den., 461 So.2d 113 (Fla. 1985), found that tangible personal property located in Dade County, Florida, for only a few months of the year had acquired situs in Dade County. At the time of the Autotote decision, a new subsection had been added to the situs statute:

> 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 twelve-month period preceding the date of assessment. Section 192.032(5), Fla. Stat. (1983).

The Autotote court found that subsection 5 was applicable only to multi-county disputes and, therefore, of no effect with regard to Autotote's property.

The District Court of Appeal, Second District, reviewing the issue of Sarasota County's assessment of Ringling's property for the 1980 through 1983 tax years, rejected the Autotote court's holding that subsection 5 applied only to property involved in multi-county disputes. The Second District Court found that the requirement of twelve-month

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[1]The Court found that the annual stays in Sarasota County were distinct from those incidential to transportation; that while Ringling intended to transport the property out of the state each year, Ringling also intended to bring it back at the conclusion of each tour; and that the property enjoyed the protection of the state to such a degree that its owner should be required to contribute to the state's maintenance. Mikos v. Ringling, supra.

presence applied to all tangible personal property located within the State of Florida. (Appendix, at p. vi)

The Court found that, for purposes of Florida's situs statute, the twelve-month presence requirement had to be met and the ten weeks presence of Ringling's property, although inclusive of the January 1 taxing date, was not sufficient to establish situs. In holding that property present within the state on the statutory taxing date was not taxable, the Court ignored the wide latitude given states by the United States Supreme Court's decision in Minnesota v. Blasius, 290 U.S. 1 (1933), wherein the Supreme Court stated that property present within a state for one day only was taxable, so long as it was present on the state's taxing date.[2]

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[2]The only factor which might prevent the assessment of such property is where the property is traveling in the stream of interestate commerce. The question of whether Ringling's property was traveling within the stream of interstate commerce when located in Sarasota county was answered in the negative in Mikos v. Ringling Bros.-Barnum & Bailey Combined Show, Inc., 368 So.2d 884 (Fla. 2d DCA 1979), and was not raised by Ringling below.

II. THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, ERRED IN CONSTRUING SECTION 192.032(5), FLORIDA STATUTES IN SUCH A MANNER AS TO RENDER SECTION 192.032(2), FLORIDA STATUTES INOPERATIVE.

In reviewing Section 192.032, Florida Statutes, the District Court of Appeal, Second District, found that the statute was ambiguous and looked to the legislative intent behind the enactment of subsection 5. The Court determined that the legislature, in enacting subsection 5, intended to limit the Florida Court's previous expansive interpretations of the term "permanent", and change the meaning of the phrase "permanently located." (Appendix, at p. vii). The Court then provided the following interpretation of subsection 5:

> Section 192.032(5) states that for property to be taxable it must be habitually located or typically present for a period of twelve months. While we do not read this to mean that the property must remain within the state for each and every day of the twelve month period, (Ringling's) property was only located within Sarasota County for ten weeks during the year. (Appendix, at p. viii)

As the Court acknowledged, the above interpretation of subsection 5 is inconsistent with that portion of subsection 2 which authorizes the taxation of property brought into the state after January 1 and before April 1st. Section 192.032(2), Fla. Stat. (1983). The Court stated:

> Admittedly, this interpretation of subsection 5 appears to create an inconsistency with that portion of subsection 2 which permits the taxation

> under certain circumstances of property brought into the State between January 1 and April 1 of the taxable year. However, subsection 5 was the later enactment, and in cases of statutory inconsistency, the last expression of legislative intent prevails. Askew v. Schuster, 331 So.2d 297 (Fla. 1976). (Appendix, at p. viii)

Subsection 2 clearly demonstrates the legislature's intent to tax movable tangible personal property located in this state on January 1. In addition, to avoid allowing property to escape taxation by being absent from the state on January 1, 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. Under this portion of subsection 2, property brought into the state on March 31st and removed the following day, week, month, or any time prior to December 31, is to be taxed. The Second District Court's decision below, however, renders the provision of subsection 2 inoperative by requiring twelve-months of presence.

The language of subsection 5 and the Second District Court's interpretation of the subsection is plainly inconsistent with the provisions of subsection 2 and the legislature's policy to tax movable tangible property which is present in the state for less than twelve months. Where such an inconsistency exists, the following rule of statutory construction is to be applied by the courts:

> [W]here the last sentence in one section of a statute is plainly inconsistent

> with the preceding sentence of the same section and preceding sections which conform to the legislature's obvious policy and intent such last sentence, if operative at all, must be so construed as to give it effect consistent with such other sections and parts of sections and with the policy they indicate. Sharer v. Hotel Corporation of America, 144 So.2d 813, 817 (Fla. 1962), citing Johnson v. State, 157 Fla. 685, 27 So.2d 276, 282 (Fla. 1946).

This District Court of Appeal, Second District, erred in failing to apply this rule[3] of statutory construction to the provisions of Section 192.032, Florida Statutes.

As stated by this Court in State v. Putnam County Development Authority, 249 So.2d 6 (Fla. 1971), it is the duty of the Courts to read the provisions of an act as being consistent with one another, rather than in conflict, where there can be found a reasonable basis for consistency. Supra, at p. 10. See also: Woodgate Development Corporation v. Hamilton Investment Trust, 351 So.2d 14, 16 (Fla. 1977). The District Court of Appeal, Third District's, interpretation of subsection 5, in Autotote Limited, Inc. v. Bystrom, supra, provides such consistency. There, the District Court, adopting the opinion of the trial court, found:

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3. The District Court of Appeal, Second District, utilized the general rule of statutory construction, that in cases of conflicting provisions, the last expression of the legislature in point of time or order of arrangement will prevail. However, the exception to this rule, that the last expression of the legislature must be construed so as to give it effect consistent with the obvious intent of the legislature as set out in the preceding sections of the statute, must be applied to Section 192.032. Sharer, supra.

> The term "permanently located" was defined by the legislature in order 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. To regard the legislative definition of "permanently located" as imposing an additional stricture on taxing tangible personal property located in Florida on January 1 would be incompatible with the patent intent of the Florida Legislature to render taxable under Subsection 192.032(2) property brought into the state after January 1 and before April 1, which assessment is mandated where a Property Appraiser has reason to believe that such property will be removed from the State prior to January 1 of the next succeeding year. Autotote, supra, at p. 663.[4]

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[4]. The idea that the legislative intent behind Section 192.032 was to settle disputes between counties is not new. It was first adopted by the District Court of Appeal, Third District, in Integrated Container Services, Inc. v. Overstreet, supra, wherein the Court, adopting the decision of the trial court, held with regard to Section 192.032:

> "Clearly, the statute in question recognizes the taxability of property which comes into and leaves the state, in the same year, consequently the provision does not appear to condition the right to tax upon permanency of location. Moreover, if, as the Plaintiff contends, the statute was enacted as a direct result of the Supreme Court's holding in Caruthers v. Curcie Brothers, Inc., (Fla. 1967), 195 So.2d 545, the legislative intent was to settle disputes between counties since that was the problem in Caruthers. The court holds that F.S. 192.032 is a situs provision and that the right to tax is established by the following statutory mandate :
>
> '196.001. Property subject to taxation. -- Unless expressly exempt from taxation, the following property shall be subject to taxation in the manner provided be law: (1) All real and personal property in this state. . .' (emphasis supplied) "See William v. Jones, (Fla. 1975) 326 So.2d 425, 435 [appeal dismissed, 429 U.S. 803, 97 S. Ct. 34, 50 L.Ed.2d 63 (1976)].

The Autotote Court's construction of subsection 5 harmonizes and reconciles the provisions of Section 192.032, Florida Statutes, as opposed to the Mikos Court's construction, which renders portions of subsection 2 inoperative. The Mikos court's interpretation presupposes that the legislature intended to repeal subsection 2. However, it should never be presumed that the legislature intends to enact purposeless, useless legislation.[5]

Instead, Court's are to presume that the legislature in enacting a new provision did not intend to repeal a law without having expressed the intent to do so. Woodgate Development Corporation, supra, at p. 16. The Autotote court recognized this presumption and thereafter construed the two seemingly contradictory subsections in such a manner as to render them both effective. Therefore, the Autotote Court's interpretation of subsection 5 should be adopted by this Court, as it is the only construction of the statute which will allow all of the provisions of Section 192.032, Florida Statutes, to be operative.

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5. As this Court stated in Sharer, "Legislators are not children who build block playhouses for the purpose, and with the gleeful anticipation, of knocking them down".

CONCLUSION

The District Court of Appeal, Second District, erred in rejecting the District Court of Appeal, Third District's, interpretation of Section 192.032 as set out in Autotote Limited, Inc. v. Bystrom, 454 So.2d 661 (Fla. 3d DCA 1984); pet. for rev. den., 461 So.2d 113 (Fla. 1985). Therefore, Petitioner prays that this Court adopt the Third District Court's decision, reverse the decision of the Second District Court and the trial court sub judice, and direct that summary judgment be entered in Petitioner's favor.

Respectfully submitted,

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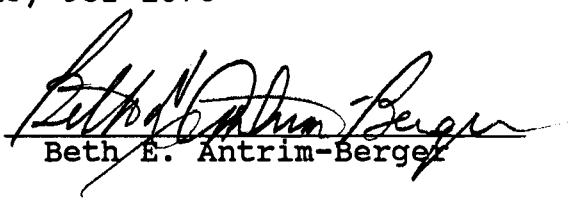
BY: 
Beth E. Antrim-Berger

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to Granville H. Crabtree, Jr., 100 South Washington Boulevard, Sarasota, Florida 33577 and K. Jane Fankhanel, 345 Park Avenue, New York, New York 10154 this the 4th day of November, 1985.

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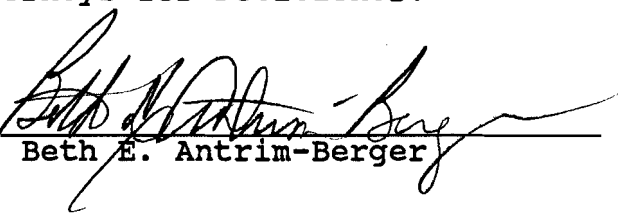
By: 
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