IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

DEPARTMENT OF REVENUE, PETITIONER, v. GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., RESPONDENTS.	CASE NO. 69,756
**********	DCA CASE NO. BI-257
DEPARTMENT OF REVENUE, APPELLANT, v. GENERAL AMERICAN TRANSPORATION CORPORATION, ET AL. APPELLEES.	CASE NO. 69,757

Reply Brief of Petitioner/Appellant, Florida Department of Revenue

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SUMMARY OF ARGUMENT

Point One of the Argument responds to GATC's characterization of the issue on appeal which centers on the finding of the Trial Court that the properties at issue are similarly situated. The Trial Court gratuitously reached this conclusion based on a superficial treatment of a complex area of taxation: instrumentalities of interstate commerce. Point One examines controlling law to argue that Florida had no power to tax non-resident railroad cars and failure to tax them was not discriminatory.

Point Two distinguishes the Interlachen decision and Art. VII §4 of the Florida Constitution as not relevant to the issues at bar. Point Three argues that the legislature, under the facts of this case, has the power to classify for reasons such as comity, fairness, due process, and economy and Point Four argues that Florida's tax treatment of GATC is fair.

ARGUMENT

POINT I

THE DEPARTMENT'S ASSESSMENT OF GATC'S PROPERTY WERE LAWFUL

While the District Court and GATC have framed the question as to whether §193.085(4)(b) discriminates against GATC since similarly situated rolling stock of non-resident railroads are not similarly assessed under Chapter 193, their question really begs itself. The Department since trial has maintained that the properties are not similarly situated for three reasons:

1) That cars of non-resident railroads have already paid or are subject to paying an ad valorem tax on the full value of their property to their home (track) state or states. Therefore, assessment by Florida would be double taxation.
2) That GATC's cars pay no state on the full value of their cars but pay an apportioned value on their cars to each state through which they run. Therefore, reasonably apportioned tax by Florida has no risk of double taxation; and
3) That, in addition to differences between the cars as presented in the Department's initial brief (which were never rebutted by GATC but merely superficially dismissed), the cars at issue here are different for situs purposes because of the salient fact that cars of non-resident railroads leave their track to return to their track. GATC's car have no track to return to.

The questions then are more properly:

1) Whether Florida has the power to tax non-resident railroad cars? If it does, then:

2) Could it exercise that power where it taxes resident railroad cars (Seaboard) when they are non-resident cars in other states, as it presently does? If Florida can, then;

3) Does Article VII §4 require Florida to change its method of taxation of instrumentalities against the norm at the risk of litigation and other uncertainties, such as a dislocation* of its taxing system for a result, which in dollars to the state, is negligible?

The issue in this case is whether the taxation of the operating property of Florida's railroads discriminates against the appellees, private car line companies.

The tax assessments of both were made pursuant to §193.085(4), F.S. §193.085(4)(a) requires the assessment of "all operating property of every description" of railroad companies owning track in this state under the unit-rule method of valuation. §193.085(4)(b) requires the assessment of all private car line companies operating rolling stock in Florida based on "an annual determination of the average number of cars habitually present in Florida."

In abbreviated terms, the unit-rule method marshalls all of the operating property (less that which has attained actual situs elsewhere) of a railroad wherever located and apportions the value of all of the operating property (including the track and right-of-way) to those states with track in proportion to the miles of track in each state.

*As stated in the Department's initial brief, since the dislocation brought on by legislative and administrative error in 1970, Florida has been unable to levy an ad valorem tax against GATX, though the legislature intended to do so. See GATC v. Askew, 310 So.2d 46 (Fla. 1st DCA, 1975).

Florida employs this method for all railroad companies maintaining track in Florida as directed by §193.085(4)(a).

GATC's expert witness, Mr. John Green, testified on direct that this is the customarily applied standard unit approach. He testified at r-1106-1107.

BY MR. MADSEN:

Q Mr. Green, there has been other testimony with respect to the question of whether the unit rule as commonly applied to railroad properties picks up or reflects the value of nonresident cars in the valuing state. Do you have an opinion on that question?

A Yes, I do have an opinion.

Q And what is your opinion, sir?

A It definitely does not pick up the value of those nonresident cars because of the very nature of the approach and the way the interchange is handled between the railroads. There is no element of the value of those nonresident cars in the standard unit approach as it's customarily applied. (e.s.)

Another expert witness called by GATC, Mr. Arlo Woolery testified further in this regard at r-1086-1087:

Q You mentioned that the unit of a railroad would include leased property. Would it include nonresident railcars received by that railroad in interchange?

A In my opinon, it would not.

THE COURT: Why not?

THE WITNESS: For this reason: The market value is usually defined as a willing buyer-willing seller transaction in which the buyer would pay a price and the seller would deliver a property. And I have the feeling from railroad valuation experience that I have had and

conversations I have had that if I were to pay the market value for the unit of a resident railroad, that resident railroad would not deliver to me the nonresident railcars that were present on that railroad.

So it would just be a matter of what property the resident rail line would deliver to the buyer as part of a transaction. And in my opinion, the resident railroad could not deliver to me as part of that transaction the nonresident railcars.

And I know that in Arizona where for nonpayment of taxes the sheriff was authorized to sell on the courthouse steps the property that was delinquent in its tax payment, that if a resident railroad in Arizona had been delinquent in its taxes, I don't know of a sheriff in any one of our counties that would have had the temerity to go up on the courthouse steps and try to sell the cars of a nonresident railroad to satisfy that tax lien.

BY MR. MADSEN:

Q Mr. Woolery, are you aware of any qualified apraisal opinion to the contrary, in other words, stating that a unit appraisal does pick up non-resident railcars received in interchange?

A I have never seen one.

The Florida legislature, in comity with sister states and in conformity with federal constitutional law as construed in Central RR of Penn. v Commonweath of Penn., 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297, reh. den. (1962)* has chosen to adopt the unit-rule method of appraising railroad property in its customary and universally applied fashion. (§193.085(4)) This is to include in the unit of the resident railroad, the value of all

*For one scholar's view of Penn Central, see Federal Limitations on State Taxation, by Paul J. Hartman, Ch. 7:8, pages 392-396, Lawyers Coop. 1981

her cars, including those used by other railroads under the Car Service and Per Diem Agreement of the American Association of Railroads. As the Court in Penn Central held:

> We conclude, however, that on the record before us that Pennsylvania was constitutionally permitted to tax, at full value, the remainder of Appellants' fleet of freight cars, including those used by other railroads under the Car Service and Per Diem Agreement of the American Association of Railroads. These were, in the language of the stipulation, "regularly, habitually and/or continuously employed in this manner, but they did not run on fixed routes and regular schedules..." (at 726) (e.s.)

Here GATC presents no proof whatsoever that any of the cars of non-resident railroads entering Florida under the Car Service and Per Diem Agreement of the American Association of Railroads were here on fixed routes and schedules. They didn't even present evidence that those cars were habitual or continuously employed in Florida. Their evidence was presented only in gross percentages on given days - that a certain number of non-resident cars were observed in Florida. To find or presume tax situs was error below.

With the understanding that Penn Central also held that:

> ...the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State, not merely on such property as is subjected to tax elsewhere...(the Court's emphasis) at 726,

it is clear that except for non-resident cars which travelled into Florida on "fixed routes and regular schedules," (and there are none known), Florida has no power to subject non-resident railroad cars to ad valorem taxation. This is because Penn Central expressly held that states of resident railroads are constitutionally permitted to tax their cars used by other railroads in other states through interchange at full value. Since other states can (and do), Florida cannot, and does not.

Again, Florida, in enacting §193.085(4) and continuing it without more has done so with an understanding of the following:

1) That 37 or more sister states tax, at full value, their resident railroad cars which enter Florida through interchange (r-1035, Lahner);

2) That under Penn Central, supra, those 37 or more states are permitted under the Federal Constitution to tax their cars in Florida at full value;

3) That the rest of the states which do not tax their cars in Florida, for whatever reason, under Penn Central, could tax them at full value. Therefore, Florida cannot apportion their value; and

4) That, as to Private Car Line Companies like and including GATC, since their cars are for all practical purposes never in their domiciliary, home, or resident state, no state can tax them at their full value. Therefore, since they too must pay their way, they are apportioned to all states in which they run.

From this, the result is the same; railroads pay only 100% of their value to the track states and private car line companies pay only 100% of their value (assuming all states levy the tax, which they don't) to the states through which they run (except Florida since the early 1970s). Commonwealth v. Union Pacific R. Co., 283 S.W. 119 (Ky. 1926). This is in accord with Federal Constitutional principles and limitations. See Penn Central, supra.

Against this background GATC has nevertheless asserted that the legislature and the Department violated organic law in assessing their property. They argue that until such time as Florida taxes that which it has been shown it cannot, Florida's taxation of their property it discriminatory.

POINT II

THE INTERLACHEN DECISION IS NOT RELEVANT TO A DETERMINATION OF THIS CAUSE

In its answer brief, GATC argues that their property is the same as non-resident railroad property, enters this state the same way and enjoys the same benefits and protection as is enjoyed by non-resident railroad cars. GATC further argues that s. 193.085(4) is a prohibited classification of property based on ownership* and cites primarily Interlachen Lake Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973) to support its position that Art. VII s. 4 requires taxation of non-resident cars as a constitutional condition to taxing their cars.

The Interlachen case upon which GATC relies is not really relevant to the issue presented by this case. Here, the issue is whether Florida can tax a property under federal law or has the power to reasonably conclude it cannot or should not for reasons such as comity, fairness, due process, and economy. In Interlachen, this Court held:

> "It is true that the Constitutional provision allows the legislature to prescribe regulations for the purpose of securing a just valuation of all property and not to any one particular class. The regulations contemplated by the Constitution are those which establish the criteria for valuing property: and all property - save those four classes specifically enumerated in the Constitution - must be measured under the same criteria." (at 435)

Clearly, this injunction applies to all property which is subject to the taxing power of the State and no more. It has nothing to do with

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*This classification, the Department argues, is not by ownership, but in accordance with Federal Organic Law prohibiting double taxation pursuant to two apportionment formulas contained in s. 193.085(4).

property which the state has no power to tax. It says nothing more than that which the state can tax, it must tax using the same criteria for valuation. Here s. 193.085(4), is not really a valuation regulation. S. 193.011 contains the uniform regulations to secure a just value for all property, including properties assessed pursuant to s. 193.085. S. 193.085 is more properly an apportionment regulation with different formulas to conform with federal decisional law under the due process and commerce clauses. Under s. 193.085(4), all property is assessed at just value according to s. 193.011 and apportioned to the state.

What GATC avoids facing is that no state has the constitutional authority to tax all of GATC's cars at full value. Its cars are permanently absent from the domicile. (see Commonwealth v. Kentucky,* supra). Therefore, under Penn Central no state could tax all of GATC's cars at full value and therefore apportionment of their property by average number of cars habitually present is the way they are taxed.

On the other hand, the ruling of Penn Central was that Pennsylvania was constitutionally permitted to tax, at full value, the rolling stock of her resident railroad which had entered other states through interchange. Since other states not only could (Penn Central) but do (Lahner, R-1035) tax resident cars of railroads absent through interchange, Florida cannot tax those cars.

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*GATC and the Trial Court superficially dismiss the Kentucky case, though it represents the only known case nationwide which compares the two taxing methods at issue herein. The Kentucky Court could have thrown out the assessment for lack of constructive situs if one had been required, but correctly reached the merits of the power to tax non-resident cars. Why this decision has been treated with disregard is unknown. It is not anachronistic at all. Its holding should be this Court's holding if this Court wishes to entertain any presumption of constitutionality as it should afford both the face and application of s. 193.085(4).

POINT III

IN THE INSTANT CASE, THE LEGISLATURE HAS THE INHERENT POWER TO CLASSIFY

In his dissent in Braniff Airways v. Nebraska, 347 U.S. 590, 98 L.Ed. 967, 74 S.Ct. 757 (1953) Justice Frankfurter, in finding fault with the majority for extending the situs test historically developed for inland water and land instrumentalities to air transport, observed the following:

> "One of the most treacherous tendencies in legal reasoning is the transfer of generalizations developed for one set of situations to seemingly analogous, yet essentially very different, situations. The doctrines evolved in adjusting rights as between the States to tax property bearing some relation to a number of States, and the taxing power of the States as against the freedom from State interferences secured by the Commerce Clause, bear, of course, a practical relation to what it is that is taxed. It took a considerable time to make this adjustment in regard to taxation of railroad property and railroad income-to decide when the States are wholly excluded from levying certain taxes, when an ad valorem tax may be levied on railroad property reasonably deemed to be permanently in a given State, and on what basis income from interstate railroad business may fairly be apportioned among different States. Even as to railroads, nice distinctions had to be made and the making of them has not been concluded."

GATC, in maintaining this cause, has seized upon a theory which on its face seems compelling; two properties appear alike in many ways, yet one is taxed by Florida and one is not. In response to the Department's explanation as to why, GATC responds that this cause contains no question of federal law and that the lawfulness of a railroad's assessment is not at issue. The Department's position is that this case concerns how and whether Florida apportions instrumentalities of interstate commerce which necessarily involves federal law.

GATC's position is that Article VII s. 4 as a condition to taxing its property requires that the legislature fix a situs in Florida by a "constructive" situs statute, without any consideration of U.S. Constitutional limitations. GATC's brief, pgs. 28-30. GATC argues, therefore, that to be fair, Florida must enact a statute purporting to tax non-resident cars and await the lawsuits of non-resident railroad companies to test the lawfulness of those assessments. GATC of course, would not be concerned with whether or not Florida would have to alter her assessments of resident railroads to conform with this novel method of taxation.

Assuming Florida took the position that states lose the power to tax the cars of their resident railroads which enter Florida through interchange, then Florida would likely have to apply that principle to her resident railroads and not assess them for their cars temporarily lost through interchange. The result can be stated with some certainty:

1) Florida would have to reduce her resident assessments significantly at a loss of revenue to her counties.

2) As Mr. Lahner testified (r-1076), in response to a question by GATC as to what would happen if a state tried to assess non-resident railroads:

> A. This lawyer will say that would end up in a court suit. There certainly would be no voluntary payment in that type of situation. It would have to be - it would be contested in court.

Therefore, Florida would be faced with lawsuits and the uncertainty they present with regard to her making up the revenue lost from taxing the out-of-state cars of her resident railroads by taxing non-resident railroad cars in Florida.

Another ramification of this change in method would be great uncertainty:

1) There would be uncertainty as to how this method would affect the unit concept for multi-state resident railroads like Seaboard; i.e., would Florida only have to give up assessing the apportioned value of the cars that left the Seaboard system (ventured out of the Southeastern states) or the apportioned value of all of Seaboard's cars which leave the state, whether or not they remain on Seaboard's system?

2) Would this method abrogate the unit rule method for assessing railroads? This method requires the value of the whole as a "going concern" with an apportionment of its parts, (see R-1035, and Union Pac. RR v. Comm. of Kentucky, supra, quoted in the Department's initial brief). With a method which severed a part of the unit to be separately valued (the rolling stock which leaves Florida), would Florida be able to tax Seaboard or any of her multi-state resident railroads by valuing whats left of the unit, i.e., the track, buildings, switches, bridges,

etc. in other states and apportioning their value to Florida on a mileage basis or any basis? What nexus or situs theory would support Florida capturing the apportioned value of a railroad's terminal outside Florida with the unit already severed?

Conspicuously absent from this lawsuit are Florida's resident railroads. They have not appeared as Amici herein, likely for the reason that they can glean chaos out of this lawsuit to their benefit, a dislocation of Florida's tax system, which could mean years of stricken assessments and opportunities to obtain tax advantages in Florida and other states through dislocation of the established taxing systems of Florida and her sister states.

In its recent holding in Colding v. Herzog, 467 So.2d 980 (Fla. 1985), this Court recognized the inherent power of the legislature to classify property for ad valorem tax purposes where the cost of enforcement of the tax outweighed the revenues produced. Certainly, that inherent power to classify permits the legislature to accommodate its taxing power to the intricacies of long standing established and customary methods of state taxation of instrumentalities of interstate commerce. Considering the potential for uncertainty and litigation in this area should Florida be required to alter its method of taxation, and the risk to revenue they represent as a condition to taxing GATC's property, what compels this requirement? Certainly not Art. VII s. 4. Again, the uniformity it requires speaks to valuation. Exercise of the State's power to tax, when doubted, is controlled by Art. I s. 2 and s. 9. (see Department's initial brief).

POINT IV

FLORIDA'S TAXATION OF GATC'S PROPERTY WITHOUT TAXING NON-RESIDENT CARS IS NOT UNFAIR

The answer to this question lies in examining what GATC hopes to gain should it have its way, other than dislocation and years of confusion and lost revenue to the state.

Presently, Florida taxes its resident railroads for their cars which GATC argues should be taxed in other states. Through interchange, a Florida railroad gives up its cars for a while and picks up non-resident cars for a while. Florida taxes all of Seaboard's cars, including those it gives up and does not tax the cars it picks up (r-1035-1036). GATC advocates the inverse of this. As the Court in Union Pacific R.R. v. Comm. of Kentucky held, supra, the end result to the state over the years is the same. Assuming in one year, Seaboard gives up more cars than it uses, it may be overtaxed. In those years it uses more than than it gives up, it may be undertaxed. Any unfairness to GATC would be measured only by the extent over the years Florida undertaxed its railroads, if any. Doubtless that with most, if not all railroads paying 100% of the value of their rolling stock to their resident states (r-1060, Lahner, see also Department's initial brief, page 16) and the likelihood that less than all states tax private car line rolling stock, leaving less than 100% of their value taxed nationwide, §193.085(4) cannot be said to unfairly treat GATC.

CONCLUSION

With the dislocation of Florida's taxation of private car line companies which occurred by legislative or administrative omission in 1970, GATC has enjoyed years of tax avoidance. This Court should respectively bring stability back to Florida's taxation of instrumentalities of inter-

state commerce by entering an order holding that §193.085(4) is constitutional, both facially and as applied, and that the Trial Court erred finding that non-resident cars are similarly situated to GATC's, and in presuming tax situs of non-resident cars in Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished by mail to Robert S. Goldman, Attorney for Appellee, P. O. Box 1876, Tallahassee, Florida 32302, this 3rd day of March, 1987.

JEFF KIELBASA