

IN THE FLORIDA SUPREME COURT

FILED
SID J. WHITE

CASE NO. 70,161

DEC 21 1987

State of Florida
Appellant, Defendant

:

CLERK, SUPREME COURT
By Deputy Clerk *S.S.*

v.

:

Bond Validation Appeal from
the Circuit Court of the
Fourteenth Judicial Circuit
in and for Bay County
Florida

City of Panama City Beach,
Florida
Appellee, Plaintiff

:

:

Cir. Civ. 87-104

APPELLEE'S SUPPLEMENTAL BRIEF

W. ROBERT OLIVE
ELISE F. JUDELLE
RANDALL W. HANNA
Bryant, Miller and Olive, P.A.
201 South Monroe Street
Suite 500
Tallahassee, Florida 32301
(904) 222-8611

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations and Authority	ii
Statement of the Case and Facts	1
Summary of Argument	2
Argument	3
ISSUE I	
EXPLANATION OF THE TAXABLE BOND ACT OF 1987 AND ITS IMPACT ON BONDS ISSUED BY FLORIDA GOVERNMENTAL UNITS.	3
ISSUE II	
IMPACT OF THE TAXABLE BOND ACT OF 1987 ON THE BONDS AT ISSUE IN THIS CASE.	11
Conclusion	17
Certificate of Service	18

TABLE OF CITATIONS AND AUTHORITY

<u>CASES</u>	<u>Page</u>
<u>Lake Worth Utilities Authority v. City of Lake Worth</u> , 468 So.2d 215 (Fla. 1985)	13
<u>State v. Broward County</u> , 468 So.2d 965 (Fla. 1985)	3
<u>State v. Daytona Beach Racing and Recreational Facilities District</u> , 89 So.2d 34 (Fla. 1956)	15
<u>State v. Division of Bond Finance</u> , 495 So.2d 183 (Fla. 1986)	5,13,15
<u>State v. City of Miami</u> , 379 So.2d 651 (Fla. 1980)	14
<u>State v. Leon County</u> , 400 So.2d 949 (Fla. 1981)	14
<u>State v. Orange County Industrial Development Authority</u> , 417 So.2d 959 (Fla. 1982)	14

FLORIDA CONSTITUTION

Article VII, Section 10	14
Article VII, Section 10(a)	15
Article VIII, Section 2	12,13
Article VIII, Section 2(b)	13

STATUTES

Chapter 87-237	3
Chapter 159, Part IV	7
Chapter 159, Part VII	4
Section 159-602	7
Section 159.821	4
Section 159.822	3,4,5
Section 159.823(8)	11
Section 159.824	7,8
Section 159.825	8,11
Section 159.825(1)(b)	8
Section 159.825(1)(f)	9,12
Section 159.825(1)(h)	9,12,15
Section 159.826	8
Section 159.827	10
Section 159.827(1)	14

Section 159.828	10,12,13
Section 159.829	4
Section 159.8291	4,8
Section 166.261	15
Section 215.84	6,8
Section 215.84(1)	8
Section 215.84(3)	6

OTHER

Internal Revenue Code of 1986, as amended.....	3,6
--	-----

STATEMENT OF CASE AND FACTS

The Statement of Case and Facts are as set forth in the Brief of Appellant, State of Florida, and previously adopted by the Appellee. This Supplemental Brief is submitted pursuant to an Order of this Court dated as of December 10, 1987.

SUMMARY OF ARGUMENT

The Taxable Bond Act of 1987 provides supplemental authority for the issuance of taxable bonds by governmental units in the State of Florida and resolves conflicts in the provisions of existing Florida law in order to ensure that governmental units have the ability to access markets in a manner that will help achieve the lowest overall effective borrowing cost and terms most suitable to such governmental unit and its residents.

The Taxable Bond Act of 1987 specifically authorizes the Bonds at issue in this case. The Legislature has found that the issuance of the Bonds constitutes a public purpose and the use of the proceeds of the Bonds does not constitute a lending of credit of the Appellee. This finding by the Legislature is consistent with previous decisions of this Court and should not be overturned without being shown to be arbitrary, unreasonable, or a clear abuse of discretion.

ARGUMENT

PART I

ISSUE

EXPLANATION OF THE TAXABLE BOND ACT OF 1987 AND ITS IMPACT ON BONDS ISSUED BY FLORIDA GOVERNMENTAL UNITS.

Chapter 87-237, Laws of Florida, the "Taxable Bond Act of 1987" (the "Act") provides supplemental authority and guidelines for units of local governments to issue taxable debt obligations, ensuring that general provisions of Florida law designed primarily to facilitate the issuance of tax-exempt debt obligations will not inadvertently be interpreted to prohibit the issuance of taxable debt obligations issued for public purposes.

The impact of the Act on bonds issued by Florida governmental units can best be described by reviewing the findings of the Legislature set forth in Section 159.822, Florida Statutes, as created by Section 1 of the Act. Governmental units have long possessed the power to issue bonds to finance important projects and programs that benefit the economic and social well-being of the people of the State. Favorable Federal tax laws have historically allowed governmental units the power to borrow funds at low rates of interest, because such interest was exempt from Federal income taxation. Recent changes in Federal law particularly the enactment of the Internal Revenue Code of 1986, as amended, (See State v. Broward County, 468 So.2d 965 (Fla. 1985))

have caused local officials to look at innovative ways to continue to achieve low effective interest rates within the confines of statutory provisions which were designed primarily for the issuance of tax-exempt obligations. While Florida law does not prohibit the issuance of taxable bonds, including the Bonds in this case, the Legislature felt if necessary and desirable to establish procedures and guidelines for governmental units to use in connection with the issuance of taxable bonds.

The Act creates part VII of Chapter 159, Florida Statutes, consisting of ss. 159.821 through 159.829 and 159.8291.

Section 159.822, Florida Statutes, sets forth the Legislative findings and purpose underlying the new statute, providing in part:

159.822 Legislative findings; purpose.--

* * *

(4) Under the constitution and laws of the state, governmental units have the power to issue bonds that bear interest subject to federal income taxation, but currently lack procedures and other guidelines by which they may structure such financings for the applicable market or otherwise achieve the lowest effective borrowing cost or terms most suitable to the governmental unit, the project, or the financing program.

(5) The purposes to be achieved by taxable bonds in compliance with the provisions of this act are predominantly designed to serve the public purposes stated in this section, to supplement and complement the purposes established in other statutes authorizing the issuance to bonds, and such purposes under the State Constitution of providing for the health, safety, and welfare of the people.

That governmental units in the State have the power to issue taxable bonds has been definitively determined by this Court. State vs. Division of Bond Finance, 495 So.2d 183 (Fla. 1986). It is important, however, to realize that taxable bonds have only recently come into widespread use as a financing mechanism by Florida governmental units. In recognition of this recent increase, the Act seeks to remove any unintended impediments lurking in existing general law that might prevent governmental units from utilizing whatever form of debt obligation may be expedient in the issuer's judgment to accomplish its governmental objective.

The remainder of Section 159.822, Florida Statutes, provides in part:

159.822 Legislative findings; purpose.--

(1) The ability of governmental units to issue bonds is essential to their ability to finance public improvements and other projects and programs that serve important public purposes and benefit the social and economic well-being of the people of the state.

(2) The exemption of interest on such bonds from federal income taxation has been a major feature of bonds issued by governmental units, by reducing interest costs to governmental units and enhancing the marketability of the bonds.

(3) The Internal Revenue Code of 1986, as amended, substantially curtails the purposes for, and conditions under which, bonds may be issued with interest exempt from federal income taxation, with the result that in order to provide financing for those purposes or under those conditions governmental units must in some instances, and in other instances may find it in their best interest to, issue bonds which bear interest not exempt from federal income taxation.

* * *

Because governmental units have historically issued "tax-exempt" bonds, certain aspects of Florida law were written without due consideration being given to the issuance of taxable obligations or were written such that certain statutory provisions were made applicable to taxable bonds in a manner that could inhibit governmental units from financing important governmental projects. Prior to enactment of the Internal Revenue Code of 1986, as amended, there was little need for, and thus a very limited market in taxable governmental bonds. The recent increase in the volume of taxable debt has served to highlight areas of potential conflict in existing law.

An example of such conflict is found in Section 215.84, Florida Statutes (1986 Supp.), which limits the rate of interest that bonds issued by governmental units may bear. Section 215.84(3), Florida Statutes (1986 Supp.) provides that:

"Bonds may bear interest at a rate not to exceed an average net interest cost rate, which shall be computed by adding 150 basis points to The Bond Buyer '20 Bond Index' published immediately preceding the first day of the calendar month in which the bonds are sold."

The Bond Buyer 20 Bond Index is a compilation of the rate of interest on certain bonds which are exempt from federal income taxation and serves as a means for the State to ensure that the rate of interest paid by governmental units is consistent with rates paid by other governmental units across the country on

similar kinds of debt. Since the rate of interest paid on taxable bonds is calculated and determined in a different manner, such index is totally inappropriate to determine appropriate taxable interest rates and may in certain instances prevent the issuance of taxable bonds by governmental units.

Another example of such conflict is found in Section 159.602, Florida Statutes (1985) which provides that the tax-exemption of bonds issued pursuant to Chapter 159, Part IV, Florida Statutes, was an important factor in the passage of such law by the Legislature even though such law does not by its term prohibit the issuance of taxable debt obligations.

The Act attempts to resolve conflicts between existing statutory authority and the inherent authority of governmental units to issue debt, be it tax exempt or taxable, in order to allow such governmental units to structure financings to achieve the lowest effective borrowing cost available in the prevailing market.

To neutralize the inconsistent provisions of current law that might unduly hinder the issuance of taxable bonds, Section 159.824, Florida Statutes provides that:

"Any provision of law, whether special or general, which imposes limitations or restrictions on the issuance of taxable bonds or is otherwise in conflict with this act with respect to the issuance of taxable bonds is expressly superseded by this act to the extent of such conflict."

By passage of the Act, the Legislature also specifically provided supplemental authority for the issuance of taxable bonds. Section 159.824, Florida Statutes, provides in part:

"This act is supplemental to all other provisions of state law governing the issuance of bonds by any governmental unit . . ."

Section 159.8291, Florida Statutes, provides that the "[A]ct shall be liberally construed in order to effectively carry out the purposes of [the] [A]ct."

A large portion of the Act sets forth general parameters to be adhered to in connection with the issuance and sale of taxable bonds such as providing for (i) the payment of taxable bonds in legal tender of the United States, in foreign currency or commodities or in precious metals (Section 159.825(1)(b)), (ii) a separate interest rate limitation for taxable bonds based upon the 30-year Treasury Bond yield (Section 159.825(1)(d)), and (iii) taxable bonds to be sold at a negotiated sale (Section 159.826). It is important to note that the provisions of Section 215.84 described above were amended in 1986 to make the provisions of such section applicable to both taxable and tax-exempt obligations. Section 215.84(1), Florida Statutes (1986 Supp.). The enactment by the Legislature of Section 159.825(1)(d) shows a clear and convincing Legislative intent that there be no impediment to the issuance of taxable bonds by governmental units in the State of Florida.

Other special needs typical of a taxable financing are addressed by the supplemental authority provided to governmental units by Section 159.825(1)(f) authorizing governmental units to enter into numerous contracts which may be necessary or appropriate to achieve a desirable interest rate. Such section provides:

(f) In connection with, or incidental to, the sale and issuance of bonds, the governmental unit may enter into any contracts which the governing body determines to be necessary or appropriate to achieve a desirable effective interest rate in connection with the bonds by means of, but not limited to, contracts commonly known as investment contracts, funding agreements, interest rate swap agreements, currency swap agreements, forward payment conversion agreements, futures, or contracts providing for payments based on levels of or changes in interest rates, or contracts to exchange cash flows or a series of payments, or contracts, including, without limitation, options, puts, or calls to hedge payment, rate, spread, or similar exposure. Such contracts or arrangements may also be entered into by governmental units in connection with, or incidental to, entering into any agreement which secures bonds or provides liquidity therefor. Such contracts and arrangements shall be made upon the terms and conditions established by the governing body, after giving due consideration for the credit worthiness of the counterparties, where applicable, including any rating by a nationally recognized rating service or any other criteria as may be appropriate.

Proceeds of any bonds issued pursuant to the Act are expressly authorized by Section 159.825(1)(h) to be invested in any securities or obligations described in the ordinance or resolution providing for the issuance of such bonds. The impact of such section on the bonds at issue in this case is discussed in greater detail in Part II of this Supplemental Brief.

Sections 159.827 and Section 159.828, Florida Statutes are discussed in Part II of this Supplemental Brief.

The Act establishes guidelines and procedures allowing governmental units to issue taxable bonds on such terms as will help ensure, within the confines of the Florida Constitution, the lowest effective borrowing cost and terms available in the prevailing bond market and most suitable to the governmental unit and its residents.

PART II

ISSUE

IMPACT OF THE TAXABLE BOND ACT ON THE BONDS AT ISSUE IN THIS CASE.

The Act was enacted by the Florida Legislature after the judgment of the lower court validating the Bonds was entered in this case, but prior to oral argument. A copy of the Act was filed with the Court pursuant to a Notice of Supplemental Authority dated as of July 1, 1987. The Act became law on August 5, 1987.

The Appellee contends, as outlined in its initial Brief, that the Bonds at issue in this case are valid obligations under the Constitution of the State of Florida without any effect being given to the adoption of the Act. However, the Act provides specific statutory authority for the issuance of bonds such as the Bonds at issue in this case, and further provides that the issuance of such bonds constitutes a public purpose and does not constitute a lending of credit of the Appellee.

The interest on the Bonds will not be exempt from Federal income taxation. The Act specifically provides authority for the issuance of taxable bonds, defined therein as "bonds the interest on which is not, in any manner, exempt from federal income taxation or excludable from gross income for federal income tax purposes." Section 159.823(8), Florida Statutes. See also Section 159.825, Florida Statutes.

The proceeds of the Bonds will be invested in an investment agreement. Section 159.825(1)(f), Florida Statutes provides specific authority for the transfer of such proceeds to an investment agreement. Furthermore, the provisions of Section 159.825(1)(h), Florida Statutes, to the effect that any provisions of Florida law relating to the investment of surplus funds shall not be applicable to the investment of such proceeds, addresses the concern raised by Appellant that proceeds of the Bonds cannot be invested as contemplated by Appellee.

The proceeds of the Bonds will be placed in an investment agreement and certain interest earnings thereon shall be used to acquire and construct municipal projects. Section 159.828, Florida Statutes provides:

159.828 Use of proceeds of bonds.--The proceeds of an issue of taxable bonds and the investment earnings thereon shall be used, in the manner, and to the extent specified in the ordinance or resolution providing for the issuance of the bonds, by the governmental unit issuing the bonds for a purpose specified for the issuance of bonds in the statutes under authority of which the bonds are issued. Notwithstanding the preceding sentence, invested or reinvested proceeds of an issue of taxable bonds shall be deemed to have been expended for a purpose specified for the issuance of bonds in the statutes under authority of which the bonds are issued if the earnings thereon and proceeds of liquidation of the investments acquired with such proceeds, to the extent received by the governmental unit and not applied to pay debt service on the bonds, are applied toward such purpose.(Emphasis Added)

The Appellant has alleged that investment of the proceeds of the Bonds in an investment contract does not constitute a municipal function within the meaning of Article VIII, Section 2 of the

Florida Constitution.

Article VIII, Section 2(b) of the Florida Constitution provides:

(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

The Court has made it clear that Article VIII, Section 2 of the Florida Constitution provides municipalities with inherent governmental, corporate and proprietary powers unless otherwise provided by law. Lake Worth Utilities Authority v. City of Lake Worth, 468 So.2d 215 (Fla. 1985).

The Act merely provides express Legislative recognition of the previously existing authority and ability of the Appellee to issue the Bonds. Section 159.828, Florida Statutes provides express statutory authority for governmental units to issue bonds and use only the investment earnings thereon to construct public projects. It has long been established that declarations of public purposes by the Legislature are considered correct "unless patently erroneous." State v. Division of Bond Finance, Supra at 184.

Each concern raised by the State in this case has been specifically addressed by the Legislature through the passage of the Act.

While not raising the issue in the initial brief filed in

this case, the Appellant in oral arguments alleged that the issuance of the Bonds violates Article VII, Section 10 of the Florida Constitution. Such section provides:

SECTION 10. Pledging Credit.-Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person..."

This Court should not find that the issuance of the Bonds constitutes a pledge of the credit of the Appellee. The right of the Bondholders to receive payment of principal of and interest on the Bonds is secured only by an investment agreement and earnings therefrom. No other assets, revenues or taxes of the City are pledged or made available to the payment of the Bonds, either legally or morally. This is legally akin to the issuance of industrial revenue bonds secured solely by the payments to be received by a private party. State v. Orange County Industrial Development Authority, 417 So.2d 959 (Fla. 1982); State v. Leon County, 400 So.2d 949 (Fla. 1981); State v. City of Miami, 379 So.2d 651 (Fla. 1980). The Bonds will be payable solely from amounts received under the investment agreement.

In addition, Section 159.827(1), Florida Statutes contains an express legislative finding that the issuance of revenue bonds such as the Bonds does not constitute lending of the taxing power or credit of governmental units. Such section provides:

(1) The issuance of taxable bonds by a governmental unit for any purpose permitted under the statutes under authority of which such taxable

bonds are issued is declared to constitute a lawful and public purpose. So long as the payment of such taxable bonds is not secured by a pledge of any ad valorem taxing power of the governmental unit issuing such taxable bonds or by any revenues of such governmental unit derived other than from the sale, operation, or leasing of the project financed with such taxable bonds or from the investment or reinvestment of proceeds of such taxable bonds, such taxable bonds shall not constitute on the part of any such governmental unit a lending or using of its taxing power or credit to or for the benefit of any corporation, association, partnership, or person.

This finding by the Legislature is well within the confines of previous decisions by this Court and clearly cannot be shown to be arbitrary, unreasonable, or a clear abuse of discretion. State v. Division of Bond Finance, Supra; State v. Daytona Beach Racing and Recreational Facilities District, 89 So.2d 34 (Fla. 1956).

The adoption of the Act lays to rest all questions regarding the ability of the Appellee to issue the Bonds and use the proceeds thereof for their intended purposes.

The argument of the Appellant that the proceeds of the Bonds must be invested in accordance with Section 166.261, Florida Statutes, is also equally put to rest by the Act. Section 159.825(1)(h), Florida Statutes specifically provides that the provisions of Florida law applicable to the investment of public funds shall not be applicable to the proceeds of the Bonds and any moneys set aside or pledged to the payment of the Bonds.

Section 10(a) of Article VII of the Florida Constitution specifically provides authorization for the enactment of laws

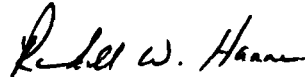
authorizing the investment of public trust funds. The proceeds of the Bonds will be placed with a corporate trustee to be held pursuant to the terms of a trust indenture and will clearly constitute public trust funds for purposes of the Florida Constitution.

With respect to the Bonds at issue in this case, the Act provides supplemental authority and clearly disposes of all concerns raised by the Appellant. Validation of the Bonds should be affirmed.

CONCLUSION

The Taxable Bond Act of 1987 provides supplemental authority for the issuance of the Bonds. All concerns raised by the Appellant in this case have been specifically addressed by the Legislature which has determined that the issuance of debt obligations such as the Bonds constitutes a public purpose and does not constitute a lending of credit of the issuer of such debt obligations. Accordingly, for these purposes and for the purposes set forth in the initial brief of the Appellee filed in this case, the Final Judgment validating the Bonds should be affirmed.

Respectfully submitted,



Randall W. Hanna
Bryant, Miller and Olive, P.A.
201 South Monroe Street
Suite 500
Tallahassee, Florida 32301
(904) 222-8611