IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE AND OFFICE OF THE COMPTROLLER,

Appellants,

vs.

CASE NO. 70,186

FIRST UNION NATIONAL BANK OF FLORIDA, a national bank, and FIRST UNION CORPORATION OF AMERICA, a bank holding company,

Appellees.
_____/

On Appeal from the District Court of Appeal, First District, State of Florida, Case No. BK-432

APPELLANTS' REPLY BRIEF TO ANSWER BRIEF OF AMICUS CURIAE, BARNETT BANKS OF FLORIDA, INC.

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PRELIMINARY STATEMENT

Amicus curiae, Barnett Banks of Florida, Inc. ("Barnett") has filed an answer brief which addresses the issue whether this Court's decision should operate on a pure prospective basis. This issue only becomes relevant if the Court declares the tax invalid as violative of the Federal Public Debt Statute, 31 U.S.C. §3124.

It is the Appellants' position that the tax is valid because it falls squarely within the purview of the exception to the federal statute and therefore the State may include interest earned on federal obligations in the base for purposes of measuring the tax. The State points to authority from the United States Supreme Court, sister state Supreme Courts, and this Court in support of its argument that the tax at issue is a "nondiscriminatory nonproperty tax imposed on corporations or other artificial entities for the exercise of certain privileges in the State of Florida."

However, in an abundance of caution and because of the fiscal impact a decision from this Court of invalidity of the tax would have on the State, Appellants argue that it would be a proper exercise of this Court's inherent equitable powers to give any decision of invalidity a "pure" prospective only effect: the "Sunburst Doctrine." The United States Supreme Court first gave sanction to the prospective only approach in Great Northern

Railroad v. Sunburst Oil & Refinery Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) the case from which the doctrine acquired its name. Justice Cardozo, speaking for the Court stated, in pertinent part, as follows:

> This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
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> We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.
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> On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.(citations omitted) The alternative is the same whether the subject of the new decision is common law . . . or statute.
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> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. 287 U.S. 364,365.

The question regarding refunds and prospective vs. retroactive effect of a decision of invalidity has never been an issue in this proceeding. On Motion for Summary Judgment the trial court upheld the validity of the tax. Upon reversal, the District Court remanded the case to the trial court for further proceedings to determine the refund issue. In the event this Court finds the tax invalid, it is respectfully requested that this Court exercise its inherent equitable power, and fashion a pure prospective effect to its decision. The State, in good faith, relied upon its presumptively valid taxing statute; it collected, appropriated and expended the monies generated from the tax. For over a decade, the tax remained unchallenged. Refunds would be nothing more than multi-million dollar windfalls at the expense of the state treasury and other taxpayers in the State. Under the circumstances, this Court ought to weigh the equities in favor of the public interest and refuse refunds to these banks even if Part VII, Ch. 220 is found to be unconstitutional.

ANY DECISION OF INVALIDITY SHOULD BE GIVEN PURE PROSPECTIVE EFFECT.

Barnett has filed suit in Circuit Court challenging the tax on the same grounds as Appellees seeking a refund of virtually all corporate taxes paid to the State from 1980 to the present. Having filed an independent action challenging the tax, Barnett points to three cases where it has been held that the court's decision of invalidity should operate prospectively "except for those taxpayers who have timely judicially challenged" the tax. There is, however, another line of authority clearly more appropriate for this case. This other line of authority supports a "pure" prospective effect to any decision of invalidity. Succinctly, any decision of invalidity should operate as of the date that decision is final. This doctrine is premised on the presumption that the tax is valid until declared otherwise by a final appellate decision; accordingly, no refunds should be due any taxpayer. There is clear precedent for such a "pure" prospective effect to any possible decision of invalidity in this case.

In Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973) this Court refused to order tax refunds totalling $7,300,000 after invalidating a statute authorizing school districts to levy an ad valorem tax in excess of 10 mills without a vote of the electors. The Court reasoned that pure prospective

application of the ruling was proper because of the school board's reliance on a presumptively valid statute and the budgetary and administrative burdens a refund would cause. The decision of this Court in Gulesian has been cited with approval by at least one other state supreme court and is also cited in two of the three cases cited by Barnett.[1] It remains viable authority.

In Deltona Corporation v. Bailey, 336 So.2d 1163 (Fla. 1973) this Court again enunciated the principle that a decision holding a taxing enactment invalid may operate prospectively from the date the opinion becomes final where persons relying on the statute did so assuming it to be valid. The Court noted that this principle is premised on the general rule that an act of the Legislature is presumed constitutional until invalidated by a final appellate decision.

In Deseret Ranches of Florida, Inc. v. St. Johns River Water, 406 So.2d 1132 (Fla. 5th DCA 1981) affirmed in part, reversed in part, 421 So.2d 1067 (Fla. 1982), the District Court held that the water district, in levying the Basin tax at issue,

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[1] See Metropolitan Life Ins. Co. v. Commissioner of Insurance, 373 N.W. 2d 399 (N.D. 1985) where the North Dakota Supreme Court refused to order tax refunds of premium taxes on a finding of unconstitutionality. This decision contains a very succinct analysis of the Sunburst Doctrine, citing authorities from numerous jurisdictions. See also, Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982); Colding v. Herzog, 467 So.2d 980 (Fla. 1985).

acted in good faith reliance on a presumptively valid statute and thus the Court's decision of unconstitutionality "shall operate prospectively from the date hereof." Id., at 1142.

In Alsdorf v. Broward County, 373 So.2d 695 (Fla. 4th DCA 1979) cert. denied, 385 So.2d 754 (Fla. 1980) the Court affirmed the trial court's denial of all requests for refunds of improperly collected taxes finding said denial by the trial court to be a "proper exercise of its inherent equitable powers." Id. at 701. See also, Intern. Studio Apartment Ass'n v. Lockwood, 421 So.2d 1119 (Fla. 4 DCA 1982) pet. for rev. den. 430 So.2d 451 (Fla. 1983) cert. denied, 464 U.S. 895 (1983) where the Court gave a prospective only effect to its decision of unconstitutionality noting the injustice and hardship a retroactive application of its decision would cause on the Clerk of the Court and the County by mandating the return of monies long since expended. No refunds were ordered.

The doctrine of pure prospectivity works both ways; it does not operate exclusively for the benefit of a taxing authority but also provides protection to taxpayers. For example, in Deltona, the effect of the statute at issue therein was to give a tax break to subdivision developers. Upon the decision of invalidity, the taxing authority was prohibited from going back and assessing additional taxes. In short, the court held that

the developers were justified in their reliance on a presumptively valid taxing statute giving them a tax break and accordingly prohibited the tax assessors from going back and assessing additional taxes. Moreover, the doctrine provided protection for "other persons" who relied on the presumptively valid statute. See, Deltona, supra at 1166, 1167, wherein the Court states:

> . . . Second, the Interlachen Lakes Estates decision stated in unequivocal language that it was to operate prospectively "from the date the opinion becomes final." Clearly the opinion was not final until the order on petition for rehearing was filed on December 9 1974. (citations omitted) To the argument, based on Gulesian and Conboy, supra, that the Interlachen Lake Estates decision was limited to the facts and particular hardship involved in that case only, we respond that such an argument is refuted by a plain reading of the decision. The case came to the Court on certified questions pursuant to Florida Appellate Rule 4.6 without any discussion in the opinion of any peculiar factual situations. In addition, Justice Ervin stated that the decision was to operate prospectively "because **persons** relying on the state statute did so assuming it to be valid despite the new provisions of the 1968 State Constitution." **Use of the word "persons" makes clear that the decision was not limited to the taxpayers involved in that particular case. Accordingly, we conclude that the trial court erred in holding that taxpayers were not entitled to the benefit of Section 195.062, Florida Statutes (1973), for the tax year 1974.** Ad valorem real property taxes for that year became a lien on January 1, 1974. The Interlachen Lake Estates case did not become final and operative, by its express terms, until December 9, 1974. (e.s.)

Succinctly, this equitable doctrine works both ways. In Deltona, it protected the taxpayers. In Gulesian, it protected the taxing authority which relied on a presumptively valid taxing statute.

Without question, this Court has the power to fashion prospective only decisions, particularly in the exercise of equity jurisdiction. Numerous courts have applied the "Sunburst Doctrine" giving its rulings pure prospective effect as of the date the decision becomes final. The essence of the doctrine is succinctly stated (together with authority from numerous jurisdictions) in Metropolitan Life Ins. Co. v. Commissioner of Insurance, 373 N.W. 2d 399 (N.D. 1985) where the Supreme Court of North Dakota declined to order a tax refund of premium taxes on a finding of unconstitutionality. The Court, quoting the United States Supreme Court in Lemon v. Kurtzman, 411 U.S. 192, 207-208, 93 S.Ct. 1463, 1473, 36 L.Ed. 2d 151, 165-166 (1973) stated:

> Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs were 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers . . . have the power to carry

> forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the first principles of constitutional adjudication - the basic presumption of the constitutional validity of a duly enacted state or federal law.' San Antonio Independent School District v. Rodriquez, 411 U.S. 1, at 60, 93 S.Ct. 1278, at 1311, 36 L.Ed.2d 16 (1973) (Stewart J., concurring. (e.s.)

A case of particular relevance is First of McAlester Corp. v. Oklahoma Tax Commission, 709 P.2d 1026 (Okla. 1985) where the Oklahoma Supreme Court was faced with essentially two questions: (1) whether the "in lieu bank tax" which specifically excluded interest earned on state and local obligations from the tax, but did not likewise exclude interest income from federal obligations, violated the Federal Public Debt Statute, 31 U.S.C. §3124 and (2) if so, should its decision of invalidity be applied **prospectively**, from the date of the decision of the United States Supreme Court in Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 103 S.Ct. 692, 74 L.Ed.2d 562 (1983) or **retroactively** to 1971, the date of enactment of the tax.[2] The Court held that the

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[2] In Memphis Bank, the Supreme Court enunciated the meaning of the term "nondiscriminatory" for purposes of the Federal Public

case was squarely controlled by the Memphis Bank decision and that the Oklahoma tax discriminated against federal obligations by including federal obligations in the base while excluding similar state and local obligations from the tax. However, citing the Sunburst Doctrine, the Court declared its tax invalid prospectively from the date of the decision of the United States Supreme Court in Memphis Bank [3] The Court also pointed out that its decision "shall be understood to affect the rights, positions and actions of **taxpayers which have claimed, or will claim, refunds** to the Oklahoma Tax Commission, or in which appeals have been taken to this Court." Id., at 1036.

In First of McAlester Corp. v. Oklahoma Tax Commission, supra and Intern. Studio Apartment Assn. v. Lockwood, supra, the respective Courts applied a three part test enunciated and applied by the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), to

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[2] cont'd.
Debt Statute. The Court held that a state tax which imposes a greater burden on holders of federal property than on holders of similar state property impermissibly discriminates against federal obligations. The Oklahoma tax clearly discriminated.

[3] It must be noted that there is no Supreme Court decision on point invalidating a tax similar to Florida's tax, only authority supporting the tax. However, the Oklahoma case is useful for its prospective application. It is also worthy to note that the Oklahoma taxing statute was amended to cure the discrimination problem by including state and local debt obligations in the tax base and that the tax, like the Florida tax sub judice, is measured by "entire net income" for the current taxable year.

determine whether a decision should have a retroactive or prospective application. Formulating that test the Court stated, in pertinent part, as follows:

> **First**, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, ... **Second**, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. (citations omitted) **Finally**, we have weighed the inequity imposed by retroactive application, for [w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. Cipriano v. City of Houma, supra, 395 U.S., [701], 89 S.Ct. [1897] at 1900 [23 L.Ed. 2d 647]. (e.s.)

In the case sub judice, this Court will clearly be deciding for Florida an issue of first impression. The taxes imposed by Chapter 220, Fla. Stat., have never been examined and analyzed for purposes of the Federal Public Debt Statute. Secondly, as aptly noted by the Oklahoma Supreme Court in First of McAlester when looking to the history of the Federal Public Debt Statute to determine whether retrospective opeation of its decision of

invalidity would further or retard its purpose: "retrospective application would not impair the borrowing power of the federal government, although to require payment of refunds would not necessarily further the accomplishment of the purpose of the rule to encourage banks to invest in federal obligations where investments were made before the decision was rendered. Lastly, there clearly would be an inequity imposed by retroactive application: among other things, these banks would be virtually tax free for the refund years at issue at the expense of other residents and taxpayers in the State. It is respectfully submitted that under the circumstances, this Court ought to weigh the equities in favor of the public interest and refuse refunds even if the tax is found to be invalid.

CONCLUSION

The corporate franchise tax on banks and savings institutions was enacted by the Florida Legislature in 1972. It remained unchallenged until the Appellees filed suit in 1984 seeking a substantial tax refund. The challenge to the tax is premised on the Federal Public Debt Statute, a law which was originally enacted by Congress over 100 years ago.

The State of Florida, in good faith reliance on the presumptively valid taxing statute, collected, appropriated and expended the monies generated from the tax. Appellees and Amicus Curiae now seek multi-million dollar windfalls at the expense of other taxpayers in the State. Equity mandates that this not happen. It is respectfully submitted that any decision of invalidity be given a "pure" prospective effect. There is clear precedent for such a decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF TO ANSWER BRIEF OF AMICUS CURIAE, BARNETT BANKS OF FLORIDA, INC. has been furnished by U.S. Mail to Thomas M. Ervin, Jr., Esq., Ervin, Varn, Jacobs, Odom & Kitchen, P. O. Box 1170, Tallahassee, Florida, 32302; and Robert J. Winicki, Esquire, Mahoney, Adams, Milam, Surface & Grimsley, Post Office Box 4099, Jacksonville, Florida, 32201, this 21st day of May, 1987.

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