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

REPLY BRIEF OF APPELLANTS FLORIDA DEPARTMENT OF REVENUE AND OFFICE OF THE COMPTROLLER

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REPLY ARGUMENT

I. The tax on banks and savings institutions is valid. There is an abundance of dispositive legal authority in support of the validity of this tax. It does not violate the Federal Public Debt Statute, 31 U.S.C. §3124.

Appellees' Answer Brief fails to distinguish the two United States Supreme decisions precisely on point which support the validity of the tax at issue in this proceeding. Appellees' failure, however, is understandable. The taxes reviewed in **Garfield Trust Company v. Director, Div. of Taxation,** ___U.S. ___, 107 S.Ct. 390, ___L.Ed. 2d___(1986) dismissing for want of a substantial federal question, 508 A.2d 1104 (N.J. 1986) and **Reuben L. Anderson-Cherne v. Com'r. of Taxation**, 423 U.S. 886, 96 S.Ct. 181, 46 L.Ed. 2d 118 (1975), dismissing for want of a substantial federal question, 226 N.W. 2d 611 (Minn. 1975), are indistinguishable from the tax before this Court.[1]

Failing to distinguish the cases in any meaningful fashion, Appellees then attempt to diminish the precedential value of the two cases by saying at page 24 of their Answer Brief that "review was subsequently denied by the United States Supreme Court." This is factually and legally an incorrect statement.

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[1] Relevant portions of the taxing statutes reviewed in the two cases are included in the Appendix at the end of this Brief. A more thorough discussion of the similarities with the Florida tax (particularly regarding the incidence of the taxes) is herein forthcoming.

Both cases involved appeals, not certiorari petitions. Both cases invoked the obligatory jurisdiction of the Supreme Court in contrast to the discretionary jurisdiction over certiorari cases. Both cases presented the precise issue regarding the Federal Public Debt Statute that is being posed to this Court. Moreover, both appeals were dismissed for want of a substantial federal question which, without doubt, constitutes an **adjudication on the merits.** As stated in Hicks v. Miranda, 422 U.S. 332, 344 (1975):

> . . . That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. §1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We are not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. As Mr. Justice Brennan once observed, "**[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . .**," Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959); cf. R. Stern & E. Gressman, Supreme Court Practice, 197 (4th ed. 1969) ("**The Court is, however, deciding a**

> **case on the merits, when it dismisses for want of a substantial question. . . ")** C. Wright, Law of Federal Courts 495 (2d ed. 1970) ("**Summary disposition of an appeal, however, either by affirmance or dismissal for want of a substantial federal question, is a disposition on the merits**"). (e.s.)

Very briefly, Appellants wish to point out how indistinguishable the taxes reviewed in the two cases are from the Florida tax before this Court. The New Jersey tax required a corporation to pay an annual "franchise" tax "for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State." N.J.S.A. 54:10A-2; (A-1); Garfield Trust, 508 A.2d at 1106. The tax was computed by adding together prescribed percentages of a net worth base and an entire net income base.[2] N.J.S.A. 54:10A-4(d), 4(k) and 5; (A-8,9); Garfield Trust, supra at 1106. The Minnesota tax reviewed in Reuben was an "annual excise" tax imposed upon every domestic corporation for the "privilege of

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[2] Appellees argument on page 24 of their Answer Brief that the net income measure is only a portion of the New Jersey tax and thus distinguishable from the Florida tax is completely inconsistent with its "de minimis" argument made later in the Brief on pages 33 and 34. It is also interesting to note that this "small part" of the tax was at the rate of 7 1/2 % of the corporation's entire net income for the time period involved in Garfield Trust; the current rate is 9 % (A-8,9). The Florida rate at issue is 5%. The particular tax either violates or does not violate the federal statute by using a "net income" measure. The Court held the New Jersey tax did not violate the statute.

existing as a corporation during any part of its taxable year" and upon every foreign corporation for the "privilege of transacting . . . business within this state during any part of its taxable year, in corporate or organized form." The tax was "measured by such corporations' taxable net income for the taxable year for which the tax is imposed." Minn. St. 1971, §290.02 (A-10); Reuben L. Anderson, 226 N.W. 2d at 613.

Likewise, the tax before this Court is an annual "franchise" or excise tax imposed on corporations and other artificial entities "for the privilege of conducting business, deriving income, or existing within this state" in corporate or artificial capacity. See, §§220.02, 220.64, Fla. Stat. The tax is measured by such corporations' "net income."[3] The taxes are factually and legally indistinguishable.

Moreover, both cases (Garfield Trust and Reuben) answered the same question, the precise issue, being posed to this Court: does the tax because of its "net income" measure violate the Federal Public Debt Statute, 31 U.S.C. §3124? Both cases

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[3] Moreover, the Legislature in §220.02(2), Fla. Stat., has expressly stated that it is its intent that the tax levied by Chapter 220 be construed to be an **excise or privilege tax measured by net income** and that the tax not be deemed or construed to be a property tax or a tax on property or a tax measured by the value of property for any purpose. Thus, the Legislature has not only clearly structured the tax to be a classic franchise or privilege tax but it has made its intent regarding the incidence of the tax very clear.

answered that question in the negative. There is ample authority to support the validity of this tax. Succinctly, a state may impose on a corporation a nondiscriminatory franchise tax or another nonproperty tax and may include federal obligations, interest earned on federal obligations, or both in the computation of the tax.[4] The Florida tax does not violate the Federal Public Debt Statute.

Instead of addressing the question whether the tax violates the Federal Public Debt Statute, Appellees attempt to confuse the Court with nonissues. This Court need not speculate as to whether the tax would pass muster under the Florida Constitution prior to its amendment in 1971. The Constitution was, in fact, amended to authorize a direct property tax on a corporation's income. The only thing that amendment insures is that this tax today would clearly pass muster under the Florida Constitution; if a direct property tax on a corporation's income is permissible, then surely an indirect nonproperty excise or privilege tax measured by a corporation's net income is

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[4] The Florida and Minnesota taxes include in the computation only interest earned on federal obligations; the New Jersey tax examined in Garfield Trust includes in the computation both the face value of the federal obligation and the interest earned on that obligation. See also, Bankers Trust New York Corp. v. Dept. of Finance, City of New York, 55 U.S.L.W. 3741, May 4, 1987, dismissing for want of a properly presented federal question, ___A.2d___ (N.Y. Sup. Ct. App. Div. May 27, 1986) concerning validity of city's corporate tax measured by "net income" in light of the Federal Public Debt Statute.

permissible. This Court also need not look to a 1931 Supreme Court case reviewing a tax measured by the preceding year's net income. This is a meaningless distinction. The abundance of recent authority clearly upholds taxes measured by a corporation's current year's income. Garfield Trust, supra; Reuben, supra; National Bank of Alaska v. State, Dept. of Revenue, 642 P.2d 811 (Alaska, 1982); Connecticut Bank & Trust Co. v. Tax Commissioner, 423 A.2d 883 (Conn. 1979).

Appellees' argument regarding the 1959 amendment to the Federal Public Debt Statute and the American Bank case warrant comment. The 1959 amendment expressly codified the exception which allows states to impose on corporations franchise or other nonproperty taxes and to include (directly or indirectly) interest earned on federal obligations in the computation of those taxes. The American Bank case relied on so heavily by Appellees acknowledged that exception in striking down a "property tax," i.e., a tax not within the exception:

> Congress must have believed that franchise . . . taxes required federal obligations to "be considered, directly or indirectly, in the computation of the tax"; otherwise the specific exemptions for these taxes would have been superfluous. American Bank & Trust Company v. Dallas County, 463 U.S. 855, 103 S.Ct. 3369, 3375, 77 L.Ed 2d 1072 (1983).

From the foregoing it is respectfully submitted that this tax comes within the exception for a "franchise or another

nonproperty tax imposed on a corporation." There is ample authority to support such a construction. The nature and operation of this tax clearly indicates that it is a tax imposed for or on a privilege; it is a franchise or another nonproperty tax. This conclusion is buttressed by the explicit language in the statute as well as the explicit intent behind the enactment. For over 100 years, the United States Supreme Court has considered a franchise tax to be a tax imposed for or on a privilege.[5] Numerous state courts, scholars and legal commentaries have consistently considered "franchise" to be synonymous with privilege.[6] To hold otherwise in this case renders the specific Congressional exception for corporate franchise and other nonproperty taxes superfluous and the Florida Legislature's intent meaningless. There is an abundance of authority from the United States Supreme Court, from sister state Supreme Courts and from this Court cited in Appellant's Initial Brief which support a construction which would uphold the validity of this tax.

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[5] See, e.g., Colonial Pipeline Co. v. Collector of Revenue of Louisiana, 421 U.S. 100 (1975); Morgan v. Louisiana, 93 U.S. 217, 223 (1877).

[6] In addition to authorities already cited in the Initial Brief, see also, Black's Law Dictionary 593 (5th ed. 1979); 71 Am. Jur. 2d State & Local Taxation, §266 (1973).

II. The tax does not discriminate against interest earned on federal obligations. The tax is "non-discriminatory" as mandated by the Federal Public Debt Statute, 31 U.S.C. §3124.

Appellees have not shown one instance where the Florida tax discriminates in any way against federal obligations. By its express terms, the taxing scheme mandates inclusion of all interest earned on federal, state, and local debt obligations in the tax base for purposes of measuring the tax. See, §§220.63, 220.13, 220.13(1)(a)2, Fla. Stat. In addition, by administrative rule the Florida Department of Revenue has consistently maintained that all interest earned on federal, state, and local debt obligations must be included in the tax base. See, Fla. Admin. Code Rule 12C-1.13(1)(a)2. There is parity of treatment for all debt obligations.

The United States Supreme Court has made it clear that the term "nondiscriminatory" as used by Congress in the Federal Public Debt Statute pertains to the treatment for tax purposes of federal obligations as compared with state obligations. Memphis Bank & Trust Company v. Garner, 459 U.S. 392, 103 S.Ct. 692, 74 L.Ed. 2d 562 (1983).

In a futile attempt to show discrimination, Appellees point on page 38 of their Answer Brief to various corporate tax credits granted under Chapter 220, Fla. Stat. In the most simplistic terms, this argument mixes apples and oranges; it clouds the true

test as enunciated by the Supreme Court in Memphis Bank. The Supreme Court said: compare the treatment of federal obligations with the treatment accorded state and local obligations. Moreover, the case cited in support of their "discrimination by credit" argument is inapposite.[7]

Appellees also attempt to show favorable treatment of state and local debt obligations by reference to the water and sewer bonds issued pursuant to §153.62 and 153.63, Fla. Stat., and allegedly exempt from taxation by §153.76, Fla. Stat. Admittedly, §153.76 omits the standard language employed by the Legislature stating that the exemption shall not be applicable to any tax imposed by Chapter 220. This omission, however, is not fatal. Section 153.76 was enacted by the Legislature in 1959. (See, §27, Ch. 59-446, Laws of Florida.) It was repealed in 1972 to the extent it provided an exemption from any tax imposed by Ch. 220. Chapter 72-278, Laws of Florida, which created Part VII, Ch. 220, to impose the tax sub judice, specifically provided in §10 for its repeal; it stated as follows:

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[7] In Delta Air Lines, Inc. v. Dept. of Revenue, 455 So.2d 317 (Fla. 1984), this Court struck down a corporate tax credit as violative of the Commerce Clause because it discriminated against interstate commerce by providing a direct commercial advantage to select Florida-based air carriers. The tax credits cited by Appellees apply to every entity subject to Ch. 220 taxes. See, §§220.02(9) and 220.64, Fla. Stat. There is no discrimination between taxpayers subject to the tax, no classification, no violation of the Commerce Clause. The case has absolutely no relevance to the issue at hand.

> Sections 125.019, 159.31, 159.50, 183.14, 215.76, 243.33, 315.11, 340.20, 348.122, 348.122, 348.65, 348.762, 349.13, 403.1834, 423.03 and 554.102, Florida Statutes, and all other comparable statutes of tax exemption, are hereby repealed to the extent that they would exempt interest, income or profits on debt obligations from the tax imposed by chapter 220, Florida Statutes (e.s.)

Thus, contemporaneous with the passage of the tax at issue, the Legislature, to insure the tax was "nondiscriminatory," repealed all statutes of tax exemption for state and local debt obligations to the extent they would exempt interest, income or profits on debt obligations from the tax imposed by Chapter 220. The last expression of legislative will prevails, i.e., the exemption previously granted by §153.76 was repealed upon enactment of the tax at issue.

It is also very important to note that 10 of the 15 statutory sections cited by Appellees on pages 41 - 42 of their Brief were specifically enumerated in the above wholesale repeal of exemptions from Chapter 220 taxes.[8] Thus, there is no exemption from the tax sub judice for the bonds authorized in the statutory sections cited by Appellees. If there is no exemption, there is no discrimination. In addition, the remaining 5

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[8] This wholesale repeal of tax exemption statutes has been approved by this Court. Straughn v. Camp, 293 So.2d 689 (Fla. 1974)

statutory sections cited by Appellees on pages 41 - 42 specifically provide that the exemption shall not be applicable to any tax imposed by Ch. 220. As the trial judge so aptly held "[t]he tax on banks and savings associations imposed by Part VII, Ch. 220 is inescapably a tax imposed by Ch. 220 and thus the exemption does not apply." (R 291)

Appellees also point to the Pasco County Expressway obligations allegedly issued pursuant to §348.84, Fla. Stat. to show discrimination. **However, no bonds were ever issued!** (R 105) By affidavit in the Record, Thomas A. Beenck, Chief of the Bureau of Legal Services of the Division of Bond Finance, Florida Department of General Services, attested that there were no bonds outstanding nor did it appear that any bonds were ever issued by or on behalf of the Pasco County Expressway Authority. (R 105). Moreover, any phantom bond issue from the authority would have to be pursuant to the provisions of the State Bond Act. (See, §348.84, Fla. Stat.) The State Bond Act, §§215.57 - 215.83, Fla. Stat., specifically provides in §215.76 **that the exemption from taxation for state and local bonds shall not be applicable to any tax imposed by Ch. 220.** Thus, assuming the bonds even existed, there is no omission of the pertinent language.

Throughout this entire analysis it must be remembered that Appellees are attempting to secure the benefit of an exemption from taxation for state and local debt obligations in an effort

to then argue that the corporate tax discriminates because the interest earned on the state or local debt obligation is exempted. It is a fundamental rule of statutory construction that exemptions from taxation must be strictly construed against the one seeking the benefit of the exemption.[9] Appellees have not shown one instance in the taxing scheme where state or local debt obligations are more favorably treated than federal debt obligations. There is parity in treatment; the tax is nondiscriminatory.

Even assuming for argument that Appellees in their search through the statutes can find one example which lacks the language stating that the tax exemption does not apply to any tax imposed by Ch. 220, this Court should still find that interest earned from such a bond is includible in the tax base in order to uphold the validity of the tax. Other state courts have so held. See, Connecticut Bank and Trust Co. v. Tax Commissioner, 423 A.2d 883 (Conn. 1979); National Bank of Alaska v. State, Department of Revenue, 642 P.2d 811 (Alaska, 1982).[10]

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[9] This rule applies if there is an ambiguity in the statute. Appellants assert there is no ambiguity in the language routinely employed by the Legislature with reference to state and local debt obligations - interest earned is not exempt from any tax imposed by Ch. 220. If there is an ambiguity, Appellees still lose the exemption because of the strict construction rule.

[10] A more thorough discussion of these cases is contained on pages 43 through 46 of Appellants' Initial Brief filed herein.

III. Any possible decision regarding invalidity of the tax should be given "pure" prospective effect: the Sunburst Doctrine.

An Amicus Answer Brief has been filed relating solely to the issue of whether any decision of invalidity should be given pure prospective effect. Appellants will thoroughly respond to this issue in its Reply to that Amicus Brief. There are, however, certain statements made in Appellees' Answer Brief which warrant a reply here.

First, contrary to Appellees' assertion, there is Florida authority for "pure" prospectivity of a decision of invalidity and it was cited in Appellants' Initial Brief on page 35. 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.

Second, the power of the Courts to fashion "pure" prospective-only decisions is hardly a "novel" suggestion. The Doctrine was definitively established in 1932 by the decision in Great Northern R. Co. v. Sunburst Oil & Refinery Co., 287 U.S. 358 (1932), from which the doctrine acquired its name. The cases

applying the doctrine are many. See, for example, International Studios Apt. Ass'n. v. Lockwood, 421 So.2d 1119 (Fla. 3rd DCA 1982); Gulesian v. Dade County School Board, supra and Metropolitan Life Ins. Co. v. Commissioner of Insurance, 373 N.W. 2d 399 (N.D. 1985), declining to order a tax refund on a finding of unconstitutionality.

Third, there is absolutely no bad faith involved, at least not on the part of the State. The taxing scheme Appellees challenge has been the law since 1972, presumptively valid. Appellees exercised the privilege of doing business in the State throughout the period for which they seek a refund; they never protested the tax or indicated that a refund of taxes might be sought based on alleged violation of the Federal Public Debt Statute, which has been the law for well over 100 years. The State of Florida relied on the presumptively valid taxing statute. Appellees now seek a multi-million windfall at the expense of other taxpayers in the State. They sat idly for years while the State relied in good faith on the revenues generated from the tax. It is the Appellees who should "not be permitted to gather fruit out of season in a garden of equity." If the tax is invalid (and the State strongly argues it is valid), this Court should apply a "pure" prospective effect to any decision of invalidity and grant refunds to no one. There is clear precedent for such a decision.

CONCLUSION

The cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute. There is abundance of authority to support the validity of this challenged tax. The decision of the District Court should be reversed, with directions that the Final Summary Judgment of the trial court upholding the validity of the tax be reinstated and affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas M. Ervin, Jr., Esquire, Varn, Jacobs, Odom & Kitchen, Post Office Box 1170, Tallahassee, Fl., 32302; and Robert J. Winicki, Mahoney, Adams, Milam, Surface & Grimsley, Post Office Box 4099, Jacksonville, Fl., 32201, this 14th day of May, 1987.

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