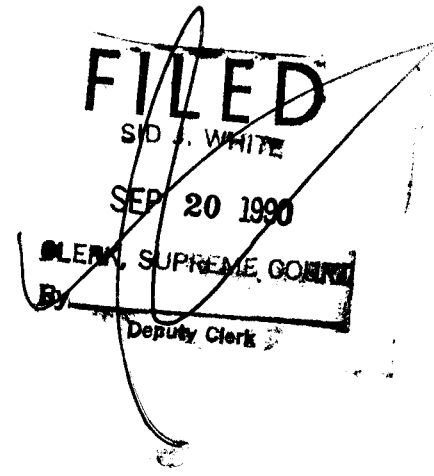


**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

DIVISION OF ALCOHOLIC BEVERAGES & TOBACCO, DEPARTMENT OF BUSINESS REGULATION AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Appellants/Cross-Appellees,

vs. CASE NO.: 70,368

MCKESSON CORPORATION, Et. Al.,

Appellees/Cross-Appellant.

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# BRIEF OF AMICUS CURIAE NATIONAL DISTRIBUTING COMPANY, INC.

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## PRELIMINARY STATEMENT

The Amicus Curiae, National Distributing Company, Inc., is a wholesaler/distributor of alcoholic beverages in the State of Florida and has been licensed to distribute alcoholic beverages in the State of Florida by the Division of Alcoholic Beverages and Tobacco, Department of Business Regulations, State of Florida, the Appellant in this action.

Any decision by this court could directly and substantially affect the rights of National Distributing Company, Inc. (National), as well as other alcoholic beverages wholesalers/distributors in the State of Florida.

Further, the issue presented in this case is of great importance to the many taxpayers that have paid or will in the future pay unconstitutional taxes. National has conferred with counsel for the Division of Alcoholic Beverages and Tobacco (Division) and with counsel for McKesson Corporation (McKesson), the only parties who sought review in the United States Supreme Court of this court's decision in Division of Alcoholic Beverages and Tobacco, State of Florida v. McKesson Corporation, 524 So.2d 1000 (Fla. 1988), and counsel for National has been authorized to

state that said parties have no objection and do consent to National filing a brief as Amicus Curiae in support of McKesson's position.

It is the Division's intent, pursuant to its construction of the opinion of the United States Supreme Court in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, et al, 110 S.Ct. 2238 (1990) to retroactively assess a tax (excise tax) against National as well as other alcoholic beverage distributors in Florida who were competitors of McKesson during the taxable preiord of July 1, 1985 through June 30, 1988. A preliminary determination made by the Division, subject to modification, would result in a tax assessment of in excess of 1.7 million dollars against National. Accordingly, any decision made by this court at this time could directly and substantially affect the rights and financial stability of National.

## STATEMENT OF THE CASE AND THE FACTS

National relies upon the facts as enumerated by the Florida Supreme Court in Division of Alcoholic Beverages and Tobacco, Department of Business Regulation v. McKesson Corporation, supra, and the facts as enumerated by the United States Supreme Court in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, 110 S.Ct. 2238 (1990).

After the United States Supreme Court reversed the decision of the Florida Supreme Court in so far as the relief that might be available to McKesson, the Division filed a Motion for Leave to advise this court of the action that the Division was contemplating taking in view of the decision of the United States Supreme Court in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco supra. This court granted the Division's motion by order entered on August 6, 1990 and instructed the Division to file its brief no later than August 31, 1990. McKesson was instructed to file its brief on or before September 20th, 1990. Accordingly, National, as amicus curiae in support of McKesson's position, is filing its brief to comply with the briefing schedule set by the court.

## SUMMARY OF ARGUMENT

The United States Supreme Court in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, supra, reversed the decision of the Florida Supreme Court in Division of Alcoholic Beverages and Tobacco, Department of Business Regulation v. McKesson Corporation, supra., in so far as the decision of the Florida Supreme Court declined to provide McKesson with any relief other than declaring the statutes attacked invalid. Instead, the U.S. Supreme Court ruled that McKesson was entitled to a "clear and certain remedy" and that McKesson was entitled to some form of retrospective relief. It was the determination of the Supreme Court that where a state penalizes a taxpayer for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the due process clause of the United States Constitution requires the State to afford the taxpayer a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

The Supreme Court ruled that the State had three potential options available to it to provide relief to McKesson for its payment of the unlawful taxes. These options are as follows:

1. The State could cure the invalidity of the tax by refunding to McKesson the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received.

2. Alternatively, to the extent consistent with other constitutional restrictions, the State could assess and collect back taxes from McKesson's competitors (other alcoholic beverage wholesalers) who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme; or

3. A combination of a partial refund to McKesson and a partial retroactive assessment of tax increases on favored competitors, so long as the results of the tax actually assessed during the contested tax period reflect a scheme that does not discriminate against interstate commerce.

The State and the Division have chosen option (2) and have elected not to provide McKesson with any refund of taxes paid. Instead the State and the Division have elected

to attempt to erase the property deprivation by assessing the competitors of McKesson the difference between what the competitor paid in reduced taxes with what the competitor would have paid at the higher tax rate.

It is the purpose of the Division to inform this court of its intent and to obtain a ruling by this court that the State has the lawful right to elect the above referenced option and that the election of the above referenced option is consistent with other constitutional restrictions, would not violate any constitutional rights of the affected competitors, and that the only rights that the competitors would have after the assessment would be to challenge the amount of the assessment, but not the validity of same.

Such a position clearly deprives National, in the most blatant way possible, of its due process rights and its right to challenge the validity of any tax assessment. Such was not the intent of the ruling of the United States Supreme Court.

The United States Supreme Court did not attempt to rule on the issue of whether the selection of option (2) would violate the competitor's due process rights and/or other constitutional restrictions. McKesson's competitors were not parties to the action in the Supreme Court, and, for the most part, have not been parties to the proceedings in the

state courts. Substantial and significant constitutional issues are presented where a state attempts to retroactively assess taxes against a taxpayer. Florida law generally prohibits the retroactive imposition of a tax. Each wholesaler/distributor should have the right to completely and fully develop any constitutional argument that it may have against the imposition of the tax as it applies to that distributor's particular circumstance. To deny the distributor's this fundamental right not only would be a gross abuse of and deprivation of the due process rights of the distributor/taxpayer, but would effectively deny the distributor free access to the courts in violation of the Florida Constitution and would impermissibly interfere with contracts between the alcoholic beverage wholesalers and retailers in the State of Florida in violation of the Florida Constitution.

The only legitimate and constitutional relief that can be provided to McKesson in the State of Florida is the granting of a tax refund.

## ARGUMENT

In Florida, pursuant to the provisions of §561.37, §561.371, §561.49, §561.50 and §561.55, Fla. Stat., alcoholic beverage wholesalers doing business in the State of Florida are required to remit to the Division the applicable excise tax on all "sales" of alcoholic beverages in the State of Florida. Pursuant to the provisions of §564.06 and §565.12, Fla. Stat. (1985-1989), the applicable tax rates have been set by the Florida legislature, Under these statutory provisions each wholesaler is mandated to pay to the Division, on a monthly basis, the applicable tax after sale of the alcoholic beverage in the State of Florida. If the wholesaler fails to remit the applicable tax on time, the Division is authorized to issue a warrant which, when filed in a local circuit court, directs the county sheriff to levy upon and sell the delinquent taxpayers goods and chattels to recover the amount of the unpaid tax plus a penalty of 50% along with interest of 1% per month and the cost of executing the warrant. (§210.14(1) (1985)). In addition, the Division is authorized to revoke, pursuant to the provisions of

§561.29(1)(a), or decline to renew pursuant to the provisions of §561.24(5), Fla. Stat., a distributor's license for failure to abide by the Florida law, including the statutory requirement that the alcoholic beverage tax be timely paid.

During the applicable tax period (July 1, 1985-June 30, 1988) National, pursuant to the specific mandate of the alcoholic beverage laws, timely remitted all excise taxes due the State of Florida on the sale of all alcoholic beverages in Florida sold by National. The majority of the alcoholic beverages sold by National in the State of Florida were subject to the higher tax rate. However, some of the alcoholic beverages sold by National in the State of Florida during the applicable tax period were subject to the lower tax rate. Accordingly, National was required by statute to remit taxes to the State of Florida at the lower tax rate.

National remitted on a timely basis all excise taxes due on other alcoholic beverages not subject to the lower tax rate to the Division, as required by law. National's pricing policies, including determination of discounts, rebates or otherwise were influenced by the taxes that National was required by law to remit to the State of Florida upon the sale of those alcoholic beverages in Florida. If National was required to pay excise taxes on

the sale of alcoholic beverages in Florida at a higher tax rate, the price of the alcoholic beverage to the retailer in Florida would be affected accordingly. The retailer, in turn, determines its price to the consumer based upon what the retailer had to pay the distributor for the alcoholic beverages. The retailer in turn presumably recoups all expenses and costs from the consumer. Such is common business practice and prudent business judgment.

In order to avoid payment of a refund to McKesson, however, the Division seeks to issue a tax assessment against National, as well as other wholesalers doing business in Florida, equaling the difference between what National or the other wholesalers paid on alcoholic beverages qualifying for the lower tax rate, and what National would have paid on the sale of these alcoholic beverages at the higher tax rate. Since these alcoholic beverages have already been sold to the retailer at a specific price, and presumably have already been sold to the consumer, National has no way of recouping the increased costs of the sale of the alcoholic beverage in the State of Florida. Accordingly, the Division's position, and if approved by the court, could have a substantial and potentially destructive impact on National's ability to conduct its business and to remain in business.

Under such circumstances it would be inappropriate for this court to make any ruling which would in any way preclude National's rights to defend against any tax assessment. If the court were to make such ruling, National's due process rights would be destroyed without ever having had its day in court and the right to develop any defense it feels justified and legitimate.

The only ruling this court should make, if at all, is to concur with the Division's position that the Supreme Court has ruled that the Division can potentially cure the unconstitutional deprivation of McKesson's property rights by electing to retroactively impose a tax on McKesson's competitors, but whether the Division can do so in conformity with existing Florida law, and under the constitution of the State of Florida, as well as the United States Constitution, will be an issue that must be resolved in the future on a case by case basis. The only ruling that the court can make which would not infringe upon the rights of other wholesalers would be that the only legitimate and constitutional remedy available to the Division is to grant a tax refund to McKesson.

It is clear from the Division's motion, brief and proposed rule, that the Division is not only attempting to

obtain approval from this court to retroactively assess taxes against wholesalers who were competitors of McKesson, but also to obtain a ruling that the procedure it has elected to follow, as well as the option it has selected, conforms in all respects to the U. S. and Florida Constitutions and existing law. However, the Supreme Court decision did not authorize the State of Florida or the Division to select the option of retroactively assessing taxes against competitors of McKesson, but simply recognized such option as a possible remedy and possible relief that could be provided to McKesson to cure the unconstitutional deprivation of McKesson's property rights resulting from McKesson's payment of unlawful taxes.

The selection of this option by the State places a very heavy and substantial burden on the State to defend its position against each distributor upon which a tax is assessed. The attempt by the State to circumvent the rights of the wholesalers is outrageous, unreasonable, arbitrary and capricious, and should not be condoned by the court. As previously stated, a ruling by this court which would directly affect the rights of the wholesaler to defend itself against a tax assessment, when said wholesalers are not parties to this proceeding, is, in itself, a violation of the wholesalers due process rights.

The imposition of the proposed excise taxes against wholesalers who have already paid the applicable and lawful tax rate at the time the alcoholic beverages were sold in the State of Florida would result in the retroactive imposition of the tax. Florida law generally prohibits the retroactive imposition of a tax. Department of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979); Pederson v. Green, 105 So.2d 1 (Fla. 1958). The Supreme Court recognized that while a potential option for the State of Florida to provide a clear remedy and relief to McKesson could be the remedy of retroactively assessing taxes against competitors of McKesson, such option was not without its problems and that the State had the very heavy burden of implementing that option without being in violation of existing State law and without violating the Florida or United States Constitution. Whether the State could implement this option without running afoul of State law and applicable constitution restrictions, must be determined on a case by case basis. The United States Supreme Court never intended for this court to determine the constitutional rights of the wholesalers without said wholesalers having their day in court and without the State having to meet a very heavy burden of demonstrating that the option it has selected can

be implemented and applied against a specified wholesaler without violating the wholesalers' constitutional rights and without violating State law.

Under the State's position, National would be unfairly penalized for having complied with existing law. Such result is itself harsh and oppressive. Not only did National comply with existing law by paying the applicable excise tax, but National had no choice but to comply or run the risk of having its alcoholic beverage wholesaler license revoked and/or a lien being imposed on its property for the payment of the tax. To say that National should have reasonably foreseen this consequence and that the State's selection of the above-described option does not unduly interfere with National's settled expectations, is akin to arguing that a woman is a "little pregnant." It is simply a distinction without a difference. It is unreasonable and illogical to argue that National did not have the right to rely on the existing tax structure when it remitted taxes to the State of Florida. It was the State of Florida that enacted the taxing statutes, and amended same, not National. Clearly National's due process rights are being violated under the facts of this case if the State elects option (2) because said choice clearly unduly interferes

with the settled expectations of National, as well as the settled expectation of all wholesalers in the State of Florida.

In the present case, the retroactive assessment of a tax increase against National would produce a harsh and oppressive result. National had no choice but to pay the tax. National should have every opportunity to demonstrate the harsh and oppressive result of the State's selection of option (2) and should have every opportunity to demonstrate that the selection of option (2) unduly interfers with National's settled expections.

The United States Supreme Court did not suggest to the Florida Supreme Court that it has the power to approve the retroactive increase of taxes. The court merely opined that the State might, as an alternative, increase taxes through the retroactive imposition of same on competitors of McKesson, if such an increase and retroactive application did not violate the due process rights of the wholesaler.

Further, a tax assessment is a legislative power. Article VII(a) of the Florida Constitution, states that "no tax shall be levied except in pursuance of law." Florida courts in interpreting this provision have stated that "taxation is a legislative power, which cannot be delegated;

and it can only be exercised pursuant to a valid statute containing definite limitations." Stewart v. Daytona and New Smyrna Inlet District, 114 So. 545 (Fla. 1927).

The power to tax is vested solely in the legislature. Housing Authority of Plant City v. Kirk, 231 So.2d 522, 524 (Fla. 1970). The power to tax cannot be conferred on the judiciary.

The Florida legislature has not specifically authorized the retroactive imposition of the higher tax against the wholesalers of Florida. Pursuant to the Florida Constitution, prior to the imposition of such tax, it would be required that the Florida Legislature enact a specific statute authorizing such imposition. If such statute has not been enacted, any imposition of the higher tax on National would be in violation of the above stated constitutional provision.

Further, it is a well settled proposition of law in Florida that contracts are made in legal contemplation of the existing applicable law. Johnson v. Government Employees Insurance Company, 333 So.2d 542 (3rd DCA 1976); State v. City of Coral Gables, 72 So.2d 48 (Fla. 1964); Carter v. Government Emp. Ins. Co., 377 So.2d 242 (Fla. 1st DCA 1979); Florida Beverage Corporation v. Division of Alcoholic Beverages and Tobacco, 503 So.2d 396 (Fla. 1st DCA

1987). Unless a statute clearly expresses a contrary intention, all legislation is presumed to have only prospective effect. Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975); Carter v. Government Emp. Ins. Co., supra; Young v. Altenhus, 472 So.2d 1152 (Fla. 1985); Black v. Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985).

When National sold the alcoholic beverage in the State of Florida it was with the knowledge of and with contemplation of the existing law relating to excise taxes on the sale of alcoholic beverages in the State of Florida. Such contemplation and knowledge formed the basis of the price to be charged to retailers in Florida at that time and, as such, was part of the agreement and arrangement between the wholesaler and retailer. The effect of the retroactive application of the higher tax rate to sales made by National to retailers in prior years results in the diminishment of the value of the contract between National and the retailers it serviced. The application of the existing excise statute in this manner is repugnant to the United States and Florida Constitution and cannot be applied to nor affect the contract between the retailer and the wholesaler.

Both the United States and Florida Constitutions provide that no law impairing the obligations of contracts

shall be passed. (United StatesConstitution, Article I, Section 10, Cl. 1). A statute that is not in effect at the time a contract is entered into cannot be retroactively applied to alter the obligations of the contract even though the act which triggers the obligation occurs after the statute is enacted. Housler v. State Farm Mutual Insurance Co., 374 So.2d 1037 (2nd DCA 1979).

The retroactive assessment of the higher tax rate to National would do violence to the above-referenced constitutional provisions.

The Division has suggested a proposed rule to be implemented by the Division setting out the procedure that it intends to follow in retroactively assessing taxes against wholesalers at the higher tax rate. It is the Divisions intention to seek a ruling from this court that such rule is valid. However, there is no provision in the Florida Constitution or Florida law, which would allow this court to initially rule on the validity of a proposed rule. The Florida legislature has set out the procedure under Chapter 120, Fla. Stat., for attacking the validity of a proposed rule. Each wholesaler affected by this proposed rule should have the right to challenge its validity pursuant to the provisions of Chapter 120, Fla. Stat. Any ruling by this court on that issue would be premature and

National would respectfully suggest that the court is without jurisdiction to make such initial determination.

## CONCLUSION

The United States Supreme Court has suggested a potential remedy to be provided by the State of Florida in order to afford relief to McKesson for the unconstitutional deprivation of its property rights by having paid an unlawful tax. Such remedy or relief includes the actual refund of taxes to McKesson. Under Florida law and the Florida Constitution, the only legitimate remedy to the State to afford relief to McKesson is to grant the tax refund.

The option and/or remedy selected by the Division to afford relief to McKesson would violate the Florida Constitution and existing Florida law and, as such, is not a viable remedy. National, as well as any other affected wholesaler, must be given the opportunity to fully defend itself against any tax assessment issued against it by the State of Florida. Any determination by this court as to the rights of National and the legitimacy of the tax assessment, would be premature and would result in a gross violation of

National's due process rights and should not be condoned by this court.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a ture and correct copy of the foregoing has been sent by U.S. Mail to Joseph C. Mellichamp, III, Senior Assistant Attorney General, Department of Legal Affairs, Tallahassee, Florida 32399-1050; David C. Robertson and Neal S. Berinhold, Esqs., Morrison & Foerster, California Center, 345 California Street, San Francisco, CA 94104-2105; Charles A. Wachter, Esq., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601; M. Stephen Turner, 820 East Park Avenue, Tallahassee, Florida 32301; Barry R. Davidson, Esq., Steel, Hector & Davis, 4000 Southeast Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-2398; Harold F.X. Purnell, Esq., Oertel &

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J. Riley Davis

JRD/ac
SUN-2131