IN THE
SUPREME COURT OF FLORIDA

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

Appellants/Cross-Appellees,

v.

McKESSON CORPORATION, et al.,

Appellees/Cross-Appellants.

_____/

CASE NO. 70,368

On Remand from the United States Supreme Court

BRIEF OF THE HOUSE OF MIDULLA INC., AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLEE McKESSON CORPORATION

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PRELIMINARY STATEMENT

Amicus Curiae, The House of Midulla, Inc., is referred to as "Midulla".

Appellants, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida, are referred to collectively as the "Division".

STATEMENT OF INTEREST OF AMICUS CURIAE

In McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 495 U.S. ____, 110 S. Ct. 2238, 110 L.Ed.2d 17 (1990), the United States Supreme Court required a remedy for McKesson Corporation for past discrimination in taxation of alcoholic beverages produced from crops grown outside the State of Florida. The Court indicated that at least three remedies may be available: (i) refund the discriminatory portion of the tax assessed against previously disfavored goods; (ii) subject to other constitutional requirements, assess retroactive taxes against previously favored goods in amounts sufficient to offset the previous favored treatment; or (iii) some combination of the first two alternatives. In its opening brief the Division has asked this Court to retroactively impose a special excise tax on previously-favored sales.

Midulla is a Florida corporation engaged in the wholesale distribution of alcoholic beverages. From 1985 through 1988, Midulla sold alcoholic beverages that received favored tax treatment declared unconstitutional in the present case. If this

Court retroactively imposes the requested special tax on sales by Midulla of goods that received favored tax treatment between 1985 and 1988, Midulla will be destroyed.

During the period the challenged tax was in effect, Midulla's average net profit from the sale of a gallon of product entitled to preferential tax treatment was 18 cents or less. The Division's proposal would retroactively increase the tax to between two and three dollars per gallon (depending on the product).

If the Division is now permitted to assess and collect from Midulla the amount of the tax preferences previously allotted to preferred goods sold by Midulla during the years 1985-1988, the additional tax assessment will be in excess of $1,300,000.00. This is over two thousand percent of Midulla's net profit earned from the sale of goods previously entitled to tax preference. **This proposed assessment is equal to 265 percent of Midulla's net assets.**

The challenged tax is a "point of sale" tax; namely, the tax is neither assessed nor collected until the goods are sold from a distributor to a retailer. As a distributor, Midulla has acted as a collection agent for the Division with respect to the tax. As collection agent, Midulla has always complied with the instructions of the Division regarding collection and remittance of the tax.

If, pursuant to the Division's proposal, the tax is retroactively assessed against Midulla, Midulla will have no opportunity to collect the tax from the retailers who purchased the goods originally granted the tax preference. Nor will Midulla be

entitled to retain its collection allowances normally granted to distributors for collection of beverage taxes. Further, the proposed tax assessment is so great that it will force Midulla either into bankruptcy or out of business. Midulla believes the proposed tax is unconstitutional as a violation of the Due Process clauses of the Florida and United States Constitutions and prays that this Court order a remedy less harsh and oppressive than the one sought by the Division.

STATEMENT OF THE CASE AND FACTS

Midulla accepts the Statements of the Case and Facts set forth in the briefs of the parties. It adopts the mathematical analysis set forth in the Amicus brief of Orlando Holding, Inc.

ISSUES ON APPEAL

I. Whether the Division is estopped from collecting taxes on a retroactive basis from Midulla.

II. Whether the imposition of the proposed tax violates the due process clauses of the United States and Florida Constitutions.

SUMMARY OF THE ARGUMENT

To avoid repetition, Midulla adopts the arguments advanced by Amicus Orlando Holding. For those reasons and the reasons set forth hereafter, Midulla urges this Court not to impose the retroactive tax requested by the Division.

Midulla refrained from collecting the taxes at the higher rate based on the specific instructions and representations of the Division not to collect the taxes at that higher rate. Midulla acted merely as a collecting agent and it would now be impossible for it to retroactively collect the taxes. Under this limited factual situation, and in light of the Division's specific instructions, the Division should be estopped from retroactively collecting the tax from Midulla.

The United States Supreme Court's opinion specifically limited the imposition of a retroactive tax in situations where it would be harsh and oppressive or unduly interfere with settled expectations. As demonstrated by the estoppel argument, the imposition of this retroactive tax will significantly interfere with Midulla's settled expectations.

The imposition of the retroactive tax would also be harsh and oppressive as to Midulla. Quite simply, it would destroy Midulla.

ARGUMENT

I. THE DIVISION IS ESTOPPED FROM COLLECTING TAXES ON A RETROACTIVE BASIS FROM MIDULLA.

Florida courts have held the State and its taxing agencies are estopped from collecting back taxes if the surrounding circumstances are sufficiently strong to warrant such a result. E.g., George W. Davis & Sons, Inc. v. Askew, 343 So.2d 1329 (Fla. 1st DCA 1977), held the Department of Revenue was estopped from collecting taxes it sought to retroactively assess.

Davis arose as follows. In 1968 the First District Court of Appeal had invalidated an admissions tax on fishing boat operations. Approximately four years later, the First District revisited the issue in the Pelican case,[1/] and found the admissions tax on fishing boat operations to be valid. In the interim, the Department of Revenue told the plaintiff taxpayer (Davis) that it would not attempt to collect admissions taxes on plaintiff's fishing boat operations, and the plaintiff stopped collecting the tax from its customers. The plaintiff also abandoned its plans to raise its prices in order to absorb the tax, in reliance on the Department of Revenue's pronouncements. After Pelican was decided, the Department of Revenue attempted to assess and collect admissions taxes from the plaintiff for the period between the two appellate decisions.

1/ Department of Revenue v. Pelican Ship Corporation, 257 So.2d 56 (Fla. 1st DCA 1972)

The First District held the trial court correctly estopped the Department of Revenue. The plaintiff was found to be, in essence, the collecting agent for the state. Prior to Pelican, the plaintiff had no authority to collect the tax, and would have been "legally and morally obligated" to return collected taxes to its customers. 343 So.2d at 1331. The plaintiff relied on both the earlier opinion and the Department of Revenue pronouncements, and could not go back and collect the tax from its past patrons.

Midulla's position is legally indistinguishable from that of the taxpayer in Davis. Even while this case was previously before this Court, the Division specifically instructed Midulla to collect taxes in accordance with the tax preference.[2/] Midulla relied on the Division's pronouncements, and neither collected the tax nor increased the price of goods sold by it to absorb a retroactive application of the tax. As collecting agent for the Division, Midulla had no authority to collect taxes above the specified amounts, and would have been "legally and morally obligated" to

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2/ See the February 25, 1988 memorandum in the appendix hereto. In the appendix, Midulla has enclosed some of the written communications it received from the Division on collecting taxes at the specified rate. The computation sheets and attached memos are representative of the monthly written instructions sent by the Division specifying the amount of tax Midulla was told to collect. Midulla also had frequent direct telephone contact with the Division during the period the preference was in force and as a result relied on the Division's representations. Midulla would submit evidence on these contacts in an appropriate forum.

return collected taxes to its customers if it attempted to collect excess taxes. [3]

Davis relied in part on City of Naples v. Conboy, 182 So.2d 412 (Fla. 1965), which held a taxing authority estopped to go back and collect taxes from developers for under-assessed property. The arguments for estoppel for a person in the position of Davis or Midulla are much stronger because they are a collecting agent, rather than someone paying a tax on property they actually own. Indeed, this distinguishes the two cases relied upon by the dissent in Davis. Those cases did not involve a situation where a taxpayer was acting as a collecting agent. In one case, there had been an erroneous legal opinion that a particular stock transaction was not taxable, and in the other case the official simply overlooked collecting the documentary stamp tax on a deed. 343 So.2d at 1334. These are much different situations, and did not involve an innocent party who was merely collecting a tax on behalf of a taxing authority which specifically instructed the collecting agent (as in Davis and here with Midulla).[4]

Decisions subsequent to Davis have emphasized the importance of the taxpayer as a collecting agent where estoppel is applied. First National Bank of Birmingham v. Department of Revenue, 364

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[3] Collecting money for taxes Midulla knew the Division did not want and would not accept might have amounted to obtaining property by false pretenses. See Section 817.03, Florida Statutes (1989).

[4] See also, City of Coral Springs v. Broward County, 387 So.2d 389 (Fla. 4th DCA 1980), holding municipality estopped to enforce its lien by foreclosure where its representative told acquirer of property there were no liens.

So.2d 38 (Fla. 1st DCA 1978), appeal dismissed, 368 So.2d 1366 (Fla. 1979), observed that an admissions tax in Davis, "like the sales tax, is collected on behalf of the state by the operator, and it is in effect a form of excise tax upon the customer for exercising his privilege of purchasing the admission." 364 So.2d at 41. The opinion specifically distinguished intangible taxes paid by the holder of a note. In Midulla's situation the tax is intended to be an excise tax collected from the customer and Midulla should not be penalized for relying on the Division's instructions.

Department of Revenue v. Hobbs, 368 So.2d 367 (Fla. 1st DCA 1979), appeal dismissed, 378 So.2d 345 (Fla. 1979), considered the issue of representations made to taxpayers. That case distinguished Davis, because the taxpayers in Hobbs had not received instructions from the department on not collecting the taxes, but sought to rely on an interdepartmental memorandum. 368 So.2d at 369. The court distinguished the plaintiff in Davis, who had received and relied upon the department's representations.[5/] Davis is like the situation in Midulla's case, where it received and relied upon the specific representations and instructions of the Division that it should not collect the tax at the higher rate.

The differences between Davis and Hobbs highlight the inequity of the Division's position here. The admissions tax Davis and

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5/ But see Department of Revenue v. Anderson, 389 So.2d 1034, 1038 (Fla. 1st DCA 1980) (en banc), review denied, 399 So.2d 1941 (Fla. 1981), applying equitable estoppel to enjoin collection of admissions taxes even absent direct contact with department.

Hobbs did not collect was a tax in effect during the entire time of those litigation disputes. By contrast, Midulla did collect the beverage tax at the rates prescribed in the statute during the entire time period - as indicated above, it could not legally have collected the taxes at a higher rate. Midulla abided by the statute and the Division's instructions. Midulla's situation presents a stronger case for not retroactively imposing the tax than either Davis or Hobbs.

This is not a situation where the Division forgot to collect the tax or made a mistake solely regarding the law.[6/] Here the Division gave specific factual instructions not to collect the tax at the higher rate. And therefore Midulla - as its collecting agent - did not collect the tax at the higher rate. Midulla relied on this and the Division should be estopped to now seek taxes at the higher rate.

II. IMPOSITION OF THE PROPOSED TAX VIOLATES THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

In McKesson, supra, 110 L.Ed 2d 17, the United States Supreme Court indicated that a permissible remedy in this case might be the assessment and collection of back taxes from McKesson's competitors, "to the extent consistent with other constitutional

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6/ That the Division may also have been mistaken on the law does not alter the fact that it gave the specific instructions to Midulla.

restrictions." 110 L.Ed 2d at 38. Those other constitutional requirements require the tax not be harsh and oppressive. McKesson, 110 L.Ed 2d at 38; n.23, citing Welch v. Henry, 305 U.S. 134 (1938). Nor can it violate due process by "unduly interfering with settled expectations." 110 L.Ed 2d at 38, n.23.

As demonstrated by the discussion above, the retroactive imposition of this tax will unduly interfere with Midulla's settled expectations. The Division's proposed regulation was initially promulgated in late August, 1990. Amicus Midulla first learned about the proposed tax in early September, 1990. Yet, the proposed regulation attempts to authorize assessment of taxes against transactions which occurred more than five years prior to the creation of the tax. Further, the proposed regulation is not a substitute for any tax on the books in 1985 or subsequent years; it constitutes an abrupt departure from the law that existed between the date of the transactions now claimed to be taxable and the present time.

That Amicus Midulla relied on the existing scheme of taxation during the years 1985-1988 in setting its prices for the goods now sought to be taxed is beyond question. As indicated above, its net profit per gallon on preferred goods sold during the period at issue was 18 cents or less. If Amicus Midulla knew that the special excise tax now proposed by the Division was imposable upon such sales, in its capacity as collection agent for the Division, it would have added the tax to the cost of the goods sold, collected the tax from purchasers, and remitted the tax to the

Division. The full amount of the tax would have been collected from retailers, or none of the preferred products would have been sold; in either event, Midulla would not bear the burden of the special tax.

The Division never contemplated the tax could be collected retroactively. In fact, even during the litigation the Division told Midulla and other distributors and manufacturers on several occasions that the Division would not seek to impose taxes on transactions occurring prior to disposition of this case by appellate courts (see n. 2). Midulla's reliance on the statute and the Division's implementation of it is clear.

It is also indisputable that the proposed tax would be harsh and oppressive as applied to Midulla. Midulla's preliminary calculations indicate the amount of special taxes that will be imposed by the Division's proposed tax scheme will far exceed Midulla's net assets. The special tax will, therefore, make Midulla an insolvent corporation, and either force Midulla to liquidate or go bankrupt. The tax would amount to a confiscatory taking of all the assets of Midulla.[7/]

[7/] As is apparent, Midulla did not significantly benefit from the unconstitutional preference. The tax preference declared unconstitutional in McKesson was part of a taxation scheme that imposes point-of-sale taxes upon distributors of alcoholic beverages. Each distributor adds the tax to the cost of its goods, and collects the tax from retailers purchasing the goods. Each distributor is entitled to retain a small portion of the collected taxes to compensate it for its time and expense in acting as collecting agent for the Division. After the Division's announcement seeking retroactive collection of the taxes, due to the time limits for filing, Midulla plans to file its request for a refund. As is apparent, Midulla's real concern is with survival, rather than a refund.

In light of the foregoing it is understandable why the Division's initial brief on remand to this Court makes only the most conclusory statement that its retroactive taxing proposal "will not work 'harsh and oppressive' results" (page 21). **One wonders what the Division thinks is harsh and oppressive, if taxing companies out of existence simply because they followed the Division's instructions is not harsh and oppressive.**

Orlando Holding's brief quotes the Division's prior brief to the United States Supreme Court. There the Division argued retroactive taxation would create inequity and would, in its opinion, "be harsh and oppressive."

The Division's vacillation on its "harsh and oppressive" position is nearly matched by its now asserted argument that everyone should have easily foreseen the invalidation of this taxing statute. (Initial brief page 20-21). Although now asserting the obviousness of the unconstitutionality, the Division itself continued to argue through the prior appeal to this Court that the statute was constitutional. See Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 524 So.2d 1000, 1002 (Fla. 1988).

The Division also misses the mark with its attempted reliance on American Trucking Associations, Inc. v. Smith, 495 U.S. _____, 110 S. Ct. 2323, 110 L.Ed 2d 148 (1990). The sentence the Division quotes from American Trucking specifically addresses the reliance interest of a state that can easily foresee the invalidation of its tax statutes. 110 L.Ed.2d at 162. The opinion does not go on to

state, as the Division implicitly suggests, that it was also addressing the reliance interests of taxpayers. As indicated above, such a rule would be particularly inappropriate here. Not only would taxpayers have had to draw a different legal conclusion than the one expressly argued by the Division, but the taxpayers, as the Division's collecting agents, would have had to disregard its specific instructions.

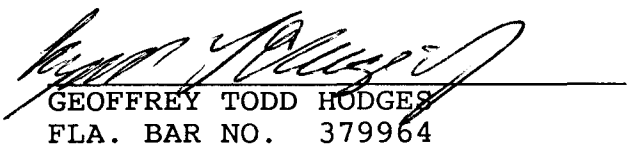
The Division's attempted reliance on the Minnesota case[8/] is misplaced for the reasons discussed in the Orlando Holding's brief. In the court's own words, because of the small amount of wine made in Minnesota, the effect of the preference was "minimal." As the tax consequences to Midulla and Orlando Holdings vividly demonstrate, the retroactive application sought by the Division would destroy them, in dramatic contrast to the negligible tax retroactively imposed in the Minnesota case.

8/ Johnson Brothers Wholesale Liquor Company v. Commission of Revenue, 402 N.W.2d 791 (Minn. 1987).

CONCLUSION

Based on the foregoing, as well as the arguments advanced by Amicus Orlando Holdings, Midulla urges this Court not to impose the retroactive tax which would destroy it.

Respectfully submitted,



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