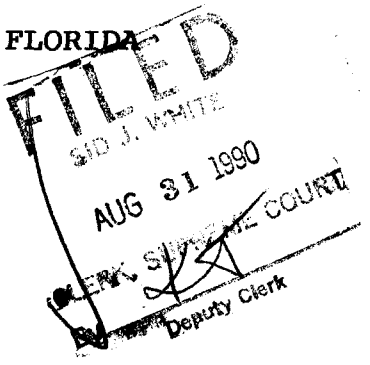
IN THE SUPREME COURT OF THE STATE OF FLORIDA



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

Appellants/
Cross-Appellees,

v. CASE NO. 70,368

MCKESSON CORPORATION, ET. AL.,

Appellees/
Cross-Appellant.
_____/

APPELLANTS' INITIAL BRIEF ON REMAND

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL
Department of Legal Affairs
Tallahassee, FL 32399-1050
(904) 487-2142

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Appellants, the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida, were the Defendants in the trial court and Respondents in the United States Supreme Court and will be referred to herein as Appellants or Florida. When referring to Appellants individually, the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation will be "DABT." The Appellee McKesson Corporation was a Plaintiff in the court below and will be referred to as "McKesson." The Circuit Court of the Second Judicial Circuit for Leon County was the trial court.

STATEMENT OF CASE AND FACTS

In Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, et al., v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), this Court prospectively invalidated, in part, the taxing scheme contained in §§564.06 and 565.12, Fla. Stat.

The United States Supreme Court reversed the judgment of this Court and remanded the cause for further proceeding not inconsistent with its opinion. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, ___U.S.___, 110 S.Ct. 2238, 2258 (1990).

The Appellants filed a motion for leave to advise this Court of the action the State would contemplate taking in view of the decision of the United States Supreme Court.

This Court granted that motion by its order entered on August 6, 1990. Therein, this Court provided a briefing schedule, with the Appellants' initial brief on remand to be served no later than August 31, 1990.

SUMMARY OF ARGUMENT

The United States Supreme Court reversed the judgment of this Court and remanded the cause for further proceeding not inconsistent with its opinion. In the instant case, the United States Supreme Court took exception to its traditional stand in cases where a state tax scheme has been invalidated on Commerce Clause grounds.

The Court set forth in detail the legal analysis which it felt appropriate to determine the extent of Florida's constitutional duty to provide relief to McKesson for its payment of an unlawful tax. The Court observed that "[i]n order to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested period that in no respect impermissibly discriminates against interstate commerce."

The Court noted several alternatives from which the State could choose to cure the impermissible discrimination. All of the choices are calculated to "create in hindsight a nondiscriminatory scheme." Not all of the choices will satisfy McKesson. Florida proposes, subject to this Court's direction, to assess and collect back taxes from those of McKesson's competitors who benefitted from tax rate reductions during the contested tax period.

The issue which is before this Court is whether this choice is consistent with other constitutional restrictions. The Appellants, without limitations, submit that the choice is consistent with other constitutional restrictions and is the most

appropriate method for crafting "in hindsight a nondiscriminatory scheme."

It cannot be doubted that the United States Supreme Court gave the choice serious consideration, because of its predetermination of the potential problem of Florida not being able to collect all of the taxes due from certain distributors who may have gone out of business. Retroactive equalization is both appropriate and permissible. It is equally clear that retroactive tax increases do not necessarily deny due process to the person whose taxes are increased. Thus the method proposed by the State to equalize burdens is permissible.

Those provisions of §§564.06 and 565.12, Fla. Stat., found unconstitutional are severable from the remainder of the statutes in question. Severance has removed the unconstitutional exemptions while keeping the general taxing structure intact. The proposal would thus collect taxes, albeit retroactively, pursuant to the statute's valid remainder.

This choice does not violate due process by unduly interfering with settled expectations. It is constitutionally permissible to retrospectively increase the taxes of those who benefitted from the invalid discrimination. The tax exemptions and preferences were void ab initio.

Since McKesson initially interprets the subject statutory provisions and since it rendered the exemption and preference portions inoperative ab initio, rights acquired under those portions are subject to being lost. Therefore, the underlying beverage tax remains unpaid by the licensed wholesale

distributors, who received invalid exemptions and preferences. It is these taxes which Florida will collect in order that it might provide a clear and certain remedy which in no respect impermissibly discriminates. In this particular case the strict application of the void ab initio doctrine does not run afoul of due process.

Since this unconstitutional scheme was not created by the Legislature in a vacuum, it may be reasonably concluded that the "reliance interests" of the beneficiaries of these unconstitutional preferences similarly "merit little concern." The State merely proposes to equalize the burdens borne by distributors.

This Court had little difficulty in declaring the subject provisions unconstitutional. The invalidity of the 1985 amendment could have been easily foreseen, by the distributors which chose to take advantage of the exemptions and preferences, after the Bacchus decision. They can hardly claim to have been lulled into a sense of reliance upon the invalid provisions. Additionally, no state constitutional provision specifically prohibits this retroactive increase of tax liability.

The distributors who claimed the exemptions and preferences, likewise, cannot be heard to claim the loss of a "vested right" to the preferred rate of taxation. Nor can they claim that the alteration of a preferred rate violates their rights to due process. No one has a vested right to a particular rate of taxation. Finally, in this case, the State's proposed equalization will not work "harsh and oppressive" results.

ARGUMENT

I. Background

This action was originally brought by licensed wholesale distributors of alcoholic beverages doing business in Florida and a manufacturer of wine coolers based in California which sold its products to wholesalers in Florida for resale. These Appellees challenged the statutory taxing scheme contained in §§564.06 and 565.12, Fla. Stat. These provisions granted tax exemptions and preferences to alcoholic beverages, produced from agricultural crops which were grown in Florida, regardless of their point of manufacture. These provisions also disallowed tax exemptions and preferences to otherwise eligible beverages under certain circumstances.

Appellees brought this case as a result of the decision of the United States Supreme Court in the case of Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The Bacchus Court struck down as violative of the Commerce Clause a Hawaiian alcoholic beverage excise tax exempting okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and fruit wine manufactured in the State. The Bacchus Court concluded that the exemption had both the purpose and effect of discriminating in favor of locally produced products.

At the time Bacchus was decided, §§564.06 and 565.12, Fla. Stat. (Supp. 1984), granted tax exemptions and preferential treatment to alcoholic beverages made from certain base agricultural crops grown in Florida and manufactured and bottled

in Florida. In response to Bacchus, the Florida Legislature amended those sections by Chs. 85-203 and 85-204, Laws of Fla. The amended provisions, as codified in §§564.06 and 565.12, Fla. Stat. (1985), granted exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane and certain grape species, all of which will grow in Florida, or from by-products or concentrates thereof, no matter where the point of manufacture. The preferences were disallowed under certain enumerated circumstances.

The trial court, following the principles contained in Bacchus, invalidated the amended taxing scheme as unconstitutional. However, the trial court ruled that its judgments were prospective and denied all claims for refund made by the licensed wholesale distributors.

The trial court judgments were appealed, both by the Division of Alcoholic Beverages and Tobacco of the Department of Business Regulation (hereinafter the "DABT") and the licensed wholesale distributors. The DABT appealed that portion of the trial court finding that the subject statutes were unconstitutional, while the licensed wholesale distributors cross-appealed the prospective nature of the judgments and the denial of their claims for refund.

The First District Court of Appeals consolidated the cases and certified them to this Court. This Court accepted jurisdiction under Article V, §3(b)(5), Florida Constitution and found that:

> . . . [t]hat the provisions of [Florida Statutes] 564.06(2), (3) following the term

> "$3.00 per gallon," (4) following the term "3.50 per gallon," (7) and (9) through (13) and [Florida Statutes] 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are . . . unconstitutional on their face.

Division of Alcoholic Beverages v. McKesson Corp., 524 So.2d 1000, 1010 (Fla. 1988), reversed on other grounds, ___U.S.___, 110 S.Ct. 2238 (1990).

This Court also affirmed that portion of the trial court judgments which gave its ruling prospective effect. By sustaining this prospective effect, this Court denied the Appellees' claims for a refund of taxes.

McKesson Corporation (hereinafter referred to as "McKesson") petitioned the United States Supreme Court for a writ of certiorari. The United States Supreme Court granted that petition.[1] That case was consolidated with the case of American Trucking Association, Inc. v. Smith, ___U.S.___, 110 S.Ct. 2323 (1990).

II. The Decision of the United States Supreme Court

In the instant case, the United States Supreme Court took exception to its traditional stand in cases where a state tax scheme has been invalidated on Commerce Clause grounds. Usually, the Court left it up to the state courts to craft appropriate relief in accordance with both federal and state law.[2] The Court held that because an exaction of a tax constitutes a deprivation of property, procedural safeguards against unlawful exactions

---

[1] 488 U.S. 954, 109 St.Ct. 389, 102 L.Ed.2d 378 (1988).

[2] See American Trucking Association, Inc. v. Smith, ___U.S.___, 110 S.Ct. 2323 (1990).

must be provided in order to satisfy due process. Id., 110 S.Ct. at 2250.

The Court set forth in detail the legal analysis which it felt appropriate to determine the extent of Florida's constitutional duty to provide relief to McKesson for its payment of an unlawful tax.

Under that analysis, the Court found that had the liquor tax been declared invalid for reasons other than that it discriminated against interstate commerce, (i.e., that it was beyond the State's power to tax), there would be no choice except to refund the tax previously paid. Id., 110 S.Ct. at 2251.

However, the liquor tax was not invalidated in its entirety. The tax scheme was found unconstitutional only insofar as it operated to discriminate against interstate commerce. The underlying tax was never challenged by McKesson. It is this underlying tax which McKesson had paid and then sought a refund.

The Court stated that it was Florida's duty under the Due Process Clause to provide a "clear and certain remedy." Id., 110 S.Ct. at 2251. The Court went on to say that the State must ensure that the tax, as actually imposed on McKesson and its competitors during the period, does not deprive McKesson of tax monies in a manner that discriminates against interstate commerce. The Court observed that "[i]n order to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce." Id., 110 S.Ct. at 2254, n.27.

The Court noted several alternatives from which the State could choose to cure the impermissible discrimination. Florida could erase the property deprivation itself by providing a full refund of all taxes paid by McKesson for the appropriate period. Id., 110 S.Ct. at 2252. Alternatively, the Court stated that Florida retains the flexibility in responding and may reformulate and enforce the liquor tax, during the period it was contested, in any way that treats McKesson and its competitors in a manner consistent with the Commerce Clause. Id., 110 S.Ct. at 2252.

The following are the methods appropriate to accomplish the second alternative described by the United States Supreme Court:

a. Refund to McKesson the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reduction that its competitors were actually allowed; or

b. Consistent with other constitutional restrictions, assess and collect back taxes from McKesson's competitors who benefited from the rate reductions during the contested tax period. The retroactive tax rate would ". . . create in hindsight a nondiscriminatory scheme;" or

c. A combination of a partial refund and retroactive assessment, so long as the scheme does not discriminate against interstate commerce.

Id., 110 S.Ct. at 2252.

III. The DABT's Proposal

All of the choices are calculated to "create in hindsight a nondiscriminatory scheme." Not all of the choices will satisfy McKesson.

However, the charge from the United States Supreme Court was not to satisfy McKesson, but to correct the discrimination

against interstate commerce. What must be considered is whether the choices satisfied the Constitution and the mandate from the United States Supreme Court.

The DABT proposes, subject to this Court's direction, to assess and collect back taxes from those of McKesson's competitors who benefitted from tax rate reductions during the contested tax period. See Appendix 1, Proposed Emergency Rules. This will "create in hindsight a nondiscriminatory taxing scheme." Id., 110 S.Ct. at 2252.[3] For McKesson to complain of the choice which the State has made is merely self-serving.[4]

The issue which is before this Court is whether this choice is consistent with other constitutional restrictions. The Appellants, without limitations, submit that the choice is consistent with other constitutional restrictions and is the most appropriate method for crafting "in hindsight a nondiscriminatory scheme."

It cannot be doubted that the United States Supreme Court gave this choice serious consideration, because of its

---

[3] Prior to the decision in McKesson by the United States Supreme Court, Florida had certain concerns that to give McKesson a refund would be a windfall and to back assess the licensed distributors who received the exemptions and preferences would be unfair, however, the decision from the United States Supreme Court has erased both concerns.

[4] The revenue from this tax amounts to nearly $250 million for each year in question, with approximately 98 percent coming from sales of beverages not subject to the preferences. This is the third largest source of revenue received by the State. McKesson's refund of the difference between the full tax rate and the preferential rate would be $35,719,648, with an additional amount of outstanding refund claims of $298,020,159. The amount that is owed by the distributors who obtained the invalid exemptions and preferences is $8,199,966.

predetermination of the potential problem of Florida not being able to collect all of the taxes due from certain distributors who may have gone out of business.

In considering this problem, the Court stated:

> Should the State choose this remedial alternative, the State's effort to collect back taxes from previously favored distributors may not be perfectly successful. Some of these distributors, for example, may no longer be in business. But a good-faith effort to administer and enforce such a retroactive assessment likely would constitute adequate relief, to the same extent that a tax scheme would not violate the Commerce Clause merely because tax collectors inadvertently missed a few in-state taxpayers.

Id., 110 S.Ct. at 2252, n. 23.

Florida's choice will suffice to cure the Commerce Clause violation found to have occurred.

The United States Supreme Court has in the area of retroactive legislation which is equally applicable in the instant situation stated that the "readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." 110 S.Ct. at 2252.

Retroactive equalization is both appropriate and permissible. The United States Supreme Court has on numerous occasions made clear in an equal protection context that those, such as McKesson, who did not deny Florida's power to tax but argued that the tax levels unconstitutionally favored another category of taxpayer, are entitled only to ". . . equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of

benefits to the excluded class." Heckler v. Mathews, 465 U.S. 728, 740 (1984).

It is equally clear that retroactive tax increases do not necessarily deny due process to the person whose taxes are increased. Welch v. Henry, 305 U.S. 134, 147, 59 S.Ct. 121, 126, 83 L.Ed. 87 (1938); See, United States v. Hemme, 476 U.S. 558, 106 S.Ct. 2071, 90 L.Ed.2d 538 (1986). Thus the method proposed by the State to equalize burdens is permissible as is more fully discussed infra.

A. The Exemption Provisions Found Invalid Are Severable

The first issue that must be addressed is whether those provisions of §§564.06 and 565.12, Fla. Stat., found unconstitutional are severable from the remainder of the statutes in question. If so, severance would remove the unconstitutional exemptions while keeping the general taxing structure intact. The proposal would thus collect taxes, albeit retroactively, pursuant to the statute's valid remainder.

In National Distributing Company, Inc. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988), this Court addressed the issue of the constitutionality of portions of two statutes (i.e., §§564.06 and 565.12, Fla. Stat. (1981-1984 Supp.). These predated the statutes considered in the instant case. The issue there facing this Court was whether the statutes discriminated against interstate commerce by granting tax exemptions for alcoholic beverages produced from Florida grown products. Citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), and Division of Alcoholic Beverages v.

McKesson, supra, this Court agreed with the trial court's conclusion that certain portions of these two statutes were indeed unconstitutional. National Distributing Company, supra, at 157.

This Court then systematically struck down as violative of the Commerce Clause each tax exemption and tax preference contained in the aforementioned statutes. Id., at 157-158. This Court concluded that the stricken exemptions and preferences were "severable from the statutes in question, since severance would have removed the exemptions improperly provided to in-state manufacturers of alcoholic beverages while keeping the general taxing structure intact." Id., at 158.

The conclusion that the Legislature intended for the preferences and exemptions to be stricken and for the underlying tax to remain, inescapably results from a simple reading of the relevant statutes. In each instance, the preferences and exemptions are couched in terms such that the general tax is not being required to be paid or did not apply. See, §564.06(2),(3), (4), and §565.12(1)(b) and (2)(b), Fla. Stat. (1981-1984 Supp.). These preferences and exemptions were freestanding and properly excised because constitutionally infirm.

In 1985, the Florida Legislature amended §§564.06 and 565.12, Fla. Stat. (Supp. 1984), in response to Bacchus. These statutes, as amended, are the subject of this case. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, supra, at 1002. The amended provisions granted exemptions or tax preferences to wines and distilled spirits manufactured from

citrus, sugar cane or certain grape species, all of which grew in Florida. Id. The new statutory scheme differed from the old in that the preferences and exemptions granted under the old scheme were limited to Florida manufacturers using Florida grown products. The new scheme gave preferences and exemptions to alcoholic beverages manufactured from sugar cane, citrus, and certain grape species, all of which grew in Florida, but none of which grew exclusively in Florida. Id., at 1006.

The structure of the old and new statutory schemes was identical. As with the old scheme, the preferences and exemptions in the new scheme were couched in terms such that the basic tax was not required to be paid or did not apply. See, §564.06(2),(3),(4), and §565.12(1)(b), (2)(b), Fla. Stat. (1985). As with the old scheme, the new clearly evinced the legislative intent that, if constitutionally infirm, the preferences and exemptions should be stricken, thus leaving the underlying tax intact.

Finding that the 1985 preference scheme violated the Commerce Clause, Id., at 1009, this Court affirmed the trial court's judgment that those portions of the statutory scheme providing for an exemption or preference were unconstitutional on their face. Id., at 1010.[5]

---

[5] The Court also affirmed as unconstitutional those portions of the 1985 scheme resulting in "discriminatory legislation in 'response to another State's unreasonable burden on commerce.'" McKesson at 1009 (citation omitted).

Since this Court in McKesson struck the preferences and exemptions but not the underlying tax is conclusively established by the United States Supreme Court which stated that "the Florida courts did not invalidate the Liquor Tax in its entirety; rather, they declared the tax scheme unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce." Id., 110 S.Ct. at 2252. Thus, the preferences and exemptions were excised while the underlying tax remained. Since the State's collections would be pursuant to statute, no argument could be correctly advanced that this Court was imposing a tax.

B. The State May Retroactively Collect Taxes From Those Who Benefitted

In the instant case, the United States Supreme Court stated that:

> Because we do not know whether the State will choose in this case to assess and collect back taxes from previously favored distributors, we need not decide whether this choice would violate due process by unduly interfering with settled expectations.

Id., 110 S.Ct. at 2252, n. 23.

However, the Court's ". . . cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . [t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 729, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984) (citations omitted). The decision in R. A. Gray relied for the formulation of its rule on the decision in Welch v. Henry, 305 U.S. 134 (1938).

In Welch the United States Supreme Court stated that:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.
>
> * * * * * * * * * *
>
> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Id., 305 U.S. at 146,147. See, United States v. Darusmont, 449 U.S. 292, 101 S.Ct. 549, 66 L.Ed.2d 513 (1981).

Since the United States Supreme Court has stated that the Commerce Clause does require retrospective equalization, then the question arises: Is it constitutionally permissible to retrospectively increase the taxes of those who benefitted from the invalid discrimination? The answer to this question is plainly yes. The tax exemptions and preferences were void ab initio.

As this Court stated in State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 743 (1924):

> Where, in adjudicating litigated rights under a statute, it appears beyond all reasonable doubt that the statute is in conflict with some express or implied provision of the Constitution, it is then within the power and duty of the court, in order to give effect to the controlling law, to adjudicate the existence of the conflict between the statute and the organic law, whereupon the

> Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative ab initio, so that the Constitution and not the statute will be applied by the court in determining the litigated rights.
>
> * * * * * * * * * *
>
> If a legislative enactment conflicts with an existing provision of the Constitution, such enactment does not become a law.

Certainly, "[r]ights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the Constitution, not by judicial decisions." Greer, 102 So. at 745.

Yet, it also is clear that ". . . rights acquired under a statute that has not been adjudged valid are subject to be[ing] lost if the statute is adjudged invalid . . ." even though the statute had been generally considered valid. Greer, 102 So. at 745.

Since McKesson initially interprets the subject statutory provisions and since it rendered the exemption and preference portions inoperative ab initio, rights acquired under those portions are subject to being lost. Therefore, the underlying beverage tax remains unpaid by the licensed wholesale distributors, who received invalid exemptions and preferences. It is these taxes which Florida will collect in order that it might provide a clear and certain remedy which in no respect impermissibly discriminates.

> The courts alone are by the organic law empowered to authoritatively declare or to adjudge a statute to be in accord with or in conflict with the Constitution, so that the

> statute, if valid, stands, or, if contrary to organic law, will by the operation of the Constitution be rendered invalid from its enactment . . . The opinions of officials and of attorneys and others that a statute is valid may be persuasive in a judicial determination of the matter, but such opinions, and acts done pursuant to such opinions, do not affect the power and duty of the court to adjudge a statute to be in conflict with organic provisions, when in the judgment of the court there is such conflict; nor do such opinions and acts affect the operation of the dominant force of the Constitution in rendering the statute inoperative ab initio, to the extent that it conflicts with the superior law as judicially determined.

Greer, 102 So. at 743.

Section 565.12(1)(a), Fla. Stat. (1985), established a tax rate of $6.50 per gallon for beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, except for wines. Subsection (b) of this statute states:

> As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus by products, sugarcane, and sugarcane by products, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof, there shall be paid by every manufacturer and distributor a tax at the rate of $4.35 per gallon.

Section 565.12(1)(b), Fla. Stat. (1985). (Emphasis added).

The unconstitutional subsection (b) is void ab initio. Hence, its attempt to render the tax rate in subsection (a) inapplicable to the preferred classes described in subsection (b) is void ab initio. Therefore, the rate set forth in subsection (a) is and has always been applicable to all such alcohol.

The other relevant portions of those statutes addressed by the Florida Supreme Court are worded in the same manner as §565.12(1)(b), Fla. Stat. See, §§565.12(2)(b), 564.06(2), 564.06(3), and 564.06(4), Fla. Stat. (1985). The preference, in each instance, is couched in terms such that the tax does not apply. These preferences being void ab initio, the taxes have always applied.

The well settled principle that statutes are presumptively valid, and may therefore be relied upon, McKesson, 524 So.2d at 1010, tangentially conflicts with the general rule that unconstitutional statutes are void ab initio. In a particular case the strict application of the void ab initio doctrine, especially when it results in a retroactive assessment of a tax increase, may run afoul of due process. See, 110 S.Ct. at 2252, n. 23. While such might result in a particular case, it does not in the instant case.

The United States Supreme Court in McKesson, states:

> Moreover, even were we to assume that the state's reliance on a 'presumptively valid statute' was a relevant consideration to Florida's obligation to provide relief for its unconstitutional deprivation of property, we would disagree with the Florida court's characterization of the Liquor Tax as such a statute. The Liquor Tax reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in Bacchus Imports, Ltd. v. Dias . . . The state can hardly claim surprise at the Florida courts' invalidation of the scheme.

Id., at 2255. See also, American Trucking, supra.

"Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern." American Trucking, 110 S.Ct. at 2333. Since this unconstitutional scheme was not created by the Legislature in a vacuum, this Court may reasonably conclude that the "reliance interests" of the beneficiaries of these unconstitutional preferences similarly "merit little concern." The State merely proposes to equalize the burdens borne by distributors.

This Court had little difficulty in declaring the subject provisions unconstitutional. The invalidity of the 1985 amendment could have been easily foreseen, by the distributors which chose to take advantage of the exemptions and preferences, after the Bacchus decision. They can hardly claim to have been lulled into a sense of reliance upon the invalid provisions. Williams v. Jones, 326 So.2d 425, 437 (Fla. 1976).

These amendments reflected "only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in Bacchus." 110 S.Ct. at 2255.

Likewise the argument that these distributors had settled expectations, based upon the amendments, has a hollow ring.[6] Nor is this a case of the statute having received a given construction by a court of supreme jurisdiction and certain rights having "been acquired under and in accordance with such construction," and subsequently overruled which was dealt with in

---

[6] It goes without question that businesses with a substantial financial presence with a state often will employ lobbyists to speak for them on matters before the Legislature.

the case of Department of Revenue v. Anderson, 389 So.2d 1034, 1037 (Fla. 1st DCA 1980). The first decision in this State invalidated the subject provisions based upon the Bacchus case, which had predated the amendments in 1985.

This retrospective tax increase does not, by its nature, deny due process to the persons whose taxes are increased. See, City of Key West v. R.L.J.S. Corporation, 537 So.2d 641 (Fla. 3d DCA 1989); Williams v. Jones, supra. Additionally, there is no state constitutional provision specifically prohibiting this retroactive increase of tax liability.[7]

The distributors who claimed the exemptions and preferences, likewise, cannot be heard to claim the loss of a "vested right" to the preferred rate of taxation. Nor can they claim that the alteration of a preferred rate violates their rights to due process. See, City of Key West, supra; U.S. v. Darusmont, supra. No one has a vested right to a particular rate of taxation. City of Key West, supra; Cohan v. Commissioner of Internal Revenue, 39 F.2d 540 (2nd Cir. 1930).

Finally, in this case, the State's proposed equalization will not work "harsh and oppressive" results. The measure of the occurrence of such results is the knowledge on the part of the distributors who sought and obtained the exemptions and preferences. These distributors, like Florida, "can hardly claim surprise at the Florida courts invalidation of the Liquor Tax scheme." Id., 110 S.Ct. at 2255. The scheme "reflected only

---

[7] Such an increase does not fall within the prohibition against ex post facto laws. See, Seaboard System R.R., Inc. v. Clements, 467 So.2d 348 (Fla. 3d DCA 1985).

cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in Bacchus Imports, Ltd. v. Dias. 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984)." Id., 110 S.Ct. at 2255. Just as with Florida, this knowledge prevents resort to arguments against equalization which have as their basis economic considerations.

Florida is not the first state to face the issue of providing an appropriate remedy for a Commerce Clause violation, when the taxing authority had imposed a lower tax rate, or gave preferential treatment to, alcoholic beverages distilled from agricultural products grown in the state. The State of Minnesota recently faced the same scenario in the case of Johnson Brothers Wholesale Liquor Co. v. Commissioner of Revenue, 402 N.W.2d 791 (Minn. 1987).

Like Florida, Minnesota imposed an excise tax on wine for decades. In 1980, Minnesota passed a statute that set lower excise taxes on wine manufactured from Minnesota grown grapes in an attempt to foster its budding wine industry, which at the time consisted of two wineries. For five years, from 1980 to 1984, sales of Minnesota farm wines were a miniscule part of the total taxable wine sales. In 1985, in response to the Bacchus decision, the Minnesota Legislature repealed the statute.

In 1984, the taxpayers filed a claim for a refund for the taxes paid from July 1980 through December 1983. From December of 1984 through July of 1985, the taxpayers paid the excise taxes on all their wine sales as though the preferential tax rate statute applied. The Commissioner of Revenue issued an order

assessing additional taxes. The taxpayers appealed that order and sought a refund claim in the tax court.

The tax court held the statute unconstitutional and invalid. It denied the taxpayers claim for a refund and affirmed the Commissioner's assessment of excise taxes that had been withheld. The taxpayers petitioned the Minnesota Supreme Court for a writ of certiorari to review the decision of the tax court.

The Minnesota Supreme Court affirmed. The Court found the statute was unconstitutional under Bacchus. The Court then determined the appropriate remedy, stating:

> The harm caused by a discriminatory tax on interstate commerce is that it puts such commerce at a competitive disadvantage relative to local commerce. Logically, the disadvantage suffered by relators could have been corrected either by extending the lower rates of section 340.436 to all wine producers or by severing the statute form the chapter and thus raising taxes for merchants of Minnesota wine.
>
> * * * * * * * * * *
>
> When a statutory scheme has been declared unconstitutional, our primary goal in determining a remedy is, insofar as possible, to effectuate the intent of the legislature had it known the statutes were invalid. See, Archer Daniels Midland Co. v. State, 315 N.W.2d 597, 600 (Minn. 1982). Here, the original tax on wine, adopted in 1984 and in effect for 46 years, was uniform on all growers and distributors. It was and is a major contributor of revenue to the state. The 1980 act was an amendment only to the general act--an exception to its provisions. It would obviously have been the legislature's intent that the general act still prevail if the 1980 amendment were invalid. Further evidence of the Minnesota Legislature's intent was its decision to repeal the 1980 amendment in the first session held after the U.S. Supreme Court decided Bacchus, thus restoring taxes on Minnesota's wineries to their former levels.

> The refund requested by relators would be incommensurate with the harm they suffered. The effect of Minn.Stat. §340.436 on relators' wine sales was minimal. Sales from Minnesota wineries constitute less than on-half of one percent of total Minnesota wine sales. The Commissioner of Revenue's action in retroactively assessing Minnesota's farm wineries for nearly all the taxes they should have paid is adequate to negate whatever miniscule amount of injury [was] suffered by relators. All future harm has already been forestalled by the legislative repeal[8] . . .

Johnson Brothers, 402 N.W.2d at 793.

The prior decision of this Court was prospective in nature. 524 So.2d at 1010. The decision of this Court would not have allowed the DABT to collect the underlying taxes from those distributors which claimed the tax exemptions or preferences. However, the DABT is now in the position to collect the underlying taxes from those distributors that claimed tax exemptions or preferences, since the unconstitutionality of the subject provisions is now retroactive to the date of the enactment of those exemptions and preferences. Greer, supra.

Florida, like Minnesota, now proposes to collect the tax revenues for the period 1985-1988. Such is appropriate, permissible and not unreasonable.[9]

---

[8] In Ch. 88-308, §§9-11, Laws of Fla., the Legislature amended §§564.06 and 565.12, Fla. Stat., which was subsequently found unconstitutional in Ivey v. Bacardi Imports, Co., Inc., 541 So.2d 1129 (Fla. 1989).

[9] See, §95.091, Fla. Stat., which limits the Department of Revenue to assessing taxes for a period of five years, plus two years for a total of seven years.

CONCLUSION

WHEREFORE, the Appellants respectfully request this Court to enter an order conforming to the mandate of the United States Supreme Court and affirming the action proposed by the Appellants.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Joseph C. Mellichamp, III
Senior Assistant Attorney General
Fla. Bar #133249
Department of Legal Affairs
The Capitol-Tax Section
Tallahassee, FL 32399-1050
(904) 487-2142

Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **DAVID C. ROBERTSON** and **NEAL S. BERINHOLT**, 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, FL 33601; **M. STEPHEN TURNER**, Esq., 820 East Park Avenue, Tallahassee, FL 32301; **BARRY R. DAVIDSON**, Esq., Steel, Hector & Davis, 4000 Southeast Financial Center, 200 South Biscayne Blvd., Miami, FL 33131-2398; **HAROLD F.X. PURNELL**, Esq., Oertel & Hoffman, P.A., Post Office Box 65079, Tallahassee, FL 32314-6507; **BRUCE ROGOW**, Esq., 2097 S.W. 27th Terrace, Ft. Lauderdale, FL 33312; **HOWELL L. FERGUSON**, Esq., Post Office Box 150, Tallahassee, FL 32302; **JOHN AURELL**, Esq., Aurell, Fons, Radey & Hinkle, Suite 1000, 101 North Monroe Street, Tallahassee, FL 32301; **JACK M. COE**, Esq., 1130 Washington Avenue, Room 206, Miami Beach, FL 33139; **GARY R. RUTLEDGE**, **MARGUERITE H. DAVIS**, and **PAUL R. EZATOFF, JR.**, Esqs., Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., 215 South Monroe Street, Suite 400, Tallahassee, FL 32301; this 31st day of August, 1990.

Joseph C. Mellichamp, III
Senior Assistant Attorney General