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-Appellants.
_____/

APPELLANTS' REPLY BRIEF ON REMAND

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PRELIMINARY STATEMENT

The Amici Curiae Briefs, that have been filed by House of Midulla, Inc., National Distributing Co., Inc., and Orlando Holding, Inc., will be referred to as "Amici" collectively or individually as "Midulla", "National Distributors", or "Orlando Holding".

STATEMENT OF THE CASE AND FACTS

DABT adopts the statement of the case and facts as set out in its Initial Brief on Remand.

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.

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 remedy the Commerce Clause violation. All of the choices are calculated to "create in hindsight a nondiscriminatory scheme." Not all of the choices determined to be available by the Court are deemed satisfactory by McKesson. Specifically, McKesson objects to any remedy which does not entitle it to a refund of taxes paid.

However, Florida has proposed, 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. This will fully remedy the injury suffered by McKesson by virtue of the violation to its rights found to have occurred under the Commerce Clause.

Clearly, the United States Supreme Court did not mandate that Florida provide a refund as the sole mechanism by which it could remedy the violation of McKesson's Commerce Clause interests. Therefore, so long as the remedy actually afforded cures the illegality under the Commerce Clause, McKesson, frankly, has not more to say about the matter. Selection of a particular remedy from among the choices made available does not affect McKesson's legal, as opposed to its economic, interests.

To the extent the issue which is before this Court is whether the state's choice of remedy is consistent with the constitutional rights of others, McKesson has no voice in the matter. The Appellants will show that their choice is consistent with other constitutional restrictions and that it 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 advanced by Appellants its imprimatur. That Court went so far as to recognize the possibility that Florida would not being able to collect tax from every distributor which took advantage of the preference. Acknowledging this fact, that Court found that such perfection was unnecessary. The Court's statements in this regard, with full knowledge of the history and circumstances surrounding this case, make it safe to say that the retroactive equalization which Appellants propose is both appropriate and permissible. It clear that the Court has held

this remedy out to the Appellants as being available. Thus the method proposed by the State to equalize burdens is permissible as against any claim by McKesson to the contrary.

The remedy which Appellants propose is permissible as against the claims of the Amici as well. The provisions of §§564.06 and 565.12, Fla. Stat., found unconstitutional are severable from the remainder of the statutes in question. Severance removes the aspect of the legislative scheme found unconstitutional while keeping the general tax intact. Appellants' proposal would collect tax, albeit retroactively, pursuant to the statute's valid remainder.

This does not violate due process rights by unduly interfering with settled expectations. As a general proposition, it is constitutionally permissible to retrospectively tax those who benefitted from the discriminatory preferences. The law is that the unconstitutional exemptions and preferences were void ab initio. Any reliance which the special interests benefitting from the unconstitutional preferences placed thereon merits less concern where the state merely proposes to equalize the burdens borne by all distributors. This is all the more true where the special interest were challenging identical provision in the prior enactment, while making the business decision to deal in preferred products.

McKesson challenged the constitutionality of the exemption and preference provisions. Thus, McKesson cannot now be heard to claim that it acquired any rights thereunder. McKesson is responsible for the loss of the preference by those on whom tax would now be imposed. Therefore, that McKesson would now champion the rights of those who took advantage of the

preferences is a dissembling argument at best. The state proposes to collect tax in order that it might provide McKesson with a clear and certain remedy which in no respect impermissibly discriminates. In this particular case McKesson's argument that the proposal injures others is disingenuous and is a pretense.

The distributors who voluntarily sought exemption and preference should not be heard to claim the loss of a "vested right" to a preferred rate of taxation ultimately determined to be unconstitutional. Certainly, no one has a "vested right" to the continuance of a preferential rate of taxation which discriminates against interstate commerce in violation of the Commerce Clause. One might reasonably ask just when such a "right" might vest.

The Appellants do not propose to retroactively tax these distributors apart from affording McKesson a remedy as required by the United States Supreme Court. As the state acts in pursuance of the findings of the judiciary, it does not infringe upon vested rights. Nor does the severance of the preferential rates violate their right to due process as that right has heretofor been construed. Finally, in this case, the State's proposed method of equalization will not work "harsh and oppressive" results. It will effectuate the constitutionally mandated remedy in what, on balance, is the most appropriate and fair means available under the circumstances.

ARGUMENT

III. THE DABT'S PROPOSAL [REPLY TO MCKESSON'S AND AMICI VARIOUS POINTS AND SUBPOINTS][1]

[1] McKesson and the Amicus do not dispute or contradict DABT's points I and II dealing with the background of this case and the

McKesson's and the Amici Answer Briefs are more informative for what they do not say than for what they do say.

A. NOTICE

In the various Answer briefs the distributors argue that they could not have foreseen that the provisions of §§564.06 and 565.12, Fla. Stat., were unconstitutional. Indeed, none of these parties inform this Court that during the time McKesson was challenging the 1985 Amendments to §§564.06 and 565.12, Fla. Stat., all three of the Amici were challenging the parallel and virtually identical exemptions and preferences contained in §§564.06 and 565.12, Fla. Stat., (1981-1984 Supp.).[2] See, National Distributing Co., Inc. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988). Thus, their argument on this point is misleading at best. The challenges to both the prior and amended statutes were based on the case Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

All three of the Amici voluntarily chose to take advantage of the exemptions and preferences contained in §§564.06 and 565.12, Fla. Stat., (1985) at the same time they were challenging the exemptions and preferences contained in §§564.06 and 565.12, Fla. Stat., (1981-1984 Supp.). They made the purely business decision to deal in the exempt products with an obvious knowledge

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decision of the United States Supreme Court except McKesson has unsuccessfully attempted to cast a different light on the three alternatives provided by the United States Supreme Court, and thus DABT stands by its position in its Initial Brief on Remand and those points will not be covered in this Reply Brief.

[2] The 1985 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 Imports Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984)"; McKesson, 110 S.Ct. at 2255.

of the risks associated with that decision.[3] There were no statutory provisions which mandated that they deal in the exempt products.[4] Nevertheless, they choose to embark on a course to avail themselves of a preference which, given their litigation posture, they reasonably believed to be unconstitutional.

The other aspect of the "notice" issue which McKesson and the Amici refuse to discuss is this Court's decision in State ex rel. Nuveen v. Greer, 88 Fla. 294, 102 So. 739 (1924). Their collective silence regarding the principles set forth therein and their application to the instant case is deafening.

Neither McKesson nor the Amici discussed, distinguished, or otherwise comment on Greer. Why? Because the principles in Greer address and answer all of the questions concerning retroactivity, vested rights, notice, due process, estoppel, and the contract issue against McKesson and the Amici, and support the DABT's proposal.

B. RETROACTIVE ASSESSMENT

This inattention results in McKesson incorrectly characterizing the DABT proposal as "retroactive taxation by administrative fiat" (McKesson Answer Brief, p. 9), and that it "preempts the Legislature's exclusive authority under Florida law

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[3] As to the profitability of the Amici business, such is strictly a result of their business decisions and dealings with the exempt products and thus should not be a concern of this Court.

[4] In opposing the DABT's proposal McKesson states that the Amici, being distributors of the exempt products, had no reason to believe the statutory provisions in question were unconstitutional. McKesson's Answer Brief, pgs. 30-31. Such a comment is vacuous. The Amici were challenging as unconstitutional virtually identical provisions which they now claim they had no idea were unconstitutional.

to impose state taxes" (McKesson Answer Brief, p. 9).[5] McKesson arrives at this misconception by refusing to recognize the legal principles set forth in Greer.

The underlying Beverage Tax which DABT proposes to collect has always been in place and McKesson has never challenged the State's ability to impose and collect that tax. Only the exemptions and preferences were challenged. These provisions were found unconstitutional and severed by this Court from the underlying tax. The issue then became whether the effect of the severances was to be prospective, which is the exception to the rule, or retroactive, which is the general rule when a statute is found to be unconstitutional. This Court originally found severance should be prospective. The United States Supreme Court reversed.

It is at this point that the principles announced in Greer become integral to any analysis of the remedy to be fashioned. McKesson and the Amici have chosen instead to strike out on their own, citing legal principles which have no application to the issue before this Court.[6]

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[5] Appellants would suggest as an aside to this Court that DABT has grave reservations with respect to McKesson's standing to argue the constitutional rights of others. The U.S. Supreme Court suggested three methods to remedy violation of McKesson's rights under the Commerce Clause. DABT has adopted one of the U.S. Supreme Court's suggestions, viz; retroactive tax assessment on the distributors who benefited from the discriminatory scheme. Advancing the constitutional rights of its competitors is mere pretense. So long as its Commerce Clause rights are secured. McKesson has no standing to complain about the particular method adopted to level the field. It may only complain if the field remains uneven.

[6] McKesson and Amici cite numerous cases which are either inapposite, inappropriate, or not contrary to the position of DABT. It is because of this that each of these cases will not be specifically addressed in this brief. Nevertheless, all of the positions espoused by McKesson and Amici will be answered.

The United States Supreme Court has never actually prohibited retroactive taxing statutes. Similarly, no federal court of appeal has yet adopted an absolute temporal limitation on retroactivity.

The decision of Welch v. Henry, 305 U.S. 134 (1938) delineated some flexible criteria to consider when dealing in this area. The Court stated:

> 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.

Among the factors to be considered in the assessment of whether a retroactive statute is harsh and oppressive in application is whether it abrogates "vested rights".[7] Canisius College v. United States, 799 F.2d 18, 25 (2nd Cir. 1986) cert. denied, 481 U.S. 1014 (1987).

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).

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[7] Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1922) relied upon by the Amici is not to the contrary. The distributors in the instant case, unlike the plaintiff in Forbes, have no final judgment establishing such a right, nor do they have any other basis for claiming a vested right in either not paying the tax or to the refund they claim. Greer, 102 So. at 745.

The distributors who dealt in exempt products have no vested rights impaired by the retroactive, back assessment of the tax question.

The question is, "whether the taxpayer relied on prior law so that had he been able to foresee enactment of the legislation he would have acted to avoid the tax." Canisius, 799 F.2d at 26.

McKesson and the Amici brought parallel suits against the exemptions and preferences involved in this case. McKesson challenged the 1985 version. The Amici challenged the 1981-1984 version. During the time the Amici were challenging the 1981-1984 version as unconstitutional under Bacchus, they voluntarily sought the business advantage of "virtually identical" exemptions and preferences under the 1985 enactment.

The Amici and McKesson, on behalf of all of the distributors who dealt in the exempt products, do not claim that they did not foresee the ultimate fate of the preferences in question. In other words, they anticipated that a court would find them unconstitutional. Instead they argue that they did not foresee the ultimate imposition of tax which they sought to avoid by dealing in the preferred products, once the preferences had been declared unconstitutional.

The reason for this feigned lack of foresight is not that the principles set forth by DABT are new or unique, for they have always been in the body of law. It is that the distributors were of a single mind, and could only see the possibility of enormous refunds if successful in their respective challenges to the exemption provisions and, alternatively, their reaping the benefits by dealing in exempt products while their lawsuits were pending. After getting the decision they sought, i.e., to have

the decision declaring the exemptions unconstitutional made retroactive and not prospective, they now argue against the consequence of their actions.

Here, the principles that underlie DABT's proposal are based upon long standing judicial decisions. There is nothing in this case that suggest the distributors relied on the assumption of the continued constitutional validity of the specific provisions except while it suited their respective business purposes.[8]

DABT submits that the consequences of the retroactive application of the taxes in question on the distributors who dealt in the exempt products are free of the elements of novelty and surprise.[9]

One other criteria which the courts have looked to is the length of the period affected, as an additional factor to be considered in the determination of whether the retroactive legislation is unduly harsh and oppressive in application. Considering the absence of either vested interests or taxpayer reliance, the five-year period is not unduly harsh and oppressive. This is the period given the Department of Revenue to issue back assessments See, §95.091. Fla. Stat. (1989).[10]

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[8] McKesson and the Amici attempt to say they were mislead by the DABT when, during the various challenges, DABT continued to administer the exemption provisions. They, however, have forgotten the doctrine of separation of powers and that DABT was merely administering a statute they had no authority to otherwise ignore or question. Barr v. Watts, 70 So.2d 347 (Fla. 1953); Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982).

[9] DABT, in its proposed emergency rules, affords each previously favored distributor an opportunity to be heard should it contest the DABT's calculated special tax liability. The opportunity afforded is an extremely meaningful one, viz., a chapter 120 hearing.

[10] DABT knows the exact amount each distributor owes because DABT has preserved in its archives each and every monthly report

Additionally, DABT could not have assessed these taxes until the United States Supreme Court rendered its decision, because this Court had originally made its decision prospective. Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000, 1010 (Fla. 1988).

As did McKesson in its brief, Midulla, at page 13, makes much of certain statements in DABT's brief to the U.S. Supreme Court that retroactive taxation would create inequity and would be harsh and oppressive. Both Midulla and McKesson opine that the DABT has vacillated on this question. Up to now, the only opinion that matters is that of the United States Supreme Court. The United States Supreme Court without question has authorized the State to: "consistent with other constitutional restrictions. . .assess and collect back taxes from petitioner's competitors who benefited from the rate reductions. . ." McKesson 110 S.Ct. at 2252. It seems that the Court did not share the reservations expressed by both DABT and McKesson. Accordingly, DABT, quite properly, has reassessed its position in light of the decision above.

C. ESTOPPEL

Midulla submits to this Court that its present position is "legally indistinguishable" from that of the taxpayer in George W. Davis and Sons, Inc., v. Askew, 343 So.2d 1329 (Fla. 1st DCA 1977). Midulla's Brief at p. 7. This simply is not true.

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submitted by each distributor from July 1, 1985 through June 30, 1988. DABT's computation of the tax owed is based exclusively on the records submitted to DABT by the distributors. Should there be any dispute with respect to the calculation, that dispute may be referred to a DOAH hearing officer. Such a dispute seems unlikely since it would ipso facto involve the distributor questioning his own records.

In Davis, the First District Court of Appeals held that the Department of Revenue was estopped from back assessing and collecting an admissions tax, pursuant to Ch. 212, Fla. Stat., during the interim period between a decision it rendered in Straughn v. Kelly Boat Services, Inc., 210 So.2d 266 (Fla. 1st DCA 1968) and its subsequent decision in Department of Revenue v. Pelican Ship Corp., 257 So.2d 56 (Fla. 1st DCA 1972). Both Kelly and Pelican hinged on the validity of the admissions tax as it applied to deep sea fishing operations. In Kelly the First District held the tax inapplicable, whereas in Pelican it held the tax applicable.

The only question which arose in Kelly was did the admission tax apply to deep sea fishing operations? The District Court found that it did not. Because of this decision the Department of Revenue, during the period 1968 until 1972, took the position that the admissions tax did not apply to this particular industry. In 1972, the First District revisited this very question in Pelican. In Pelican the First District concluded that the admissions tax did apply to this industry and receded from its prior holding in Kelly.

It was at this point that the Department of Revenue sought to back assess (retroactively) the boat owners for the period 1968-1972. The Court in Davis stated that under the set of facts in that case, the Department of Revenue was not allowed to retroactively assess tax for the period between judicial decisions. This is in accordance with the Greer decision. Greer, 102 So. at 745.

However, this is not the situation before the Court today. In the instant case, the first decision concerning the validity

of §§564.06 and 565.12, Fla. Stat. (1985) struck the provisions as being unconstitutional.

Since this Court in McKesson initially interpreted the subject statutory provisions and since its decision the exemption and preference portions inoperative ab initio, rights acquired under those portions are subject to being lost. Greer, 102 So. at 745. 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 the clear and certain remedy mandated by the United States Supreme Court which in no respect impermissibly discriminates.[11] Estoppel does not apply in this case.

D. CONTRACT IMPAIRMENT

McKesson and the Amici argue that DABT's proposal would violate both the United States and Florida Constitutions' Contract Clause. Their argument is based on the contention that the proposal is subsequent legislation which is retroactive and diminishes the value of the various contracts that they allege existed between the distributors and retailers.

However, this contention is baseless on several grounds. First, DABT's proposal is based upon a judicial decision mandating that a remedy be allowed, not on a subsequent legislative enactment. Secondly, all persons, which include the distributors in this case, are held to notice that all statutes are subject to all express and implied applicable provisions of

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[11] It must be remembered that Midulla, like all other distributors, is not a tax collector for DABT, it is the taxpayer. §561.506, Fla. Stat. (1989).

the Constitution, and also, that should a conflict between a statute and any express or implied provision of the Constitution be duly adjudged, the Constitution by its own superior force and authority would render the statute invalid from its enactment. Finally, the courts have no power to control the effect of the Constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the Constitution. Greer, at 745.[12]

The most important point to be made is that the federal and state organic prohibitions against "impairing the obligation of contracts" relates to legislative action not to judicial decisions which is the issue in the instant case is dealing with, not retroactive legislation. Greer, at 747.[13] See also, Daytona Beach Racing and Recreational Facilities District v. Volusia County, 372 So.2d 419, 420 (Fla. 1979); Straughn v. Camp, 293 So.2d 689, 694 (Fla. 1974).

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[12] Florida Beverage Corp. v. Division of Alcoholic Beverage, 503 So.2d 396 (Fla. 1st DCA 1987) has no application to the instant case. Florida Beverage involved the effect of the subsequent repeal by the Legislature of a statutory provision, which had been in effect at the time the private parties had entered into a contract. See 10 Fla. Jur. 2d, Constitutional Law §§307-320. However, the instant case doesn't involves an act of the Legislature. See footnote 13 infra.

[13] Morton v. Zuckerman-Vernon Corp., 290 So.2d 141 (Fla. 3rd DCA 1974) and Sepielli v. Wilson P. Abraham Const. Corp., 313 So.2d 122 (Fla. 3rd DCA 1975), relied upon by Amici are not to the contrary. In those cases, one of the parties to the contract attempted to use the judicial process to relieve that party from the obligation of the contract. Neither case involved the initial invalidity on a statute and the effect of invalidity on a private contractual obligation. Following the other principles in Greer such initial invalidity would not effect or impair the obligations of contracts of private persons.

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.

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 5th day of October, 1990.

Respectfully submitted,

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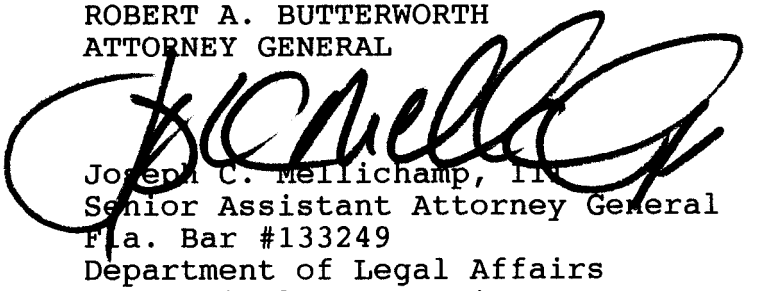

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