IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA



IN RE: ADVISORY OPINION OF
THE GOVERNOR'S REQUEST OF
MAY 12, 1987

CASE NO. 70,533

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# BRIEF OF FISERV TAMPA, INC. CHALLENGING THE CONSTITUTIONALITY OF EXEMPTION 35

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## STATEMENT OF THE CASE AND FACTS

FIserv Tampa, Inc. is a Florida corporation which provides data processing services primarily for savings and loan associations in the State of Florida.[1] There are only two major corporations which provide such data processing services to savings and loan associations in Florida. The other organization is Florida Informanagement Services, Inc. (hereinafter FIS).

Section 3 of Chapter 87-6, Laws of Florida, creates a narrow exemption to the new sales tax concerning data processing services. This exemption will be codified as Section 212.0592(35), Florida Statutes (1987). Exemption 35 is carefully tailored to provide a sales tax exemption for FIS while taxing FIserv Tampa for identical data processing services. Thus, FIserv Tampa focuses its challenge in this brief upon the FIS Exemption.

This Court has exercised its discretionary jurisdiction to accept review of the Governor's request for an advisory opinion pursuant to Article IV, §1(c), Florida Constitution. In Re: Advisory Opinion of the Governor's Request of May 12, 1987,

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[1] FIserv Tampa, Inc. will be referred to throughout this brief as "FIserv Tampa." FIserv Tampa is a wholly owned subsidiary of FIserv, Inc. That entity will be referred to as "FIserv."

In order to provide this Court with a limited amount of information concerning FIserv-Tampa and its only major competitor, Florida Informanagement Services, Inc. (hereinafter FIS) this brief contains an appendix providing the annual reports of each organization as well as a recent report on the major data processing services for savings institutions.

___ So.2d ___ (Fla. 1987) [12 FLW 240, 5/15/87]. The question presented by the Governor broadly requests this Court to review numerous constitutional challenges to Chapter 87-6, Laws of Florida. While FIserv Tampa appreciates the Governor's concern, FIserv is equally concerned that this procedure may be inadequate to provide a broad resolution of the numerous constitutional challenges to the various provisions of Chapter 87-6, Laws of Florida.

Typically a challenge to a tax involves the filing of a standard lawsuit in which evidence is presented. Following a consideration of the evidence, the lower court enters findings of fact and conclusions of law which are then appealable to the district courts of appeal and this Court. See, e.g., Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, Case No. 70,368.

In this case, there has been no opportunity to provide evidence in any lower judicial body. Although FIserv believes that Exemption 35 is facially unconstitutional, it also believes that Exemption 35 is unconstitutional in its application. FIserv Tampa questions whether the procedure contemplated in Article IV, §1(c), Florida Constitution is adequate to allow for the resolution of questions of fact as well as questions of law.

Fortunately, the opinion of this Court in this case will not create binding judicial precedent. Instead, it will merely be persuasive authority. Lee v. Dowda, 155 Fla. 68, 19 So.2d 570 (Fla. 1944); Ready v. Safeway Rock Co., 157 Fla. 27, 24

So.2d 808 (Fla. 1946). Interestingly, the Constitution provides that the justices of this Court provide their individual opinions to the Governor. An advisory opinion is not actually the opinion of the Supreme Court of Florida. Collins v. Horten, 111 So.2d 746 (Fla. 1st DCA 1959). Because this is an advisory opinion, FIserv Tampa is providing information in its statement of facts which it believes to be accurate but which is obviously not contained in any underlying record.

Exemption 35 provides tax relief concerning:

> Data processing services performed for a financial institution by a service corporation of a financial institution described in SIC Major Group 61, provided:
>
> (a) The service corporation is organized pursuant to s. 545.74, Rules of the Federal Home Loan Bank Board;
>
> (b) All capital stock of the service corporation may be purchased by only savings and loan associations having operations in this state;
>
> (c) No savings and loan association or savings bank owns, or may own, more than 10 percent of such service corporation's outstanding capital stock;
>
> (d) Every eligible savings and loan association or savings bank may own an equal amount of capital stock or may, on such uniform basis as the service corporation may determine, own an amount of such stock equal to a stated percentage of its assets or savings capital at the time the

> stock is purchased, or an amount of such stock equal to its pro-rata share of accounts serviced.[2]

This exemption is clearly tailored to contain a number of peculiar restrictions. Those restrictions provide tax relief to FIS but not to its major competitor FIserv Tampa.

First, Exemption 35 only applies to data processing services performed by a service corporation "of a financial institution described in SIC Major Group 61". "SIC" is defined in Chapter 87-6, Laws of Florida to mean those classifications contained in the Standard Industrial Classification Manual, 1972, as published by the Office of Management and Budget, Executive Office of the President, and as amended in the 1977 Supplement. Section 212.02(24), Florida Statutes (1987). Major Group 61 describes a group of credit agencies other than banks. These institutions are primarily federal and state savings and loan associations (S&Ls) and credit unions. (A. 63-64)

The Legislature did not provide an exemption for service corporations owned by Major Group 60 which includes banking. (A. 59-62) Thus, a data processing service which is owned by a typical bank cannot provide tax exempt data processing services to either a bank or an S&L. If banks and other financial institutions wish to have tax free data processing, the data processing will need to be done by FIS or a comparable organization operated by Florida S&Ls.

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[2] Presumably, the Legislature intends the exemption to apply only when all four subsections have been fulfilled. There is, however, no conjunction between subsection (c) and subsection (d).

Secondly, Exemption 35 requires that the service corporation be created pursuant to s. 545.74, Rules of the Federal Home Loan Bank Board. Those federal regulations are contained in the appendix. (A. 66-71) FIserv Tampa is a data service corporation but it is not organized pursuant to the Rules of the Federal Home Loan Bank Board. The only significant data processing service corporation operating in the State of Florida which is such a service corporation is FIserv's single major competitor, FIS.

Thirdly, Exemption 35 requires the stock of the service corporation to be available for purchase only by S&L operations in the State of Florida. FIserv Tampa is a wholly-owned subsidiary of FIserv. FIserv is a publicly held corporation whose stock is traded over the counter. (A. 28-49) FIS repurchased its common stock from non-users and, thus, it is the only known organization providing data processing service in the State of Florida which falls within this provision. (A. 19)

Interestingly, this provision does not require that the service corporation provide services only to the S&Ls which own capital stock. Both FIserv and FIS provide data processing services to S&Ls which are not stockholders. Indeed, both organizations service S&Ls outside the State of Florida and specifically in Georgia. In this modern era of regional banking, even if other S&Ls created a new organization to compete with

FIS, the new organization would not be tax exempt if a single stockholder were a savings and loan association in Georgia or another state.

Although Exemption 35 requires the data processing service to be owned by Florida S&Ls, the exemption applies to data processing services performed for "a financial institution". Thus, FIS is entitled to provide tax free data processing not only for S&Ls but also for typical banks. The regulations of the Federal Home Loan Bank Board allow FIS to provide data processing services to other persons so long as those services are less than one half of the data processing services provided. 12 CFR §545.138 (1986). Since typical banks are in SIC Major Group 60 rather than SIC Major Group 61, they cannot provide tax exempt data processing services to themselves. FIS has been given a preferential competitive position not only in the data processing market for S&Ls but for other financial institutions as well.

Historically, FIserv Tampa was a wholly-owned subsidiary of Freedom Federal Savings and Loan Association until January, 1984. Thus, FIserv could have passed this test at an earlier time.

Finally, Exemption 35 requires that no savings and loan association own more than 10% of the service corporation's stock. Thus, even if FIserv were still a wholly-owned subsidiary of a single Florida savings and loan association, it would no longer receive a sales tax exemption. FIS, of course, fulfills this requirement. In the future, if any data processing service

organization wishes to enter the market to compete with FIS, the new organization will need the cooperation of at least ten Florida savings and loan associations. The new act contains no rational explanation for this provision. It appears to simply limit future possible competitors of FIS.

The business of providing data processing services to financial institutions is a rather specific business which is provided by a small number of competitors. (A. 51-57) FIS is the only known competitor in this business which will receive the benefit of Exemption 35. FIS is a large Florida corporation with its headquarters in Orlando, Florida. (A. 4) It provides services virtually identical to FIserv. In 1985, FIS had revenues relating to data processing services in the amount of $26,085,442.00. (A. 19) Although a portion of those revenues undoubtedly relate to services provided in other states, 5% of these revenues exceeds $1,300,000.00. In 1984, FIS had a net income of $1,456,914.00. In 1985 its income was $216,766.00. (A. 19) Thus, its net income in 1985 was less than 5% of its gross revenues. Its net income in 1984 barely exceeded 5% of its gross revenues. (A. 19) FIS served 94 savings institutions according to a 1986 report. (A. 54) Its sales of $26,000,000.00 made it the eighth largest provider of such data processing services in the United States. (A. 55)

FIserv Tampa is a wholly-owned subsidiary of FIserv, Inc. FIserv Tampa is a Florida corporation with its headquarters in Tampa, Florida. The parent corporation is a Delaware corporation with its headquarters in Milwaukee, Wisconsin.

FIserv Tampa has gross revenues from data processing in the approximate amount of $9,000,000.00. Of this amount, approximately 6.3 million relates to services in Florida. It employs 135 people at its Tampa headquarters. FIserv Tampa provides data processing services to approximately 60 financial institutions. Forty-five of those institutions are S&Ls in Florida.

There are approximately 150 savings and loan associations in Florida. Some of those S&Ls provide data processing services through in-house facilities.[3] Thus, the above-described market shares make FIS and FIserv Tampa the only two significant competitors providing data processing services to the savings and loan industry in Florida.

FIserv, on a national level (including FIserv Tampa and operations in other states), is one of the largest providers of such data processing services. (A. 53-55) In 1986, its total revenues exceeded $70,000,000.00 and its net income was approximately $5,500,000.00. (A. 28) Thus, its net income was less than 8% of its gross revenues. From the financial information provided in the annual reports of the two

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[3] The in-house facilities should be exempt under the new sales tax. Section 212.0592(2) & (5), Florida Statutes (1987).

corporations, it is obvious that a 5% tax upon gross revenues which applies to FIserv Tampa but not to FIS will have a major impact upon profitability and competition.

In the introduction to Chapter 87-6, Laws of Florida, the Legislature stated that:

> "It is the intent of this Legislature to make the sales tax on services fair and equitable by reinstating the sales tax exemptions to essential services . . . ."

In the case of data processing services, the Legislature has actually reinstated the tax upon one competitor while yielding to the lobbying efforts of the other competitor to create an exemption for only one of the two competitors. Thus, for whatever reason, the Legislature has decided that the data processing services provided by FIS are non-taxable "essential services" while deciding that identical services provided by FIserv are taxable.

A sales tax exemption concerning data process services for savings and loan associations as a concept does have substantial merit. Savings and loan associations which utilize in-house data processing do not suffer a 5% surcharge on these services because of the exemptions for services provided by employees and affiliated groups. Section 212.0592(2) & (5), Florida Statutes (1987). Data processing services can be more economically provided either by a larger bank or by a service which processes data for a number of banks. An exemption allows the smaller savings and loan associations to compete more

favorably with the larger savings and loan associations. It allows all S&Ls to provide services to Florida customers more efficiently and at a reduced cost.

On the other hand, Exemption 35 achieves a different goal. Because of the small margin of profit in this business, the lobbying efforts of FIS will provide it with an unfair advantage over its only major competitor, FIserv. FIserv may be forced out of business in the State of Florida. This will allow FIS to achieve a monopoly status. Since the smaller savings and loan associations cannot provide this service as economically as a larger service corporation, FIS will be able to increase its prices. Unless ten or more of the other S&Ls can create a new service corporation, FIS will have no competition. The customers will suffer. The savings and loan associations who are not stockholders in FIS will suffer. The revenue received by the State of Florida from FIserv will dry up while the untaxed revenues of FIS should increase.

In order to avoid inefficient use of in-house data processing service, FIserv believes that the entire function of providing data processing services to savings and loan associations should be tax exempt. FIserv will rely upon the arguments of other parties concerning the unconstitutionality of taxes on services comparable to services provided in-house. At a minimum, the FIS Exemption contained in Section 212.0592(35) should be declared unconstitutional so that both major

competitors in this business would be obligated to pay the tax. This result would increase revenues to the State of Florida while placing the competitors on equal footing.

## POINTS ON APPEAL

### I.

THE FIS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

### II.

THE FIS EXEMPTION VIOLATES EQUAL PROTECTION AND DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND UNDER THE FLORIDA CONSTITUTION.

## SUMMARY OF THE ARGUMENT

There are only two major corporations which provide data processing services to savings and loan associations in Florida. Those two corporations are FIserv Tampa and FIS. Through the skills of its lobbyists, FIS has obtained Exemption 35 in Chapter 87-6, Laws of Florida. Exemption 35 is carefully designed to provide a sales tax exemption on services provided by FIS while taxing identical services provided by FIserv Tampa. Since net profits in this industry approach 5%, the discriminatory 5% sales tax will have a devastating effect upon competition in the industry.

This carefully tailored exemption is provided only to service corporations owned by S&Ls operating in Florida. Moreover, no fewer than 10 S&Ls must participate in the ownership of the service corporation. Despite the requirement that S&Ls own the service corporation, the FIS Exemption will allow FIS to provide tax free data processing not only to S&Ls but also to other financial institutions.

Exemption 35 violates the commerce clause of the United States Constitution. By requiring that the exemption is only given to service corporations owned by S&Ls having operations in Florida, the statute is flagrant economic protectionism which constitutes a per se violation of the commerce clause. Moreover, the exemption imposes a direct burden on interstate commerce by

unfairly taxing data processing services which are not owned by Florida S&Ls, but rather are owned by S&Ls and other independent companies in interstate commerce.

The FIS Exemption also violates due process and equal protection. This Court has previously held that an excess tax which forces a company out of business or gives one business an unfair advantage over another is unconstitutional. State ex rel James v. Gerrell, 137 Fla. 324, 188 So. 812 (Fla. 1938). An excise tax which does not equally treat all persons similarly circumstanced and which discriminates on grounds which do not have a fair and substantial relationship to the object of the legislation is unconstitutional. Exemption 35 is grossly oppressive, plainly unequal, and contrary to the common right of FIserv Tampa to do business in the State of Florida and to fairly compete with FIS. FIS may be the largest provider of data processing services to S&Ls in the State of Florida, but the Legislature does not have the right to make it the only provider through irrational, blatantly preferential legislation.

## ARGUMENT

### I.

### THE FIS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

FIserv challenges the impermissible burden on interstate commerce imposed on financial institution data processing companies not owned by Florida savings and loan associations. The two primary reasons the exemption violates the commerce clause are as follows:

1. Exemption 35 creates flagrant economic protectionism which amounts to a per se violation of the commerce clause because it provides the exemption only for service corporations owned by S&Ls "having operations in this State". The exemption provides outright economic protection to a service corporation owned by Florida S&Ls. It accomplishes this by economically burdening and discriminating against non-Florida S&Ls as well as other independent companies in interstate commerce. FIserv submits that the tightly defined requirements for Exemption 35 prevent virtually any non-Florida S&L from obtaining the exemption and competing in the market for financial institution data processing. This exemption is the result of a lobbying effort specifically designed to benefit one and only one Florida corporation, FIS, at the expense of all other competitors.

2. The exemption imposes a direct burden on interstate commerce by unfairly taxing independent companies that are not owned by Florida S&Ls. There is absolutely no legitimate basis for creating a disproportionate advantage for data processors that are owned by Florida S&Ls. There is absolutely not legitimate basis for imposing a disproportionate burden on data processors that are independently owned and operated in interstate commerce. If the purpose of the exemption is to confer a legitimate exemption on S&Ls' use of data processing services, then the exemption should apply across the board to all companies that provide data processing to S&L's rather than strictly to a service corporation that happens to be owned by a tightly defined combination of S&Ls. Likewise, the exemption should not allow a Florida S&L service company to provide tax free data processing to financial institutions other than S&Ls when no one else (including other financial institutions) can provide this tax free service. Because the burden on interstate commerce is direct and substantial, the exemption violates the commerce clause.

The Commerce Clause enforces our overriding national interest in free, unrestricted trade among the states. See Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). The Commerce Clause federalizes regulation of interstate commerce and restricts internecine actions among the states, see, H.P. Hood & Son, Inc. v. Du Mond, 336 U.S. 525, 533-34, 69 S.Ct. 657, 93 L.Ed. 865

(1949). It prevents a state from "legislat[ing] according to its estimate of its own interests [and] the importance of its own products." Id. at 533.

The United States Supreme Court has adopted a two-tiered approach in reviewing Commerce Clause cases. Where state legislation effects economic protectionism, the Court has declared a "virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Where state legislation does not amount to economic protectionism, but nevertheless imposes some burden on interstate commerce, the Court will strike down the statute unless it advances legitimate local interests by affecting interstate commerce only incidentally, and employs the least burdensome alternative. Id. The exemption for savings and loan owned data processors fails under both tiers of scrutiny.

A. THE FIS EXEMPTION CONSTITUTES ECONOMIC PROTECTIONISM AND, THEREFORE, IS UNCONSTITUTIONAL

This Court may find economic protectionism either in discriminatory purpose or in discriminatory effect. Either condition is sufficient to condemn a statute. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The "evil of protectionism can reside in legislative means as well as legislative ends." Philadelphia v. New Jersey, 437 U.S. 617, 626, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). The data processing exemption is demonstrably protectionist and discriminatory in both its purpose and its effect.

The Supreme Court in Commerce Clause cases has indicated that courts cannot restrict their review of state statutes to the language of the statute. As the Court stated in Best & Co. v. Maxwell, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed 275 (1940), "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." Thus, even if the language of the exemption appeared non-discriminatory, this Court would need to review the exemption and its necessary application to determine whether it reflects a discriminatory effect. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984); Philadelphia v. New Jersey, 437 U.S. at 626.

In reviewing a state's restrictions on interstate commerce, the Supreme Court looks to the restrictions' practical effect. For example, in Dean Milk Co. v. Madison, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), the Court found that a city regulation, which on its face purported to advance health and

safety, had the practical effect of discriminating against interstate commerce, rendering the regulation unconstitutional. The Court in Best & Co. v. Maxwell, 311 U.S. 454 (1940), stated:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

Id. at 455-56. See also Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (Court must focus on state tax provisions' "practical effect"); Maryland v. Louisiana, 451 U.S. 725, 756, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (Court must assess state tax "in light of its actual effect"); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 37, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) (the Court's "principal focus of inquiry must be the practical operation of the statute").

This Court has of course recognized the United States Supreme Court's approach. For example, in Delta Air Lines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984) the Florida Supreme Court held unconstitutional a statute that discriminated against interstate commerce by providing a commercial advantage to local commerce. This Court recognized that the statute's practical effect was the focus of inquiry. Id. at 320.

Exemption 35 on its face provides outright economic protectionism for a Florida data processing company owned by a combination of savings and loans operating in Florida. This

definition automatically eliminates all independently owned data processing companies that provide services to financial institutions. Moreover, the tight definitional requirements that the exempt service corporation be owned by at least ten savings and loans operating in Florida virtually eliminates the possibility that any other company may be formed to take advantage of the exemption. As a result, the exemption will grant a substantial direct advantage for a particular Florida service corporation to the substantial competitive harm of other companies operating in interstate commerce.

The Supreme Court in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), found unconstitutional a North Carolina statute that had a similar practical effect. The North Carolina statute interfered with the prevailing free market forces by boosting the competitive advantage of local growers and dealers at the expense of out-of-state growers and dealers. Id. at 350-52. The statute offered the North Carolina apple industry "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." Id. at 352. This state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." Guy v. Baltimore, 100 U.S. 434, 443, 25 L.Ed. 743 (1880).

The overriding purpose and effect of Exemption 35 is to grant an unconstitutional tax preference a Florida savings and loan-owned data processor at the expense of non-Florida S&Ls and other data processors owned by financial institutions which are not S&Ls or by independent companies. The FIS Exemption's purpose is therefore illegitimate and subverts the core purpose of the Commerce Clause. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

B. THE FIS EXEMPTION IMPOSES AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

If Exemption 35 did not have a protectionist purpose and effect, therefore making it per se, it still would violate the commerce clause because it places an excessive burden on interstate commerce. The commerce clause requires this court not only to determine whether the law is protectionist in purpose or effect, but also to determine:

> "(1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce."

Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); see, Pike v. Bruce Church, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Exemption 35 fails to satisfy even one of these requirements for constitutionality.

1. Exemption 35 neither regulates even-handedly nor creates only incidental effects on interstate commerce.

As discussed above, Exemption 35 has a grossly disproportionate effect on data processors that provide services to financial institutions. Non-exempt data processors will be substantially burdened by being forced to charge the sales tax and therefore suffer a loss of sales.

Exemption 35's effects on interstate commerce are therefore not "incidental." The purposefully limited tax exemption directly favors Florida S&L-owned service corporations and disfavors non-Florida interstate commerce. The direct result of Exemption 35 is the prohibited effect on interstate commerce.

2. Exemption 35 does not serve a legitimate local purpose.

As discussed above the overriding purpose of Exemption 35 is to provide a tax advantage to a Florida S&L-owned service corporation at the expense of non-Florida S&L companies. This purpose is illegitimate, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), and subverts clause's creation of a unified national market. As the United States Supreme Court held in Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84

L.Ed.2d 751 (1985), "promotion of domestic business by discriminating against non-resident competitors is not a legitimate state purpose."

Florida's desire to protect a particular local service corporation represents an attempt to further a purely economic purpose that - - whether the implementation is non-discriminatory or not - - is constitutionally suspect under the commerce clause. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 530-539 (1949). As the Supreme Court noted in Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43-44 (1980):

> "In almost any commerce clause case it would be possible for a state to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the commerce clause prohibits a state from using its regulatory power to protect its own citizens from outside competition."

More importantly, the purpose of Exemption 35 is not to provide a legitimate exemption to S&Ls that necessarily rely on data processing services, but to create an unfair advantage to a combination of S&Ls that provide data processing services in the market in competition with interstate commerce. S&Ls who now rely on the services of an independent company, such as FIserv, will be put at a disadvantage by being required to pay more for their data processing services as a result of the increased tax. Exemption 35 will impair the natural market forces by encouraging

S&Ls to abandon non-Florida data processors and contract with the Florida-owned service corporation that has been granted an artificial competitive advantage.

If the purpose of the exemption were to confer a legitimate exemption on S&Ls, the exemption would have to apply even-handedly to all providers of data processing services for S&Ls, so that S&Ls could use the services of any data processing provider and not be unfairly disadvantaged by their choice of an independent company.

3. Exemption 35 imposes an excessive burden on interstate commerce.

Exemption 35 necessarily achieves its purposes by placing a disproportionate burden on interstate commerce. Therefore, the State has the burden of demonstrating that legitimate local benefits outweigh the burden on interstate commerce, and could not be achieved by means other than burdening interstate commerce. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 353 (1977).

The State cannot justify Exemption 35 on these grounds. Not only is the obvious burden on interstate commerce enough to seriously disrupt the market and substantially disadvantage independent companies, but a legitimate exemption for S&L data processing could easily have been achieved without burdening interstate commerce. There is absolutely no reason why the tax break should be conferred on a particular Florida service

corporation to the detriment of all other competitors. The state could easily have chosen a much less restrictive means of conferring a tax break on S&Ls for their use of data processing services.

Any reasonable basis for exempting data processing services performed for a financial institution or S&L should extend equally to all such companies and not be artificially restricted to Florida S&L-owned companies. Without applying the exemption equally, the statute profoundly disadvantages interstate commerce and confers an unfair competitive advantage on the Florida service corporation able to take advantage of the exemption. The exemption therefore violates the commerce clause.

## II.

EXEMPTION 35 VIOLATES EQUAL PROTECTION AND DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND DUE PROCESS UNDER THE FLORIDA CONSTITUTION.

The federal judiciary has held the states, in the exercise of their taxing powers, are subject to the due process and equal protection requirements of the Fourteenth Amendment. Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 4 L.Ed.2d 189 (1974). The Supreme Court of Florida has further recognized the levy of taxes is subject to due process challenges under the Florida Constitution, Article I, §9. In State v. City of Pensacola, 126 So.2d 566 (Fla. 1961) this Court stated:

> "The Declaration of Rights, Section 1, F.S.A., provides 'All men are equal before the law. . .', while the 14th Amendment to the Constitution of the United States provides that 'No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' . . . That the 'equality before the law' provision of the Declaration of Rights is a constitutional limitation upon the taxing power of the State was recognized in the case of State ex rel. James v. Gerrell, 137 Fla. 324, 188 So. 812, 813 . . . Likewise, the United States Supreme Court has employed the 'equal protection' clause of the 14th Amendment to strike down a discriminatory state tax." Id. at 569.

Exemption 35 must therefore pass constitutional scrutiny under both the Federal and State Constitution.

Admittedly, in matters of taxation, the states are possessed with broad latitude in creating classifications without offending the Equal Protection Clause or the Privileges and Immunities Clause of the Federal Constitution. Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978).

> "The pole star for judging the validity of a particular classification is whether that classification 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Ohio Oil Co. v. Conway, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775 (1929). Accord, Rollins v. State, 354 So.2d 61 (Fla. 1978); Gammon v. Cobb, 335 So.2d 261 (Fla. 1976)." Amrep at 1349.

When a tax enactment creates a distinction in treatment, it is valid under Equal Protection only if the discrimination has some relevance to the purpose for which the classification is made and the difference in treatment is not so disparate as to be wholly arbitrary. State v. Andersen, 208 So.2d 814 (Fla. 1968).

Although excise taxes are not subject to the requirements of equality and uniformity as guaranteed by Article VII, Florida Constitution, they are invalid under due process and equal protection if they are unreasonable, unjustly discriminatory, "arbitrary, whimsical, irrational, grossly oppressive, plainly unequal, or contrary to common right." Gray v. Central Florida Lumber Co., 104 Fla. 446, 140 So. 320, reh'g. den., 104 Fla. 446, 141 So. 604, cert. den., 287 U.S. 634, 53

S.Ct. 18, 77 L.Ed. 536. This test was quoted with approval by this Court in Belcher Oil Co. v. Dade County, 271 So.2d 118 (Fla. 1972).

In this case, the FIS Exemption cannot satisfy the basic tests of equal protection and due process. Under the "pole star" test described by this Court in Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978), Exemption 35 does not have a fair and substantial relation to the object of this sales tax legislation and all persons similarly circumstanced are not treated alike. FIS and FIserv Corporation are both Florida corporations authorized to do and doing business in the State of Florida. Both of them provide data processing services. Both of them provide their service primarily to S&Ls. Both of them provide their service to S&Ls who are not stockholders in the corporations. Both of them engage in interstate commerce. Nevertheless, FIS has convinced the Legislature to provide a carefully tailored exemption which allows it to provide services tax free. With the help of the Legislature, FIS is using the sales tax exemption as a method of unfair competition to drive its only major competitor out of the market.

This special classification for FIS does not rest upon some ground of difference which has a fair and substantial relationship to the object of this sales tax legislation. In the last few years, the distinctions between S&Ls and traditional banks have become fewer. Nevertheless, one can still argue that S&Ls should receive favored treatment vis-a-vis banks because

they are intended to provide low cost home loans. This legislation, however, does not discriminate between S&Ls and banks. Instead, it distinguishes between data processing services owned by S&Ls and providing services to financial institutions in general and those owned by other entities.

Considering the test described in the Gray case, this tax is grossly oppressive to FIserv Tampa. In a market place where profits rarely exceed 5% of the gross revenues, the tax is so oppressive that it will probably force FIserv out of this data processing market in the State of Florida.

This Court has previously held that a classification does not withstand constitutional analysis if it results in such an unfair advantage. State ex rel. James v. Gerrell, 137 Fla. 324, 188 So. 812 (Fla. 1938). As this Court stated:

> "[Differences in excess taxes] cannot arise on the ground of residence or citizenship when no other factor is involved. Neither can they be employed to force one out of or deter him in going into a lawful business or to give one an unfair advantage over another engaged in the same business. Hamilton v. Collins, 114 Fla. 276, 154 So. 201; Dusenbury v. Chesney, 97 Fla. 468, 121 So. 567; Roach v. Ephren, 82 Fla. 523, 90 So. 609." 188 So.2d at 814.

Under the test enunciated in the Gray case, it is also clear that Exemption 35 is "plainly unequal" and "contrary to common right". For the same reasons described above, the

Legislature cannot constitutionally use the new sales tax as an opportunity to eliminate one of two competitors from this marketplace.

In many respects, this exemption is similar to the statutes which attempted to exempt inter-company accounts receivable only for domestic Florida corporations. Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978). In Amrep, this Court held that it was unconstitutional to provide tax relief to domestic corporations but not to foreign corporations which were authorized to do business in the State. In this case, both data processing services are Florida corporations which are doing business in this State. One of them receives a tax break because its owners do other business in the State of Florida. The other receives no tax break because its owner only does business in the State of Florida through the subsidiary. This discrimination obviously violates the commerce clause, but it also violates equal protection and due process. See also, Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985)

## CONCLUSION

Exemption 35 is invalid. It violates the commerce clause of the United States Constitution because it protects a single corporation owned by Florida S&Ls from interstate competition with other S&Ls and with independent data processing services. It violates due process and equal protection because it discriminates in favor of FIS and against FIserv Tampa on a wholly arbitrary basis. The exemption is unjustly discriminatory, whimsical, irrational, grossly oppressive, plainly unequal, and contrary to common right. Accordingly, this exemption should be removed from the new sales tax act.

FIserv believes that all data processing services whether provided in-house or by service corporations should be tax exempt. If Exemption 35 is merely eliminated, FIserv will be returned to an equal competitive footing with FIS and the sales tax revenues for Florida will actually be increased.

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