IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE ADVISORY OPINION OF
THE GOVERNOR, REQUEST OF
MAY 12, 1987.

Case No. 70,533

/

ON REQUEST FOR AN ADVISORY OPINION

INITIAL BRIEF OF NORTH AMERICAN FINANCIAL SERVICES, LTD.

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

NORTH AMERICAN FINANCIAL SERVICES, LTD., is an Iowa corporation authorized to do business in the State of Florida, and will be referred to herein as NAFS. The State of Florida will be referred to as the State, and Chapter 87-6, Laws of Florida (1987) will be referred to from time to time as the the Bill.

POINT ON APPEAL

CAN THE LEGISLATURE ARBITRARILY EXEMPT A PROVIDER OF DATA PROCESSING SERVICES FROM THE SALES TAX WHILE REQUIRING ALL OTHER PROVIDERS OF THE SAME SERVICE TO CHARGE AND COLLECT THE TAX?

STATEMENT OF THE CASE AND FACTS

Due to the nature of this case a traditional statement of the case and facts as contemplated by Fla. R. App. P. 9.210(b)(3) cannot be provided. In lieu thereof, NAFS will advise the Court of its status and the precise portion of the the Bill that it is focusing on in this brief. This, however, should not be construed as a waiver by NAFS as to other objections to the Bill raised by any other interested party, which NAFS specifically adopts.

NAFS is an Iowa corporation authorized to do business in the State of Florida. Its principal business is providing data processing services in interstate commerce to banks, savings and loan associations and other financial institutions in the State

of Florida and throughout the United States. NAFS performs some of these services in Florida. Under the terms of the Bill NAFS will arguably be compelled to collect a 5% sales tax on services it provides after July 1, 1987.

Section 3 of the Bill created Fla. Stat. §212.0592, which purports to create certain exemptions from the tax, including:

> 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.

Fla. Stat. §212.0592(35).

NAFS does not fall within the scope of this exemption. For that matter the overwhelming bulk of data processing servicers for financial institutions do not and cannot fall within the scope of this exemption. The exemption is limited to an entity with the following specific and unique qualifications:

(1) The entity must be a service corporation of a financial institution described in SIC Major Group 61 (a savings and loan association or savings bank) and organized pursuant to s.545.74 Rules of the Federal Home Loan Bank Board;

(2) The service corporation is wholly owned by savings and loan associations or savings banks, with no one owner holding more than 10 percent of the outstanding capital stock.

Of critical importance is that the exemption does not limit to whom the exempted entity can provide tax-free data processing services. Under this exemption the service corporation could provide data processing services to any bank or institution that is not a stockholder of the corporation, charge it a fee, yet not be required to charge and collect the sales tax as the transaction and the entity would be exempt.

This service corporation would be providing the same services that NAFS or any other data processor would provide. However, this entity would, as a result of the exemption, be able to enjoy a 5% price advantage over its competitors, including NAFS, for no rational or stated reason. The adverse affect this

would have on the ability of NAFS and others not exempt to conduct business in interstate commerce is manifest.

NAFS is aware of an exempt entity presently existing in the State of Florida, to wit: Florida Informanagement Services, Inc., which is a data processing company presently owned by various savings and loan associations in the State of Florida.

Pursuant to the interlocutory order of this Court dated May 13, 1987, NAFS, as an interested party, files this brief.

SUMMARY OF ARGUMENT

The exemption in question grants a great benefit to a competitor of NAFS and other data processing servicers for no legitimate state purpose. Clearly, the exemption is arbitrary and capricious.

Both the commerce clause and the equal protection provision of the United States Constitution are violated by the Bill's exemption. There is no valid classification created by the exemption. The effect of the exemption is to discriminate among providers of the same service, granting some a 5% windfall, while burdening most with a marketing and sales albatross that cannot be avoided.

Florida and Federal law both recognize that such an exemption cannot withstand constitutional muster. As such the tax is void.

ARGUMENT

THE LEGISLATURE CANNOT ARBITRARILY EXEMPT A PROVIDER OF DATA PROCESSING SERVICES FROM THE SALES TAX WHILE REQUIRING ALL OTHER PROVIDERS OF THE SAME SERVICE TO CHARGE AND COLLECT THE TAX.

The legislature has created an exemption for a provider of data processing services to financial institutions, while at the same time requiring that all other providers of this same service charge and collect a 5% sales tax. No rational reason exists for the legislature's arbitrary classification among providers of the same service. This capricious exemption serves no valid state purpose and violates the right of NAFS to equal protection under law granted to it by the Fourteenth Amendment to the United States Constitution. As well, the exemption violates the commerce clause of the United States Constitution, U.S. Const. Art. I, §8, cl.3.

In analyzing the statutory deficiencies present in this case, the courts in their analysis tend to meld the concepts of equal protection and the commerce clause. Fundamental to any analysis is the underlying concept of fairness and whether there is a legislative reason for the disparity in treatment facing the affected party. A review of the applicable case law demonstrates that the Bill, as it affects NAFS, is unconstitutional by virtue of the arbitrary exemption.

This Court in Eastern Air Lines, Inc. v. Department of

Revenue, 455 So.2d 311 (Fla. 1984) app. dism. 106 S.Ct. 213 (1985) noted that in the field of taxation "[t]he state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." Id. at 314. In Eastern Air Lines this Court found that a statute that imposed a new sales tax on all fuel purchased by interstate air common carriers, but that did not impose a similar tax on railroads and vessels was constitutional, as the "discrimination" was founded on a reasonable distinction or difference in state policy. In the present case, to the contrary, there is no reasonable distinction that can be gleaned from the statute. In the present case the classification is not predicated upon different services, but rather as to different providers of the same service.

In Gammon v. Cobb, 335 So.2d 261 (Fla. 1976) this Court held that in order for a statutory classification not be deemed to deny equal protection, the classification "must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed." Id. at 264. Also, The Fronton, Inc. v. Florida State Racing Commission, 82 So.2d 520, 523 (Fla. 1955) (the attempted classification must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis); State v. Bryan, 87 Fla. 56, 99 So. 327, 329 (1924) (classifications that in effect impose burdens on some

citizens that are not imposed upon others, under practically similar conditions with no conceivably just basis for the classifications, constitute a denial of equal protection in violation of the Fourteenth Amendment).

In Miller v. Publicker Industries, Inc., 457 So.2d 1374 (Fla. 1984) the Court was faced with a statute which limited a four cents per gallon gasohol tax exemption to gasohol containing ethyl alcohol distilled from United States agricultural products only. This Court affirmed the trial court's holding that the statute violated, among other things, the commerce clause of the United States Constitution.

The plaintiff in Miller demonstrated that with the exemption being limited to non-foreign source alcohol, the blender-distributors of gasohol in Florida would either not purchase or would require a substantial reduction in price before purchasing foreign ethyl alcohol. Similarly, in the present case, present or potential customers of NAFS will require NAFS to reduce its charges by 5% to make its charges comparable to those of any entity exempted by Fla. Stat. §212.0592(35).

This Court held in Miller that:

> We agree that "interstate commerce must bear its fair share of the state tax burden." ... The commerce clause does, however, require "substantially even-handed treatment." ... A state tax must not be discriminatory ... and the prohibition on discriminatory taxation of interstate commerce extends to foreign commerce as well as domestic. ... We conclude that the tax exemption limitation

> of Chapter 84-353 facially discriminates against foreign commerce and alcohol used to produce gasohol and that the trial court properly declared it unconstitutional.

Id. 457 So.2d at 1376. (citations omitted).

The same result is mandated here. If anything, the discrimination in the present case is even more arbitrary as the classification here is even more irrational and no attempt is made to explain the reason for the exemption. Clearly, the exemption does not permit substantially even handed treatment and violates the commerce clause of the United States Constitution.

In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) the Court was faced with a Hawaii statute that imposed a excise tax on liquor at the wholesale level but exempted from the tax certain locally produced alcoholic beverages. The Supreme Court of Hawaii upheld the constitutionality of the statute, finding that the exemption was rationally related to the state's legitimate interest in promoting domestic industry. The United States Supreme Court rejected this argument and reversed.

> No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which State can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to insure ... against discriminating state legislation."

Id. at 272. Also, Northwestern States Portland Cement Company v. Minnesota, 358 U.S. 450 (1958); Hale v. Bimco Trading, Inc.,

306 U.S. 375 (1939).

In Metropolitan Life Insurance Company v. Ward, 470 U.S. 869 (1985) the Court reversed the lower courts' findings that a statute imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies was constitutional. The Court in Ward, in finding that the statute violated the commerce clause, noted the differences between commerce clause and equal protection analysis and the consequent different purposes the two constitutional provisions serve:

> Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden of the state law would impose on interstate commerce. In the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.

Id. 105 S.Ct. at 1683.

The Court also noted that the "two constitutional provisions performed different functions in the analysis of the permissible scope of a State's power - one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States." Id. The result, however, is the same.

A tremendous competitive advantage is being granted to an entity exempted by Fla. Stat. §212.0592(35). NAFS and

similarly situated data processors, for no valid reason or state purpose, are being saddled with a 5% competitive surcharge. The exemption is not only arbitrary and capricious but outrageous.

In the present case the exemption in question violates the commerce clause as the State's interest is not legitimate and a substantial burden is imposed on interstate commerce. As well, the statute violates the equal protection provisions of the Fourteenth Amendment as the State's purpose is not legitimate and there is no rational relationship between the burden imposed and the State's purpose.

CONCLUSION

The Bill is unconstitutional as it exempts a competitor of NAFS from the charging and collecting of the sales tax, without any rational or valid state purpose. For this and the reasons set forth in the briefs of the other interested parties this Court should rule that the Bill is unenforceable by the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Bob Martinez, Governor, State of Florida, The Capitol, Tallahassee, Florida 32301; and Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301, this 28th day of May, 1987.

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