

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

JUN 1 1987
CLERK, SUPREME COURT
By _____
Deputy Clerk

ON REQUEST FOR AN ADVISORY OPINION

REPLY BRIEF OF NORTH AMERICAN FINANCIAL SERVICES, LTD.

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ARGUMENT

Both the Governor's and Florida Informanagement's suggestion that only challenges directed to the facial validity of the Bill can be brought in this proceeding and that challenges addressed to a particular application of the Bill must be raised in an adversary proceeding, is misplaced. This Court in its interlocutory order of May 13, 1987, invited "those interested parties who contend that the aforesaid statute is unconstitutional" to file briefs, without any limitation on the type of constitutional challenge raised. In Re Advisory Opinion of the Governor, Request of May 12, 1987, ___ So.2d ___, 12 FLW 240 (Fla. May 13, 1987).

The constitutional challenges raised by NAFS, based upon the patent, unfair and discriminatory exemption granted its competitor and "grandfather" provisions granted to other industries, highlight the constitutional infirmities of the Bill, which apparently is the result of political legerdemain as opposed to a fair and equal assessment of the tax as to all concerned and affected parties.

Contrary to the suggestions appearing in the briefs of the proponents of the Bill, whether or not there is a "revenue crisis" in Florida is not an issue before the Court. The amount of time that the legislature allegedly spent in considering the Bill is not an issue before the

Court. Whether or not politics can play a part in the legislative process is not an issue before the Court. Rather, this Court must focus on whether the Bill in question is constitutional. If the Bill is not constitutional, this Court must so advise the Governor, irrespective of the economic and political consequences.

It is somewhat intriguing to note that though the proponents of the Bill contend that the Bill was a product of a long and careful deliberative process, it was only after the briefs were filed by the opponents of the Bill that certain "glitch" bills appeared apparently in an attempt to amend away some of the constitutional infirmities raised by the opponents.

In particular, with regard to the NAFS brief, NAFS demonstrated that the Bill clearly violated the United States Constitution's commerce clause (U.S. Const. Art. I, §8, cl.2) and the equal protection provision (U.S. Const. Amend. XIV) by granting its competitor an exemption from the service tax irrespective of whether the competitor was providing the service to one of its own shareholders or to a third party financial institution.

Florida Informagement in its brief alleges that a glitch bill (Committee Substitute for House Bill 1506) amended portions of the exemption relating to data processing services provided to financial institutions, Fla. Stat. §212.0592 (35) but has not provided the Court or

counsel with a copy of said bill. Counsel for NAFS has attempted, without success to date, to obtain a copy of this glitch bill.

Florida Informanagement argues that the exemption now only applies to data processing services the exempted entity provides to its owners, and that this is similar to the exemption granted any entity that has services provided to it by an affiliate. There is, in fact, no similarity, as Florida Informanagement supplies services to non-owner financial institutions as well.

Florida Informanagement is a competitor of NAFS. Florida Informanagement attempts to earn a profit. As a result of the exemption Florida Informanagement can increase its profit and have a competitive advantage over NAFS because it can provide certain services without the overhead and other costs involved in charging and collecting a service tax to its owner members. This will enhance its overall profitability and performance in the market place.

If, as Florida Informanagement contends, the purpose of Fla. Stat. §212.0592(35) was to put allegedly smaller financial institutions that desire to perform data processing services in-house on the same footing as larger institutions through the economics of scale and cooperation, then the exemption would and should have been limited to an entity that could only supply data processing services to the owners of the service corporation. However, this is not

the case.

Florida Informanagement offers no legal support for the exemption it alone has been granted. Rather, it attempts in a conclusory fashion to state that there are no constitutional infirmities with the exemption. At best Florida Informanagement begs the question as opposed to reciting and answering the question.

For example, on page 13 of its brief it boldly asserts that "[e]xemption 35 does not provide any direct commercial advantage to local commerce." This is ridiculous. Florida Informanagement is receiving a commercial advantage not granted any other data processor. Pursuant to the exemption, Florida Informanagement can only be composed of local savings and loan associations or savings banks. By being granted the ability to avoid a 5% surcharge on its services, local commerce clearly obtains an advantage.

Likewise, the conclusion in its brief on page 16 that "[a]ny burden on interstate commerce is therefore created by federal law" is preposterous. The Florida legislature (if not Florida Informanagement) created the exemption and utilized the language in question. Federal law did not create the exemption; Florida did. The Florida legislature has clearly created a burden on interstate commerce by granting Florida Informanagement an exemption that is not available to others engaged in interstate commerce. To utilize a federal regulation as part of the

framework of the exemption and to then argue that it is the federal government's "fault" that the exemption exists is ludicrous.

The suggestion by Florida Informanagement that any other entity can obtain the exemption and thus the exemption is cured of its constitutional infirmities is likewise without merit. To begin with only savings banks or savings and loan associations can obtain this exemption, and only if these entities comply with the balance of Fla. Stat. §212.0592(35), which includes the requirement that at a minimum ten entities must join together. It is more than merely curious that Florida Informanagment has more than ten savings and loan associations or savings banks as shareholders.

Florida Informanagement's statement on page 25 of its brief that "[i]t is totally absurd to argue that the services performed by FIServ Tampa and NAFS are identical to those performed by FIS or service corporations similarly situated" is equally without basis. Even a mere cursory review of the FIServ and Florida Informanagement annual reports attached as an appendix to the FIServ brief demonstrates that the various companies offer the same services. NAFS as well, provides data processing for financial institutions. This is precisely what Florida Informanagement does. The only difference that does exist between NAFS and Florida Informanagement is that the

legislature, for whatever political reason, has granted Florida Informagement an exemption from the tax, while not granting one to NAFS.

Another area of the Bill demonstrating its unconstitutionality is the discriminatory use of "grandfather" provisions. The Bill provides in pertinent part that the tax does not apply to a written contract for advertising services in excess of two years if entered into prior to April 1, 1987, even for the portion of the contract that would be performed after July 1, 1987. Fla. Stat. §212.0595 (9). A similar exemption is granted to construction contracts entered into before May 1, 1987, with regard to improvements to real property. Fla. Stat. 87-6, §31.

The Florida legislature granted advertisers and construction contractors relief from charging and collecting the service tax on contracts entered into prior to the effective date of the service tax, but did not similarly grant such relief to data processors, such as NAFS. The usual data processing contract with a financial institution runs between three and five years. There is no legitimate state purpose or rational reason to grant the exemption to advertisers and construction contractors while denying the same relief to data processors, and other providers of services under long term contracts.

These selective grandfather provisions violate both

the equal protection and commerce clause provisions of the United States Constitution. U.S. Const. Art. I, §8, cl.2 and Amend XIV. See, Metropolitan Life Insurance Company v. Ward, 470 U.S. 869 (1985); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Miller v. Publiker Industries, Inc., 457 So.2d 1374 (Fla. 1984); Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984) app. disp. 106 S.Ct. 213 (1985); Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); and other cases cited in NAFS' initial brief.

CONCLUSION

Whether for political reasons, through the result of successful lobbying or through mere inadvertence the Florida legislature has created a taxing scheme that is unconstitutional. Fla. Stat. §212.0592(35) is arbitrary and capricious. It serves no purpose but to unfairly benefit a competitor of NAFS. What better evidence is there as to the true nature of the exemption than the fact that the exemption's beneficiary has filed a responsive brief in favor of the tax.

The constitutional infirmities in the statute are further highlighted by the discriminatory and irrational application of grandfather clause exemptions granted to advertisers and construction contractors.

Simply put, the questions are why is Florida Informagement different from all other data processors,

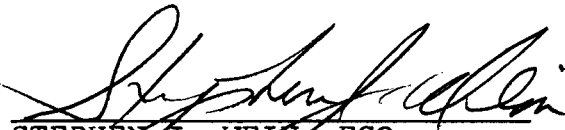
and why do advertisers and contractors receive dispensation from the statute that NAFS does not receive? While there may be political answers to these questions there can be no constitutional answer to these questions.

The Bill cannot pass constitutional muster and this Court should so advise the Governor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Overnight Mail to Office of the Attorney General, The Capitol, Tallahassee, Florida, 32301, Joseph G. Spicola, Jr., Esq., Suite 209, The Capitol, Tallahassee, Fl. 32301, and Alan C. Sundberg, Esq., P. O. Drawer 190, Tallahassee, Fl. 32302 and by regular mail to counsel on the attached list this 16th day of June, 1986.

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