

SUPREME COURT OF FLORIDA  
CASE NO. 70,533

IN RE

ADVISORY OPINION OF THE GOVERNOR  
REQUEST OF MAY 12, 1987

**FILED**  
SID J. WHITE

JUN 18 1987

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By: *pl*  
Deputy Clerk

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REPLY BRIEF OF EDITH BROIDA, INTERESTED PARTY  
AS ATTORNEY AT LAW, PROFESSIONAL CONSULTANT  
AND CONSUMER ADVOCATE

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## INTRODUCTION

This interested party, Edith Broida, is a member of the Florida Bar, actively practicing law in the State of Florida for 33 years, a professional consultant in the fields of systems and management, education and social welfare, and others, and a consumer advocate in a multitude of area affecting consumers and taxpayers and generally the residents and citizens of the State of Florida, having many times successfully protected their interests.

Intercession in this case is not on behalf of any particular entity other than the general welfare of this State, its economic position, and all those who will bear the burden of Chapter 87-6, who in fact are all the people in or doing business in the State.

## REPLY TO THE HISTORY OF TAXATION

### THIS TAX

1. It has been stated in support of the tax that it has been considered times before by the legislature and executive in prior administrations but never passed.

It has to be evident it was never passed by those prior representatives of the people due to their good judgment and knowledge in recognizing all the objections that have now been raised, and that it was a burdensome, unmanageable, and inappropriate tax that would cause excessive harm, might not produce the revenue hoped and be repealed.

The fact that the constitution of the govern-

ment has changed does not improve the tax, instead it raises issue as to the judgment and knowledge of the disastrous affect of the tax of those passing it.

2. On p.36 of the brief of the legislature we can see the outline of things to come in the administration of the tax. Statement is made that the stamp taxes in prior times once passed were repealed because the cost of administration was greater than the revenue from the tax. In that situation the tax had been held constitutional. This tax will be uncollectible, and more and more state employees will be hired to collect it using more and more of the revenue it produces to administrate it. Suits will continue to be filed against it, administrative decisions continuously made as to whether it applies to this or that service. More and more exemptions will be allowed as business is injured by it, and the economy of the State as well, with businesses perhaps closing or relocating to other states, laying off employees, and causing a recession.

3. Another contention made in the same brief is that where tax on newspapers was concerned there was a greater public outcry against a tax on liquor than on newspapers. This is a specious arguement. How many literate people were there as compared to beer drinkers? The public does not understand the issues of free speech and it was not the beer drinkers who framed the Constitution. Fortunately the fact that the public would choose liquor over "larnin" has never swayed our legislature to close the schools and open pubs instead- I hope.

In that instance the tax was on the newspapers themselves not on the consumers of the papers, and not on the advertisers in all the media and newspapers, which advertising tax is in our case paid by the advertisers. Advertising supports the media ( except for public television which hopes we all will support them by contributions). It supports the press. Without advertising there will be no television, radio, or newspapers.

4. It is of no purpose at all to cite, where the newspapers are concerned, laws passed in the 1700's. Those laws had a different impact on a different society. In the 1700's there was a large illiterate slave population and population of bondsmen who probably also were not literate. Today the descendants of those people are members of the judiciary, mayors, governors, etc.

In those years people were punished in the public plaza, and there was no one who could spend \$100,000. on a Ferarri automobile except for royalty and a few others for like extravagances.

5. The comparison of this State tax posture with any other state is not helpful. The fact that only two of the fifty have passed taxes on legal fees indicates the other forty-seven have not which is more compelling. We have no knowledge of the population structure of those two states, the economic structure, what other taxes they have, what the exemptions are, whether the tax is in fact collected or collectible, what their needs are, the occupations, and whether the tax is fairly administered, or might be a measure

to keep other lawyers from coming into the state. Oregon sent out postcards telling one and all don't move to Oregon it rains all the time. Nevada doesn't, as I understand, allow lawyers to hang their shingle if from out of state.

6. This party disagrees with the statement on p.17 of the legislature's brief that the purchase of services either increases or remains steady in a recession. Of course it can't and won't. These are the glamour products which are the first to go. If someone has no money for food or rent he is not about to build a new house, hire an architect. He won't be able to afford a divorce so he won't hire a lawyer. The professionals are the first to suffer in a recession, as will the tax. In a recession income is reduced, businesses fail, employees lose jobs. Only in the economics of a textbook economist, not in the real world would professionals survive.

REPLY TO ISSUE OF A JUDICIAL ADVISORY OPINION TO  
THE GOVERNOR

1. Agreeing to hear all parties the justices have thereby declared they are open to all considerations.

Many of the opponents agree that the Governor cannot by this method assure himself that the tax will be upheld in court challenges. The individual opinions are not a ruling of the Supreme Court. The Court is not bound as a court although each Justice who rules in favor of the constitutionality of the tax would be ill-disposed to reverse if the issue later came before the Court as a Court. There is no possible way that the Justices can allay the concern of the Governor that the tax might in

the final result be held constitutional whether the opinion is given on both State and Federal Constitutions.

Whatever the opinion of the Justices whether for or against the Governor is in no better position than before.

The previous requests to render an advisory opinion did not address any issue which is of the magnitude of this. Asking whether the Governor can make an appointment for a balance of a term, which ends in a stated period, certainly is not crucial to the welfare of the entire State. Enormous outlay of funds was not a concern in any of the prior requests, outlay, which if the tax law is repealed, will not be recovered.

It would be more likely that the intention in making the request was to attempt to deter those who contest, with such august opinions on the law.

The entire approach by all who accomplished the passage of the tax was speed, and refusal to thoroughly examine the nature of the tax and its affect.

The lack of understanding of the tax is prevalent among lawyers, for example. Senator Dempsey Barron, it was reported in the newspaper said "lawyers are greedy". Lawyers are not the ones paying the tax. A law school professor of a prestigious state school said "lawyers charge too much". His interest in the tax might stem from the fact that his income is paid by the State, but I wonder if he and the Senator think lawyers will reduce their fees to absorb the tax. The point however has been made in the briefs of proponents that it is expected the taxes paid by business will be passed on to the consumer. In that case, why would lawyers be required to reduce their fees. There are lawyers

who charge less and try to be as reasonable as possible. They will have to charge even less then, and perhaps leave the practice of law.

REPLY TO BRIEF OF FLORIDA INFORMANAGEMENT  
SERVICES, INC. PROPONENT OF THE TAX

1. This is an in-house company in savings and loan computer services. They have responded to the brief of FiServ Tampa, a similar firm, privately operated which objects to the tax. The in-house firm will not be taxed. However, their brief establishes the unconstitutional deprivation of the free and independent opportunity for businesses to compete in the State of Florida.

By its very explanation of the difference between in-house company services and the intent of the legislature as stated on their page 5, that it provides an open-door for other savings and loans and banks to organize a service corporation which could provide tax-exempt services to the owner, and on page 6, that such entities band together to form an organization to provide services to themselves, the legislative intention results in avoidance of the tax, and in restriction on competition between companies vying for business. This is a deterrent to free competition and an unconstitutional violation of Federal laws providing for interstate commerce, and Art. 1, Sec. 8 of the U. S. Constitution providing for Congress to regulate commerce among the several states, and by obstructing the mandate of the 14th Amendment to the U. S. Constitution securing the right to the protection of property.

The further result is the elimination of many



independently owned companies in Florida.

2. I believe the intended affect of this law to be unconstitutional in its purpose to change the nature of businesses and preclude business competition. The computer services is only one example. Business which use professional services and there are many and many types of services will now employ in house professionals if they can afford it.

Smaller businesses will not be able to afford it and they will pay the tax. In the case they cite Bacchus Imports Ltd v. Dias, 468 U. S. 263, 104 S. Ct. 3049, 82 L. Ed 2d 200, 1984, on their p. 11 and 12, the court held a tax on out-of-state liquor in protection of locally produced alcoholic beverages was a Federal commerce clause violation. Here the State of Florida is taxing independent businesses but not in-house businesses within the State, and out-of-state businesses wanting to do business in the State.

This unconstitutional affect applies to all professional services.

In another case they cite where a privilege tax of \$25. on business men resident in the State and a tax of \$100. on non-residents was held to be a denial of equal protection of the laws in 1919, their brief p.22, the court held

"The sales tax is in fact unjustly discriminatory, arbitrary, irrational, grossly oppressive, plainly unequal and contrary to common right."  
Gray v. Central Florida Lumber Co., 140 So 320, 325, Fla 1932.

3. Chapter 87-6 is not a sales or a use tax. A consumer sales tax is a tax on a finished product or service. A tax on dry cleaning is a tax on a finished product to the consumer. The new tax creates pyramiding in the production

of a product or service which will be added to the cost of the end product, which again will be taxed by the sales tax. The consumer will now pay the taxes paid by the business for the use of its professionals in producing the product. Until now the producer did not have those taxes to pay. The worst part is that there are so many professional services that each business uses that it is prohibitive in the amount the product will be increased.

Example: A developer of real property residential or commercial will now pay a tax on his architect, engineer, or more than one, surveyor, appraiser, accountant, decorator, environmental consultant, attorney for contracts for purchases and sales, for corporate actions, for litigation, the real estate broker, advertising agent, and on and on.

The purchaser will then pay additional taxes on his purchase to his attorney, real estate broker, appraiser, roofing consultant, surveyor, engineer, and when it sells it will go on again. Documentary stamps have also been increased.

There is no product in the State that will not become highly inflated. If the business does not add on the cost it could go bankrupt. Any product that has competition from other States will probably lose business. The business may reduce quality, and then it will be in competition with businesses in other states that do not reduce quality.

This is worse than an income tax because deductions cannot be taken. The rich (?) business is being taxed with the knowledge of the State that they will either have to absorb the tax or pyramid the cost on to the product for the consumer to pay.

4. The result is excessive and burdensome overtaxation, elimination of business which cannot compete, reduction of quality making the consumer suffer, schemes to avoid the paying of the tax.

5. In the case of City of Deland v. Fla. Public Service Co. 161 So 735, 1935 the court found it unconstitutional and said:

"The nature of a tax ordinance must be determined by character of its incidence and its practical operation rather than by its name, and spoliation under the guise of taxation will be declared unconstitutional regardless of its name or form."

Also Henderson Bridge Co. v. Henderson, 173 U. S. 592, 19 S. Ct, 43 L. Ed. 823.

This tax did not permit pyramiding and therefore was declared unconstitutional. It is therefore obvious that pyramiding must follow or bankrupt the business.

The tax in this case cited on a utility company of 10% of each sale was obviously an income tax and confiscatory, and unreasonable.

The tax we now have is still worse. It will result in a much higher percentage increase in product cost than 5%.

The individual who pay the professional services tax of course cannot adjust the cost as business will do.

The court further held the taxing power of government must be given practical construction which will not be unduly restrictive.

This tax forces all businesses to change their methods of operation in the State of Florida and precludes other from entering the State.

Business has been required by tax laws to pass

the cost to the purchaser to prohibit unfair competition for the strong to absorb the tax and build up his trade at the expense of the weaker dealer who cannot afford to absorb it. Gaulden v. Kirk, 47 So2d 567, 1950, and Doby v. State Tax Commission, 234 Ala 150, 174 So 233, 237.

THE EXEMPTIONS ARE IRRATIONAL AND UNCONSTITUTIONAL

1. In a hit and miss effort exemptions have been created. They are irrational and unconstitutional.

2. The production of movies will not be taxed to encourage movie making as a new industry. The making of commercials will be taxed. Totally irrational. The same type of professionals are used in commercials as in movies. Some commercials are movie length. Actors, directors, cameramen, lighting technicians, writers, producers, set design, costume design and all other services used for movies are used for commercials. The business of producing commercials is also an industry.

3. The tax on advertising has been treated in all proponent briefs as a tax on newspapers. It is a tax on the purchaser of advertising including the person who has to sell his house to relocate his job, the one who sells his car to enter military service, the sale of a home or condo to enter a nursing home.

The business that pays this tax will again add it on to the product.

4. Beauty parlors and barbers do not have to be taxed. If a man pays \$10 a week for a haircut he would pay

tax of \$26.00 a year. If he uses a lawyer to represent him on a traffic ticket it could cost him \$500. plus \$26.00 in tax and he might lose anyway and would not have a year's haircuts to show for the expenditure.

5. Taxes are not paid on medication or over the counter drugs, the antidote to pain. Lawyer's services are supposed to be the antidote to financial, personal, and sometimes physical pain and loss.

A prescription of "Heet" applied to a sacroiliac back can relieve pain for days and possibly forever saving hundreds of dollars in visits to physicians. The fee to a lawyer may win nothing, save nothing. The "Heet preparation costs about \$3.00. The legal fee will more likely be not less than \$100. It will be taxed.

#### AN ADDITIONAL UNJUST PROFESSIONAL TAX

1. The tax will be applied to the broker fee of a securities broker. His fee is taxed when a security is purchased and when it is sold. It can be sold at a loss after holding it for five years. It has already been taxed by Florida in intangible tax for every year it is held even though the owner is losing money every year. A tax on a fee when the security is sold at profit is not as inequitable.

#### THE TAX ON LEGAL FEES

1. The Refund Process: Will the attorney have to report the name of his client to obtain a refund if he refunds a fee and must apply for the refund of tax. Certainly any lawyer who is investigated by the revenue department will have to open his books and expose the names of his clients. It would breach the attorney-client privilege of privacy, and

the press may get the information and publish it, and the courts engaged to enjoin the publication.

2. Divorce is emotional, unpleasant. Children become involved. The terminology applied to the tax of enjoying these services of a lawyer is certainly a misnomer. Paying a tax on a failed marriage by one or both of the parties or on a custody action between them or any other parties engaged in custody disputes is an additional penalty.

3. This court has recently found an agent of a landlord guilty of filing his own eviction notices. Now he will have to use an attorney, and pay a tax on each one. Some landlords do have frequent tenant problems and have to evict for non-payment of rent. If they can't collect rent they cannot pay their mortgage or taxes on the property or maintenance or utilities. They must use lawyers for many services.

4. When a piece of clothing is bought if it isn't right it can be returned and the tax refunded. When a lawyer prepares a Will, for example, for a person to benefit third parties that transaction may not end there. In a true case in Florida a trust was drawn and executed, on behalf of the trustor's children. Some years later a fifth wife of the trustor proceeded to engage the court to abrogate the trust, which the court did. Some would have stopped there. The adult children took an appeal and reversed the trial judge. Under our new tax law, the tax paid for the trust should have ended all controversy. It did not, so a new tax would be paid to the litigating lawyers in trial court, in appeal court. It did not end there either. The trustor, 86 years

old became comatose, guardian appointed, legal action again, the guardian wife obtained a ruling that the trust property be transferred to the guardianship and that her fees in the prior action be paid from it which that different judge did. Another appeal reversing that judge.

All these actions for the purpose of keeping a legal instrument which was supposed to eliminate future ligation will now be taxed.

Would anyone believe that either of the judges who ruled in favor of the fifth wife would adjudge that she, as the ultimate loser, has to pay all taxes? Another appeal? More taxes?

5. The taxes that will be paid in all legal matters are astronomical. It is difficult to believe that anyone who voted for this tax understand what they have done.

In an estate proceeding taxes on the personal representative fees, his attorney, the guardian fees, his attorney, real property appraiser, personal property appraiser, trustee, attorney for the trustee, advertising of the administration, advertising of sale of property, court reporter fees, broker fee if there are securities to be sold, courier fees, attorney fees for any attorney litigating. All of these could come from the estate. Estates which are federally taxable already pay tax to the State.

6. Any tax on legal fees is an unjust unfair burden on a necessity that is as important as food and more important than over-the counter medication.

## CONCLUSION

It would be difficult to decide which part of this multitudinous tax is the most burdensome. Surely the tax on legal fees is the worst. There everyone is a loser. There is nothing to be enjoyed.

In all its parts this is the worst tax anyone can ever contrive. The poor family that spends \$1000 a year on goods pays a tax of \$50. One visit to the traffic court can result in a fee of \$500 with a tax of \$25.00, the loss of a license, employment, and income.

The Governor has not proceeded with the prior essentials, the institution of a lottery which should have already been in operation before this tax was passed. The information from the State is they are having difficulty in knowing what to do about the lottery. Anything that anyone wants to make difficult will be difficult.

Other elimination of waste and misappropriation of funds for worthless projects and excessive costs of projects should be eliminated before any such harsh tax as this is employed.

We must concern ourselves with the ultimate effect of the tax to determine the character of the tax. To cite City of Deland "spoliation under the guise of taxation will be declared unconstitutional regardless of its name or form".

Edith Broida, Esq.

Edith Broida



CERTIFICATE OF SERVICE

It is hereby certified a copy of the foregoing Reply Brief was sent by Air Express U. S. Post Office to Joseph C. Spicola Jr., General Counsel to the Governor containing brief for the Governor, Attorney General, and the Legislature, June 17, 1987, and to the Supreme Court.

Edith Brown