IN THE SUPREME COURT OF FLORIDA

IN RE ADVISORY OPINION OF THE GOVERNOR
REQUESTED MAY 12, 1987

CASE NO. 70,533

FILED
SID J. WHITE
JUN 18 1987
CLERK, SUPREME COURT
By ______
Deputy Clerk

REPLY BRIEF OF BAKER & HOSTETLER

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SUMMARY OF ARGUMENT

The Subject Question posed to the Justices requires them to advise the Governor whether the service sales and use taxes are "valid" so that he will know whether the revenue sources thereby created are reliable. Understandably, the Legislature, Governor and Attorney General have tried in their briefs to narrow the Subject Question to a reading of the facial constitutionality of Chapters 87-6 and 87-72, Laws of Florida. If the Justices were to opine that the service sales and use taxes were unconstitutional on their face, the advisory opinion would be responsive to the Subject Question. However, if the Justices do not so opine, the advisory opinion can do little to reassure the Governor of the validity and reliability of the revenue sources created by these new taxes. We have therefore addressed in our briefs some of the due process and Commerce Clause problems that will inevitably arise upon the application of the advertising use tax. These problems are sufficiently serious that they prevent the Justices from providing the Governor the assurances that he seeks.

The Governor and Legislature have argued that successful "as-applied" challenges may be ignored because the resulting revenue losses would be less than those caused by a facial reading of the advertising use tax as unconstitutional. The "as-applied" revenue losses may indeed be less, but how much? Even the most confident economist would not try, at this early stage, to quantify the revenue losses resulting from such unknown

unconstitutional applications. It is thus impossible to reassure the Governor, at this time, as to the adequacy of revenues after part or all of the advertising use tax is held unconstitutional.

The so-called "glitch bill" in fact weakened the advertising use tax. It added the requirement that "nexus" exist between Florida and the advertiser in the case of the advertising use tax. But it omitted the requirement of nexus in the case of the ad agency that purchases the advertising for resale to the advertiser. Florida's advertising use tax now expressly requires nexus with the advertiser directly buying an ad from an out-of-state network or newspaper. But the advertising use tax does not require nexus with the ad agency, which must collect and remit the advertising use tax when it purchases advertising from a network or newspaper and then resells the advertising to the advertiser.

The Governor's brief ignores serious questions as to whether nexus may even exist between the advertiser and Florida when the advertising use tax is applied to the advertiser. The Governor has cited no cases in which a use tax was imposed on any out-of-state user. The links between Florida and an out-of-state advertiser-user are necessarily more attenuated than the links, discussed in the Governor's brief, between the taxing state and the out-of-state vendors, which sell to users residing in the taxing state.

The "glitch bill" weakened the advertising use tax in a second respect. Nexus is required only between Florida and the advertiser, not the advertising transaction. Although this probably does not violate due process or the Commerce Clause on its face, this more liberal definition of nexus creates problems for the advertising apportionment formula. Unlike the general apportionment formula used for other services, the advertising apportionment formula is inflexible and does not permit the Florida Department of Revenue to adjust its application to fit individual circumstances. Thus, an out-of-state advertiser placing an ad of only local interest in an out-of-state paper is subject to the Florida advertising use tax if the advertiser has nexus with Florida through ownership in Florida of property having nothing to do with the advertising transaction. The imposing of the advertising use tax in this case, although clearly required by statute, is clearly in violation of the Due Process and Commerce Clauses.

ARGUMENT

I. THE JUSTICES SHOULD NOT ADVISE THE GOVERNOR THAT THE USE TAX ON ADVERTISING CREATES REVENUE SOURCES IN COMPLIANCE WITH THE REQUIREMENTS OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION OR THE COMMERCE CLAUSE UNDER ARTICLE I, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

By Interlocutory Order of this Court dated May 13, 1987, two Justices dissenting, the Justices announced that they

would address whether Chapter 87-6 (and now, presumably, Chapter 87-72), Laws of Florida, "validly create revenue sources" from the service sales and use taxes ("Subject Question").

Addressing the Subject Question requires a two-step process. First, the Justices should determine whether the new law is facially constitutional. If it is not, the new taxes do not validly create new revenue sources and the Governor must be so advised. If the new law or significant portions of it appear facially constitutional, the Justices must proceed to the second question--whether the new law is likely to withstand the many constitutional challenges to its application and thereby create valid revenue sources.

Undeniably, the second question is difficult to answer. It requires analysis of applications of the new law that, however probable, have not yet occurred. Yet, the failure to consider probable applications of the new law means that the advisory opinion in fact will not respond to the Governor's self-styled constitutional dilemma concerning his budgetary responsibilities. An opinion limited to a facial reading of the new law clearly will not spare the Governor the "staggering" consequences of a "delayed" judicial determination invalidating the new law. Governor's letter to Chief Justice McDonald, dated May 12, 1987, and attached to the Interlocutory Order.

The briefs of the Legislature, Governor, and Attorney General ask the Justices to address only the facial constitutionality of Chapters 87-6 and 87-72, Laws of Florida. Brief of the

Florida Senate and the Florida House of Representatives ("Leg"), pp. 66 and 72; Brief of the Honorable Bob Martinez, Governor of the State of Florida, and the Florida Department of Revenue ("Gov"), pp. 5 and 83; Brief of the Honorable Robert A. Butterworth, Attorney General of the State of Florida, p. 7.

The Subject Question cannot be answered by addressing only facial challenges because the Governor has sought in the advisory opinion assurances as to the reliability of revenues. In their briefs, the Governor and the Legislature justify their reduction of the Subject Question to the facial constitutionality of the new law by suggesting that the revenue losses suffered as a result of later, successful "as-applied" challenges would not be as great. Gov, p. 16; Leg, p. 70. But no one can know at present what such "as-applied" constitutional challenges will cost the State.

By trying to limit the advisory opinion to an analysis of the facial constitutionality of the new law, the Governor, Legislature and Attorney General acknowledge the impossibility of the Justices providing the Governor meaningful assurances as to revenues at this early stage. At the same time, their approach would so limit the significance of the advisory opinion as to render it not much more than an academic exercise, at least as it pertains to the due process and Commerce Clause questions.

Barring a taxing scheme that irrationally discriminates in all cases between in-state and out-of-state taxpayers, successful due process and Commerce Clause challenges to a tax

law on its face are infrequent. As amply demonstrated in the brief of the Magazine Publishers Association and the Association of Business Publishers at pages 15-21, due process and Commerce Clause questions are taxpayer-specific and fact-bound. Thus, successful due process and Commerce Clause challenges to a state tax law must await, in the overwhelming majority of cases, application of the law to a particular taxpayer and transaction.

The Justices should not advise the Governor that the advertising use tax creates a valid and reliable source of revenue, regardless whether the Justices opine on the due process and Commerce Clause issues in connection with the advertising sales and use taxes or opine that the advertising sales and use taxes, on their face, do not violate the due process and Commerce Clause challenges. There is no basis in the record for such an opinion, which must await the serious "as-applied" challenges, only a few of which we have described in our briefs.

A. Due Process Requires a Nexus Between the State of Florida and the Advertiser or Advertising Transaction Subjected to the Florida Advertising Use Tax.

The Governor asserts that the advertising use tax is facially constitutional because, as a result of the so-called "glitch bill," the advertising use tax may not be imposed against the advertiser unless there is nexus between the advertiser and Florida. Ch. 87-72, §3, Laws of Florida, amending §212.0595(6). There are two serious problems with this assertion.

First, the Subject Question requires that the Justices determine not only the facial constitutionality of the new law, but its probable constitutionality as applied. This point is discussed in the preceding section.

Second, the "glitch bill" added the requirement of nexus only with respect to advertisers. The typical advertising transaction involves a sale for resale. In this transaction, the advertising use tax is imposed upon the ad agency that resells the advertising to the advertiser. A network in New York, for example, sells advertising to a New York ad agency, which marks up the price of the ad and resells it to an Ohio advertiser. If the first sale meets the sale-for-resale requirements, as it should, the advertising use tax is collected and remitted by the ad agency, not the advertiser. The "glitch bill" added no nexus requirement for the ad agency transaction, which is more common than the direct sale to the advertiser.

The Governor is therefore clearly incorrect in his assertion that "nexus is required before the [advertising use tax] can be imposed." Gov, p. 60. His reliance upon the general nexus requirement in Section 212.059(3)(b) is misplaced. Section 212.0595(11)(b) expressly provides that Section 212.059(3) is inapplicable to the advertising sales and use taxes. His reliance upon the clause, "if the advertiser has nexus for tax purposes of this state," Section 212.0595(6), is also misplaced. This clause and the Governor ignore the majority of situations in

which the ad agency will be required to collect and remit the advertising use tax.

Thus, even if the Justices limit themselves to a facial reading of the advertising use tax, there is a serious deficiency in the express statutory requirement of nexus with respect to advertisers, but not ad agencies. But the Justices should nevertheless consider the validity of probable applications of the advertising use tax to advertisers, notwithstanding its facial shortcoming as to ad agencies. As we pointed out in the preceding section of this brief, the Subject Question can only be answered by considering such probable applications.

The question that must be answered is whether the advertising use tax may be constitutionally imposed upon advertisers (and ad agencies, if the Justices, ignoring the principle of expressio unius est exclusio alterius, read into Section 212.0595(6) a nexus requirement as to ad agencies and other dealers). The Governor tries to answer this question by reducing our arguments to the "outdated notion that the Due Process and Commerce Clauses require the physical presence of the taxpayer in the jurisdiction--either through property or employees ...." Gov, pp. 60-61.

The question of tax nexus may be determined by reference to the ample Supreme Court authority in the area of state sales and use taxes and, to the extent necessary, other state taxes. There is no reason for the Justices to resort to the long-arm jurisdiction cases cited by the Governor, such as

Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569 (1977) and *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985). Evolving determinations of the limits of state taxing jurisdiction will be based on the principles developed in the scores of state tax cases decided over the last hundred years, not on tortured analogies drawn from state long-arm jurisdiction cases. Nothing is gained by contrasting the due process considerations of imposing *in personam* or *in rem* jurisdiction on a negligent motorist required to appear in a court in the state in which an accident occurred with the due process considerations of imposing taxing jurisdiction upon out-of-state taxpayers.

Based on well-developed principles of taxing jurisdiction, it is apparent that nexus will not readily exist between Florida and the out-of-state advertiser (or ad agency). Consider the case of an Ohio corporation engaged in the manufacture of consumer products. The manufacturer has no presence in Florida except that its products, after several wholesale transactions taking place outside Florida, are finally wholesaled to a Florida retail outlet from which they are sold to the Florida consumer. This Ohio manufacturer purchases directly from a Savannah broadcaster a one-minute local advertising spot for its product. The broadcast spot reaches Florida residents in nearby Jacksonville, which is within the signal reception area of the station. The advertising use tax would apportion to Florida a portion of the $1,000 cost price of the ad based upon the media provider's market coverage in Florida versus its total market coverage. If

the apportionment factor were 40%, then $400 of the cost price would be apportioned to Florida, and the Ohio manufacturer would be required to self-accrue and remit to Florida the advertising use tax of $20.

The nexus analysis must begin with National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 878 S. Ct. 1389 (1967), and Miller Bros. Co. v. State of Maryland, 347 U.S. 340, 74 S. Ct. 535 (1953), in which the Supreme Court held that state use taxes were applied in contravention of due process and the Commerce Clause. The Bellas Hess facts are well known. A Delaware corporation doing business in Missouri mailed catalogues twice yearly and advertising flyers occasionally to customers in Illinois. Goods were delivered to Illinois residents by mail or common carrier. Otherwise, the mail-order vendor had no contacts with Illinois: no warehouses, offices, sales representatives, agents, telephone listings or advertising other than that already described.

The Miller Bros. contacts were more substantial. A Delaware corporation selling furniture out of its retail outlet in Delaware near the Maryland state line made sales on a regular basis to Maryland residents. Its contacts with Maryland consisted of such sales, occasional advertising flyers mailed to Maryland residents, furniture deliveries to Maryland residents by common carriers and employees of the vendor, and advertisements in Delaware newspapers and radio stations whose market coverage included part of Maryland.

The Supreme Court held in both cases that neither taxing state could impose upon either out-of-state vendor the duty to collect and pay a use tax without violating due process and the Commerce Clause. The advertising and marketing presence of each out-of-state vendor was insufficient to justify the imposition of the use tax.

The state court cases upon which the Governor relies are more relevant than his long-arm jurisdiction cases, but are not persuasive. In Good's Furniture House, Inc. v. Iowa State Board of Tax Review, 382 N.W.2d 145 (Iowa 1986), cert. denied, ____ U.S. _____, 107 S. Ct. 76 (1986), the out-of-state vendor's contacts with the taxing jurisdiction included, in addition to "intensive television advertising," regular deliveries and regular repair service by vendor employees to customers residing in the taxing state. In Rowe-Genereux, Inc. v. Vermont Department of Taxes, 138 Vt. 130, 411 A.2d 1345 (1980), the out-of-state vendor's contacts with the taxing jurisdiction included, in addition to advertising in a shopper and on a radio station both located in the taxing state, deliveries and installations by vendor employees to customers residing in the taxing state, plus financing to taxing-state residents. The taxing state sought to impose the use tax on the vendor only for those sales in which it delivered the goods in its own truck into the taxing state. 411 A.2d at 1350. In Cooey-Bentz Co. v. Lindley, 66 Ohio St. 2d 54, 419 N.E.2d 1087 (1981) (per curiam), the out-of-state vendor's contacts with the taxing jurisdiction

included, in addition to directing its advertising to taxing-state residents in a manner not specified in the opinion, "regularly" servicing customers in the taxing state, as well as delivering and installing goods in the taxing state through the use of vendor employees.

The trio of state court decisions are thus clearly distinguishable on the ground that each involved substantial contacts in addition to intensive or systematic advertising into the taxing state. Each of these cases is distinguishable on another ground.

In each of the state court decisions, as well as most if not all of the Supreme Court decisions, the out-of-state use tax is imposed on a vendor which has sold to residents of the taxing state. Florida's advertising use tax is imposed in transactions in which the user is not a Florida resident; the user is the out-of-state advertiser. Also, when imposed upon the advertiser rather than the ad agency, Florida's advertising use tax is imposed not on the vendor, but the user. The qualities of the contacts are different when no user resides in the taxing state. They are also different when, in the case of the advertiser, the use tax is imposed on the user. In both instances, the contacts are necessarily less substantial than in the conventional situation in which the use tax is imposed on the vendor selling to taxing-state residents.

For instance, the typical national advertiser does not have the contacts with Florida that are enjoyed by a Thomasville,

Georgia vendor selling, delivering, installing and servicing its goods into and in Florida. The national advertiser may be an Ohio manufacturer that purchases advertising in vast blocks from a New York network. All negotiations and other contacts take place in New York and Ohio. The advertiser intends to reach Florida, but does not know when or precisely where its message will be received in Florida. The link with Florida is between the network and its Florida affiliate, which provides the broadcast time for the transmission of the advertiser's message, perhaps many months after the transaction began. Is there nexus between Florida and the advertiser? No use tax decision cited by the Governor ever had the end user or the vendor so far removed from the taxing state. The Ohio advertiser may instead enter directly into a contract with a New York agency, which enters into a contract with a New York network, which enters into a contract with a Florida affiliate. If an agency relationship is even relevant, the ad agency may in fact be the advertiser's agent (or it may be the network's), but it is hard to conceive that the network is the advertiser's agent. The linkage is thus no more direct when the advertiser purchases the advertising from a New York ad agency.

The linkage is also indirect from the perspective of the advertiser and the sale of the advertiser's product in Florida. The advertiser manufactures the goods in Ohio. It then sells them to a Pennsylvania wholesaler, which sells them to a Georgia wholesaler, which sells them to a Florida retailer, which

sells them to a Florida consumer. The ad agency in this case would not even be part of the product distribution chain.

Serious nexus issues await the application of the advertising use tax. Even disregarding the facial problem with respect to ad agencies, the Justices should not opine as to the reliability of the revenue sources represented by the advertising use tax due to the clear nexus problems that must be addressed in specific cases.

B. Due Process Requires that the Part of the Advertising Cost Price Apportioned to the State of Florida by the Florida Advertising Use Tax be Reasonable and Bear a Rational Relationship to Values Connected to the State of Florida.

The statutory inclusion of "nexus" added to the advertising use tax by the "glitch bill" requires the Florida Department of Revenue to apply the advertising apportionment formula in a manner that violates the Due Process and Commerce Clauses. In the case of advertisers, a portion of the advertising cost price must be apportioned in every case in which nexus exists between Florida and the advertiser, rather than the advertising transaction. The Governor incorrectly states in his brief that "[t]he Legislature could hardly have done more to manifest its intent that the [advertising use tax] apply only to those transactions that are within Florida's constitutional taxing power." Gov, p. 60. Of course it could have done more--

it could have required that the nexus exist between Florida and the advertising transaction, rather than the advertiser.

We are not arguing that the nexus requirement may not be satisfied by requiring nexus between the advertiser and Florida. The problem is that this broader nexus provision places intolerable pressure on the rigid advertising apportionment formula.

The advertising apportionment formula, Section 212.0595(4), leaves absolutely no room for equitable adjustment by the Florida Department of Revenue. The general sales and use tax apportionment formula, Section 212.0591(9), creates a series of apportionment formulas that are presumptively applicable. However, the taxpayer may seek equitable relief based upon a showing satisfactory to the Florida Department of Revenue that the benefit of the service was in fact enjoyed outside Florida. If there is <u>any</u> nexus between Florida and the advertiser and if a portion of the media provider's market coverage is in Florida, a portion of the advertising cost price <u>must</u> be apportioned to Florida. The Florida Department of Revenue is empowered to refine by rule the "average circulation" and "signal reception area" definitions of market coverage. But if the message of an advertiser with any nexus reaches Florida, a portion of the ad cost price must be apportioned to Florida, even though the nexus between Florida and the advertiser exists by virtue of facts unrelated to the advertising transaction.

Consider an Indiana corporation owning and operating a car wash in Gary, Indiana. The corporation directly places an ad in a Chicago newspaper. Assume that the ad, which is of local interest only, reaches Florida through the sale of that edition in Florida. The Indiana corporation owns a restaurant in Florida. The nexus established by the ownership of the restaurant in Florida subjects the Chicago advertising transaction to the Florida use tax. The Florida Department of Revenue has no choice but to apportion a portion of the ad cost price to Florida based on market coverage. The same result probably takes place even if the Indiana corporation owns only a boat or a condominium in Florida.

Under the Due Process and Commerce Clauses, the advertising apportionment formula must fairly reflect the relationship between Florida and the portion of the ad cost price apportioned to Florida. However, there is no rational relation between the car wash ad appearing in the Chicago newspaper and the State of Florida. Florida has imposed a tax on a transaction taking place entirely outside of its borders. Florida has provided nothing of benefit to the car wash, which is discrete from and unrelated to the Florida business or investment of the taxpayer. Unless the car wash business is part of a unitary business with the Florida business or investment (if a unitary business may even encompass an investment), the attempt to apportion a portion of the tax base to Florida necessarily violates the Due Process and Commerce

Clauses. See, e.g., ASARCO Incorporated v. Idaho State Tax Commission, 458 U.S. 307, 102 S. Ct. 3103 (1982).

The Governor's brief once again misses the mark by limiting itself to a general discussion of the requirements of fair apportionment without focusing upon inevitable applications. Serious apportionment issues await the application of the advertising use tax to out-of-state advertisers. The Justices should not opine as to the reliability of the revenue sources represented by the advertising use tax due to the clear problems with the advertising apportionment formula that must be addressed in specific cases.

II. CONCLUSION

The Governor requests in the conclusion to his brief that the Justices opine that the service sales and use taxes are facially valid in all respects. We have demonstrated that the advertising use tax suffers from at least one facial deficiency--it does not require nexus between the ad agency and Florida in the case of the advertising use tax.

But the Subject Question requires that the Justices go beyond a facial reading of the new law and somehow reassure the Governor as to the reliability of the new revenue sources. Regardless how the Justices opine as to the facial constitutionality of the advertising use tax from a due process and Commerce Clause perspective, we respectfully request that the Justices advise the Governor: 1) they are unable to opine as to

whether the advertising use tax contained in Chapters 87-6 and 87-72 will withstand constitutional attacks, as applied, and thus whether the tax represents a reliable source of revenue and 2) he should govern the State of Florida and discharge his constitutional duties accordingly.

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