O/A 3-4-88

IN THE SUPREME COURT OF THE STATE OF FLORIDA

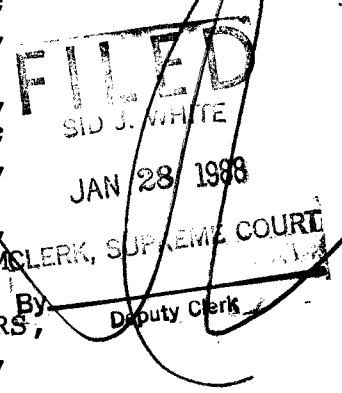
NATIONAL DISTRIBUTING COMPANY, INC., d/b/a CONSOLIDATED DISTRIBUTING CO.; NATIONAL DISTRIBUTING COMPANY, INC., d/b/a NATIONAL WINE & LIQUOR; NATIONAL DISTRIBUTING COMPANY, INC., d/b/a CONSOLIDATED NDC DISTRIBUTORS; NATIONAL DISTRIBUTING COMPANY, INC., d/b/a BAY SOUTH DISTRIBUTORS, INC., NATIONAL DISTRIBUTING COMPANY, INC., d/b/a NATIONAL WINE & LIQUOR OF PALM BEACH COUNTY; NATIONAL DISTIRUBTING COMPANY, INC., d/b/a BAY DISTRIBUTORS, INC.; NATIONAL DISTRIBUTING COMPANY, INC., d/b/a NDC DISTRIBUTORS OF PENSACOLA; TAMPA WHOLESALE LIQUOR CO., INC.; HOUSE OF MIDULLA OF SOUTHWEST FLORIDA, INC.; GRANTHAM DISTRIBUTING CO., INC.; AND GRANTHAM WINE COMPANY,

Appellants/Cross Appellees,

v.

OFFICE OF THE COMPTROLLER STATE OF FLORIDA,

Appellee/Cross Appellant.
_____/



CASE NO.: 71,638

On Certification of an Appeal From Final Order of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida

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ANSWER BRIEF OF APPELLEE
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA

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PRELIMINARY STATEMENT

The Plaintiffs below, Appellants before this Court, are referred to herein as "the distributors" for the sake of clarity.

The Defendant below, Appellee/Cross-Appellant before this Court, is referred to herein as "the Comptroller" or "the State".

For brevity's sake, the excise tax on the sale of wines and distilled spirits under §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.), is referred to herein as "the beverage tax" or "the alcoholic beverage tax." The tax preference or exemption provisions of §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.) are referred to as the "former Florida products exemptions."

References to the record on appeal are to the Volume and page number; e.g., "R. Vol. I., p. _____." References to the Appendix To The Answer Brief of Appellee - Cross Appellant, State of Florida, Office of the Comptroller, are thus: "App. p. ____."

STATEMENT OF THE CASE AND THE FACTS

The distributors' statement of the case and the facts is accurate insofar as it goes, but requires the following supplementation.

This case arises out of claims filed with the Comptroller by the distributors for the refund of beverage taxes remitted to the state treasury. The time periods for which refunds are sought vary slightly among the distributors, but cover basically periods of time ending June 30, 1985 and reaching back no more than three years from that date. The refund claims do not reach back a full three years before June 30, 1985 (to June 30, 1983) in all cases because some of the distributors filed refund claims on dates after July 1, 1985. The provisions of §215.26, Florida Statutes, operate as a statute of non-claim as to taxes remitted more than three years prior to the date of the claim for refund.

The sole basis for the refund claims is the distributors' contention that the former provisions of §§564.06 and 565.12, Florida Statutes, which granted a tax preference to alcoholic beverages manufactured and bottled in Florida from Florida-grown produce, were unconstitutional. The distributors filed their refund claims after the decision of the United States Supreme Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984), 82 L.Ed.2d 200, (hereinafter "Bacchus") which held that a similiar Hawaiian tax preference contravened the Commerce Clause. In the next legislative session after the Bacchus decision, the 1985 Florida Legislature substantially amended the tax preferences contained in §§564.06 and 565.12, Florida

Statutes (1985). None of the refund claims at issue in these proceedings is for beverage excise taxes paid after June 30, 1985. The amended provisions of §§564.06 and 565.12, Florida Statutes, took effect on July 1, 1985. All refund claims at issue here are for beverage taxes remitted under the provisions of §§564.06, 565.12, Florida Statutes (1981 - 1984 Supp.).

National Distributing Co., operating through various fictitious entities and subsidiaries, dealt in beverages which were eligibile for tax preference or tax exemption under the Florida products exemptions of §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.). That distributor sold 2,076,608 gallons of such distilled spirits and 511,808 gallons of such wines during the refund period. R. Vol. I, pp. 126-127; App. pp. 6-7. Tampa Wholesale Liquor Co. and House of Midulla of Southwest Florida, Inc. did likewise, selling 1,247,858 and 35,961 gallons, respectively, of such distilled spirits and 49,065 and 15,857 gallons, respectively, of such wines during the refund period. R. Vol. I, pp. 126-127 App. pp. 5-6. Grantham Distributing Company and Grantham Wine Company followed suit, distributing 2,413,042 gallons of exempt distilled spirits and 28,928 gallons of exempt wine during the refund period. R. Vol. I, p. 127; App. p. 6. Each of the distributors reported such beverages as exempt to the State and paid beverage tax on them at the exempt rate rather than the full rate. The distributors realized a tax advantage by dealing in exempted beverages and claiming the exemption in the aggregate amount of $10,449,315.29 during the refund period. R. Vol. I, pp. 72-111; App. pp. 53-92

(by calculation).

No compulsion existed which required these distributors to deal in exempt or tax preferred beverages. No compulsion existed which required them, having sold such beverages, to claim the favorable tax rate on their beverage tax returns. R. Vol. I, pp. 72-74, 112-116; App. pp. 53-55, 93-97.

As to the alcoholic beverages sold by the distributors which did not qualify for complete exemption the former Florida products exemptions, the distributors stipulated that for each unit of product they sold, they included the unit cost of the beverage excise tax in the selling price of the unit, in addition to all other taxes and overhead expenses, and in addition to their profit margin. They stipulated that they were fully paid by their customers for all units of product sold during the refund period. R. Vol. I, pp. 124-125; App. pp. 4-5. The trial court found that the distributors had passed the cost of the tax on to their customers and fully recouped the cost of the tax from their customers. R. Vol. IV, p. 687; App. p. 99.

The taxes sought by the distributors were remitted directly to the State treasury, and expended. R. Vol. I, p. 125; App. p. 5.

As soon as the Bacchus decision was rendered by the Supreme Court of the United States, the executive branch of Florida government attempted to follow its holding, but was prevented from doing so by the entry of an injunction. R. Vol. I, pp. 112-115; App pp. 94-97.

In addition to the affirmative defenses of laches, estoppel

and prospective-only remedy, the Comptroller pleaded as a defense that distributors lacked standing as taxpayers to seek a refund of taxes, because they had passed the financial burden of the tax on to their customers and had been fully reimbursed for the taxes. R. Vol. I, p. 63; App. p. 1. Although the trial court found that the distributors had passed the financial burden of this excise tax on in full to their customers, it nevertheless overruled the standing defense of the Comptroller and proceeded to the merits of the distributor's refund claims. R. Vol. IV, pp. 688-689; App. p. 100-101.

QUESTIONS PRESENTED FOR REVIEW

1. WAS THE DECISION BY THE LOWER COURT TO MAKE ITS DECLARATORY RELIEF OPERATIVE ONLY FROM THE DATE OF JUDGMENT FORWARD WITHIN THE COURT'S DOMAIN OF DISCRETION?

2. DID THE LOWER COURT ERR IN HOLDING THAT ALCOHOLIC BEVERAGE DISTRIBUTORS WHICH VOLUNTARILY AND REGULARLY ENGAGED IN THE SALE OF WINES AND DISTILLED SPIRITS QUALIFYING FOR THE FLORIDA PRODUCTS EXEMPTIONS OF §§564.06 AND 565.12, FLORIDA STATUTES (1984-1986 SUPP.) AND WHICH CLAIMED AND RECEIVED SUBSTANTIAL TAX BENEFITS FROM THOSE EXEMPTIONS MAY NOW BE HEARD TO QUESTION THE CONSTITUTIONALITY OF THOSE EXEMPTIONS?

3. WHERE ALCOHOLIC BEVERAGE DISTRIBUTORS HAVE PASSED THE FINANCIAL BURDEN OF THE ALCOHOLIC BEVERAGE EXCISE TAX ON TO THEIR CUSTOMERS AND RECOVERED THE COST OF THE TAX IN FULL, IN ADDITION TO PROFIT AND OTHER EXPENSES, DID THE LOWER COURT ERR IN HOLDING THAT SUCH DISTRIBUTORS HAVE STANDING TO MAINTAIN AN ACTION FOR TAX REFUNDS?

SUMMARY OF ARGUMENT

The trial court declared the Florida products tax exemptions of former sections 564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.) to be in violation of the Commerce Clause of Article I, §8, of the Constitution of the United States. However, the trial court declared those exemption provisions to be severed from the remaining provisions of former sections 546.06 and 565.12, Florida Statutes. Furthermore, the trial court exercised its rightful discretion to give its decree of unconstitutionality application only from the date of judgment forward. The effect of that decision is to deny the refunds of beverage taxes which the distributors seek. Assuming that the trial court was correct in addressing the merits of the distributors' claims of unconstitutionality as to the Florida products exemptions of former sections 564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.), the trial court's determination to make its ruling prospective in operation only is well within that court's realm of discretion, is amply supported by the uncontested facts of record, and ought to be sustained.

The complaint brought by the distributors sought declaratory relief, mandatory injunctive relief and a writ of mandamus, the latter two remedies to compel a refund of all alcoholic beverage taxes remitted during the refund period. Those claims either sound in equity or are governed by the principles of equity. Standard Newspapers, Inc. v. Woods, 110 So.2d 397(Fla. 1959); Tampa Waterworks Co. v. State, 77 Fla. 705, 82 So. 230 (1919). The decision in Great Northern R. Co. v. Sunburst Oil & Refining

Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932), confirmed the power of the courts, particularly in matters of equity, to give prospective-only application to their judgments and decrees without any offense to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In the decades since that decision, scores of federal and state courts have exercised their discretion to do so in cases involving the constitutionality of tax statutes and other laws and even in cases involving relief from violations of the Civil Rights Acts.

The facts in this case show not only that the trial court's decision to make its ruling purely prospective is well within the mainstream of such decisions, but, in fact, that the equities are so much in favor of the State that to do otherwise would be tantamount to an abuse of discretion.

The distributors relied solely upon the decisions in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (hereinafter "Bacchus") and Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), (hereinafter "Ward"), in support of their claims that the former Florida products exemptions were unconstitutional under the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. Bacchus reversed precedents which had stood for decades and which had held that the States exercised plenary power over the taxation and regulation of alcholic beverages sold within their boundaries, unfettered by Commerce Clause restraints. A strenuous dissent in Bacchus characterized the majority position as a "totally novel approach to the Twenty-

first Amendment". Bacchus, supra, 104 S.Ct. at 3064. An even stronger dissent in Ward characterized the majority opinion as "astonishing". Ward, supra, 105 S.Ct. at 1684. The State therefore reasonably relied upon the tax structure created by former §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.). The distributors themselves relied upon and took extensive advantage of the Florida products exemptions which now serve as the basis for the assertions of unconstitutionality which underlie their tax refund claims. The distributors did not suffer the financial burden of the beverage taxes. Instead, they passed the cost of the tax on to their customers in full. After Bacchus, Florida acted promptly and substantially modified the Florida products exemptions of §§564.06 and 565.12, Florida Statutes.

The trial court was thus fully warranted in giving prospective-only effect to its decree.

The case for not giving tax refunds to the distributors is even stronger than the trial court recognized. While the ultimate result reached by the trial court (no refunds) is correct, the court erred in giving any hearing at all to the distributors' constitutional arguments regarding the former Florida products exemptions and erred in reaching those constitutional issues in its judgment. The trial court erred in failing to recognize that estoppel and laches bar the distributors from now challenging the constitutionality of the former Florida products exemptions in order to obtain tax refunds.

The undisputed facts in this case show that the distributors made the voluntary choice to deal in beverages eligible for the former Florida products exemptions, and claimed and received the benefit of the favorable tax treatment for such beverages throughout the refund period. By doing so, the distributors garnered to themselves tax benefits exceeding ten million dollars during the refund period. The law is clear that one who voluntarily avails himself of the benefits of a statute is later estopped from challenging the statute's validity. That principle applies here. The trial court erred in not applying it, because it incorrectly applied cases which hold that one compelled to comply with a statute is not estopped from challenging it. There is no such compulsion upon the distributors here.

The trial court further erred in holding that the distributors have standing to challenge the constitutionality of the former provisions of §§564.06 and 565.12, Florida Statutes, in order to seek refunds of taxes paid under those provisions. This Court has taken the position that one who has not borne the financial burden of an excise tax lacks standing to seek a refund of the tax under §215.26, Florida Statutes. The facts in this case demonstrate that these distributors fully passed the financial burden of the tax on to their customers and did not themselves bear its financial burden. The distributors have no injury as taxpayers, and thus no standing, to claim a refund of taxes for which they have already been made whole by their customers. The trial court incorrectly refused to follow Florida precedent on this point because that court made the mistake of

confusing standing to seek prospective relief as to an existing statute having ongoing application to one's business interests with standing to seek a refund of taxes previously paid under now-defunct statutory provisions where one has already been made whole for the taxes paid. Competitive or business injury, while supplying standing to enjoin existing statute, can not be used as a basis for seeking past damages for business injury from the past effects of a statute. In failing to discern the distinction between those concepts, the trial court erred.

Even more fundamentally, the distributors suffered no competitive injury because they themselves took advantage of the Florida products exemptions and thereby put themselves in a favorable competitive posture relative to distributors who dealt only in beverages not qualifying for the tax preference.

In sum, trial court's denial of tax refunds is correct. However, this Court ought to affirm the result on the additional grounds of estoppel, laches and lack of taxpayer standing.

POINT I.

THE LOWER COURT'S DECISION TO MAKE ITS DECLARATION OF INVALIDITY OPERATIVE ONLY FROM THE DATE OF JUDGMENT FORWARD IS SUPPORTED BY THE FACTS AND WELL WITHIN THE REALM OF ITS EQUITABLE DISCRETION.

The Comptroller here addresses all points presented in the distributors' initial brief. Those points are all interrelated and turn, finally, upon whether the trial court abused its equitable discretion in fashioning equitable relief which operates only prospectively from the date of judgment. The Comptroller asserts that the decision of the trial court to give only prospective effect to its declaration of unconstitutionality is well within the established mainstream in cases such as this, is amply supported by the record and ought to be sustained. The distributors have shown no abuse of discretion, which is the standard they must meet for reversal.[1]

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[1] The trial court's decision to give only prospective application to its decision moots the controversy over whether its remedy of severing the former Florida products exemptions was correct. Since the judgment operates only prospectively, the distributors are not entitled to refunds regardless of the severance issue. See, e.g., City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (prospective only declaration of Title VII violation means no refund of previously remitted retirement contributions to class); Metropolitan Life Insurance Co. v. Commissioner of Insurance, 373 N.W.2d 399, 408 - 411 (N.D. 1985) (prospective-only declaration of unconstitutionality as to tax exemption means no refund of taxes previously paid.). Nevertheless, the Comptroller notes that the trial court's decision that the offending tax exemptions were severable from the flat tax provisions of former §§564.06, 565.12, Florida Statutes (1981 - 1984 Supp.) corresponds with remedies deemed appropriate when similar issues were presented in other tax cases. E.g., Delta Airlines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984). The distributors misconstrue the opinion in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) on this point. The Bacchus

The decision in Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) laid to rest any lingering debate over the power of the courts, particularly in matters of equity, to fashion their decrees in such a manner that those decrees would operate without retroactive effect, even in the case under consideration. Since the advent of that decision, scores of courts, both state and federal, have exercised their equitable discretion to do so. The courts have done so in cases involving the constitutionality of tax statutes and tax exemptions. Gulesian v. Dade Cty. Sch. Bd., 281 So.2d 325 (Fla. 1973); Metropolitan Life Insurance Co. v. Commissioner of Insurance, 373 N.W.2d 399 (N.D. 1985). They have done so in cases involving enforcement of the Civil Rights Act of 1964, the enforcement of which receives special deference. E.g., City of Los Angles, Dep't of Water & Power v. Manhart, supra n.1; Arizona Governing Committee for Tax-Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983) (hereinafter "Norris"). They have even done so in cases involving the First Amendment to the Constitution of the United States. Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). This Court has done so in the case of tax refund suits brought on the basis that the statute levying

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1 Cont.
case held only that possible severance as a remedy would not remove competitive injury standing to challenge the statute. Bacchus expressly declined to decide whether refunds were appropriate, 104 S.Ct. 3049 at 3059, and no issue of whether a prospective-only ruling or severance was appropriate was decided in that case.

The trial court was thus theoretically correct that severance was an appropriate remedy, though it need not have reached that question.

the tax was unconstitutional. Gulesian v. Dade County Sch. Bd., supra. Another Florida court has done so in a case involving interest on fees paid into the public treasury under a statute declared to be unconstitutional. International Studio Ap't Ass'n. v. Lockwood, 421 So.2d 1119 (Fla. 3d. DCA 1982) pet. for rev. den. 430 So.2d 451 (Fla. 1983).

In Metropolitan Life Insurance Co. v. Commissioner of Insurance, supra, the court held unconstitutional North Dakota's tax preference for domestic insurance companies. However, the court refused to give retrospective application to its ruling, and denied the plaintiffs' demands for refunds of taxes previously paid under the statute. The decision in that case is instructive here. The North Dakota court denied tax refunds to the plaintiffs because: (1) the decision of the United States Supreme Court in Metropolitan Life Insurance Co. v. Ward, supra, which occasioned the North Dakota decision, constituted a newly announced principle of constitutional law and the state therefore was justified in relying upon the presumed constitutionality of the statute in question; (2) the state acted to address the constitutional defect announced in the Ward decision; (3) the prior statute had long been in effect without protest before the Ward decision; (4) serious economic dislocation for the state would have occurred by the imposition of retroactive relief; and (5) the plaintiffs had not shown real injury as taxpayers because they had shifted all or most of the financial burden of the tax to their customers in the form of higher prices and thus would receive an unjustified windfall by the granting of refunds.

Each of those considerations applies with even more compelling force here.

A.

BACCHUS IMPORTS, LTD. v. DIAS WAS A NEW PRINCIPLE OF LAW

The majority holding in Bacchus was accompanied by a strong dissent which characterized the majority's decision as a clear departure from prior decisions and a "totally novel approach to the Twenty-first Amendment". Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 3064, 82 L.Ed.2d 200 (1984). That characterization is well supported. For decades prior to the Bacchus case, the United States Supreme Court had rebuffed Commerce Clause challenges to the States' taxation and regulatory laws which favored local alcoholic beverage industries, and did so on the express ground that the Twenty-first Amendment removed Commerce Clause strictures on the States in regard to the regulation of the sale and distribution of alcoholic beverages. State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); Mahoney v. Joseph Triner Corp., 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424 (1938); Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Michigan, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1939). Thus, the Bacchus decision constituted a new principle of law. See Metropolitan Life Ins. Co. v. Commissioner of Insurance, supra; Gulesian v. Dade County Sch. Bd., supra; International Studio Ap't Ass'n. v. Lockwood, supra. Similarly, the four justices who dissented in Metropolitan Life Insurance Co. v. Ward, supra, upon which the distributors now rely for their equal protection challenge,

characterized the majority Ward opinion as "astonishing." 105 S.Ct. at 1684. (O'CONNOR, BRENNAN, MARSHALL and REHNQUIST, J.J., dissenting). Indeed, the Courts of this State long ago upheld the very statutes at issue here against an equal protection challenge. Faircloth v. Old Mr. Boston Distiller Corp., 245 So.2d 240 (Fla. 1970). None of the distributors ever protested the tax as being constitutionally suspect; they never questioned it, never challenged it.

B.

THE STATE JUSTIFIABLY RELIED UPON THE VALIDITY OF ITS TAX STATUTES

Just as North Dakota justifiably relied upon the long and unprotested existence of its tax format, Metropolitan Life Ins. Co. v. Commissioner of Insurance, supra, Florida justifiably relied upon the tax format for alcoholic beverages in place prior to Bacchus. Until the advent of Bacchus the general wisdom was that the Twenty-first Amendment removed Commerce Clause restrictions on the States' taxation and regulation of alcoholic beverages imported into the States for consumption.

C.

THE STATE'S PROMPT ACTION

As soon as the Bacchus decision was issued, the Division of Alcoholic Beverages attempted to comply with it. The executive branch was enjoined from doing so. In the next ensuing legislative session after the Bacchus opinion issued, the legislature substantially amended the exemptions, removing the offensive "Florida-grown-and-bottled" concept.

D.

THE LACK OF EQUITY IN THE DISTRIBUTORS

Even more so than in Metroplitan Life Ins. Co. v. Commissioner of Insurance, supra, this record demonstrates unequivocally that these distributors did not suffer the burden of the taxes for which they seek refunds; they passed that burden on directly and totally to their customers. Granting a refund would constitute a windfall and should not be countenanced. That is particularly true when one considers that these self-same distributors actually sought out and enjoyed the benefits of the exemptions in the millions of dollars.

Clearly, under the circumstances of this case, the trial court was free to weigh the equities in favor of the public interest and refuse refunds to these distributors. Indeed, when one arrays the cases opting for prospective-only relief along a continuum from cases where the equities are least favorable to the State to cases where the equities are most favorable to the State, this case falls so clearly at the latter extreme that to do other than what the trial court did would be tantamount to an abuse of discretion.

The distributors seek to circumvent that conclusion by reference to cases which are not on point. The Florida decisions relied upon by the distributors[2] were cases in which the refund applicants had borne the financial burden of the tax as end

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[2] Ostendorf v. Turner, 426 So.2d 539 (Fla. 1982); Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993 (Fla. 1976); Colding v. Herzog, 467 So.2d 980 (Fla. 1985); City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972); City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984).

consumers or as property owners, in the case of ad valorem taxes. In contrast, this Court has held that no refund is due where a taxpayer passes on the financial burden of an excise tax to another. State ex rel. Szabo Food Services Inc. v. Dickinson, 286 So.2d 529, 532 (Fla. 1974). Accord, Shannon v. Hughes & Co., 270 Ky. 530, 109 S.W.2d 1174 (1937). That is precisely the case here. Gallager v. Evans, 536 F.2d 899 (10th Cir. 1976) ordered refunds of fees paid under protest and which had not been deposited to the State treasury, but had been placed in a suspense fund. In contrast, the record here shows not a peep of protest by these distributors until four months from the end of the period for which they seek refunds and further shows that the funds went to the State treasury and were expended. Thus the reliance interests implicated here were not present in Gallager v. Evans. Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930), relied upon by the distributors, is not on point. That case involved the payment of ad valorem, not excise, taxes. It involved suit for a refund of taxes which had been paid under protest in the first instance. Further, it predated the Sunburst decision and modern prospective-remedy cases. Even more fundamentally, none of the authorities cited by the distributors presented facts which showed, in combination, that the now-complaining taxpayer had made no protest, had passed the tax on and had benefitted from the operation of the very tax exemption provisions which it sought to challenge.

The distributors also claim that for every dollar of taxes paid on non-exempt beverages they lost a dollar of profit, which

should be recompensed by a tax refund. Passing over the problem that such a claim is for damages, not for a tax refund (see Point III, infra), and that these distributors were placed in a favored competitive posture by the exemptions (see Points II and III, infra), that assertion defies logic and common sense. If the tax had been completely absent during the refund period it would have been absent not only for these distributors, but also for their competitors. Market forces and competition would have reduced the price these distributors were able to charge for their products, so that elimination of the tax (in whole or in part) would not have translated, as the distributors assert, into increased profits equal to the tax reduction.

The distributors lastly complain that the State did not act promptly to amend the former Florida products exemptions after Bacchus. They therefore assert a right to a refund at least from the date of the Bacchus decision forward to July 1, 1985. That claim ignores the fact that they benefitted from the exemption during that period and that they passed on the financial burden on taxable beverages during that period. Further, even in the enforcement of Title VII of the Civil Rights Act of 1964, the federal courts, in fashioning remedies, have been sensitive to the fact that the States require, as a practical matter, a reasonable period of time to conform to newly announced principles of law. The courts have, therefore, molded their equitable remedies, even in that sensitive area, so as not to penalize a state for the time reasonably needed to come into compliance. See, e.g., Norris, supra. See also Hughlan Long, et

al. v. State of Florida, TCA 82-1056-WS (N.D. Fla., filed March 31, 1986), aff'd 805 F.2d 1542 (11th Cir. 1986), cert. granted 108 S.Ct. 65 (No. 86-1685, Oct. 5, 1987). Here the executive branch attempted forthwith to comply with the newly announced principle of Bacchus, but was prevented from doing so. Only the legislative branch could address the problem. It did so in its next session. The distributors should not be heard to claim that such action did not constitute prompt compliance, given the realities of the situation.

In sum, the trial court's decision to make its ruling prospective only is a sound exercise of equitable discretion, within its realm of discretionary authority, and well within the mainstream of cases holding in favor of full-prospectivity. The equities are compellingly with the State and against the distributors. The distributors have shown no abuse of discretion by the trial court. Affirmance of the result below is in order.

POINT II.

THE LOWER COURT ERRED IN HOLDING THAT THESE DISTRIBUTORS WERE NOT BARRED BY ESTOPPEL AND LACHES FROM CHALLENGING THE CONSTITUTIONALITY OF THE FORMER FLORIDA PRODUCT EXEMPTIONS OF §§564.06 AND 565.12, FLORIDA STATUTES (1981-1984 SUPP.)

The admitted fact is that the distributors engaged in the sale of millions of gallons of alcoholic beverages qualifying for the former Florida products exemptions under §§564.06 and 565.12, Florida Statutes, (1981 - 1984 Supp.) throughout the refund period, claimed the tax preferences provided by those statutes to such alcoholic beverages and received, as a result of those decisions, tax advantages to their businesses aggregating to more

than ten million dollars. R. Vol. I, pp. 79-111, 127-128; Vol. IV, p. 689; App. pp. 5-52, 57-92, 99-100. The decisions by the distributors to deal in tax-preferred beverages and then to claim the benefit of the tax-exemptions were purely voluntary on their part, made no under no conceivable compulsion. R. Vol. I, pp. 72-75, 112-114; App. pp. 53-55, 93-97. No distributor voiced question to the State regarding the constitutionality of §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.) or indicated that a refund might be sought based upon such alleged constitutional defects until February, 1985. The taxes were appropriated and expended. R. Vol. I, p. 125; App. p. 5.

Given those facts, the law is clear that the distributors are precluded from demanding a refund of beverage taxes paid under former §§564.06, 565.12, Florida Statutes (1981 - 1984 Supp.). Both Florida and federal precedents adhere to the principle that one who has voluntarily taken advantage of the benefits of a statute may not be heard to challenge its consitutionality.

Jannett v. Windham, 109 Fla. 129, 147 So. 296 (1933) disposed of a challenge to the provisions of a law requiring licensure of small loan businesses thusly:

> [1] The Plaintiffs in error operate under Chapter 10177, Acts of 1925....a statute which exempts those in their class who make small short loans, from the usury laws upon obtaining a stated license; and, having the benefit of the statute, they cannot challenge the validity of the provision requiring the license to be obtained.

Id. The same result was reached in McNulty v. Blackburn, 42 So.2d 445 (Fla. 1949). That decision dealt with a constitutional challenge by a former fire chief of the City of St. Petersburg to

a statute which altered his retirement benefits after he had retired. The Court disposed of the challenge as follows:

> The Act of 1941 carried additional benefits and security to those embraced in 1927 Act. Appellant accepted these benefits from appellee as soon as the 1941 Act became effective and continued to accept them month after month for more than six years and a half without complaint before he raised any question as to their validity. If the point had been raised promptly a different question might have been presented, but we express no opinion as to what the answer might have been.
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> When the legislature, as in this case, sets up a completely revised pension plan, involving a new set up as to taxes and benefits, one in doubt as to his status under the new plan cannot accept benefits under it for a period of almost seven years and then challenge its validity.

Id. 42 So.2d at 446, 447 (emphasis supplied).

Again in Seaboard Coastline Railroad Co. v. McKelvey, 259 So.2d 777 (Fla. 3d DCA 1972), the Florida courts refused to permit a challenge to the constitutionality of a statute by one who had enjoyed and accepted its benefits.

Federal decisions are consistent. Hess v. Mullaney, 213 F.2d 635 (9th Cir. 1954), was a taxpayer's action challenging Alaska's ad valorem tax. One basis of the challenge was the statute's exemption of vessels from the ad valorem tax if the vessel's owner elected to pay a lower tonnage tax. Once again, the court disposed of that challenge by holding that the taxpayer would not be heard to complain because it had accepted the benefit of the favorable tax provision. Of like import is the decision in In re Chicago, Milwaukee, St. Paul & Pac. R. Co. 713 F.2d. 274 (7th

Cir. 1983). In that case an appeal from rulings of a federal district court, sitting as the Milwaukee Railroad Reorganization Court pursuant to an act of Congress, put in issue the constitutionality of the act. Section 9 of the act required the railroad and affected labor unions to negotiate labor protection agreements, under which benefits to union members would have the highest priority in the railroad's reorganization. The union negotiated the agreements and its members received benefits thereunder. The union then challenged the act's constitutionality. The court held as follows:

> ....we need not decide whether [the act is invalid]. First having taken advantage of section 9 of the Milwaukee Act to the extent of obtaining many millions of dollars in labor-protection benefits for the workers it represents....the [union] may not turn around and challenge the constitutionality of the statutory scheme of which section 9 is an integral part. Section 5(b)(1), the nominal target of the challenge [is not unconstitutional]. It becomes vulnerable only when read together with section 9. Having exploited section 9 for its own purposes ....the [union] will not be heard to challenge its constitutionality....

Id. at 279-280 (emphasis supplied).

The foregoing decisions apply with full force to this case. The distributors sold millions of gallons of exempt alcoholic beverages under §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.) and took advantage of the preferential rates. By doing so they enjoyed a substantial benefit in tax savings for their business. Now the distributors wish to claim that those very exemptions were unlawful and, on that sole basis, demand that taxes they paid on non-exempt beverages be returned.

However, the distributors enjoyed the benefits of the statutes for many years in silence, just as the retired fire chief did in McNulty v. Blackburn; their businesses benefited from the exemptions, just as the plaintiff's business benefited from the small loan statute in Jannett v. Windham; they took advantage of the statutes' benefits just as did the union in In re Chicago, Milwaukee, St. Paul & Pac. R. Co. Just as in those cases, the distributors may not now be heard to complain, belatedly, that the benefits they sought out and enjoyed were unlawful, so that they might gain a windfall by having the law, in the warmth of which they basked so long and well, declared unconstitutional.

The trial court held that the distributors were not estopped from challenging the constitutionality of the former Florida products exemptions of §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.), despite the fact that the distributors had undertaken a course of substantial dealing in the tax preferred alcoholic beverages. In doing so, the trial court relied upon a line of cases holding that one who is compelled to accept a statutory design is not estopped from challenging the constitutionality of the statute. Hialeah Race Course v. Gulfstream Park Racing Ass'n, 245 So.2d 625 (Fla. 1971); Southeast Volusia Hospital v. State Department of Insurance, 432 So.2d 592 (Fla. 1st DCA 1983), rev'd. on other grounds, 438 So.2d 815 (Fla. 1983); Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (Fla. 4th DCA 1972); Fisher v. Dade County, 127 So.2d 132 (Fla 3d DCA 1961).

The trial court erred in relying on those cases. In each of

those cases the plaintiffs were compelled to comply with the statute subject to challenge by operation of the law itself. In the Hialeah Race Course case, Gulfstream Park Racing Association was compelled by operation of §550.081, Florida Statutes (1947), to accept less favorable racing dates, because the statute granted Hialeah Race Course the favorable dates to begin with, which resulted in Hialeah Race Course always having the more lucrative dates, and thus automatically perpetuated Hialeah's initial advantage. In the Southeast Volusia Hospital case, the statute compelled the hospital into a Hobson's choice: either to participate in the Patient Compensation Trust Fund or to meet financially onerous, statutorily required, financial responsibility standards. The hospital had not voluntarily participated in the fund. In the Admiral Development Corporation case, the City of Maitland's ordinance required dedication of a percentage of lands as a condition of subdividing land within the city. The ordinance coerced dedication. The developer had to reach a dedication agreement in order to subdivide. Again, there was legislative compulsion, not free will. In the Fisher case, to work at all as a plumber, the plaintiff either had to pass licensure examination or meet the terms of a grandfather clause. The plaintiff was not, therefore, estopped to challange the validity of the grandfather clause.[3]

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[3]Nor are the federal cases and cases from other jurisdictions relied on by the distributors on point. Begin v. Inhabitants of Town of Sabattus, 409 A.2d 1269 (Me. 1979), involved the exception to the estoppel rule that acceptance of general statutory terms does not stop one from challenging the

In contradistinction to those cases, nothing in §564.06 or §565.12, Florida Statutes, compelled these distributors to deal in alcoholic beverages which would receive favorable tax treatment. Rather, the legislature offered an inducement. It offered not the stick, but the carrot. The distributors voluntarily chose to nourish themselves upon that carrot, and did so very well, gathering over ten million dollars in tax advantage to themselves. They cannot now be heard to cry that the carrot poisoned the statute. They are in the same position as the union in In re Chicago, Milwaukee, St. Paul & Pacific R. Co., supra. Having availed themselves of the benefits of the exemptions, they now wish to have the entire statute declared unconstitutional on the basis of those very exemptions, in order that they might gain even further advantage. This they may not do. They may no more be heard to complain than could the property owners in MacKinlay v. City of Stuart, 321 So.2d 620 (Fla. 4th DCA 1975), who waited,

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3 Cont.
constitutionality of a severable provision. Here, the distributors are seeking to challenge the very provisions from which they benefitted. Moreover, in the Maine case the plaintiff was compelled to seek construction permits under the challenged ordinance to do business at all. There was statutory coercion not present here. Coercion from the government was also found in Edward P. Allison Co. v. Village of Dolton, 24 Ill.2d 233, 181 N.E.2d 151 (1962) (immediate threat of work stoppage); People v. Arthur Morgan Trucking Co., 16 Ill.2d 313, 157 N.E.2d 41 (1959) (threat of arrest); People ex rel. Carpenter v. Trelear Trucking Co., 13 Ill.2d 596, 150 N.E.2d 624 (1958) (official's refusal to accept license application for lower weight and statutory penalties for operation on roads without license); Chicago & Eastern Ill. Ry. Co. v. Miller, 309 Ill. 257, 140 N.E. 823 (1923) (threat of loss of certificate of authority and unmarketability of bonds); Louisville & Nashville R. Co. v. Bass, 328 F.Supp. 732 (W.D. Ky. 1971) (Congressionally imposed extension of cooling off period under Railway Labor Act and Congressionally imposed settlement of labor dispute). As noted above, there is no element of statutory or executive coercion present in this case.

unprotesting, until the City of Stuart had issued revenue bonds and provided improved services to their property and then sought to have the annexation of their property declared invalid in order to avoid the tax burden concomitant to annexation. See also State ex rel. Landis v. City of Coral Gables, 120 Fla. 492, 163 So. 308 (Fla. 1935). The distributors sat silently by, enjoying the exemptions' bounty, while the State, secure in the belief of the statutes' validity, collected taxes on non-exempt beverages, committed and expended them, and made ongoing financial decisions, without a peep of protest from these distributors that the tax they were paying on non-exempt beverages was rendered invalid by the exemptions they were all the while happily enjoying. Such is surely the stuff of estoppel.

Moreover, the facts of this case clearly call for applying the doctrine of laches against these distributors.

Laches is based upon the inequity of permitting a claim to be enforced in the face of a change in the conditions or relations of the parties occasioned by a delay that works a disadvantage to the party against whom the claim is made. Smith v. Daffin, 115 Fla. 418, 155 So. 658 (Fla. 1934). The harm to the State of Florida from the distributors' delay in asserting their claims for refunds is apparent. Firstly, the State may not now require them to remit full taxes on the spiritous liquors and wines which they reported as exempt and upon which they paid less than the full tax, or no tax at all, during the period for which they seek refunds. Further, the State has made decisions allocating

resources based upon the justified belief - a belief not challenged by the distributors until now - that the tax was lawful and funds derived there from would be available for expenditure. Those decisions might have, and probably would have, been made differently had there been some announced doubt as to the availability of those tax funds. See generally McNulty v. Blackburn, 42 So.2d 445 (Fla. 1949); Atchison, Topeka & Santa Fe Ry. Co. v. Lennen, 732 F.2d 1495, 1506-1507 (10th Cir. 1984). The trial court erred in not holding that laches barred the distributors from challenging the constitutionality of §§564.06 and 565.12, Florida Statutes (1981 - 1984 Supp.) for the sole purpose of seeking tax refunds.

POINT III.

THE DISTRIBUTORS LACK THE INJURY AS TAXPAYERS NECESSARY TO CONFER STANDING UPON THEM TO SEEK REFUNDS OF ALCOHOLIC BEVERAGE EXCISE TAXES.

The State pleaded as a defense to this action below that the distributors lacked standing as taxpayers to bring an action to compel the refund of beverage excise taxes. R. Vol. I, p. 63; App. p. 1. The trial court found that the distributors passed the cost of the beverage excise tax on in full to their customers, in addition to all other costs and in addition to making a profit on the beverages sold, and that the distributors fully recouped the value of the taxes from their customers. R. Vol. IV, p. 687; App. p. 99. Those findings are amply supported by the record. R. Vol. I, p. 124-125; App. pp. 4-5. The court nevertheless overruled the State's standing objections and reached the merits of the distributors' refund demands. R. Vol.

IV, pp. 688-691, App. pp. 100-103.

The trial court erred in not finding that the distributors lacked standing to seek a refund of beverage excise taxes on the facts of this case. In ruling that the distributors had standing, the trial court mistakenly relied on Bacchus, supra. The Bacchus decision held that competitive or economic injury to alcoholic beverage distributors' businesses conferred standing on them to challenge Hawaii's domestic preference alcoholic tax provisions. Bacchus, supra, 104 S. Ct. at 3054. However that holding was made in the context of a challenge to a tax exemption which was on the statute books of Hawaii and had ongoing effect at the time of commencement of the Hawaii case. Bacchus, supra, 104 S.Ct. at 3053. When the distributors instituted the instant proceeding, the Florida products exemptions which they seek to challenge had already been removed from §564.06 and §565.12, Florida Statutes, and replaced with substantially different preference provisions. Ch. 85-203, §2; Ch. 85-204, §1, Laws of Fla. While economic or competitive injury may give one standing to challenge the present and potentially ongoing application of a viable statute to one's business, the specter of ongoing application in this case was mooted by the time that these distributors instituted suit. The Bacchus opinion expressly declined to decide the question of whether alleged competitive injury would supply standing to a wholesale alcoholic beverage distributor to seek a refund of excise taxes previously paid, finding that question to be one which may be determined by state law. Bacchus, supra, 104 S.Ct. at 3059.

The trial court failed to appreciate the distinction between standing to challenge the present application of an existing statute to one's business, on the one hand, and standing to demand a refund of previously paid excise taxes, on the other. In the first case, a businessman may assert a present negative effect upon his business position and, based thereon, seek a declaration of present unconstitutionality. However, in a case such as this, where the questioned language has been repealed before suit is instituted and the sole objective for seeking a declaration of unconstitutionality is to obtain a refund of taxes paid under the defunct provision, alleged past competitive injury to one's business does not supply standing to seek a tax refund. It may not do so because such an attempt is nothing more than an attempt to exact damages from the State, recompense such for alleged past competitive injury, occasioned by a legislative act. Sovereign immunity prevents such a damage claim, whether straightforward or artfully disguised as a tax refund issue. See Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d 912, 918-919 (Fla. 1985). Accord, Shannon v. Hughes & Co., 270 Ky. 530, 109 S.W.2d 1174, 1177 (1937). While a businessman may assert present competitive injury to his business as grounds for standing to enjoin the operation of a statute, he may not stand by and then claim damages for alleged past competitive injury, because the State's sovereign immunity precludes such a claim. Since there is no cause of action against the State for alleged past competitive injury, it cannot be the basis for standing to claim a tax refund as recompense for such injury.

Instead, the distributors must show injury as taxpayers, persons who wrongfully paid a tax; rather than as injured businessmen, persons who suffered a loss of business or market from the economic effects of a tax. Under section 215.26, Florida Statutes - the section under which the distributors demand a refund and the only statutory provision allowing the refunds sought here - this Court has held that "one who does not himself bear the financial burden of a wrongfully extracted tax suffers no loss or injury, and accordingly, would not have standing to demand a refund." State ex rel. Szabo Food Services, Inc. v. Dickinson 286 So.2d 529, 532 (Fla. 1974) (emphasis supplied) (hereinafter "Szabo").

In the Szabo case, a retail dealer of machine-vended food sought a writ of mandamus to compel a refund of sales taxes paid on food sold through its vending machines. The Court observed that the sales tax statute required the retail dealer to add the tax to the selling price and make it part of the purchase price, insofar as practicable. The Court presumed from the face of the taxpayer's petition for mandamus that the retailer had complied with the statute and collected the tax from its purchasers. The Court denied Szabo's petition, since the retailer did not suffer the financial burden of the tax.

The distributors contend that Szabo is distinguishable because the statute involved in that case required the retailer to pass the tax on, while, in the case at bar, the statutes do not expressly require the tax to be passed on. Szabo is, however, not so easily distinguished. The distributors make much

of the fact that the legal incidence of the beverage excise tax is upon the distributor. That fact does not distinguish this case from Szabo. In Szabo, just as in this case, the Court considered a statute which placed the legal incidence of the tax on the entity which sought the refund. The legal incidence of the tax imposed by Ch. 212, at issue in Szabo, was not upon the retailer's customers but rather upon the retailer. Compare Green v. Panama City Housing Authority, 115 So.2d 560, 562 (Fla. 1959), Gaulden v. Kirk, 47 So.2d 567, 569 (Fla. 1950), with §§212.03, 212.05, Fla. Stat. (1985). In Szabo, the Court did not hold that one who bears the legal incidence of an excise tax may seek a refund. Rather, it adopted the opposite position, in carefully chosen words: one who does not bear the financial burden of the tax may not seek its refund, despite the fact that one may bear the legal incidence of the tax. See also Shannon v. Hughes & Co., 270 Ky. 530, 109 S.W. 2d. 1174 (1937). Further, in Szabo, just as in the instant case, the refund applicant passed the financial burden of the tax on to its customers without separately stating and identifying it as a tax. In Szabo the sales for which refunds were sought were sales from vending machines, which did not present any receipt, much less a tax-itemized receipt, to consuming customers. Moreover, the beverage excise tax law contains collection incentives or credits quite similar to those provided to dealers under the sales tax law. Compare §212.12, Fla. Stat. (1985) with §§561.506(2), 564.06(6), 565.13, Fla. Stat. (1983). That similarity demonstrates legislative awareness that the tax would be collected from

retailers by the beverage wholesaler and a legislative intent that the wholesale beverage distributors would merely be collection conduits for the tax from their customers. See also §561.50, Fla. Stat. (1983) (tax not due until tenth day of month following month of sale); §561.506, Fla. Stat. (1983) (wholesaler allowed to make deductions from his monthly tax collection payment). Indeed with such a high tax on a relatively low-priced product, and in view of the requirement that all retailers be given the same prices during the same offering period, §561.42, Fla. Stat. (1985); Rule 7A-4.471, F.A.C.; practical economic realities virtually compel a pass-through and collection of the tax by the wholesale dealer from his customers at the retail level.

The holding in Szabo comports with public policy and equity. Had the Court directed a refund to the retail dealer in Szabo, it would have allowed a windfall from the public treasury to the retailer. The retailer (it was admitted) had passed the tax along to its customers. It had not suffered the financial burden of the tax; it had recouped its loss. The granting of a refund in such a case would have constituted an unjustified enrichment.

The same considerations of policy apply in this case. The distributors' attempt to distinguish Szabo is feeble at best. It is also unsupported by any reasoned public policy. As a matter of jurisprudential policy, why should the distributors be unjustly enriched by allowance of a refund, if they passed the tax on? Should that be allowed simply becuase the statutes in

question here do not expressly direct that the tax to be passed on? The statutes surely did not prohibit such a pass-on. Indeed, they contemplate that the distributors will merely be collection conduits for the tax. And, since the distributors in fact did pass the tax on, they would be as unjustly enriched by a refund as Szabo Food Services would have been in the Szabo case.

In addition to policy considerations, careful analysis of Szabo confirms that its holding is not confined to situations wherein the law requires one upon whom a tax is laid to collect it back from another in the chain of distribution. The Court in Szabo held that one who does not suffer the financial burden of a wrongfully exacted excise tax may not demand its refund. The Szabo court observed that from the face of the petition for mandamus in the Szabo case, it appeared that the retailer had passed the tax on by collecting from its purchasers. Thus, the only substantial distinction between this case and Szabo is one of evidence. In Szabo, there was an admission in the pleadings that the tax had been passed on. In this case the fact has been admitted by stipulation. R. Vol. I, pp. 124-125; App. pp. 4-5.

In sum, the trial court erred in finding that these distributors had injury as taxpayers, and thus taxpayer standing, to seek a declaration of unconstitutionality as to the defunct statutory provisions where their sole purpose was not to obviate present or future competitive injury, but to seek a refund of previously paid taxes.

Even more fundamentally, if one accepts, merely for purposes of argument, that alleged "competitive injury" to these

distributors (as opposed to taxpayer injury) would supply the required standing to seek a refund, the distributors fail to meet even that threshold. The record demonstrates that these distributors actively engaged in a substantial volume of business in exempt beverages of their own free and unfettered will. They claimed and enjoyed the tax preferences attendant upon dealing in the preferred beverages and realized a ten million dollar tax advantage by doing so. It is obvious, then, that these distributors did not suffer a competitive disadvantage because of the former Florida products exemptions. Exactly the opposite is true; the distributors were put at a competitive advantage by the exemptions, in relation to those distributors who elected not the deal in the tax-preferred beverages and therefore engaged only in the sale of beverages which bore a significantly higher per-gallon excise tax.

The Comptroller therefore respectfully submits that the trial court erred in finding that these distributors had the taxpayer standing required to bring this action at all and in reaching the merits of the distributors' constitutional challenges underlying their refund demands.

CONCLUSION

Assuming that the lower court was correct in reaching the merits of the distributors' refund claims and the underlying constitutional challenges upon which those claims rest, the court below had the equitable discretion to make its declaration of unconstitutionality operative only prospectively from the date of judgment, thereby denying the distributors' refund claims. The distributors have failed to show an abuse of discretion by the lower court. The result reached below should be affirmed.

In addition, the result below should be sustained on grounds independent of those relied upon by the lower court. This Court should hold that the trial court was correct in its decision on the merits, but should also hold that, irrespective of the ruling on the merits of the claims, the distributors are barred by estoppel and laches from pursuing the refund claims and that the distributors lack the necessary taxpayer standing to seek tax refunds.

The Comptroller requests that the Court affirm the result below on each of those grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **WILBUR E. BREWTON**, Esq. and **JANICE G. SCOTT**, Esq., Taylor, Brion, Buker & Greene, Post Office Box 11189, Tallahassee, Florida 32302, this 29th day of January, 1988.

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