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 DISTRIBUTING 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. CASE NO.: 71,638

OFFICE OF THE COMPTROLLER STATE OF FLORIDA,

Appellee/Cross Appellant.

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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CROSS REPLY BRIEF OF APPELLEE
OFFICE OF THE COMPTROLLER
STATE OF FLORIDA

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DANIEL C. BROWN
ASSISTANT ATTORNEY GENERAL
Department of Legal Affairs
Tax Section, The Capitol
Tallahassee, FL 3239-1050
904/ 487-2142

COUNSEL FOR APPELLEE

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ARGUMENT

POINT I.
THE TRIAL COURT DID NOT ERR IN MAKING ITS DECISION ON THE MERITS PROSPECTIVE-ONLY IN OPERATION

The distributors assert that the trial court erred in relying on cases such as Gulesian v. Dade County School Bd. 281 So.2d 325 (Fla. 1973) and Metropolitan Life Insurance Co. v. Commissioner Of Insurance, 373 N.W.2d 399 (N.D. 1985) in limiting its declaratory decree to prospective-only application. The court did not err in doing so.

Contrary to the distributors' assertion that Gulesian is a "narrow exception which can be distinguished on its facts" from this case, this Court has held that Gulesian not limited to its narrow facts and, in fact, that its holding is supported by the mainstream of cases which have many times opted for prospective-only relief when a statute presumed to be constitutional is declared otherwise. Deltona Corp. v. Bailey, 336 So.2d 1163, 1166 (Fla. 1976). Indeed, in Gulesian, this Court affirmed prospective-only relief mainly because of the school board's good faith reliance on the presumptive validity of the statute and the budget difficulties which retrospective application would create. Gulesian v. Dade County School Bd., supra, at 327. See also Deseret Ranches Of Florida, Inc. v. St. John's River Water Mg't. Dist., 406 So.2d 1132, 1142-1143 (Fla. 5th DCA 1981), mod. on other grounds 421 So.2d 1067 (Fla. 1982). In the case at bar the State's justifiable reliance on the validity of these statutes is clear. Further, the magnitude of the harm from granting refunds is much greater than that in Gulesian.

Instead of Gulesian being distinguished from this case, it is the decisions which the distributors rely upon which are not on point. Cases such as Colding v. Herzog, 467 So.2d 980 (Fla. 1985); City of Tampa v. Thatcher Glass Corp, 445 So.2d 578 (Fla. 1984); and Osterndorf v. State, 426 So.2d 539 (Fla. 1982) are all cases in which the complainants bore both the economic incidence of the tax or fee in dispute. They were at the end of the line and could not pass the tax burden on directly in the chain of distribution. Here, in contrast, the tax is a stated, per-gallon amount, levied and identifiable on removal from the distributors' inventories for sale and, as the distributors have stipulated, is included in their sales prices in addition to all other taxes, costs and profit margin. Try as they might, these distributors cannot avoid the fact that they recouped the value of the taxes in full from their customers. As a result, prospective relief is fair. It avoids a windfall to the distributors at the expense of a totally innocent party.

The distributors' attempted distinction of Metropolitan Life Insurance Co. v. Commissioner Of Insurance, supra, is dispelled by a plain reading of that decision. When the North Dakota Supreme Court rendered its prospective-only decision, the legislature of North Dakota had already repealed the offending tax preference provisions. 373 N.W.2d at 402. The case is squarely on point with the facts of this case.

The distributors complain that a denial of refund denies them recompense for "potential" lost profits. They cite Hanover Shoe, Inc. v. United States Machinery Corp., 392 U.S. 481 (1968) and

Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz, 584 F.2d 12 (3d Cir. 1978) for the proposition that the fact that they passed on the cost of the tax is irrelevant. Those cases, again, are not in point. They are anti-trust cases between private parties or cases where the gravamen of the complaint is damage to business markets. This case is not a businessman's action for damages, but a taxpayer action for taxes paid. It is noteworthy that the distributors do not even dispute the point that soveriegn immuinity bars an action against the State for general business damages bottomed on the allegation that the damage flows from a fundamental act of governing, the enactment of legislation. See Point III, Answer Brief of Appellee/Cross-Appellant.

The distributors' attempt to distinguish away State ex rel. Szabo Food Services, Inc. v. Dickinson likewise fails. The distributors attempt to present the Szabo holding that one who does not bear the financial burden of an excise tax cannot claim its refund as dictum. That characterization does not withstand inspection. Standing, partaking of jurisdictional limitations, is the first issue a court must address. In Szabo, the court held that the taxpayer had no standing to seek a refund. It need have decided nothing more to reach a complete disposition of the case. Therefore, if any part of the Szabo opinion is dictum, it is the portion which address the merits of the taxpayers claim, not the ruling on standing.

POINT II.

THE LOWER COURT ERRED IN FINDING NO ESTOPPEL OR LACHES

The distributors' argument that they were compelled to deal in tax-favored products defies common sense. To accept that argument is to accept the proposition that a tax incentive is legislative compulsion. To state that proposition is to refute it. In every case relied upon by the distributors, there was an element of coercion in the terms of the law itself or in its execution, a governmentally imposed penalty for non-compliance. This record is totally devoid of such a coercive element.

Likewise, the distributors' claim that estoppel should not be applied because the case involves an offense to public morals has a tinny ring to it. How can the offering of a tax incentive, justifiably believed to be well within the State's constitutional power based upon precedents of the highest court of this nation, be characterized as an affront to public morals, particularly when the complainants themselves were the beneficiaries of what they now assert to be that affront?

POINT III.
THE DISTRIBUTORS HAVE FAILED TO SHOW TAXPAYER STANDING TO CLAIM A TAX REFUND

It is worthy of note, again, that the distributors do not even address the Comptroller's point that sovereign immunity bars a claim for past general business damages and that they must therefore show taxpayer injury to obtain a tax refund.

The cases relied upon by the distributors for standing are cases in which a present and prospective challenge to a tax format was the gravamen of the action, Bacchus Imports, Ltd. v.

Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984); JDS Realty Corp. v. Government of Virgin Islands,[1] 824 F.2d 256 (3d Cir. 1987); National Meat Ass'n v. Deukmejian, 743 F.2d 656 (9th Cir. 1984); or cases where the issue of sovereign immunity against actions to compel damages from the State was not an issue. Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz, 584 F.2d 12 (2d Cir. 1978) (refunds of business damages from producer settlement fund for that purpose).

In contrast, the law in taxpayer refund suits in this State is that one does not have standing to seek a tax refund if he has passed the financial burden of the tax to another. Szabo, supra. Nothing in any case cited by the distributors says otherwise with respect to the right of a taxpayer in this state to demand a refund of tax paid under the law of this State. Szabo, supra, is founded on sound public policy and controls in a taxpayer refund action such as this case.

Moreover, the distributors nowhere explain how it is that, since they took advantage of the favorable tax rates and thus occupied a favorable competitive position under the statutes they now challenge, they nevertheless suffered competitive injury as a result of the tax rate differential.

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[1] The JDS Realty case, like Bacchus, did not decide the issue of whether competitive business injury supplies taxpayer standing to demand a tax refund where the taxpayer has passed the financial burden of the tax on. 824 F.2d at 258. Rather it decided only that such injury allowed a challenge to the constitutionality of the provision. The opinion did not address the tax refund issue. In a later unreported opinion the the district court denied refunds because the plaintiff had passed the tax burden on JDS Realty Corp. v. Government of Virgin Islands, (D.V.I., opinion filed June 30, 1986) aff'd 826 F.2d 1055 (3d Cir. 1987).

CONCLUSION

The Comptroller requests that the Court affirm the result below on all grounds asserted before this Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, The Capitol
Tallahassee, FL 32399-1050
904/ 487-2142

COUNSEL FOR APPELLEE

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 8th day of February, 1988.

DANIEL C. BROWN
Assistant Attorney General