IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,638

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.

OFFICE OF THE COMPTROLLER
STATE OF FLORIDA,

Appellee/Cross Appellant
_____/

INITIAL BRIEF OF APPELLANTS

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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PRELIMINARY STATEMENT

The Appellants/Cross-Appellees, National Distributing Co., Inc., doing business as Consolidated Distributing Co., National Wine & Liquor, Consolidated NDC Distributors, Bay South Distributors, Inc., National Wine & Liquor of Palm Beach County, Bay Distributors, Inc., NDC Distributors of Pensacola; and, the Appellants/Cross-Appellees, Tampa Wholesale Liquor Co., Inc., House of Midulla of Southwest Florida, Inc., Grantham Distributing Co, Inc., and Grantham Wine Company, Plaintiffs below, shall be referred to herein as "Appellants" or "the distributors." Appellee/Cross-Appellant, State of Florida, Office of the Comptroller, Defendant below, shall be referred to herein as "Appellee" or as "the State."

References to the record on appeal shall be made by use of the symbols (R:), containing the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

On April 15, 1987 the Plaintiffs filed a Complaint for Declaratory Relief, For Writ of Mandamus and For Other Relief. (R: 1). The complaint alleged, in pertinent part, that sections 564.06 and 565.12, F.S. (1981-1984 Supp.), imposed unconstitutional taxes upon Appellants, alcoholic beverage distributors, since said statutes unconstitutionally discriminated against interstate commerce by favoring local industry with tax exemptions or preferences. The distributors had each filed with the Comptroller, and with the Division of Alcoholic Beverages and Tobacco, applications for tax refunds for all taxes paid pursuant to §§564.06 and 565.12, F.S., (1981-1984 Supp.), for a three year period preceding each application. National Distributing Co., Inc., filed its applications on June 18, 1985. Tampa Wholesale Liquor Co., Inc., and House of Midulla of Southwest Florida, Inc., filed their applications on May 22, 1986. Grantham Distributing Co., Inc., and Grantham Wine Company filed their applications on April 29, 1986. (R: 686-687).

The applications sought alcoholic beverage excise tax refunds based on the invalidity of the taxing statutes, §§564.06 and 565.12, F.S., (1981-1984 Supp.),

as disclosed by the reasoning and holding of the United States Supreme Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200, (1984).

Each refund application was denied and the distributors petitioned for administrative hearings before the Division of Administrative Hearings. (R: 333-451). Administrative proceedings were commenced but were stayed pending the filing and conclusion of the instant cause before the Circuit Court of Leon County, Florida. See DOAH Case No. 86-0501 through 86-0507, 86-2389, 86-2782; Defendants' Notice of Filing Public Records and Request For Judicial Notice (R: 333-334).

In response to the Complaint filed by the Appellants in the Circuit Court of Leon County, the Appellees filed their Answer on April 20, 1987. (R: 63). In the Answer, Appellees raised certain designated Defenses and Affirmative Defenses, alleging Appellants were estopped to challenge the statutes, were estopped to seek a refund, were barred by laches, and that a prospective-only application of unconstitutionality should be decreed, thereby barring the requested refund.

The parties entered into and filed a Stipulation of Facts on April 24, 1987 (R: 124). The Stipulation states as follows:

STIPULATION OF FACTS

The parties, by and through their undersigned counsel, hereby stipulate to the following factual matters solely for the purpose of this pending litigation without waiving any objection to same relating to relevance, materiality or admissibility and without conceding any ground of challenge to the constitutionality of §§564.06 and 565.12, Florida Statutes:

1. For each unit of product sold by Plaintiffs to licensed retail vendors during the period for which refunds are sought, the taxes for which refunds are sought were an element of the sales prices charged for each such unit of product, in addition to all other costs, taxes, and overhead expenses incurred by Plaintiffs with respect to the sale of such units of product, and in addition to the profit included by Plaintiffs in the determination of the sales prices for such units of product.

2. For each unit of product sold to licensed retail vendors during the refund period, the total purchase price, of which the taxes for which refunds are sought were an element, became a debt due from the retail vendors to Plaintiffs for units of product sold to retail

vendors and, upon delivery of the products, became collectible as any other debt due to Plaintiffs.

3. During the refund period, Plaintiffs bore the legal incidence of taxes due under sections 564.06 and 565.12, F.S., and were legally liable to remit such taxes to the State of Florida regardless of whether vendors which purchased beverages from Plaintiffs ever paid to Plaintiffs all monies owing for the beverages purchased. However, for the purpose of this stipulation, Plaintiffs do not contend that they were not paid in full for all beverages delivered to licensed retail vendors during the period for which tax refunds are sought in these proceedings.

4. During the refund period Plaintiffs other than National Distributing Co. paid beverage excise taxes on products in which they dealt, which products were not exempt or partially exempt from the tax, without protesting the payment of the tax, without voicing question to the State regarding constitutionality of the provisions of §564.06 and §565.12, F.S., (1981-1984 Supp.), and without advising that refund of such taxes might be sought by Plaintiffs based on the alleged unconstitutionality of those statutes. National Distributing Co. never questioned the constitutionality

of those statutes, protested payment of the tax or voiced any questions to the state regarding the constitutionality of the statutes until February, 1985.

5. The provisions of sections 564.06 and 565.12, F.S., (1981-1984 Supp.), effective for the requested refund period, on their face uniformly imposed the stated beverage taxes and exemptions on all manufacturers, distributors and vendors who manufactured, distributed or sold the taxed products; and, the statutory exemptions provided from taxes for certain products were available to all manufacturers, distributors and vendors who manufactured, distributed or sold the exempt products.

6. The beverage excise taxes remitted by Plaintiffs during the refund period where deposited to the General Revenue Fund of the State Treasury. For purposes of this case, Plaintiffs do not contest Defendant's allegation that said taxes were appropriated and expended.

7. TAMPA WHOLESALE LIQUOR CO. and HOUSE OF MIDULLA OF SOUTHWEST FLORIDA sold and distributed the following gallonage amounts of spiritous beverages and wines which were totally exempt or partially exempt from the beverages taxes imposed by sections 564.06 and 565.12, Florida Statutes:

* * * [Lengthy gallonage data deleted]

8. The attached exhibits 1 and 2 are accurate statements of the matters reported therein.

9. GRANTHAM DISTRIBUTING CO. together with GRANTHAM WINE CO., sold and distributed the following gallonage amounts of spiritous beverages and wines which were totally exempt or partially exempt from the beverage taxes imposed by sections 564.06 and 565.12, F.S.:

YEAR	LIQUOR	WINE
1981	453,962	1,008
1982	499,263	5,342
1983	471,707	2,697
1984	799,192	2,736
1985	188,918	17,145

10. The attached exhibits 3 and 4 are accurate statements of the matters reported therein.

11. NATIONAL DISTRIBUTING CO., INC., doing business through its various fictitious entities or subsidiaries, sold and distributed the following gallonage amounts of spiritous beverages and wines which were totally exempt or partially exempt from the beverage taxes imposed by sections 564.06 and 565.12, F.S.:

* * * [Lengthy gallonage data deleted]

12. The attached exhibits numbered 5 though 11 are accurate statements of the matters reported therein.

[end of Stipulation of Facts (R: 128)]

The exhibits attached to the stipulation, and referred to in paragraph 12 thereof, set forth the amounts of taxes paid to the Division of Alcoholic Beverages and Tobacco by each Appellant distributor and shows, in pertinent part, by calculation, the following for each distributor's refund period:

DISTRIBUTOR	TOTAL TAXES PAID PURSUANT TO §564.06 AND §565.12, F.S., (1981-1984 SUPP)	DIFFERENCE BETWEEN TOTAL AMOUNT PAID AND EXEMPT RATE
Grantham Distributing Co.	$10,939,357.75	$3,908,151.68
Grantham Wine Co.	$10,506,943.45	$10,506,943.45
Tampa Wholesale Liquor Co., Inc.	$28,945,537.54	$18,103,381.80
House of Midulla of Southwest Florida, Inc.	$ 4,674,070.37	$ 2,973,447.83
National Distributing Company, Inc., d/b/a (Aggregate)	154,204,144.30	$84,385,741.39

On August 11, 1987 the Appellees filed Defendants' Corrected Motion For Summary Judgment, (R: 452) relying on the Stipulation of Facts (R: 124) and certain affidavits filed April 21, 1987 (R: 72,112). Hearing was set on Defendants' Corrected Motion For Summary Judgment for October 23, 1987.

On October 1, 1987, the Appellants, Plaintiffs below, filed Plaintiffs' Motion For Partial Summary Judgment requesting the trial court to determine and declare that Sections 564.06 and 565.12, F.S. (1981-1984 Supp.), were unconstitutional on their face and void ab initio as they pertained to Plaintiff distributors. (R: 480).

Plaintiffs resisted Defendant's request for summary judgment as to the determination of Defendant's affirmative defenses on the grounds that Defendants had failed to demonstrate the non-existance of all material facts pertinent to Defendant's "pass-on" defense, and Defendant's claim that Plaintiffs lacked standing to seek a refund. (R: 515-529).

On October 23, 1987 hearing was held on the Defendants' Corrected Motion For Summary Judgment and on the Plaintiffs' Motion For Partial Summary Judgment. Pursuant to said hearing, Final Summary Judgment was entered by the Honorable Charles E. Miner, Jr., on November 3, 1987 and filed on November 4, 1987. (R: 686).

In the order of Final Summary Judgment, the trial court found that there existed no disputed material facts. The court found that Plaintiffs did remit the subject alcoholic beverage taxes during the periods for

which refunds were sought. The trial court further concluded that Plaintiffs were entitled to challenge sections 564.06 and 565.12, F.S. (1981-1984 Supp.), and to receive a declaration as to their constitutionality (R: 688). The Court also found that Plaintiffs were not barred by laches or estoppel in seeking the relief prayed for in the action below. (R: 690).

The Honorable Charles E. Miner, Jr., presiding below, declared that the tax preferences granted to Florida - produced alcoholic beverages under §§564.06 and 565.12, F.S. (1981-1984 Supp.), violated the Commerce Clause of Article I, §8, of the Constitution of the United States. The unconstitutionality of the challenged statutes was never contested by Appellee.[1]

However, in the Final Summary Judgment, Judge Miner concluded that the entire statutes were not rendered invalid by the discriminatory provisions. Rather, the court severed the exemptions, holding the remaining tax provisions of each statute to be valid. The order also

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[1] The Defendants' Corrected Motion for summary judgment states "[t]he Comptroller finds no distinguishing factors which would lead to the conclusion that the analysis in Bacchus Imports, Ltd. v. Dias, supra, would not have applied with equal force to the provisions of §§564.06 and 565.12, Florida Statutes, as they stood prior to July 1, 1985." (R: 453).

decreed that such ruling would be applied prospectively only, based on "the facts" and on the court's further findings that the Supreme Court decision in Bacchus Imports, Ltd. v. Dias, supra, constituted a break with established precedent, that the State reasonably relied upon the validity of the tax, and that the Plaintiffs never voiced concern to the State regarding the validity of the statutes until 1985.[2] (R: 689-690).

On November 23, 1987, the Appellants filed their Notice of Appeal to the District Court of Appeal, First District, from the November 4, 1987, Final Summary Judgment. (R: 692). The Appellee/Cross-Appellant filed its Notice of Cross Appeal on November 30, 1987. (R: 694).

Also, on November 30, 1987, the Appellee/Cross-Appellant filed with the District Court of Appeal, First District, a Suggestion of Certification pursuant to Rule 9.125, Florida Rules of Appellate Procedure, to which the District Court of Appeal responded with its December 21, 1987, Order certifying the appeal. (See record in District Court of Appeal case no. 87-1859).

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[2] Appellant National Distributing Co., Inc., protested payment under the subject statutes in February of 1985. (R: 125,688). National's refund application was filed in June of 1985. (R: 687)

On December 23, 1987 this Honorable Court entered its Order Accepting Jurisdiction, Establishing Briefing Schedule and Setting Oral Argument. (See record in this case).

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO HOLD §§564.06 AND 565.12, FLORIDA STATUTES (1981-1984 SUPP.), UNCONSTITUTIONAL IN TOTO AND, INSTEAD, SEVERING ONLY THE TAX EXEMPTIONS AND PREFERENCES, AS INVALID, FROM THE REMAINING PROVISIONS.

II. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE DECLARATION OF UNCONSTITUTIONALITY OF §§564.06 AND 565.12, FLORIDA STATUTES (1981-1984 SUPP.), SHALL BE PROSPECTIVE IN OPERATION THEREBY DENYING ANY TAX REFUND TO APPELLANTS.

III. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANTS ANY TAX REFUND OR REMEDY FOR THE IMPOSITION UPON APPELLANTS OF UNCONSTITUTIONALLY DISCRIMINATORY TAXES.

SUMMARY OF ARGUMENT

The trial court erred in its ruling that only the alcoholic beverage excise tax exemptions and preferences favoring Florida industry contained in sections 564.06 and 565.12, Florida Statutes, (1981-1984 Supp.), are unconstitutional in violation of the Commerce Clause of the United States Constitution. The entire taxing scheme set forth in the challenged statutes is unconstitutional since it discriminated against Appellants by conferring the detriment of a higher tax rate on non-Florida produced or grown products in order to subsidize the Florida-grown products industry. These higher taxes paid by Appellants were required by taxing provisions clearly set in compensation for and in consideration of the impermissible tax benefits to local industry contained in the same statutory provisions. Therefore, severance is not proper under Florida Law. The U.S. Supreme Court in Bacchus Imports, Ltd. v. Dias, infra, rejected severance as a remedy under circumstances virtually identical to those in the instant case.

Nor should the trial court have declared the unconstitutionality of provisions of section 564.06 and 565.12, F.S. (1981-1984 Supp.), to be prospective only as to these Appellants who were the actual litigants who

challenged and first received the declaration of invalidity pertaining to sections 564.06 and 565.12, Florida Statutes. The weight of authority previously issued by this Court requires that any ruling of unconstitutionality not be prospective as to these Appellants and not be utilized to deprive these Appellants of the requested refund of excise taxes.

A remedy for the subjection of Appellants to the unconstitutional taxes is required, for to do otherwise is to perpetuate the very constitutional violation condemned by the United States Supreme Court and by the trial court below. That remedy, according to the U.S. Supreme Court and according to the refund provisions of Florida law, is a full refund of the discriminatory taxes paid by Appellants. The refund is both authorized and mandated under the circumstances of this case.

POINT I

THE TRIAL COURT ERRED IN FAILING TO HOLD SECTIONS 564.06 AND 565.12, FLORIDA STATUTES (1981-1984 SUPP.), UNCONSTITUTIONAL IN TOTO AND, INSTEAD, SEVERING ONLY THE TAX EXEMPTIONS AND PREFERENCES, AS INVALID, FROM THE REMAINING PROVISIONS.

Sections 564.06 and 565.12, Florida Statutes (1981-1984 Supp.), challenged by Appellants in the trial court, each granted tax-preferred treatment to alcoholic beverages made from specific agricultural products grown in Florida and manufactured and bottled in Florida.

On June 29, 1984, the Supreme Court of the United States held that states may not constitutionally utilize a taxing scheme which, through purpose or effect, discriminates against interstate commerce by providing direct commercial advantage to local business or industry. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

The Bacchus decision arose in the context of a challenge to an Hawaiian statute, Haw.Rev.Stat. 244-4 which, in part, exempted from alcoholic beverage taxes

Okolehao brandy (distilled only from the root of a shrub indigenous to Hawaii), Haw.Rev.Stat. 244-4(6) and "[a]ny fruit wine manufactured in the State from products grown in the State...." Haw.Rev.Stat 244-4(7).

The Supreme Court in Bacchus held that the statutes violated the long-standing proscription against states' imposing "'...a tax which discriminates against interstate commerce ... by providing a direct commercial advantage to local business.'" Id., 104 S.Ct. at 3054. The Court further held that such violation was not alleviated by the intent to encourage new industries or help ailing ones. Id. at 3056-3057. Nor was the violation found to be alleviated by the existence of the Twenty-First Amendment to the Constitution. Id. at 3058, 3059. The Supreme Court explained:

> Approaching the case in this light, we are convinced that Hawaii's discriminatory tax cannot stand. Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local industries by erecting barriers to competition. [Id. at 3058]

The United States Supreme Court reversed the Hawaii Supreme Court and held that the statute "...violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products." [Id. at 3057; footnote omitted].

In so ruling, the Court noted:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does does not depend upon whether one focuses upon the benefitted or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other.[Id. at 3057].

The Supreme Court refused to hold only the exemption portion of the statute to be invalid and refused to sever the exemptions from the remainder of the tax statute. As one basis for its refusal the Court noted that the challenged exemptions had expired and severance would, therefore, provide no remedy for the past harm inflicted by the discriminatory provisions. Id. at 3054.

In the instant case, the trial court found that, based on the holding and rationale of Bacchus Imports, Ltd. v. Dias, supra, sections 564.06 and 565.12, F.S. (1981-1984 Supp.), in providing tax preferences to Florida-produced alcoholic beverages, violated the Commerce Clause of Article I, §8, of the Constitution of the United States. (R: 688) The unconstitutionality of these provisions, virtually identical to those held unconstitutional in Bacchus, was not challenged by

Appellee. (R: 453). However, in contrast to the United States Supreme Court's refusal to sever the preferences out of the statutes and hold only the preferences invalid, the trial court in the instant case did just that. Appellants assert that such action by the trial court was in error in light of the ruling of the Supreme Court in Bacchus and in light of Florida law governing when severance is proper. The trial court should have stricken sections 564.06 and 565.12, F.S. (1981-1984 Supp.), in their entirety and granted Appellants' requests for refunds of taxes paid thereunder.

In determining when a portion of a general law, containing unconstitutional features, may be severed and deleted, and the remainder left intact, this Court has required that the portion declared to contain the unconstitutional feature be logically separable from the remaining valid provisions; that the Legislative purpose expressed in the valid provision still be capable of being accomplished independently; that an act complete in itself remains; and, that it can be said the Legislature would have passed the valid provisions without the invalid provisions. Presbyterian Homes of the Synod of Florida v. Wood, 297 So.2d 556, 559 (Fla. 1974); Cramp. v. Board of Public Instruction of Orange County, 137

So.2d 828 (Fla. 1962).

In making such severability inquiry, it is therefore imperative that the court determine that there is, indeed, both an invalid portion of the statute and a valid one. Appellants assert that the trial Court erred in this respect in declaring that the only invalid provisions of sections 564.06 and 565.12, F.S. (1981-1984 Supp.), were the exemptions or preferences.

The Supreme Court in Bacchus Imports, Ltd. v. Dias, supra, recognized that:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense.

104 S.Ct. at 3057. Similarly, it is virtually impossible to say that the provisions of §§564.06 and 565.12, F.S. (1981-1984 Supp.), solely benefit the local industry and in no way bring detriment to out of state industry. As the Supreme Court found, in a taxing scheme such as this, the burdens are allocated unevenly on both sides; and as the Supreme Court found, both benefits and detriments are conferred by each statute. Both benefits and detriments are created and each must be viewed in light of the other. Just as the United States Supreme Court in Bacchus invalidated the entire Hawaiian taxing statute,

which provided tax preferences to Hawaii-grown and produced alcoholic beverages, and flatly refused to sever only the exemptions, the trial court below should have invalidated the entire of §§564.06 and 565.12, F.S. (1981-1984 Supp.).

It simply cannot be said that the provisions of the challenged statutes were separate and distinct. Nor can it be said that the Legislature would have enacted the same remaining tax rate as it did for non-Florida Grown or bottled products if, at the time, the Legislature had known it could not give preferences to local products or set the rate at a level to benefit local industry.

In fact, it cannot be assumed the Legislature would enact any tax statute without making some provision for favoring Florida Industry. As far back as 1903, in what appears to be the first state-wide alcoholic beverage taxing provision, the Legislature provided a license tax exemption for manufacturers and distillers of wine made from certain Florida-grown agricultural products. Section 446, General Statutes of the State of Florida (1903).

Even subsequent to the Bacchus decision, the preferences for primarily Florida-grown products were continued by the Legislature and, subsequently,

invalidated by the Circuit Court of Leon County. See pending appeal, Division of Alcoholic Beverages vs. McKesson Corp., Florida Supreme Court Case Number 70,368.

Therefore, it is fairly apparent that the Florida Legislature has and maintains a deeply ingrained desire to provide tax relief to the Florida industries and to allow out-of-state products to foot more than their fair share of the tax bill in order to accomplish this longstanding intent.

While it will be argued that the Legislature surely would have set some over all tax to be applied evenly to local and out-of-state products, if it were totally unable to favor local industry, it can equally be reasoned that the Legislature would not have enacted that same, necessarily higher, rate previously applied only to out of state products, since to apply that rate to Florida products would violate the very strongly evidenced intent of the Legislature to benefit local industry.

The two provisions at issue, the tax rate for regular wine and liquor and the preferential rate for Florida-grown products are inextricably intertwined. Since the Legislature obviously sought to raise a certain

projected amount of revenue with the alcoholic beverage tax as a whole, it must have, in order to compensate for the shortfall created by the preferences, necessarily set a higher tax rate on the regular products. That being the case, the tax on regular products is equally discriminatory and violative of the Commerce Clause as is the preferential tax. Since no one can, without speculating, say with certainty what lower over-all rate the Legislature would have set, absent the ability to favor local industry, the entire tax statute must needs be invalidated. Even if the tax on regular wine and liquor, standing alone, is not found to be discriminatory, the tax set for regular wine and liquor was set in compensation for, and in consideration of, the preferential tax provisions. Therefore, the entire statute must fall. In Barndollar v. Sunset Realty Corp., 379 So.2d 1278 (Fla. 1980), this Court instructed that:

> "When ... the valid and void parts of a statute are mutually connected with and dependent upon each other as conditions, considerations, or compensations for each other, then a severance of the good from the bad would effect a result not contemplated by the legislature; and in this situation a severability clause is not compatible with the legislative intent and cannot be applied to save the valid parts of the statute."

Id. at 1281. See also State v. Hilburn, 70 Fla. 55, 69 So. 784 (1915).

Further, where as here the manifest purpose of all the provisions of a statute are clearly inconsistent with the Constitution, all the statutory provisions are considered to be interconnected and all must fall. State ex rel Boyd v. Green, 355 So.2d 879 (Fla. 1978). Based upon the fact that the manifest intent of the Legislature, as evidenced by more than eighty years of statutory history, has been to require out-of-state alcoholic beverages products to bear more than their fair share of the tax in order to benefit local industry; and since this purpose is carried out by each entire statutory provision, internally interconnected by the relative consideration and compensation by the one tax rate for the other, each entire statute must fall.

Therefore, the trial court erred in failing to declare §§564.06 and 565.12, F.S. (1981-1984), each unconstitutional in toto and further erred in severing the tax preference provisions and leaving the remainder intact. The trial court's order of Final Summary Judgment should be reversed and sections 564.06 and 565.12, F.S. (1981-1984 Supp.), should be declared unconstitutional, with directions that Appellants receive refunds of taxes paid thereunder for the refund period.

POINT II

THE TRIAL COURT ERRED IN HOLDING THAT THE DECLARATION OF UNCONSTITUTIONALITY OF SECTIONS 564.06 AND 565.12, FLORIDA STATUTES (1981-1984 SUPP), SHALL BE PROSPECTIVE ONLY IN OPERATION, THEREBY DENYING ANY TAX REFUND TO APPELLANTS.

The trial court, in its order of Final Summary Judgment, held that:

> ...the declaration of unconstitutionality as to §§564.06 and 565.12, Florida Statutes (1981-1984 Supp.) set forth herein should be prospective in operation, not retroactive, and thus does not entitle Plaintiffs to the refunds which they seek. [R: 690]

As a basis for such holding, the trial court found that:

> ...although the Florida-produced alcoholic beverage exemptions of former §§564.06 and 565.12, Florida Statutes (1981-1984 Supp.) became constitutionally suspect under the Commerce Clause as a result of the Bacchus Imports Ltd. v. Dias decision, the facts of this case call for the application of a prospective-only declaration of unconstitutionality regarding the tax preferences in former §§564.06 and 565.12, Florida Statutes (1981-1984 Supp.). [R: 689]

The court found as justification for its prospective-only ruling that the Bacchus case constituted a break with established precedent. Id. The trial court further relied upon its finding that:

> [t]he State therefore reasonably relied upon the validity of the tax structure created by

> §§564.06 and 565.12, Florida Statutes (1981-1984 Supp.), particularly in view of the fact that Plaintiffs never voiced concern to the State regarding the validity of those statutes until 1985.[3] [R: 690]

Finally, as a basis for its prospective-only holding, the trial court relied upon its finding that:

> [t]he State immediately took steps to address the constitutional concerns raised by the decision on Bacchus Imports, Ltd. v. Dias. [R: 690]

It must be noted, however, that the only legitimate steps taken by the State to address the constitutional problems of sections 564.06 and 565.12, F.S. (1981-1984 Supp.), constituted waiting almost a year, until the next regular legislative session, to repeal the "Florida-Grown Products" exemptions.

Additionally, the trial court clearly found that the Bacchus decision, rendered in June of 1984, rendered the subject Florida Statutes constitutionally suspect. That being so, the State cannot correctly be held to have "reasonably relied upon the validity of the tax structure created by §§564.06 and 565.12, Florida Statutes (1981-

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[3] The Stipulation of Facts (R: 125) shows that Appellant National Distributing Co., Inc., objected to payment of said taxes in February of 1985. However, section 215.26, Florida Statutes, authorizing the filing of requests for tax refunds does not require that the taxes be paid under protest.

1984 Supp.)..." regardless of whether any Plaintiff below objected to payment of taxes, certainly, at the very least, for the period of time between June of 1984, when Bacchus was decided and July 1, 1985, when the statutes were substantially amended.

Further, whether the 1985 Legislature's attempt to address the constitutional defects in sections 564.06 and 565.12, Florida Statutes (1981-1984 Supp.), constituted a good faith legitimate attempt to avoid favoring local industry by discriminatory taxation in violation of the Commerce Clause of the United States Constitution is open to question in view of the pending appeal in Division of Alcoholic Beverages and Tobacco, etc, et al v. McKesson Corporation, et al, Florida Supreme Court case number 70,368 wherein that question has been raised.[4]

Regardless of the correctness of the trial court's finding regarding pre-June 1984 actions, there exists no sufficient justification for the trial court in the instant case to have found Appellants not to be entitled to refunds for the period commencing June, 1984 to July 1, 1985, when the subject statutes were amended, even if

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[4] This court may judicially notice appellate briefs in this prior, unrelated appeal. Glendale Federal Savings & Loan v. State, Department of Insurance, 485 So.2d 1321 (Fla. 1 DCA 1986).

Bacchus constituted a break in precedent not forseen by Appellee or the State of Florida.

Even if the trial court found correctly that the State relied in good faith on the validity of the taxing statutes, such good faith reliance does not support a prospective-only application of the ruling against Appellants in this case. In Osterndorf v. State, 426 So.2d 539 (Fla. 1982), this Court found that the tax collector had enforced an unconstitutionally discriminatory taxing scheme "in good faith reliance on a presumptively valid statute", Id. at 545, but allowed the taxpayers who had challenged the statute to obtain their refunds. This was so even though this Court held the decision to be prospective only:

> Our decision in this case is prospective only for the taxable year commencing January 1, 1983, **except for those taxpayers who have timely judicially challenged the** applicability of the residence requirement. [Id.; emphasis added]

This Court, in City of Tampa v. Thatcher Glass Corporation, 445 So.2d 578 (Fla. 1984), did not deny refunds to the actual plaintiffs who had challenged the tax even though a prospective application of the ruling of invalidity was declared for all others, and even though the tax collector relied in good faith on the statute prior to the challenge. See also City of Tampa

v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972), where refunds were granted to the taxpayers who actually challenged the tax provisions while the ruling was prospective-only to all others.

In Colding v. Herzog, 467 So.2d 980 (Fla. 1985), this Court, after holding a tax invalid, again declared the ruling to be prospective only "[b]ecause the tax has been assessed in good faith reliance pursuant to a presumptively valid rule" but held such prospectivity would bar refunds only to those who had not challenged the tax. Therefore, again in Colding, this Court allowed refunds to the actual plaintiffs who prevailed in invalidating the tax, while declaring the ruling of invalidity to be prospective-only to all others.

The rationale for this procedure was clearly stated in Interlachen Lake Estates, Inc. v. Brooks, 341 So.2d 993 (Fla. 1976), that:

> The language in the opinion relating to prospective invalidity **had no application to the controversy between the parties to the litigation.** To conclude otherwise would render the Court's decision merely an advisory opinion. [Id. at 995]

This Court made the above statement in clarifying the effect of its ruling in Interlachen Lake Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973), wherein this Court had held its decision on the unconstitutionality of a taxing

statute to operate prospectively from the date of the opinion "because persons relying on the State statute did so assuming it to valid...." Interlachen Lakes Estates v. Snyder at 435. In the Brooks case, this Court's clarification demonstrates that good faith reliance by taxing authorities may give rise to a prospective application of the ruling but will not deprive the actual litigants of the effect of the ruling or of the refund sought.

Therefore, good faith reliance, even if it clearly appeared, would not be sufficient to deny the requested refunds to Appellants who actually challenged the statutes in question. However, such good faith reliance does not appear in the instant case most certainly after the date of the Bacchus decision.

In Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), relied upon by the trial court for its prospective-only holding, the actual parties who successfully challenged the statute were denied refunds in large part only because the trial court found that:

> ...**considering the slight benefits** to individual taxpayers [less than $25 each for over 350,000 claimants] . . . a retroactive application of [the] ruling to require **refunds would work a great hardship on the School Board out of proportion to the interests of the individual taxpayers,** as compared to the needs of the school children

of the county.

[Id. at 326; emphasis and bracketed material added]

In the instant case, the trial court made no such finding that the Appellants' recovery would be slight as compared to the hardship to the State, nor could one be reasonably made. The refunds to the Appellants, for just the period after the Bacchus decision would total more than $44,700,000, under the most conservative approach, for all Appellants. The benefit to Appellants is clearly not "slight."[5] Therefore, it is apparent that the

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[5] The data contained in the Stipulation of Facts, by calculation, shows that for the period July, 1984 through June 1985, the Appellants remitted the following taxes:

	Wine taxes paid on regular and Florida Products	Liquor taxes paid on regular and Florida Products	Difference between amount paid on regular wine and liquor and exempt tax rate.
National Distributing Co., Inc. (Aggregate)	$13,697,135.35	$41,944,509.52	$28,134,189.86
Grantham Distributing Co.	$ 805,251.57	$ 4,065,633.95	$ 1,620,525.75
Grantham Wine Co.	$ 4,748,955.69	$ -0-	$ 4,748,955.69
Tampa Wholesale Liquor Co.	$ 6,543,696.87	$ 7,461,313.81	$ 8,847,663.87

footnote continued

rationale adopted by this Court in Gulesian, supra, and used by the trial court below, is not applicable to the instant case and may not properly be used to render the ruling of unconstitutionality prospective-only as to these Appellants, and thereby to deny their requested refunds. Any other result would render this Court's opinion advisory only. Certainly, the Gulesian decision provided no impediment to this Court in Interlachen Lakes Estates v. Brooks, supra, in allowing refunds to the actual litigants in spite of the holding of prospectivity as to all others.

The decision of the trial court in the instant case, that the prospective application of its decision renders Appellants not entitled to recover refunds of taxes paid pursuant to the unconstitutional statutes, was not in accord with the majority of this Court's decisions rendered under similar circunstances and should be reversed.

Appellants were the actual litigants who challenged the statutes and who obtained the declaration of

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(Footnote number 5 continued)

House of Midulla of Southwest Fla., Inc.	$ 972,174.94	$ 1,282,643.81	$ 1,435,616.20

unconstitutionality. Even if the State reasonably relied on the validity of the statutes prior to the Bacchus decision, which decision the court below found rendered the statutes "suspect," the declaration of unconstitutionality of the provisions may be made prospective only to taxpayers other than Appellants.

Since the validity of the statutes was no longer to be relied upon after the Bacchus decision, the trial court's reasoning for denying Appellants tax refunds after June of 1984 is further eroded. Therefore, the trial court's order denying any tax refund to these Appellants should be reversed and this cause should be remanded for entry of an order determining the amount of refund to which Appellants are entitled.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANTS ANY TAX REFUND OR REMEDY FOR THE IMPOSITION UPON APPELLANTS OF UNCONSTITUTIONALLY DISCRIMINATORY TAXES.

By declaring unconstitutional only the Florida-grown products tax exemptions and preferences of §§564.06 and 565.12, F.S. (1981-1984 Supp.), and by decreeing that such ruling be prospective only, even to Appellants who were the actual litigants, thereby denying any remedy to Appellants, the trial court's order perpetuated the very constitutional violation which the invalid statutes themselves perpetuated.

The United States Supreme Court in Bacchus Imports Ltd. v. Dias, supra, rejected severance as a solution where, as here, the challenged statute has expired, because severance of only the exemptions under these circumstances provided no remedy for the harm inflicted during the time that the statute was in effect. Id., 104 S.Ct. at 3054, n. 7.

While severance and prospective application might arguably offer some remedy when applied to a statute with ongoing effect, it offers none in the instant case. The unconstitutionality relating to sections 564.06 and 565.12, F.S. (1981-1984 Supp.), just as in Bacchus, arises from the fact that the provisions improperly

confer a benefit on one party and a detriment on the other party at the same time. Id., 104 S.Ct. at 3057. It is impossible to reasonably characterize only one portion of the statute as the impermissible "benefit" without also recognizing the remaining taxing provision to be an impermissible "detriment" imposed in order to favor local industry.

Appellants' taxes on regular, non-Florida wine and liquor necessarily subsidized the Florida-grown exemptions and preferences. Therefore, to throw out only the exemptions or preferences and refuse to refund the discriminatory regular tax is to perpetuate the very Commerce Clause violation struck down in Bacchus. Nor does the fact that Appellants sold both type products relieve the harm or the violation. Every dollar paid by Appellants in discriminatory higher taxes constitutes a dollar lost in profit. In the Final Summary Judgment, the trial court found that all Appellants benefitted by selling exempt or partially exempt products in an amount exceeding ten million dollars (R: 688). The Appellee's affidavit and data upon which this finding was based reflect such benefit to be $10,449,315.32.

However, total aggregate taxes paid by Appellants for the same period for non-exempt or non-preferred

beverages were $209,270,053.41. (R: 128 and attachments). Therefore, it can be seen that such benefit is slight when compared to the amount of taxes paid at the higher, discriminatory rate. The regular products rate, even if set only slightly higher per gallon to compensate for the revenue lost due to exemptions, necessarily severely impacted Appellants whose regular products tax bill exceeded $200,000,000.00 for the refund period.

If Appellants had been taxed at the lower, preferred rate for all its products sold, regardless of the origin or agricultural base of the products, the difference in tax savings, all potential profit to Appellants, would have been $84,385,741.39 for the full refund period or $44,786,951.37 tax savings if taxed at the preferred rate for the period July 1984 (post-Bacchus) to July 1, 1985, when the statutes were amended. (R: 128 and data attached)

By denying Appellants any refund of taxes paid at the higher discriminatory rate, Appellants have been denied any and all remedy for the constitutional violation. Denial by a state court of the recovery of taxes exacted by an unconstitutional statute is itself a constitutional violation against Appellants. Carpenter

v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 418 (1930). See also Gallagher v. Evans, 536 F.2d 899 (10th Cir. 1976);

The clear purpose and effect of sections 564.06 and 565.12, F.S. (1981-1984), was to favor Florida industry and products at the expense of out-of-state products. To sever a now dead exemption (and make that ruling prospective) is to affirm the impermissible purpose and intent of the Legislature in all respects. It is, in effect, to do nothing at all, thereby preserving and perpetuating the very violation which the court below purported to condemn.

This Court has ample precedent on which to base a ruling which would provide a remedy to these Appellants while providing prospective application to all others not previously challenging the provisions. City of Tampa v. Thatcher Glass Corporation, supra; Osterndorf v. State, supra; Colding v. Herzog, supra; Interlachen Lake Estates v. Brooks, supra; City of Tampa v. Birdsong Motors, Inc., supra; Barndollar v. Sunset Realty Corp., supra; State v. Hilburn, supra.

These Appellants should be afforded a remedy for exaction of millions of dollars in discriminatory taxes which, but for the tax provisions, would have constituted

potential profit to Appellants. Section 215.26, F.S. 91985), provides such a remedy by providing for the refund of these taxes. The United States Supreme Court in Bacchus and Carpenter v. Shaw, supra, further provide the basis to require this remedy. This Court should reverse the trial court's denial of any remedy to Appellants and remand with directions that the requested tax refund be determined and granted to Appellants.

CONCLUSION

Based on the foregoing argument and citation of authority, Appellants respectfully request that the Final Summary Judgment be reversed insofar as it holds that the declaration of unconstitutionality applies only to the tax exemption or preference provisions of §§564.06 and 565.12, F.S. (1981-1984 Supp.), insofar as it holds that the Ruling is prospective-only even as to Appellants, and insofar as it denies any refund of taxes to Appellants. Appellants further request that this cause be remanded for a determination of the amount of tax refund, based on the directions of this court and the Stipulation of Facts, which Appellants will receive.

Respectfully submitted,

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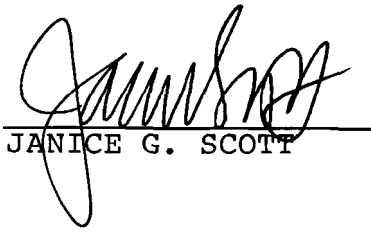
CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANTS has been furnished by hand delivery this 19th day of January, 1988 to DANIEL C. BROWN, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050.



JANICE G. SCOTT