O/A 3-4-88

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.

_____/

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REPLY BRIEF OF APPELLANTS/CROSS APPELLEES

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

Plaintiffs below, Appellants/Cross-Appellees herein, all alcoholic beverage distributors, will be referred to herein as Appellants or "the distributors."

Defendant below, Appellee/Cross-Appellant herein, will be referred to as "the State."

Sections 564.06 and 565.12, Florida Statutes (1981-1984 Supp.), may be referred to herein as the "alcoholic beverage excise tax."

References to the Answer Brief of Appellee/Cross-Appellant shall be made by use of the symbols "Ans. Br." followed by the appropriate page numbers.

For the sake of clarity, Appellants have designated in its Table of Contents, and in the format of this brief, argument made in Reply to the Answer Brief of Appellee (the State's point I) separately from argument made in response to Cross-Appellant's points on appeal (the State's points II and III).

SUMMARY OF ARGUMENT IN RESPONSE TO QUESTIONS PRESENTED BY CROSS-APPELLANT

The trial court correctly found that these distributors were not barred by estoppel or laches or by lack of standing from challenging the constitutionality of §§564.06 and 565.12, F.S. (1981-1984 Supp.). These distributors sought refunds of the alcoholic beverage excise taxes paid during the applicable three year refund period, on the basis of the unconstitutionality of the statutes, soon after the decision invalidating similar statutes in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) which the State concedes was the earliest point that anyone could have reason to believe the Florida provisions were invalid.

The distributors' past compliance with the clear, mandatory terms of the tax statutes which set specific tax rates for alcoholic beverages made from Florida-grown products cannot be considered "voluntary acceptance of benefits" which would estop the distributors' challenge to the statutes. The trial court was correct in rejecting the State's defenses of laches and estoppel on the facts and law before it.

The trial court also correctly found the distributors had standing to bring the challenge to the statutes. The statutes placed the legal burden of the tax on these distributors and they were the parties who paid the tax from their own funds. The fact that the distributors included the tax liability, along with other costs and overhead, in setting their prices of goods does not legally or logically establish the absence of any economic injury. The courts have clearly recognized that such forced

inclusion of illegal charges (or taxes) deprives a distributor of the ability to raise its prices or the ability to receive a higher profit on goods sold. The necessarily higher prices set on non-preferred products would also discourage purchase where preferred, lower cost products not necessarily sold by each distributor, compete for sales. Further, the so-called pass-on defense has been found by numerous courts not to be proven simply by a Defendant pointing to the inclusion of such charges or taxes in the price of the goods. The United States Supreme Court has rejected the pass-on defense entirely. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). The Supreme Court in Bacchus, infra, found on facts virtually identical to those in the instant case that the distributors had standing to challenge the alcoholic beverage excise tax statutes. The trial court's finding below that these distributors have standing to challenge the statutes was correct and should be affirmed.

Nor should the pass-on defense be utilized to deprive the distributors of a refund on equitable grounds. The pass-on defense, soundly criticized and rejected by the United States Supreme Court, may not be used as an equitable basis on which to deny a remedy since "equity should not require cognizance of a defense whose basis has been, with [the] limited exception [of express cost-plus contracts], soundly criticized by the Supreme Court as impracticable." Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz, 584 F.2d 12, 18 (3d.Cir. 1978) (bracketed material added).

The State's defenses were rejected below and should be rejected on appeal. Refunds of the discriminatory taxes paid by these distributors during the refund period should be ordered.

POINT I

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.

This argument is made in reply to the Answer Brief of the State on this issue, which was first presented by Appellant distributors as Point II in the distributors' Initial Brief on the merits. The State did not provide a separate response to the distributors' Point I and Point III.

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932), is heavily relied upon by the State for its support of the prospective-only ruling of the trial court as to these distributors. However, Sunburst in no way dictates when a decision must be prospective-only. Nor does Sunburst support the use of a prospective-only ruling in the instant case. Rather, it simply affirms the general power of a state court to make such a ruling. The so-called "Sunburst Doctrine" provided no impediment to this Court in its past holdings that decisions properly declared to be prospective-only will not be applied prospectively to the actual litigants who first brought the challenge. See Colding v. Herzog, 467 So.2d 980 (Fla. 1985); City of Tampa v. Thatcher Glass Corp., 445 So.2d 578 (Fla. 1984); Osterndorf v. State, 426 So.2d 539 (Fla.1982); and, cases cited in the Appellants' Initial Brief, Point II.

Sunburst dealt solely with the question of whether a court decision, which overrules a prior court decision, if applied

prospectively, will be considered an unconstitutional "taking." The U.S. Supreme Court in Sunburst explained:

> [w]e think the federal constitution has no voice upon the subject. "Id., 287 U.S. at 364.

The Court also pointed out that by so ruling it had:

> "...no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the federal constitution. [Id.]

Sunburst did not rule upon the wisdom or propriety of prospective-only rulings in every case. Sunburst did not involve a declaration of the unconstitutionality of a statute nor did it involve the applicability of a state tax refund statute such as §215.26, F.S.

Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), is the only Florida Supreme Court case cited by the State in defense of the prospective-only holding as to these Appellant/distributors. Gulesian, however, pre-dated Colding, Thatcher Glass, and Interlachen Lake Estates, Inc. v. Brooks,[1] and is a narrow exception which can be distinguished on the facts and rationale utilized by the Court. (See Appellants' Initial Brief, p.29-31 for discussion of Gulesian -- 350,000 or more actual litigants were denied refunds because the benefit to each litigant was slight when compared to the devastating impact on the school board budget.). Such facts and rationale simply do not apply to the distributors in the instant case where the

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[1] 341 So.2d 993 (Fla. 1976).

refund would not be slight, totalling at least $44,786,951--and the impact on the total 1987 legislative General Appropriation of $18,451,572,028 would be an impact of less than one quarter of one percent. See 87-98, Laws of Florida. Gulesian simply does not apply.

The only other Florida case relied upon by the State to support the prospective-only ruling of the trial court is International Studio Apartments Association v. Lockwood, 421 So.2d 1119 (Fla. 3d DCA 1982), pet. for rev. den 430 So.2d 451 (Fla. 1983). However, International Studio does not defeat or negate the authorities relied upon by the distributors which demonstrate the incorrectness of the prospective-only ruling applied to these litigants.

In International Studio, supra, the Plaintiffs, certain condominium associations, who sought refunds of interest on funds deposited in the court registry, were not the litigants who first had the interest statute declared unconstitutional. The statute under which the Plaintiffs in International Studio sought refunds had previously been declared unconstitutional in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed. 2d 358 (1980), wherein the only plaintiffs were Webb's Fabulous Pharmacies, Inc., and certain of its creditors. Therefore, the prospective-only holding in International Studio was held prospective against persons other than those who originally had the statute declared unconstitutional. In fact, Webb's Fabulous Pharmacies, Inc., which first had the statute declared unconstitutional, clearly did receive the return of the

monies requested. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 101 S.Ct. at 449 and, on remand, Beckwith v. Webb's Fabulous Pharmacies, Inc., 394 So.2d 1009 (Fla. 1981), affirming the order of the trial court granting return of the money.

In the instant case, these distributors are the actual litigants who first had the provisions of §§564.06 and 565.12, F.S. (1981-1984 Supp.), declared unconstitutional. Under the holdings in City of Tampa v. Thatcher Glass Corp. supra; Colding v. Herzog, supra; Osterndorf v. State, supra; Interlachen Lake Estates, Inc. v. Brooks, supra, the prospective-only ruling of the trial court as to the unconstitutionality of provisions of the alcoholic beverage excise tax statutes may not be made prospective as to these distributors.

The State places its greatest reliance on a North Dakota case, Metropolitan Life Insurance Co. v. Commissioner of Insurance, 373 N.W.2d. 399 (N.D. 1985), for the proposition that prospective-only application to these distributors in the instant case is proper. Based upon the Metropolitan Life decision, the State asserts that these distributors did not suffer the burden of the taxes, and thereby have no equities on the side of their refund claim. This assertion ignores the reality that §§564.06 and 565.12, F.S. (1981-1984 Supp.), clearly place the tax burden on the distributors, not on the retail purchasers of alcoholic beverages.

Further, the Metropolitan Life decision heavily relied upon by the State was also made in the context of an on-going statute. The North Dakota Supreme Court affirmed the injunctive

relief provided to the insurers against future enforcement of the tax statute so that some remedy was afforded to the Plaintiffs. A prospective application in the instant case denies these distributors any remedy. Further, the opinion in Metropolitan Life makes no reference to a state tax refund statute, like §215.26, Florida Statutes, which demonstrates legislative intent to provide a refund of wrongfully exacted taxes as a remedy.[2]

Further, the trial court's finding below, not clearly utilized in the decision, that the distributors "...passed the cost of the tax on to their customers" (R: 687) is not borne out by the facts before the court. In the Stipulation of Facts, the only document which addresses this issue, the parties stipulate only that the taxes were an element in the determination of the sales price, as were other elements such as other costs and overhead. (R: 124). The tax was not separately stated on any invoice.

Therefore, to the extent that the distributors were required to set a higher price, to account for the discriminatory tax, the distributors were economically prohibited from factoring in that much more in profit. The State's conclusory allegation that if the distributors had not been required to pay the higher, discriminatory tax, market forces "would have reduced the prices...so that elimination of the tax...would not have translated...into increased profits equal to the tax reduction"

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[2] Nor did Gulesian or International Studio Apartments deal with a refund request of state taxes under §215.26, F.S.

(Ans. Br. p.18) is not a finding made by the trial court nor is it supported in the record. The economic injury embodied in the loss of the ability or flexibility to increase prices in order to increase profit, caused by the distributors' need to include the discriminatory charges or taxes in its sales price, has clearly been recognized, without need for specific or quantified proof by the Federal courts, e.g., Hanover Shoe, Inc. v. United States Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); Abbotts Dairies Division of Fairmont Foods, Inc., 584 F.2d 12 (3d. Cir. 1978). In fact, it is precisely because such injury is clearly recognized but found legally difficult of proof that the courts have totally rejected the pass-on defense as a defense to refund or recovery of illegal charges. Hanover Shoe, supra.

The State argues the distributors have no equities on their side but steadfastly refuse to recognize the equity of the distributors' having lost over 119 million dollars[3] in increased profit potential. The ability to raise prices to increase profit is a valuable right and that right was limited by the imposition on these distributors of the discriminatory taxes. This equity in the distributors favor should be recognized.

State ex rel Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1974), cited by the State in support of this "pass-on" defense, does not stand for the proposition that the

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[3] Excess taxes paid by the distributors over the preferred rate during the refund period.

distributors may receive no refund. In Szabo, the tax refund was denied because the statutory construction of a tax exemption urged by Szabo Food Service, Inc., was rejected by the Court. The Court in Szabo found the taxation had been proper. Further, the Court found that the statute, as it existed at the time, required the tax be collected from the consumer and required the seller, Szabo, to add that tax to its selling price. The Court's statements that "[o]ne 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" [Id. at 532] was by way of dicta since the Court's decision hinged on its finding that there was no wrongful tax.

Further, the statement must be viewed in the context of the Szabo tax statute which placed both the legal and financial burden of the tax on the consumer or purchaser, not applicable in the instant case. The Szabo case has no bearing on whether the ruling of unconstitutionality in the instant case should be prospective-only or whether the instant distributors are entitled to receive a tax refund as a remedy for the past unconstitutional taxes.

The tax refund claim of the distributors, Appellants herein, must be viewed under Florida law, in light of section 215.26, F.S., and in light of this Court's numerous decisions, rendered prospective, but made applicable to the actual parties who successfully brought the challenge. Under these Florida authorities, the distributors are entitled to the retrospective application of any decision declaring §§564.06 and 565.12, F.S.

(1981-1984 Supp.), to be unconstitutional. And, that declaration should extend to each of the statutory provisions in their entirety, since the full taxes assessed were discriminatory, having been set in compensation for and consideration of the tax subsidy to "Florida-grown" products.

This court should declare §§564.06 and 565.12, F.S. (1981-1984 Supp.), to be unconstitutional in their entirety, and, pursuant to §215.26, F.S., should order full refunds of all taxes paid by the distributors in excess of the preferred rates for each refund period.

POINT II

THE LOWER COURT'S DECISION THAT THESE DISTRIBUTORS WERE NOT BARRED BY ESTOPPEL OR LACHES FROM CHALLENGING THE CONSTITUTIONALITY OF §§564.06 AND 565.12, FLORIDA STATUTES, (1981-1984 SUPP.) WAS CORRECT AND WAS WITHIN THE COURT'S DISCRETION.

The State unsuccessfully urged below that the Plaintiff distributors should be barred from challenging the constitutionality of §§564.06 and 565.12, F.S. (1981-1984 Supp.), by estoppel based upon the fact that the distributors each sold some products which were taxed at the lower, preferred "Florida-grown" tax rate. The trial court rejected this and found the distributors were not barred by estoppel. (R: 690).

The State's Motion for Summary Judgment requested that the trial court declare the distributors had no "standing" to challenge the subject statutes or to seek a refund on the basis that the distributors "...voluntarily took advantage of, enjoyed and benefitted from the exemptions" contained in the discriminatory statutes. (R: 462).

This argument is erroneous and inapplicable for several reasons. Whether the distributors "voluntarily accepted" tax benefits actually calls for a determination as to whether the statutes, on their face, gave the distributors a choice of compliance. Strict compliance with the requirements of taxing statutes can hardly be discussed in terms of voluntariness. For example, §565.12, F.S., states in pertinent part regarding the preferential tax rates for beverages manufactured and bottled in

Florida from Florida grown products:

> "...there **shall** be paid by all manufacturers and distributors a tax at the rate of $2.39 per gallon." [e.s.]

This tax was required in lieu of a rate of $4.75 per gallon.

Even if the Division of Alcoholic Beverages and Tobacco had no rule or policy penalizing a distributor for paying more tax than that mandated by law, such policy or lack thereof is irrelevant to a legal determination of whether compliance with the actual mandatory terms of the statute can be called "voluntary." Even if such an inquiry were relevant, it is axiomatic that where rejection of the preferential rates or exemptions provided by statute would have a clear, detrimental economic effect on the distributors' business, acceptance of the favorable rates by complaince with the statute cannot be characterized as voluntary.

Clearly, to have foregone in excess of ten million dollars in economic incentives mandated by statute would have been economically detrimental to the distributors' businesses. Under these circumstances, compliance with the clear, mandatory provisions of the subject taxing statutes cannot be characterized as "voluntary" for purposes of foreclosing the distributors' rights to challenge the unquestionably discriminatory, unconstitutional statutes or to seek refund of taxes paid under the unconstitutional taxing scheme. Begin v. Inhabitants of Town of Sabattus, 409 A.2d 1269 (Me. S.Ct. 1979) and People v. Treloar Trucking Company, 150 N.E.2d 624, 626 (Ill. S.Ct. 1958) [where Plaintiff acts under duress of disastrous effect to business,

conduct is held to be involuntary; conduct under economic duress does not estop later assertion of rights]; See also People v. Arthur Morgan Trucking Co., 157 N.E. 42 (Ill. S.Ct. 1959); Chicago & E. I. Ry. Co. v. Miller, 140 N.E.2d 823 (Ill. S.Ct. 1923).

The above-cited cases also point out that the general theory upon which the state relies, that voluntary acceptance of benefits precludes a challenge to the statute, only applies "if no question of public policy or public morals is involved." Id. at 824. Certainly where the statutes are clearly violative, as discriminatory, of the United States Constitution, such does involve a question of public policy. See also Louisville and Nashville R. Co. v. Bass, 328 F. Supp 732 (N.D.Ky 1971) [judicial remedy should not be denied]. Defendants theory of estoppel, on this basis alone, is inapplicable. See also Edward P. Allison Co. v. Village of Dolton, 181 N.E.2d 151 (Ill. S.Ct. 1962); Donoho v. O'Connell's, Inc., 164 N.E.2d 52 (Ill. S.Ct. 1960) [acceptance of statutory benefits induced by economic pressures constitutes involuntary acceptance not barring a subsequent challenge to the statutes].

This same principle is clearly recognized in Florida as well. See Hialeah Race Course, Inc. v. Gulfstream Park Racing Association, 245 So.2d 625 (Fla. 1971); Admiral Development Corporation v. City of Maitland, 267 So.2d 860 (Fla. 4 DCA 1972); Fisher v. Dade County, 127 So.2d 132 (Fla. 3 DCA 1961); Southeast Volusia Hospital v. State Department of Insurance, 432 So.2d 593, 597 (Fla. 1 DCA 1983), reversed on other grounds, 438 So.2d 815

(1983), [Statutes under which Plaintiffs benefitted made such conduct "virtually compulsory"; under these circumstances Plaintiffs' participation cannot "realistically be said to be voluntary"].

Nor can the instant distributors' participation in the tax rates for Florida-grown products mandated by statute be realistically said to be voluntary, especially where non-participation would have clear detrimental business effects. Further, when the distributors had reasonable grounds to believe the taxing scheme was invalid, subsequent to the Bacchus decision, they proceeded expeditiously to challenge the subject statutes and seek a refund.

Even where benefits have been accepted, a court may properly hear the challenge if it is conceivable that no one else will be able to acquire standing to bring the challenge. Ruth v. Industrial Commission, 490 P.2d 828 at 830 (Az.S.Ct. 1971). In the instant case, Plaintiffs are the only parties with a basis to assert the constitutional challenge since they actually paid the taxes in question and since the excise taxes were not itemized or invoiced to any retailers or consumers. Monaghan v. Southern Bell Telephone & Telegraph Co., 136 So.2d 198 at 202-203 (Miss. S.Ct. 1962). In Monaghan, the telephone company was held entitled to recover taxes improperly assessed even though the taxes had been "absorbed" in or "buried" in the price paid by customers. Further, the Court held that the customers could not recover the taxes since the taxes were simply a consideration in and part of the aggregate cost of the services. It would appear

in the instant case that the distributors are the only parties who could ever have standing to bring the challenge. Under Ruth, supra, even voluntary acceptance of benefits, under this circumstance does not defeat standing.

In the case of Seaboard Coast Line R.R. Co. v. McKelvey, 259 So.2d 777 (Fla. 1 DCA 1972), relied upon by Defendants, the court's references to the plaintiff's having benefitted from the statute were by way of dicta since the court found that the constitutionality of the statute could not properly be raised for the first time on appeal. Further, the court did not actually rule that, given the proper procedural context, it would not hear the appellant's challenge. Id. at 779.

The authorities cited by Defendants for the proposition that one who voluntarily benefits from the provisions of a statute loses standing are simply inapplicable and unpersuasive in light of the numerous authorities cited above more closely addressing the facts of this case.

Further, the distributors' challenge was never limited to the preferred tax rates for "Florida-grown" products. The Complaint challenged each entire statutory provision and the distributors now assert that each entire statutory provision is invalid--not simply because of the exemptions or preferences--but because the tax rate on non Florida-grown products was discriminatory. Therefore, the distributors are not, as the state characterizes it, crying "that the carrot poisoned the statute." (Ans. Br. p.25). The tax provisions of each statute cannot be severed. The entire mandatory statutory tax scheme set

forth in §§564.06 and 565.12, F.S. (1981-1984 Supp.), was poisoned.

These distributors were required by statute to comply with the tax provisions contained in the Beverage Law, including the complete reporting of all beverages sold by gallonage and type, and the computation of tax thereon for submission to the State based upon the rates set by statute. Failure to comply with these provisions of the Alcoholic Beverage Law would have subjected these distributors to suspension or revocation of their licenses or, at the least, a fine. See §§561.29, F.S. (1981-1984 Supp.).

The trial court found based on the totality of the facts that the estoppel urged by the State did not apply to these distributors. For this Court to overturn the ruling, this Court must make its own independent factual determinations, a procedure in which appellate courts are loathe to engage.

The distributors in no way "voluntarily accepted" benefits from the statutes and this spurious basis should not now be used to bar these distributors' challenge to the constitutionality of the laws or their claim for refund. The trial court was correct in ruling that these distributors were not barred by estoppel from challenging the taxing statutes or seeking a tax refund.

The State also unsuccessfully argued below that the distributors should be barred by laches from challenging §§564.06 and 565.12, F.S. (1981-1984 Supp.). The trial court disagreed and correctly found on the facts that the distributors were not barred by laches from challenging the statutes or seeking a

refund.

The distributors' claim for refund arose intitally from §215.26, F.S., which provides that a claim may be made for a refund of taxes within three years of payment. The distributors incurred no undue delay subsequent to the decision in Bacchus Imports, Ltd. v. Dias, supra, in seeking such a refund based on the invalidity of the taxing statutes. The State even urges in its brief (Ans. Br. pp. 14-15) and so urged below that the Bacchus decision was not reasonably foreseen by anyone. The State's arguments now overlook that very justification relied on by it that the statutes were presumed to be constitutional and that similar florida statutes had, in fact, been held to be valid. Faircloth v. Old Mr. Boston Distiller Corp., 245 So.2d 240 (Fla. 1970). If the State cannot be faulted for not recognizing the invalidity of the tax statutes at an earlier date nor should the distributors be so faulted.

The State's authorities on the issue of laches are not applicable to the facts of the instant case. The fact that the distributors never filed a formal protest or that they paid taxes without protest is irrelevant since payment under protest is not an element of Florida's tax refund statutes, nor of its case law.

One necessary element of laches is the proof that the plaintiff had knowledge of the conduct and failed to assert his rights. This necessarily implies that the these distributors had reason to know the conduct by the State was wrongful. It is clear that the distributors had no reason, any more than did the State, to believe the statutes were unconstitutional until the

Supreme Court ruling in Bacchus. The trial court correctly held, on the facts it had before it, including its own finding that no one could reasonably forsee the holding of unconstutitionality of similar statutes in Bacchus, that these distributors were not barred by laches or estoppel from challenging these statutes or seeking a refund. That ruling should not be disturbed on appeal.

POINT III

THE TRIAL COURT WAS CORRECT IN DECIDING THAT APPELLANT DISTRIBUTORS HAD STANDING TO SEEK REFUNDS OF ALCOHOLIC BEVERAGES EXCISE TAXES PAID BY THEM.

The State asserts that the trial court erred in finding the distributors had standing to challenge the constitutionality of §§564.06 and 565.12, F.S. (1981-1984 Supp.). The finding of the trial court was as follows:

> 13. The Court finds that Plaintiffs are entitled to a declaration as to the constitutionality of former §§564.06 and 565.12, Florida Statutes (1981-1984 Supp.).

(R: 688) The trial court therefore rejected the State's affirmative defense that the distributors lacked standing on the ground that they suffered no economic injury by virtue of the discriminatory nature of the taxing provisions. This ruling should not be disturbed on appeal.

This is so especially in light of the holding as to standing by the United State's Supreme Court in Bacchus Imports, Ltd., v. Dias, supra. There, the State of Hawaii argued that the distributors had no standing to challenge the alcoholic beverage excise tax because they passed the tax on to purchasers. The Supreme Court rejected this argument, noting that the wholesalers are legally liable for the tax and further, that even if the tax is passed on, the prices of products subject to the higher discriminatory tax rate were necessarily higher when compared to the prices of favored products. The Court concluded: "The wholesalers plainly have standing to challenge the tax in this Court." [Id., 104 S.Ct. at 3054, footnote omitted].

Similarly in the instant case, the trial court found, and the State so stipulated, that the legal burden of the taxes fell upon these distributors. Clearly, if the tax were passed on as part of the sales price, the prices of products not favored with the preferential tax rate would be set higher, thereby reducing potential profit and discouraging purchase where a tax-favored product, possibly not sold by that distributor, competes. The trial court below correctly found these distributors suffered the requisite financial impact of these tax provisions and had standing to challenge the statutes.

The State attempts in its brief to explain away the holding in Bacchus regarding standing by arguing that standing is conferred only if distributors are challenging an ongoing statute, rather than one substantially amended as in the instant case. (Ans. Br. p.28). It is difficult to see the distinction urged by the State in this regard. If an ongoing statute containing the same terms as §§564.06 and 565.12, F.S. (1981-1984 Supp.), would affect these distributors enough to confer standing, as admitted by the State, surely the fact that these distributors were subject to those same terms during their statutory refund period also confers standing. Further, at the time the Supreme Court ruled in Bacchus, the Hawaii tax preference provisions were no longer in effect. Even so, the Supreme Court saw no difficulty in recognizing the distributors' standing at that time and none exists in the instant case.

Any doubt, however, can be laid to rest by the recent ruling in JDS Realty Corporation v. Government of Virgin Islands, 824

F.2d 256 (3d Cir. 1987), wherein the Circuit Court of Appeals rejected the government's contention that a wholesaler of alcoholic beverages, tobacco and other items lacked standing to challenge the excise tax imposed unless the wholesaler could show it did not pass those taxes on to purchasers. The court rejected the notion that a wholesaler must demonstrate economic injury in order to challenge an excise tax and, relying on the Bacchus decision, stated:

> This claim is without merit. In Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.200 (1984), the Supreme Court rejected the contention that wholesalers could not challenge an excise tax because they had not demonstrated any economic injury from the tax. First, the Court found that the wholesalers were liable for the tax. Id. at 267, 104 S.Ct. at 3053. Second, the Court stated that "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages..." Id. Thus, the Court concluded that "[t]he wholesalers plainly have standing to challenge the tax in this Court." Id.
>
> Similarly, this case involves a challenge to an excise tax. JDS is responsible for the payment of the tax. Moreover, by taxing only goods imported, the excise tax increased their costs as compared to those businesses that relied solely on local goods. We therefore conclude JDS has standing to bring this action.

JDS Realty Corp., supra, at 258.

Therefore, so long as the distributors were legally liable to pay the taxes at the time the statutes were in effect, as these distributors clearly were, and so long as they paid taxes on products at the higher, non-preferential rate, as these distributors did, the distributors clearly have standing to challenge the statutes under which the tax was paid and standing

to request a refund. Distributors have not been required by the United States Supreme Court or the Circuit Court of Appeals to demonstrate any quantifiable economic injury in order to have standing nor should these instant distributors be so required.

The State also asserts in its brief that the Bacchus court "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." (Ans. Br. p.28) This, however, is an erroneous characterization of the Supreme Court's ruling. The Court was not referring in any way to "standing" to seek a refund but was simply dealing with the question of the distributors' right to receive a refund as a remedy. The Court stated:

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally disciminated against interstate commerce, were not addressed by the State courts. [Id., 104 S.Ct. at 3059].
> * * * *
> It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by State law. [Id., footnote 14]

In National Meat Ass'n v. Deukmejian, 743 F.2d. 656 (9th Cir. 1984), aff'd 105 S.Ct. 768, the court rejected a "pass-back" defense, on the basis of the Bacchus decision, as follows:

> In Bacchus Imports, the state argued that liquor wholesalers lacked standing to attack the constitutionality of a discriminatory tax because they could shift the burden of the tax to their customers. **The Supreme Court found that the cost-shifting theory did not affect the wholesaler's standing** - - (1) expressing doubt that wholesalers could actually pass on the tax, and (2) **finding standing even if the burden could be shifted.**

Id. at 661-662, n.3. (emphasis added) Importantly, the court in National Meat Ass'n. elaborated on its own reasons for rejecting the pass-on defense:

> Further, we are not aware of any decision in which a discriminatory tax has been upheld on the ground that the payor had the ability to shift the incident [sic] of the tax. Such a holding would permit a state to discriminate against any out-of-state seller who was powerful enough to extract favorable concessions from its suppliers. Moreover, the constitutionality of such a scheme could fluctuate as a function of market conditions.

Id., n.3.

Just as the court in National Meat Association, supra, found that a pass-on of a discriminatory tax cannot save the tax, a pass-on may not properly be utilized to deny standing to challenge the tax or to deny the refund itself. In fact, to deny the refund of a discriminatory tax because the tax could be or was passed on is tantamount to upholding the discriminatory tax, and is subject to the very criticisms levied by the court in National Meat Association, above.

In Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz, 584 F.2d. 12 (3d. Cir. 1978), the Third Circuit Court of Appeals rejected the pass-on defense asserted against the dairies' claims for repayment of a price differential caused by an invalid milk marketing order. The claim was based on an invalid order setting the minimum price which Abbotts, as a milk handler, was required to pay to producers. The defense was asserted that the higher costs, even though invalid, had been passed on to Abbotts' purchasers, so that the refund of overpayments should be

denied. The Court of Appeals and the District Court both found that the pass-on defense, or the fact that the Plaintiff included the charges in its sales price, would not be allowed to bar the refund. The Court of Appeals reasoned as follows:

> We will first consider the availability of the passing on defense in the present case. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), established that in a §4 Clayton Act suit it is no defense that a party seeking to recover overcharges has passed on equivalent price increases to its customers. The court expressed two fundamental and related rationales: first, that permitting a passing on defense would create complex, burdensome and possibly insoluble problems of proof; second, that enforcement of antitrust laws would be impeded if such a defense were deemed litigable.
>
> The economic reasons given in support of the first rationale are not logically limited to antitrust suits. These reasons are illustrated as follows. If the exact amount of an overcharge were passed on by a purchaser-seller, the effect on that purchaser-seller may still have been a negative one for the quantity of sales may have decreased. **Even if sales increased after the exact amount of the overcharge was passed on there is no way of determining how much they would have risen absent the overcharge.** Also, a defendant could not practically prove that the purchaser-seller would not have raised his prices without passing on an overcharge. **If the purchaser-seller would have raised prices in any event, the raising of prices to compensate for the overcharge may have wiped out the prospect of increased profits.** Id. at 492-93, 88 S.Ct. 2224.
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> * * *
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> **In the present case the Government argues that the milk market is inelastic-that Abbotts was not competitively disadvantaged due to the overcharge because all handlers in the market area had to pay the same price to farmers for milk used for fluid comsumption.** By this argument the Government seeks to demonstrate

> that Hanover's principal rationale is not here applicable. **Yet it does not follow ineluctably from the record** that all overcharges were passed on, that total sales remained constant with price rises, and **that Abbotts, if it did raise its price, would not have been able to do so successfully without the overcharge.** The inelasticity vel non of the fluid milk market in the Delaware Valley Marketing Area for the period in question is therefore a matter subject to factual disagreement. Because nothing in the record as developed to the present suggests that Abbotts in fact maintained "cost-plus" contracts during the relevant period, attempts to prove these elements would require at least in part the kind of inquiry which Hanover believed would be fruitless. **Even if Abbotts' records were to show an increase in its prices commensurate with the overcharges, part of the increase may have been made anyway and only part of the overcharge may have been passed on.** Inasmuch as the Court in Hanover articulated the need to avoid such complex and unascertainable elements of proof in an antitrust context, we are counselled against permitting those same elements here where the economic complexities promise to be every bit as great.

Id. at 16-17, footnote omitted, emphasis added.

The court in Abbotts Daries clearly articulated why the pass-on defense should be rejected in the instant case and why it fails to establish lack of economic injury to bar a challenge to the statutes or a refund of taxes paid by the distributors. The court in Abbotts Dairies also agreed with the second rationale of Hanover Shoe, that to allow the pass-on as a defense to a distributor's claim to refund would deter any distributor, or in fact any manufacturer or retailer, from ever requesting a refund of illegally exacted charges. Id. at 17. Public policy alone dictates rejection of the so-called "pass-on defense."

Further, as to whether the pass-on of costs sought to be

recovered should be considered as an equitable defense, the court in Abbotts Dairies stated:

> The Government's argument that equitable principles require consideration of a passing on defense does not persuade us differently, for equity should not require the cognizance of a defense whose basis has been, with limited exception, soundly criticized by the Supreme Court as impracticable.

Id. at 18. Therefore, the State's pass-on defense in the instant case has no recognized viability as a defense against standing or as an equitable defense against refund and should not be so used in the instant case.

Both the United States Supreme Court and many of the circuit courts of appeals, have squarely rejected the notion that distributors must show certain, quantifiable economic injury, by demonstrating they did not pass the tax on to purchasers, in order to have standing. Nor do the cases of State ex rel Szabo Food Services, Inc. v. Dickinson,[4] or Shannon v. Hughes & Co., 270 Ky. 530, 109 S.W.2d 1174 (1973), compel the conclusion that the instant distributors lack standing to bring a constitutional challenge to the tax statutes.

In Szabo, the food vendor sought a refund of taxes paid on food sold by vending machine. The Court clearly held that the statute validly required remission of the taxes so no refund was due. Further, the Court found Szabo was a collection agent only for the taxes and "bore no tax liability." Id. at 532. In the instant case the trial court found the distributors did bear the

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[4] 286 So.2d 529 (Fla. 1974)

tax liability. Szabo is simply not applicable to the instant case. Since the facts and circumstances of the instant case are almost identical to those in Bacchus and JDS Realty, supra, those cases should control.

The implications of Szabo are limited to its context and have no bearing on a tax imposed pursuant to an unconstitutional and discriminatory taxing scheme, as in the instant case. To foreclose any remedy to those directly and monetarily affected by unconstitutional enactments of the Legislature on nothing more than the dicta in Szabo would indeed be a miscarriage of justice.

The State asserts there is no meaningful distinction between a taxing statute such as in Szabo and Shannon v. Hughes, supra, which explicity state that the tax is to be collected from the buyers, and the statutes in the instant case, which do not so dictate and which place the tax liability on the distributors. However, the Court in Shannon v. Hughes does give meaning to that distinction.

In Shannon, the court recognized that by statute the Legislature of Kentucky could and did limit the right to seek a refund to the "aggrieved taxpayer", that is, the one from whose own funds the taxes were paid. The statute itself refused any refund to one who was directed only to collect taxes. Id. at 1176. The court noted that where a statute directs the person simply to collect the taxes and remit them, "[h]e has never been out any amount, but only became the collector of the tax for the commonwealth and the custodian of the amount of it until the date when he accounted to the commonwealth therefor." [Id. emphasis

added.] In Shannon the specific terms of limitation in the statutes governed. Shannon and Szabo also pre-dated Bacchus and JDS Realty.

The Florida statutes in question do not direct the distributors to collect the tax but rather to pay the tax. The Stipulation of Facts entered in the instant case shows that the amount of the tax was simply treated as an overhead item as all other overhead items in arriving at a cost of goods sold. When the distributors actually paid the tax, the distributors were clearly "out the amount" of the taxes from their own funds under the rationale of Shannon.

In any event, the pass-on defense has been soundly criticized and rejected. In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), the Court in discussing the so-called "pass-on" defense explained:

> The mere fact that a price rise followed an unlawful cost increase [or, tax, in the instant case] does not show that the sufferer of the cost increase [or unlawful tax] was undamaged. His customers may have been ripe for his price increase earlier; if a cost rise [or tax] is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs [or tax], the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. [bracketed material added]

Id. at 493, N. 9. The Supreme Court further recognized that "[a] wide range of factors influence a company's pricing policies." Id. at 492. The Court noted that in order to establish a pass-on defense, the defendant would have to establish a number of "virtually unascertainable" matters; and, that the fact that the

cost of goods tracks or reflects the illegal charge does not in and of itself establish the pass-on defense or the absence of any economic injury. Id. at 492-493. Because of the practical impossibility and chilling effect of litigating the pass-on defense, the defense must be rejected. Hanover Shoe, supra. See also Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Abbott's Dairies Division of Fairmont Foods, Inc. v. Butz, 584 F.2d 12 (3d Cir. 1978), discussed supra.

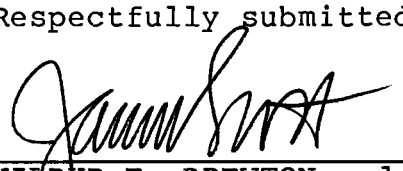
The State has been totally unable, in either its Motion for Summary Judgment or in the Stipulation of Facts, to show that these distributors bore no economic burden or suffered no economic injury, in order to support the State's affirmative defense of lack of standing on the part of these distributors.

As the Court found in Hanover Shoe and Bacchus, the fact that the cost of goods may reflect or include an unlawful charge [or tax] does not establish lack of economic injury or the elements of the so-called pass-on defense. Just as the court in Hanover Shoe held, the pass-on defense must be rejected especially where, as here, the Supreme Court in Bacchus clearly rejected it as a basis to deny standing to distributors challenging an excise tax. The State failed to establish its "pass-on defense" and the trial court's finding that these distributors had standing to challenge the constitutionality of §§564.06 and 565.12, F.S. (1981-1984 Supp.), should be affirmed.

CONCLUSION

Based on the foregoing argument and authority, the ruling of the trial court that the distributors had standing to challenge the alcoholic beverage excise tax statutes should be affirmed. The trial court's findings that these distributors were not barred by laches or estoppel should also be affirmed. The trial court's severance and holding of invalidity of only the "Florida-grown" products preferred rate provisions from the remainder of each statute should be reversed. Sections 564.06 and 565.12, F.S. (1981-1984 Supp.), should be declared unconstitutional in their entirety. The trial court's prospective-only application of its ruling, even to these distributors who brought the first successful challenge, should be reversed and these distributors should be granted a refund. This matter should be remanded with directions that all taxes paid pursuant to said statutes in excess of the "Florida-grown products" rate during each applicable refund period be refunded to these distributors.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS has been furnished by hand delivery this 8th day of February, 1988 to DANIEL C. BROWN, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050.

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