O/A 3-9-90

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,201

DEPARTMENT OF REVENUE,

Appellant,

vs.

MAGAZINE PUBLISHERS OF AMERICA, INC., ET AL.,

Appellees.
_____/

On Discretionary Review From The District Court of Appeal of Florida, First District

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APPELLANT, DEPARTMENT OF REVENUE'S REPLY BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kevin J. ODonnell
ASSISTANT ATTORNEY GENERAL
TAX SECTION, THE CAPITOL
TALLAHASSEE, FL 32399-1050
904/487-2142

COUNSEL FOR APPELLANT
DEPARTMENT OF REVENUE

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I. THE EXISTENCE OF A NEWSPAPER EXEMPTION WAS AN IMPROPER BASIS FOR FINDING AN EXCISE TAX ON MAGAZINES CONSTITUTIONALLY INVALID

Appellant, in reply to Point I of the Magazine Publishers Answer brief, adopts the able discussion of that point contained on pages seven through eighteen of the Answer brief of Appellee The Florida Press Association, et al.

II. THE APPROPRIATE REMEDY IS A MATTER OF STATE LAW AND THE COURTS SHOULD NOT CREATE EXEMPTIONS OF QUESTIONABLE VALIDITY UNDER STATE LAW

The Magazines challenged exemptions granted to newspapers and religious publications. (App. 11-12) They claimed that these exemptions carry for them a competitive disadvantage. (App. 11) But for the exemptions possessed by the Newspaper and Religious Publishers, the Magazine Publishers stated no injury. Unquestionably, they possess no immunity. Nevertheless, the Magazines' propose a new exemption premised upon a nonexistent constitutional mandate. Their continued reluctance to admit that they request an exemption underscores their desire to ignore the practical effect of their proposal.

Lacking immunity, the Magazines have mischaracterized the sales tax as one targeting magazines. (App. 11-12) Magazines are not singled out for taxation. They simply do not receive the limited preference granted to newspapers and religious publications. These are the classifications at issue. Magazines

are taxed as routine tangible personal property and they are subject to the same sales and use tax as are others who traffic in First Amendment expression including books, periodicals, journals, flyers, cable television and telecommunications purchasers, among others. Clearly, any invalidity as may be found resides exclusively in limitations to the tax's general applicability.

Inexplicably, the Final Order (App. 0-6) favors magazines with the very differential treatment found to invalidate the Legislature's scheme of taxation in the first instance. The trial court would classify magazines for exemption without any further guidance and, at the same time, compound the invalidity it found. It is submitted that when the trial court accepted the Appellees' contentions, it usurped the legislative power to classify the objects for exemption. C.f., Williams v. Jones, 326 So.2d 425 (Fla. 1975); appeal dismissed, 429 U.S. 803. It also viewed the remedy question in isolation.

No rational basis for the new exemption is offered by its proponents. They argue only that it is constitutionally mandated. Yet, they can not even vouchsafe its constitutionality. It is highly unlikely that the Free Press Clause mandates the discrimination which Appellees propose. This Court should be cognizant of the practical operation of any remedy which it might impose.

The Final Order ends differential treatment between newspapers and magazines by requiring Appellant to deferentially treat magazines from other forms of expression currently subject

to tax. The Magazine Publishers apparently believe that the aftermath of their proposal is not relevant to this Court's decision. Yet, their choice of remedy suffers from any flaw found to exist in the legislation which they challenge:

> MR. FEAGIN: Well, Your Honor, it's the constitutional differential. I don't think -- I'm struggling here. I don't think we want to get ourselves in a posture of trying to represent and endorse to this Court a distinction between magazines and books or some other less periodic publication on a basis that we will represent to you is constitutional.

(App. 530). The judiciary should not provide new exemptions to a tax of general applicability and thereby compound the infirmity requiring judicial action in the first place.

The Newspaper Publishers agree that frequency of publication provides the rational basis for their exemption. (Newspaper Publishers Answer Brief at 15-16) A ruling on the first point which invalidates the current classification scheme will raise grave doubt as to the continued vitality of the legislative rationale offered in support of a newspaper exemption.

Clearly there is not a shred of evidence that the legislature intended to exempt all commercial First Amendment activity. The Magazine Publishers cannot rely on the existence of a newspaper exemption, for which they admittedly do not qualify, to provide any basis for an expanded exemption. Coupled with the lack of <u>any</u> legislative guidance for its implementation, this deficiency will foster litigation and produce confusion among the dealers who must collect the tax at their own peril.

Those who administer the tax and those who must pay it also have a strong interest in stability and certainty. If this Court decides to overturn forty years of precedent upholding the newspaper classification, Appellant submits that such a ruling would speak volumes about Appellant's ability to validly classify between, for example, magazines and periodicals, books and flyers.

The Herald's focus on where the analysis must begin has shed no light on where that analysis leads this Court, the State and the taxpayers. For Florida, the federal issue is laid to rest when the violation of a constitutional right ceases to occur. The cases analyzing the First Amendment have no more to say about remedy than that. The practical operation of the resultant tax is too great a concern to leave to chance.

The Herald relies on Grosjean v. American Press Co., 297 U.S. 233 (1936), Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), and Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), for two independent propositions crucial to its argument. First, that the remedy in this case is determined by reference to federal decisions. Second, that these decisions prescribe a remedy for every violation of the Free Press Clause which is invariably the same. The first proposition is merely drawn by inference. The second is not borne out by a thorough examination of the shortcomings of the remedy proposed by Appellees when compared to those provided by the high court. See Appellant's Initial Brief at 13 - 15.

As demonstrated by the recent decision in Texas Monthly, Inc. v. Bullock, 109 S.Ct. 890 (1989), there is room for this Court to provide a remedy tailored to fit the facts of this case. That decision is too easily dismissed by the Herald as an Establishment Clause case. (Herald Answer Brief at 13-14) Texas Monthly affirms this Court's authority to find an appropriate remedy for an invalid classification and does not by its own terms limit that authority to Establishment Clause cases. Id. at 896.

Texas was given the option to eliminate, curtail or broaden its exemption or eliminate its tax altogether. No Free Press Clause decision has stated why this Court does not enjoy these same options. Nevertheless, Appellees argue that this Court must automatically provide a particular remedy simply because this is a Free Press Clause case. Appellant would submit that the Free Press Clause does not require state courts to ignore the practical effect of providing an arguably unconstitutional exemption, lacking a rational basis and devoid of legislative guidance.

The protection of constitutional interests in this case does not require a remedy which strikes a tax on the sale of magazines in Florida. The federal opinions and state decisions cited by Appellees to support enlargement of Florida's newspaper exemption contain no language mandating a competitive advantage for magazines. The federal decisions relied upon by Appellees do not support any such advantage. Thus, even if this Court determines that the choice of remedy is prescribed by federal law, it does

not necessarily follow that federal law prescribes the particular remedy sought by Appellees.

Marginally increasing the field of exempt expression does not promote First Amendment goals nor eliminate targeting. It simply provides an advantage to the Magazine Publishers which they now argue is their constitutional due. In the context of the present challenge, one might legitimately ask whether the Magazines' concern arises because other publications receive a preference, or because their efforts in the political arena have failed to produce their own exemption? In other words, do the challengers oppose differential taxation, or do they merely seek from the judiciary their own competitive advantage?

It is beyond dispute that Chapter 212, Fla. Stat. - The Florida Revenue Act of 1949 - is designed to raise money, not to confer exemptions. For the Herald to argue that "the 'legislative purpose' of Chapter 212 may be accomplished without either the magazine tax or the newspaper exemption" (Herald Answer Brief at 19) evidences a clear misunderstanding of the role of a revenue statute. Compare Welsh v. United States, 398 U.S. 333, 365 (1970)(expansion of draft exemption to non-religious objectors approved), with, Small v. Sun Oil Co., 222 So.2d 196, 200 (Fla. 1969)(an exemption could not have been the inducement for a tax). It bears repeating that the legislature has not adopted, nor is it required to adopt a policy which exempts the press generally.

Legislative intent "is determined primarily from the language of the statute." St. Petersburg Bank & Trust Co. v.

Hamm, 414 So.2d 1071,1073 (Fla. 1982). The plain import of Chapter 212 and especially §212.21, Fla. Stat., evidences legislative disfavor with enlarging exemptions. It is beyond peradventure that exemptions should be narrowly construed within the limitations prescribed by the legislature and rest on some definite provision of law. E.g., Wanda Marine Corporation v. State, Department of Revenue, 305 So.2d 65, 69 (Fla. 1st DCA 1974).

Under the Final Order the judiciary would enlarge an exempt classification to include objects not specifically contemplated by the Legislature. Since the Magazine Publishers will not recognize this fact their state law argument focuses exclusively on the question of whether this Court should strike the tax or the exemption? Let there be no mistake. Appellees offer no serious counter to Appellant's argument that this Court would be creating a new exemption if it upheld the Final Order. Appellees simply intone "strike the tax" without due regard for the ramifications.

Whether a particular exemption is held to create, or merely evidence an invalid classification is a non-issue in this case. Surely, Appellees would agree that state decisions instruct this Court to apply a rule of reason to reach a rational and constitutional result.

No one denies that the Newspaper Publishers have enjoyed a long-standing tax preference. The Newspaper Publishers take great solace in the longevity of their "newspaper" exemption. The Magazine Publishers would, no doubt, point out that a

"newspaper" exemption cannot be likened to a universal First Amendment exemption. Again, the legislature has not shown an intent to exempt the press, but to tax it generally with limited exceptions. In fact, when the legislature reenacted the newspaper exemption in 1987, it explicitly chose not to exempt magazines at that time.

The Newspaper Publishers' resort to the historical high ground would only be relevant were the expressions of legislative intent not so clearly directed at maintaining current revenue sources. The theory that newspapers are immune from sales tax is not worthy of serious consideration. Appellant's Initial Brief at 24 - 26. The Newspaper Publishers ask this Court to presuppose what price the legislature would be willing to pay for continuance of the favor granted them. This requires a social policy choice which is the legislature's to make.

As for the Religious Publisher's argument that their exclusion from tax is not before this Court, Appellant would be happy to agree with the argument. Appellant did not below and does not now argue that the religious publication exclusion contained in §212.06(9), Fla. Stat., should be held invalid. Any argument to the contrary misapprehends Appellant's position on severance of that exclusion.

In response to the Magazine Publisher's challenge, Appellant has consistently urged that the exclusion is valid, but that <u>to the extent that the Magazine Publishers prove invalidity,</u> the proper remedy is to strike the exclusion, as is specified in §212.21(2), Fla. Stat. The clear thrust of the Religious

Publisher's argument is that the Magazine Publishers have not proved invalidity on this ground. On that score there is total agreement between the Religious Publishers and Appellant.

However, the Magazine Publishers continue to maintain that a religious publication exclusion violates their constitutional rights. (Magazine Answer Brief at 24, n. 11) The existence of this issue formed the basis for intervention by the Religious Publishers. (App. at 549-552, 562-565) The issue was fully briefed for consideration by the trial court at the trial court's direction. (App. at 77-78)

Moreover, the Herald argues that "if the Court holds that the newspaper exemption should be invalidated, ... the religious publication exemption must also fall." (Herald Answer Brief at 22) While on the present record the argument amounts only to bringing in the chorus, for so long as the Magazine Publishers argue that the religious publication exclusion violates their rights, and to the extent that any Appellee is successful in maintaining this argument, Appellant will respond that severance of the exclusion, rather than its enlargement, is appropriate and produces no unconstitutional result.

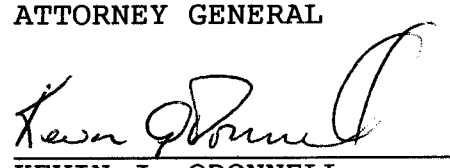
CONCLUSION

The final summary judgment should be reversed and remanded for trial on Count II of the complaint based on Gasson v. Gay, 49 So.2d 525 (Fla. 1950). If the Court overrules that decision and finds unconstitutional the differential treatment challenged by the Magazines, the Court should sever the provisions giving rise to the

challenge and remand the case to the trial court for a determination of the attorney's fee issue.

Respectfully submitted,

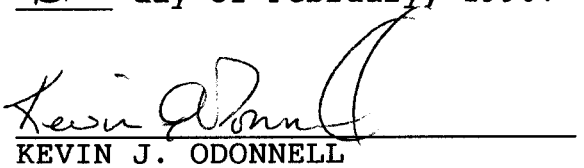
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



KEVIN J. ODONNELL
Assistant Attorney General
Department of Legal Affairs
Tax Section, The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **JAMES M. ERVIN, Jr.**, Holland & Knight, Barnett Bank, 8th Floor, P.O. Drawer 810, Tallahassee, FL 32302; **WILLIAM L. HYDE**, 101 E. College, P.O. Drawer 1838, Tallahassee, FL 32302; **TIMOTHY J. WARFEL**, Messer, Vickers, Caparello, French & Madsen, First Florida Bank Building, Suite 701, P.O. Box 1876, Tallahassee, FL 32302-1876 and **CECIL L. DAVIS, Jr.**, 119 E. Park Ave., P.O. Box 10316, Tallahassee, FL 32302 and by U.S. Mail to **LAURA BESVINICK**, 100 S.E. 2nd St., Suite 3400, Miami, FL 33131; this 26 day of February, 1990.



KEVIN J. ODONNELL