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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

Petitioner,

vs. CASE NO: 78,279

HEARING OFFICER P. MICHAEL RUFF, DIVISION OF ADMINISTRATIVE HEARINGS, TALLAHASSEE, FLORIDA,

Respondent.
_____/

PETITIONER'S RESPONSE TO RESPONSE OF INTERVENOR AND RESPONDENT TO PETITION AND ORDER NISI

Robert A. Butterworth
Attorney General

Joseph C. Mellichamp, III
Senior Assistant Attorney General
Fla. Bar. No. 133249

Office of the Attorney General
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 32399-1050
(904)487-2142

Donald D. Conn
General Counsel
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32399-1007
(904) 488-7365

John B. Fretwell
Senior Attorney
FL Bar ID No. 0166680

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PRELIMINARY STATEMENT

Two responses have been filed, one by Respondent Hearing Officer, P. Michael Ruff, and one by Intervenor/Respondent Florida West Coast Beverage Distributors, Inc., a Florida Corporation, f/k/a the House of Midulla, Inc., f/k/a Tampa Wholesale Liquor Company, Inc. The responses will be referred to as "Respondent's response" and "Intervenor's response" respectively. Petitioner, Division of Alcoholic Beverages and Tobacco will be referred to as the "Division." The acronym "DOAH" will refer to the Division of Administrative Hearings.

STATEMENT OF THE CASE AND FACTS

The Division adopts the statement of the facts as set out in the Petition for Writ of Prohibition. Similarly, the Division adopts the statement of the case as set out in the Petition for Writ of Prohibition updated as follows:

1. On July 17, 1991, the Division filed with this Court its Petition for Writ of Prohibition Directed to the Division of Administrative Hearings.

2. On July 18, 1991, this Court denied the Division's request for an immediate stay of the administrative proceedings.

3. On July 19, 1991, the administrative hearing convened as scheduled. A copy of the transcript of the DOAH hearing will be found at page 30 of the Appendix to Intervenor's response. It is parenthetically noted that the date of hearing reflected on the

cover sheet of the transcript (page 30 of the Appendix to Intervenor's response) is erroneous. The hearing was conducted on Friday, July 19, 1991, not July 17th.

4. On August 5, 1991, the Division and the Intervenor filed proposed final orders with Respondent. The Division's proposed final order in the DOAH proceeding is set out in the Appendix to the Intervenor's response beginning at page A-128. Intervenor's proposed final order commences at page A-103 of the aforementioned Appendix.

5. On August 21, 1991, this Court ordered Respondent P. Michael Ruff to show cause why the Petition should not be granted. Additionally, this Court stayed all proceedings before DOAH pending disposition of the Petition for Writ of Prohibition.

6. On September 3, 1991, Respondent filed with this Court his Response to Order To Show Cause.

7. On September 4, 1991, this Court granted the Motion to Intervene filed by the Intervenor. Intervenor's response was filed the same day.

REPLY TO INTERVENOR'S AND RESPONDENT'S VARIOUS POINTS AND SUBPOINTS

A. JURISDICTION

Intervenor's response raises several points under the general heading of jurisdiction. First among these is the question of the Division's allegedly incorrect interpretation of Rule 9.030(a)(3), Fla. R. App. P. The Rule basically mirrors

the constitutional provision set forth at Article V, Section 3(b)(7), Fla. Const. (1968). Neither the aforementioned rule, nor the aforementioned constitutional provision provide this Court with unfettered authority to issue writs when and where it pleases. On the contrary, only "writs necessary to the complete exercise of its jurisdiction" may be issued pursuant to the aforementioned authorities Id. Intervenor accurately cites a plethora of cases standing for the proposition that there must be jurisdiction before this honorable Court may complete the exercise thereof by invoking its power to issue all writs. See pages 11-12 of Intervenor's response. The Division agrees, and interprets Rule 9.030(a)(3), Fla. R. App. P., precisely the same way as Intervenor does, that is to say, there must be jurisdiction to complete. Intervenor suffers under the misapprehension that the Division is asking this Court to use its all writs authority to usurp jurisdiction it does not have. Nothing could be further from the truth.

Section 25.041, Fla. Stat. (1989), states, in relevant part that:

> (1) The Supreme Court is vested with all the power and authority necessary for carrying into complete execution all its judgments, decrees and determinations in the matters before it, agreeable to the usage and principles of law.

On January 15, 1991 this Court made a determination to remand the case of Division of Alcoholic Beverages and Tobacco, et al. v. McKesson Corporation, et al., 574 So.2d 114 (Fla. 1991)

to the circuit court, Second Judicial Circuit with detailed instructions. Id., 574 So.2d at 116. Pursuant to this remand, proceedings are ongoing in the circuit court. McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida, Second Judicial Circuit Case No. 86-2997. To complete the exercise of this Court's jurisdiction in Division of Alcoholic Beverages and Tobacco, et. al., v. McKesson Corporation, et. al., 574 So.2d 114 (Fla. 1991), this Court is constitutionally and by statute empowered to issue all writs necessary to accomplish such end and to take other action "necessary for carrying into complete execution all its judgments, decrees and determinations..." Section 25.041, Fla. Stat.(1989); Article V, Section 3(b)(7) Fla. Const. (1968). To suggest, as Intervenor does, that somehow this "empowerment" to complete the exercise of this Court's jurisdiction does not extend to actions taken to protect or enforce this Court's mandate is to suggest that this Court's authority is illusory rather than real. A mandate that cannot be protected or enforced is not a mandate, it is a request. Fortunately, Intervenor's suggestion bears little or no resemblance to the actual state of the law. When the issue arises, appellate courts are quick to ensure that their mandates are being followed below. See, e.g., Robinson v. Gale, 380 So.2d 513 (Fla. 3d DCA 1980); Anthony Lee Jones and Luella Toots v. The Honorable Francis X. Knuck, 388 So.2d 328 (Fla. 3DCA 1980); Department of Transportation v. Burnette, 399 So.2d 51

(Fla. 1DCA 1981); Waltman v. Prime Motor Inns, Inc., 461 So.2d 120 (Fla. 3DCA 1984), rehearing denied (1985). The Division recognizes that the above cited authorities are limited to the appellate court that issued the mandate and to the lower tribunal tasked with implementing the mandate. None of the above cases involve third parties, such as Respondent and Intervenor, interfering with the implementation of the mandate. There can be no doubt, however, that should this Court conclude that Respondent was interfering with the mandate, and that such interference was thwarting this Court from the complete exercise of its jurisdiction, that any and all writs necessary for the complete exercise of jurisdiction could be issued. Fla. Const. (1968); Article V., Section 3(b)(7), Fla. Const. (1968); Rule 9.030(a)(3), Fla. R. App. P.

The second issue raised by Intervenor in its discussion of jurisdiction centers on the uncontroverted point of law that final agency action may be appealed to the appropriate district court of appeal. Section 120.68, Fla. Stat. (1989). Intervenor goes on to say that "[t]he Florida Constitution limits this Court's jurisdiction under the all writs power to cases in which a direct appeal to the Court would be allowed as a matter of right." (Intervenor's response, page 12). That statement is of questionable accuracy. The statement is unquestionably irrelevant. Accuracy is doubted because the relevant portions of the constitution have changed significantly since State ex rel. Sentinel Star Company, Inc. v. Lambeth, 192 So. 2d 518 (Fla. 4DCA 1966), the case on which Intervenor relies, was decided. As of

the 1966 date of decision, the constitutional language read:

> The Supreme Court may issue all writs necessary or proper to the complete exercise of its jurisdiction. Article 5, Section 4(2), Fla. Const. (1885).

By 1976 the relevant provision had been changed to read:

> May issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review, and all writs necessary to the complete exercise of its jurisdiction. (emphasis added) Article V(b)(4) FLa. Const. (1968) (amended 1976)

The current version of this language states:

> May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction. Article V Section 3(b)(7) Fla. Const. (1968) (amended 1986)

The evolution of this language seems to suggest that if there ever were a time when this honorable Court's power to issue all writs was limited to those cases in which a direct appeal was a matter of right, that time has long since past. The issue is irrelevant, of course, because this proceeding involves protection of this Court's mandate. The District Court of Appeal has no involvement whatsoever with this Court's mandate.

The tertiary issue raised by Intervenor under the general heading of jurisdiction is that the Division has implied that this Court has jurisdiction to issue a writ of prohibition because a constitutional issue is involved in the DOAH proceedings. (Intervenor response at page 12). The Division addressed jurisdiction at pages one and two of its Petition For

Writ of Prohibition. The relevant language is "[s]aid writ is necessary to the complete exercise of this honorable Court's jurisdiction under Rule 9.030(a)(3), Florida Rules of Appellate Procedure. The pending action threatens this honorable Court's mandate issued in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So.2d 114 (Fla. 1991)". Among the definitions of the verb "to imply" is: "to say or express indirectly." The American Heritage Dictionary, second college edition at 646. It would be difficult to imagine more straightforward, more direct, and less indirect, language than that used by the Division to address jurisdiction. Intervenor has simply erred on this, as well as all other points it raises relevant to this proceeding.

The remaining issues under jurisdiction address the pleadings. First, Intervenor avers that the Division has failed to allege that "irreparable harm will result from Ruff's improper exercise of jurisdiction." (Intervenor's response at page 13). In light of this alleged failure, Intervenor states that this Court "must assume that DABT's right to appeal any adverse determination in the DOAH proceeding is sufficient to cure any improper exercise of jurisdiction by Ruff" (Intervenor's response at pages 13-14). Intervenor suggests that the Division failed to allege that which must be alleged, and in so doing has admitted that it has not read that which the Division has alleged. The Division concedes, as it must, that the improper or erroneous exercise of jurisdiction with which a tribunal is vested is a matter for appeal. (Petition for Writ of Prohibition at

pages 9-10). The Division is alleging that Respondent assumed jurisdiction to which it had no legal claim. (Petition at page 10). English v. McCrary, 348 So.2d 293, 298 (Fla. 1977). Respondent had no legal claim to that jurisdiction because the issue had been mandated by this Court to the circuit court, Second Judicial Circuit for resolution. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So.2d 114, 116 (Fla. 1991). The fact "that irreparable damage is likely to follow Ruff's improper exercise of jurisdiction [sic.]" (Intervenor's response at page 13), is spread throughout the record of the proceedings that resulted in this Court's mandate with which Respondent interferes. Perhaps Justice Grimes, in his concurring opinion, put it most succinctly when he wrote: "[T]he fiscal ramifications of this matter are ominous for the State of Florida." Id., 574 So.2d at 117. Justice Overton's concurring opinion sets forth the numbers, i.e., some $285 million dollars to McKesson and like-positioned distributors, or some $8.5 million to the state should the manner and method of collection of the retrospective tax assessment survive scrutiny of the circuit court pursuant to this Court's mandate. Id., 574 So.2d at 116-117. In light of the enormous sums involved, one is virtually constrained to adopt the somber view that it may be impossible to avoid irreparable harm in this case. One thing is certain, however; that the chances of avoiding or mitigating such harm are substantially diminished if Respondent adjudicates that which this Court mandated to the circuit court for adjudication.

Intervenor suggests that Section 81.011, Fla. Stat. (1989) requires that the initial petition in any case in which prohibition is sought be verified by affidavit. (Intervenor's response at page 14). Intervenor misreads the statute. The affidavit is required only when the petition contains matters not of record. Section 81.011, Fla. Stat. (1989). The Petition for Writ of Prohibition, and all matters submitted therewith were and are matters of record. No certified transcript was submitted with the Petition because the hearing was not conducted until July 19, 1991, two days after the Petition was filed on July 17, 1991. A copy of the certified transcript has been submitted by Intervenor commencing at page 30 of the appendix to Intervenor's response.

B. PROTECTION GUARANTEED BY CHAPTER 120

This section consists primarily of black letter administrative law with which the Division agrees. A couple of issues raised by Intervenor in its response at pages 17-19 must be addressed by the Division. There is no doubt that the Division adopted the rules in an effort to meet this honorable Court's requirements as mandated to the circuit court. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So.2d 114, 116 (Fla. 1991). Intervenor suggests that "The implication of DABT's argument is that if it engages in rule-making that it believes furthers a mandate of this Court, it need not comply with Chapter 120." (Intervenor's response at page 17). That self-serving statement assumes that there has been some noncompliance with Chapter 120 by the Division. That issue

is not before this Court. The Division concedes, incidentally, that "its exercise of rule making power is always subject to Chapter 120." (Intervenor's response at page 18), and that the promulgation of the instant emergency rules was done in compliance with Chapter 120, Fla. Stat. (1989).

The most pressing issue set forth in Intervenor's response at pages 17-19 begins with the first complete paragraph on page 18. Intervenor suggests that the Division considers Intervenor's Petition in the DOAH proceedings to be untimely. The Division's position has consistently been that "[t]he rules challenge is nothing more than a rather transparent subterfuge, occasioned presumably by the lapse of the 21 day period to intervene, for an attack upon the validity of the tax assessment." Petition for Writ of Prohibition at A-42 of Appendix. See also, Petition for Writ of Prohibition, paragraph 9 at page 6. Intervenor forfeited its opportunity to intervene in the circuit court litigation, and thus forfeited its opportunity to challenge the assessment. The following quotation is taken from Respondent's response at page 2:

> Rather, the Hearing Officer views his jurisdiction in the proceeding before the Division as only involving the issues raised by the Petition, which relate to the way in which the subject rules provide for the manner and means of collection and payment of the tax and not to any issues, constitutional or otherwise, which concern the validity of the underlying tax assessment itself. It is the Respondent's understanding that the issues concerning the validity of the assessment, including any constitutional issues, are presently pending before the Circuit Court for the Second Judicial Circuit, in and for Leon County, Florida, Case No. 86-2997. (Emphasis supplied).

The administrative petition, however, seeks to attack the tax assessment, which is precluded as a matter of law. That may only be attacked at the circuit court proceeding to which Intervenor forfeited his opportunity to intervene.

C. JUDICIAL RESTRAINT

Intervenor's response addresses the issue of "judicial restraint and the administrative process" (page 19) at pages 19-28. The discussion evinces nothing less than a total misapprehension of the Division's position. Intervenor concedes that Respondent "cannot decide constitutional issues or otherwise exceed his jurisdiction." Intervenor concedes that "[P]rohibition is the proper remedy for preventing a subordinate tribunal from exceeding its jurisdiction" (Both quotations from Intervenor's response at page 20). Intervenor rather plaintively pleads that it made no constitutional challenge to the rules. It was the Respondent who, in his Order of June 5, 1991, decided that his jurisdictional base was "the question of the manner and means of payment of the assessment." (Petition for Writ of Prohibition at page A-56 of the Appendix thereto). Indeed, Respondent reiterates, and re-emphasizes his position in his response to this Court:

> Rather, the Hearing Officer views his jurisdiction in the proceeding before the Division as only involving the issues raised by the Petition, which relate to the way in which the subject rules provide for the manner and means of collection and payment of the tax... (emphasis added) (Respondent's response at page 2).

Accordingly, Respondent exceeds its jurisdiction when it finds jurisdiction over the manner and means of payment. Intervenor states at page 20 of its response:

> When petitioned for a writ of prohibition, this court cannot and will not assume that an inferior judicial body will act erroneously in the exercise of its jurisdiction unless presented with clear and convincing evidence to the contrary. Smith v. Peacock, 146 Fla. 181, 200 So. 522 (1941); Adams v. Lewis, 146 Fla. 177, 200. So. 852 (1941).

As has so frequently occurred, Intervenor correctly articulates a legal principle, supports the principle with proper authority, only to discover that the principle supports the Division rather than Intervenor. In this case, of course, the "inferior judicial body" has acted in excess of its jurisdiction; has erroneously acted in the exercise of its jurisdiction. The principle contemplates future tense; the reality is present perfect.

That the manner and method of collection and payment of the tax is a constitutional issue is addressed at pages 11-13 of the Petition For Writ of Prohibition, and is incorporated by reference herein. Respondent tacitly acknowledges, and the rules on their face reveal that the manner and method of collection and payment is a constitutional issue. See Respondent's response, and Rule 7AER91-8, Petition for Writ of Prohibition, Appendix thereto at pages A-13-14. The linchpin to Intervenor's analysis of this issue is Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Fund, 427 So.2d 153 (Fla. 1982). That landmark case has nothing whatsoever to do with the issues facing this Court. The Division does not seek to stay or to

remove the sole remaining issue (i.e., the manner and method of collection and payment) to circuit court; the issue is there already. McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Second Judicial Circuit Case Number 86-2997. The Division seeks that this Court prohibit Respondent from proceeding further. Only the circuit court may resolve the question of whether the manner and method of collection passes constitutional muster. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So. 2d 114, 116 (Fla. 1991). This is so primarily because this Court entrusted the circuit court with the task of resolving the issue. Id. That the issue is a constitutional one is, at least at this point, only secondarily relevant. The court, in Key Haven properly emphasizes that administrative remedies must be exhausted unless the challenge is facial unconstitutionality of a statute. Key Haven, 427 So.2d at 155, 157. What administrative remedies remain to be exhausted? Has not the Respondent very clearly stated that he:

> Views his jurisdiction in the proceeding before the Division as only involving the issues raised by the Petition, which relate to the way in which the subject rules provide for the manner and means of collection and payment of the tax...(Respondent's response at page 2); (emphasis added).

The issue appears to be joined. Since the Respondent's jurisdiction rests solely upon "the way in which the subject rules provide for the manner and means of collection and payment of the tax" Id., the fact that the "manner and means of collection" is a

constitutional issue becomes as significant as the mandate issue. Thus the Division asks this Court to prohibit Respondent from proceeding further since to so proceed would not only interfere with this Court's mandate in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So.2d 114 (Fla. 1991) but would also result in Respondent having to resolve a constitutional issue without jurisdiction so to do. See e.g.; Gulf Pines Memorial Park v. Oakland Memorial, 361 So.2d 695 (Fla. 1978); Department of Revenue v. Young America Builders, 330 So.2d 864 (Fla. 1DCA 1976)

CONCLUSION

For the reasons set forth in th above Response to Response of Intervenor and Respondent to Petition and Order Nisi, the Division prays that this honorable Court issue the requested Writ of Prohibition. The Division joins with Intervenor in its request for a oral argument should this Honorable Court so desire. Since the Division cannot begin to fathom what sort of evidence Intervenor seeks to present, the Division objects to any sort of evidence presentation.

Respectfully submitted,

Robert A. Butterworth
Attorney General

Joseph C. Mellichamp, III
Senior Assistant Attorney
General
Fla. Bar. No. 133249

Office of the Attorney General
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 32399-1050
(904)487-2142

Donald D. Conn
General Counsel
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32399-1007
(904) 488-7365

John B. Fretwell
Senior Attorney
FL Bar ID No. 0166680

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to P. Michael Ruff, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; to Geoffrey Todd Hodges, Esquire, P.O. Box 3324, Tampa, Florida 33601; and John McNeel Breckenridge, Jr., Esquire, The Breckenridge Group, 2502 North Rocky Point, Suite 225, Tampa, Florida 33607, this 16th day of September 1991.

John B. Fretwell