78,279

IN THE SUPREME COURT OF FLORIDA

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

Petitioner

vs. CASE NO.

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

Respondent.
_____/

PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE DIVISION OF ADMINISTRATIVE HEARINGS

Robert A. Butterworth
Attorney General

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

Eric J. Taylor
Assistant Attorney General
Fla. Bar No. 337609

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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PREFACE

Florida West Coast Beverage Distributors, Inc., a Florida Corporation, formerly known as The House of Midulla, Inc., formerly known as Tampa Wholesale Liquor Company, Inc. (hereinafter "Midulla"), is the Petitioner below, and the real party in interest. Midulla filed a petition in the Division of Administrative Hearings (hereinafter "DOAH") for an administrative determination of invalidity of certain emergency rules. Petitioner (respondent below), Division of Alcoholic Beverages and Tobacco (hereinafter "Division") contends that DOAH has exceeded its jurisdiction by refusing to dismiss the Petition for lack of jurisdiction and continuing with the proceedings. The Petition is supported by the Appendix hereto.[1] If this Honorable Court issues an order to show cause, a response should be required from the aforementioned Midulla.

JURISDICTION

Pursuant to Florida Rules of Appellate Procedure 9.100, the Division seeks a Writ of Prohibition directed to the Division of Administrative Hearings to prohibit the further exercise of jurisdiction by DOAH in the case of Florida West Coast Beverage Distributors, Inc. v. State of Florida, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, DOAH Case Number 91-2701R. Said writ is necessary to the complete exercise

[1] Pages of the Appendix are numbered consecutively A-1 through A-78.

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). (A-1-7)

STATEMENT OF THE FACTS

1. On June 4, 1990, the United States Supreme Court rendered its decision in the case of McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, _____ U.S. _____, 110 S.Ct. 2238 (1990). This decision was on writ of certiorari from the Florida Supreme Court's decision in the case of Division of Alcoholic Beverages and Tobacco v. McKesson Corp, 524 So.2d 1000 (Fla. 1988).

2. McKesson had commenced an action seeking declaratory and injunctive relief against Florida's liquor excise tax scheme. The tax was found to provide preferential treatment to beverages manufactured from certain "Florida-grown" crops then bottled instate. McKesson also sought a refund of the excise tax it had paid for the years July 1985 until February 1988.

3. The trial court enjoined future enforcement of the preferential treatment, but declined to order a refund. The Florida Supreme Court affirmed both decisions, thereby denying McKesson a refund of the difference between the tax rate of the disfavored beverages and that of those favored. McKesson then petitioned for certiorari to the United States Supreme Court presenting the question of whether, under federal law, McKesson was entitled to a refund of taxes paid by McKesson.

The United States Supreme Court reversed that portion of the Florida Supreme Court's decision affirming the denial of post payment relief and remanded the case to the Florida Supreme Court for further proceedings consistent with its opinion.

4. The United States Supreme Court stated that because an exaction of a tax constitutes a deprivation of property, procedural safeguards against unlawful exactions must be provided in order to satisfy due process. The Court set forth the legal analysis which it felt was appropriate to determine the extent of Florida's constitutional duty to provide relief to McKesson for its payment of an unlawful tax.

The Court made available several alternatives by which the State could cure the invalidity.

The State may choose to provide a full refund of all taxes paid by McKesson for the appropriate period. Alternatively, the State may reformulate and enforce the Liquor Tax, during the period it was contested, in any way that treats McKesson and its competitors in a manner consistent under the Commerce Clause.

The following are the methods to accomplish the second alternative given by the United States Supreme Court:

> a. Refund to McKesson the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reduction that its competitors were actually allowed.
>
> b. Consistent with other constitutional restrictions, assess and collect back taxes from McKesson competitors who benefited from the rate reductions during the contested tax period. The retroactive tax rate would ". . . create in hindsight a nondiscriminatory scheme."

c. A combination of a partial refund and retroactive assessment, so long as the scheme does not discriminate against interstate commerce. Id., 110 S.Ct. at 2252 (footnote and citation omitted).

All of the choices are calculated to "create in hindsight a nondiscriminatory scheme."

5. The Florida Supreme Court reaffirmed the position that the State has the option of choosing the manner in which it will reformulate the alcoholic beverage tax during the contested period so that the resultant tax actually assessed during that period reflects a scheme which does not discriminate against interstate commerce. Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 574 So.2d. 114, 116 (Fla. 1991).

The Florida Supreme Court gave several specific directions as to the course this litigation is to follow now that it has again reached the trial court.

The Court stated:

> In light of the state's proposal, we remand to the trial court for further proceedings on McKesson's claim for a refund. While McKesson may not necessarily be entitled to a refund, it is entitled to a "clear and certain remedy," as outlined in the Supreme Court's Opinion. Because nonparties, such as amici, will be directly affected by the retroactive tax scheme proposed by the state, all affected by the proposed emergency rule must be given notice and an opportunity to intervene in this action. Therefore, on remand, the trial court not only must determine whether the state's proposal meets "the minimum federal requirements" outlined in the Supreme Court's opinion, it also must determine whether the proposal comports with federal and state protections afforded those against whom the proposed tax will be assessed.

Id., 574 So.2d at 116.

6. Finally the Florida Supreme Court tasked the trial court with deciding whether "the state's proposal to retroactively assess and collect taxes from McKesson's competitors" meets constitutional muster. Id., McKesson, 574 So.2d at 116.

7. Since the Supreme Court mandated that all directly affected nonparties, such as Midulla must be given notice and an opportunity to intervene in the Circuit Court action, the Division issued assessments to the fifty-two distributors still in business that benefited from the rate reductions. Copies of the emergency rules setting forth the procedure for the retroactive assessment and collection of the tax were provided to the distributors that benefited from the tax rate reductions with the notice. The emergency rules, 7AER 91-8, 7AER 91-9 and 7AER 91-10 were filed and provided to the Circuit Court on April 2, 1991.[2] The rules served the purpose of notifying all affected nonparties; of providing a point of entry for those wishing to contest their assessment; and established methods for payment of the assessment. The rules provided several options for those affected thereby:

a. Within 30 days of receiving notice, the distributor could pay his special tax liability in full or;

b. Within 30 days of receiving notice, the affected distributor could remit the first installment of a payment plan spread out over 60 months.

c. Within 21 days of receiving notice, a

[2] See, 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 Number 86-2997.

distributor could contest all or part of the Division's calculation of the special tax liability, and/or the constitutionality of the imposition of the tax. Collection of the tax is stayed until final resolution of the contested amount. A copy of the assessment sent to Midulla and emergency rules may be found at A-8-24.

8. The State has assessed the competitors of McKesson who benefited from tax rate reductions during the contested period. [3]

The issuance of the assessments is the most effective way of noticing all affected distributors. It affords them an opportunity to be heard concerning the amount of the assessment and a full and fair opportunity to present any claim that the imposition of this tax is unconstitutional.[4]

STATEMENT OF THE CASE

9. Midulla filed its petition with Respondent on May 2, 1991, (A-25-36) some 27 days after it received its assessment and copy of the rules on April 5, 1991, (A-37), and some six days beyond the time allotted for contesting the assessment. (A-24) The petition was reviewed by the Director of DOAH and was found to be in compliance with the requirements of Section 120.56, Florida Statutes. Accordingly, on May 8, 1991, the Director assigned

[3] These assessments were made against the licensed distributors who are still in business. See Id., 110 S.Ct. at 2252, n.23.

[4] As stated by the Florida Supreme Court, those distributors who choose must be given an opportunity to intervene in this action or they may wish to pursue other courses of review available to them. Such notice has been given to each distributor who has been assessed.

Respondent, P. Michael Ruff, as hearing officer. (A-38)

10. On May 14, 1991, the Division filed with Respondent a Motion to Dismiss the petition on the grounds that Midulla lacked standing, and that DOAH lacked jurisdiction. (A-39-45). Respondent by his Order of May 28, 1991, found that the Division's Motion that jurisdiction did not lie with DOAH was meritorious. Accordingly, the Respondent granted the Division's motion, dismissed the case and ordered the file closed. (A-46).

11. On June 4, 1991, the Respondent sua sponte issued a "corrected order" indicating that the case was erroneously closed by Respondent. (A-47). Respondent avers that the "dismissal of the action was due to oversight on the part of the Hearing Officer because the 'observance' of Memorial Day, as opposed to the actual official Memorial Day holiday was on Monday, May 27, 1991." Thus a response from Midulla (A-48-55), previously considered by Respondent as untimely, was now deemed to be timely. The Respondent reopened the case and scheduled telephonic argument on the revived Motion to Dismiss. (A-39-45).

12. On June 5, 1991 Respondent issued an order (A-56) denying the Division's Motion To Dismiss (A-39-45). Respondent in said Order concluded that:

> even if jurisdiction concerning assessment validity is before the circuit court, the question of the manner and means of payment of the assessment (should it prove valid), as embodied in the subject rules, is presently within the jurisdiction of the Division of Administrative Hearings.

A hearing was set for July 19, 1991.

13. On June 20, 1991, the Division filed with Respondent a Motion For Reconsideration of Respondent's denial of the Division's Motion To Dismiss. (A-57-62). As an alternative to reconsideration, the Division asked that the Respondent abate the administrative proceedings until such time as the issues pending in the Circuit Court on remand from the Supreme Court were resolved. (A-57-62). Collection of Midulla's special tax liability was to be stayed until final resolution of the contested amount. Midulla responded to this motion at A-63-70.

14. On July 16, 1991, DOAH telephonically contacted Petitioner and indicated that Respondent had denied both the Motion for Reconsideration and the Motion to Hold in Abeyance. DOAH further indicated that the administrative hearing would proceed as scheduled on July 19, 1991. An order from Respondent was received by the undersigned counsel on July 17, 1991. (A-71-72).

15. On July 1, 1991, the emergency rules about which Midulla complained expired by operation of law. See Section 120.54(9)(c), Florida Statutes.

NATURE OF RELIEF SOUGHT

16. Petitioner Division seeks first that this Honorable Court immediately stay the administrative proceedings which are scheduled to convene on July 19, 1991 until this Court decides this Petition. The Division views time as being of the essence.

17. Secondly, after said stay has been ordered, and while it remains in full force and effect, the Division seeks that this Honorable Court issue an Order to Show Cause to Respondent

and Midulla why the requested Writ of Prohibition should not be granted.

18. Thirdly, the Division seeks that the requested Writ of Prohibition be made absolute and that DOAH be prohibited from exercising any jurisdiction in this matter. Jurisdiction, as already decided by this Court, resides solely in the Second Judicial Circuit Court.

ARGUMENT

19. The purpose of prohibition is to permit a superior court to prevent an inferior court or administrative body from exceeding its jurisdiction. School Board of Marion County v. Angel, 404 So.2d 359 (Fla. 5DCA 1981). Prohibition is a confined writ designed to prevent the inferior judicial body from acting in excess of its lawful jurisdiction. State ex. rel. Rash v. Williams, 302 So.2d 474 (Fla. 3DCA 1974); State ex rel. Pope v. Joanas, 278 So.2d 305 (Fla. 1DCA 1973). Prohibition is the appropriate method to prevent a court or administrative tribunal from acting without jurisdiction. Old Republic Insurance Company v. Whitworth, 442 So.2d 1078 (Fla. 3DCA 1983). "Prohibition is an extraordinary writ, a prerogative writ, extremely narrow in scope and operation, by which a superior court, having appellate and supervisory jurisdiction over an inferior court or tribunal possessing judicial or quasi-judicial power, may prevent such inferior court or tribunal from exceeding jurisdiction or usurping jurisdiction over matters not within its jurisdiction." English v. McCrary, 348 So.2d 293, 296 (Fla. 1977) (emphasis added.) "A

clear distinction is drawn between assumption of jurisdiction to which the court has not legal claim and erroneous exercise of jurisdiction with which it is invested." Id. at 298. In the first instance prohibition is the appropriate remedy. The erroneous exercise of jurisdiction is properly the subject of appeal rather than prohibition. Id. see also School Board of Marion County, at 361.

A. INTERFERENCE WITH MANDATE

20. Midulla having missed their opportunity to challenge the assessment by failing to file within 21 days, is attempting to use the rule challenge as a substitute for a timely challenge to the assessment.

Additionally, Respondent has concluded that "...the question of the manner and means of payment of the assessment (should it prove valid), as embodied in the subject rules, is presently within the jurisdiction of the Division of Administrative Hearings." (A-56). This conclusion is more than error; it is an usurpation of jurisdiction over matters that have been specifically entrusted by this Honorable Court to the Circuit Court.

21. Justice Overton, in his concurring opinion in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So.2d at, 117 writes:

> It is important to note that this case was not remanded to the Supreme Court of Florida in order for this Court to decide which alternative means should be chosen to rectify this wrong. The case was remanded for the 'state' to decide. Since

> the executive branch is charged with implementing the tax laws, collecting the taxes, and operating the government in accordance with those laws, I find that it is a clear function of the executive branch to initially choose which alternative to apply, given the choices articulated by the United States Supreme Court. Our responsibility is not to second-guess the executive branch but, instead, to assure that the choice made is implemented in a constitutional manner. (emphasis added)

The Florida Supreme Court thus specifically mandated the trial court to measure "the state's proposal to retroactively assess and collect taxes from McKesson's competitors" against constitutional standards. Id., 574 So.2d at 116.

B. CONSTITUTIONAL ISSUES

22. The usurping jurisdiction over the constitutional issues of the assessment and the collection of the taxes by DOAH pales into insignificance when measured against the enormity of usurpation of issues mandated to the Circuit Court by this Honorable Court. See O.P. Corporation, et. al. v. The Village of North Palm Beach, et. al., 302 So.2d 130, 131 (Fla. 1974); Branner Enterprises, Inc. v. Department of Revenue, 452 So.2d 550 (Fla. 1984).

The extent of DOAH's usurpation of jurisdiction, however, is by no means limited to its interference with this Honorable Court's Mandate. DOAH has also usurped jurisdiction over constitutional issues. It cannot be seriously argued that the "manner and means of payment of the assessment" is not a constitutional issue; this is the very "due process" question to be answered by the Circuit Court. Paragraph (2) of Rule Number

7AER 91-8 states at A-14:

> It is the division's, intent by promulgating the following remedial rules, 7AER 91-9 and 7AER 91-10, to implement a nondiscriminatory additional tax scheme, which does not impose a significant tax burden that is so harsh and oppressive as to transgress constitutional limitations. (emphasis added)

The emergency rules stand in stark contrast to the "pay your tax on time or expect trouble" tenor of section 561.50, Florida Statutes.[5] Rule Number 7AER 91-10 authorizes equal installment payments over a 60-month period, the first payment being due within 30 days of receiving the notice of assessment. No interest is being sought by the Division. The Division calculation of the tax may be contested pursuant to Chapter 120, Florida Statutes. The Rules provided that a previously favored distributor could timely petition to intervene in the case presently pending in the Second Judicial Circuit Court. The Division did not oppose the timely intervention of previously favored distributors who wished to present a claim in the Circuit Court that the Division's calculation of its special tax liability is incorrect or that the imposition of the tax is unconstitutional. Midulla, however,

[5] Under ordinary circumstances, the "manner and means of payment" of the beverage tax are models of simplicity, viz; the tax "shall be computed... and the amount so computed shall be remitted... to the division at intervals of 1 month, on or before the 10th of each month, for all beverages sold during the previous calendar month..." Section 561.50, Florida Statutes (1989) Section 561.50 also empowers the Division to take some relatively harsh measures when it considers the security of the tax involved to be in immediate jeopardy.

forfeited this opportunity to intervene. Collection of the special tax is stayed until final resolution of the contested amount. (A-24). "The manner and means of payment" as contained in the rules, represent the effort of the Division to ensure that the collection of back taxes from McKesson's competitors who benefited from the rate reductions is "consistent with other constitutional restrictions." McKesson, 110 S.Ct. 2252. It is a constitutional issue as a matter of law. Respondent is without jurisdiction with respect to this constitutional issue.

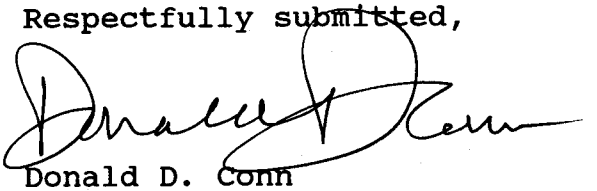
23. Administrative hearing officers lack jurisdiction to consider constitutional issues. Gulf Pines Memorial Park v. Oakland Memorial, 361 So.2d 695 (Fla. 1978). Constitutional questions are not subject to administrative determination. Department of Revenue v. Young American Builders, 330 So.2d 864 (Fla. 1DCA 1976). "[W]hen a proper constitutional question has been raised the circuit court should proceed with the determination of that question and should stay the other issues pending before the hearing officer." E.T. Legg and Company v. Franza, 383 So.2d 962, 964 (Fla. 4DCA 1980). Accord Dyna Span Corp. v. Pollock, 510 So.2d 307 (Fla. 4DCA 1986) Midulla's response to the Division's Motion For Reconsideration erroneously suggests some conflict between E.T. Legg and Dyna Span and Criterion Insurance Company v. State, 458 So.2d 22 (Fla. 1DCA 1984) Midulla errs when it states at A-65 that a challenge to "an administrative emergency order on both constitutional and statutory grounds was barred from resort to the court because it had failed to exhaust its statutorily provided administrative remedies (i.e., it had failed to seek an

administrative hearing for review of the statutory defects in the emergency order prior to the time it raised its constitutional claims in court)." In fact, the constitutional issue had been resolved. "...[O]nce the trial court determined the legal issue that the statute under attack was constitutional, it correctly abstained from entertaining any of the nonconstitutional questions by holding such questions were not properly before it." Id., 458 So.2d at 26 (emphasis in original). The constitutional issue in Criterion was decided by the courts. There exists a subtle but important distinction between being barred from hearing an issue and deciding that issue. Nothing in Criterion comes remotely close to suggesting that DOAH hearing officers are empowered to resolve constitutional issues.

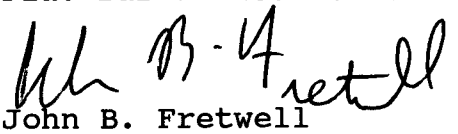
24. The complained of emergency rules remain viable only because of this litigation. Their purpose (i.e., to provide notice; to provide a point of entry for those who wished to contest the assessment; and to provide methods of payment of the assessment) has long since been served. The rules were filed with the Circuit Court as part of the Division's initial pleading on remand. (A-73-78) The Division expects the litigation with respect to the constitutionality of the assessment and the means and manner of payment thereof (or, if you will, the collection) will be long and arduous. That litigation, however, must be exclusively in the Circuit Court a place where no doubt, Midulla would be had not the 21 days expired. Accordingly, the State of Florida, Department of Business Regulation, Division of Alcoholic

Beverages and Tobacco prays that this Honorable Court issue the requested Writ of Prohibition.

Respectfully submitted,



Donald D. Conn
General Counsel
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32399-1007
(904) 488-7365
Fla. Bar ID No. 167758



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

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Fla. Bar No. 337609

Office of the Attorney General
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 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 P. Michael Ruff, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; to Geoffrey Tod 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 17th day of July, 1991.

John B. Fretwell

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Donald D. Conn
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(904) 488-7365

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Senior Attorney
FL Bar ID No. 0166680

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