O.A. 3-5-92 047

FILED
SID J. WHITE
FEB 17 1992
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Case No. 79,061

TOM GALLAGHER, as Florida Commissioner of Insurance and Treasurer, et al.,

Appellants,
Cross-Appellees,

v.

MOTORS INSURANCE CORPORATION, et al.,

Appellees,
Cross-Appellants.

DCA Case No. 91-3704
Lower Case No. 90-2046

REPLY BRIEF OF CROSS-APPELLANTS

KENNETH R. HART
Florida Bar I.D. #192580
STEVEN P. SEYMOE
Florida Bar I.D. #501750
ROBERT A. PIERCE
Florida Bar I.D. #175399
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

Attorneys for Appellees,
Cross-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. FLORIDA'S INSURANCE PREMIUM TAX IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE 1

A. THE PURPOSE ASSERTED BY THE STATE FOR FLORIDA'S DISCRIMINATORY TAX IS PRETEXTUAL AND THE TRIAL COURT ERRED IN FINDING IT TO BE THE PURPOSE FOR FLORIDA'S DISCRIMINATORY TAX. 1

B. FLORIDA'S DISCRIMINATORY INSURANCE PREMIUM TAX IS NOT RATIONALLY RELATED TO THE PURPOSE ASSERTED BY THE STATE AND THE TRIAL COURT DID NOT HOLD THERE IS SUCH A RELATIONSHIP 7

II. FLORIDA'S RETALIATORY TAX VIOLATES CONSTITUTIONAL PROHIBITION AGAINST UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY 9

III. FLORIDA'S RETALIATORY TAX VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY DISCRIMINATING AGAINST FOREIGN INSURERS 11

IV. FLORIDA'S STATUTE OF LIMITATIONS APPLIES TO THE PRO FORMA RETALIATORY TAX ASSESSMENTS 12

V. TAXPAYERS ARE ENTITLED TO RELIEF UNDER 42 U.S.C. § 1983 AND § 1988 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Page

Cases

Allied Stores of Ohio, Inc. v. Bowers,
358 U.S. 522 (1959) 2

Bill Smith, Inc. v. Cox,
166 So.2d 497 (Fla. 2d DCA 1964) 2

Cooper v. State of Utah,
684 F.Supp. 1060 (D. Utah 1987) 15

DABT v. McKesson Corp.,
524 So.2d 1000 (Fla. 1988), reversed on other grounds,
495 U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) 12

Dennis v. Higgins,
__ U.S. __, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) 15

Dobbs v. Sea Isle Hotel,
56 So.2d 341 (Fla. 1952) 2

Eastern Air Lines, Inc. v. Dep't of Revenue,
455 So.2d 311 (Fla. 1984), appeal dismissed, 474 U.S. 892 (1985) 10

Ellsworth v. Ins. Co. of North America,
508 So.2d 395 (Fla. 1st DCA 1987) 2

Englewood Water Dist. v. Tate,
334 So.2d 626 (Fla. 2d DCA 1976) 2

Finnegan v. Fernandina,
15 Fla. 379 (1875) 13

Freimuth v. State,
272 So.2d 473 (Fla. 1972) 9, 10

G.D. Searle & Co. v. Cohn,
455 U.S. 404 (1982) 8

Kassel v. Consolidated Freightways Corp. of Delaware,
450 U.S. 662 (1981) 1

 Page

Metropolitan Life Inc. Co. v. Ward,
470 U.S. 869 (1985) 3, 7

Mikos v. Ringling Bros. Barnum & Bailey Combined Shows, Inc.,
497 So.2d 630 (Fla. 1986) 13

New Energy Co. of Indiana v. Limbach,
486 U.S. 269 (1988) 12

Penn Mut. Life Ins. Co. v. Dep't of Licensing & Regulation,
162 Mich. App. 123, 412 N.W.2d 668 (Ct. App. 1987) 7

Principal Mut. Life Ins. Co. v. Div. of Ins.,
780 P.2d 1023 (Alaska 1989) 7

Rhodes v. Stewart,
488 U.S. 1 (1988) 15

S.R.G. Corp. v. Dep't of Revenue,
365 So.2d 687 (Fla. 1978) 2

State of Florida v. Melahn,
No. 79,024 (Fla.S.Ct.) 3

Thayer v. State,
335 So.2d 815 (Fla. 1976) 2

Western & Southern Life Ins. Co. v. State Bd. of Equal.,
451 U.S. 648 (1981) 7, 8, 11

Western & Southern Life Ins. Co. v. State Bd. of Equal.,
159 Cal.Rptr. 539, 99 Cal.App.3d 410 (Cal. Ct. App. 1979) 12

Zobel v. Williams,
457 U.S. 55 (1982) 1

Statutes

42 U.S.C. § 1983 . . . . 13, 14, 15

42 U.S.C. § 1988 . . . . 13, 15

Page

Section 95.091, Florida Statutes 12

Section 624.411, Florida Statutes 4

Section 624.418, Florida Statutes 5

Section 624.429, Florida Statutes 9

Section 624.509, Florida Statutes 1, 6, 8, 14

Section 624.512, Florida Statutes 5

Section 626.932, Florida Statutes (1991) 6

Section 626.913, Florida Statutes (1991). 6

Other Authorities

McCarran-Ferguson Act, 15 U.S.C. § 1011 . . . . 3, 5, 10

ARGUMENT

I. FLORIDA'S INSURANCE PREMIUM TAX IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE

A. THE PURPOSE ASSERTED BY THE STATE FOR FLORIDA'S DISCRIMINATORY TAX IS PRETEXTUAL AND THE TRIAL COURT ERRED IN FINDING IT TO BE THE PURPOSE FOR FLORIDA'S DISCRIMINATORY TAX.

Taxpayers asserted in their Answer and Cross-Appeal Brief ("Cross-Appeal Brief") that the State's asserted purpose for its insurance premium tax, section 624.509, et. seq., Florida Statutes, is a pretext and noted that the State admitted that its purpose was a legal fiction during trial. In its Reply and Cross-Answer Brief ("Answer Brief"), the State concedes this to be the case but urges this Court to ignore these arguments as being irrelevant.

The State argues that certain cases cited by Taxpayers are inapplicable because they involve a different level of scrutiny or burden of proof. See, e.g., Zobel v. Williams, 457 U.S. 55, 61 (1982); Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 682-83 (1981). As Taxpayers pointed out in their Cross-Appeal Brief, these cases were not cited for their level of scrutiny or burden of proof, but rather for the purpose of showing how courts identify a statute's purpose when resolving constitutional challenges.[1] The holdings in these cases as to the identification of a statute's purpose applies regardless of the particular level of scrutiny or standard of review. In its Answer Brief, the State confuses the issues of identification of purpose, burden of proof, and level of scrutiny. Although certain aspects of these issues differ for various types of constitutional challenge, the manner in which a court identifies the purposes of a statute is not different.

---

[1]The State has failed to cite a single case which holds that when a statute sets forth its purpose, a state may use a legal fiction to create other purposes.

In Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959), the U.S. Supreme Court, in an equal protection challenge to a taxing statute, held that when a facially discriminatory statute sets forth its purpose, the Court should not attempt to discern any other purpose. "Having themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence." Id. at 530. Although the State argues that that finding was unnecessary to the Court's decision and, therefore, obiter dictum, clearly it was critical to the Court's determination of the unconstitutionality of the tax and supports Taxpayers' arguments that this Court should not go outside of the statute where the statute sets forth the legislature's purpose.

Rules of statutory construction have consistently recognized that legislative intent is to be determined from the language of the statute at issue. Where the legislature has expressed its intent by use of words found in the statute, the court is to give effect to that expressed intent. S.R.G. Corp. v. Dep't of Revenue, 365 So.2d 687 (Fla. 1978); Englewood Water Dist. v. Tate, 334 So.2d 626 (Fla. 2d DCA 1976). A court cannot attribute to the legislature any intent beyond that which was expressed in the statute. Bill Smith, Inc. v. Cox, 166 So.2d 497 (Fla. 2d DCA 1964). To do so would violate the well-established rule of statutory construction that the inclusion of one item is the intentional and deliberate exclusion of all others. See, e.g., Thayer v. State, 335 So.2d 815 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952).

In an attempt to avoid these cases, the State asserts that this Court should also consider the purposes expressed by the Florida Legislature in 1988, one year after the statute's initial repeal. However, courts have clearly held that subsequent legislative history may not be considered in determining an earlier legislative intent, and any attempt to introduce such evidence should be rejected. See, e.g., Ellsworth v. Ins. Co. of North America, 508 So.2d 395,

398 (Fla. 1st DCA 1987). This is especially applicable here since the State in 1988 was in litigation as to the constitutionality of Florida's insurance premium tax after the purposes set forth in support of its insurance premium tax had been declared unconstitutional by the U.S. Supreme Court in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).[2]

In both its Initial Brief and its Answer Brief, the State argues that it lacks plenary regulatory authority over foreign insurers and that it, therefore, may only exercise the full range of its regulatory authority when foreign insurers domesticate in the State. Id. at 10, 16. This premise pervades the State's argument and yet, is without any support. This is a straw man the State has set up simply to knock down. In their Cross-Appeal Brief, Taxpayers argued that the record in this case demonstrates that the State has an enormous degree of regulatory authority over insurers, including foreign insurers, and that any differences in the regulation between foreign insurers and domestic insurers, including any refusal to impose regulations, is a reflection of the State's own choice and not any limitation upon the scope of its authority. Yet, nowhere in its Answer Brief does the State respond to these arguments.

As the State acknowledged in its Initial Brief, the McCarran-Ferguson Act conferred extensive regulatory authority upon the states over foreign insurers. State's Initial Brief at 35. When combined with the State's inherent police powers, the only limitation upon the State's exercise of its authority over insurance is "the imaginations people have." (R. 1293) The State is fully aware of its plenary authority, but eschews any attempt at regulation, arguing that it must instead impose a substantial tax upon foreign insurers in order to encourage domestication so that

---

[2]Moreover, the 1988 legislative history demonstrates that the Florida Legislature was, in fact, concerned only with the collection of substantial tax revenues and the promotion of a domestic insurance industry. See Brief of Amici Curiae, State of Florida v. Melahn, No. 79,024, pending before this Court, at 20-21; Appendix to Amici Curiae Brief at 326-62.

it may then impose its existing and voluntarily adopted regulatory scheme. This argument is nonsensical, and is clearly just a ruse by the State to impose a substantial tax upon foreign insurers under the guise of regulatory concerns. As previously discussed, during trial the State admitted that its regulatory concerns were a legal fiction. (R. 1258-59)

That the State's concern with regulatory issues is a pretext can be seen by examining Florida's Insurance Code. Florida's code spans over 600 pages, more than any other regulated or non-regulated business, and covers all aspect of insurance regulation. If the State truly had regulatory concerns, it would enact regulations to address those issues or it would structure the tax so that foreign insurers could meet the State's concerns and receive the same tax treatment as domestics. Instead, however, the State actually imposes less regulation upon foreign insurers doing business in this State than it does upon domestic insurers. For example, under section 624.411, Florida Statutes, domestic insurers are required to deposit securities valued at $250,000 in order to transact casualty insurance in the State of Florida; foreign insurers, by contrast, must deposit securities having a value of only $150,000. Id. Similarly, a domestic insurer authorized to transact more than one kind of insurance must deposit securities valued at $300,000; a similarly-situated foreign insurer must deposit securities valued at only $200,000. Id. And where a foreign insurer enjoys a surplus over $10 million dollars, the State exempts completely that insurer from maintaining any deposit of securities in this State. Id. A similarly-situated domestic insurer is denied the same exemption and must provide an appropriate deposit of securities.

The State, therefore, has set up a straw man when it argues that its regulatory powers are at a "zenith" with regard to a domestic insurer. The State's regulatory authority, under the

McCarran-Ferguson Act and its police power, is plenary and does not require, as a predicate to its application, the domestication of foreign insurers.

As an additional argument, the State asserts that it seeks domestication so that it might have greater access to the books and records of all insurers, as its access to the books and records of foreign insurers is more limited than for domestic insurers. This is also a straw man. By statute, the State currently requires all insurers, including foreign insurers, to submit their annual reports each year. If the State desires more information, it could require such by statute or it could provide those foreign insurers which voluntarily submit such information the same tax treatment that it provides to domestics. That the State does not do so is a reflection, not on the limits of its regulatory authority, but rather on the manner it has chosen to regulate insurers.

Clearly, the State's interest in seeking domestication is not to have greater access to those books and records; it has that access whenever it chooses to exercise such. See § 624.418, Fla. Stat. Rather, the purpose in requiring books and records in the State of Florida is entirely consistent with the purposes the Florida Legislature set forth for the premiums tax in section 624.512; that is, to provide jobs within the State of Florida for the people who must maintain those books and records. The legislative reports clearly state that the reason for including the purposes in the statute was to "express the public goal of having insurers employ individuals in this State, thereby aiding employment." (Plaintiffs' Exh. 6)

Thus, the purpose asserted by the State of acquiring greater regulatory authority over an insurer is a pretext. The State already has plenary regulatory authority over insurers doing business in this State. If the State truly had regulatory concerns, it would address those concerns by regulation. Dr. Hofflander testified that there are a multitude of direct ways to regulate foreign insurers if the State's objective is greater regulatory control. This would include

requiring assets to be held in Florida and imposing additional capital and surplus requirements. The only limitation for achieving direct regulatory control is "the imaginations people have." (R. 1293) Nowhere does the State attempt to explain why this is not possible.

Instead, the State has imposed a tax upon foreign insurers, knowing full well that an insurer can have only one place of domicile and, in the words of its own expert, that it would be improbable that a foreign insurer would change its domicile. (R. 1427) Robert Menke, one of the State's witnesses, indicated that his company moved to Florida as part of its bankruptcy reorganization and that it lost six of the seven licenses it had in other states as a result of its redomestication. Clearly, the State's purpose for its premium tax is not related to regulatory concerns but collection of revenue and encouragement of a domestic industry.

Further, the State claims that the testimony of another company official, Mr. Alexander, is proof that its purpose is not pretextual. The State argues that without the inducement of the insurance premium tax, Mr. Alexander's company would have chosen to domicile elsewhere in order to write "surplus lines." This argument makes no sense because surplus lines can only be written for non-residents. An insurer cannot legally move into the State of Florida and sell surplus lines to Florida residents. See, e.g., §§ 626.913, et seq., Fla. Stat. (1991). Thus, encouraging Mr. Alexander to domesticate in Florida does nothing to protect Florida policyholders with respect to surplus lines.

In fact, companies selling surplus lines in the State are also subject to a premiums tax. See § 626.932, Fla. Stat. (1991). An insurer selling surplus lines in Florida may not, as a matter of law, be domiciled in Florida. Therefore, the purpose for this premiums tax is clearly only for the collection of revenue. As demonstrated by the evidence in this case, the purposes for the premium taxes under sections 624.509 and 626.932 are the same. Accordingly, the

purposes now asserted by the State in support of its premium tax is a pretext, and the trial court erred in looking beyond the clear language in the statute for a purpose for the tax.

B. FLORIDA'S DISCRIMINATORY INSURANCE PREMIUM TAX IS NOT RATIONALLY RELATED TO THE PURPOSE ASSERTED BY THE STATE AND THE TRIAL COURT DID NOT HOLD THERE IS SUCH A RELATIONSHIP

As set forth above, the State has plenary authority to regulate foreign insurers. The State, similarly, has the ability to tie that authority to any regulatory objective that it deems of concern. Yet, the State rejects any attempt at such, and instead, claims that it imposes a tax upon foreign insurers in the hope that foreign insurers will change their state of domicile. This is done knowing that no substantial portion of the insurance industry will be affected and that the only practical result will be receipt of substantial tax revenues. (R. 1427) Under no circumstances can such an indirect and tenuous relationship be deemed rationally related to the State's objective.

As was pointed out in Taxpayers' Cross-Appeal Brief, two states subsequent to Ward have struck similar insurance premium taxes because such taxes lack a rational relationship to any legitimate state purpose, including increased regulatory authority. Cross-Appeal Brief at 46-48, citing Principal Mut. Life Ins. Co. v. Div. of Ins., 780 P.2d 1023 (Alaska 1989); Penn Mut. Life Ins. Co. v. Dep't of Licensing & Regulation, 162 Mich. App. 123, 412 N.W.2d 668 (Ct. App. 1987). As these cases discuss, insurance premium taxes are not rationally related to any legitimate state purpose because, regardless of the activities undertaken by a foreign insurer, the foreign insurer would continue to be taxed at a higher rate. In its one-page response to this issue, the State entirely ignores these cases and U.S. Supreme Court cases which have validated residency-based discrimination only where it was possible for the nonresident to be accorded the same treatment provided residents without changing its domicile. See,e.g., Western & Southern

Life Ins. Co. v. State Bd. of Equal., 451 U.S. 648 (1981); G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982). The State's refusal to respond to this important issue and the cited Supreme Court cases can only be interpreted to mean that the tax is not structured so as to be rationally related to any legitimate State purposes.

Further, an examination of section 624.509 shows that it is not rationally related to the State's asserted regulatory purposes. The statute specifically requires that all revenues collected from Florida's premium tax be deposited into the general revenue of the State. Exhibits introduced at trial demonstrated that the monies collected from the tax were several times the budget for the Department of Insurance. (Plaintiffs' Exhs. 4, 23) As Taxpayers argued in their Cross-Appeal Brief, if the State indeed had regulatory concerns such as collection from a foreign insurer in the event of insolvency, it would tie the collection of these revenues to these concerns. The fact that the money is not tied to any regulatory concerns, but rather is being used to fund the general revenues of the State of Florida is proof of the true purpose of Florida's insurance premium tax.

Finally, the State argues that the evidence shows that companies domesticate in this State as a result of the tax. The trial court reached a contrary conclusion finding that companies do not domesticate as a result of the tax. This finding is supported by clear and substantial evidence. The only expert who testified as to the issue, Dr. Hofflander, testified that studies he performed showed there was no correlation between a discriminatory tax and inducing insurers to domesticate.[3] (R. 1282-86) As it did during trial, the State argues that such studies do not show what is in the minds of executives when they relocate. However, as Dr. Hofflander

[3]Exhibits introduced at trial showed that foreign insurers have written, over the last decade, well over 80% of the Florida insurance market. (Plaintiffs' Exh. 23-24; 1289, 1301-12)

testified at trial, such studies do show what is not in their minds, and accordingly, that no relationship exists between the tax and inducing insurers to domesticate. (R. 1341-43)

II. FLORIDA'S RETALIATORY TAX VIOLATES CONSTITUTIONAL PROHIBITION AGAINST UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY

In their Cross-Appeal Brief, Taxpayers argued that Florida's retaliatory tax, section 624.429, Florida Statutes, was unconstitutional as it violated Florida's prohibition against unlawful delegation of legislative authority and cited a substantial body of case law from this Court in support of such. Yet, nowhere does the State attempt to distinguish these cases or respond to the arguments made by Taxpayers.

Instead, the State attempts to recast the issue before this Court by asserting that "the issue presented is whether a statute's mere reference to the taxes imposed by another state constitutes an invalid delegation of legislative authority." Answer Brief at 33 (e.s.) This, however, is not the issue presented by Florida's retaliatory tax as Florida may indeed reference and even adopt other statutes already in existence. See, e.g., Freimuth v. State, 272 So.2d 473 (Fla. 1972). Florida's retaliatory tax, by contrast, adopts on a prospective basis the future obligations and tax laws of other states, and consequently the prospective, legislative taxing policies of other states, as if such laws were its own. It is the wholesale and complete adoption of future legislative taxing schemes which invalidates Florida's tax.[4]

The State acknowledges that adoption of the taxing policies of other states presents a constitutional problem to the statute, but argues that "[t]he very objective of the retaliatory tax ... is to affect the taxing policies of other jurisdictions." Answer Brief at 34 (e.s.). Under no

---

[4]Florida's retaliatory tax also adopts non-tax obligations imposed by other states. See Cross-Appeal Brief at 54-59.

circumstances, however, can the State's intention that the statute effect a particular result somehow cleanse the statute of its unconstitutionality.[5] The statute is undoubtedly unconstitutional and the State's intent that it be unconstitutional does not cure the violation.[6]

In response to this dilemma, the State argues that this Court should not interpret the Florida Constitution so narrowly. It argues that "the operation of this tax" is no different from that found constitutional in Eastern Air Lines, Inc. v. Dep't of Revenue, 455 So.2d 311 (Fla. 1984), appeal dismissed, 474 U.S. 892 (1985), where this Court upheld a tax which adopted the federal Consumer Price Index. While Taxpayers do not dispute that the operation of a tax, including one that unconstitutionally adopts the laws of another state, may be a simple act and easily performed by employees of the Department of Revenue, the question before this Court is whether Florida's Legislature has delegated its authority to decide what the taxing policies of this State should be for entities doing business within the State's borders.[7] As to that issue, the State is silent. By its own terms, Florida's retaliatory tax adopts future legislative policies and as such, is unconstitutional.

---

[5]It should be noted that Florida has a mechanism to carry out its objective which it utilizes for example, with its Income Tax Code. See Cross-Appeal Brief at 58-59. This is not simply a procedural formality; rather, it ensures that the Florida Legislature does not delegate its legislative authority.

[6]Similarly, under no circumstances can the passage of time or Congress' passage of the McCarran-Ferguson Act cure the statute's invalidity under Florida's Constitution, as the State suggests.

[7]Indeed, the taxes declared unconstitutional in Freimuth, which adopted prospective changes of Congress, would be even simpler because only Congress' enactments must be reviewed on an annual basis, whereas here, 49 separate legislatures must be reviewed.

III. FLORIDA'S RETALIATORY TAX VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY DISCRIMINATING AGAINST FOREIGN INSURERS

In their Cross-Appeal Brief, Taxpayers also argued that Florida's retaliatory tax violated the Equal Protection Clause of the U.S. Constitution and that the State failed to assert that the tax was rationally related to any legitimate state purpose. Here also, the State failed to respond to Taxpayers' argument.

While admitting that its "obligation [at trial was] to show a conceivable and legitimate purpose for the statute," the State nevertheless failed to do this. Answer Brief at 36. Instead, it asserts that it "notified" the trial court that it intended to rely upon the decision of the U.S. Supreme Court in Western & Southern, and that the purposes applicable to that statute should be applied to support Florida's retaliatory tax. Id. Although Taxpayers are unsure as to when and how this notification occurred, clearly it did not satisfy the State's admitted burden to show a conceivable and legitimate purpose for the statute.

Moreover, it permitted the trial court to err by believing, as the State asserts, that California's and Florida's taxing schemes were similar. As was noted in Taxpayers' Brief, California's and Florida's taxing schemes differed in a significant manner. Florida's scheme imposed a discriminatory insurance premium tax on foreign insurers, whereas California's did not. The State argues in its Answer Brief that California's premiums tax was discriminatory. However, in Western & Southern the Court noted in its opening paragraph:

> California imposes two insurance taxes on insurance companies doing business in the State. A premiums tax, set at a fixed percentage of premiums paid on insurance policies issued in the State, is imposed on both foreign and domestic insurance companies and a "retaliatory" tax, set in response to the insurance tax laws of the insurer's home State, is imposed on some foreign insurance companies.

451 U.S. at 649-50. Thus, California's premium tax was imposed equally on both domestic and foreign insurers. The only difference between domestic and foreign insurers was that foreign insurers received a credit for ad valorem taxes for only that part of their office actually used.[8] See Western & Southern Life Ins. Co. v. State Bd. of Equal., 159 Cal.Rptr. 539, 99 Cal.App.3d 410 (Cal. Ct. App. 1979).

California, therefore, was in a legitimate position to seek to deter other states from enacting discriminatory or excessive taxes as its tax structure was not discriminatory. Because Florida had enacted and was receiving significant tax revenue from its discriminatory insurance premium tax, it was not in a position to retaliate against states with no discriminatory taxing schemes. It is simply inconsistent for a state to retaliate against the insurance premium taxes of other states when that state engages in and receives substantial and significant revenues as a result of its own discriminatory tax. Florida's retaliatory tax therefore lacks a legitimate state purpose.[9]

IV. FLORIDA'S STATUTE OF LIMITATIONS APPLIES TO THE PRO FORMA RETALIATORY TAX ASSESSMENTS

In their Cross-Appeal Brief, Taxpayers argued that the trial court erred in failing to apply Florida's statute of limitations, section 95.091, Florida Statutes, to the 1983 and 1984 pro forma

---

[8]This difference is not the type of unlimited discrimination that is present in this case. For foreign insurers which used all of their office space, it was not discriminatory. Thus, foreign insurers could control the credit's affect by the amount of real estate they decided to purchase.

[9]In addition, the State failed to respond to the Taxpayers' argument that the retaliatory tax lacks a legitimate state purpose and is unconstitutional under the Due Process Clause because Florida is using discriminatory taxes to encourage other states to abolish their discriminatory and unconstitutional taxing structures. As courts have held, the remedy lies not in enacting a discriminatory tax, but rather in challenging the unconstitutional taxing structures. See, e.g., New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988); DABT v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), reversed on other grounds, 495 U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).

retaliatory tax assessments. In answer, the State argues that these assessments are not formal assessments. Answer Brief at 9. This argument is specious. In its Complaint, Taxpayers pled these pro forma assessments were assessments, (R. 315-16) and the State in its Answer, admitted that these were assessments (R. 342). Further, the Final Judgment treated them as assessments. (R. 799-85)

The State also argues that equity requires an offset. But, as the State is well aware, a taxpayer historically has not been allowed, under principles of equity, to off-set any taxes he might owe the State. See Finnegan v. Fernandina, 15 Fla. 379 (1875). If equity is to be applied, it should be applied uniformly to both Taxpayers and the State. Further, the only reason the trial court refused to apply the statute of limitations for tax years 1983 and 1984 was because it found the parties knew that this issue could ultimately be decided by the courts. Under no circumstances can such a finding be sufficient to extend a statute of limitations. This is particularly true when the State created its own difficulties by failing to timely deny Taxpayers' claims for refund and by failing to timely issue pro forma assessments. Cross-Appeal Brief at 65-66. Being clear on its face, Florida's statute of limitations for the imposition of taxes should be applied. It is a well-established principle that tax laws are to be construed most strongly in favor of the taxpayer and against the State. Mikos v. Ringling Bros. Barnum & Bailey Combined Shows, Inc., 497 So.2d 630 (Fla. 1986).

V. TAXPAYERS ARE ENTITLED TO RELIEF UNDER 42 U.S.C. § 1983 AND § 1988

In their Cross-Appeal Brief, Taxpayers argued that they were entitled to relief under 42 U.S.C. §§ 1983 and 1988, as they had pled and proved the State's liability under those statutes. In its response, the State fails to challenge or rebut any of Taxpayers' arguments as to the State's

liability. Rather, the State argues the matter should be remanded to the trial court so that the State may present additional evidence and argument as to its liability under § 1983.

In the parties Joint Pretrial Statement, the only issues reserved for post-trial resolution were issues relating to damages, costs, and attorneys' fees in the event Plaintiffs prevailed on their § 1983 count. (R. 638-39) The issue of the State's liability under § 1983 was not reserved for subsequent resolution and Taxpayers squarely presented this issue to the trial court for a determination during trial. See Cross-Appeal Brief at 66-72. Thus, the trial court was correct in entering judgment as to the State's liability under § 1983, but erred in determining that Taxpayers' were not entitled to relief for the reasons set forth in Taxpayers' Cross-Appeal Brief.[10]

The issues that the State now seeks to raise for purposes of remand should be rejected as a matter of law. For example, the State argues that a genuine issue still exits as to whether the State "caused a deprivation of Taxpayers' rights" because it now asserts that the assessments were "made at the request" of the Taxpayers. Answer Brief at 42. Clearly, the assessments imposed upon Taxpayers were imposed as a result of section 624.509, and not because of Taxpayers. The absurdity of the State's position is illustrated by the fact that the State has not withdrawn its assessments and is still seeking to collect, in the future, additional taxes imposed pursuant to section 624.509. To assert that Taxpayers "caused," or are causing, their deprivation is specious.

Additionally, the State argues that Taxpayers cannot prevail under § 1983 because such an action cannot be brought with regard to state tax cases and because Taxpayers have not shown

---

[10]In addition, the issues the State seeks to raise were not raised by the State in its answer or its affirmative defenses.

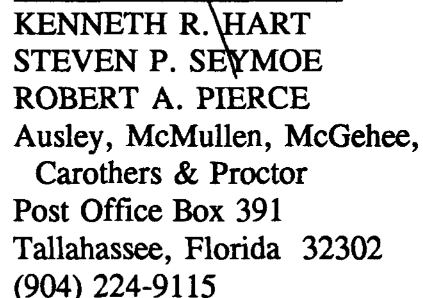
they were entitled to prospective, injunctive relief. The first issue was directly addressed by the U.S. Supreme Court in Dennis v. Higgins, __ U.S. __, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991), which held that § 1983 applied to state tax cases. The State has chosen to ignore Dennis and did not discuss it in its Brief. As to the second issue, in order to recover under § 1983, Taxpayers must only show that they have affected the State's actions towards Taxpayers. See, e.g., Rhodes v. Stewart, 488 U.S. 1 (1988); Cooper v. State of Utah, 684 F.Supp. 1060 (D. Utah 1987). Taxpayers did this when the trial court declared the statute unconstitutional, and the State, consequently, refrained from enforcing the issued assessment. No further proof need be shown. Id.

The "other arguments" that the State would like to present to the trial court with regard to its liability, were either presented to and rejected by the trial court or were not timely presented to the trial court and therefore waived. Therefore, this Court should reverse the lower court and order judgment in favor of Taxpayers under §§ 1983 and 1988.

CONCLUSION

For the reasons set forth above and in their Cross-Appeal Brief, this Court should grant judgment in Taxpayers' favor.

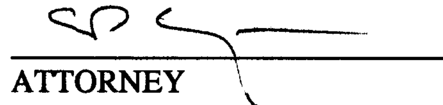
Respectfully submitted,



KENNETH R. HART
STEVEN P. SEYMOE
ROBERT A. PIERCE
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Lee Rohe, Assistant Attorney General, Tax Section, The Capitol, Tallahassee, Florida 32301 and Daniel C. Brown, Esquire, Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., 215 South Monroe Street, Suite 400, Tallahassee, Florida 32301, on this 17 day of February 1992.



ATTORNEY

sps\dca\reply.sps