SUPREME COURT OF FLORIDA
CASE NO. 84,414

SARASOTA COUNTY,

Petitioner

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 93-01902

vs.

SARASOTA CHURCH OF CHRIST, INC., ET AL.,

Respondents

_____/

BRIEF OF AMICUS CURIAE
FLORIDA HOME BUILDERS ASSOCIATION

IN SUPPORT OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

Amicus Florida Home Builders Association ("FHBA") adopts the statements of the case and facts, as presented in the Answer Brief of Respondents, Sarasota Church of Christ, Inc., et.al. ("Churches"), supplemented only by the additional fact noted by Sarasota County ("County") that Sarasota Ordinance No. 89-117 utilized the procedures set forth in Sections 197.3631 and 197.3632, Fla. Stat., to collect the stormwater utility assessments at issue in this case. (Initial Brief at 5).

INTEREST OF AMICUS CURIAE

FHBA is a Florida not-for-profit corporation and statewide association of approximately 18,000 builders, developers, and property owners. A significant number of FHBA members have paid, and will in the future pay, taxes, special assessments and development exactions similar to the assessments at issue in this case. This Court's determination as to the circumstances under which local governments must refund monies exacted unlawfully is of particular import to FHBA and its members. Therefore, FHBA supports the opinion of the Second District Court of Appeal, insofar as the Court ruled that illegal assessments must be refunded.

SUMMARY OF THE ARGUMENT

The doctrine of "prospectivity" should not be employed to defeat refunds of unlawful taxes and exactions. Exaction of a tax or assessment where there is no power to do so, generally constitutes an unlawful taking of property without due process of law. The Due Process Clause of the Fourteenth Amendment requires that taxpayers be afforded access to either a predeprivation process before parting with their monies, or meaningful backward-looking relief. When monies must be paid to avoid financial sanctions or seizure of property, such monies are considered paid under duress, and the state has not provided a fair and meaningful predeprivation process. Such is the case here. Therefore, Churches are entitled to meaningful, backward-looking relief.

County requests application of the doctrine of "prospectivity" articulated in Chevron Oil Co. v. Huson, 404 U.S.97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). However, the Chevron prospectivity analysis has been limited severely in recent years by James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); and Harper v. Virginia Department of Taxation, __ U.S. __, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

County also relies upon Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), and Alsdorf v. Broward County, 373 So.2d 695 (Fla. 4th DCA 1979), in an effort to defeat refunds in this case. However, both cases recognize only a narrow exception to the general rule of full retroactivity, and both have been circumscribed by McKesson Corp. v. Florida Alcoholic Beverages and Tobacco Div., 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990); Beam, and Harper.

I. THE DOCTRINE OF "PROSPECTIVITY" SHOULD NOT BE EMPLOYED TO DEFEAT REFUNDS OF ILLEGAL TAXES AND EXACTIONS.

A. THE DUE PROCESS CLAUSE REQUIRES THAT TAXPAYERS BE AFFORDED EITHER ACCESS TO A PREDEPRIVATION PROCESS PRIOR TO PARTING WITH THEIR MONIES, OR MEANINGFUL BACKWARD-LOOKING RELIEF.

The Second District Court of Appeal ruled that Churches were entitled to a refund of all monies paid pursuant to the stormwater management special assessment ordinance, because the assessments were really taxes from which the Churches were exempt. Sarasota Cty. v. Sarasota Church of Christ, 641 So.2d 900, 902 (Fla. 2d DCA 1994). However, County objects to the refunds, arguing that "[t]he entry of an order requiring the refund of taxes or assessments is a drastic remedy." (Initial Brief at 23). County further argues that "in determining the propriety of a refund of an assessment, the court's primary consideration is whether the local government relied, in good faith, on statutory or other governmental authority in levying the assessment." Id.

As the Arizona Supreme Court has forthrightly noted: "An honorable government would not keep taxes to which it is not entitled..." Pittsburgh & Midway Coal Mining Company v. Arizona Dept. of Revenue, 776 P.2d 1061, 1065 (Arizona 1989). However, honor and good faith aside, the FHBA submits that the exaction of a tax or assessment where there is no power to do so constitutes a taking of property which implicates Due Process concerns. As such, Churches are entitled to access to either a predeprivation process or meaningful backward-looking relief, pursuant to the United States Supreme Court's ruling in McKesson Corp. v. Florida Alcoholic Beverages and Tobacco Div., 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed. 2d 17 (1990).

McKesson recognized that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." [citations omitted] McKesson, 496 U.S. at 36, 110 S. Ct. at 2250. In this regard, McKesson quoted from Ward v. Love County Board of Comm'rs, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920), a decision reversing the Oklahoma Supreme Court's refusal to award a refund of unlawful taxes to the Choctaw Indian Tribe. The Choctaw Tribe had paid tax to avoid sale of its lands, and sued for a refund. In ordering the refund, the Ward Court explained:

> To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State. Ward, 253 U.S. at 24, 40 S. Ct. at 422.

Likewise, the First District Court Appeal, in a special assessment case similar to the one at hand, has recognized the relevance of this "takings" issue to the imposition of special assessments. In Madison County v. Foxx, 636 So.2d 39, 50 (Fla. 1st DCA 1994), the Court explained that: "[g]enerally, the exaction of an assessment of benefits against property which there was no power to impose is an unconstitutional taking of property without due process of law. 70A Am. Jur.2d Special Assessments S. 11 (1987)."

Due Process was the issue in McKesson, which addressed the question of whether it was permissible for the Florida Supreme Court to apply prospectively its ruling invalidating a discriminatory scheme for taxing alcoholic beverages. In National Distrib. v. Office of Compt.,

523 So.2d 156 (Fla. 1988), Justice Barkett, writing for the Court, explained why prospective application was appropriate:

> Unreasonable disruption of state government would be caused by retroactive application, and an unconscionable windfall would accrue to appellants. Retroactive application would have the effect of requiring the taxpayers of this state to refund in excess of an estimated $350 million in taxes that they already have paid. We thus find that any benefit to appellants is far outweighed by the harm that would be inflicted upon this state's citizens and their government.
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> . . .
>
> We cannot conclude that the state has acted in bad faith.
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> . . .
>
> Based on these facts, we find that the equities of this case disfavor appellants on the question of a tax refund, requiring that this opinion be given an exclusively prospective application. See Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973); McKesson [Division of Alcoholic Beverages & Tobacco v. McKesson Corp.]; Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla. 1973). Equitable relief properly was denied appellants. Id. at 158.

In reviewing this determination, the United States Supreme Court explained that:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." McKesson, 496 U.S. at 31, 110 S.Ct. at 2247.

There can be no question after McKesson that persons who are wrongly deprived of their property, including their tax or assessment dollars, are entitled to protection under the Due Process Clause. Here Churches were deprived of monies that the Second District found to

constitute unlawful taxes, and, as such, Churches are entitled to protection under the Due Process Clause.

B. CHURCHES LACKED ACCESS TO A FAIR AND MEANINGFUL PREDEPRIVATION PROCESS, AND THEREFORE ARE ENTITLED TO MEANINGFUL, BACKWARD-LOOKING RELIEF.

The stormwater utility assessments were collected pursuant to the provisions of Sections 197.3631 and 197.3632, Fla. Stat. (Record p. 257). These provisions of law provide a uniform method for the collection and enforcement of non-ad valorem assessments. Such non-ad valorem assessments are "...subject to all collection provisions of this chapter, including provisions relating to discount for early payment, prepayment by installment method, deferred payment, penalty for delinquent payment, and issuance and sale of tax certificates and tax deeds for nonpayment." See s. 197.3632 (8), Fla. Stat.

In other words, Churches were required to pay the special assessments promptly or suffer the risk of penalties, interest, and the liening and potential loss of their property. Under similar circumstances, the taxpayers in McKesson were found to have no meaningful predeprivation remedy. McKesson, 496 U.S. at 39, 110 S. Ct. at 2251.

The McKesson Court explained that:

> We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress" in the sense that the State has not provided a fair and meaningful predeprivation procedure. See, e.g., United States v. Mississippi Tax Comm'n, 412 U.S. 363, 368, 93 S.Ct. 2183,, 2187, 37 L.Ed. 2d 1 (1973) (economic sanctions for nonpayment); Ward v. Love County Board of Comm'rs, 253 U.S. 17, 23, 40 S.Ct. 419, 421 64 L.Ed. 751 (1920) (distress sale of land); Gaar, Scott & Co. v. Shannon, 223 U.S. 468, 471, 32 S.Ct. 236, 237, 56 L.Ed. 510 (1912) (both). Justice Holmes suggested in

> Atchison T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, 32 S.Ct. 216, 56 L. Ed. 436 (1912), that a taxpayer pays "under duress" when he proffers a timely payment merely to avoid a "serious disadvantage in the assertion of his legal...rights" should he withhold payment and await a state enforcement proceeding in which he could challenge the tax scheme's validity "by defence in the suit." O'Connor, 223 U.S. at 286, 32 S.Ct., at 217. . . .McKesson, 496 U.S. at 39, 110 S. Ct. 2251, Note 21.

Therefore, since Churches lacked a clear and certain predeprivation remedy, they are entitled to meaningful backward-looking relief.

C. THE DOCTRINE OF "PROSPECTIVITY" ARTICULATED IN CHEVRON HAS BEEN LIMITED SEVERELY BY BEAM AND HARPER.

County suggests that this Court should rely on Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), to give prospective application to the finding that the stormwater utility assessments are unlawful. (Initial Brief at 23). However, the Chevron analysis for prospectivity has been limited severely by recent rulings in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991); and Harper v. Virginia Department of Taxation, __ U.S. __ , 113 S.Ct. 2510, 125 L.Ed. 2d 74 (1993).

As County has noted, the Chevron case articulated criteria for giving a court decision prospective application only. The three criteria include: (1) the decision establishes a new principle of law; (2) prospective application avoids injustice or hardship; and (3) prospective application will not unduly undermine the purpose and effect of the new principle of law. Chevron, 404 U.S. at 106-107, 92 S.Ct., at 355-356.

Beam reviewed a Georgia Supreme Court decision that applied the Chevron analysis to deny a tax refund. Beam, like McKesson, involved state alcoholic beverage taxes. The taxpayer in Beam sought to recover excise taxes collected under a law declared unconstitutional for the same reasons that this Court held Florida's discriminatory taxing scheme unlawful in the first McKesson case, Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), rev.'d in part, 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed. 2d 17 (1990). The Georgia Supreme Court denied the refund, and held that its declaration of unconstitutionality should be applied prospectively under the Chevron decision.

In reversing this ruling, the United States Supreme Court explained that, "[i]n the ordinary case no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar." Beam, 111 S. Ct. at 2442. However, the Court, citing Chevron, acknowledged that it had infrequently resorted to pure prospectivity. Id. That said, the Court refused to employ the doctrine of selective prospectivity in Beam, and instead, held that "once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application." Beam, 111 S.Ct. at 2447-2448. The Court said that it would not speculate as to the bounds or propriety of pure prospectivity; however, it also noted that "[a]ssuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small of number of cases..." Beam, 111 S. Ct. at 2448, 2446. Justices Marshall and Blackmun joined in Justice Scalia's concurring opinion finding both selective and pure prospectivity beyond the Court's power to "say what the law is." Beam, 111 S. Ct. at 2450-2451.

Subsequent to Beam, the Court again considered the Chevron analysis. In Harper, the Court was called upon to decide whether the Virginia Supreme Court correctly denied refunds of state income taxes to federal retirees. Harper reiterated the point that retroactivity was the norm; and reversed Virginia's denial of the refunds, explaining that Virginia's efforts to incorporate into state law the Chevron analysis was not permitted under the Supremacy Clause, U.S. Const., Art. VI, cl. 2. Harper, 113 S.Ct. at 2518.

Again, Justice Scalia, in a concurring opinion, expressed his displeasure with the doctrine of prospectivity, calling it "the handmaid of judicial activism" and "the born enemy of stare decisis," and urging reconsideration of Chevron. Harper, 113 S. Ct. at 2521-2522. In a dissenting opinion, Justices O'Connor and Rehnquist complained that "[r]ather than limiting its pronouncements to the question of selective prospectivity, the Court intimates that pure prospectivity may be prohibited as well." Harper, 113 S. Ct. at 2527.

If anything remains of the Chevron doctrine after Beam and Harper, it is clear that its application will be limited severely, and this Court should not rely upon it as the basis for denying refunds in the case at bar.

D. GULESIAN RECOGNIZES A NARROW EXCEPTION TO THE GENERAL RULE OF FULL RETROACTIVITY, AND HAS BEEN CIRCUMSCRIBED FURTHER BY MCKESSON AND ITS PROGENY.

County argues that the entry of an order requiring refunds is a drastic remedy, and that the Court's primary consideration in this regard should be whether the local government relied in good faith on statutory or other governmental authority in levying the assessment. In support of

this argument, County cites Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973); and Alsdorf v. Broward County, 373 So.2d 695 (Fla. 4th DCA 1979).

In Gulesian, the Florida Supreme Court denied property tax refunds to Dade County taxpayers who were assessed school taxes based upon a millage in excess of that permitted under the Florida Constitution. In denying refunds, the Court took into account equitable considerations, including the good faith of the school board and the potential hardship on the district.

However, when Broward County argued for similar relief from property tax refunds five years later, the Fourth District Court of Appeal declined to grant it, explaining "...we believe the law to be that a taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment. We construe the Supreme Court's ruling in Gulesian to have carved out a very narrow exception to the taxpayer's right to a refund." Coe v. Broward County, 358 So.2d 214, 216 (Fla. 4th DCA 1978). In responding to the County's argument that the refunds would "...result in a disproportionate expense to the county, as compared to the benefit to the average taxpayer," the Coe Court explained, "[i]f this factor alone is to be determinative of the issue, then the taxpayer would almost never be entitled to refunds of illegally assessed taxes, since there will always be relatively high administrative costs in processing tax refunds. . . . A taxing authority must demonstrate more than the mere expense of processing refunds in order to deny the taxpayers their right to a refund of the illegally assessed taxes." Id. at 217.

Gulesian and good faith also were advanced as bases for denying tax refunds to the alcoholic beverage distributers in National Distrib. v. Office of Compt., 523 So.2d 156, 158 (Fla. 1988). In dismissing the "good faith" argument, the United States Supreme Court

responded: "...we do not find this concern weighty in these circumstances," and "...even were we to assume that the State's reliance on a `presumptively valid statute' was a relevant consideration to Florida's obligation to provide relief for its unconstitutional deprivation of property, we would disagree with the Florida court's characterization of the Liquor Tax as such a statute." McKesson, 496 U.S. at 45-46, 110 S.Ct. at 2254-2255.

The McKesson Court also rejected the State of Florida's arguments regarding the costs of issuing refunds. The Court explained:

> We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds. McKesson, 496 U.S. at 51, Note 35.

Following the reversal of Florida's ruling in the McKesson case, this Court had occasion to consider whether to apply prospectively its decision striking a workers compensation law as violative of the single subject rule. Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). The Court ordered prospective application, but Justice Barkett authored a separate opinion, joined by Justices Shaw and Kogan, dissenting from the majority's prospective application ruling. In doing so, Justice Barkett explained:

> I also believe, however, that the majority errs in the prospective application of its opinion. When a court declares a statute facially unconstitutional, it means, in plain English, that the enactment has been null and void from the outset. It is a declaration that the legislature acts outside its power when it contravenes constitutional dictates.
>
> Having decided that this legislative enactment is a facially unconstitutional violation of the single-subject rule, the Court has no power to breathe constitutional life into it for the period between its enactment and the Court's declaration of facial invalidity. How can a court require compliance with an act it

says the legislative had no authority to enact? Logically, it cannot, judicial fiat notwithstanding. Id. at 1176.

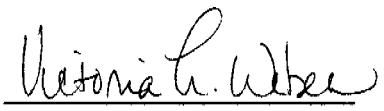
This dissenting opinion noted that "...in the past the Court has ordered prospective application of an opinion following a successful constitutional challenge. . . .With all due respect, it did so, as it does here, without analysis and without any logical support. While I sympathize with the administrative difficulties that accompany such a ruling, I do not believe it is the function of the judiciary to suspend constitutional principles to accommodate administrative convenience." Id. at 1177.

As with an unconstitutional statute, it would seem impossible to breathe life into an unlawful assessment. Therefore, if the stormwater assessments constitute illegal taxes for which the Churches are exempt, the Churches should be entitled to a refund of their monies which were exacted unlawfully.

CONCLUSION

FHBA respectfully requests that this Court affirm the order of the Second District Court of Appeal insofar as it requires the refund of illegal assessments.

Respectfully submitted,



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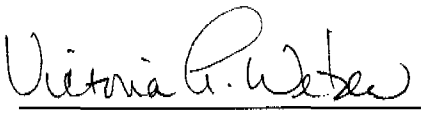

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