SUPREME COURT OF FLORIDA

CANAVERAL PORT AUTHORITY, Petitioner, v. DEPARTMENT OF REVENUE, et al., Respondents.	*	CASE NO. 84,743 District Court of Appeal, 5th District - No. 93-2422

REPLY BRIEF ON THE MERITS OF PETITIONER CANAVERAL PORT AUTHORITY

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I. WHETHER ANALYZED UNDER THE TEST OF THE SECOND DISTRICT OR THE FIFTH DISTRICT, THE CANAVERAL PORT AUTHORITY IS IMMUNE FROM AD VALOREM TAXES ON ITS FEE INTEREST IN ITS REAL PROPERTY.

It should be noted initially that Respondents have made no real effort in their brief to support the opinion and analysis of the Fifth District Court of Appeal in this case, and have chosen instead to focus on an argument which the Fifth District did not reach but did cast doubt upon.[1] At no point does the Department of Revenue address the propriety of the test articulated and used by the Fifth District in this case to determine the threshold issue, i.e., whether a government entity (other than a county or school board) is a political subdivision of the state immune from taxation, nor does DOR address the conflict between the Fifth District's test and that of the Second District in Sarasota-Manatee Airport Authority v. Mikos, 605 So. 2d 132 (Fla. 2d DCA 1992), rev. denied, 617 So. 2d 320 (Fla. 1993), applied by the trial court below and the basis for jurisdiction in this Court (discussed in detail in section I of the CPA's initial brief[2]). Similarly, Respondents do not address the issue of how the Fifth District's test, if the correct analysis, must be applied to the established facts of this case (discussed in section II of the CPA's initial brief), and instead rely simply on the bald assertion that the CPA

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[1]See Florida Department of Revenue v. Canaveral Port Authority, 642 So. 2d 1097, 1102 n. 11 (Fla. 5th DCA 1994), discussed in greater detail *infra* Section II.

[2]See also the briefs of amicus curiae Greater Orlando Airport Authority, Broward County/Port Everglades Authority, Hillsborough County Aviation Authority, and Sarasota-Manatee Airport Authority.

is "an entity in the nature of a municipality" that can only be exempt under § 196.199(4), Fla. Stat.[3] Of course, this assertion (which appears to employ the Second District's test in Sarasota-Manatee) is directly contrary to the uncontroverted evidence herein and the trial court's express findings from its review of the evidence.

While paying scant attention to the analysis of either of the appellate courts, DOR argues instead that any immunity has been legislatively waived and "[t]he only relevant fact in this case is the use to which the Authority puts its property,"[4] so that the CPA and similar government entities can only be exempt from taxes, and only under § 196.199, Fla. Stat. Such an expansive reading of § 196.199, however, would be a radical change in the tax law of this state as it relates to government entities -- contrary to extensive precedent from this Court and the courts of appeal as well as the long-held understanding of numerous government entities and a multitude of taxing bodies. In urging this position, therefore, DOR asks this Court to overrule not only Sarasota-Manatee but also First Union National Bank of Florida v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993), which dealt with immunity of county property from taxation.[5] While the impact for independent special districts is

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[3]See e.g. Respondents' brief on the merits at page 5.

[4]See Respondents' brief on the merits at page 9.

[5]The extreme nature of this position is further confirmed by the amicus curiae brief of the Escambia County Property Appraiser which contends that even property owned by the state and counties should be taxed under a "function by utilization" test where such property is leased to private individuals for proprietary purposes.

evident from the concerns raised by amicus curiae, the argument of DOR has an even greater reach that would seriously alter the tax status of numerous state, county and other government properties as well that are presently held to be immune.

In McCulloch v. Maryland, 4 Wheaton 316, 431 (1819), Chief Justice Marshall cautioned, "The power to tax involves the power to destroy." The problems that can ensue if this Court adopts the extreme position urged by DOR illustrate this maxim and become apparent when it is recognized that DOR is attempting to allow one local government entity to impose taxes on the real property of another government entity which itself has the power as an independent special district to impose ad valorem taxes on a specific geographic area. While it may seem attractive to argue, as does DOR at page 4 of its brief, that the leases at issue contain "pass-through" clauses making the tenant liable for ad valorem taxes imposed,[6] the reality is that the attempt to impose these particular taxes is a novel approach never before used and not in effect when existing leases were negotiated and the tenant businesses involved were established. Consequently, if Brevard County is allowed to impose these taxes the following results

[6]While the leases in evidence before the trial court do have such a "pass-through" clause, it cannot be assumed that all government entities which would fall within the ambit of DOR's position have such provisions in all of the leases that would be affected should this Court adopt the analysis of DOR.

(short of default and a tax deed sale[7]) can be expected: (1) tenants' businesses will pay these new taxes in addition to the taxes they already pay along with the lease amounts they have to pay the CPA, forcing businesses to close which cannot handle the increased burden and remain viable; and (2) the CPA will have to find new tenants (or re-negotiate leases with existing tenants) and establish reduced lease payments to accommodate the additional tax burden now imposed on these properties. In either event, the CPA can anticipate a decrease in its revenues from lease payments[8] and the possible need to make up any shortfall in required revenues through re-imposition of its own ad valorem taxes throughout the independent special district.[9] Brevard County, on the other hand, would receive a windfall by taxing properties not previously on its tax rolls for which it provides no services of the type routinely

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[7]The taxes at issue would be imposed on the real property itself, rather than the taxpayer, and are *in rem* in nature. Consequently, if payment is not made, the property is subject to a tax lien under § 192.053, Fla. Stat., tax certificates will issue, and the real property can ultimately be sole to a non-governmental third party. If DOR's position is accepted, nothing in the law prevents such an absurd event as the forced transfer of government real property to the private sector pursuant to tax deeds.

[8]For a statement of revenues received by the CPA from lease payments (constituting 11% of the CPA's total revenues for FY 1992) see R. Plaintiff's trial ex. 4: CPA Comprehensive Annual Financial Report, p. 24, ¶ 1 & p. 26, 29, 46, 49, 51; TR p. 132.

[9]The CPA stopped imposing its own ad valorem taxes in 1986. Since that time income from user fees has been depended upon to fund continued development. See R. Plaintiff's trial ex. 4: CPA Comprehensive Annual Financial Report, p. 75, 94; TR p. 149-152.

received by county taxpayers.[10] Thus if this new approach to taxation as attempted by Brevard County first in 1992 (and now by Palm Beach County[11]) is upheld or the DOR's argument is adopted, the result can be a dramatic restructuring of the CPA's revenue base and sources and the potential imposition of taxes on surrounding landowners so that the CPA can continue to fulfill its legislatively mandated mission of operating and maintaining a deepwater seaport.

For the reasons set forth in its initial brief as well as the briefs of amicus curiae, it is respectfully submitted that the Canaveral Port Authority, an independent special district, is in law and fact a political subdivision of the state, which performs an important state intermodal transportation function.[12] Indeed, the operation of a deepwater international seaport is one of the most ancient of government functions. Port Canaveral's role as one of Florida's twelve statutorily recognized deepwater international seaports readily distinguishes it from the port authority at issue

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[10]See p. 10-12 of the trial court's Final Judgment which notes that the CPA has authority to exercise police powers and the port is not governed by Brevard Co. ordinances. R. 320-322, Final Judgment. Brevard Co. provides no police, fire, ambulance, water, wastewater or other services to the port, which are instead contracted and paid for by the CPA. See also R. Plaintiff's trial ex. 4: CPA Comprehensive Annual Financial Report, p. 26 & 29; TR p. 130-131. Similarly, Brevard Co. has no governing authority over Port Canaveral and provides no zoning or land use services to the port. See R. Plaintiff's trial ex. 4, p. xvi & p. 93-96; TR p. 131-132.

[11]See State Department of Revenue v. Port of Palm Beach District, 650 So. 2d 700 (Fla. 4th DCA 1995).

[12]See the discussion in Petitioner's initial brief on the merits regarding Chapter 311 and Port Canaveral's statutory inclusion in Florida's statewide system of deepwater international seaports.

in Ocean Highway and Port Authority v. Page, 609 So. 2d 84 (Fla. 1st DCA 1992), and draws into serious question the continuing validity of the federal appellate court's analysis in Broward County Port Authority v. Arundel Corporation, 206 F.2d 220 (5th Cir. 1953). The CPA is, therefore, immune from the taxation now attempted by Brevard County, whether analyzed under the test used by the Second District in Sarasota-Manatee or by the Fifth District in the case at bar, and this Court should stop this attempt by Brevard County and the DOR to tax, for the benefit of a local county government, an independent government entity which performs regional and statewide responsibilities and thereby shares in the sovereign tax immunity of the state.

At page 21 of their brief the Respondents acknowledge that the state and its political subdivisions are immune from taxation. As the Fifth District pointed out in the case at bar, Florida has political subdivisions other than counties which are immune from taxation.[13] Both the Second District and the Fifth District have set out functional, reality based tests, not dependent on legislative labels, to determine when a government entity is a political subdivision of the state and thereby immune. Under either of these tests, the evidence presented to the trial court, and the legislative treatment of Florida's twelve deepwater international seaports, if the Canaveral Port Authority is not a political subdivision of the state, it is hard to envision what independent special district could be.

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[13]642 So. 2d at 1099.

II. THE SOVEREIGN IMMUNITY ENJOYED BY POLITICAL SUBDIVISIONS OF THE STATE CANNOT AND HAS NOT BEEN WAIVED BY STATUTE.

The Respondents' expansive reading of § 196.199(4), Fla. Stat., and the attempt to convert it into a waiver of sovereign tax immunity was urged by DOR unsuccessfully on the Fifth District in this case. Although the appellate court did not need to reach this issue since it found no immunity, the Fifth District did state:

> Without agreeing that the legislature has that power, based on the limited authority that may be found in *[State ex rel. Charlotte County v. Alford, 107 So. 2d 27 (Fla. 1958)]*, and *Dickinson [v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975)]*, we remark only that if the legislature intended a waiver of sovereign immunity from taxation, it chose extraordinarily oblique language to accomplish the purpose.

Florida Department of Revenue v. Canaveral Port Authority, 642 So. 2d 1097, 1102 n. 11 (Fla. 5th DCA 1994). Common sense alone would indicate that an event as momentous as the waiver of sovereign tax immunity must be more clearly stated, and should not take twenty years to be discovered and put into effect.

The fallacy in DOR's argument arises initially from the fact that the immunity of the sovereign from taxation is inherent and "not dependent upon statutory or constitutional provisions but rests upon broad grounds of fundamentals in government." State v. Alford, supra, 107 So. 2d at 29. As this Court explained in Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571 (Fla. 1957):

> It seems from the decisions of this court and those of other jurisdictions that the criterion in determining the taxable character of property is the nature of the use to which it is put and not the ownership. [Cites omitted.] But these decisions are of no assistance because the primary problem is whether or not a tax may be levied on property of the *county*. . . .

> After a careful study of appropriate provisions of the Constitution and the statutes we decide that property of the state and of a county, which is a political division of the state, [citing then Sec. 1, Art. VIII], is *immune* from taxation, and we say this despite the references to such property [in certain statutes] as being exempt.

99 So. 2d at 573-574 [emphasis by the Court]. Similarly, in First Union National Bank of Florida v. Ford, *supra* -- a decision Respondents now want this Court to overrule -- the Fifth District followed the precedents and explained:

> As was true under Florida's prior constitutions, counties are considered to be parts of the state. As such, it has long been established by case law that they are immune from state, municipal, or other special districts' attempts to tax them. *See Dickinson, [supra]; Hillsborough County Aviation Authority v. Walden, 210 So. 2d 193 (Fla. 1968); State ex rel. Charlotte County v. Alford, [supra]; Park-N-Shop v. Sparkman, [supra]; Orange County, Fla. v. Florida Department of Revenue, 605 So. 2d 1333 (Fla. 5th DCA 1992), result approved, 620 So. 2d 991 (Fla. 1993); Sarasota-Manatee Airport Authority v. Mikos, [supra]. Cf. Lewis v. The Florida Bar, 372 So. 2d 1121 (Fla. 1979); 50 Fla. Jur. 2d Taxation § 3:35.* Absent a waiver in the state constitution itself, which does not exist, counties do not need to qualify for statutory tax exemptions pursuant to Chapter 196, because the legislature lacks the power to tax them by passing statutes.

636 So. 2d at 525. See also Orange County Florida v. Florida Department of Revenue, 605 So. 2d at 1334 ("tax exemption emanates from the beneficence of the legislature and presupposes the power to tax, while immunity from taxation flows directly from the Constitution and is not subject to the ever-transitory and fleeting benevolence of the legislature"); Andrews v. Pal-Mar Water Control District, 388 So. 2d 4, 5 (Fla. 4th DCA 1980), rev. denied, 392 So. 2d 1371 (Fla. 1980) (district immune from tax liability and hence not subject to Chapter 196).

As the foregoing authorities recognize, the legislature does not have the power to waive sovereign immunity by statute absent some constitutional authorization to do so. Consequently, the waiver of sovereign immunity in tort found in § 768.28, Fla. Stat., is valid only because of Article X, § 13 of Florida's Constitution, which specifically authorized that waiver. No comparable provision exists, however, in the realm of sovereign tax immunity. Thus the legislature had no authority to address the taxable status of the CPA's fee interest in its leased property through § 196.199, the contention that § 196.199(4) is a valid waiver of immunity is constitutionally insupportable, and Respondents' attempt to rely on Dickinson for this proposition is unfounded.[14]

Nothing in Chapter 196 itself or in its enactment shows the legislative intent to take the drastic step of waiving sovereign tax immunity. Section 768.28, on the other hand, contains unequivocal language in both its title and its text waiving sovereign immunity in tort, and expressly references its constitutional authority to do so. Though many decisions recognize the long standing confusion of exemption and immunity, that

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[14]In Dickinson this Court addressed an exemption in § 166.231, Fla. Stat., and noted that it had not been directed to any discussion in the development of the 1968 Constitution or the debates on its adoption which indicated that a grant of tax power was, by implication, also intended as a release of sovereign tax immunity. Similarly, this Court rejected the contention that an express grant of tax authority could be expanded through the terminology of an exception. 325 So. 2d at 4. It also pointed out that, if the City were correct, the statute at issue would be fatally flawed under Art. III, § 6, of the Constitution. The Court did not reach this latter issue, however, "in light of our conclusion that the inherency doctrine provides the State and its political subdivisions with immunity from tax." 325 So. 2d at 4, n. 8.

confusion and the legislature's propensity to grant exemptions to immune entities that do not need them does not justify the reconstruction of the "oblique language" of Chapter 196 into a waiver of sovereign tax immunity. Furthermore, if a statutory waiver alone is sufficient, Art. X, § 13, of Florida's Constitution authorizing waiver in the tort context would be meaningless, and constitutional tax immunity would be subject to the "ever-transitory and fleeting benevolence of the legislature." Chapter 196 should, therefore, be recognized for what it is -- a grant of exemptions to properties that are otherwise subject to taxation under the Constitution, and not a nebulous waiver of sovereign tax immunity without any basis in the Constitution for such a waiver.

Respondents' attempt to rely on decisions such as Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 (Fla. 1976), and Capital City Country Club v. Tucker, 613 So. 2d 448 (Fla. 1993), is also misplaced. Both of these decisions involved municipally owned property (in addition to other differences), so the issue of immunity and whether it could be or had been waived was not presented, as municipalities have never enjoyed sovereign tax immunity. Similarly, Walden v. Hillsborough County Aviation Authority, 375 So. 2d 283 (Fla. 1979), in no way addressed the question of immunity. Other decisions cited by DOR are readily distinguishable since they involved taxes on the leasehold and not the government entity's fee interest. See e.g. Straughn v. Camp, 293 So. 2d 689 (Fla. 1974); Williams v. Jones, 326 So. 2d 425 (Fla. 1975). Here the issue presented is

quite different, i.e., an attempt to tax the fee interest of a government entity which is a political subdivision of the state, whether factually analyzed under the Second District's test in Sarasota-Manatee or the Fifth District's test in the case at bar. Earlier cases which did not involve or raise this immunity issue or the exemption of § 315.11 discussed *infra* are not dispositive.

III. EVEN IF THE CANAVERAL PORT AUTHORITY IS NOT IMMUNE FROM AD VALOREM TAXATION OF ITS FEE INTEREST IN ITS REAL PROPERTY, IT STILL ENJOYS A BROAD EXEMPTION UNDER CHAPTER 315, FLA. STAT.

Much as they side-step the issue of immunity and the conflict in tests used by the Second and Fifth Districts, Respondents also do not address the validity of the Fifth District's interpretation, in a case of first impression, of the scope of the exemption granted to all port facilities under Chapter 315, Fla. Stat. (discussed in section III of the CPA's initial brief). DOR instead views this general act as repealed by Chapter 71-133, § 14, Laws of Florida, or subsumed by § 196.199(4). See Respondents' brief on the merits at page 11-12. Chapter 71-133, § 14, however, expressly limited its repeal to "all special and local acts or general acts of local application." Thus no repeal was enacted of general acts such as Chapter 315 and the exemption in § 315.11 during the tax reforms of 1971.[15] Moreover, Respondents fail to cite any

[15]See e.g. Department of Business Regulation v. Classic Mile, Inc., 541 So. 2d 1155, 1157-1158 (Fla. 1989) and State v. Leavins, 599 So. 2d 1326, 1335-1336 (Fla. 1st DCA 1992) for a discussion of the distinctions among general laws and special or local laws.

authority for their claim that the blanket exemption of port facilities under § 315.11 was somehow modified by § 196.199(4).

The Fifth District tried to read § 196.199 and § 315.11 in harmony by citing Sebring Airport Authority v. McIntyre, 642 So. 2d 1072 (Fla. 1994), for the proposition that the CPA's property is only exempt to the extent of its governmental or public use. This reliance on Sebring is misplaced, however, since that case only involved interpretation of § 196.199(2)(a) and its effect on property used for a raceway. No exemption comparable to Chapter 315 and § 315.11 was at issue in Sebring or in Volusia County v. Daytona Beach Racing and Recreational Facilities District, *supra*, on which DOR so heavily relies, nor can a raceway be compared to a federally authorized[16] deepwater international seaport which plays a critical, legislatively established role in the state's intermodal transportation system. See Chap. 311, Fla. Stat. Furthermore, the strict construction used in Sebring, Volusia County, and by the Fifth District in the case at bar is improper in this case. Here the legislature, recognizing the unique role of Florida's ports to the state as a whole and the broad regions they impact as confirmed by the extensive evidence in this case, specifically required in § 315.16 that Chapter 315 be liberally

[16]For a brief discussion of the federal government's part in the establishment and development of this deepwater port, see R. Plaintiff's trial ex. 4: CPA Comprehensive Annual Financial Report, p. 93. As the trial court found, Port Canaveral supports nation's space program and national defense, is a foreign trade zone, and is a customs port of entry. R. 321, Final Judgment. It is also one of only a dozen ports in the U.S. that is, by contract with the federal government, subject to mobilization by the Federal Maritime Administration in time of war. TR p. 121-122.

construed. Consequently, neither Sebring nor Volusia County is controlling of or particularly helpful to the case at bar.

Under the circumstances presented, this case can be resolved, uniform tax treatment of the state's port facilities confirmed, and the result of the trial court upheld under the exemption provided in Chapter 315, Fla. Stat., for the reasons set forth above and in detail in section III of the CPA's initial brief. This Court need not, therefore, address the extreme immunity and waiver position put forth by Respondents (along with its far-reaching effect on government entities and citizens not presently before the Court) if it concludes that Chapter 315 is entitled to liberal construction under § 315.16 and it gives the exemption of § 315.11 and the definitions of § 315.02(6) the broad construction required by the legislature but erroneously refused by the Fifth District.

CONCLUSIONS

In 1928 Justice Oliver Wendell Holmes, following Chief Justice Marshall's theme, declared, "The power to tax is not the power to destroy while this Court sits."[17] Much like Justice Holmes' Court, this Court must now confront this power to destroy, as it is presented by Respondents with an analysis that would dramatically alter the tax law of this state so that one government entity may tax the real property of an autonomous entity which it neither controls nor serves. No valid basis for such a drastic change in the long-respected sovereign tax immunity of this state and its

[17]Panhandle Oil Co. v. Knox, 277 U.S. 218, 223 (1928).

agencies such as the CPA has been presented, nor has it been shown that a valid waiver of sovereign tax immunity has taken place.

It is respectfully submitted that this Court should instead preserve the integrity of the established tax system among government entities and promote the "compelling policy reasons" underlying the principle of sovereign tax immunity[18] by rejecting the taxes that Brevard County now seeks to impose under any one of three legally supportable analyses: (1) by upholding the test of Sarasota-Manatee and affirming the trial court's judgment which applied that test; (2) by adopting the test of the Fifth District herein but requiring its proper application and a finding that the CPA is immune; or (3) by giving Chapter 315 and its tax exemption the broad reading that they require, so that if tax immunity does not exist or has somehow been waived, the real property at issue remains exempt from this belated attempt to place it on Brevard County's tax rolls. Under any of these approaches, the result reached by the trial court still obtains, and its final judgment should be reinstated. Alternatively, if the Fifth District's narrow reading of Chapter 315 is approved, this case should be remanded for evidence on how specific parcels of property may (or may not) fit the statutory definition as now interpreted.

For these reasons as well as those set forth by amicus curiae Greater Orlando Airport Authority, Broward County/Port Everglades Authority, Hillsborough County Aviation Authority, and Sarasota-Manatee Airport Authority, the Petitioner Canaveral Port Authority

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[18]See Dickinson, 325 So. 2d at 4.

would urge this Court to reverse the decision of the Fifth District Court of Appeal and order the judgment of the trial court reinstated, or alternatively, remand this case to the trial court for further proceedings under Chapter 315.

Respectfully submitted,

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