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IN THE SUPREME COURT OF FLORIDA

PORT OF PALM BEACH DISTRICT,

Petitioner

vs. CASE NO. 85,434

DEPARTMENT OF REVENUE, et al.,

Respondents.
_____/

RESPONDENTS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Department of Revenue ("DOR"), hereby adopts Petitioner's designations of parties and record.

STATEMENT OF THE CASE AND FACTS

The DOR takes exception with Petitioner's footnote 1 at page two of its Brief On The Merits. Although the undersigned counsel for DOR was present at the oral argument, the undersigned did not participate in oral argument. Instead, the undersigned yielded his time to counsel for the Property Appraiser. Hence the undersigned could not possibly have "agreed with the Court" regarding the hypothetical use of certain language within the Port's charter.

SUMMARY OF ARGUMENT

The Petitioner is performing a proprietary function and is not part of a centralized, statewide system of port management. The Petitioner does not act as an agent of the State, nor can the Petitioner be viewed as a "branch of the general administration of the policy of the state."

The Petitioner's reliance upon two special acts as evidence of its political subdivision status is misplaced. Special acts which purport to apprehend assessment or collection of taxes are prohibited by Art. III, § 11(a)(2), Fla. Const.

The Florida Legislature can waive sovereign immunity, including tax immunity, according to decisions of this Court. Section 196.199, Fla. Stat., is such a waiver. When government or a public authority allows its property to be used for commercial, non-scientific, non-religious, non-literary and non-charitable purposes, such property is taxable.

Indeed, unless expressly exempt, all real and personal property in Florida is taxable. The Petitioner can point to no such exemption.

ARGUMENT

POINT I

THE PORT IS PERFORMING A PROPRIETARY FUNCTION

At page 8 of Petitioner's Brief, it is asserted that promotion and development of deep water ports is an "important governmental function." Further, it is also asserted that unlike the ports of Miami, Everglades and Jacksonville, the Port of Palm Beach is "not an arm of county government."

However, in Department of Revenue v. Canaveral Port Authority, 642 So. 2d 1097 (Fla. 5th DCA 1994), review pending, Case No. 84,743 Florida Supreme Court, the Fifth DCA held at page 1101 that Canaveral Port Authority ("CPA") is:

> [A] business of a restricted nature, and it does not possess the usual incidents and powers of a governmental subdivision of the State. It is in effect a business corporation and the discharge of its functions, though amply authorized, is in the forwarding or carrying on of a proprietary function. (e.s.)

Like the Canaveral Port Authority, the Petitioner is not part of a centralized, Statewide system of port management and operation. The Petitioner was not acting as an agent of the state, but was created by special act to carry out a limited purpose. Thus, Petitioner cannot be viewed as a branch of the general administration of the policy of the state. Department of Revenue v. Canaveral Port Authority, 642 So. 2d 1097, 1101 (Fla. 5th DCA 1994). See also, cases cited therein; and, Commissioners of Duval County v. City of Jacksonville, 18 So. 339, 343 (Fla. 1895).

The use of public property like that of the Petitioner's, for private corporate profit, should not be endorsed by this Court as a branch of the "general administration" of the policy of the state. At page 13 of Petitioner's brief, it is believed that "other political subdivisions" is a clear indication that "the Legislature considers the Petitioner a political subdivision of this state."

Taken within the context of Ch. 74-570, Laws of Fla., itself, it is clear that the Legislature meant that the Board of Trustees of the Internal Improvement Trust Fund was the only state agency from which approval for port activity was required. In other words, to enable the Port to act quickly, the Port could bypass other regulatory authorities when dredging, filling in lands, etc. See, Art. VII, § 2(25), Ch. 74-570, Laws of Fla.

At pages 13 and 14 of its Brief, Petitioner cites Ch. 95-467, Laws of Fla., as evidence of the Port's classification. However, the 1995 tax year is not at issue in this case and Ch. 95-467 Laws of Fla., can not be applied retroactively. Moreover, the need to amend the law in 1995 is evidence of the Legislature's doubt about the Port of Palm Beach's status.

At the bottom of page 14, Petitioner cites Art. X, § 12, Ch. 74-570 Laws of Fla., as authority for the contention that the Port shall be exempt from all taxation by the state, county, municipality or other political subdivision, Clearly, the Legislature's use of the word "immune" would have been employed instead of "exempt" if the Petitioner was truly a political subdivision. See, Dickinson v. City of Tallahassee, 325 So 2d 1, 3 (Fla. 1975).

Secondly, under Art. III, § 11(a)(2), Fla. Const., special acts such as Ch. 74-570, Laws of Fla., are prohibited if the special act pertains to:

> (2) assessment or collection of taxes for state or county purposes, including extension of time therefor, relief of tax officers from due performance of their duties, and relief of sureties from their liability.

Both Ch. 74-570, Laws of Fla., and Ch. 95-467, Laws of Fla., violate Art. III, § 11(a)(2), Fla. Const., as special acts pertaining to the "assessment or collection" of taxes. But see, State v. Flowers, 643 So 2d 644 (Fla. 1st DCA 1994) wherein it was held that a statutory tax imposed only upon Apalachicola oysters did not violate Art. III, § 11(a)(2), Fla. Const.

However, Flowers, supra, depended upon the case of State v. Leavins, 599 So. 2d 1326 (Fla. 1st DCA 1992), for its reasoning that the oyster tax in question was a "general" and not a "local" law. Flowers, 643 So 2d at 646.

As held in Leavins, supra, a general law is defined as a law that operates uniformly within the state, uniformly upon subjects as they exist within the state, or uniformly within a permissible classification. Id., 599 So. 2d at 1336, (citing to Department of Business Regulation v. Classic Mile Inc., 541 So 2d 1155 (Fla. 1989)).

In Classic Mile, supra, this Court held that a law affecting pari-mutuel wagering in Marion County should be struck as an unconstitutional special act. As defined in Classic Mile, supra, at page 1157, a special law is:

> . . . one relating to, or designed to operate upon, particular persons or things, or one

> that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal; a local law is one relating to, or designed only in, a specifically indicated part of the State, or one that purports to operate within classified territory when classification is not permissible or the classification is illegal.

In the case sub judice, the Port and its corporate tenants are the sole beneficiaries of Chs. 74-570 and 95-467 Laws of Fla., which purport to grant immunity from ad valorem taxation. A law which gives tax relief to a select few corporate lessees while their competitors, outside the Port, must bear ad valorem taxes, amounts to the very kind of unequal treatment prohibited by Art. III, § 11(a)(2), Fla. Const.

To summarize, Petitioner's reliance upon Chs. 74-570 and 95-467, Laws of Fla., is in error since any special act pertaining to tax assessment and collection is prohibited by the Florida Constitution.

POINT II

WAIVER OF TAX IMMUNITY

As held by this Court, the Florida Legislature can waive sovereign immunity including tax immunity. Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975); State ex rel. Charlotte County v. Alford, 107 So. 2d 27 (Fla. 1958).

This Court in the case of State ex rel. Charlotte County v. Alford, 107 So. 2d 27 (Fla. 1958),(cited in Dickinson), was faced with the question of the taxable status of land owned by the Game and Fish Commission, a constitutional agency. At page 29 it is stated:

> That, within constitutional limits, the Legislature may provide for the taxation of lands or other property of the State, is readily conceded. The question arises, however, whether the subject act actually does so provide.

The thrust of §§ 196.001 and 196.199, Fla. Stat., is to permit taxation of government-owned property. Unlike the general act in Dickinson, and the special act in Alford, the legislative waiver in § 196.199(4), Fla. Stat., is clear and unequivocal.

Section 196.199(4) provides in pertinent part:

> Property owned by any municipality, agency, authority, or other public body corporate of the state which becomes subject to a leasehold interest or other possessory interest of a nongovernmental lessee other than that described in paragraph (2)(a), ... shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes. (e.s.)[1]

Section 196.199(4), Fla. Stat., provides for taxation of property owned by any municipality, agency, authority or other public body corporate of this state which becomes subject to a leasehold interest or other possessory interest of a nongovernmental lessee. This section does not have reference to the taxation of a leasehold interest but refers to the taxation of the referenced governmental unit and the property it owns. The statute also provides for an exemption if property owned by any municipality, agency, authority, or other public body corporate which is subject to a lease and the lessee is an

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[1] Section 196.199(4), Fla. Stat., is constitutional. See, Capitol City Country Club v. Tucker, 613 So. 2d 448, 452 (Fla. 1993).

organization which uses the property for governmental purpose or exclusively for literary, scientific, religious or charitable purposes. Capital City Country Club v. Tucker, 613 So. 2d 448, 450-451 (Fla. 1993). See also, Op. Att'y Gen. Fla. 92-32 (1992).[2]

POINT III

THE TAXABLE STATUS OF THE PROPERTY LEASED TO NON-GOVERNMENTAL ENTITIES BY THE PORT.

Florida Law requires taxation, unless expressly exempt, of all real and personal property in this state, personal property belonging to persons residing in this state, and leasehold interests in property of the federal, state, and local governments.[3] Property is taxed as either real property, tangible personal property, or intangible personal property.[4] Real and tangible personal property is taxed by local governments. Intangible personal property tax is a state tax which is shared with counties and school boards. Sections 199.292(3) and 199.292(1), Fla. Stat., respectively.

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[2] See contra, Sarasota-Manatee Airport Authority v. Mikos, 605 So. 2d 132 (Fla. 2d DCA 1992), rev. denied, 617 So. 2d 320 (Fla. 1993). [However, the Second District Court of Appeal never addressed the question of whether immunity could be waived, and if so, had it been waived by the Legislature. Without such a discussion, the opinion in Sarasota-Manatee Airport Authority v. Mikos, supra, is incomplete.]

[3] Section 196.001, Fla. Stat., and AM FI Inv. Corp. v. Kinney, 360 So. 2d 415, 416 (Fla. 1978).

[4] Real property is defined as "land, buildings, fixtures, and all other improvements to land. The terms 'land', 'real estate', 'realty', and 'real property' may be used interchangeably." Section 192.001(12), Fla. Stat.

The taxation of the Port's property, in fact all property, is determined first by reference to § 196.001, Fla. Stat. That section provides that, unless expressly exempt from taxation, all real and personal property and all leasehold interests in government owned property are subject to taxation. Whether the Port is labeled "immune," or whether it is an entity "in the nature of a municipality," or an authority or a public body corporate is not the issue. The Petitioner is only entitled to an exemption from ad valorem taxation for those properties which so qualify under Ch. 196, Fla. Stat. In this case, the uses and purposes to which the property is being put, as established by the activities of the lessees, do not qualify the property for an exemption under Ch. 196, Fla. Stat. Volusia County v. Daytona Beach Racing and Recreational Facilities Dist., 341 So. 2d 498, 502 (Fla. 1977), appeal dismissed, 434 U.S. 804 (1978).

This conclusion is inescapable when one analyzes §§ 196.001 and 196.199, Fla. Stat.[5] This statute evidences the legislative intent that unless expressly exempted, all property, including that property owned by the Port, shall bear the same tax burden as private property owners who devote their land to the same use.[6] The courts have ruled that property of the federal government, the state, and the counties is immune from taxation.[7]

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[5] See, Ch. 72-133, §§ 11 and 16, Laws of Fla.

[6] Williams v. Jones, 326 So. 2d 425, 433 (Fla. 1975).

[7] See, Park-N-Shop, Inc., v. Sparkman, 99 So. 2d 571, 573-774 (Fla. 1957); Orlando Utilities Commission v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1969), cert. denied, 236 So. 2d 539 (Fla. 1970); and, Dickinson v. City of Tallahassee, supra.

The courts have further ruled that this immunity extends to property of certain special districts.[8] The Florida Constitution does not expressly address the tax immune status of government property.[9]

Our state constitution specifically provides that certain government property is **exempt** from ad valorem taxation. First, Art. VII, § 3(a), Fla. Const., exempts property "owned by a municipality and used exclusively by it for municipal or public purposes." This implies that municipal property used for non-municipal or non-public purposes is to be taxed.[10] Second, this constitutional provision also states that other property "used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from

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[8] In Sarasota-Manatee Airport Auth. v. Mikos, 605 So. 2d 132 (Fla. 2d DCA 1992), rev. denied, 617 So. 2d 320 (Fla. 1993), the Second District Court of Appeal ruled that "Special districts that are created as political subdivisions of the state enjoy the same immunity from taxation as does the state" without addressing whether the immunity could be waived, and if so, had it been waived. 605 So. 2d at 133. In Andrews v. Pal-Mar Water Control Dist., 388 So. 2d 4 (Fla. 4th DCA 1980), rev. denied, 392 So. 2d 1371 (1980), the Fourth District Court of Appeal ruled that the district is a political subdivision of the state, and therefore immune from taxation. 388 So. 2d at 5. This decision does not address district property leased to private interests for non-public purposes.

[9] Indeed, it is not necessary for the constitution to address the issue of government immunity from taxation. It is generally held that ". . . in the absence of any constitutional prohibition the state may tax its own property, the presumption is always against an intention to do so, and such property is impliedly immune from taxation unless an intention to include it is clearly manifested. . . This immunity . . . rests on public policy and the fundamental principles of government." 84 C.J.S. Taxation § 200, (1954). Accord, Alford, supra.

[10] Capital City County Club, supra; See, Lykes Bros., Inc. v. City of Plant City, 354 So. 2d 878, 881, n.12 (Fla. 1978).

taxation." The Legislature has provided for the exemption of these properties in statute. Section 196.192, Fla. Stat. Section 196.199, Fla. Stat., also address the exemption of government property. To conclude, all property "owned and used" by such governments is declared exempt from taxation under the following conditions: (1) federal government property is exempt except as provided by federal law; (2) state property is exempt if "used for governmental purposes;" and (3) local government property is exempt if owned and "used for governmental, municipal, or public purposes. . ."

CONCLUSION

WHEREFORE, the Respondent moves this honorable Court to affirm the decision of the lower court but also declare that § 196.199, Fla. Stat., is the Legislative waiver of immunity, conditioned upon how governmental property is being used.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **Robert B. Cook, Esq.**, 11911, U.S. Highway One, Suite 308, North Palm Beach, Florida 33408; **Gaylord A. Wood,** Esq. Wood & Stuart, 304 S.W. 12th Street, Fort Lauderdale, Florida 33315-1549; **Jay R. Jacknin, Esq.** and **Eric Ash, Esq.**, 1555 Palm Beach Lakes Blvd., Suite 1010, West Palm Beach, Florida 33401; **Jack J. Aiello, Esq.**, and **David P. Ackerman, Esq.**, 777 S. Flagler Drive, Suite 500, East Tower, West Palm Beach, Florida 33401; **Steven M. Katzman, Esq.**, and **Bridget A. Berry, Esq.**, 777 South Flagler Drive, Suite 310 East, West Palm Beach, Florida 33401; **H. Michael Masdsen, Esq.**, and **Kimberly L. King, Esq.**, P.O. Box 1876, Tallahassee, Florida 32302-1876; on this 13th day of October, 1995.

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