IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,

Petitioner/Appellant,

v.

Case No. SC00-1916

First DCA Case No. 1D 99-3770
L.T. Case No. DOR 99-1-DS

FLORIDA MUNICIPAL POWER AGENCY AND FLORIDA MUNICIPAL ELECTRIC ASSOCIATION, INC.

Respondents/Appellees.

PETITIONER/APPELLANT DEPARTMENT OF REVENUE'S REPLY BRIEF

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CERTIFICATE OF TYPE STYLE AND SIZE

I HEREBY CERTIFY that the type style and size used in the Department's Jurisdictional Brief is Courier New 12 point.

PRELIMINARY STATEMENT

The Department adopts its designations and abbreviations as set forth in its Initial Brief.

STATEMENT OF THE CASE AND FACTS

The Department adopts and incorporates its Statement of the Case and Facts from its Initial Brief.

SUMMARY OF ARGUMENT

Appellees' arguments in its Answer Brief are without merit and the decision of the First District Court of Appeal should be reversed. The deletion of obsolete language should not change the substantive meaning of Section 212.08(6), Fla. Stat. Prior to the 1996 amendment to Section 212.08(6), Fla. Stat., materials purchased by municipally owned utilities for use in the repair, replacement, or refurbishment of their existing electric transmission or distribution systems were taxable. As a result of the First District's ruling, these transactions after the 1996 amendment are exempt. This change is not supported by the legislature's express intent to delete obsolete language, the legislative history of the statute, the Department's rule, Florida Administrative Code Rule 12A-1.001(9)(b), the Department's Declaratory Statement and this Court's rulings that a tax exemption statute should be strictly construed against the taxpayer and that a statute should not be given a literal reading when to do so results in an unreasonable conclusion.

A literal reading of Section 212.08(6), Fla. Stat., is not appropriate in this case because it results in a substantive change which does not accurately reflect the legislature's intent and leads to an unreasonable or ridiculous conclusion. Therefore, this Court should answer the certified question in the negative, reverse the decision of the First District, and uphold the decision of the Department as reflected in its Declaratory Statement.

ARGUMENT

I. THIS CASE IS A CASE OF GREAT PUBLIC IMPORTANCE.

The Department agrees with The First District Court of Appeal that the question certified is a question of great public importance. As this Court is well aware, the providing of electric power in this state is a huge industry.[1] The ruling by the First District provides for a tax exemption to municipally owned utilities which did not exist prior to the 1996 amendment to Section 212.08(6), Fla. Stat., and affects a major Florida industry. Private electric companies in this state will not enjoy the benefit of this tax exemption.

It is unrebutted that the Department's Declaratory Statement indicated that Legislative Staff Analysis concluded that there would be no fiscal impact as a result of the amendment. (Vol. I,

[1] For example, sales of electricity in Florida for the year 1995 exceeded 11 billion dollars. See U.S. Census Bureau, Statistical abstract of the United States: 1999, Table No. 957, page 599.

R-32). The Department previously by its rule, Florida Administrative Code Rule 12A-1.001(9)(b), and its Declaratory Statement has taken the position that the statute does not exempt sales of machines and equipment used for generation, transmission or distribution of electric energy by systems owned and operated by a political subdivision or municipality in this state. Thus the First District's holding that such transactions are exempt will have some negative fiscal impact on the state. Because this impact, whatever it is, was not contemplated by the legislature (staff analysis concluded no fiscal impact as a result of the amendment), the First District and Appellees must be wrong.

II. THE TITLE TO CHAPTER 96-397, LAWS OF FLORIDA, THE DEPARTMENT'S LONG-STANDING RULE AND THE HISTORY OF SECTION 212.08(6), FLA. STAT., SUPPORTS THE DEPARTMENT'S INTERPRETATION.

To read Section 212.08(6), Fla. Stat., as amended by the 1996 amendment, to exempt from sales taxation materials purchased by these municipally owned utilities for use in the repair, replacement, or refurbishing of existing electric energy transmission or distribution systems is contrary to the express Legislative intent to delete obsolete language from the statute.

The Department stands by its representation in its Initial Brief that Chapter 96-397, Laws of Florida, "generally functioned as a revisor's bill" (e.s.), and that "[T]his bill in fact contained numerous actions taken by the legislature to delete surplus or obsolete language." Initial Brief at p. 13-14. See also, footnote 7, Initial Brief at p.14. The title to Chapter

96-397, Laws of Florida, states in pertinent part "an act relating to taxation; . . . amending s. 212.08, F.S.; deleting obsolete provisions relating to exemptions for political subdivisions;..." (e.s.)

The Department submits that the elimination of obsolete language should not change the substantive meaning of the statute. Prior to the 1996 amendment to Section 212.08(6), Fla. Stat., materials purchased by municipally owned utilities for use in the repair, replacement, or refurbishment of their existing electric transmission or distribution systems were taxable. As a result of the First District's ruling, these transactions after the 1996 amendment are exempt. This change is not supported by the legislative intent.

Prior to the 1996 amendment the words "for transmission or distribution expansion" were part of the following exception clause in Section 212.08(6):

> except sales, rental, use, consumption, or storage for which bonds or revenue certificates are validated on or before January 1, 1973, for transmission or distribution expansion.

These words delineated and identified the revenue certificates or bonds and transactions which qualified for exemption from taxation. Because the pertinent clause is an exception, only those transactions "for which bonds or revenue certificates are validated on or before January 1, 1973, for transmission or distribution expansion" (e.s.) were exempt from taxation. The deletion of obsolete language should not result in a change in

the exemption.

The Department's current rule, Florida Administrative Code Rule 12A-1.001(9)(b)[2] interprets Section 212.08(6), Fla. Stat., to provide that the sales of machines and equipment used for generation, transmission or distribution of electric energy by systems owned and operated by a political subdivision or municipality in this state shall be subject to the tax. The rule interpreted the section and the exception clause to Section 212.08(6), Fla. Stat. in a manner which provides that the exemption pertains solely to the purchase of equipment for expansion of an electrical energy system owned by a political subdivision or municipality. The First District gave no deference to the fact that the Department which is charged with administering Section 212.08(6), Fla. Stat., interpreted the statute pre- and post-1996 amendment consistent with there being no substantive change to the statute. This rule interpretation is not clearly erroneous and should not be overturned. State ex rel. Biscayne Kennel Club v. Board of Business Regulation, Dept. of Business Regulation, 276 So.2d 823, 828 (Fla. 1973).

The expansion of the exemption from taxation by the First District Court's ruling is not only inconsistent with the legislature's expressed intent to delete obsolete language, it is contrary to the history of Section 212.08(6) Fla. Stat., which

[2] Originally adopted in 1968 and codified as Florida Administrative Code Rule 12A-1.01(12).

establishes that the legislature as far back as 1969 narrowed the exemption from taxation for electric energy systems owned by political subdivisions and municipalities. See Department's arguments in Initial Brief at p.16-18.

III. THE LEGISLATURE'S INTENT SHOULD NOT BE DETERMINED BY A PLAIN LANGUAGE READING OF SECTION 212.08(6), FLA. STAT.; THIS COURT HAS AUTHORITY TO INTERPRET THE SECTION TO AVOID AN UNREASONABLE OR RIDICULOUS RESULT.

Although legislative intent can generally be determined from the language of the statute, the Department submits that a plain language reading of Section 212.08(6), Fla. Stat., is not appropriate in this case because there are cogent reasons for believing that the plain language of Section 212.08(6), Fla. Stat., does not accurately reflect the legislature's intent. See Department's Argument II above. As stated by this Court in Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984):

> It is also true that a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion. Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So.2d 256 (Fla. 1970). Such a departure from the letter of the statute, however, 'is sanctioned by the courts only when there are cogent reasons for believing that the letter [of the law] does not accurately disclose the [legislative] intent.' State ex rel. Hanbury v. Tunnicliffe, 98 Fla. 731, 735, 124 So.2d 279, 281 (1929).

See Raulerson v. State, 25 Fla. L. Weekly 542, 2000 WL 963827 (Fla. 2000); Weber v. Dobbins, 616 So. 2d 956 (Fla. 1993); Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So. 2d 308 (Fla. 4th DCA 1999).

This Court in Raulerson recently determined that a plain

language reading of Section 322.01(10), Fla. Stat. (1995), which defined "conviction"[3] was unclear as to whether or not the term "conviction" was intended by the legislature to encompass withheld adjudications within the meaning of the misdemeanor and felony offenses contained in Section 322.34(1), Fla. Stat. In concluding that the term "conviction" included withheld adjudications for purposes of Section 322.34(1), Fla. Stat., this Court not only considered how Section 322.34, Fla. Stat., interrelated with other statutes, but considered the legislative history of the section to determine the legislature's intent. This Court stated:

> Accordingly, we must consider how section 322.34 interrelates with other statutory provisions, as well as the legislative history surrounding the statute to ascertain the legislature's intent. *See e.g. Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla. 1987) ("Were these provisions even slightly ambiguous, an examination of legislative history and statutory construction principles would be necessary.").

Id., at ****7**.

In Weber, this Court had before it for consideration the following question certified by the Fourth District Court of

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[3] Section 322.01(10), Fla. Stat.(1995), defines "conviction" as follows:

> "Conviction" means a conviction of an offense relating to the operation of motor vehicles on highways which is a violation of this chapter or any other such law of this state or any other state, including an admission or determination of a noncriminal traffic infraction pursuant to s. 313.14, or a judicial disposition of an offense committed under any federal law substantially conforming to the aforesaid state statutory provisions.

Appeal as a question of great public importance:

> DO THE IMMUNITIES PROVIDED BY SECTION 440.11, FLORIDA STATUTES (1983), EXTEND TO A CORPORATE OFFICER WHO ELECTS, PURSUANT TO SECTION 440.05, TO EXEMPT HIMSELF FROM COVERAGE UNDER THE PROVISIONS OF CHAPTER 440?

This Court in refusing to follow a literal interpretation of certain sections in Chapter 440, Fla. Stat., because the result would lead to an unreasonable or ridiculous conclusion stated:

> A literal interpretation of these statutes [Sections 440.02, 440.05 and 440.11, Fla. Stat.] would permit a corporate officer or business owner who elects to purchase workers' compensation benefits for himself or herself to be fully insulated from liability, while giving those who elected the exemption unlimited exposure for tort liability claims of injured employees. Moreover, it could be argued that because an employee's immunity is tied to those "same immunities from liability enjoyed by an employer," the employer's decision not to be covered strips the employees of any immunity as well. Sec. 440.11(1). Ostensibly, then the corporate officers or business owner could sue a fellow employee for injuries caused by job-related negligence. <u>If the Court applied a literal interpretation of the statutory definition of "employee" to section 440.11, the result would lead to an unreasonable or ridiculous conclusion.</u> Therefore, we hold that the district court erred in finding that Weber's exemption of workers' compensation coverage removed him from the immunities granted by section 440.11. (e.s.)

<u>Id</u>, at 959.

In <u>Las Olas</u>, the Fourth District Court of Appeal, in denying one of the Petitioner's (Bantrock's) Petition for Certiorari and affirming the circuit court's holding, did not follow a literal interpretation of the City of Ft. Lauderdale's zoning ordinances because a literal interpretation would lead to an

unreasonable result.[4]

The literal interpretation asserted by Appellees and the First District's ruling concerning the 1996 amendment to Section 212.08(6), Fla. Stat., is erroneous because it leads to an unreasonable or ridiculous result. It completely disregards the legislature's intent to delete obsolete language and the legislative history of the section. It improperly expands the exemption to exempt transactions which were not exempt prior to the 1996 amendment. The deletion of obsolete language should not change the status quo as to the taxability of transactions prior to the amendment.

Appellees assert that "ASSUMING, ARGUENDO, THE LEGISLATURE DID MAKE A DRAFTING ERROR BY NOT STRIKING THE DISPUTED WORDS, THIS COURT CANNOT CORRECT THE ERROR." Answer Brief, argument III. This assertion and argument is incorrect because it ignores

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[4] The Court stated:

> In statutory construction a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity. (internal cites omitted) True, section 47-33.1(a)(1) does state in unambiguous language that, *for the purposes of section* 47-33.1, the term "setback" means the horizontal distance between a principal structure and the edge of the interior curb of [Sagamore Street, in this case]. But it is apparent to us that such meaning applied literally to the word "setback" (whether in the singular or the plural) as it is used in subsections (b) and (d) would itself be unreasonable and would effectively render those subsections a nullity. (e.s.)(footnote omitted)
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> Id, at 312-313.

this Court's pronouncements concerning when a literal interpretation of a statute is not proper. This Court clearly has authority to interpret Section 212.08(6), Fla. Stat., as amended to eliminate the words "for transmission or distribution expansion" because otherwise a literal interpretation produces an unreasonable result as explained previously in this brief. See Raulerson; Weber; Florida Dept. of Business and Professional Regulations, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So.2d 374, 382 (Fla. 1999); Holly v. Auld; and Las Olas.

IV. SECTION 212.08(6), FLA. STAT., IS AN EXEMPTION STATUTE WHICH MUST BE STRICTLY CONSTRUED AGAINST THE TAXPAYER.

Appellees' argument IV in their Answer Brief assert that "SECTION 212.08(6) IMPOSES A TAX ON RESPONDENTS AND, THEREFORE, MUST BE STRICTLY CONSTRUED AGAINST THE TAXING AUTHORITY, WITH ALL AMBIGUITIES RESOLVED IN FAVOR OF RESPONDENTS." The Department submits that Appellees and The First District's opinion misconstrue Section 212.08(6), Fla. Stat., as a taxing statute rather than an exemption statute which must be strictly construed against the taxpayer. The Department adopts and relies on its arguments as contained in argument III of its Initial Brief in response to Appellees' argument IV in their Answer Brief. Additionally, the legislature has specifically provided that the provisions contained within Section 212.08, Fla. Stat., are specified exemptions. The title to Section 212.08, Fla. Stat. and beginning paragraph state as follows:

> 212.08 **Sales, rental, use, consumption, distribution, and storage tax; specified exemptions.** -- The sale at retail, the rental, the use, the consumption, the distribution, and storage to be used or consumed in this state of the following are hereby exempt from the tax imposed by this Chapter. (e.s.)

Section 212.08(6), Fla. Stat., provides for exemptions for political subdivisions. Thus, the statute must not be construed in a literal manner, but must be construed strictly to not exempt from taxation materials purchased by municipally owned utilities for use in the repair, replacement, or refurbishment of their existing electric energy transmission or distribution systems.

CONCLUSION

Based upon the above arguments and authorities, this Court should answer the certified question in the negative, reverse the decision of the First District, and uphold the decision of the Department of Revenue as reflected in its Declaratory Statement in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of

December, 2000, to FREDERICK M. BRYANT, Esq., 2010 Delta Blvd., P.O. Box 3209, Tallahassee, FL 32325-3209.

Respectfully submitted,

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