IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

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STATE OF FLORIDA,
DEPARTMENT OF CITRUS,

Petitioner, **CASE NO 2D02-_______**

vs.

Lower Court
Case No. 02-3648 RE
Division of Admin. Hearings

PEACE RIVER CITRUS PRODUCTS, INC.,

Respondent.
______________________________/

PETITION FOR A WRIT OF PROHIBITION

PRELIMINARY STATEMENT

Petitioner, State of Florida, Department of Citrus, (hereinafter "the Department"), pursuant to Article V, Sec. 4(b)(3), Florida Constitution and Rules 9.030(b)(3), and 9.100, Florida Rules of Appellate Procedure, by and through the undersigned Counsel, hereby request this Court to issue a Writ of Prohibition directed at the Division of Administrative Hearings (hereinafter "DOAH"), to prohibit the further exercise of jurisdiction by DOAH in the case of *Peace River Citrus Products, Inc. v. State of Florida, Department of Citrus*, Case No. 02-3648 RE, because the exercise of jurisdiction in that case will adversely and directly conflict with the jurisdiction presently being exercised by Judge Maloney of the Tenth Judicial Circuit Court in the case of *Tampa Juice Service, Inc., et al. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated), on the same issues of law.

Judge Maloney has ruled in that case that a portion of Sec. 601.155, Fla. Stat., imposing a tax upon foreign citrus products, is unconstitutional. The case is now in the remedial phase in order to satisfy the constitution and correct the discriminatory tax and Judge Maloney has authorized to those that took advantage of the unconstitutional exemption and the Department to issue assessments to collect the taxes not paid. The Department drafted and promulgated the challenge emergency rules for the sole purpose of complying with Judge Maloney's Order in the issuance of the assessments. The Department's petition for a Writ of Prohibition is supported by an Appendix.

Respondent, Peace River Citrus Products, Inc., (hereinafter "Peace River"), is the Petitioner below and the real party in interest. Based upon the records of the Department, Peace River will be assessed back taxes as a result of remedial phase of *Tampa Juice Service, Inc., et al. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated).

Peace River has filed a Petition in DOAH for an administrative determination of the emergency rules promulgated by the Department.[1/] The Department (the Respondent below) contends that DOAH has exceeded its jurisdiction by refusing to dismiss Peace River's Petition for lack of jurisdiction and continuing with the proceedings[2/] in spite of the ongoing jurisdiction over the challenged tax and Judge Maloney's jurisdiction to approve or disapprove the Department's back assessments. A copy of the DOAH Order Denying the Department's Motion to Dismiss is Appendix 1.

[1/] See Appendix 2, Peace River's Petition to Determine the Validity of the Emergency Rules Promulgated by the Department of Citrus, dated September 20, 2002.

[2/] See Appendix 3, the Department's Motion to Dismiss, dated October 1, 2002.

This Court has jurisdiction to issue a writ of prohibition.[3] Article V, Sec. 4(3), Florida Constitution; Rule 9.030(b)(3), Florida Rules of Appellate Procedure. *See, e.g., State, Department of Revenue v. Stafford*, 646 So. 2d 803 (Fla. 4th DCA 1998); *Walker v. Garrison*, 610 So. 2d 716 (Fla. 4th DCA 1992).

STATEMENT OF THE FACTS

1. The Florida Citrus Commission was established in 1935 to organize and promote the growing and sale of various citrus products, fresh and processed, in the State of Florida. The purpose of the Citrus Commission is today reflected in Sec. 601.02, Fla. Stat.

2. The powers of the Florida Citrus Commission (hereinafter "the Commission"), and the Department are set forth in full in Sec. 601.10, Fla. Stat. The powers of the Department include the power to tax and raise other revenue to acheive the purposes of the Department.

3. The Commission is authorized to set standards by Sec. 601.11, Fla. Stat.

4. The Commission is authorized to conduct citrus research by Sec. 601.13, Fla. Stat.

5. To help pay for this new part of the State government, the Legislature enacted the "box tax," today codified as Sec. 601.15(3), Fla. Stat.

6. Sec. 601.15(3), Fla. Stat., reads, in pertinent part:

> There is hereby levied and imposed upon each standard-packed box of citrus fruit grown and placed into the primary channel of trade in this state an excise tax at annual rates for each citrus season as determined from the tables in this paragraph and based upon the previous season's actual statewide production as reported in the United States Department of Agriculture Citrus Crop Production Forecast as of June 1.

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[3] The purpose of prohibition is to permit a superior court to prevent an inferior court from exceeding its jurisdiction. *School Board of Marion County v. Angel*, 404 So. 2d 359 (Fla. 5th DCA 1981).

7. The box tax was challenged in 1936 and the Florida Supreme Court issued an opinion in 1937 affirming the box tax. *C. V. Floyd Fruit Company v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248 (1937).

8. In 1970 the Legislature enacted the "equalization tax" which is codified as Sec. 601.155, Fla. Stat. The statute mirrored Sec. 601.15, Fla. Stat., and merely added certain processors who were mixing foreign citrus products with Florida products. The purpose was to have all Florida processors of citrus products help pay for the costs of the Department.

9. Sec. 601.155(1), Fla Stat., states:

> The first person who exercises in this state the privilege of processing, reprocessing, blending, or mixing processed orange products or processed grapefruit products or the privilege of packaging or repackaging processed orange products or processed grapefruit products into retail or institutional size containers or, except as provided in subsection (9) or except if a tax is levied and collected on the exercise of one of the foregoing privileges, the first person having title to or possession of any processed orange product or any processed grapefruit product who exercises the privilege in this state of storing such product or removing any portion of such product from the original container in which it arrived in this state for purposes other than official inspection or direct consumption by the consumer and not for resale shall be assessed and shall pay an excise tax upon the exercise of such privilege at the rate described in subsection (2).

10. Thus, the clear import of Sec. 601.155 is that the equalization tax is only imposed on that Florida person or business "processing, reprocessing, blending, or mixing processed orange products or processed grapefruit products or the privilege of packaging or repackaging processed orange products or processed grapefruit products into retail or institutional size containers" **in this State.**

11. The legislation was enacted according to law. No objection to Sec. 601.155, Fla. Stat. Was raised for thirty (30) years.

12. In March of 2000, certain citrus businesses challenged Sec. 601.155(5), Fla. Stat., as unconstitutional, claiming the tax was discriminatory against them

because certain importers of California, Arizona and Texas citrus products were exempt from the tax under Sec. 601.155, Fla. Stat.. That case was brought in the 10th Judicial Circuit Court, in and for Polk County. *Tampa Juice Service, Inc., et al. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated). Presently, Judge Maloney of that Circuit Court is presiding over that case.

13. Judge Maloney, in April, 2002 written decision, found a portion of Sec. 601.155, Fla. Stat, unconstitutional. In particular, it was within subsection (5) that the Circuit Court struck the exemption for California, Arizona and Texas citrus products. *See*, Appendix 4, *Tampa Juice Service, Inc. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated), Partial Final Declaratory Judgment, dated March 18, 2002. Such a ruling necessitated the formulation of a remedy for the injured plaintiffs as the result of finding the tax imposed by Sec. 601.155, Fla. Stat., partially discriminatory.

14. In the case of *Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 574 So. 2d 114 (Fla. 1991), the Supreme Court of Florida, echoing the words of the United States Supreme Court,[4/] directed the procedure the State is to follow when a court finds a tax discriminatory. The Supreme Courts stated three (3) alternative remedial procedures that were acceptable in the "leveling" of the playing field for the discriminated plaintiff.[5/]

15. As part of those decisions, the State, through the Department, was to propose to the trial court which of the three stated Supreme Court alternatives the

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4/ *See McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

5/ Under *McKesson*, a refund of the taxes collected from the injured plaintiff was not automatic. All the State was required to do was to undo the discrimination in some fashion.

State wished to exercise in order to cure the discriminatory effect of the invalid exemption. One of these choices was to provide the relief to the injured plaintiffs in *Tampa Juice*.

16. The Department complied with the Supreme Court's directions and proposed one of the remedies approved by the Supreme Court of Florida to the Circuit Court in Polk County. The Department proposed to the Circuit Court the *McKesson* option to "level the playing field" by assessing the full tax against those citrus producers importing California, Arizona and Texas citrus products who had taken advantage of the exemption from taxation contained in Sec. 601.155(5), Fla. Stat.. This option operated as if the exemption from taxation never existed.

17. On August 8, 2002, Judge Maloney issued an order approving of the proposal to assess the persons or entities, subject to certain later objections, permitting the Department to assess taxes under Sec. 601.155, Fla. Stat., against those who earlier took advantage of the now voided tax exemption. *See*, Appendix 5, *Tampa Juice Service, Inc. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated), Order, dated August 8, 2002.

18. While not necessary under the Supreme Court's *McKesson* decision, in order to publically implement the Department's selected remedial option to impose and collect the back taxes, the staff of the Department proposed certain emergency and regular rules to regulate the procedure of the back assessment and to inform those so affected of their rights to contest the assessments.

19. On September 18, 2002, the Florida Citrus Commission ("Commission"), the twelve member agency of the Department, took the proposed/challenged emergency rules under consideration at a regularly scheduled and noticed meeting of the Commission. During that public meeting, the Commission promulgated those

emergency and regular rules to regulate the procedure and notice of the back assessment. *See* Appendix 6, Emergency Rules.

20. Based upon the records of the Department, Peace River will be assessed back taxes as a result of remedial phase of *Tampa Juice Service, Inc., et al. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated).

21. It is those emergency rules to regulate the procedure and notice of the back assessment of taxes under Sec. 601.155, Fla. Stat., that the Peace River challenged before DOAH.

22. Judge Maloney has been kept abreast of the back assessment process and has already scheduled a hearing time in November when those persons so assessed by the Department as part of the remedial phase of *Tampa Juice*, like Peace River here, may object on any grounds why the assessment of taxes under Sec. 601.155, Fla. Stat., violates the law or their rights.

ARGUMENT

The Department is reluctantly seeking the jurisdiction of this Court for a Writ of Prohibition against DOAH only because DOAH's involvement in this case directly conflicts with the continuing jurisdiction over the remedial phase of *Tampa Juice Service, Inc., et al. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated). Only a court may declare a tax unconstitutional. *See Department of Revenue v. Nemeth*, 733 So. 2d 970 (Fla. 1999). Consequently, only a court may approve a remedy to correct the invalid taxing scheme. The use of administrative rules to publically announce the refund procedure is directly ancillary to the court-controlled remedial process as stated in *Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 574 So. 2d 114 (Fla. 1991).

The key point at this juncture in the *Tampa Juice* proceedings is to allow the Department to freely implement, under the judicial guidance of Judge Maloney, the Department's chosen remedial procedure. The challenged emergency rules have no life outside of the *Tampa Juice* litigation and would never have been proposed but for the *Tampa Juice* litigation.

This Court, for the reasons stated below, must issue a writ of prohibition against DOAH to allow Judge Maloney to proceed to test the Department's remedial procedure of back assessment and to hear the objections of those so assessed without interference from another body that could issue a ruling in the abstract and conflict with the Supreme Court's directions in *Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 574 So. 2d 114 (Fla. 1991)(*McKesson III*).

Since the *Tampa Juice* case deals with the constitutionality of a tax statute, since only a court can be involved in the remedial process of an unconstitutional law, and since administrative agency cannot address the validity of a statute, prohibition is proper in this case where the actions of the DOAH proceeding will have a direct effect on the Circuit Court's remedial process of correcting the effect of an unconstitutional statute.

The purpose of prohibition is to permit a superior court to prevent an inferior tribunal, such as DOAH, from exceeding its jurisdiction. *School Board of Marion County v. Angel*, 404 So. 2d 359 (Fla. 5th DCA 1981). Prohibition is an extra ordinary writ, narrow in scope and operation but one allowable when an inferior tribunal will exceed its jurisdiction and interfere with the proper tribunal. *English v. McCrary*, 348 So. 2d 293 (Fla. 1977). That is the case here. Because the challenged rules are directly related to the correction of an unconstitutional tax, any action by DOAH would interfere with the trial court's constitutional duty to find a remedy because of the unconstitutional law. It is one thing if the rules did not have a direct connection with the constitutionality of a statute, but here the rules do.

I. DOAH'S JURISDICTION INTERFERES WITH THE JURISDICTION OF THE CIRCUIT COURT

A. DOAH'S PROCEEDING COULD CONFLICT WITH THE CIRCUIT COURT'S REMEDIAL PROCEEDINGS

First, the exercise of jurisdiction by DOAH, under the peculiar circumstances of this case, interferes with the ongoing jurisdiction of the Tenth Judicial Circuit Court. Peace River has filed a Petition with the DOAH challenging the Department's Emergency Rules 20-15.001 - 20-15.003. These emergency rules were promulgated and passed by the Department for the sole purpose of complying with the August 8, 2002, Order of Judge Maloney of the Tenth Judicial Circuit Court, in and for Polk County, Florida, in the case of *Tampa Juice Service, Inc., et al. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated). The Order was for the Department assess back taxes against certain citrus producers. The challenged emergency rules directly respond to and address the circumstances ordered by Judge Maloney.

At the very heart of this entire matter is the constitutionality of a portion of Sec. 601.155, Fla. Stat. An administrative agency cannot determine the constitutionality of a statute. *Key Haven Associated Enterprises, Inc. v. Board of Trustees*, 427 So. 2d 153 (Fla. 1982). Only a court can rule that a tax statute is invalid. *Department of Revenue v. Nemeth*, 733 So. 2d 970 (Fla. 1999).

The emergency rules challenged in this case are so intertwined with the statutory constitutional issues presented in *Tampa Juice* that for DOAH to continue to exercise jurisdiction and attempt to make a decision on the emergency rules would interfere with the jurisdiction of the Tenth Judicial Circuit Court. The continuance could easily result in conflicting decisions and interfere with, or slow down, the process to reach a conclusion in the *Tampa Juice* case.

A review of the process Judge Maloney is presently following arises from the *McKesson* litigation 12 years ago. The Circuit Court is in is the same position the trial court was in in *McKesson* after the case was remanded back from the Florida Supreme Court. In *McKesson*, the Legislature had passed an excise tax on liquor. The Legislature, in trying to encourage local production, reduced the amount of tax paid by Florida producers.[6] In other words, the Florida processors were exempted from a portion of the excise tax. That left non-Florida producers paying the full rate of tax and the Florida producers paying the lower level of taxes.

The Florida Supreme Court affirmed the original trial court which had struck the exemption in question as being in violation of the Commerce Clause. The Florida Supreme Court also affirmed the trial court's "prospective only" remedy, denying McKesson the refund it sought. The United States Supreme Court reversed this decision on remedy. *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990)(*McKesson II*).

The United States Supreme Court stated that it was Florida's duty under the Due Process Clause to provide a "clear and certain remedy." *McKesson II*, 496 U.S., at 39. The Court went on to say that the State must ensure that the tax, as actually imposed on McKesson and its competitors during the period, does not deprive McKesson of tax monies in a manner that discriminates against interstate commerce. The Court observed that "[in order to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce." *McKesson II*, 496

[6] *See, Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 524 So. 2d 1000 (Fla. 1988)(*McKesson I*).

U.S., at 39, n. 27.

The United States Supreme Court noted several alternatives from which the State could choose to cure the impermissible discrimination. The Supreme Court did **not** hold that a refund **must** be paid, only that the discrimination be addressed and cured. In support of this position, the Supreme Court provided specific detailed options Florida could choose from to alleviate the discrimination suffered by McKesson. The State could:

> cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received. . . . . Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme.

McKesson II, 496 U.S., at 40. The Court stated that Florida retained the flexibility in responding and may reformulate and enforce the beverage tax, during the period it was contested, in any way that treats McKesson and its competitors in a manner consistent with the Commerce Clause. *Id.*

The Florida Supreme Court, on remand from the United States Supreme Court, reaffirmed the position that the State has the option of choosing the manner in which it will reformulate the alcoholic beverage tax during the contested period so that the resultant tax actually assessed during that period reflects a scheme which does not discriminate against interstate commerce and gave several specific directions as to the course this litigation was to follow once it had again reached the trial court. *McKesson III*, 574 So. 2d, at 116.

This case is no different. The Legislature enacted the "equalization" tax and included an exemption. The Circuit Court struck the exemption but not the tax. Therefore, under the *McKesson* rationale, the backward application of the full equalization tax to those who have not previously paid the tax is permissible, subject to any individual due process concerns. Upon review of the law, Judge Maloney agreed with the Department's position and issued an Order approving the Department's right to backwardly assess the equalization tax. *See*, Appendix 5, *Tampa Juice Service, Inc. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated), Order, dated August 8, 2002.

To show just how DOAH could interfere with Judge Maloney's jurisdiction, Invervenor [7/] Sun Orchard, in paragraph 14 of its Petition[8/] to DOAH, argues to DOAH that there is no express legislative authority for the back assessment of taxes. Not only has this question been resolved by *McKesson*, that very issue was raised by the plaintiffs in *Tampa Juice* and **rejected** by Judge Maloney in his August 8th Order. Thus, Sun Orchard is attempting to have DOAH issue an order contrary to Judge Maloney on the same issue and in the same case where those back assessed can appear to challenge their respective assessments. The rest of Sun Orchard's Petition, as applied to the *McKesson* back taxing authority, has already been addressed and answered in favor of the Department by Judge Maloney in *Tampa Juice*.

Further, all of the so-called issues raised by Peace River and Sun Orchard are the very types of issues the Supreme Court of Florida contemplated in *McKesson* when that Court approved the right of intervention to challenge back assessment. Judge Maloney has adopted that procedure in *Tampa Juice*. As stated in the assessment letter, dated October 2, 2002, to Sun Orchard, Sun Orchard has been informed of its absolute right to intervene in the *Tampa Juice* litigation and present

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[7/] In the letter the Department has waived all objections to intervention except for an untimely filing.

[8/] See Appendix 7.

any defense to payment of the tax.

The emergency rules were promulgated by the Department for the purpose of complying with the *McKesson* remedial actions, as approved in this case by Judge Maloney. As set out, the rules specifically address the *Tampa Juice* case, explain who the "favored persons" are, and the intent of the Department to assess those favored persons. Since these rules are directly and completely tied to the *Tampa Juice* litigation and Judge Maloney's order, any action of the part of DOAH interferes with the ability of Judge Maloney to fulfill his judicial obligation set out by the Supreme Court of Florida in the *McKesson* decision.

B. THE DEPARTMENT'S EMERGENCY RULES ARE *NOT* ADMINISTRATIVE RULES IN THE TRADITIONAL SENSE; THE EMERGENCY RULES ARE TIED SOLELY TO THE *TAMPA JUICE* LITIGATION; RULES ARE NOT EVEN NECESSARY

When the United States Supreme Court ruled in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), all the Supreme Court required of Florida was to correct the discriminatory tax and make the plaintiffs whole through one of three options. Neither the United States nor Florida Supreme Courts set out a specific procedure the State was to follow. Both Courts, however, made it very clear it was the State's, and only the State's, choice of the remedy. The courts were restricted to approving the remedy for any other constitutional problems. If none existed, the State's plan was to be approved.

In Florida, when a tax exemption is struck, the effect of the striking is as if the exemption from the tax never existed. The exemption is *void ab initio*. The Florida agency or department tasked by the Legislature with the responsibility of imposing, collecting and otherwise administering the tax has the power to assess the tax against all those subject to the tax. The power to assess lies in the legislation imposing the tax and ordering its collection. Consequently, when an exemption is voided, the persons who had taken advantage of the exemption are now subject to the full rate of taxation paid by everyone else subject to the tax. The agency or department responsible with the administration of the tax need no additional power to assess the tax against all those who took advantage of the voided exemption.

The purpose of the emergency rules was to provide notice, an opportunity to be heard and administrative procedures to pay the tax due and owing. Contrary to what Peace River and others argue, rules do not tax, statutes tax.[9] The assessments sent to Peace Rive and others is **NOT** based upon the emergency rules. The assessment is based upon the full force and effect of Sec. 601.155(1), Fla. Stat., as if the invalidated exemption in subsection (5) never existed. The Department merely seeks to enforce the statute as it was found after the various Court decisions

What this means is that there is no requirement whatsoever under the Supreme Court of Florida's decision in *McKesson* that requires the drafting and promulgation of any type of rules under the Florida Administrative Code. Because the exemption is now voided, the agency may merely fully assess those who claimed the exemption just as the agency did against all others subject to the tax. Statutes tax; rules do not. The basis for any agency to tax is the statute itself. No specific procedure is necessary for the respective agency to demand payment of the tax.

So it is here. The Department has long collected taxes against persons, like the plaintiffs in *Tampa Juice*, without need for any assessment or collection rule. The Legislature imposed the tax in Sec. 601.155, Fla. Stat. The Department did not impose the tax and had no power to do so. So when Judge Maloney struck the exemption,

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[9] *See e.g. Campus Communications v. Department of Revenue*, 473 So.2d 1290 (Fla. 1985); *Pioneer Oil Co. v. State Department of Revenue*, 401 So.2d 1319 (Fla. 1981); and *Department of Revenue v. Young American Builders*, 358 So.2d 1096 (Fla. 1st DCA 1978).

parties like Peace River who had taken advantage of the exemption are now subject to the same form of assessment and collection as the others, without need for any special rules.

The proposed emergency and regular rules were promulgated merely as a showing of public responsibility, telling the world which of the *McKesson* options were chosen and providing the affected parties, like Peace River, of their rights. The Department could have avoided any rules at all by merely sending a letter of assessment to Peace River and provide Peace River with the rights accorded to it in the *Tampa Juice* litigation, including the right to intervene in that case.

The rules in question are not your normal administrative rules. The sole reason for their promulgation is to allow the Department to freely implement, under the judicial guidance of Judge Maloney, the Department's chosen remedial procedure. The challenged emergency rules have no life outside of the *Tampa Juice* litigation and would never have been proposed but for the *Tampa Juice* litigation. Therefore, the rules are quite unique in nature and are tied inextricably to the *Tampa Juice* litigation. Barring DOAH to proceed with a hearing and allowing Judge Maloney to proceed uninterrupted will serve the ends of justice more expeditiously. The *McKesson* decision already provides for Peace River to have a say in the back assessment. Judge Maloney has already recognized this and has started that process in motion. If Peace River does not get a DOAH hearing on the rules, Peace River will have a full opportunity before Judge Maloney to both challenge the rules and to oppose the assessment against it. Peace River will have its full due process rights protected.

II. THE DIVISION DOES NOT HAVE JURISDICTION IN THIS MATTER DUE TO THE UNIQUE FACTS AND LAW GOVERNING THE CHALLENGED RULES

This Court can look to a decision of the Supreme Court of Florida for the answer to the issue posed by the Department. This case presents the exact same facts and circumstances present 11 years ago in the case of *Division of Alcoholic Beverages and Tobacco v. McKesson Corporation*, 574 So. 2d 114 (Fla. 1991). The only difference is that in this case the offending tax has not yet been reviewed by the appellate courts of this State. However, this case is in the present procedural posture **because** of the lessons learned from the *McKesson* case and the more orderly process of bringing to the Second District and, possibly, the Supreme Court of Florida, the appellate review of both the merits decision on the validity of Sec. 601.155, Fla. Stat., and the trial court's decision on the proposed remedial procedures to correct the judicially found tax discrimination based upon a finding of unconstitutionality.

In *McKesson*, the discriminatory tax on foreign alcohol had been struck and a "clear and ceratin remedy" ordered. This did not occur in *McKesson* at the trial stage because it was initially ruled that no remedy was necessary. The United States Supreme Court reversed that decision. *See McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Upon remand from the Supreme Court of Florida, the Division of Alcoholic Beverages and Tobacco ("DABT") promulgated emergency rules to accomplish the same exact ends as are present in this case - the pronouncement of a back assessment and the notice of rights to those liquor dealers as assessed. Again, those emergency rules were for the sole purpose of providing a remedy under the *McKesson* rulings. As Peace River has done here, some of those who were to be assessed by DABT sought an administrative hearing in DOAH to challenge DABT's emergency rules. DOAH refused to dismiss the cause and allow the issues to be presented to the Second Judicial Circuit Court, the court examining DABT's remedial proposal. When DOAH denied DABT's motion to dismiss, DABT sought a writ of prohibition against DOAH in the Supreme Court of Florida.

While the DOAH does normally have the jurisdiction to rule upon emergency rules, this case is unusual. Because of the unique factual and legal circumstances present in this case and their relationship with the proposed emergency rules, this case is controlled by the Florida Supreme Court's decision in *Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Ruff*, 592 So. 2d 668 (Fla. 1991), which had before it the identical legal issue.

Because *Ruff* is a short decision, it is set forth fully. In its *per curiam* decision, the Supreme Court of Florida stated:

> The Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, seeks to prohibit a Division of Administrative Hearings hearing officer from exercising jurisdiction over a petition for administrative determination of the validity of emergency rules. The rules in issue were promulgated by the Department of Business Regulation after the United States Supreme Court decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). The Department of Business Regulation asserts that the hearing officer is without jurisdiction because, on remand, only the circuit court has jurisdiction in this matter.
>
> This cause presents unique jurisdictional and legal issues because of its present posture. This posture is the result of the reversal, in part, of this Court's decision in *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla.1988), by the United States Supreme Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), and this Court's subsequent remand to the circuit court in *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 574 So.2d 114 (Fla.1991), for further proceedings consistent with decision of the United States Supreme Court. While we agree that the Department of Administrative Hearings has jurisdiction over emergency rules promulgated by the Department of Business Regulation, we find that, under the unique circumstances of this case, the constitutional issues are so entwined with the administrative rule issues that all the issues should be resolved in one judicial proceeding. In our remand decision, we stated:

> Because nonparties ... will be directly affected by the retroactive tax scheme proposed by the state, all affected by the proposed emergency rule must be given notice and an opportunity to intervene in this action. Therefore, on remand, the trial court not only must determine whether the state's proposal meets "the minimum federal requirements" outlined in the Supreme Court's opinion, it also must determine whether the proposal comports with federal and state protections afforded those against whom the proposed tax will be assessed.

Id. at 116. While we deny the petition for a writ of prohibition, we find that, at this stage of the proceeding, all of the issues can be resolved only by the circuit court. Accordingly, under our jurisdiction of this cause, as well as the supervisory and transfer authority contained in article V, section 2, of the Florida Constitution, we direct that all issues pertaining to this taxing scheme be heard by the circuit judge assigned to this cause on remand.

It is so ordered.

CONCLUSION

For the reasons stated above, the Department respectfully requests this Court to issue a Writ of Prohibition directing DOAH to dismiss the action below from the DOAH and transfer Peace River's cause of action to the Tenth Judicial Circuit Court as part of the *Tampa Juice Service, Inc., et al. v. Department of Citrus*, Case No. GCG-00-3718 (Consolidated), litigation before Judge Maloney.

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: the Honorable Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings, the DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and Ms. Kristen C. Gunter, Esquire, Macfarlane, Ferguson, 500 South Florida Avenue, Suite 240, Lakeland, Florida 33801, this 18th day of October, 2002.

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

I hereby certify that the Petitioner's Petition for Writ of Prohibition complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., in that this Petition uses Times New Roman 14-point font.

ERIC TAYLOR
Senior Assistant Attorney General

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TBD