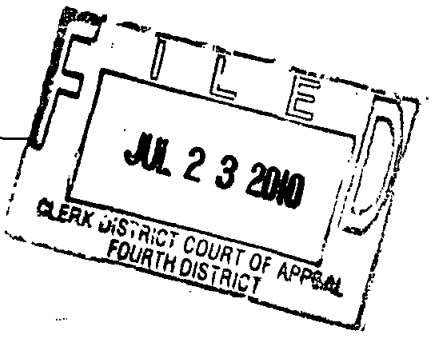
IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

Case No.: 4D10-456
L.T. Case No. 08-13474



STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellant,

v.

SEMINOLE TRIBE OF FLORIDA,

Appellee.

REPLY BRIEF OF STATE OF FLORIDA, DEPARTMENT OF REVENUE

On Appeal from a Final Summary and Declaratory Judgment of the Seventeenth Judicial Circuit, in and for Broward County, Florida

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I. The plain language of the statute controls and the imposition of Florida's motor fuel tax on transactions that occur off the reservation is valid.

Neither Supreme Court precedent nor federal statutory authority support Appellee's assertion that the Florida fuel tax statute's definition of use is invalid and inapplicable here. Appellee misses the mark by jumping to an Indian Commerce Clause preemption analysis; *before* such an analysis may be undertaken, the Court must determine whether the state is taxing an action that occurred on or off the reservation. Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 173 (2d Cir. 2005) ("And the Indian Commerce Clause's grant of authority to the federal government, and preemption of state authority, extends only to activities occurring in ... Indian lands within the territory of the United States.") (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973)). Instead, the Court must rely on the statute itself to determine where the taxable event occurs. *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 102-103 (2005) (relying on the statute's plain language and a fair interpretation of how it is written and applied to establish the taxable event).

It is the most well-settled of all statutory interpretation principles that the plain language of a statute determines its meaning. Saleeby v. Rocky

Elston Constr., Inc., 3 So. 3d 1078, 1082 (Fla. 2009). Indeed, if a "statute is clear and unambiguous, 'there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.' " Id. (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). No reason grounded in fact or law supports the Appellee's argument that this Court should ignore the plain language of the statute in determining where the taxable event occurs under section 206.41, Florida Statutes. Use is defined, plainly and without ambiguity, in section 206.01(24) as "the placing of motor or diesel fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion thereof."[1] The only material fact relevant in this case and under the statute is where the fuel was placed into the vehicle, and it is undisputed that this occurred off the reservation. [AB 2][2] The trial court erred in concluding that the definition is invalid and inapplicable here. [R 412]

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[1] In addition to the statute's plain definition of use, the record evidence shows that the tax has been imposed off the reservation consistent with the Department's interpretation for thirty years. [R 243, 244]; *see* Wagnon, 546 U.S. at 103 (noting that the Kansas Department of Revenue's interpretation of the statute was consistent with its plain language).

[2] Record citations are [R #] where # is the page number. The answer brief is cited as [AB #] and the initial brief is cited as [IB #] where # is the page number.

The key critical factor in all of the Court's Indian tax cases is where the legal incidence of the tax falls, and each case turns to the language of the statute to make that determination. Dispositive language in the statute is determinative, and, absent that, courts are to fairly interpret a tax statute as both written and applied. Wagnon, 546 U.S. at 102-03 ("We have suggested that such 'dispositive language' from the state legislature is determinative of who bears the legal incidence of a state excise tax." (citation omitted)); *see also* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462 (1995) (the Court looked to the law's statutory definitions and plain language to determine when a tax was imposed, relying on the import of the language and the structure of the statute).

The Supreme Court does not look beyond the plain language of the statute if such language is clear. For instance, in Wagnon, it refused to determine that because distributors passed along taxes to the Potawatomi Nation, the incidence of the tax was on the tribe. 546 U.S. at 113 (rejecting argument that "any off-reservation tax imposed on the manufacture or sale of any good imported by the Nation or one of its members would be subject to interest balancing"). Indeed, Wagnon is the key to the analysis at hand, for though the Potawatomi Tribe would ultimately *consume* the taxed fuel on the reservation, the Court still concluded that the tax was valid because it

was imposed on a transaction occurring off the reservation (albeit to a non-Indian distributor). Id.

Although Appellee states that Wagnon involved a sales tax, at no point in Wagnon is the tax described as either a sales or use tax. Instead, it was a state fuel tax that applied to the use or sale of fuel. Kan. Stat. Ann. § 79.3408(a) (2003 Cum. Supp.).[3] And the principles on which the Court relied in that case were not limited to any particular tax label or title. Rather, the idea that conduct occurring off the reservation is subject to state law is a longstanding principle entirely applicable to matters from sales taxes to excise taxes to criminal activity. *See* Mescalero, 411 U.S. at 148 ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

Under Appellee's theory of the taxable event, the state would refund the motor fuel tax if, despite purchase, fuel was not actually consumed. Because the driver never "used" the fuel, the tax should not have to be paid. Or a refund would issue if the car was driven and the fuel consumed in another state. Or, if the Appellee's interpretation prevailed, refunds for this

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[3] Similarly, the statute challenged here is entitled "State taxes imposed on motor fuel," § 206.41, Fla. Stat. And "fuel tax" is defined as "any tax imposed by the laws of the state upon or measured by the sale, use, distribution, or consumption of motor fuel." § 206.01(7), Fla. Stat.

tax on fuel purchased on the reservation should be reduced by the amount of fuel consumed off reservation lands. [R 245] Such circumstances would be antithetical to the statute's language and application. The incidence of the tax arises because of the transaction of purchasing fuel; at that moment, the fuel is used. *See* Wagnon, 546 U.S. at 108-09 (tribe's theory that incidence of tax was actually on the purchaser of fuel was irreconcilable with the fact that the distributor would pay for fuel that was never subsequently sold to a purchaser). Therefore, the tax is properly imposed against the Appellee when a transaction occurs off of the reservation.

The Appellee rests the majority of its argument on a distinction it alone draws as to the application of the Supreme Court's Indian tax jurisprudence on excise tax versus sales tax statutes. Such a bright line distinction is not present in the cases relied on by the Appellee, or in any of the Supreme Court jurisprudence. Critically, the distinction is also not relevant in Florida caselaw.[4] *See* Campus Commc'ns, Inc. v. Dep't of Revenue, State of Fla., 473 So. 2d 1290, 1293 (Fla. 1985) ("A sales tax is an excise tax.") (citing § 212.05, Fla. Stat.); *see also* Delta Air Lines, Inc. v. Dep't of Revenue, 455 So. 2d 317, 323-24 (Fla. 1984) (holding that Florida

[4] This assertion is consistent with the Department's response to the request for admissions [R 172]; the Department admitted that the fuel tax is an excise tax but did not, as the Appellee suggests [AB 7], otherwise draw a distinction between it and a sales tax.

could impose an "excise tax on the *purchase* of motor fuel" by airlines). Indeed, every case the Appellee cites fails to mention any distinction between sales and excise taxes critical to resolution of the issue at hand.

In Colville, for instance, the Court described the tax as an "excise tax" and then cited the state statutory provision that the tax is levied on the "*sale*, use, consumption, handling, possession, or distribution" of cigarettes. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 141 (1980) (citing Wash. Rev. Code § 82.24.020 (1976)) (emphasis added). In fact, reliance on the labeling of a tax to draw a distinction between its permissibility, rather than determining the actual incidence of the tax, was an argument the Supreme Court found unpersuasive in Colville. The Court rejected the state's attempt to distinguish between its case and Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), on the basis that one case involved an excise tax and the other a personal property tax. Colville, 447 U.S. at 163 (rejecting the state's argument that the different labeling of the two taxes "mandate[d] a different result"). And rather than looking to the category or label of the tax at issue, the Court explicitly adopted the federal district court's determination that the legal incidence of

the tax is determined by examination of state authorities, accepting the state's contention as to the meaning of the statute. Id. at 142 & 142 n.9.

Indeed, the plain meaning of the statute comports with the practical implications of the use of fuel.[5] The nature of fuel as a commodity under this statute is that once it is sold, it is deemed used. *See* Wagnon, 546 U.S. at 109 ("As [the Potawatomi Nation's contrary] interpretation cannot be reconciled with the manner in which the Kansas motor fuel tax is actually applied, it must be rejected."). Neither Moe nor Colville involved a commodity that could appropriately be cast as being used upon purchase.[6]

Appellee asserts that because section 206.41(4)(c)(1), Florida Statutes, permits the refunding of the tax if the fuel is "used" for agricultural purposes, the statutory definition of use is inconsistent with this portion of the statute. But Wagnon considered a similar argument and found it

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[5] A similar plain meaning for use of fuel was accepted by the Supreme Court in another tax challenge: "A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce." Edelman v. Boeing Air Transp., Inc., 289 U.S. 249, 252 (1933).

[6] Colville dealt with state taxes on cigarette and tobacco products sold on reservation to non-Indians. 447 U.S. at 142. Moe dealt with a personal property tax on reservation property, a vendor license fee applied to cigarette sales conducted on the reservation, and a cigarette sales tax as applied to on-reservation sales to tribe members by tribe members. 425 U.S. at 465.

unavailing. The Court explained, in response to the taxpayers' argument regarding a tax deduction and its effect on the Court's interpretation of the statute:

> [T]he availability of tax deductions does not change the nature of the taxable event, here the distributor's receipt of the fuel. By analogy, an individual federal income taxpayer may reduce his tax liability by paying home mortgage interest. But that entitlement does not render the taxable event anything other than the receipt of income by the taxpayer.

Wagnon, 546 U.S. at 109. Similarly, the provision for refund of the motor fuel tax under a specific exemption not at issue here does not render the taxable event anything other than the placing of fuel in a vehicle's tank. Additionally, the statute's characterization of the pre-collection of the tax as an "administrative convenience" does not call into question the statute's definition of use — collection occurs prior to even the placing of the fuel in the tank. § 206.41(4)(a), Fla. Stat. This provision reiterates that the legal incidence of the tax is on the consumer. Id.

In short, the answer brief and final summary judgment provide no caselaw citation or other support for their conclusory assertion that "the application of the Indian Commerce Clause depends on where the fuel was *actually* used, not where it was deemed to be used by a state statute." [AB 9] The Indian Commerce Clause does not "of its own force, automatically bar[] all state taxation of matters significantly touching the political and economic

interests of the Tribes." Colville, 447 U.S. at 157. Because Appellee fails to point to a particular provision of the Clause applicable here (in addition to its failure to first demonstrate that the conduct taxed occurs on the reservation), its argument fails.

The Appellee's citation to other Supreme Court caselaw is similarly unhelpful to its argument. The Court has made clear that the balancing test from White Mountain Apache Tribe v. Bracker, 448 U.S. 135 (1980), applies only to non-Indian conduct occurring on the reservation, which is not at all what occurred herein. Wagnon, 546 U.S. at 99 ("But the Bracker interest-balancing test applies only where 'a State asserts authority over the conduct of *non-Indians* engaging in activity *on the reservation*.' " (emphasis added) (quoting Bracker, 448 U.S. at 144)). The Court has "taken an altogether different course ... when a State asserts its taxing authority outside of Indian country." Id. at 112. Several compelling, additional distinctions between this case and Bracker are relevant. In Bracker, the parties did not dispute that the fuel was used, within the meaning of Arizona's statute, on the reservation, and that therefore the state services the taxes supported were not applicable to the roads travelled. 448 U.S. at 148.[7]

[7] An additional factual distinction between Bracker and this case that is worth noting was that the timber company claiming an exemption "kept records concerning the amount of fuel used while traveling on state

Also, the Court ultimately concluded that the comprehensive regulation by the federal government of the particular industry — timber harvesting — preempted the state tax on fuel used on the reservation. Id. at 146. No assertion has been made by the Appellee that the fuel transactions here were a part of any industry over which the federal government has exercised preemptive regulation.

Nor does Appellee explain why the purpose it asserts is behind Florida's statutory definition of use (ease of compliance with Interstate Commerce Clause) would mean that the plain definition should not apply in this case. While Cotton Petroleum Corp. v. New Mexico does draw a distinction between the Interstate Commerce Clause and the Indian Commerce Clause, the distinction it highlights does not control the issue in this case. 490 U.S. 163, 191-92 (1989). The Court provided there that the extensive jurisprudence on interstate commerce is premised on a structural understanding of the unique role *states* play in commerce and, therefore, analyses from these cases are not readily applicable to cases involving the Indian Commerce Clause. Id. ("the Commerce Clause draws a clear distinction between 'States' and 'Indian Tribes.' "); *see also* Bracker, 448

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highways *and does not seek a refund for fuel taxes* or motor carrier license taxes *attributable to state highway use.*" White Mountain Apache Tribe v. Bracker, 585 P.2d 891, 894 n.3 (Ariz. Ct. App. 1978).

U.S. at 143 ("Tribal reservations are not States, and the differences in form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other."). The Department is not advocating that any principles of interstate commerce be made applicable in this case, nor that the Appellee be treated as a state. Instead, the Department has always asserted that the statute and its plain language ought to be applied as written, an analysis followed by all Indian Commerce Clause cases.

This case boils down to the question of whether the taxable event occurred on or off the reservation. With no compelling reason to deviate from the plain language of the statute or Supreme Court jurisprudence, this Court must conclude that the taxable event under the plain language of the statute occurs when fuel is placed in the vehicle. If that occurs off the reservation, then the use of the fuel also occurs off the reservation, regardless of where the vehicle is then driven, and is subject to the taxes at issue here.[8] With no basis in the Indian Commerce Clause supporting

[8] Additionally, as noted in the initial brief, Appellee presented "no evidence to show where and when the fuel it purchased off the reservation was consumed." [IB 12] The use of the fuel in official vehicles alone cannot establish that the fuel was consumed on the reservation; even the Appellee provided only that "some" fuel was consumed on the reservation. [AB 2]

preemption of Florida's statutory definition, the judgment of the trial court holding the statute invalid must be reversed.

II. Raker's affidavit makes assertions of which Raker had no knowledge, personal or imputed, and therefore the trial court erred in relying on this affidavit in granting final summary judgment to the Appellee.

The answer brief is unable to respond to the Department's second argument for reversal of the trial court judgment: the record in this case reveals that the Appellee did not keep records necessary to answer (and still cannot answer) the questions of who, what, where, and why regarding the motor fuel it purchased off its reservation and trust lands. The trial court committed harmful error when it relied on James Raker's affidavit, which was based on Exhibit 12 and not within his personal knowledge, to grant summary judgment. Brooks v. State, 918 So. 2d 181, 194 (Fla. 2005) (holding that admission of testimony not based on personal knowledge is not proper and subjects such a ruling to a harmless error analysis).

The Appellee instead argues that the knowledge necessary to make the statements in his affidavit may be imputed to Raker, as Chief Financial Officer for the Seminole Tribe. As revealed by his deposition, however, the information in Raker's affidavit as to where fuel was consumed does not exist and so could not have been based on either personal or imputed knowledge. Raker's deposition indicates that the Appellee relied exclusively

upon deposition exhibit 12 [R 323; page 57] for the information about the vehicles that filled up off the reservation. But Raker later indicated that neither he nor anyone else had information about "where those vehicles were, in fact, used." [R 339; page 118] All that was compiled is "the data for the fuel that has been purchased from various sources [and] the data as to the number of gallons ... used." [R 314; page 19] The statements in his deposition directly conflict with the assertion in his affidavit that the fuel was used "by the Tribe in transporting persons, cargo and equipment on and among its reservations and trust lands." [R 166] Such conflict between Raker's affidavit and deposition should not have been the basis for the trial court's entry of summary judgment. *See* M.S. v. Dep't of Children & Families, 6 So. 3d 102, 105 (Fla. 4th DCA 2009) (reversing trial court judgment because it relied heavily on improperly admitted evidence).[9]

In short, the only information Raker had was that the fuel was purchased and put into tribal vehicles off the reservation, the material and

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[9] Alternatively, the Court also should not impute any knowledge to Raker because the Appellee never indicates whether the matter of where the vehicles are driven after obtaining fuel is within Raker's area of responsibility, a requirement necessary for imputing personal knowledge to him. *See* J.R. Carter v. Cessna Fin. Corp., 498 So. 2d 1319, 1321 (Fla. 4th DCA 1987) ("A factual basis for the affiant's knowledge need not be set out where the affiant is shown to be in a position *where he would necessarily possess the knowledge*." (emphasis added)).

undisputed fact upon which the Department's motion for final summary judgment was based.

The trial court committed harmful error by granting the Appellee's motion for final summary judgment solely on the evidence provided in the Raker affidavit. This affidavit was not based on personal or properly imputed knowledge and therefore should have been stricken.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court reverse the trial court's final judgment that the fuel tax was invalid and remand this case to the trial court with instructions to enter final summary judgment as a matter of law for the Department.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief is prepared in Times New Roman 14-point font consistent with Florida Rule of Appellate Procedure 9.210, and that a true copy of the foregoing has been furnished this 22nd day of July, 2010, by U.S. Mail to: John H. Pelzer, Esquire, Matthew S. Nelles, Esquire and Glen Stankee, Esquire, Ruden, McClosky, Smith, Schuster & Russell, P.A., 200 East Broward Boulevard, 15th Floor, Post Office Box 1900, Fort Lauderdale, Florida 33301.

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