**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 12-CV-62140-Scola/Snow**

**SEMINOLE TRIBE OF FLORIDA**,
a Federally recognized Indian Tribe,

Plaintiff,

v.

**STATE OF FLORIDA, DEPARTMENT OF REVENUE, and MARSHALL STRANBURG,**
as Interim Executive Director and
Deputy Executive Director,

Defendants.
_____/

**DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW**

Marshall Stranburg, as Executive Director of the Florida Department of Revenue ("Executive Director"), acting in his official capacity,[1] files this Motion for Final Summary Judgment and Incorporated Memorandum of Law pursuant to Federal Rules of Civil Procedure Rule 56 and Southern District of Florida Local Rule 56.1. The Department's Statement of Undisputed Material Facts is filed concurrently herewith.

## MEMORANDUM OF LAW

### I. Summary Judgment Standard

Pursuant to Rule 56 of the Federal Rules of Procedure, a court is to enter summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[1] Mr. Stranburg was named permanent Executive Director of the Florida Department of Revenue on April 23, 2013. The State of Florida, Department of Revenue, was dismissed as a defendant in the Order Granting in Part, Denying in Part, Defendants' Motion to Dismiss. Dkt. 46, at 3.

## II. Introduction

This case involves a challenge by the Plaintiff of two taxes imposed on non-Indian taxpayers related to transactions with the Plaintiff. The first tax is a tax on the privilege of engaging in the business of renting or leasing commercial property ("rental tax"). The second tax is imposed on utility companies based on gross receipts from utility services delivered to a retail consumer in this state ("gross receipts tax"). In both instances, the statutes either explicitly or by fair implication place the legal incidence of the taxes on non-Indian taxpayers.

When determining whether a state tax may be imposed on transactions related to Indian tribes or tribal members, the initial and often dispositive questions are (1) who bears the legal incidence of the tax, and (2) whether the transaction giving rise to the tax liability occurred within or outside of the Indian reservation. *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 101 (2005). States are generally barred "from placing the legal incidence of an excise tax '*on a tribe or on tribal members* for sales made *inside Indian country*' without congressional authorization." *Id.* at 101-02 (citing *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995)). If the transaction giving rise to the tax liability occurred outside of the reservation, however, states may impose non-discriminatory taxes applicable to all citizens of the State, even if the legal incidence is imposed on the tribe or tribal members,. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). When the legal incidence of a state tax is imposed on private parties doing business on the reservation, the tax may be imposed if it passes the interest-balancing test set forth in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980).

**III. The Rental Tax**

Florida imposes a sales tax on all tenants or persons renting or leasing commercial property. Fla. Stat. § 212.031 (2013); *Florida Revenue Comm'n v. Maas Bros., Inc.*, 226 So.2d 849 (Fla. 1st DCA 1969). The plain language of section 212.031 requires the tenant to pay the tax. *Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327, 1329 (Fla. 1989). The tenant is personally liable for the tax, and any unpaid amount of the tax constitutes a lien on the property of the tenant. Fla. Stat. § 212.031(4) (2013). In the Order Granting in Part, Denying in Part, Defendants' Motion to Dismiss (ECF No. 46, p. 4.), this Court concluded that "there is no legal dispute that the legal incidence of the Rental Tax is borne by the tenants" and the Plaintiff may not challenge the tax as a direct tax on Plaintiff. The legal incidence of the rental tax is not imposed on the tribe or tribal members, and is not categorically barred by federal law.

Plaintiff operates its Seminole Hard Rock Hotel & Casino ("Casino") on its Hollywood and Tampa reservations. (Compl. ¶ 10, ECF No. 1.) Plaintiff entered into 25-year leases with Ark Hollywood, LLC, and Ark Tampa, LLC (collectively "Ark"), non-Indian lessees, to operate food courts at the Casinos (collectively "Leases"). The Leases were approved by the Bureau of Indian Affairs (BIA) on August 4, 2005. (Compl. ¶¶ 12-13, Exhibits A and B of Compl., ECF No. 1.) Ark was audited for the period July 1, 2005, through June 30, 2008, and was assessed additional sales and use tax on its rental payments to Plaintiff under section 212.031, Florida Statutes. (Compl. ¶ 18, ECF No. 1.) Plaintiff challenges the rental tax imposed on Ark. It claims that the rental tax is prohibited by 25 U.S.C. § 465 and 25 C.F.R. Part 162. (Compl. ¶¶ 29-31, ECF No. 1.) However, the rental tax is not a tax on Tribal land; rather it is a privilege tax imposed on non-Indian tenants for the use of commercial property, and is not prohibited by either provision.

25 U.S.C. § 465 was enacted as part of the Indian Reorganization Act ("IRA") of 1934, 25 U.S.C.A. § 461 et. seq. Section 465 gives the Secretary of Interior the power to acquire land for Indians. Lands or rights acquired pursuant to the IRA are titled to the United States in trust for the Indian tribe or individual Indian, and "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 465. The Supreme Court determined that § 465 only provides an exemption from tax on the property itself, but neither the face of § 465 nor the legislative history of § 465 provides a tax exemption on income derived from the use of the property. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973).

Only Congress can grant tax exemptions and courts will not imply a tax exemption because the income is derived from land that is exempt from tax. *Id.* at 156-57. In *Mescalero*, the Court held that "the exemption in s 465 does not encompass or bar the collection of New Mexico's nondiscriminatory gross receipts tax and that the Tribe's ski resort is subject to that tax." *Id.* at 158. Similarly, in *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949), the Court held that although Indian lands are exempt from the tax, the lessees of Indian landsare subject to state taxation. The rental tax at issue is a transactional tax on the privilege of renting the commercial property, not a tax on the land or improvements on the land. Therefore, the tax is not prohibited by 25 U.S.C. § 465.

A state may impose a nondiscriminatory tax on private parties doing business with an Indian tribe unless Congress has granted an exemption from to the tax. Congress did not grant such an exemption for lessees of Indian land under 25 U.S.C. § 465 and the lessees here are not exempt from paying the rental tax at issue.

## IV. The Newly Adopted Federal Regulation Does Not Prohibit the Rental Tax

Plaintiff asserts that Federal Regulations, 25 C.F.R. Part 162, adopted by the Department of the Interior, Bureau of Indian Affairs ("BIA"), effective January 4, 2013, prohibit the rental tax. (ECF No. 35, pp. 3-6.)[2] 25 C.F.R. Part 162 provides the procedure to obtain BIA approval of leases pursuant to the Indian Long-Term Leasing Act, 25 U.S.C. § 415. The new federal regulations also added section 162.017, which purports to prohibit any State or political subdivision of a State from imposing any fee, tax, assessment, levy, or other charges on (a) permanent improvements on the leased land, without regard to ownership of those improvements; (b) activities under a lease conducted on the leased premises; and (c) leasehold or possessory interests.

The Indian Long-Term Leasing Act, 25 U.S.C. § 415, which forms the basis for these rules, does not preclude state taxation, but simply permits the leasing of Indian lands for a term not to exceed twenty-five years with the Secretary's approval. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989), the Supreme Court held that the Indian Mineral Leasing Act of 1938, a statute similar to § 415, does not expressly permit or expressly preclude state taxation, but simply provides that unalloted Indian lands "may, with the approval of the Secretary of the Interior, be leased for mining purposes…." *Id.*, citing 25 U.S.C. § 396a. The Court concluded "that federal law, even when given the most generous construction, does not pre-empt New Mexico's oil and gas severance taxes." *Id.* at 186. Similarly, the Indian Long-Term Leasing Act does not expressly preclude state taxation of non-Indian tenants of Indian

[2] Plaintiff's Motion for Final Summary Judgment and Incorporated Memorandum of Law, ECF No. 35, was denied by Order Denying Plaintiff's Summary-Judgment Motion without Prejudice and Authorizing Defendant to Depose Suresh Geer, ECF No. 49, on October 2, 2013. However, the motion laid out Plaintiff's legal arguments in this case, and this Motion for Final Summary Judgment refers to Plaintiff's previous motion for summary judgment in anticipation of its legal arguments.

land. It simply permits the leasing of Indian lands with the Secretary's approval. The Act, therefore, does not provide an exemption from the rental tax at issue, and BIA does not have the power to create such an exemption. Only Congress has that power.

**A. The New Federal Regulations Do Not Apply to the Leases at Issue**

Even if the BIA could create tax exemptions, 25 C.F.R. § 162.017, by its own terms, does not apply to the Leases approved by the BIA on May 2, 2005. 25 C.F.R. § 162.008(a) provides that provisions of the lease document govern where the lease document conflicts with Part 162, if the lease was approved by BIA before January 4, 2013. Section 6.3 of the subject Leases provide that "***Tenant shall pay***, prior to the time the same become delinquent, to the applicable Federal, tribal and/or Florida governmental authority, ***any and all sales, excise, property and other taxes levied, imposed or assessed with respect to (i) the occupancy by Tenant of space on Reservation Land….***" (Exhibits A and B of Compliant, § 6.3.) (Emphasis added.) It is undisputed that the Leases, including the requirement that Ark pay the rental tax, were approved before January 4, 2013. Thus, by its own explicit terms, § 162.017 does not apply to the rental tax imposed by section 212.031, Florida Statutes.

**B. The Rental Tax is Not a Tax on Leasehold or Possessory Interest**

Plaintiff claims 25 C.F.R. § 162.017(c), prohibits the rental tax because it is a tax on the leasehold and possessory interest of the non-Indian tenants. (ECF No. 35, pp. 3-6.) The Florida rental tax is an excise tax on the privilege of renting or leasing real property. *Gaulden v. Kirk*, 47 So.2d 567, 574 (Fla. 1950)(citing 51 Am.Jur. 62). It is ***not*** a tax on leasehold or possessory interests. The tax is based on the consideration paid by the tenant for the use of the real property, not the value of the tenant's leasehold or possessory interest. It is commonplace to distinguish a

tax for the beneficial use of property from a tax on the property itself.[3] *U.S. v. City of Detroit*, 355 U.S. 466, 476 (1958) (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)). 25 C.F.R. § 162.017(c) does not prohibit the rental tax imposed by section 212.031, Florida Statutes, because the rental tax is a transactional tax on the privilege of renting commercial space, not a tax on the tenant's leasehold or possessory interest.

The prohibition of tax under section 162.017 is subject to applicable Federal law, including federal court decisions. Pursuant to Federal court decisions, a state may impose a leasehold or possessory interest tax on non-Indian lessees of Indian land; hence, even if the rental tax can be considered a tax on the leasehold or possessory interest of the non-Indian tenants, the tax is permissible.

In *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971), *cert. den.*, 405 U.S. 933 (1972), the court held that California may impose a tax on the possessory interests of non-Indian lessees unless it finds "that the legislation dealing with Indians and Indian lands demonstrates a congressional purpose to forbid the imposition of it." *Id.* at 1186. After reviewing legislation dealing with Indians and Indian lands, the court concluded that nothing in the statutes expressly forbade a tax upon the use of property, and that the statutes did not exempt private lessees of Indian land from a leasehold or possessory interest tax. *Id.* Likewise, in *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1967), cert. den. 430 U.S. 983 (1977), the 9th Circuit held that California may impose a tax on the non-Indian tenant's possessory interest. The court found that even where the tax is based on the value of the leasehold, it does not directly encumber the Tribe's property, and that any indirect

[3] Florida does impose a tax on a tenant's leasehold interest when property owned by a governmental entity is used by a private party for other than a public purpose. Fla. Stat. § 196.199. That Florida tax is not at issue in this case.

burden placed on the lessor's interest is not sufficient to constitute an encumbrance of an "interest in land or other tribal asset." Although a state or local government may not assess a tax on land or improvements covered by § 465, the California tax on possessory interests is not barred by § 465 because it is not a tax on the land. *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, FN 7 (9th Cir. 2013).

Although section 212.031, Florida Statutes, does not impose a tax on the leasehold or possessory interest of the non-Indian tenant, *Agua Caliente* and *Fort Mojave* support the proposition that such a tax can properly be imposed on the tenants. Like the California possessory interest tax, the tax at issue is imposed on the private tenants leasing property on Indian reservation for the beneficial use of the property, and the lessee remains fully liable for the payment of the tax. The owner and the property are not burdened by any unpaid amount of the tax. In accordance with *Agua Caliente* and *Fort Mojave*, the state is not prohibited from imposing the rental tax on the non-Indian tenants.

As discussed above, the U.S. Supreme Court and federal courts have held that 25 U.S.C. § 465 does not exempt tax on income derived from Indian land, and a state may impose a gross receipts tax on income derived from the use of the land, a severance tax on mineral leases, and tax on the leasehold or possessory interest of the non-Indian lessee. Pursuant to Supreme Court and federal court holdings, Florida may impose a nondiscriminatory tax on the non-Indian lessee for the privilege of using real property in Florida.

The Florida commercial rentals tax is neither a tax on the "lands and rights" exempt by § 465, nor is it a tax on the lessee's leasehold or possessory interest in the property; rather, the tax is imposed on the privilege of renting real property. *Zero Food Storage Div. of American Consumer Ind., Inc. v. Department of Revenue*, 330 So.2d 765, 767 (Fla. 1st DCA 1976).

Florida's rental tax is a sales tax on the lessee's consideration paid for the use of real property, and is not exempt under § 465 or section 162.017(c). The Supreme Court has consistently refuted the "proposition that restricted Indian lands and the proceeds from them were-as a matter of constitutional law-automatically exempt from state taxation." *Mescalero,* 411 U.S. at 150 (*citing Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943); and *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949)).

Plaintiff claims that the "final regulation[s] expand upon the prohibition of State taxation of Indian land that is provided in 25 U.S.C. § 465." (ECF No. 18, FN 13.) As discussed above, neither section 465 nor section 415 provides a tax exemption of state taxes to non-Indian tenants. Only Congress has the "plenary power to legislate in the field of Indian affairs" pursuant to the Indian Commerce Clause,[4] and the Bureau of Indian Affairs, an administrative agency, does not have the power to expand or create prohibition of state taxes, fees, or other charges imposed on non-Indian tenants.

**E. *Bracker* Interest Balancing Test**

Since no statute or rule prohibits the imposition of this tax, the *Bracker* balancing test provides the proper analysis. In this case, however, the Secretary already conducted the *Bracker* balancing test and determined that the state taxes imposed on Ark are permissible, and that the Leases are in the best interest of Plaintiff. [Exhibit A and B of the Complaint, unnumbered page 39, ECF No. 1.] The Secretary considers all the provisions of the lease between an Indian Tribe and a non-Indian lessee to ensure the lease is in the best interest of the tribe when the Secretary approves a lease under the authority of 25 U.S.C. § 415, and the accompanying federal

[4] *Cotton Petroleum*, 490 U.S. at 192.

regulations in 25 C.F.R. Part 162. *Red Mountain Machinery Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1410 (9th Cir. 1994), *cert denied*, 513 U.S. 1044 (1994) (declining to engage in a "balancing test" under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), "because the Secretary, pursuant to his statutory authority, has already engaged in such an analysis and has authorized the application of the mechanics' lien law under the terms of the lease between Grace and the Tribe."). The Leases approved by the Secretary, and determined to be in the best interest of Plaintiff, require Ark, the non-Indian tenant, to pay any state tax related to "***the occupancy by Tenant of space on Reservation Land….***" (Exhibits A and B of Compliant, § 6.3.)(Emphasis supplied.)

Even if the Court independently applies the *Bracker* balancing test to the rental tax, the state may impose the tax because the significant state interests greatly outweigh any Tribal or Federal interest. Plaintiff asserts that the tax imposed on its tenants may result in less rental payments to Plaintiff, and makes it more difficult for Plaintiff to lease the property. As to the first assertion, the Leases require Ark to pay an "annual minimum rent" and an "annual percentage rent" to Plaintiff as rent, and does not allow any reduction of rent paid to Plaintiff by the amount of taxes Ark was required to pay pursuant to section 6.3 of the Leases. (Exhibits A and B of Complaint, p. 7.) The rent payable to Plaintiff is not decreased by the rental tax imposed and paid by Ark

As to the second assertion, the *Bracker* balancing test applies. The test "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interest at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). In *Cotton Petroleum*, the Court held that taxes imposed on non-Indian tenants in a mineral lease on Indian land were not pre-

empted by "federal laws and policies which protect tribal self-government and strengthen impoverished reservation economies." *Cotton Petroleum*, 490 U.S. at 177. In *Cotton Petroleum*, the lessee argued that paying severance taxes to both the Tribe and the State put it at a competitive disadvantage. The Court found that Congress intended to provide Indian tribes with revenue, but found "no evidence for the further supposition that Congress intended to remove all barriers to profit maximization." *Id.* at 180. *See also, Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155-156 (1980) ("We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.")

In this case, the Tribe argues that payment of the rental tax makes renting property on the reservation less attractive to non-Indian lessees. Exemption from the tax would do nothing more than give the Tribe a competitive advantage – something the Supreme Court has consistently rejected as a basis for preempting a tax. Even if this could be considered, the tribe did not perform any economic studies or have any evidence supporting its assertion. (Defendant's Statement of Fact, ¶¶ 14-15.) Such self-serving and conclusory assertions are insufficient to evidence that the rental tax on Ark burdens the Plaintiff, and does not preempt the tax.

In contrast to this effectively non-existent burden, the State provides important governmental services to Plaintiff, its members, and its guests with the tax collected from the non-Indian tenants. The tax imposed under section 212.031, Florida Statutes, goes into the general revenue fund used to maintain state roads and highways used by Plaintiff's members and patrons. Plaintiff does not have a court system, and civil and criminal matters are referred to the proper state or federal authorities. If someone is arrested on the reservation, the person is taken

to the county jail to be processed, and such cases are prosecuted by the State Attorney. (*Id.* ¶ 7.) Plaintiff's members and patrons also utilize hospitals and fire departments funded by the State. (*Id.* ¶ 9.) The tax also funds state universities, colleges, and vocational schools available to Plaintiff's members. (*Id.* ¶¶ 33-37.) The State has significant interest in collecting the rental tax from the non-Indian tenants, and the tax is permissible under the *Bracker* balancing test.

## IV. GROSS RECEIPTS TAX ON UTILITIES SERVICES

### A. The Gross Receipts Tax is Imposed on the Utility Company

Section 203.01, Florida Statutes imposes a tax on the "gross receipts from utility services that are delivered to a retail consumer in this state." Fla. Stat. § 203.01(1)(a)1. In Indian tax cases, the initial and often dispositive question is who bears the legal incidence of a tax. *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). If the legal incidence of the state tax is on a tribe or tribal member for sales made inside Indian country, then the state may not impose the tax without clear congressional authorization. *Id.* Plaintiff claims that the legal incidence of the tax is on Plaintiff because it pays the amount as a component part of its utility bill, and that the state is prohibited from imposing the tax on Plaintiff. (ECF No. 35, p. 9.)

The legal incidence of the tax is dictated by the state statute. *Chickasaw*, 515 U.S. at 461. The statute and related rules are clear that the incidence of the tax falls on the utility companies. It is "imposed upon every person for the privilege of conducting a utility or communications services business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill." Fla. Stat. § 203.01(5) (2013). "[T]he gross receipts tax is imposed on the privilege of doing business, and it is an item of cost to the distribution company." Rule 12B-6.0015(3)(a), Florida

Administrative Code (F.A.C.).[5] The statute and the rule clearly place the legal incidence of the tax on the utility company, by holding it "fully and completely liable for the tax" and designating it as an item of cost to the utility company.

The implementation of the tax also shows that it is imposed on the utility company, not its retail customers. Every retail consumer, including a governmental unit, has this amount included in its utility bill. Fla. Stat. § 203.01(4) (2013). Even the State of Florida, which would otherwise be tax exempt, is not entitled to a reduction in its utility bills in the amount of the tax. The fact that no retail consumers, even governmental units, may claim a tax exemption shows that the tax is imposed on the utility company, and not the retail consumers.

Plaintiff claims that the economic reality of the tax is that it is paid by the retail consumers.[6] In *Chickasaw*, the Supreme Court declined to examine the economic realities when determining the legal incidence of a tax because "tax administration requires predictability…. If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume - a complicated matter dependent on the characteristics of the market for the relevant product." *Chickasaw*, 515 U.S., at 459-60. In this case, the gross receipts tax is an item of cost to the utility company in conducting its business.

This tax is no different from any other cost to a business – all of which are ultimately paid by the consumer in the final price of the good or service. For example, there is a federal excise tax imposed on the manufacturer of tires. When a retail customer purchases tires, the Florida sales tax is calculated on the entire bill, including the separately stated federal excise tax,

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[5] An executive department's construction of a statutory scheme should be given considerable weight. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).
[6] ECF No. 35, at 11.

because the federal excise tax is part of the sales price of the tires. (Defendant's Statement of Facts, ¶ 24.)[7] Permitting the utility company to separately state the tax does not change the fact that the tax is imposed on the utility company, not the retail consumer.

**B. Section 203.01(1)(d), Florida Statutes Does Not Apply**

In its order on the motion to dismiss, the Court suggested that under section 203.01(1)(d)(4), Florida Statutes, "the retail consumer bears the legal incidence by providing for a tax refund" to the retail consumer, and not the person who receives payment for the delivery of the electricity. (Order Granting in Part, Denying in Part, Defendant's Motion to Dismiss, ECF, No. 46, p. 5.) However, paragraph (d) does not apply in this case because Plaintiff pays the utility company for both the electricity and the transportation of electricity, under section 203.01(1)(c), Florida Statutes. Paragraph (d) only applies when the customer purchases the electricity outside of the state, pays a like tax to the other state, and pays only for its transportation into this state. It does not apply, as here, when the payment to the utility company is taxed under paragraph (c). Fla. Stat. § 203.01(1)(d)1.[8] In this case, Plaintiff pays Florida Power & Light (FPL), the utility company, a charge for both the electricity and the delivery of the electricity. Accordingly, paragraph (c), not paragraph (d), applies.

[7] For example, a tire quoted as costing $100 would be shown on an invoice as $96 + $4 federal excise tax. This is a tax on the manufacturer treated as a cost to the manufacturer, so the price subject to the Florida sales tax is the full $100. If this were a tax on the consumer, the Florida sales tax would be applied only to the $96 cost of the tire, not to the $4 tax. The same is true here.

[8] "Each distribution company that receives payment for the delivery of electricity to a retail consumer in this state is subject to tax on the exercise of this privilege as provided by this paragraph *unless the payment is subject to tax under paragraph (c).* Fla. Stat. § 203.01(1)(d)1. (e.a.)

**C. The Transaction Occurred Outside of the Reservation.**

Even if the court finds that the tax is imposed on Plaintiff, a state may impose a nondiscriminatory tax on its citizens, including Indians, when the transaction giving rise to the tax obligation occurs outside of the reservation. *Mescalero Apache Tribe*, 411 U.S. at 148-49. The tax obligation arises when the utility company receives payments from its retail consumers for utility services, which occurs outside the reservation. The tax obligation does not arise from the delivery of the electricity, as Plaintiff claims. (Reply, ECF No. 45, p. 10.) For example, if the distribution company charged a retail consumer for electricity and the delivery of the electricity, but the consumer does not pay the bill, the distribution company is not liable for any gross receipts tax under section 203.01, Florida Statutes, because the company did not receive any payments for its taxable services. The State may impose the nondiscriminatory tax since the transaction giving rise to the tax obligation occurs outside of the reservation.

**D. Assignment of Rights**

Plaintiff claims it can bring this challenge under an assignment of rights from FPL. An assignee "stands in the shoes of the assignor." *Sierra Equity Group, Inc. v. White Oak Equity Partners, LLC*, 650 F.Supp.2d 1213 (S.D. Fla. 2009). In this case, FPL would be prohibited from bringing this challenge of the gross receipts tax by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, which provides that "[t]he district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the state law where a plain, speedy and efficient remedy may be had in the courts of such state." Although a tribe is "not barred by § 1341 from seeking to enjoin the enforcement of a state tax law," *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 473 (1976), FPL *is* barred by § 1341 from

challenging the state tax in this court. Since Plaintiff stands in the shoes of FPL, and is not acting in its own capacity, Plaintiff may not challenge the state tax in this court.

Statutes authorizing tax refunds or exemptions must be strictly construed, and unambiguous statutes must be given their plain and ordinary meaning. *Moe*, 425 U.S. at 640. FPL assigned Plaintiff "any right which [FPL] has to recover gross receipts tax paid to the Florida Department of Revenue, for transactions occurring during the period 12/2008 through 11/2011" for approximately 5,000 account numbers. (Exhibit 5 of the Geer Deposition.) The assignment of rights does not affect the legal incidence of the tax.

The assignment of rights is very narrow, and only assigns to Plaintiff any right which FPL has to recover gross receipts tax paid to the Department from 12/2008 through 11/2011, and does not apply to an injunctive and declaratory relief on future transactions. If Plaintiff is indeed challenging the refund denial for the period 12/2008 through 11/2011, the suit would be barred by the Eleventh Amendment because the relief sought would be a retroactive levy upon funds in the State's treasury. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 316-317 (1990).

**E. *Bracker* Interest Balancing Test**

Finally, even if the court applies the *Bracker* balancing test, the tax is permissible. The gross receipts tax is distributed to the Public Education Capital Outlay and Debt Service Trust Fund, used to build and maintain school facilities. Fla. Stat. § 203.01(1)(c)2 (2013). Plaintiff operates a charter school in Glades County that receives funding from this tax, and some of Plaintiff's tribal members attend public or charter schools funded by this tax. (Defendant's Statement of Facts, ¶¶ 6, 27-32.) The State of Florida provides significant services to Plaintiff and its members by using the utility service tax to build and maintain schools that are open to all children, including Plaintiff's members who choose to attend these schools.

The Plaintiff only made a general claim that any state tax will economically burden Plaintiff and interfere with its ability to provide "essential governmental services." However, Plaintiff cannot point to any instances in which the gross receipts tax prevented Plaintiff from providing any governmental services. (*Id.* ¶ 26.) It is difficult to imagine how a $60,000 increase in its utility bill will substantially interfere with Plaintiff's ability to provide essential governmental services when Plaintiff received $2 billion in gaming revenue, made a net profit of about nine hundred million in 2013, and distributed $500 million of the profit to its approximately 4,000 members. (*Id.* ¶¶ 4-5.) The *Bracker* test is not a per se test, but a balancing of interests and the Tribe has provided no evidence as a counterweight to the State's clearly defined interests.

## CONCLUSION

Defendant Marshall Stranburg, as Executive Director of the Florida Department of Revenue, respectfully requests that the Court grant his motion for final summary judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 2, 2013, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on all counsel of record.

/s/ Jonathan A. Glogau
Attorney