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 OPPOSITION TO PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

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Marshall Stranburg, as Executive Director of the Florida Department of Revenue ("Executive Director"), acting in his official capacity,[1] files this Opposition to Plaintiff's 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 Defendant's Statement of Material Facts in Opposition to Plaintiff's motion 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).

II. The Rental Tax

Florida imposes a nondiscriminatory privilege tax on all tenants or persons renting or leasing commercial property ("rental tax"). Fla. Stat. § 212.031. The rental tax is an excise tax on the privilege of renting or leasing real property, and is not a tax on leasehold or possessory interests. The legal incidence of the rental tax is imposed on the Plaintiff's non-Indian tenants. Order Granting in Part, Denying in Part, Defendants' Motion to Dismiss (ECF No. 46, p. 4.) Federal statutes do not provide lessees of Indian land a broad tax exemption from state taxes, and States can generally "impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989).

[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.

25 C.F.R. § 162.017(c), provides "[***s***]***ubject only to applicable Federal law,*** the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. (e.a.) Section 162.017(c) does not apply to the rental tax, which is a transactional tax on the privilege of renting commercial space, and ***not*** a tax on leasehold or possessory interests. Section 162.017 is limited by ***applicable Federal law***, and pursuant to Supreme Court and Federal Court decisions, Federal statutes do not provide an exemption for non-Indian lessees of Indian land, and states may impose a nondiscriminatory tax on the lessees. The Bureau of Indian Affairs does not have the authority to create tax exemptions not granted by Congress, from taxes which are otherwise permissible under existing law.

A. 25 C.F.R. § 162.017(c) Does Not Apply to the Leases at Issue

25 C.F.R. § 162.008(a) specifically provides "[i]f we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern." 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 Plaintiff's Hard Rock Casinos in Hollywood and in Tampa, Florida (collectively "Leases"). The Leases were approved by the Bureau of Indian Affairs (BIA) on August 4, 2005, approximately eight years prior to the cutoff date in the regulations. (Comp. ¶¶ 12-13, Exhibits A and B of Compl., ECF No. 1.) Section 6.3 of the Leases provides 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.) (e.a.) Since the provision of the Leases requiring Ark to pay any sales tax imposed or assessed with respect to the occupancy of

space on the reservation conflicts with the regulation, it governs over the provision of the regulation because the Leases were approved by the BIA before January 4, 2013.

Although Plaintiff does not mention Ark or the Leases in its Motion for Final Summary Judgment[2], it challenges the rental tax based on its Leases with Ark in its Complaint. (Comp. ¶¶ 12-21, 26-36.) Any declaration of the applicability of the regulation to any other leases has not been raised in Plaintiff's complaint and is not ripe.

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

The rental tax is an excise tax on the privilege of renting or leasing real property, and is not a tax on leasehold or possessory interests. Therefore, § 162.017(c) does not preempt Florida's rental tax. *See* Defendant's Motion for Final Summary Judgment and Incorporated Memorandum of Law ("Defendant's Motion for Summary Judgment") for a more detailed discussion. (ECF No. 61, pp. 6-8.)

C. BIA Does Not Have the Authority to Create Tax Exemptions

Only Congress can grant tax exemptions. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973). Generally, lessees of Indian lands are subject to nondiscriminatory state taxes. *Id.* at 157, citing *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949). Neither 25 U.S.C. § 465 nor the Indian Long-Term Leasing Act, 25 U.S.C. § 415, provide a broad tax exemption from state taxation of lessees of Indian land. Only Congress has the "plenary power to legislate in the field of Indian affairs" pursuant to the Indian Commerce Clause. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Absent delegation by Congress, agencies do not have the authority preempt state law and courts do not defer to an agency's conclusion that state law is preempted. *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009).

[2] Motion for Final Summary Judgment and Incorporated Memorandum of Law (ECF No. 59) ("Plaintiff's Motion for Summary Judgment")

Plaintiff argues that § 162.017 simply implements the exemption in 25 U.S.C. § 465. (ECF No. 59, pp. 53-5). However, § 465 is not listed as an authority for § 162.017 and federal cases interpreting § 465 have not found such taxes prohibited. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-56 (1973), the Supreme Court declined to construe the tax exemption for "lands and rights in land" in 25 U.S.C. § 465 broadly to exempt tax on income derived from the land in light of its context and purposes without clear statutory guidance. The Court found that the legislative history of § 465 and related provisions showed that the legislative intent was "to encourage tribal enterprises to enter the white world on a footing of equal competition." *Id.* at 157. The tribe in *Mescalero* operated a ski resort under a lease with the United States that brought "the Tribe's interest in the land within the immunity afforded by s. 465." *Id.* at fn 11. The Court held that § 465 exempts state tax on the permanent improvements on the tribe's land, but the exemption does not extend to nondiscriminatory taxes imposed on all businesses throughout the State. 25 U.S.C. § 465 does not provide an exemption to non-Indian lessees from nondiscriminatory state taxes on the beneficial use of the property.

Nor does 25 U.S.C. § 415 provide any authority for creation of an exemption by the BIA. The purpose of the regulations is to establish "procedures for obtaining Secretarial approval of leases and administration and enforcement of surface leases" as required by the Indian Long-Term Leasing Act, 25 U.S.C. § 415. 77 Fed. Reg. 72440. Section 415 does not provide any tax exemption, but simply permits the leasing of Indian lands for a term not to exceed twenty-five years with the Secretary's approval.[3]

25 C.F.R. § 162.017 is limited by Supreme Court decisions and other Federal court decisions. 77 Fed. Reg. 72447 and 72472. Generally, lessees of Indian lands are subject to

[3] *See* Defendant's Motion for Summary Judgment, ECF No. 61, p. 5-6, for a more detailed discussion of 25 U.S.C. § 465 and 25 U.S.C. § 415.

nondiscriminatory state taxes, and private parties doing business with Indian tribes are not entitled to a "broad-based immunity from taxation." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989)(approving a severance tax on oil produced from Indian lands). More specifically relating to § 162.017(c), the Ninth Circuit held that a state may impose a leasehold or possessory interest tax on non-Indian lessees of Indian land. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1186-87 (9th Cir. 1971), *cert. den.*, 405 U.S. 933 (1972); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1256 (9th Cir. 1967), *cert. den.* 430 U.S. 983 (1977). Although not precedential, it should be noted that the Supreme Court had two opportunities to repudiate state taxes on leasehold or possessory interests and declined. Hence, even if the court treats the rental tax as a tax on the leasehold or possessory interest, Federal law permits the imposition of the tax on non-Indian tenants. *See* "Defendant's Motion for Summary Judgment" for a more detailed discussion. (ECF No. 61, pp. 7-9.)

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Supreme Court established "a particularized inquiry into the nature of the state, federal, and tribal interests at stake … to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 1454. The *Bracker* interest balancing test is very fact intensive, and each case involving Indian tax immunity requires an intense review of the specific transaction and the state, tribal, and federal interests relating to the transaction. Under *Bracker* and other recent Supreme Court cases, non-Indians lessees are not automatically immune from state taxes, and unless Congress grants the lessees such immunity, § 162.017 cannot categorically bar all state taxes in Indian land.

The BIA seems to be saying through the regulation that when applying the *Bracker* interest balancing test, it is the BIA's finding that "the Federal and tribal interests are very

strong." 77 Fed. Reg. 72447. However, what the regulation really does is improperly write the *Bracker* test out of the law on all taxes and fees imposed on non-Indian lessees and substitute a blanket preemption of state law in its place. The agency has no authority to rewrite decades-old Supreme Court cases holding that whether State taxation of non-Indians engaging in activity on the reservation is preempted is reviewed on a case-by-case basis under a well-established balancing test – *Bracker*.

It is the BIA's Federalism finding that "this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government…." 77 Fed. Reg. 72464. If § 162.017 preempts state law and provides a blanket exemption from state and local taxation to non-Indian lessees without regard to the *Bracker* interest balancing test, then the regulation would have a substantial direct effect on the States.

Plaintiff relies heavily on the preamble to the regulations to support its assertion that § 162.017 provides non-Indian tenants an exemption from the rental tax. However, the BIA's explanation and conclusion that state taxes are preempted by Federal law does not have the force of law, and is not entitled to any deference. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). Courts do not rely on an "agency's mere assertion that state law is an obstacle to achieving its statutory objectives" and the agency's conclusion that state law is preempted. *Id.* at 576. The weight given an "agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Id*. at 577, citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001). In this case, Supreme Court and Federal court decisions have rejected the explanations in the preamble. The BIA's explanation to § 162.017 is not entitled to any deference.

The BIA concluded that Federal statutes and regulations are comprehensive and preclude state taxation. 77 Fed.Reg. 72447. Plaintiff cites *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992) ("*Gila I*"), in support of its assertion that the Federal regulatory scheme is so pervasive that it precludes state taxes. However, the court did not reach the merits in its review of the lower court's grant of a motion to dismiss in *Gila I*; rather, it stated the tribe is entitled to try to prove that the state tax is either preempted by federal law or prohibited by the doctrine of tribal self-government. *Gila I*, 967 F.2d at 1411-1413; clarified in *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1238 at fn 2 (9th Cir. 1996) ("*Gila II*"). On appeal after remand, the court found that the federal interest in promoting the economic interests of Indians and the federal regulatory leasing scheme were insufficient to preempt the state tax, and that the argument "that the mere existence of federal oversight over leasing of Indian lands preempts a state tax is without support." *Gila II*, 91 F.3d at 1237.

The BIA also found that the "legislative history of section 415 demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands." 77 Fed.Reg. 72447. This argument was expressly rejected by the Supreme Court in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 178-80 (1989). In *Cotton Petroleum,* the Court reviewed the Mineral Leasing Act of 1938, which embodies a broad congressional policy of maximizing revenues for Indian tribes. The Court agreed that the purpose of the Act "is to provide Indian tribes with badly needed revenue, but [found] no evidence for the further supposition that Congress intended to remove all barriers to profit maximization." *Id.* at 180. The Court declined to return to the pre-1937 doctrine of intergovernmental tax immunity that would preempt state taxes that may negatively affect the tribe's finances without explicit guidance from Congress.

The preamble also provides that "State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs." 77 Fed.Reg. 72448. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court stated that the Indian Reorganization Act of 1934 and the Indian Self-Determination and Education Assistance Act encourage tribal self-government and economic development, but do not provide tribes with an "artificial competitive advantage over all other businesses in a State" by pre-empting valid state sales tax that otherwise applies to nonmembers of the Tribe. *Id.* at 155-56. Both the state and the tribe "have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other…. Economic burdens on the competing sovereign … do not alter the concurrent nature of the taxing authority." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114-15, citing *Williams v. Lee*, 358 U.S. 217, 184, n. 9 (1959).

"The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth*, 555 U.S. at 575 (citation omitted). Since 1938, the Supreme Court has held that non-Indian lessees are not exempt from a state tax on their income simply because "the economic burden of the tax may fall on the Government." *Cotton Petroleum*, 490 U.S. at 174-75. After *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938) was decided, "oil and gas lessees operating on Indian reservations were subject to nondiscriminatory state taxation as long as Congress did not act affirmatively to pre-empt the state taxes." *Cotton Petroleum*, 490 U.S. at 175. To the present day, Congress has not acted affirmatively to preempt state taxes on nonmember lessees of Indian

land. Plaintiff's reliance on the BIA's findings is without merit, given the holdings of Supreme Court and Federal Court cases.

Neither 25 U.S.C. § 465 nor the Indian Long-Term Leasing Act, 25 U.S.C. § 415, provide lessees of Indian land with an exemption from state tax. Only Congress can grant tax exemptions, and since Congress has not granted such a tax exemption to the non-Indian lessees, Florida's rental tax is not preempted. Pursuant to Supreme Court and Federal Court decisions, states may impose nondiscriminatory taxes on non-Indian tenants. Although tribal enterprises are encouraged, tribes are not entitled to "artificial competitive advantage over all other businesses in the State" by providing its non-Indian lessees a "broad-based immunity from taxation." *Cotton Petroleum*, 490 U.S. at 176; and *Colville*, 447 U.S. at 155. Pursuant to the Supreme Court and Federal Court cases cited above, § 162.017(c) does not prohibit the rental tax. BIA does not have the authority to preempt the tax.

III. Gross Receipts Tax on Utilities Services

The "dispositive language" of the taxing statute "is determinative of who bears the legal incidence of a state tax." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005), citing *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 451, 461 (1995). If the statute did not expressly place the legal incidence of the tax, then the court would apply a "fair interpretation of the taxing statute as written and applied." *Id.* at 102-03, citing *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9 (1985). The legal incidence of a tax is determined based on the statutory language to provide tax administrators with "a reasonably bright-line standard" for predicting their taxing authority. *Chickasaw*, 515 U.S. at 459-60. The economic reality of a transaction is not a factor in determining the legal incidence of a tax. *Id.*

The statute imposes a tax "on gross receipts from utility services that are delivered to a retail consumer in this state" and the tax is "levied against the total amount of gross receipts received by a distribution company for its sale of utility services…." Fla. Stat. § 203.01(1)(a)1. and 203.01(1)(c)1. "[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.). The statute provides an option for the person supplying the taxable services to separately state the Florida gross receipts tax on the total amount of the utility bill as a component part of the total charge. Fla. Stat. § 203.01(4). However, "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).

The statute explicitly imposes the tax on the utility. The agency through rulemaking has recognized the tax as a cost of doing business. It provides the utility company has the ***option*** to separately itemize the tax on its customer's utility bill as a component part of the bill. Fla. Stat. § 203.01(4) (2013). Whether the utility company separately itemizes the tax or not, the utility company remains completely liable for the tax. Fla. Stat. § 203.01(5). *See* Defendant's Motion for Summary Judgment for a detailed discussion. The specific language of the gross receipts tax on utility services and a fair interpretation of that entire taxing statute clearly place the legal incidence of the tax on the utility companies.

A. Fair Interpretation of the Utility Tax Statute

In *Wagnon*, the Supreme Court found that a fair interpretation of the Kansas statute placed the legal incidence of the tax on distributors, because the statute requires every distributor to pay the amount of motor fuel taxes due to the state. Like the gross receipts tax at issue here, the Kansas statute allows distributors "to pass along the cost of the tax to downstream

purchasers, [but] they are not required to do so." *Id.* at 103. Like the tax in *Wagnon*, the gross receipts tax statute provides that: (i) the utility company is required to report and pay the tax; (ii) the utility company ***may*** separately state the tax on the retail consumer's bill, but is not required to do so; and (iii) whether or not the utility company elects to separately itemize the tax as a component part of the bill, the utility company remains fully and completely liable for the tax. A fair interpretation of the Florida gross receipts tax on utility services similarly places the legal incidence of the tax on the utility company, and not on the retail consumers.

In *Chemehuevi*, the Supreme Court found that "the fairest reading of California's cigarette scheme as a whole is that the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable" because the consumers are obligated to pay the tax for all previously untaxed cigarettes. *Chemehuevi*, 474 U.S. at 11. In contrast, the gross receipts tax at issue only holds the utility company liable for the tax due, and the Department is without power to collect the tax from the retail consumers. Steffens Dep. ECF No. 63-1, p.

Plaintiff claims § 203.01(5), which holds each utility company "fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill" only applies "to Utility Taxes that the utility service provider already collected from the consumer [and] can never apply to Utilities Taxes that the consumer has not paid." (ECF No. 59, p. 14). Plaintiff is wrong to assert that the utility company is not liable for the gross receipts tax because the consumer refuses to pay the separately stated tax on the utility bill. The tax is calculated on the utility company's actual receipts from its customers, and the utility company is liable for the amount of tax due. Section 203.01(5), simply provides that the utility company, not its customers, is legally liable for the utility tax, regardless of whether the utility company elects to separately itemize the tax on its customers' utility bills.

Plaintiff seems confused between how a tax is calculated and the legal incidence of a tax. The gross receipts tax imposed by § 203.01 is calculated by multiplying 2.5% times the amount of gross receipts actually received from retail consumers. Fla. Stat. § 203.01(1)(c)1. If a retail consumer does not pay his utility bill, no tax is due, since 2.5% of $0 is $0 of tax due. If a retail consumer pays half of his utility bill of $100 (including the utility tax), the tax due would be $1.25 (2.5% of $50). Steffens Dep. p. 30, Lines 17-24. If the utility consumer wrongly claims an exemption of $2.50 gross receipts tax, and pays the utility company $97.50, then the utility company is liable for $2.44 of gross receipts tax (2.5% of $97.50). *Id.* at p. 40, Lines 16-25.

Plaintiff also claims that the gross receipts tax is like the sales and use tax imposed on the retail consumer, and that the utility company, like the dealers in Chapter 212, are merely collecting agents of the tax for the State. (ECF No. 59, pp. 8-11.) The gross receipts tax imposed by Fla. Stat. § 203.01, is not like the sales and use tax imposed by Chapter 212, Florida Statutes. The Florida sales and use tax provides that the sales and use tax imposed by Chapter 212 "shall be collected by the dealers from the purchaser or consumer," and the dealer is entitled to a collection allowance to compensate the dealer for reporting and remitting the tax collected. Fla. Stat. § 212.07(1)(a), and § 212.12(1)(a)1. (2013). The dealers are ***required*** to separately state the tax, and may not absorb the tax or "relieve the purchaser of the payment of all or any part of the tax." Fla. Stat. § 212.07(2), and (4). The Florida sales and use tax is legally imposed on the retail consumers, and the dealers are collecting agents of the tax for the State. The Florida sales tax is similar to the Oklahoma tax in *Chickasaw*, in which the Supreme Court determined that the distributor is a transmittal agent for the taxes imposed on the retailer because the statute required distributors to remit the amount of tax due "*on behalf of a licensed retailer*," and allows

distributors to retain a small portion of the taxes they collected for their services as "agent of the state for [tax] collection." *Chickasaw* 515 U.S. at 461-62.

The structure of the gross receipts tax stands in stark contrast to the structure of the Florida sales and use tax and the taxing statute in *Chickasaw*. The gross receipts tax statute allows, but does not require, utility companies to separately itemize the tax, and does not prohibit the utility companies from relieving the consumer of the tax. Utility companies are regulated entities, and the rates they charge their customers are based on their costs of providing utility services, which include the gross receipts tax at issue and other costs to the utility companies, such as property tax. Steffens Dep. ECF No. 63-1, p. 20, Lines 14-25; p. 21, Line 1. Whether the utility companies separately itemize the gross receipts tax or not, the utility companies remain liable for the amount of tax due, and must pay the amount to the State.[4] Chapter 203, Fla. Stat., does not refer to utility companies as collecting agents, and utility companies are not given a collection allowance. Rather, the statute requires the utility companies to report and remit the gross receipts tax on the charges received, and holds the utility companies liable for any amount of tax due.

The gross receipts tax statute does not require the tax be passed on to the purchaser. Plaintiff cited *U.S. v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975) in support of its argument that "the legal incidence of the tax rested with the purchaser because the tax was passed on and collected from the purchaser." ECF No. 59, p. 11. In *Mississippi*, the Court affirmed the rule established in *First Agricultural Nat. Bank v. Tax Comm'n*, 392 U.S. 339

[4] Plaintiff purports that Peter Steffens stated that there is no legal significance whether the utility tax is separately itemized on the utility bill because the utility company would have the right to collect the tax from the consumer even if it were not separately stated. (ECF No. 59, fn 14). Plaintiff misstates Mr. Steffens statement, which states that the tax is part of the retail consumer's utility bill, and the utility company has the right to collect any amount of the bill that is due. Steffens Dep. ECF No. 63-1, p. 36, Lines 5-25.

(1968), that "where a State ***requires*** that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *Mississippi*, 421 U.S. at 608 (e.a.). This rule does not apply because utility companies are not required to pass on the tax to their customers.

In *Chickasaw*, the Court also considered tax exemption and tax deductions when determining the legal incidence of the tax. In *Chickasaw*, the Court found that the inference that the tax is legally imposed on the retailers is supported by the fact that sales between distributors are exempt from tax, but sales from a distributor to a retailer are subject to tax. *Chickasaw*, 515 U.S. at 461. In Florida, governmental and exempt organizations are exempt from sales and use tax, but must pay the full amount of their utility bills which include the tax as a cost of doing business. Fla. Stat. § 212.08(6)(a), (7)(m), and (7)(p); Fla. Stat. § 203.01(4). There are no provisions for exempt entities to deduct the utility tax from their utility bills. The fact that exempt entities are not entitled to extend their exemption certificate to deduct the amount of the utility tax supports the Defendant's position that the legal incidence of the tax is on the utility company, and not on the retail consumers. The legal incidence of the utility tax is not imposed on the tribe or its members, and the tax is not barred by Federal law.

B. Economic Reality

Determining the legal incidence of a tax based on the taxing statute provides "a reasonably bright-line standard" so tax administrators can reasonably predict the scope of state taxation authority and "accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members." *Chickasaw*, 515 U.S. 459-60. In *Chickasaw*, the Supreme Court expressly rejected using "economic reality" as a guide in determining whether the legal incidence of an excise tax is on a tribe or on tribal members. The

Court found such determination would be daunting, and the "risk of litigation could 'engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel'." *Id.* at 459-60. In fact, the policy for administrative predictability is so strong, that the Supreme Court stated that "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." *Id.* at 460.

Despite the Supreme Court's express rejection of using economic reality as a guide, Plaintiff's main argument is that the tax "is invariably paid from the consumer's pocket." (ECF No. 59, p. 14.) The economic reality that the retail consumers may be paying the tax as part of their utility bill is not a factor in determining the legal incidence of the tax.[5] Ultimately, ***all*** costs are invariably paid from the consumer's pocket, and the convoluted analysis of the economic reality does not determine the legal incidence of the tax. As provided above, a fair interpretation of the gross receipts tax statute and the regulations ***as written and applied*** places the legal incidence of the gross receipts tax on the utility companies, not the retail consumer.

C. Assignment of Rights

Plaintiff claims that that "whether the legal incidence rests with the utilities service provider or consumer is largely academic because the utilities service providers assigned their rights to a refund to the Tribe." (ECF No. 59, p. 11.) However, an "assignment [only] transfers to the assignee all the interests and rights of the assignor in and to the thing assigned." *Dept. of*

[5] Plaintiff claims that Defendant is unable to cite a single incidence in which a utility service provider elected not to separately itemize the tax, and collect the tax from the customers. ECF No. 59, fn 15. However, Mr. Steffens stated that there are at least 87 utilities in the state and some of them may not separately itemize the tax, but he would have to audit all the utility companies to know that as a fact. Conversely, Plaintiff has provided any proof that all of the 87 utility companies *do* separately state the tax. It is, after all, the Plaintiff's burden.

Revenue v. Bank of America, N.A., 752 So.2d 637, 642 (Fla. 1st DCA 2000). Plaintiff, the assignee stands in the shoes of the FPL, the assignor, for the period and transactions specifically stated in the assignment. The assignment of rights does not affect the legal incidence of a tax or the taxability of a transaction. Since FPL assigned any rights it has from December 2008 through November 2011 to a refund of gross receipts tax, the question is whether FPL was entitled to a refund of gross receipts tax during that period.

Plaintiff claims that FPL is entitled to a refund during that period because FPL paid the gross receipts tax on the specified accounts where no tax was due[6] because the tax is imposed on the Plaintiff, and is therefore prohibited by Federal law. Hence, whether the legal incidence of the gross receipts tax is imposed on the utility company or the retail consumer is not merely an academic question because the legal incidence of the tax is determinative of whether the tax is prohibited by Federal law; therefore, entitling FPL to a refund.

The assignment of rights from FPL to Plaintiff does not provide Plaintiff the right to request injunctive and declaratory relief in this court because (i) FPL is barred by the Tax Injunction Act, 28 U.S.C. § 1341 from bringing this suit in federal court;[7] and (ii) FPL cannot assign a right to receive a refund that it does not possess at the time of the assignment.[8]

D. Federal Statutes and Regulations

Plaintiff claims that even if the legal incidence of the gross receipts tax is on the utility company, Plaintiff's use of electricity in connection with various activities regulated by (i) The Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.*; (ii) The

[6] The Department of Revenue may refund to the person who paid the tax, or his or her assigns, any moneys paid into the State Treasury in error. Fla. Stat. § 215.26 (2013).
[7] See Defendant's Motion for Summary Judgment for a more detailed discussion. (ECF No. 61, pp. 15-16).
[8] *Department of Revenue v. Bank of America, N.A.*, 752 So. 2d 637, 642 (Fla. 1st DCA 2000).

Indian Reorganization Act of 1934; (iii) The Indian Long-Term Leasing Act, 25 U.S.C. § 415, and related regulations, 25 C.F.R. § 162.017(b); and (iv) The Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* is not taxable. However, Plaintiff has not provided any evidence as to how the electricity is used, and it is also unclear whether the electricity was used on the reservation. Furthermore, statutes and regulations Plaintiff cited do not exempt the gross receipts tax at issue.

In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court stated that the Indian Reorganization Act of 1934 and the Indian Self-Determination and Education Assistance Act "evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." *Id.* at 155. The Court refused to infer "from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe." *Id.* at 156. Accordingly, the gross receipts tax imposed on the utility company for the privilege of selling electricity is not preempted by the Indian Self-Determination and Educational Assistance Act or the Indian Reorganization Act of 1934.

The Indian Long-Term Leasing Act and 25 C.F.R. § 162.017(b) also does not preempt the gross receipts tax. The Indian Long-Term Leasing Act only permits Indian lands to be leased for a term not to exceed twenty-five years with the Secretary's approval, and does not provide ***any*** exemptions from state tax. Tax exemptions are not granted by implication. *Mescalero*, 411 U.S. at 156. As Plaintiff pointed out, § 162.017(b) only addresses "activities under a lease

conducted on leased premises." This provision does not apply because the gross receipts tax is imposed on the utility company and is calculated on payments from Plaintiff to FPL under a contract for FPL to provide Plaintiff with utility service. The gross receipts tax does not arise from "activities under a lease conducted on leased premises" and, therefore, § 162.017(b) does not apply.

The Indian Gaming Regulatory Act ("IGRA") does not bar the gross receipts tax. The Act provides that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." The fact that IGRA does not ***authorize*** a tax does not imply that it somehow preempts unrelated taxes. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469 (2d Cir. 2013), citing 25 U.S.C. § 2710(d)(4). Courts have been quick to dismiss challenges that generally-applicable laws with *de minimis* affect on a tribe's ability to regulate its gambling operations are preempted by IGRA.

In *Mashantucket*, the Court held that the Indian Trader Statutes and IGRA did not preempt the state's personal property tax imposed on lessors of slot machines used by the tribe at its casino on the reservation. *Mashantucket*, 722 F.3d at 469-71. The gross receipts tax at issue is even more remotely related to Plaintiff's gambling operations than the slot machines in *Mashantucket*, since the gross receipts tax relates to approximately 5,000 accounts with FPL[9] that have not been shown to be related to Plaintiff's casinos. Even if some of the accounts may be related to the casinos, any affect, if any, on Plaintiff's ability to regulate its gambling operation would be *de minimis*, and would not be preempted by IGRA.

[9] Defendant's Statement of Fact, ¶ 20.

The legal incidence of the gross receipts tax is imposed on utility companies for the privilege of doing business in this State, and the Federal statutes cited by Plaintiff do not prohibit the State from imposing the tax on the utility companies.

E. *Bracker* Interest Balancing Test

Plaintiff claims that even if the legal incidence of the utility tax is imposed on the utility company, the tax is preempted under the *Bracker* balancing test "because it burdens activities that are conducted by the Tribe on Indian Land … preempted by Federal law." (ECF No. 59, p. 16). States may impose tax on non-Indians engaging in activity on the reservation if the state interest outweighs tribal interest under the *Bracker* interest balancing test. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). 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 interests at stake." *Id.*

Plaintiff claims that the tax burdens its activities without providing any details or evidence showing the burden caused by the tax. In fact, it is Plaintiff's position that any amount of tax paid by Plaintiff would decrease its budget and thereby burden its activities. (Geer Dep., ECF No. 64-1, p. 29, Lines 3-12.) The Supreme Court in *Cotton Petroleum* held that indirect, insubstantial, or marginal burdens on tribal interests do not support a claim that a state tax is preempted. 490 U.S. at 186-87. Plaintiff has provided nothing more than a conclusory repetition of the allegations in its Complaint that the tax interferes with its governmental operations. This is not sufficient to avoid summary judgment. In contrast to the Plaintiff's lack of evidence of any detriment to its interests, the State has a significant interest in building and maintaining school facilities available to and attended by Plaintiff's members. See Defendant's Motion for Summary Judgment, ECF No. 61, p. 16.

In *Cotton Petroleum*, the Supreme Court rejected the argument that the state tax imposed on the lessee cannot "exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole." *Cotton Petroleum*, 490 U.S. at 189. First, the "intangible value of citizenship in an organized society is not easily measured in dollars and cents." *Id.* The State provides services available to the members of the Tribe, its lessees, and patrons both on and off the reservations. "Second, there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer … must equal the amount of its tax obligations." *Id.* at 190. Plaintiff's assertion that state tax must be "narrowly tailored" to compensate the State for its services[10] was squarely rejected by *Cotton Petroleum*.

The State's interest in building and maintaining schools outweighs the Plaintiff's general interest in avoiding the tax. The gross receipts tax imposed on the utility company is not preempted by Federal law.

CONCLUSION

Plaintiff's Motion for Final Summary Judgment should be denied.

Respectfully submitted,

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[10] ECF No. 59, p. 17.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 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