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 REPLY TO PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

Marshall Stranburg, as Executive Director of the Florida Department of Revenue ("Executive Director"), acting in his official capacity,[1] files this Reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Final Summary Judgment pursuant to Federal Rules of Civil Procedure Rule 56 and Southern District of Florida Local Rule 56.1.

I. Rental Tax

The basis of Plaintiff's argument is that the final regulations and the preamble relating to leases and permits on Indian land, 25 C.F.R. Part 162, adopted by the Secretary of the Department of Interior, Bureau of Indian Affairs, is an expression of congressional intent to

[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.

preempt nondiscriminatory state taxes that apply to all persons doing business in the state. Plaintiff claims that decades of Supreme and Federal Court decisions that permit such taxes imposed on non-Indian lessees no longer apply because 25 C.F.R. § 162.017 and the preamble reflect clear congressional intent. This argument -- that the unauthorized act of a federal agency constitutes congressional intent to overturn decades of Supreme Court precedent -- has no merit.

For decades, the Supreme Court has held that states may impose nondiscriminatory state taxes on lessees of Indian land ***unless Congress expressly prohibits such taxes***. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973). In 1949, the Court plainly stated that the Constitution permits states to impose taxes on lessees of Indian land in the absence of affirmative action by Congress to immunize the lessees from state taxes and declined to infer that lessees of Indian land are immune from state tax "from mere congressional silence." *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 365-67 (1949).

Only Congress can grant tax exemptions, and courts will not imply tax exemptions absent clear statutory guidance. *Mescalero Apache Tribe* 411 U.S. at 156. A federal agency "has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas J. concurring), citing *New York v. FERC*, 535 U.S. 1, 18 (2002). 25 U.S.C. § 465 authorizes the Secretary to acquire real property for the purpose of providing land for Indians, and provides an exemption from state and local tax ***on the land***. 25 U.S.C. § 415 requires leases on Indian land to be approved by the Secretary of the Interior to protect the interests of the Indian landowner after adequate consideration is given to the impact of leases on tribes, neighboring lands and the environment. *Hollywood Mobile Estates, Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1269-71 (11th Cir. 2011). Neither statute authorizes the Secretary to preempt Florida's validly enacted

transactional tax on the privilege of renting commercial property. The Secretary is without power to prohibit nondiscriminatory state taxes that are permitted under United States Supreme Court and Federal Court decisions.[2] *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989).

Congressional intent is determined by the statutory language and the statute's legislative history. The Secretary's statements in the preamble do not express congressional intent. *Wyeth v. Levine*, 555 U.S. 555 (2009). The preamble is nothing more than the Secretary's opinion or position, and is not evidence of congressional intent. 77 Fed.Reg. 72448. The preamble is a summary of the Secretary's understanding of Supreme Court cases, reports, and articles, and only provides his justification for the tax provisions in the regulation. In sum, the preamble is neither an act of Congress nor an expression of congressional intent.

Furthermore, the Supreme Court has rejected a similar argument that the Secretary's statements demonstrate the intent of Congress. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 179, the Court found it unfathomable "to suggest that Congress intended to remove all State-imposed obstacles to profitability by attaching to the Senate and House Reports a letter from the Secretary that happened to include the phrase "the greatest return from their property." *Id.* Even when read broadly as a policy goal, the Secretary's statement is not evidence that Congress intended to maximize profit for Indians without regard for competing state interests.

To the present day, Congress has not affirmatively acted to provide private parties entering into leases on Indian land pursuant to 25 U.S.C. § 415, an exemption from all state taxes. The validity of taxes imposed on non-Indians for transactions occurring in Indian country

[2] *See* Defendant's Motion for Summary Judgment, ECF No. 61, pp. 4-6, and Defendant's Opposition to Plaintiff's Motion for Final Summary Judgment, ECF No. 66, p. 5, for a detailed discussion of 25 U.S.C. § 415 and 465.

is determined under the *Bracker* balancing test. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Simply put, the Secretary does not have the power to provide lessees of Indian land immunity from state taxes. Until Congress provides non-Indian lessees an exemption from state taxes, such taxes remain valid.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973), the Court expressly stated that "there is no reason to hold [§ 465] forbids income as well as property taxes. Nor does the legislative history support any other conclusion." In a recent case, the Ninth Circuit applied *Mescalero* to a property tax imposed on the permanent improvements built on land owned by the United States and held in trust for an Indian tribe under § 465. *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013). In *Thurston County*, the court held that it was bound by *Mescalero*, which "sets forth the simple rule that § 465 preempts state and local taxes on permanent improvements built on non-reservation land owned by the United States and held in trust for an Indian tribe." *Id.* at 1159.

Plaintiff's reliance on *Thurston County*, however, is misplaced. ECF No. 68, p. 14. The tax at issue in *Thurston County* is a property tax on a resort, conference center, and water park on the reservation (collectively, "the Lodge"). *Thurston County*, 725 F.3d at 1154, and 1159, fn 8. The *Thurston County* court limited its ruling to *property tax on permanent improvements* on lands held in trust for Indians under § 465. The court further stated that § 465 and *Mescalero* only exempt a tax on land or improvements, but did not apply to a tax on possessory interests even though the tax was measured by "the 'full cash value' of the lessee's interest in it." *Thurston County*, 725 F.3d, 158-59, fn. 7, citing *Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972).

Similarly, the exemption in § 465 does not apply to Florida's rental tax, which is a privilege tax on the consideration paid by the lessee to the landlord for the use of commercial property.

Tax exemptions must be construed narrowly, and courts cannot recognize "an exemption from state taxation that ***Congress has not clearly expressed***." *Florida Dep't. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50 (2008). Plaintiff cannot claim that 25 C.F.R. § 162.017(c), which only prohibits a tax on leasehold or possessory interests, also provides an exemption from the rental tax. Since the rental tax is not a leasehold or possessory interest tax, § 162.017(c) does not apply.

Other Federal courts have specifically held that the regulatory scheme governing Indian leases does not preempt state taxes. For example, a state may impose sales tax on rental payments by non-Indian lessees, and lessees are subject to a transaction privilege tax on its ticket sales. *See Salt River Pima-Maricopa Indian Cmty. v. State of Ariz.*, 50 F.3d 734 (9th Cir. 1995), cert. denied, 516 U.S. 868 (1995); and *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232 (9th Cir. 1996). Courts have also held that a state may impose a possessory interest tax on lessees of Indian land. *Agua Caliente*, 442 F.2d 1184 (9th Cir. 1971); and *Fort Mojave Tribe v. San Bernardino Cnty.*, 543 F.2d 1253 (9th Cir. 1967), cert denied, 430 U.S. 983 (1977). Pursuant to these Federal cases, Federal law does not preempt Florida's rental tax.

Plaintiff claims that *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), does not apply because it concerns leases under the Mineral Leasing Act of 1938, not 25 U.S.C. § 415. That argument has no merit since both statutes are silent as to whether lessees are exempt from State and local taxes. The Court in *Cotton Petroleum* first looked at the relevant legislation, then the legislative history, and held that if the legislation does not expressly preclude or expressly authorize state taxation, then the *Bracker* interest-balancing test governed. Since 25 U.S.C. §

415 and § 465 do not expressly preclude or expressly authorize state taxation, the *Bracker* interest-balancing test applies. Under the *Bracker* test, "[e]ach case requires a particularized examination of the relevant state, federal, and tribal interests." *Cotton Petroleum*, 490 U.S. at 176, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Hence, 25 C.F.R. § 162.017 cannot provide an absolute immunity to non-Indian lessees without any regard to state interests.

Plaintiff claims that for Florida to prevail under *Bracker*, it must show that the rental tax is "narrowly tailored" to compensate the State for services it provides in connection with that particular activity. In support of its assertion, Plaintiff cites *Crow Tribe of Indians v. Mont.*, 650 F.2d 1104, 1114 (9th Cir. 1981), *amended*, 665 F.2d 1390 (9th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982). The *Crow* case does not contain the term "narrowly tailored." Moreover, in a related case, the Supreme Court reviewed *Crow* in light of *Cotton Petroleum*, and stated that Montana had the power to tax the lessees, "but not at an exorbitant rate." *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 715 (1998). The Supreme Court has unquestionably rejected the argument that a state may impose a tax only in proportion to its services to the tribe. *Cotton Petroleum*, 490 U.S. at 185. The Court noted that such a strict *quid pro quo* requirement would "create nightmarish administrative burdens." *Id.* at fn. 15. A state is not required to narrowly tailor its tax to the activity being taxed.

Pursuant to the above Supreme Court and Federal court decisions, the State of Florida may legally impose the rental tax on Ark Tampa, LLC, and Ark Hollywood, LLC (collectively "Ark"), the non-Indian lessees. Pursuant to section 6.3 of Ark's leases with Plaintiff, Ark is required to pay the validly imposed sales tax on the consideration paid for the use of the commercial property. The Secretary approved the leases, presumptively applying the *Bracker*

test and finding that the leases, including the payment of the tax by Ark, were in the best interest of the Tribe. *See Red Mountain Mach. Co. v. Grace Inv. Co.*, 29 F.3d 1408 (9th Cir. 1994).

Plaintiff's Complaint challenges the rental tax as applied to Ark. Plaintiff now tries to shift its focus by claiming that, even if 25 C.F.R. § 162.017 does not apply to leases with Ark, it "would be entitled to the relief it seeks with respect to every other lease of Indian Land." ECF No. 68, p. 7. Plaintiff is not entitled to expand its challenge to the rental tax as applied to all of its lessees, since each individual lease requires analysis under *Bracker* and are not at issue in this case. Plaintiff also claims § 162.017 would prohibit the rental tax imposed on Ark "once they are amended to expressly limit the tenant's obligations to legally imposed taxes." *Id.* The possible future amendment of Ark's leases is speculative and therefore not ripe. The only leases at issue in this case are those attached to the Complaint. Pursuant to *Bracker*, each lease must be reviewed separately, and Plaintiff cannot challenge the tax as applied to all of its lessees.

II. Gross Receipts Tax

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). The Florida gross receipts tax specifies that "[t]he tax 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(4) (2013) (emphasis supplied). Such language is clearly determinative that the tax is imposed on the utility service provider.

CONCLUSION

The Department's Motion for Final Summary Judgment should be granted, and the Plaintiff's Motion for Final Summary Judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 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.

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