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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

GLOBAL HOOKAH
DISTRIBUTORS, INC.,

Plaintiff,
v. Case No. 2017-CA-1623

STATE OF FLORIDA,
DEPARTMENT OF BUSINESS
AND PROFESSIONAL
REGULATION,

Defendant.
_____/

DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION FOR FINAL SUMMARY JUDGMENT

Defendant, State of Florida, Department of Business and Professional Regulation ("Department"), pursuant to rule 1.510, Florida Rules of Civil Procedure, hereby responds to the motion for final summary judgment filed by Plaintiff Global Hookah Distributors, Inc.

In its summary judgment motion, Plaintiff asks this Court to ignore the recent United States Supreme Court opinion issued in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), arguing that it does not control the outcome of the instant case. According to Plaintiff, this case is instead controlled by a 1996 Florida Supreme Court case, *Dep't of Revenue v. Share Int'l, Inc.,* 676 So. 2d 1362 (Fla. 1996). Plaintiff also argues that, to the extent *Wayfair* is controlling, it should be applied

prospectively only. Plaintiff is mistaken on both points. *Wayfair* controls the outcome of this matter, and there is no reason that case should not be applied retrospectively as well as prospectively.

Share involved a challenge to the assessment of sales taxes by the Florida Department of Revenue against an out-of-state company for mail-order sales to Florida residents. *Dep't of Revenue v. Share Int'l, Inc.,* 667 So. 2d 226, 228 (Fla. 1st DCA 1996) ("*Share 1"*). The certified question answered by the Florida Supreme Court in *Share* was:

> [w]hether, under the facts of this case, "substantial nexus" within the meaning set forth by the United States Supreme Court in *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Illinois, Revenue of Illinois*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), exists which would permit Florida to require Share to collects sales and use taxes on all goods sold to Florida residents?

Share, 676 So. 2d at 1362. The pertinent facts of *Share* were that the principals of the company attended a three-day seminar in Florida each year in which the company's products were marketed and sold. *Id.* at 1363. The Florida Supreme Court, based on the U.S. Supreme Court decisions in *Quill* and *National Bella Hess,* answered the certified question in the negative and approved the First District's rejection of the tax assessment, observing that "[i]n a thorough analysis by Judge Barfield, the district court opinion discussed the controlling United States Supreme

Court decisions and correctly applied their holdings to the facts of this case as established in the trial court." *Id.*

Plaintiff asserts that "[i]n *Share,* the Florida Supreme Court raised the state's nexus standard from the physical presence floor set by [the United States Supreme Court]." There is absolutely no support for this claim. As set forth above, *Share* was decided based upon the application of existing United States Supreme Court precedent to the specific facts of that case. *Share,* 676 So. 2d at 1363. In *Share,* the Florida Supreme Court approved a decision in which "[u]nder these facts, the district court upheld a trial court ruling that Share did not have a sufficient presence in the State of Florida, under controlling United States Supreme Court decisions, to permit the state to require Share to collect and remit Florida taxes on mail order sales to Florida residents." *Id.*

Accordingly, when the United States Supreme Court in *Wayfair* overruled *Quill* and *Bellas Hess, Share* was effectively overruled as the opinion in that case was based entirely on the legal authority of *Quill* and *Bellas Hess. See Spencer v. State,* 389 So. 2d 652, 653 (Fla. 1st DCA 1980) (on pet. for reh'g) ("The decisions of the United States Supreme Court on questions of federal constitutional law have direct and controlling effect on our decisions though the Florida Supreme Court has not yet had an opportunity to conform its previously expressed views, which were

themselves in conformity with United States Supreme Court decisions as then understood by the Florida Supreme Court.").

By urging this Court to follow *Share* rather than *Wayfair,* Plaintiff in essence argues that a state court's interpretation of the United States Constitution should prevail over that of the United States Supreme Court. Florida courts agree with the United States Supreme Court that this is not permitted. *Miami Herald Pub. Co. v. Ane*, 423 So. 2d 376, 384-385 (Fla. 3d DCA 1982) ("It is a fundamental principle of federal constitutional law that no state court is authorized to interpret any provision of the United States Constitution, including the First Amendment, in a manner which is contrary to United States Supreme Court decisions interpreting the same provision of the United States Constitution.") (citing *Lego v. Twomey,* 404 U.S. 477, 489 (1972); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964)).

Plaintiff also argues that *Wayfair* does not apply because legislation similar to the South Dakota sales tax statute at issue in that case has not been enacted in Florida. Pl.'s Mot. Summ. J. at 10. In this regard, Plaintiff misapprehends the facts and holding of *Wayfair,* as well as its application to the instant case. The statute at issue in *Wayfair* was passed in response to *Quill* and *Bella Hess* in order to further a legislative intention "to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines." *Wayfair,* 138 S. Ct. at 2088 (citation and quotation marks omitted). This is similar to the statutes implementing

Florida's tobacco excise tax and surcharge at issue in the instant case. Both of these statutes contain language providing that the taxes will not be imposed "upon tobacco products not within the taxing power of the state under the Commerce Clause of the United States Constitution." §§ 210.276(4), 210.230(4), Fla. Stat. Under either South Dakota or Florida law, therefore, the taxes at issue are to be imposed unless prohibited by the Commerce Clause.[1]

Even if this Court were to completely disregard *Wayfair* for purposes of this case, Plaintiff's arguments still fail. That is because *Wayfair's* United States Supreme Court predecessors, *Quill* and *Bella Hess,* were concerned with sales and use taxes, and not excise taxes or surcharges like the taxes at issue in this case. The *Quill* court referred to *Bellas Hess* as creating "a bright-line rule in the area of sales and use taxes," *Quill*, 504 U.S. at 316, and noted that "we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes," *id.* at 314.

The vast majority of state courts, tasked with applying *Bella Hess* and *Quill,* have taken their lead from *Quill,* and not extended the holdings of these cases beyond the sales and use tax arena. *See, e.g., Crutchfield Corp. v. Testa*, 88 N.E. 3d 900,

[1] Section 210.276(1), Fla. Stat., provides that "[a] A surcharge is levied upon *all* tobacco products in this state and upon *any* person engaged in business as a distributor of tobacco products." (emphasis added). Likewise, section 210.30(1) states that "[a] tax is hereby imposed upon *all* tobacco products in this state and upon *any* person engaged in business as a distributor thereof." (emphasis added).

912 (Ohio 2016) ("Under these precepts, we follow our own lead along with that of most state courts that, post-*Quill,* have explicitly rejected the extension of the *Quill* physical-presence standard to taxes on, or measured by, income" (collecting cases)); *MBNA Am. Bank, N.A. & Affiliates v. Indiana Dep't of State Revenue*, 895 N.E.2d 140, 143 (Ind. T.C. 2008) (financial institutions tax) (in a case involving a claim for refund of state financial institutions tax the court "Based on this language and a thorough review of relevant case law, this Court finds that the Supreme Court has not extended the physical presence requirement beyond the realm of sales and use taxes. Thus, *Bellas Hess* and *Quill* do not control the outcome of this case."); *Lamtec Corp. v. Dep't of Revenue of State*, 215 P.3d 968, 974 (Wash. Ct. App. 2009), *aff'd sub nom. Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788 (Wash. 2011) ("Plainly stated, the *Quill* Court did not attempt to equate the substantial nexus requirement with a universal physical presence requirement."); *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C.), *cert denied*, 510 U.S. 992 (1993) (state income tax on foreign corporations not subject to the physical presence requirement set forth in *Bellas Hess*); *but see, J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831, 839 (Tenn. Ct. App. 1999) (finding "no basis for concluding that the analysis" should be different for franchise and excise taxes than for sales and use taxes").

Florida, like nearly every other the state, has followed the lead of the U.S. Supreme Court, and has not applied *Bellas Hess* and *Quill* outside of the sales and use tax context. *See Share,* 676 So. 2d at 1363 (sales taxes on mail order sales to Florida residents); *Florida Dep't of Revenue v. American Bus. USA Corp.,* 191 So. 3d 906 (Fla. 2016) (sales tax on sales of flowers by a Florida company for delivery outside of Florida not prohibited by Commerce Clause under a *Bellas Hess* and *Quill* analysis); *Dep't of Banking and Fin., State of Fla. v. Credicorp, Inc.* 684 So. 2d 746 (Fla. 1996) (*Quill* and *Bellas Hess* do not apply to licensing and annual fee requirements for out-of-state retail installment sellers); *see also Rhinehart Equip. Co. v. Dep't of Revenue,* Case No. 11-2567, 2013 WL 1303210, *8-*11 (Fla. DOAH Aug. 27, 2012; Fla. Dep't Revenue March 25, 2013) (Georgia heavy equipment dealer had physical presence in Florida to satisfy "substantial nexus" requirements of *Quill, Bellas Hess* and *Share*).

Plaintiff cannot and does not direct this Court to any Florida case in which a court or administrative tribunal applied *Quill, Bellas Hess* or *Share* to Florida's tobacco excise tax or surcharge. In fact, as noted in the Department's summary judgment motion, the only case in which this issue was even considered was a challenge to a tax audit and subsequent assessment brought by Plaintiff in 2015. *Global Hookah Distributors, Inc. v. Dep't of Bus. and Prof'l Reg.,* Case No. (Fla. DOAH Oct. 20, 2016; Fla. DBPR April 17, 2017). In that case, Plaintiff objected to

the assessment of tobacco taxes, in part, because it claimed it lacked a "substantial nexus" with Florida. *Id.*, Recommended Order at 15. The presiding administrative law judge ("ALJ") issued a finding of fact, subsequently adopted by the Department, rejecting that argument, and finding that Plaintiff's tobacco products were subject to the excise tax and surcharge. *Id.*, Recommended Order at 15-16.[2]

In addition, according to the Department's representative:

> The Department has consistently interpreted sections 210.276 (tobacco surcharge) and 210.30 (tobacco excise tax), Florida Statutes, as applying to out-of-state tobacco dealers, whether or not those dealers have a physical presence in Florida and has enforced the statutes accordingly. Should the Department's auditors determine that an out-of-state dealer is either not paying the required tobacco taxes or submitting the required reports, that dealer will be referred to the Department's enforcement section.

Torres Supp. Aff. at 2. There was simply no reason for any out-of-state tobacco distributor to believe that it was not liable for these taxes.

In an effort to salvage its case from the fatal impact of the *Wayfair* decision, Plaintiff argues that *Wayfair* should apply only prospectively to it because it obtained some sort of vested property right under prior court precedent, and because it

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[2] Plaintiff appealed the Final Order in the administrative case. *Global Hookah Distrib. Inc. v. Dep't of Bus. and Prof'l Regulation,* 284 So. 3d 987 (Fla. 1st DCA 2018). The only issue on appeal was whether the ALJ properly refused to consider Plaintiff's claim "that the Department's inclusion of federal excise taxes, shipping costs, and other related items [into the 'wholesale sales price' on which the tobacco excise tax and surcharge are based] was an unpromulgated rule for which they are entitled to relief." *Id.* at 988. The First District reversed and remanded the case, with directions that this claim be reinstated by the ALJ. *Id.*

detrimentally relied on that prior court precedent and retroactive application of *Wayfair* would be unfair to it. Plaintiff's arguments are supported by neither the law nor the facts and should be rejected by the Court.

As the Florida Supreme Court has observed, "[j]udicial decisions in the area of civil litigation have retrospective as well as prospective application." *Koppel v. Ochoa*, 243 So. 3d 886, 893 (Fla. 2018) (citation omitted). "This includes decisions of a 'court of last resort overruling a former decision ... unless specifically declared by the opinion to have a prospective effect only.' *Id.* (quoting *Florida Forest & Park Service v. Strickland*, 18 So.2d 251, 253 (Fla. 1944)). *Strickland* holds that a judicial decision construing a statute will ordinarily be deemed to "relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein." *Id. Strickland,* however, noted that "there is a certain well-recognized exception that where a *statute* has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation." *Id.* In practice, as the Fifth District Court of Appeal noted in *Florida Elks Children's Hosp. v. Stanley*, 610 So. 2d 538, 541 (Fla. 5th DCA 1992), "where the doctrine of prospective application has been applied, there have been a large number of people who took affirmative action (generally paying taxes) in response to statutory

obligations. And in these cases, prejudice was presumed if the doctrine was not applied."

In this regard, Plaintiff can make only the conclusory claim that it had a vested property right to a "refund of erroneously paid tax." Pl. Mot. for Summ. J. at 14. Plaintiff provides no case law in support of the proposition because it does not exist. Even if it did, it would be insufficient to satisfy the requirements for the nonretroactive application of a Supreme Court decision. That would require detrimental reliance on the part of the allegedly aggrieved party. *Stanley,* 610 So. 2d at 541. Detrimental reliance has to be both reasonable and detrimental. *See Mobile Med. Indus. v. Quinn*, 985 So. 2d 33, 35–36 (Fla. 1st DCA 2008) ("The elements of estoppel are well-established (1) a representation by the party to be estopped to the party claiming estoppel as to some material fact which is contrary to the position *36 later asserted by the estopped party; (2) a reasonable reliance on the present representation by the party claiming estoppel; and (3) a detrimental change in position by the party claiming estoppel caused by the representation and the reliance thereon.").

As noted above, no state or federal court decision has ever determined that the application of sections 210.276 and 210.230, Florida Statutes, to out-of-state tobacco distributors violated the Commerce Clause in any way. Plaintiff even had that question answered directly in an administrative proceeding. And the Department

has consistently applied these statutes to out-of-state tobacco distributors. Under these circumstances, any reliance by Plaintiff cannot be deemed to be reasonable. Therefore, there was no vested property right for Plaintiff to obtain in the first place.

Secondly, even if there had been such a decision, Plaintiff has not alleged any detrimental reliance on such a decision. Such detrimental reliance is required for consideration of the exception to the rule of retroactive operation of judicial decisions interpreting statutes. The case provided by Plaintiff in support of its argument, *Int'l Studio Apartment Ass'n v. Lockwood*, 421 So. 2d 119 (Fla. 4th DCA 1982), is a good example. In that case, a class action lawsuit was brought to determine whether a United States Supreme Court decision declaring a Florida statute unconstitutional would be applied retrospectively. *Id.* at 1119. The statute at issue authorized the clerk of the circuit court to invest funds deposited into the court registry and retain the interest income generated thereby. *Id.* The statute was in effect for a seven-year period and during that time, the clerk, in conformance with the statute, invested funds deposited in the court and disposed of income generated thereby. *Id.* at 1120-1121. The plaintiff class sought retrospective application which would have required the return of funds already expended by the clerk. *Id.* at 1123. Accordingly, the Fifth District determined that the United States Supreme Court

decision should be applied prospectively only. *Id.*[3] In making its determination, the *Lockwood* court observed that the plaintiff class was in the same position that they would have been in had the state statute at issue never been enacted. *Id.* at 1122-1123. Accordingly, the retrospective operation of the United States Supreme Court decision would have "no measurable effect on the constitutional interest in question." *Id.* at 1123.

[3] Plaintiff's other cases likewise evidence actual detrimental reliance by the party seeking to avoid retroactive application. *Florida Forest & Park Serv. v. Strickland*, 18 So. 2d 251(Fla, 1944) involved the effect of a Florida Supreme Court opinion overruling prior case law governing the procedures for appealing administrative determinations in workers compensation cases. The court determined that the overruling opinion would have prospective only application because the claimant at issue relied on the previously valid procedure and would have lost his right to appeal otherwise. *Id.* at 254. In *Interlachen Lakes Estates, Inc. v. Snyder,* 304 So. 2d 433 (Fla. 1973), a property tax assessment statute was declared unconstitutional. The Florida Supreme Court gave its decision prospective only application because "persons relying on the state statute did so assuming it to be valid . . . ." *Id.* at 435. *Gulesian v. Dade Cty. Sch. Bd.*, 281 So. 2d 325 (Fla. 1973) was a case in which a statute concerning the authority of school districts to levy ad valorem taxes was declared unconstitutional. Plaintiff taxpayers in that case also sought a judgment requiring a refund of the excess tax collected under the invalidated statute. *Id.* at 326. The Florida Supreme Court refused to apply its statutory unconstitutionality decision retrospectively because the school board "acted in good faith reliance on a presumptively valid statute." *Id.* Finally, *Dep't of Revenue v. Anderson,* 389 So. 2d 1034 (Fla. 1st DCA 1980) was a case involving admissions taxes for party fishing boats. For a period of time, there was an appellate court decision indicating that party fishing boat operators were not required to collect such taxes. *Id.* at 1036. A subsequent decision overruling the earlier case and making the boat operators liable for the tax was not applied retrospectively because the boat operators, in reliance on the earlier decision, did not collect and remit admissions taxes during the time that decision was in effect. *Id.*

The undisputed evidence submitted by the Department clearly establishes that Plaintiff did not, in fact, rely to its detriment on any judicial decision regarding the application of Florida's tobacco excise tax and surcharge. Throughout the refund period, it reported and paid these taxes to the Department, and with extremely generous markups on downstream sales, there is absolutely no reason to believe that Plaintiff did not pass these taxes on to its customers.[4] Torres Supp. Aff. at 2, 3.[5] In addition, since it did pay the tobacco excise tax and surcharge, it is in the same position it would have been in had the opinions in *Bellas Hess, Quill* and *Share* never been issued. It paid the taxes mandated by statute, and there is now a United States Supreme Court decision confirming that those taxes do not require an out-of-state business entity to have a physical presence in Florida. There is therefore no reason not to apply *Wayfair* retrospectively as well as prospectively.

Plaintiff claims that the United States Supreme Court determined that the South Dakota tax law at issue in *Wayfair* was constitutional because it only applied

[4] For example, according to the Torres Supplemental Affidavit, Plaintiff sold to Shaharazad, of Tarpon Springs, hookah tobacco with a reported wholesale sales price of $36.29. Plaintiff's invoices establish that the actual sales price to Shaharazad of $173.12, a markup of approximately 477%.

[5] Because of the requirement to combine documents for filing with the Court, the page number references in paragraph 10 of the Torres Supplemental Affidavit may be difficult to locate. Page 178 and 179 of Exhibit 1 to that affidavit may be found at pdf pages 184 and 185 of Defendant's Notice of Filing Summary Judgment Evidence, filed on August 7, 2018. Page 4 of Exhibit 2 may likewise be located at pdf page 189 of that same document.

prospectively. Pl. Mot. Summ. J. at 12. While that the South Dakota expressly forbids retroactive application, *Wayfair*, 138 S.Ct. at 2088, this was hardly the basis for the court's decision. As discussed above, the principal holding of *Wayfair* was to overrule *Quill* and *Bellas Hess* and eliminate the physical presence rule as a part of Commerce Clause jurisprudence. *See id.* at 2099 ("For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), should be, and now are, overruled.").

The nonretroactivity aspect of the South Dakota statute is mentioned in *Wayfair* only in passing and only after the principal holding was announced. *Wayfair*, 138 S.Ct. at 2099. It is mentioned as only one of "several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce." *Id.* And the entire discussion is dicta. The court prefaces its discussion here by noting that "[b]ecause the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here." *Id.* at 2100. Those issues were left to the South Dakota courts to decide on remand. *Id.*

Additionally, Plaintiff's argument is a nonstarter because, like the statute at issue in *Wayfair,* sections 210.276 and 210.230, Florida Statutes do not apply retroactively. Florida statutes apply prospectively unless expressly indicated otherwise. *See Foley v. Morris,* 339 So. 2d 215, 216 (Fla. 1976) ("the presumption is against retroactive application of a statute where the Legislature has not expressly in clear and explicit language expressed an intention that the statute be so applied."); *see also Fitchner v. Lifesouth Cmty. Blood Centers, Inc.*, 88 So. 3d 269, 279 (Fla. 1st DCA 2012) ("The courts presume that a statute will apply prospectively only and that it will not apply to conduct occurring before the statute was enacted.").[6]

Finally, it must be noted that *Wayfair* and its predecessor United States Supreme Court cases are all constitutional cases, interpreting the authority and rights of state and federal governments under the Commerce Clause of the United States Constitution. In this regard, as the Fifth District observed in *Stanley*, "once constitutional rights are found to exist, the court has no more authority to deny those rights than does the legislature." *Stanley*, 610 So. 2d at 540. Since the United States Supreme Court in *Wayfair* determined that states have a constitutional right to impose taxes on entities that have a "substantial nexus" to the taxing state regardless of a physical presence within that state, no other court, tasked with applying that

[6] This also disposes of Plaintiff's argument regarding the amicus brief in which the State of Florida joined. Pl. Mot. Summ. J. at 15.

case, would have the authority to deny Florida, through the Department, the right to enforce its tax statutes against Plaintiff, prospectively as well as retrospectively. *Id.*

CONCLUSION

For the reasons set forth above and in the Department's Motion for Final Summary Judgment, the Department respectfully requests that the Court deny Plaintiff's motion for summary judgment and enter final summary judgment in favor of the Department.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished on August 9, 2018, pursuant to Florida Rule of Judicial Administration 2.516 to Gerald J. Donnini II, Esq., Law Offices of Moffa, Gainor & Sutton, P.A., One Financial Plaza, Suite 2202, 100 Southeast Third Avenue, Fort Lauderdale, Florida 33394, via email to jerrydonnini@floridasalestax.com.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ William H. Stafford III
WILLIAM H. STAFFORD III
Florida Bar No. 70394
Senior Assistant Attorney General
Office of the Attorney General
State Programs Bureau
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3785 (telephone)
(850) 413-7555 (facsimile)
Counsel for the Department
william.stafford@myfloridalegal.com