64,553

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRUNNER ENTERPRISES, INC., a Delaware Corporation,

Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, et al.,

Appellee,

CASE NO. AR-337

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

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ATTORNEYS FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a Final Judgment on Entry of Mandate entered by the Circuit Court of the Second Judicial Circuit of Florida. Appellant, Brunner Enterprises, Inc., a Delaware corporation, was the Plaintiff below. Appellee, Department of Revenue, was the Defendant below. The Appellant, Brunner Enterprises, Inc., is referred to as "Appellant," "the taxpayer," "Brunner," "Brunner Enterprises," or by its corporate name. The Appellee, Department of Revenue of the State of Florida, is referred to as "Appellee" or "the Department." References to the record on appeal appear as "R-__." References to the Appendix attached hereto will appear as "A-__."

The Appellee must disagree with the Appellant's recital of the facts which are relevant to the issue before this Court..

This suit was originally brought in the Circuit Court of the Second Judicial Circuit of Florida, in and for Leon County, on November 9, 1976, to challenge the imposition by the Department of certain Florida corporate income taxes on the Appellant. An answer was filed by the Department. The case was stayed pending ultimate determination of jurisdiction. An order and certain stipulations relating to the question of jurisdiction and exhaustion of administrative remedies were filed. On November 9, 1978, Brunner Enterprises filed a Motion for Summary Judgment. Thereafter, on November 25, 1978, it

filed two affidavits, one by Travis Murphy, and one by Fred J. Brunner, in support of its motion. Depositions of Travis Murphy and Fred J. Brunner were taken at the request of the Department.

Brunner filed a Motion for Summary Judgment which was heard and the result was a final summary judgment rendered by the Honorable Charles Miner, Circuit Judge, in favor of Brunner Enterprises, on January 19, 1979. The Department of Revenue filed a timely notice of appeal invoking the jurisdiction of the District Court of Appeal, First District of Florida, on February 16, 1979.

This Court affirmed the decision of the Circuit Court (A-1-2). The Department filed its Notice of Certiorari in the District Court of Appeal of Florida, First District, on October 2, 1979, invoking the jurisdiction of the Florida Supreme Court under Art. V, §3(b)3, Constitution of Florida, because of the question certified by the First District to be of great public interest.

This Court's decision and trial court's decision were reviewed by the Supreme Court of Florida by certiorari proceedings and said decision and judgment were quashed and remanded. (A-9-11).

The mandate of the Supreme Court was filed with the District Court of Appeal, First District, and the District Court of Appeal, First District, entered an Order on Mandate on December 17, 1980. (A-13,14)

Then, on August 4, 1982, Plaintiff filed a Motion for Summary Judgment, to which the Defendants responded on December 15, 1982, by filing a Motion to Strike Plaintiff's Motion for Summary Judgment and a Motion to Enforce the Mandate.

The trial court heard, after notice, all of the motions and entered the Final Judgment on Entry of Mandate (A-14-22), which the Appellant seeks to have this Court review.

ISSUES PRESENTED

I

THE TRIAL COURT WAS CORRECT IN ADHERING TO THE MANDATE AND DECISION OF THE SUPREME COURT AND THIS COURT IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT

II

THE TRIAL COURT WAS CORRECT IN ADHERING TO THE MANDATE AND DECISION OF THE SUPREME COURT AND THIS COURT IN ENTERING THE FINAL JUDGMENT ON ENTRY OF MANDATE.

[Appellant's Issues A, B and C are addressed by Appellee's Issues I and II]

[Both Issues of the Appellee will be discussed together because of their interrelationship]

ARGUMENT

Before beginning the argument in this case, it is important that this Court remember that all the Appellant is appealing is the trial court's adherence to this Court's mandate.

The Appellant continues to ignore the fact that the facts and issues of law which the Appellant is attempting to argue have already been before this Court and the Florida Supreme Court in the previous appeal of this matter.

It is submitted by the Appellee that the facts of this case concerning the question of whether the Appellant operated two separate and distinct businesses-the active operation of Florida orange groves and the management of assets in Illinois which produced the income in question--is irrelevant. The facts involving the Appellant's business operations were before the Supreme Court of Florida and presumably were taken into account in reaching its decision that the income in question must be included in the Appellant's tax base and that the Appellant should not be allowed the use of separate accounting under Sec. *214.73*, F.S., to apportion its tax base to Florida instead of the normal three-factor apportionment method. The Supreme Court, despite the possibility that Brunner Enterprises operated two separate businesses, held that the income in question must be included in the Appellant's tax base and that the three-factor apportionment method should be applied to the Appellant's tax base to determine

the amount of its income subject to Florida tax. It is, therefore, respectfully submitted that the question of whether the Appellant operated two separate and distinct businesses is irrelevant to the proper resolution of this matter.

The only issue, properly before this Court, is whether or not the trial court had the authority to grant the Appellant's post mandate Motion for Summary Judgment, or was the trial court required to enter judgment for the Appellee as directed by this Court's mandate. Stated another way, the issue is whether the trial court was correct in adhering to the mandate and decision of the Florida Supreme Court and this Court by entering judgment for the Appellee.

It goes without question that:

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or inter-meddle with it, further than to settle as much as has been remanded.

Rinker Materials Corp. v. Holloway Materials Corp., 175 So.2d 564, 565 (2 DCA 1965), cert. den. 180 So.2d 657 (Fla. 1965); King v. L&N Investors, Inc., 136 So.2d 671 (3 DCA 1962); Petition of Vermeulen, 122 So.2d 318 (1 DCA 1960).

The judgment and mandate of this Court in this case could not be modified except upon permission of this Court, Jefferson Nat. Bank v. Metro Dade County, 285 So.2d 445 (3 DCA 1973); State v. Holt, 117 So.2d 428 (3 DCA 1960), and no such permission was sought.

The Appellant contends that the inclusion of the dividends, interest and gains on the sale of stock which the Appellant is attempting to tax in its tax base is unconstitutional based upon the United States Supreme Court decision of ASARCO, Inc. v. Idaho State Tax Comm, __U.S.__, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982).

Appellant originally filed suit in the Circuit Court of the Second Judicial Circuit of Florida, in and for Leon County, on November 9, 1976. Among the Counts raised by Appellant was the inclusion of the income in question in its adjusted federal income pursuant to Sec. 220.13, F.S. On January 19, 1979, the Circuit Court rendered a Final Summary Judgment in favor of Appellant, stating in pertinent part: as follows:

> The law to be applied in this case is most succinctly set forth in Stan Musial & Biggies, Inc., Petitioner, vs. State of Florida, Department of Revenue, Respondent, Case No. II-391, as cited by the First District Court of Appeal on September 25, 1978. Applying such law to the undisputed facts in this case, it is hereby ORDERED and ADJUDGED the Plaintiff's Motion for Summary Judgment is granted.

The Department of Revenue filed a timely notice of appeal invoking the jurisdiction of this Court. This Court affirmed the decision of the Circuit Court and certified the following question to the Supreme Court of Florida:

> Is the gain from an out-of-state sale of stock held by a foreign [sic] corporation doing business in Florida taxable under the Florida Corporation Income Tax Code, and if so, what method of computation should be used?

The Department filed its notice of certiorari in this Court invoking the jurisdiction of the Florida Supreme Court under Art. V, §3(b)3, Constitution of Florida, because of the question certified by this Court to be of great public interest. The decision and judgment of this Court were reviewed by the Supreme Court of Florida by certiorari proceedings and said decision and judgment were quashed and remanded. In answer to the first part of the question certified by this Court, the Supreme Court of Florida stated the following:

> As noted by the district court of appeal, the first portion of the question, relating to the taxability of the gain, was certified to this Court in Roeer Dean Enterprises, Inc. v. Department of Revenue, 371 So.2d 101 (Fla. 4th DCA 1978). We have addressed the issue and answered the question in the affirmative:
>
> [W]e hold that the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida may be taxable under the Florida Corporate Income Tax Code.

DOR v. Brunner Enterprises, Inc., 390 So.2d 713 (Fla. 1980).

The mandate of the Supreme Court was filed with this Court and this Court entered an Order on Mandate on December 17, **1980. (A-13)**

On August 4, 1982, the Appellant filed a Motion for Summary Judgment in the Circuit Court. The Appellee filed a Motion to Strike the Plaintiff's Motion for Summary Judgment and requested compliance with this Court's Order on Mandate.

In Appellant's original Complaint, the Appellant argued that the income in question should not be included in its adjusted federal income (the "tax base"), which is apportioned to Florida. See Count: II of Plaintiff's Complaint. The Supreme Court of Florida In Brunner, supra, specifically held that the income in question was includible in the Appellant's tax base and therefore was subject to the Florida corporate income tax. Pursuant to **the** Supreme Court of Florida's opinion and judgment, this Court issued its Order on Mandate adopting as its opinion and judgment the opinion and judgment of the Supreme Court of Florida. *(A-14)*

The Supreme Court of Florida and this Court have, therefore, disposed of Appellant's argument that the income in question is properly includible in Appellant's tax base to be apportioned to Florida.

The Circuit Court, in its Final Judgment on Entry of Mandate, states the following:

> Plaintiff admits that one of the two issues involved in this case has finally been resolved by the Supreme Court of Florida. That issue is whether the income which the Defendant is attempting to tax must be included in the tax based of the Plaintiff. As stated by Plaintiff, Plaintiff 'acknowledges that under the mandate the trial court must follow the Supreme Court's decision requiring inclusion of the out-of-state gain from the sale of the bank stock in the tax base, i.e., the federal taxable income, under $5220.12 and 220.13, Fla. Stat. (1973).' (e.s.)

The Appellant did in fact acknowledge that the Circuit Court must follow the Supreme Court's decision requiring inclusion of the income in question in the Appellant's tax base pursuant to the mandate. The Appellant, however, in its Initial Brief now states that it:

> Acknowledges that the trial court is bound by a mandate, but it does not concede that the issues of this case were finally resolved by the prior Florida Supreme Court decision. In this appeal Brunner prays that this Court will take jurisdiction, review this case in light of ASARCO, and take whatever action the Court finds necessary to apply ASARCO as is clearly required to do equity and justice. (Appellant's Initial Brief, p. 13)

Despite this statement, the Appellant has in fact already acknowledged, as recognized by the Circuit Court, that the issue of whether the income in question may be included in the Appellant's tax base has been finally resolved by the Supreme Court of Florida. Therefore, it is respectfully submitted that the judgment of the Florida Supreme Court, when it issued mandate, is the final judgment and compliance therewith

by the Circuit Court was a purely ministerial act. Modine Mgf. Co. v. ADC Radiators, Inc., 367 So.2d 232 (3d DCA 1979); and Jones v. Knuck, 388 So.2d 328 (3d DCA 1980).

The Appellant acknowledges that the Florida Supreme Court decided two issues in its decision. The Appellant contends, however, that the two issues decided by the Florida Supreme Court were as follows:

> (1) that gain from an out-of-state sale of stock could be taxable under the Florida Corporate Income Tax Code, and
> (2) that the method of computation to be used was to include the stock sale gain in the tax base. (P.26, Initial Brief of Appellant)

The Appellant then contends that the "Court did not, however, decide that the Department properly applied the three-factor formula method of apportionment to Brunner's income.,,

It is respectfully submitted, and the Circuit Court so held, that the issue of the proper method of apportionment has in fact been finally resolved by the Supreme Court of Florida. The question of the proper method of apportionment was clearly before the Supreme Court of Florida. As stated by the Florida Supreme Court, this Court certified the following question to it:

> Is the gain from an out-of-state sale of stock held by a foreigh [sic] corporation doing business in Florida taxable under the Florida Corporation Income Tax

> Code, and if so, what method of computation should be used.

390 So.2d at 714.

In addressing the second part of the question certified by this Court to the Florida Supreme Court (the proper method of apportionment) the Supreme Court of Florida held as follows:

> The method of computation under the Florida Corporation Income Tax Code used to tax the gain from an out-of-state sale of stock by a foreign corporation doing business in Florida should include the gain in the tax base described in sections 220.12-13, Florida Statutes (1973).
>
> The decision of the District Court of Appeal is quashed, and the cause is remanded with instructions to reverse the judgment of the trial court and further remand for proceedings consistent with our opinion in Roger Dean Enterprises, Inc., v. Department of Revenue, supra, as well as the views expressed in the instant opinion. (e.s.)

390 So.2d at 715,

Based upon the foregoing, it is clear that the Supreme Court of Florida resolved any question as to the proper method of apportionment based upon its decision in Roger Dean Enterprises, Inc. v. Department of Revenue, 387 So.2d 358 (Fla. 1980). In Roger Dean, the Supreme Court of Florida stated the following with regard to the proper method of apportionment:

> There is a very strong presumption in favor of normal three-factor

> apportionment and against the applicability of the relief provisions. Departures from the basic formula should be avoided except where reasonableness requires. . . . The relief provisions applicable to apportionment should not be used to remove an out-of-state stock sale made by a foreign chartered corporation subject to its income tax from the tax base. . . .
>
> Section 214.73, Florida Statutes (1974), gives the Department of Revenue discretion to alter the apportionment formula in very rare instances, but does not vest any discretion in the Department to modify federal taxable income [the tax base]. (e.s.)

387 So.2d at *363*

In its original Complaint the Appellant argued that it should be allowed the use of separate accounting under Sec. 214.73, F.S., to apportion its tax base to Florida instead of the normal three-factor apportionment method. The effect of allowing separate accounting instead of the normal three-factor apportionment method in this case would be to exclude the income in question from its tax base. Such a result was recognized and disapproved of by the Supreme Court of Florida in its decision in Roger Dean. It therefore appears that the Supreme Court of Florida's answer to the question certified by this Court as to the proper method of apportionment in this case that "the method of computation under the Florida Corporate Income Tax Code used to tax the gain from an out-of-state sale of stock by a foreign corporation doing business in Florida should include the gain in the tax base," (e.s.),

is a final determination by the Supreme Court of Florida that the three-factor apportionment method is proper in this case and that separate accounting, which would effectively eliminate the income from the tax base, is not appropriate. Such a holding is implicit in the decision rendered by the Supreme Court of Florida in light of the statements concerning the use of the normal three-factor apportionment method in Roger Dean and the Supreme Court of Florida's reliance upon the Roger Dean decision in answering the second part of the question certified to it by this Court. Where a particular holding is implicit in a decision rendered, it is no longer open for discussion or consideration. See Sax Enterprises, Inc. v. David and Dash, Inc., 107 So.2d 612 (Fla. 1958); and Sanders v. State, 90 So. 455 (Fla. 1922).

In light of the fact that the Supreme Court of Florida was specifically asked the question of the proper method of apportionment, and the fact that the Court specifically addressed both questions, the only conclusion which the Circuit Court could have reasonably reached concerning the present status of this matter was that the Supreme Court of Florida has finally resolved the entire case and has mandated a decision in favor of the Appellee. Roger Dean clearly shows that the Supreme Court realized that if a taxpayer was allowed the use of separate accounting in place of the normal three-factor method of apportionment, such use would result in the exclusion of

income from tax base. Therefore, in Brunner, the Supreme Court clearly held, in answer to the question of the proper method of apportionment, that such a result should not be allowed in this case. Goodman v. Olsen, *365* So.2d *393* (3 DCA *1979);* Walker v. Atlantic Coastline Railroad Company, 121 So.2d 713 (1 DCA 1960).

The Supreme Court has issued a "final judgment" in this case. A "final judgment" is a determination and disposition of the whole worth of a case. Therefore, once the Supreme Court issued its decision in this case, no question remained open for determination by the Circuit Court. See Nowlin v. Pickren, 131 So.2d *894* (Fla. 2d DCA 1961); Irving Trust Co. v. Kaplan, 155 Fla. 120, 20 So.2d 351 (Fla. *1944);* and Alderman v. Puritan Dairy, *145* Fla. 292, *199* So. *44* (Fla. *1940).*

The Counts raised by Appellant in its original Complaint involved the same factual situation, Therefore, the original appeal of the Final Summary Judgment of the Circuit Court to this Court would not have been proper unless the Final Summary Judgment determined and disposed of all Counts. See McClain Construction Corp. v. Roberts, 351 So.2d *399* (Fla. 2d DCA *1977).* If this were not the case, this Court or the Supreme Court would have been required to dismiss the appeal. See Harbor Yacht Repair, Inc. v. Sanger, 267 So.2d 51 (Fla. 3d DCA 1972).

Additionally, if the decision of this Court could have been granted upon any of the legal theories raised by the Appellant in its original Complaint, this Court or the Supreme Court would have done so, for the ultimate question before an appellate court is whether the trial court has arrived at a

correct conclusion. See State Plant Board v. Smith, 110 So. 2d 401 (Fla. 1959); Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961). Finally, this Court and the Supreme Court had the right to give such a decree as the trial court ought to have given. See Hollywood, Inc. v. Clark, 153 Fla. 501, 15 So.2d 175 (Fla. 3d DCA 1943).

Appellant argues that the Supreme Court indicated that "the taxpayer would have an opportunity to show the requisite constitutional dimension which under Roger Dean justifies deviation from the three-factor formula." The Appellant has taken the Supreme Court's statement completely out of context. What the Supreme Court actually said was as follows:

> Even if the taxpayer can show the requisite constitutional dimension which under Roger Dean justifies deviation from the three-factor formula, the out of state gain must be included in the tax base. i.e., the federal taxable income. (e.s.)

390 So.2d **at** 715.

The Supreme Court then responded to the second part of this Court's question concerning the proper method of apportionment. In answering this part of the question, the Supreme Court based its decision upon Roger Dean, and held as follows:

> The method of computation under the Florida Corporation Income Tax Code used to tax the gain from an out of state sale of stock by a foreign corporation doing business in Florida should include the gain in the tax base described in sections 220.12-13, Florida Statutes (1973). *390* So.2d at 715.

Appellant had argued that it should be allowed the use of separate accounting under Section 214.73, F.S., to apportion its base base instead of the normal three-factor apportionment method. In Roger Dean, the Supreme Court had recognized that if a taxpayer was allowed the use of separate accounting income, such as the income which the Appellee was attempting to tax in Roger Dean and is attempting to tax

in this case, would have, in effect, been excluded from the taxpayer's tax base. Such a result was disapproved of by the Supreme Court: in Roger Dean.

The Supreme Court in Roger Dean, and the Appellee in its rules, in facr indicate that there may **be** proper circumstances justifying a deviation from the normal three-factor apportionment method. It is also true that the facts in Roger Dean are not the same as the facts in this case. Eased upon these facts, the Appellee argues that:

> Had **the** trial court tested the facts, documents, testimony and affidavits of Brunner, it would have found that under the Roger Dean standard three-factor apportionment was unconstitutionally **applied** *to* Brunner, and that Brunner is one of those rare cases that justifies use of the relief provisions of Section *214.73,* Florida Statutes. (Initial Brief of Appellant, p. ***35-36)***

If in fact this statement were true, it is submitted that the Supreme Court would have so held in its decision on this case. The Supreme Court was fully aware of its decision in Roger Dean and the facts of this case. The Supreme Court, therefore, in answer to this Court's question as *to* the proper method of apportionment could have mandated that the lower court allow the Appellant the use of separate accounting or one of the other methods of relief sought by Appellanr under Section *214.73,* Florida Statutes, and that the normal three-factor apportionment method not be applied to Appellant. The Supreme Court, however, clearly did not do so, and, in fact, mandated the use of the normal

three-factor apportionment method as it had done in Roger Dean. See Rogers v. State, 156 Fla. 161, 23 So.2d 54 (Fla. 1945).

The Appellant's appeal is based solely upon the United States Supreme Court's decision in ASARCO, supra decided by the United States Supreme Court on June 29, 1980. The issue addressed by the United States Supreme Court in ASARCO, however, is the same issue finally resolved by the Supreme Court of Florida in this case. In ASARCO, the Supreme Court stated:

> The question of whether the state of Idaho constitutionally may include within the taxable income of a non-domiciliary parent corporation doing some business in Idaho a portion of intangible income--such as divident and interest payments, as well as capital gains from the sale of stocks--that the parent received from the subsidiary corporations having no other connection with the state, 73 L.Ed.2d at 790.

The State of Idaho taxes corporations pursuant to its version of the Uniform Division of Income for Tax Purposes Act. Under its statute, Idaho classifies income from intangible property (i.e., dividends, capital gain from the sale of stock and interest) as either "business" or "non-business" income. "Business" income includes income from intangible property acquired, managed or disposed of as an integral and necessary part of a taxpayer's trade or business. Any income classified as business income is then apportioned according to a three-factor formula to determine the amount of income subject to Idaho's tax. Non-business income is

allocated entirely to the state of the corporation's domicile. Applying Idaho's law to ASARCO, Idaho treated certain dividends, interest and capital gain on the sale of stock as business income and apportioned this income according to Idaho's three-factor formula.

Following a review of its opinions in Mobile Oil Corp. v. Comm'r of Taxes of Vermont, *445* U.S. *425* **(1980); and** Exxon Corp. v. Wisconsin Dept. of Revenue, *447* U.S. 207 (1980), and an application of the principle enunciated in those decisions to ASARCO, the Supreme Court of the United States held that the income in question could not be included in ASARCO's tax base as business income. The Supreme Court was not confronted with, nor did it address, the question of the proper method of apportionment *to* be used in apportioning income properly includible in a taxpayer's tax base to Idaho.

Based upon the United States Supreme Court's own statement of the question before it in ASARCO, as quoted above, it is clear that the only question dealt with by the United States Supreme Court was whether income, such as the income which the Appellee is seeking to tax in this case, is includible in a taxpayer's tax base. As admitted by the Appellant before the Circuit Court, this issue has been finally resolved by the Supreme Court of Florida. In its decision, the Florida Supreme Court cited Roger Dean Enterprises, Inc. v. Department of Revenue, 387 So.2d at *365* (Fla. 1980), as authority for its judgment in this case. Roger Dean, like this case and ASARCO,

dealt with the question of whether certain income was includible in a taxpayer's tax base to be apportioned to a taxing state. Citing Mobile Oil Corp., the Florida Supreme Court in Roger Dean held that "gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida may be taxable under the Florida corporate income tax code." Like the Supreme Court in ASARCO, the Florida Supreme Court applied the principles of law enunciated in Mobile Oil Corp. to Roger Dean Enterprises. In Roger Dean, the Florida Supreme Court, unlike the Supreme Court in ASARCO, found that the income in question was includible in the taxpayer's tax base. Likewise, the Florida Supreme Court has already **applied** the principle of law of Mobile Oil Corp. as adopted in Roger Dean to the income in question and finally held that such income is includible in the Appellant's tax base.

The Appellant's argument with regard to the Florida corporate income tax is nothing more than a restatement of the question of whether the Florida Supreme Court, as a part of its judgment and order, answered the second part of the question certified to it by this Court. The Appellee does not dispute the Appellant's summary of the computation of Florida's corporate income tax. The computation of Florida's corporate income tax can in fact be broken down into four basic steps: (1) determination of a taxpayer's tax base; (2) apportioning the tax base to Florida; (3) reduction of "net income" by the $5,000.00 exemption; and (4) multiplying "net income" by the 5% tax rate.

The Appellee submits that this Court and the Florida Supreme Court are fully aware of the proper method of computing Florida corporate income tax. This Court clearly showed that it was aware of the proper method of computing Florida corporate income tax in the way it phrased its question certified to the Supreme Court, The Appellant, in its original Complaint, had attacked the application of the first two steps to its factual situation. This Court's question certified to the Supreme Court therefore asked the Supreme Court for a determination of the application of the first two basic steps in computing Florida corporate income tax as applied to the Appellant. The Supreme Court of Florida answered both questions.

As recognized by the Circuit Court's Final Judgment on Entry at Mandate, an appeal of the original Final Summary Judgment in this case would not have been proper unless such judgment determined and disposed of all Counts raised by Appellant in its original Complaint. See McClain Construction Corp. v. Roberts, 351 So.2d 399 (Fla. 2d DCA 1977). If the Final Summary Judgment of the Circuit Court had not determined and disposed of all Counts, this Court or the Supreme Court of Florida would have dismissed the appeal. *See* Harbour Yacht Repair, Inc. v. Sanger, 267 So.2d 51 (Fla. 3d DCA 1972). Neither Court did so.

Additionally, since all Counts had been determined and disposed of by the Circuit Court, if the Circuit Court's decision could have been followed upon any of the legal theories raised by the Appellant in its original Complaint, this Court or the Supreme Court would have done so. This Court and the Supreme Court, however, did not dismiss the appeal and did notuphold the decision of the Circuit Court.

More importantly, as discussed above, the Supreme Court of Florida was clearly asked by this Court to determine whether the income in question could be included in the Appellant's tax base and, if so, the proper method of apportionment of said income to Florida and clearly answered both parts of the question certified to it by this Court.

CONCLUSION

It is submitted by the Appellee that the facts of this case concerning the question of whether the Appellant operated two separate and distinct businesses--the active operation of Florida orange groves and the management of assets in Illinois which produced the income in question--is irrelevant. The facts involving the Appellant's business operations were before the Supreme Court of Florida and presumably were taken into account in reaching its decision that the income in question must be included in the Appellant's tax base and that the Appellant should not be allowed the use of separate accounting under Sec. *214.73,* F.S., *to* apportion its tax base *to* Florida instead of the normal three-factor apportionment method. The Supreme Court, despite the possibility that Brunner Enterprises operated two separate businesses, held that the income in question must be included in the Appellant's tax base and that the three-factor apportionment method should be applied to the Appellant's tax base to determine the amount of its income subject to Florida tax. It is, therefore, respectfully submitted that the question of whether the Appellant operated two separate and distinct businesses is irrelevant to the proper resolution of this matter.

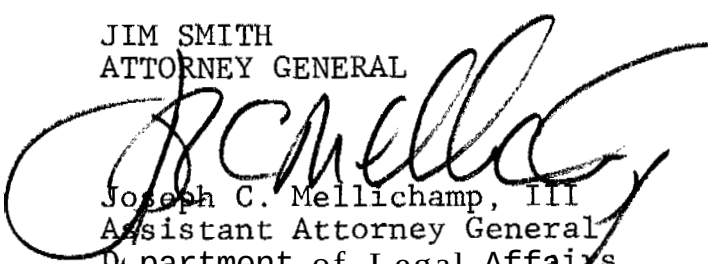
The only issue, properly before this Court, is whether or not the trial court had the authority to grant the Appellant's post mandate Motion far Summary Judgment, or was the trial court required to enter judgment for the Appellee as directed

by this Court's mandate. Stated another way, the issue is whether the trial court was correct in adhering *to* the mandate and decision of the Florida Supreme Court and this Court by entering judgment for the Appellee. Appellee submits that the trial court was correct in adhering to **the** mandate. **Thus,** its decision should be upheld.

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee and Appendix was sent by U.S. Mail this 13th day of June, 1983, to: Robert S. Hightower, Esq., Ausley, McMullen, McGehee, Carothers and Proctor, P.O. Box 391, Tallahassee, Florida *32302.*

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRUNNER ENTERPRISES, INC., a Delaware Corporation,

Appellant,

vs. **CASE NO. AR-337**

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, et **al.**

Appellee.

APPENDIX TO **ANSWER** BRIEF OF APPELLEE

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,	:	
Appellant,	:	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.
vs.	:	
BRUNNER ENTERPRISES, INC.,	:	CASE NO. NN-27
Appellee.	:	

Opinion filed September 7, 1979.

An Appeal from the Circuit Court for Leon County. Charles E. Miner, Jr., Judge.

Jim Smith, Attorney General; and E. Wilson Crump, III, Assistant Attorney General, for Appellant.

C Gary Williams of Ausley, McMullen, McGehee, Carothers and Proctor, for Appellee.

PER CURIAM.

Having considered the briefs, the record, and the oral argument presented by counsel we find this case is controlled by Stan Musial and Biggie's Inc. v. Department of Revenue, 363 So.2d 375 (Fla. 1st DCA 1978); cert. granted, Case No. 55,711 Florida Supreme Court, and affirm.

We agree with the Fourth District Court of Appeal however that the question is one of great public interest, Roger Dean Enterprises, Inc. v. Department of Revenue,

granted, 1 FLW 64, 1979], cert. granted, Case No. 55,971 Florida Supreme Court. Therefore we certify the question to the Supreme Court: Is the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida taxable under the Florida Corporate Income Tax Code, and if so what method of computation should be used?

AFFIRMED.

ERVIN, Acting Chief Judge, BOOTH & SMITH, L., JJ., CONCUR

DAUKSCH, Judge, concurring in part and dissenting in part.

While I concur in the denial of the petition for rehearing I dissent in the derision to certify the matter to our Supreme Court. If there is a conflict between our decision and others, and respondent urges there is a conflict, then our Supreme Court can grant certiorari and resolve the conflict. Article V, Section 3, *Florida Constitution*. I hold the position that a question should be certificd to our Supreme Court only when there is a great need for an early resolution of a problem which only our Supreme Court can resolve adequately. The matter here is of no greater public interest than many we decide and while I recognize some Federal District Courts have taken interest in the question we considered here, I still do not perceive such a great public interest to require our certifying the matter to our Supreme Court. The responsibility is ours and should be ours finally and unless a conflict truly exists the matter should come to a rest. Again, if a conflict exists, and our Supreme Court deems it necessary to resolve it, then that procedure is available under the same Constitutional provision cited above.

ROGER DEAN ENTERPRISES, INC., Petitioner,

v.

The DEPARTMENT OF REVENUE of the State of Florida, Respondent.

No. 77-1893.

District Court of Appeal of Florida, Fourth District.

Oct. 11, 1978.

Opinion Modified On Rehearing Dec. 27, 1978.

Foreign corporation petitioned District Court of Appeal for writ of certiorari, seeking review of an order of the division of administrative hearings, James E. Bradwell, Hearing Officer, which upheld the assessnient of delinquent corporate income taxes against the foreign corporation. The District Court of Appeal, Downcy, C. J., held that: (1)there was no error in including the gain on sale of stock interest in auto dealership in tax base of foreign corporation, computed for purposes of state corporate tax, although neither automobile dealership nor transaction itself had any real contacts with state; (2) new corporate income tax was intended *to* apply to installment payments received by foreign corporation after January 1, 1972, which were produced as result of sale of auto dcalership prior to January 1, 1972; (3) corporate income tax law, which authorized tax of installment payments received by foreign corporation after January 1, 1972, which were produced as result of sale *of* auto dealership prior to January 1, 1972, and which afforded foreign corporation option of reporting under accrual method of accounting or reporting on installment basis, was not unconstitutional, and (4) foreign corporation, which was wholly owned by one individual who also owned 75% of stock in domestic corporation with remainder owned by another, was member of "controlled group of corporations" as defined by section of Internal Revenue Code and thus was not entitled to $5,000 exemption allowed by state statute.

Certiorari denied.

1. Taxation ⇨980

Amount of tax base for state corporate income tax purposes is taxpayer's adjusted federal income for year in question which is apportioned lo state. West's F.S.A. § 220.-12(1).

2. Taxation ⇨1075

Apportionment of taxpayer's adjusted federal income tax is accomplished by utilization of three-factor formula: property factor, sales factor, and payroll factor. West's F.S.A. §§ 214.71, 220.15.

3. Taxation ⇐1075

Corporate income tax code is based upon apportionment theory, whereunder taxpayer's tax base includes all of its adjusted federal income for period in question regardless of where that income is produced; there is no elimination from tax base of income produced by foreign corporation in another jurisdiction. West's F.S.A. § 220.01 et seq.

4. Taxation ⇐1076

There was no error in including gain on sale of stock interest in automobile dealership in tax base of foreign corporation, computed for purposes of state corporate tax, although neither automobile dealership nor transaction itself had any real contacts with state. West's F.S.A. § 220.01 et seq.

5. Taxation ⇐1083

Foreign corporation, which contested computation of corporation's adjusted federal income for purposes of arriving at tax base for assessment of state corporate tax liability, failed to meet burden of demonstrating error in methodology used by Department of Revenue in apportioning corporation's adjusted federal income. West's F.S.A. § 220.01 et seq.

6. Taxation ⇐966

New corporate income tax wits intended to apply to installment payments received by foreign corporation after effective date of statute which were produced as result of sale of auto dealership prior to effective date. *West's* F.S.A. § 220.13(1)(c).

7. Statutes ⇐223.4

Latter section of corporate income tax law dealing with installment payments, being more specific, controls over section of statute dealing with legislative intent. West's F.S.A. §§ 220.02(4), 220.13(1)(c).

8. Taxation ⇐962, 966

Corporate income tax law, which authorized tax of installment payments received by foreign corporation after January 1, 1972, which were produced as result of sale of auto dealership prior *to* January 1, 1972, and which afforded foreign corporation option of reporting under accrual method of accounting or reporting on installment basis, was not unconstitutional. West's F.S.A. § 220.01 et seq.

9. Taxation ⇐1048

Foreign corporation, which was wholly owned by one individual who also owned 75% of stock in domestic corporation with remainder owned by another, was member of "controlled group of corporations" as defined by section of Internal Revenue Code and thus was not entitled to $5,000 exemption allowed by state statute. 26 U.S.C.A. (I.R.C.1954) § 1563; West's F.S.A. § 220.14(1, 4).

David S. Meisel of Rogers & Meisel, Palm Beach, for petitioner.

Robert L. Shevin, Atty. Gen., Tallahassee, and E. Wilson Crump, II, Asst. Atty. Gun.; Tallahassee, for respondent.

DOWNEY, Chief Judge.

By Petition for Writ of Certiorari we have for review an order constituting final agency action of the State Department of Revenue upholding the assessment of delinquent corporate income taxes against petitioner for the years 1972-1973.

The parties have stipulated as to the facts:[1]

"Petitioner is a West Virginia corporation. organized under the laws of that state on January 4, 1958. Prior to June 1, 1962, it operated an automobile dealership in Huntington, West Virginia. On June 1, 1962, it exchanged the assets of its automobile dealership for fifty (50%) percent of the capital stock of Dutch Miller Chevrolet, Inc., a West Virginia corporation organized to succeed to the automobile dealership formerly operated by the Petitioner. Prior to this, in 1961, the Petitioner had acquired one hundred (100%) percent of the capital stock in Palm Beach Motors (the name of which

1. The stipulation of facts submitted by the parties has facilitated the appellate presentation of this case and we commend the general use of such stipulations to the Bar.

was changed on August 10, 1961 to Roger Dean Chevrolet, Inc.) Roger Dean Chevrolet, Inc. is a wholly owned subsidiary of the Petitioner which operates on property owned by the Petitioner. The years involved herein are the fiscal years of the Petitioner ended December 31, 1972 and 1973, during which years the Petitioner's principal income (except for the gain involved herein) consisted of rents received from Roger Dean Chevrolet, Inc. Petitioner and its subsidiary filed consolidated returns for the years involved herein. During the fiscal year ended December 31, 1972,[2] Petitioner sold its stock in Dutch Miller Chevrolet, Inc. to an unrelated third party for a gain determined by the Respondent to be in the amount of $349,217.00, whirh, although the sale took place out of the State of Florida, the Respondent has determined to be taxable under the Florida Income Tax Code (Chapter 220 of the Florida Statutes).

"In the fiscal years ended December 31, 1972 and 1973, Petitioner included in Florida taxable income the amounts of $76.00 and $6,245.00, respectively, from the sale of property on April 23, 1971, such gain being reported for Federal income tax purposes on the installment method under Section 453 of the Internal Revenue Code of 1954.

"Roger H. Dean, individually or by attribution during the years involved herein, was the owner of one hundred (100%) percent of the stock of Roger Dean Enterprises, Inc. and seventy-five (75%) percent of the stock of Florida Chrysler-Plymouth, Inc. The remaining twenty-five (25%) percent of Florida Chrysler-Plymouth, Inc was owned by Robert S. Cuillo, an unrelated person. The Respondent disallowed the $5,000.00 exemption to the Petitioner in computing its Florida corporate income tax for each of the years in question on the theory that the two corporations were members of it controlled group of corporations, as defined in Section 1563, of the Internal Revenue Code of 1954.

"By letter of April 13, 1976, the Respondent advised Petitioner of its proposed deficiencies for the fiscal years ended December 31, 1972 and 1973, in the net respective amounts of $19,086.25 and $1,086.79."

Petitioner contends the Department erred in upholding the tax assessment in three respects:

(1) In holding that a gain from the sale of stock in a foreign corporation having no contacts with Florida is taxable under the Florida Corporate Income Tax Law.

(2) By imposing the Florida Corporate Income tax on gains realized prior to the amendment to the Florida Constitution which first permitted a corporate income tax.

(3) In finding that petitioner was a "member of a controlled group of corporations" within the meaning of Section 1563 of the Internal Revenue Code, which resulted in a denial to petitioner of the $5000 exception provided by the Florida Corporate Income Tax Law.

In support of its first designation of error, petitioner suggests that Florida may not impose corporate income taxes on corporate gains derived from transactions which take place outside the State of Florida and which involve a non-resident corporation where the non-resident corporation has no contacts with Florida. Additionally, petitioner contends that in any event it was entitled to be afforded the relief provided by Section 214.73, Florida Statutes (1973), which authorizes other methods of apportionment when the three factor formula does not fairly represent the extent of the taxpayers tax base attributable to Florida.

[1–3] A taxpayer's adjusted federal income forms the tax base upon which the Florida Corporate Income Tax operates. The amount of the Florida corporate tax is the taxpayer's adjusted federal income for the year in question which is apportioned to

2. This appears to be a typographical errur as the briefs and record make it otherwise clear that the sale date was April 1971.

Florida.[3] The apportionment of the taxpayer's adjusted federal income tax is accomplished by utilization of a three factor formula: a property factor, a sales factor and a payroll factor.[4] Therefore, Florida's Corporate Income Tax Code is based upon the apportionment theory. Under this theory the taxpayer's tax base includes all of its adjusted federal income for the period in question regardless of where that income is produced. There is no elimination from the tax base of income produced by a foreign corporation in another jurisdiction.[5] The apportionment factors eliminate the essential unfairness of taxing income in the taxing jurisdiction which is earned elsewhere.

[4] Because Florida is an apportionment state, there is no error in including the installment payments on the Dutch Miller Chevrolet Inc., stock in the tax base for 1972 and 1973, although neither the transaction nor the Dutch Miller Agency had any real contacts with Florida.

[5] Furthermore, petitioner contends in its brief that "[t]he ordinary scheme of apportionment docs not fairly represent the extent of petitioner's Florida tax base under the facts of this case, and under Section 214.73 F.S. an equitable apportionment would result only if the out-of-state sale were excluded from taxation in Florida." However, the exclusion of that gain would require the Department to violatr the statute which requires that the gain (if includable for federal income tax purposes) he included in the petitioner's tax base for determination of the Florida Corporate Income Tax. As the Supreme Court of Vermont said in a similar factual situation in *Hoosier Engineering Company v. Shea*, 124 Vt. 341, 205 A.2d 821 (1964):

> "It is not the application of the factor formula which creates the result complained of by plaintiff. Rather, it is the inclusion of the capital gain item as an integral part of plaintiff's net incorno. Subsection (b) docs not apply to the facts presented by the record in this case. There is no area here for the use of discretion by the commissioner and he has no statutory authority to exclude capital gains or any other item of net income based on the federal code." Id. at 824.

The burden is upon petitioner to demonstrate error in the methodology used by the Department in apportioning the petitioner's adjusted federal income and the petitioner has not demonstrated such error.

Next it is argued that, since the sale of the Dutch Miller stock pre-dated the amendment to the Florida Constitution authorizing corporate income tax, it should not be suhjcct to such tax even though certain installment payments of the sales price were paid during a tax year to which the corporate income tax was applicable. The Legislature specifically provided that the taxpayer has the option to report a gain on the installment basis just as he could do for Federal income tux purposes. It was not Legislative oversight that this method of reporting would cause installments paid after January 1, 1972, on sales which took place prior to January 1, 1972, *to* be taxed under the new Corporate Income Tax Code. Sensing the inequities involved in such taxation, the Legislature provided that the tax on older transactions wauld be imposed at a reduced percentage.[6]

[6, 7] Wl' conclude that the Legislature intended the new Corporate Income Tax to apply to installment payments received by the taxpayer after January 1, 1972,[7] but produced as a result of a transaction prior to January 1, 1972; otherwise, the Legislature would not have enacted Section 220.-

3. Section 220.12(I). Florida Statutes (1973).

4. Sections 220.15 and 214.71. Florida Statutes (1973).

5. England. "Florida Corporate Income Taxation —Background, Scope and Analysis," Florida State University Law Review (1972), p. 13.

6. Section 220.13(1)(c) (1973); England, "Florida Corporate Income Taxation — Background, Scope and Analysis," Florida State University Law Review. pp. 18 and 19.

7. *See Ferro Metal & Chemical Corp., et al. v. Department of Revenue of the State of Florida.* 365 So.2d 419. Third District Court of Appeal (1978).

13(1)(c). We do not believe the explanation of legislative intent contained in Section 220.02(4) conflicts with Section 220.13(1)(c), but if it does, the latter section being located later in the statutory scheme and being more specific, would control.

[8] Petitioner contends it is unconstitutional to tax said installments under the circumstances of this case. This is certainly an arguable position; however, we have considered the authorities cited by petitioner and find them inapposite. On the contrary, we believe the option afforded petitioner of reporting under the accrual method of accounting or reporting on the installment basis enables the taxation of these installments to pass constitutional muster.[8]

We have not overlooked *S.R.G. Corporation v. Dept. of Rev. of St. of Fla.*, 365 So.2d 687 (1978) and *Clearwater Federal Savings & Loan Association v. Department of Revenue of the State of Florida*, 350 So.2d 1134 (Fla. 2nd DCA 1977). However, we do not believe that those cases control the decision here.

[9] Finally, since the Department found petitioner to be a member of a "controlled group of corporations" it refused to allow petitioner the $5000 exemption allowed by Section 220.14(1), Florida Statutes (1973). Subsection (4) of that section provides:

> "Notwithstanding any other provisions of this Code, not more than one exemption under this section shall be allowed to the Florida members of a controlled group of corporations, as defined in section 1563 of the Internal Revenue Code with respect to taxable years ending on or after December 31, 1970, filing separate returns under this Code."

As indicated in the factual recitation above, Roger H. Dean owns 100% of the stock in petitioner and 75% of the stock in Florida Chrysler-Plymouth Inc. The remaining 25% of Florida-Chrysler is owned by Robert S. Cuillo, an unrelated person. Section 1563 of the Internal Revenue Code defines "controlled group of corporations" as follows:

> "SEC. 1563. DEFINITIONS AND SPECIAL RULES.
>
> "(a) CONTROLLED GROUP OF CORPORATIONS.—For purposes of this part, the term 'controllctl group of corporations' means any group of—
>
> * * * * * * *
>
> "(2) BROTHER-SISTER CONTROLLED GROUP.—Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing—
>
> "(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and
>
> "(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of the stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation."

Petitioner concedes that under the facts of the case the requirements of Section 1563(a)(2)(B) are satisfied, but it contends that subsection (a)(2)(A) is not satisfied because Cuillo, the 25% stockholder in Florida Chrysler-Plymouth Inc., is not also a stockholder in petitioner. Petitioner's authority for that construction of the Internal Revenue Code is *Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner of Internal Revenue*, 65 T.C. 798 (1976), a case with very similar facts. However, that case was reversed in *Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner of Internal Revenue*, 548 F.2d 501 (4th Cir. 1977), wherein the Circuit Court of Appeals rejected petitioner's contention and we think rightly so. Under the facts of this case Roger H. Dean and Robert S. Cuillo are fewer than 5 persons who own at least 80 percent of ttic total value of shares of all classes of the stock of each corporation.

8. England, "Florida Corporate Income Taxa Lion". *supra*. note 4.

In view of the foregoing it appears to us that the final agency order being reviewed is free from reversible error.

CERTIORARI DENIED.

ANSTEAD and DAUKSCH, JJ., concur.

ON PETITION FOR REHEARING

PER CURIAM.

By petition for rehearing petitioner points out that our Opinion, filed October 11, 1978, contains several factual errors. The footnote on page 2, and the word "installment" used in line 13, page 4, are incorrect. Also petitioner does not contend that the sale of Dutch Miller stock pre-dated the amendment to the Florida Constitution authorizing a corporate income tax. The sale which pre-dated the corporate income tax is the sale of other property.

[4] Accordingly, the petition for rehearing is granted and the footnote on page 2 is deleted. The first full paragraph on page 4 is deleted and the following is to be inserted in its place:

> "Because Florida is an apportionment state, there is no error in including the gain on the Dutch Miller Chevrolet Inc. stock in Petitioner's tax base, although neither the transaction nor the Dutch Miller Agency had any real contacts with Florida."

In addition the first sentence in the first full paragraph on page 5 is deleted and the following is to be inserted in its place:

> "Next, it is argued that, since the sale of property referred to in Petitioner's Point II pre-dated the amendment to the Florida Constitution authorizing corporate income tax, it should not be subject to such tax even though certain installment payments of the sales price were paid during a tax year to which the corporate income tax was applicable."

As modified the opinion filed October 11, 1978, is confirmed.

Since the questions involved appear to us to be of great public interest, we certify the following two questions to the Supreme Court of Florida:

1. Is the gain from an out of state sale of stock held by a foreign corporation doing business in Florida taxable under the Florida corporate income tax code.
2. Is it constitutional for the Florida corporate income tax to be imposed on a gain from property sold prior to the amendment of the Florida Constitution permitting such tax when said gain is reported on the installment basis in tax years subsequent to the passage of the amendment.

DOWNEY, C. J., and ANSTEAD and DAUKSCH, JJ., concur.

Patrick STOCKTON, Appellant,

v.

STATE of Florida, Appellee.

No. JJ-38.

District Court of Appeal of Florida, First District.

Oct. 11, 1978.

Defendant was convicted in the Wakulla County Circuit Court. George L. Harper, J., of receiving stolen property, and he appealed. The District Court of Appeal held that circumstantial evidence was insufficient to show defendant's knowledge of stolen character of property so as to sustain his conviction.

Reversed with directions.

Receiving Stolen Goods ⇐8(3)

Circumstantial evidence which was insufficient to exclude every reasonable hypothesis of innocence was insufficient to show defendant's knowledge of stolen character of property so as to sustain his convic-

Supreme Court of Florida

No. 57,811

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, Petitioner,

vs.

BRUNNER ENTERPRISES, INC., Respondent.

[November 20, 19801

ADKINS, J.

The First District Court of Appeal has certified the following question to this Court as being one of great public interest:

> Is the gain from an out-of-stare sale of stock held by a foreign corporation doing business in Florida taxable under the Florida Corporate Income Tax Code, and if so, what method of computation should be used?

Department of Revenue v. Brunner Enterprises, 375 So.2d 23, (Fla. 1st DCA 1979). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. (1972).

As noted by the district court of appeal, the first portion of the question, relating to the taxability of the gain, was certified to this Court in Roger Dean Enterprises, Inc. v. Department of Revenue, 371 So.2d 101 (Fla. 4th DCA 1978). We have addressed the issue and answered the question in the affirmative:

> [W]e hold that the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida may be taxable under the Florida Corporate Income Tax Code.

Roger Dean Enterprises, Inc., v. Department of Revenue, 387 So.2d 353, 365 (Fla. 1980). Brunner Enterprises, Inc., now asks us to ascertain the proper method of computation-

Brunner Enterprises, Inc., is a Delaware corporation which maintains its principal place of business in Illinois. During the fiscal years ending September 30, 1973, and September 30, 1974, it owned and operated citrus groves in Florida through its Marumike division. The daily operation of the citrus groves was in the hands of Travis Murphy. The company's president, Fred J. Brunner, came to Florida only periodically.

During the years in question, Brunner Enterprises, Inc., realized capital gain for federal income tax purposes from the sale of stock which it owned in an Illinois bank. The bank itself and Brunner's purchase and sale thereof, had no connection whatsoever with the state of Florida.

Brunner Enterprises, Inc., subtracted the gain from the sale of the bank stock on its Florida Corporate Income Tax Returns for 1973 and 1974. On audit, the Department of Revenue returned these amounts to the tax base and assessed correlative tax deficiencies. Brunner Enterprises, Inc., challenged the imposition of the additional tax and the circuit court entered final summary judgment in the taxpayer's favor citing Stan Musial & Biggie's, Inc. v. Department of Revenue, 363 So.2d 375 (Fla. 1st DCA 1978).

There is much discussion in the record and in the briefs as to the unitary or non-unitary nature of Brunner Enterprises. See Fla. Admin. Code Rule 12c - 1.15(4)(a). Under our decision in Roger Dean, the fact that a business is or is not unitary is not determinative of whether the normal three-factor apportionment formula should be applied or whether another method is appropriate. §§214.71 and 214.73, Fla. Stat. (1973). Even if the taxpayer can show the requisite constitutional dimension which under Roger Dean justifies deviation from the three-factor formula, the out-of-state gain must be included in the tax base, i.e., the federal taxable income. §§220.12, 220.13, Fla. Stat. (1973).

The second portion of the question certified is answered as follows:

A-10

The method of computation under the Florida Corporate Income Tax Code used to tax the gain from an out-of-state sale of stock by a foreign corporation doing business in Florida should include the gain in the tax base as described in sections 220.12 - .13, Florida Statutes (1973).

The decision of the district court of appeal is quashed, and the cause is remanded with instructions to reverse the judgment of the trial court and further remand for proceedings consistent with our opinion in Roger Dean Enterprises, Inc., v. Department of Revenue, supra, as well as the views expressed in the instant opinion.

It is so ordered.

SUNDBERG, C.J., BOYD and ALDERMAN, JJ., Concur
OVERTON, J., Dissents

NOT FINAL, UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Certiorari to the District Court of Appeal,

First District - Case No. NN-27

Jim Smith, Attorney General, and E. Wilson Crump, 11 and Shirley W. Ovletrea, Assistant Attorneys General, Tallahassee, Florida,

for Petitioner

C. Gary Williams and Charles L. Early of Ausley, McMullen, McGehee, Carothers and Proctor, Tallahassee, Florida,

for Respondent

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Judges of the Circuit Court for Leon County

RECEIVED
DEC 18 1980
ATTORNEY GENERAL - DEFD

WHEREAS, in that certain cause filed in this Court styled:

BRUNNER ENTERPRISES, INCORPORATED,
a Delaware corporation

Case No. NN 27

vs.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA and J. ED STRAUGHN, Executive Director of the Department of Revenue

Your Case No. 76-2434

The attached opinion was rendered on September 7, 1979

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion as rendered by the Supreme Court of Florida.

WITNESS the Honorable E. R. Mills, Jr.

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this

17th day of December, A.D. 1980

Clerk, District Court of Appeal of Florida,
First District

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

[illegible] OF THE STATE OF FLORIDA,	
Appellant	
vs.	CASE NO. NN 27
BRUNNER ENTERPRISES, INC., a Delaware Corporation,	
Appellee	

ORDER ON MANDATE

WHEREAS, The Judgment and decision of this Court in the above case was filed September 7, 1979 and reported in 375 So. 2d 23, wherein the Judgment of the Circuit Court of Leon County was affirmed,

WHEREAS, this decision and Judgment was reviewed by the Supreme Court of Florida by certiorari proceedings and this Court's Judgment and decision was quashed and remanded,

WHEREAS, the Mandate of the Supreme Court of Florida has been filed with this Court, now therefore,

IT IS ORDERED that the Judgment and Opinion of this Court filed September 7, 1979 be set aside and held for naught and the Opinion and Judgment of the Supreme Court of Florida filed November 20, 1980 be adopted as this Court's Opinion and Judgment and same shall accompany the Mandate of this Court to the Circuit Court of Leon County.

By Order of the Court dated this 17th day of December, A.D. 1980.

A True Copy

ATTEST:

RAYMOND E. RHODES, CLERK

[signature]
Clerk, District Court of Appeal, First District
Tallahassee, Florida

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

CASE NO. 76-2434

BRUNNER ENTERPRISES, LNC., a Delaware corporation,

Plaintiff,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, et al

Defendants.

FINAL JUDGMENT ON ENTRY OF MANDATE

This cause came on to be heard on Motion to Enforce the Mandate filed by the Defendants, the Department of Revenue and Randy Miller, as Executive Director of the Department of Revenue, pursuant to Rule 1.100, F.R.C.P. After proper notice, hearing was had on said Motion and all parties were represented by counsel. The Court, after having examined the Motion, the decision of the Supreme Court and the First District Court, memorandum of counsel filed by all parties, and having heard oral argument of counsel, hereby finds, orders and adjudges as follows:

STATEMENT AND HISTORY OF CASE

1. That suit was originally brought in the Circuit Court of the Second Judicial Circuit of Florida, in and for Leon County, on November 9, 1976, to challenge the imposition by the Department of certain Florida corporate income taxes on Plaintiff. An answer was filed by the Department. The case was stayed pending ultimate determination of jurisdiction, An order and certain stipulations relating to the question of jurisdiction and exhaustion of administrative remedies were filed. On November 9, 1978, Brunner Enterprises filed a Motion for Summary Judgment. Thereafter, on November 25, 1978, it filed two affidavits, one by Travis Murphy, and one by Fred J. Brunner, in support of its motion. Depositions of Travis Murphy

and Fred J. Brunner were taken at the request of the Department.

2. That the Motion for Summary Judgment was heard and the result was a final summary judgment rendered by the Honorable Charles Miner, Circuit Judge, in favor of Brunner Enterprises, on January 19, 1979. The Department of Revenue filed a timely notice of appeal invoking the jurisdiction of the District Court of Appeal, First District of Florida., on February 16, 1979.

3. That the Court of Appeal affirmed the decision of the Circuit Court. The Department filed its Notice of Certiorari in the District Court of Appeal of Florida, First District, on October 2, 1979, invoking the jurisdiction of the Florida Supreme Court under Art. V, §3(b)3, Constitution of Florida, because of the question certified by the First District to be of great public interest.

4. That decision and judgment were reviewed by the Supreme Court of Florida by certiorari proceedings and said decision and judgment were quashed and remanded.

5. That the mandate of the Supreme Court was filed with the District Court of Appeal, First District.

6. That the District Court of Appeal, First District, entered an Order on Mandate on December 17, 1980,

7, That on August 4, 1382, Plaintiff filed a Motion for Summary Judgment.

8. That the Defendants on December 15, 1982 filed a Motion to Strike Plaintiff's Motion for Summary judgment and a Motion to Enforce the Mandate.

CONCLUSIONS OF LAM

There are two issues involved in this matter both of which were certified as questions of public interest to the Supreme Court of Florida. Those issues are: whether the income in question should *be* included in Plaintiff's "tax base" and;

'hat is the proper method of apportioning the tax base to 'lorida?

Plaintiff admits that one of the two issues involved n this case has finally been resolved by the Supreme Court of 'lorida. That issue is whether the income which the Defendant s attempting to tax must be included in the tax base of the 'laintiff. As stated by Plaintiff, Plaintiff "acknowledges hat under the mandate the trial court must follow the Supreme ourt's decision requiring inclusion of the out-of-state gain rom the sale of the bank stock in the tax base, i.e., the ederal taxable income, under §§220.12 and 220.13, Fla. Stat. 1973)."

The Plaintiff, as to the second issue involved in his case -- the proper method of apportionment -- argues that:

> The Supreme Court's Brunner decision, and the mandate that is to enforce it, however, does not resolve the question as to whether or not the three-factor formula sought to be applied by the Department in Brunner is constitutional. As such, this issue must be resolved by decision of this Court. Further, since the Florida Supreme Court did not address this question, the issue is not governed by the mandate and it must be decided by this Court based on current law, including the decision of ASARCO, Inc. v. Idaho State Tax Commission, ___U.S. ___, 102 S. Ct. , 73 L.Ed.

The ASARCO case was decided by the United States Supreme Court after the decision of the Florida Supreme Court in this case had become final. Counsel for Plaintiff has contended that the decision by the Florida Supreme Court in the Brunner case is not inconsistent with the United States Supreme Court's decision in the ASARCO case,

'The decision of the United States Supreme Court in ASARCO, Inc. v. Idaho State Tax Commission, ___U.S. _____, 102 S. Ct. _____, 73 L.Ed. 787 (1982), is not applicable to the question of the proper method of apportioning a taxpayer's tax base to the various states. The question addressed by the United

States Supreme Court in ASARCO, as stated in the United States Supreme Court's opinion, is as follows:

> The question of whether the state of Idaho constitutionally may include within the taxable income of a non-domiciliary parent corporation doing some business in Idaho a portion of intangible income -- such as dividend and interest payments, as well as capital gains from the sale of stocks -- that the parent received from the subsidiary corporations having no other connection with the state.

Rased upon the United States Supreme Court's own statement of the question before it in ASARCO, it is clear that the only question dealt with by the United States Supreme Court was whether income such as the income which the Defendant is seeking to tax in this case, *is* includable in a taxpayer's tax base. As admitted by the Plaintiff, this issue has been finally resolved by the Supreme Court of Florida.

Additionally, it is submitted that the issue of the proper method of apportionment has in fact been finally resolved by the Supreme Court of Florida. The question of the proper method of apportionment was clearly before the Supreme Court of Florida. As stated by the Florida Supreme Court, the District Court of Appeal certified the following questions to it:

> Is the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida taxable under the Florida Corporation Income Tax Code, and if so what method of computation should be used? (Emphasis added).

Department of Revenue v. Brunner Enterprises, Inc., 390 So.2d 713, at 714 (Fla. 1980).

In addressing this, the method of anportionment question, the Supreme Court of Florida held as follows:

> The method of computation under the Florida Corporation Income Tax Code used to tax the gain from an out-of-state sale of stock by a foreign corporation doing business in Florida should include the gain in the tax base described in sections 220.12-13, Florida Statutes (1973).

> The decision of the District Court of Appeal is quashed, and the cause is remanded with instructions to reverse the judgment of the trial court and . . further remand for proceedings consistent with our opinion in Roger Dean Enterprises, Inc., v. Department of Revenue, supra, as well as the views expressed in the instance opinion. [Emphasis added].

390 So.2d at 715.

Based upon the foregoing, it is clear that the Supreme Court of Florida resolved any question as to the proper method of apportionment based upon its decision in Roger Dean Enterprises, Inc. v. Department of Revenue, 387 So.2d 358 (Fla. 1980). In Roger Dean, the Supreme Court of Florida stated the following with regard to the proper method of apportionment:

> There is a very strong presumption in favor of normal three-factor apportionment and against the applicability of the relief provisions. . . . Departures from the basic formula should be avoided except where reasonableness requires . . . .The relief provisions applicable to apportionment should not be used to remove an out-of-state stock sale made by a foreign chartered corporation subject to its income tax from the tax base. . . .
>
> Section 214.73, Florida Statutes (1973), gives the Department of Revenue discretion to alter the apportionment formula in very rare instances, but does not vest any discretion in the department to modify federal taxable income [the tax base]. [Emphasis added].

387 So.2d at 363.

In its original Complaint the Plaintiff argued that it should be allowed the use of separate accountiny under Section 214.73, Florida Statutes, to apportion its tax base to Florida instead of the normal three-factor apportionment method, The effect of allowing separate accounting instead of the normal three-factor apportionment method in this case would be to exclude the income from its tax base. Such a result: was recognized and disapproved of by the Supreme Court of Florida in its decision in Roger Dean. It therefore appears that the Supreme

of this matter: the Supreme Court of Florida has mandated a decision in favor of the Defendant. The Court's decision in Roger Dean clearly shows that the Court realized that the use of separate accounting instead of the normal three-factor method would result in the exclusion of income from tax base. In Brunner, the Court clearly held, in answer to the question of the proper method of apportionment, that such a result should not be allowed in this case.

As a Final judgment, the whole merits of the case before the Court were determined and disuosed of and no questions remained open for judicial determination. *See* Nowlin v. Pickren, 131 So.2d **894** (Fla. 2d **DCA** 1961); Irving Trust Co. v. Kaplan, 155 Fla. 120, 20 So.2d 351 (Fla. 1944), and; Alderman v. Puritan Dairy, **145** Fla. 292, 199 So. 44 (Fla. 1940).

All **of** the counts *of* **Plaintiff's** Complaint involved the, **same** factual situation and are clearly interrelated. Therefore, the appeal *of* the final summary judgment would not have been proper unless **the** final summary **judgment** determined and disposed **of** all counts. See McClain Construction Corp. v. Roberts, 351 So.2d 399 (Fla. **2d** DCA 1977). Otherwise, **the** District Court **or** the Supreme Court would have been required to dismiss the **appeal.** See Harbor Yacht Repair, Inc. **v.** Sanger, **267** So.2d **51** (Fla. **3d** DCA 1972).

On appeal, if the decision *of* this Court could have been granted upon any of the **legal** theories raised **by** the Plaintiff in its original complaint, the appellate courts would have done so, for the ultimate question before an appellate court **is** whether the trial court has arrived at **a** correct conclusion. See State Plant Board **v.** Smith, 110 So.2d **401** (Fla. 1959); Congregation Temple De Hirsch **v.** Aronson, 128 So.2d *585* (Fla. 1961). Additionally, **the** appellate courts **had** the right to give such a decree **as** the trial court ought to have given. See Hollywood, Inc. **v.** Clark, **153** Fla. 501, 15 So.2d **175** (Fla. **3d** DCA 1943).

This Court's duty **upon** issuance of mandate **is** to comply with the mandate. The judgment **of** the Florida Supreme Court was adopted **as** the decision *of* **the** District Court in its Order on **Mandate** dated December 17, 1980. Accordingly, the duty **of** this Court **is** to render final judgment in **compliance** with said mandate.

Modine Mfg. Co. v. ABC Radiators, Inc., 367 So.2d 232 (3d DCA 1979); Goodner v. Shapiro, 367 So.2d 1110 (3d DCA 1979); Jones v. Knuck, 388 So.2d 328 (3rd DCA 1980).

Therefore, it is Ordered and Adjudged that Defendant's Motion to Strike Plaintiff's Motion for Summary Judgment is granted and Defendant's Motion to Enforce Mandate is granted. The Corporate Income Tax assessment of the Defendant is hereby upheld and final judgment is rendered in favor of said Defendant.

All parties shall bear their respective *costs.*

DONE AND ORDERED in Chambers this 24th day of February, 1983.

JOHN A. RUDD, Circuit Judge

Copies to Counsel of Record