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.

DOCKET NO. AR-337

APPEAL FROM A FINAL JUDGMENT ENTRY OF MANDATE OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT

REPLY BRIEF OF APPELLANT

C. GARY WILLIAMS and
ROBERT S. HIGHTOWER of
Ausley, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd.)

PRELIMINARY STATEMENT IN REPLY TO DEPARTMENT'S STATEMENT OF THE CASE AND FACTS

Brunner Enterprises, Inc. is referred to as "Appellant", "the taxpayer", "Brunner", "Brunner Enterprises", or by its corporate name. The Florida Department of Revenue is referred to as "Appellee" or "the Department". References to the record on appeal appear as "TR. Vol. ___, P. ___."

Brunner takes issue with the Department's Statement of the Case and Facts. The Department's statement consists only of a procedural narration of this litigation, without any acknowledgment of the various facts of the case as reflected in the record. These facts show (1) that Brunner operated two separate, distinct and nonunitary businesses, and (2) that Brunner's activities in Florida did not provide a sufficient nexus for the State to subject 70% of Brunner's entire federal corporate income to tax in Florida as is sought by the Department.

No court has yet to consider whether the Department's application of the three factor formula method of apportionment to Brunner (which results in subjecting some 70% of Brunner's total income to tax in Florida) meets constitutional standards. Brunner has not been given a chance to show the requisite constitutional dimension which justifies some deviation from three factor apportionment (either by way of separate accounting, an alternate calculation under the three factor formula method or revision of the sales factor denominator as prayed for in Count IV of Brunner's complaint). The facts are

obviously of paramount importance in determining whether or not the Department's three factor apportionment method meets constitutional standards.

The trial court erred in assuming that the Florida Supreme Court's decision in Brunner resolved all issues against the taxpayer. Brunner's somewhat extended recitation of the facts in this appeal is necessary to reflect that (1) evidentiary matters have not been considered, (2) several issues raised by Brunner relating to the apportionment method (notably the sales factor denominator argument in Count IV of Brunner's complaint) have never been ruled on by any court and (3) the Supreme Court's prior decision did not finally resolve all issues of this case.

RESTATEMENT OF ISSUES PRESENTED

The basic issue in this appeal is whether the trial court erred in granting a final judgment to the Department based solely on the prior Supreme Court decision in Brunner and this Court's mandate. Entering the final judgment was in error because several constitutional issues were left undecided by the Florida Supreme Court's decision, and they have not subsequently been ruled on by any court. Further, the trial court erred in refusing to apply ASARCO, Inc. v. Idaho State Tax Commission, ___ U.S. ___, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982).

Brunner has asserted that the Department's proposed assessment of corporation income tax is unconstitutional as a result of (1) the Department's improper inclusion of out-of-state generated income in Brunner's Florida tax base and (2) the Department's improper application of the three factor formula method of apportionment to Brunner's income. Giving due consideration to the Department's statement of the issues presented, the issues raised by Brunner in this appeal can be restated as follows:

A. The trial court erred in refusing to apply the constitutional mandate of ASARCO, Inc. v. Idaho State Tax Commission, ___ U.S. ___, 02 S.Ct. 3103, 73 L.Ed.2d 787 (1982), to the issue of whether Brunner's out-of-state generated intangibles income can be included in its Florida tax base.

B. The trial court erred in interpreting the Florida Supreme Court's prior decision in Brunner as a final ruling adverse to the taxpayer on Brunner's claim that the three-factor formula method of apportionment was improperly and unconstitutionally applied to Brunner's particular facts.

ARGUMENT

A. Introductorv Statement.

1. Two-Year Delay in Moving to Enforce Mandate.

The Department has sought to belittle this taxpayer's appeal by asserting that all Brunner is doing is challenging the trial court's enforcement of a clear mandate and a Florida Supreme Court ruling that decided all issues in favor of the Department and adverse to Brunner. Repeatedly throughout its Answer Brief the Department argues all issues were finally resolved by the Florida Supreme Court's decision of November 20, 1980, and thus, the trial court properly entered its Final Judgment in favor of the Department.

One must inquire: If the Florida Supreme Court's decision finally resolved all issues in favor of the Department in November, 1980, why then did the Department postpone for over two years its filing a motion to enforce the mandate? It is submitted that the Department's theory that the Florida Supreme Court previously decided all issues is a recent revelation, one which came to light only after the United States Supreme Court decided ASARCO, Inc. v. Idaho State Tax Commission, ___ U.S. ___, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), and after the taxpayer moved for summary judgment based on ASARCO. The Department has offered no explanation as to why it waited over two years to move to enforce the mandate that supposedly decided all issues in its favor.

2. Taxpayer's Sales Factor Denominator Argument is Not the Same as Separate Accounting Argument.

On several occasions in its Answer Brief, the Department defends the trial court's Final Judgment as it relates to the issue of the proper method of apportionment by stating, in effect, that (1) Brunner challenges three factor apportionment and seeks to use separate accounting under Section 214.73, F.S., (2) separate accounting would result in exclusion of Brunner's income from its Florida tax base, and (3) the Florida Supreme Court's prior ruling held that use of separate accounting to exclude such income from a company's Florida tax base is impermissible, ergo, entry of the Final Judgment was correct. See Answer Brief of Appellee at pp. 5, 9, 13-14, 14-15, 17-18, 24. *See* especially Answer Brief of Appellee at 17-18, where the Department states:

> Appellant had argued that it should be allowed the use of separate accounting under Section 214.73, F.S., to apportion its tax (sic) 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.

From reading the Department's brief and the trial court's Final Judgment, one would be led to the erroneous conclusion that the only relief sought by Brunner in its Complaint was (1) avoidance of the Department's use of three factor apportionment and (2) exclusion of the out-of-state intangibles income from

its Florida tax base by way of separate accounting. This is one of Brunner's pleas; it is not, however, the only one.

In Count IV of its Complaint, Brunner prayed, in the alternative, not for the avoidance of the Department's use of three factor apportionment, but for certain specific adjustments in the computation of the sales factor to be used in applying the three factor apportionment formula to Brunner's income, (A more detailed discussion of this unresolved issue is included in the apportionment discussion beginning at page 9 of this Reply Brief).

It is clear that a taxpayer may challenge the Department's calculation of various factors which make up the three factor apportionment method. Allis-Chalmers Credit Corp. v. Department of Revenue, 408 So.2d 703 (Fla. 1st DCA 1982). Further, any such challenge depends principally upon the nature of a taxpayer's business and income -- inherently factual questions. The Department has repeatedly ignored this plea for relief. Further, it is clear this issue was not decided by the Florida Supreme Court due to the unresolved evidentiary aspects of this case, Finally, although the taxpayer made the trial court aware of this unresolved issue, the trial court ruled all issues had been previously decided by the Florida Supreme Court and granted the Department a Final Judgment. As such, the trial court erred and should be reversed. The taxpayer must be given an opportunity to complete its case.

B. THE TRIAL COURT ERRED IN REFUSING TO APPLY THE CONSTITUTIONAL MANDATE OF ASARCO, INC. V. IDAHO STATE TAX COMMISSION, TO THE ISSUE OF WHETHER BRUNNER'S OUT-OF-STATE GENERATED INTANGIBLES INCOME *CAN* BE INCLUDED IN ITS FLORIDA TAX BASE,

The Department has acknowledged the applicability of the ASARCO decision to the facts of this case, but it has not explained why the prior decision of the Florida Supreme Court should be permitted to stand in light of its obvious conflict with ASARCO. The United States Supreme Court has ruled on the issues of unitary business, and inclusion and exclusion of intangibles income generated from out-of-state activities, and the constitutional mandate of that case is the law of the land. The Department's only retort, that the inclusion in tax base issue was finally, totally and forever resolved by the Florida Supreme Court's prior decision, is inadequate when measured against the constitutional protection to which Brunner is entitled.

Throughout its Answer Brief, the Department repeatedly tells this Court that Brunner has admitted that the tax base issue was "finally resolved" by the Florida Supreme Court's prior ruling in Brunner. This is incorrect. The record reflects only that Brunner acknowledged the general legal principle that a trial court must follow the mandate of an appellate court. Trial courts, however, have the power to interpret mandates, Florida Air Conditioners, Inc. v. Colonial Supply Co., 390 So.2d 174 (5th Fla. DCA 1980), and appellate courts have the power to amend mandates and to change the law of the case where equity and justice, or where intervening

decisions of higher courts, require such action. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965); Louisville & N.R. Co. v. State, 65 So, 881 (Miss. 1914).

Throughout this appeal Brunner has prayed for this Court to modify the Mandate, apply ASARCO as the law of the case, and enter final judgment in favor of the taxpayer.

The taxpayer has presented several compelling reasons for applying ASARCO as the law of the case in this matter, The Department has not answered any of these arguments. First, the law of this case should be changed and ASARCO should be applied because it is just and equitable to do so. Beverly Beach Properties, Inc. v. Nelson, 68 So.2d 604 (Fla.), cert.den., 348 U.S. 816 (1953). Second, the law of the case should be changed because of the intervening decision (ASARCO) of a higher court which is clearly in conflict with and controlling over the prior decision of the Florida Supreme Court in Brunner. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). When considered in light of the Department's and this Court's obligation to construe taxing statutes and ambiguities strongly in favor of the taxpayer and against the taxing authority, Harbour Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979), it is clear that the mandate of ASARCO should be applied to this case and that the trial court should be reversed.

The Department of Revenue has advanced no sound reasons why ASARCO should not be applied as the law of the case in this matter. The Department argues only that the prior Florida

Supreme Court Brunner decision finally resolved all issues, therefore, nothing is left for a trial court to decide. Such a rationale leads to the conclusion that the law of the case is set in stone and is never subject to change. This is clearly erroneous. *See* Beverly Beach Properties, Inc., supra; Strazzulla v. Hendrick, supra. Further, the Department's argument that all issues were "finally resolved" by the prior decision bears little weight when one considers the Department's two-year delay in moving to enforce the decision that "finally resolved" all issues.

The law of the case in this matter should be changed, the prior mandate of this court should be modified, and this court should follow the clear constitutional mandate of ASARCO. The trial court erred in its refusal to apply ASARCO to the facts of this case. As such, the Final Judgment on Entry of Mandate should be reversed, and a final judgment should be entered in favor of the taxpayer.

C. THE TRIAL COURT ERRED IN INTERPRETING THE FLORIDA SUPREME COURT'S PRIOR DECISION IN BRUNNER AS A FINAL RULING ADVERSE TO THE TAXPAYER ON BRUNNER'S CLAIMS THAT THE THREE-FACTOR FORMULA METHOD OF APPORTIONMENT WAS IMPROPERLY AND UNCONSTITUTIONALLY APPLIED TO BRUNNER'S PARTICULAR FACTS.

The Department has argued and the trial court has held that the Florida Supreme Court's Brunner decision resolved all issues relating to apportionment against the taxpayer and mandated a final judgment in favor of the Department. (TR. Vol. III, p. 379; Answer Brief of Appellee, p. 11). A careful review of (1) the status of the case before the Supreme Court,

(2) the language of the Brunner decision, and (3) the arguments raised in Brunner's complaint (especially Count IV) demonstrates the error of the trial court's ruling. The Supreme Court's Brunner decision did not rule against the taxpayer on all pending issues, and it did not mandate a decision in favor of the Department. As such, the Final Judgment on Entry of Mandate should be reversed.

On January 19, 1979, the taxpayer's motion for summary judgment was granted based on Stan Musial & Biggies, Inc. v. Department of Revenue, 363 So.2d 375 (Fla. 1st DCA 1978), (which was subsequently reversed at 387 So.2d 365 (Fla. 1980)), and on the theory that Brunner was entitled to exclude its out-of-state generated intangibles income based on separate accounting. The only legal argument made at the summary judgment hearing was that the out-of-state generated income should be excluded from Brunner's tax base. Not discussed at the hearing were several other issues (including Count IV praying for an adjustment in the sales factor of the three-factor formula applied by the Department). The motion for summary judgment was affirmed by this Court, but on certification of two questions of great public interest, the Florida Supreme Court reversed the decision and remanded the case for "further proceedings." Brunner, 390 So.2d at 715.

The status of this case when it was before the Supreme Court did not lend itself to a resolution of all pending issues. As the case had proceeded on appeal from a summary judgment, only one issue of several had been ruled on by the

trial court, no factual disputes had been resolved by the trial court and, finally, the taxpayer's sales factor denominator argument (Count IV) had been given no consideration. Where a trial court has decided a case on one of several grounds urged and on appeal the appellate court reverses the decision, the appellate court will remand the cause for decision by the trial court on the other grounds. Miami Beach v. Schauer, 104 So.2d 129 (Fla. 3d DCA 1958), cert. dism., 112 So.2d 838 (Fla. 1959). Clearly, the Florida Supreme Court could not have resolved all issues in the prior appeal.

The Supreme Court's Brunner decision (though now superseded by ASARCO) answered the two questions certified to it by this Court: (1) the Department could subject Brunner's out-of-state intangibles income to tax in Florida and (2) that income should be included in Brunner's Florida tax base. However, the Supreme Court's decision was not a final judgment against the taxpayer on all issues. A "final judgment" means the completion of all judicial labor, pronouncement of the ultimate conclusion of the court upon the case, and disposition of the whole matter in controversy. Nowlin v. Pickren, 131 So.2d 894, 895 (Fla. 2d DCA 1961); Irving Trust Co. v. Kaplan, 20 So.2d 351 (Fla. 1944). There has been no such final resolution an all issues here.

Nothing in the Supreme Court's decision says that, once the income is included in the tax base, the taxpayer is precluded from challenging the components of the three-factor apportionment method used by the Department. In fact, the

Court clearly contemplated that such a challenge might be made (and might be successful) when it stated:

> 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).

(Emphasis added). what taxpayer but Brunner could the Supreme Court have been referring to in this statement? Clearly, a taxpayer can challenge the Department's calculations under the apportionment formulae. *See*, e.g., Allis-Chalmers Credit Corp. v. Department of Revenue, 408 So.2d 703 (Fla. 1st DCA 1982).

Brunner has prayed that its out-of-state income be excluded from its tax base, and also has prayed that it be entitled to separate accounting pursuant to the relief provisions of section 214.73, F.S. ASARCO, supra, has now made it clear that Brunner was correct on those issues. But even if those issues were conceded based on the Florida Supreme Court's prior Brunner decision, that does not deal with all of Brunner's prayers for relief. Since the filing of its Complaint Brunner has prayed for a modification of the Department's three factor formula calculations (short of total exclusion) in order to do equity and justice, and in order to make the Department's proposed assessment less constitutionally deficient. See Count IV of Brunner's Complaint, TR. Vol. I, pp. 22-26. Both the Department and the trial court have totally ignored this prayer for relief.

As indicated in Brunner's Initial Brief (at pages 39-40), the Department's application of the three factor formula method to Brunner has resulted in apportioning over 70% of Brunner's Illinois-based income to Florida for corporate income tax purposes. The apportionment factors used by the Department (property, payroll and sales), do not contain any factor or element which reflects the capital gain income from bank stock, dividend income or interest income as a gross receipt derived from a state other than Florida. In Count IV of its Complaint, Brunner sought an adjustment in its sales factor denominator which would have resulted in a more equitable apportionment of Brunner's income among Florida and Illinois. This adjustment is required by the Department's own administrative rules in order to do equity and justice in this case. *See* Fla. Admin. Code Ch. 12C-1.15(4)(d)1,2 and 5. *See* Count IV of Brunner's Complaint at TR. Vol. I, pp. 22-26. Nevertheless, the Department has repeatedly denied Brunner the right to make these adjustments.

No court has ruled on the sales factor denominator issue raised in Count IV of Brunner's complaint. Clearly, in affording to the taxpayer in "further proceedings" the opportunity under Roger Dean to show the "requisite constitutional dimension" to justify a deviation from the three factor apportionment method, Brunner, supra, at 715, the Florida Supreme Court did not rule on the sales factor denominator argument in its decision. Further, though the sales factor denominator argument was clearly raised in Count

IV of Brunner's Complaint and brought to the trial court's attention in its hearing on the Department's Motion to Enforce the Mandate (See Brunner's Supplemental Memorandum in Opposition to Defendant's Motion to Enforce Mandate and Motion to Strike, at TR. Vol. III, p. 348-349), the trial court also did not rule on this issue for it was of the opinion all issues had been finally resolved by the prior Florida Supreme Court's decision. TR. Vol. III, p. 379. Brunner must be given an opportunity to challenge the components of the three factor apportionment method applied by the Department in this case. As such, the Final Judgment on Entry of Mandate must be reversed.

CONCLUSION

Brunner recognizes that public interest requires that litigation end. Petition of Vermeulen, 122 So.2d 318 (Fla. 1st DCA 1960). However, litigation should not be aborted. In its prior decision, the Florida Supreme Court did not rule on Count IV of Brunner's Complaint, nor did it rule on the issue of whether Brunner's facts showed the "requisite constitutional dimension" to justify deviation from the three factor formula method of apportionment. Brunner should be given an opportunity to challenge the Department's three factor apportionment calculations. Further, Brunner has stated a compelling case as to why ASARCO should be applied as the law of the case in this matter. As such, the trial court's final judgment should be reversed, ASARCO should be applied as the law of the case and the trial court should consider Brunner's remaining issues.

CERTIFICATE OF SERVICE

I hereb certify that a true and correct copy of he foregoing Reply Brief of Appellant was sent by Hand Delivery this 27th day of July, 1983, to JOSEPH C. MELLICHAMP, III, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

Respectfully submitted,

C. GARY WILLIAMS and

ROBERT S. HIGHTOWER OF
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, Florida 32301
(904) 224-9115

ATTORNEYS FOR APPELLANT