O/a 1-9-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,916

Third District Court No. 84-1431

FRANKLIN B. Bystrom, et al.,)
)
Petitioners,
)
vs.)
)
S. F. WHITMAN, et al.,
)
Respondents.
)

CLERK, SUPREME COURT
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REPLY BRIEF OF AMICUS CURIAE

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PRELIMINARY STATEMENT

Petitioner, FRANKLIN B. BYSTROM, Dade County Property Appraiser, will be referred to herein as the "Property Appraiser", the Petitioner Randall Miller, as Director of the Department of Revenue of the State of Florida, will be referred to as the "Department", the Respondents, S. F. WHITMAN, D. A. WHITMAN, and W. F. WHITMAN, will be referred to collectively as the "Taxpayer".

The Amicus, C. RAY DANIEL, as Property Appraiser of Hillsborough County, and as President of the Property Appraisers Association of Florida, and the Property Appraisers Association of Florida will be referred to collectively as the "Amicus".

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

These have been adequately set forth in prior briefs.

ARGUMENT

The taxpayer concedes that income tax and income and expense records on which such tax returns are based ". . . are generally relevant in tax challenges.". (Taxpayers brief page 12.) The taxpayer contends that there are exceptions to this general rule and that the case at bar should be such an exception. At pages 12, 19, and 36 of the taxpayers brief, the taxpayer has enumerated various situations which he feels should constitute exceptions to the general rule.

At page 36 of said brief the taxpayer concedes that income tax return and income and expense records on which such returns were based ". . . are relevant in most tax challenges.". Following this statement are various situations which the taxpayer contends would constitute exceptions to this general rule. The first of these exceptions listed by the taxpayer is a situation where unimproved land is involved which yields no income. This is obviously a situation where income information would not be relevant. However, the second exception listed by the taxpayer is a situation where the Property Appraiser has valued the property using only a comparable sales approach, and in this situation income information certainly might be relevant. For instance, assume that the Property Appraiser had used a comparable sales approach to value and a taxpayer disagreed with the result. Why shouldn't the taxpayer be able to disprove the correctness of the value arrived at by

the Property Appraiser through the sales approach by showing that the sales used by the property appraiser are not truly "comparable" because the income derived from such property would not justify such sales. In such a situation if the taxpayer desired to produce such income information to show that the result arrived at through the sales approach was incorrect, why would not such income information be relevant? Obviously it would be relevant because the taxpayer is entitled to assail the value as determined by the Property Appraiser through the use of all three approaches to value should he *so* desire. Obviously such income information would be relevant and would certainly be admitted if produced by the taxpayer over any objection made by a Property Appraiser. In other words, a taxpayer is not locked into challenging an assessment placed on property by a Property Appraiser through use of only the same methodology employed by the Property Appraiser.

For the same reason, the next *so* called "exception" mentioned by the taxpayer is also not truly an exception. The taxpayer states that the situation where the Property Appraiser valued property using only replacement cost less depreciation would be a situation where income information would not be relevant. The following example demonstrates quite clearly why this statement is incorrect. Assume that a Property Appraiser used a replacement cost less depreciation approach to value on a manufacturing business, an industrial business, or a newly constructed

hotel. In any of the three situations, replacement cost less depreciation might be employed if income data were not available to the Property Appraiser, but if the taxpayer contested the assessment arrived at by the Property Appraiser through this method, he would certainly be permitted to introduce into evidence income data and information to demonstrate that the replacement approach was incorrect. A means of demonstrating functional or economic obsolescence in an assessment would be to demonstrate reduced income or loss of income because of poor plant layout, poor location, changes in traffic patterns or any other matters which would render a property functionally or economically obsolete. For instances, assume that a gas station is built on a busy intersection where there is a main traffic flow but that one year later the county or state moves the highway so that the filling station is no longer located in the heavy traffic pattern. This means that the income generated from the filling station would be reduced and the taxpayer would certainly be permitted to demonstrate this to prove that the replacement cost less depreciation method employed by the Property Appraiser was too high, even though the building had been only recently constructed.

So it is clear that the taxpayer's listed exceptions are not truly exceptions. The test employed is relevancy, and in the situations described previously, a taxpayer would certainly be entitled to produce its income

information as part of an attack of the assessment of the Property Appraiser.

POINT I

THAT ACTUAL INCOME AND EXPENSE INFORMATION OF A TAXPAYER, IS RELEVANT AND DISCOVERABLE, EVEN IF THE PROPERTY APPRAISER HAD ARRIVED AT A VALUE ON SAID TAXPAYER'S PROPERTY THROUGH THE INCOME APPROACH TO VALUE, USING HYPOTHECATED INCOME AND EXPENSE INFORMATION.

Keeping in mind the statements previously set forth herein under "Argument" it should be remembered that in order for a taxpayer to overcome the presumptousness of correctness of a Property Appraiser he has the burden of proving the assessment invalid to the exclusion of every reasonable hypothesis. Powell v. Kelly, 232 So.2d 305 (Fla. 1969). In Powell it is stated at page 308:

> The prima facie correctness of the assessments, to be overcome, must be affirmatively assailed by appropriate and sufficient allegations and proofs, to the exclusion of every reasonable hypothesis of legal assessment. See Folsom v. Bank of Greenwood, 97 FLa. 426, 120 So. 317; Harbond, Inc. v. Anderson (Fla.App.2d Dis.1961), 134 So.2d 816.

Thus, in the instant case the taxpayer is required to disprove the assessment of the Property Appraiser to the exclusion of every reasonable hypothesis of a legal assessment. Assume that the situation in the case at bar is reversed and the taxpayer sued the Property Appraiser. If the taxpayer decides to introduce actual income data the taxpayer apparently concedes that such would be admissible in the generally accepted case. If it was sought to be introduced by the taxpayer it would certainly be relevant

because he would be entitled to assail the assessment through whatever manner he chose. Thus, since relevancy is the issue, if such information would be relevant for the taxpayer then it certainly would be relevant for the Property Appraiser. Relevancy can't be one-sided. It has also been stated that as constitutional officers, the actions of tax assessors are clothed with a presumption of correctness, and that a taxpayer can overcome this presumption, only through appropriate allegations and proofs excluding every reasonable hypothesis of legal assessment. (Folsom v. Bank of Greenwood, 97 Fla. 426, 120 So. 317. District School Board of Lee County v. Askew, 278 So.2d 272 Fla. 1973.

The taxpayer in the instant case does not wish to permit the Property Appraiser to be able to defend his assessment employing the same standard which has been repeatedly announced by the Court and other Courts throughout the state. The requirement that a taxpayer must overcome a legal assessment with allegations and proofs excluding every reasonable hypothesis, necessarily carries with it the corollary that the Property Appraiser may defend his assessment on any legal basis permitted. The taxpayer simply does not want the Property Appraiser to be able to defend it by obtaining information from the taxpayer which may prove that the assessment of the Property Appraiser is correct, or perhaps too low. Such information could

certainly be used to impeach any determination of value made by the taxpayer.

The taxpayer seeks to avoid that which seems so obvious, by contending that he is only attacking one of the assessments and that this has been previously approved by Florida Courts. No Florida Court has ever approved that which the taxpayer seeks in the case at bar. The case relied upon by the taxpayer for its statement that Courts have approved a challenge to only one part of an assessment, dealt with the situation where the taxpayer only desired to contest the value of the land and not the value of the improvement. See Haines v. Leonard L. Farber Company, 199 So.2d 311 (Fla. 2 DCA 1967) and Homer v. Highleah Race Corp., Inc., 249 So.2d 491 (Fla. 3 DCA 1971). The "portion" of the ad valorem tax assessment referred to in the Homer case was a portion of the property, not one factor of the method used in arriving at the value. The taxpayers state that they wish only to challenge the capitalization rate which is but one factor or part of the formula used in employing the income approach to value.

In order for the taxpayers in the case at bar to prevail they must make a complete case for relief by excluding every reasonable hypothesis of a legal assessment against it. This burden is on the taxpayer and is not altered by the fact that it is the Property Appraiser who has initiated the action. Thus it is the taxpayer's burden to prove that the actual income derived from the property,

would not sustain the assessment of a Property Appraiser. In actuality, this should be the taxpayers burden. Thus, if the taxpayer does not prove this by furnishing such information to the Court, it could not have completed a case for equitable relief because it would not have excluded every reasonable hypothesis of a legal assessment.

At page **36** of its brief, the taxpayer recognizes and acknowledges that the Property Appraiser, in the instant case is entitled to challenge the PAAB decision ". . . by the same means afforded the taxpayer.". If this is true, and it certainly is, then, since the taxpayer could challenge the assessment by producing actual income data then the Property Appraiser should be able to.

Twice in its brief the taxpayer contends that allowing the Property Appraiser to obtain income and expense information even though the value on the property was arrived at with hypothesized income and expense information, would deny a taxpayer due process rights. This is certainly not correct. In this case, and in fact in all ad valorem assessment cases where the value is disputed, it is the total amount of the assessment which is at issue, not a specific factor in the methodology employed. In the main brief of this Amicus, the income approach to value is set forth and examples are used showing how it operates. That which the taxpayer fears is readily obvious from an examination of such formula. That is, if the hypothesized

income was too low the assessment could have been higher if actual income data had been used.

The posture of the present suit is significant because it is not postured as is suggested by the taxpayer. The posture is as follows:

The Property Appraiser filed suit asserting that the proper value of the taxpayer's property is **$18,101,841.00.** The taxpayers contend that the proper value is **$16,291,656.00,** which is the amount as reduced by the special master and accepted by the PAAB. So the outcome of the suit and the end result sought is to establish the proper value of the taxpayer's property. The taxpayer and the Property Appraiser are approximately **$2,000,000.00** apart.

The taxpayer wishes to "play-like" this is not the situation by contending that the only question before the Court is the correctness of the **7.94** percent capitalization rate applied to the net operating income by the Property Appraiser. But the issue before the Court is the correctness of the assessment as established by the Property Appraiser. In this posture then the legal issue involved in the suit is the proper assessed value of the taxpayer's property. It is generally stated that to be admissible evidence must be relevant and material. Stated otherwise, admissible evidence is that evidence which is relevant and material and not barred by some exclusionary rule. See Florida Evidence, by Spencer A. Gard, page **128,** and **129.** In

Prior v. Oglesby, 50 Fla 248 (39 So. 5991, it is stated that whatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant, and when to admit it, does not override other formal rules of evidence, it should be received.

Applying these general principles in the situation in the case at bar the information sought by the Property Appraiser meets both tests for admissibility. It is relevant because it will have a tendency to prove a material fact such fact being the proper assessment of the taxpayer's property, and it is material because the actual income from the property is logically and legally relevant to the issue before the Court, which is the proper assessment on the taxpayer's property. It would be relevant and material both from the standpoint of being presented by the Property Appraiser in his case in chief, and it would also be relevant and material from the standpoint of impeaching the determination of the value of the taxpayer's property as contended by the taxpayer. Also see Herzog Inc. v. Lincoln Road, Inc., 182 So.2d 53 (Fla. 3 DCa 19561, Baugher v. Boley, 63 Fla. 75, 58 So. 980, and 110 So.2d 654, cert. den. 361 U.S. 847, for L. ed. 2d 86, and 80 S.Ct. 102. The information sought by the Property Appraiser squarely meets the test of admissibility; it is both material and relevant, and the trial judge protected the furnishing of such information with a protective order of confidentiality.

POINT II

SECTION 195.027(3), F.S., DOES AUTHORIZE A PROPERTY APPRAISER TO OBTAIN ACCESS TO FINANCIAL RECORDS AFTER, A PROPERTY APPRAISER HAS ARRIVED AT A DETERMINATION OF THE VALUE OF A PARTICULAR PARCEL OF PROPERTY AND EXTENDED SAME ON THE TAX ROLL.

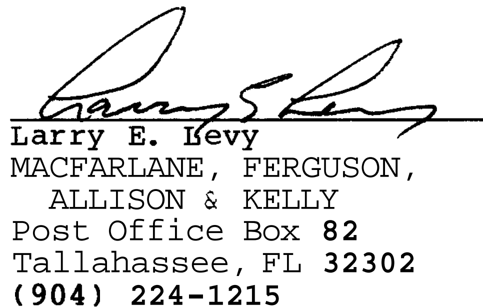
The argument under this point was not directly addressed by the taxpayer in its brief, although the involved statute is referred to at pages 21, 22, and 23 of the taxpayer's brief. Inasmuch as the taxpayer has not chosen to address the argument made by Amicus under this point, it must be assumed that the taxpayer has conceded that it cannot rebutt said argument. This seems correct inasmuch as neither the taxpayer nor the decision of the third district being reviewed recognize that the statute must be construed so as to apply to the Department of Revenue and the Auditor General as well as the Property Appraiser. As soon as this is recognized, the decision of the third district with regard to its interpretation of the statute is immediately seen to be incorrect. Thus the limitations imposed on the statute by the third district, limiting access to pre-assessment situations is obviously incorrect. The statute itself, does not suggest by any expressed language that it should be limited to pre-assessment situations, and as pointed out in the prior brief, the Auditor General and the Department of Revenue, are also within the ambit of the statute and their functions will generally occur after a Property Appraiser has arrived

at his assessment. Thus the clear meaning of the language of the statute is that it is available both in pre-assessment and post-assessment situations where the need exists. And it certainly exists in a situation where a Property Appraiser's assessment is being contested on the grounds that it is too high.

CONCLUSTION

The Amicus respectfully submits that the decision of the Third District Court should be quashed and set aside and that this Court should enter a decision finding that actual income data is admissible and discoverable in the case at bar.

RESPECTFULLY SUBMITTED on this the 10 day of December, 1985.



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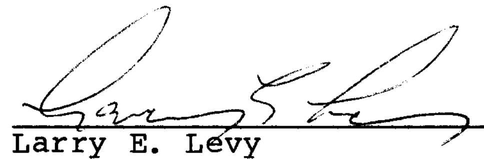
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to DANIEL A. WEISS, Assistant County Attorney, Dade County Courthouse, Sixteenth Floor, Miami, Florida 33130; J. TERRELL WILLIAMS, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301; STUART L. SIMON, ESQUIRE, Fine Jacobson, Block, England, Klein, Colan & Simon, P.A., 2401 Douglas Road, Post Office Box 140800, Miami, Florida 33134, on this the 10th day of December, 1985.



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