O/a 1-9-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,916

Third District Court No. 84-1431

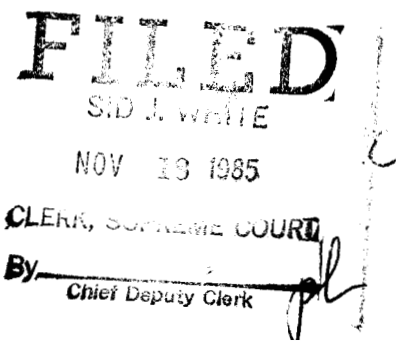
FRANKLIN B. BYSTROM, etc., et al.,

Petitioners,

vs.

S.F. WHITMAN, et al.,

Respondents.



BRIEF OF RESPONDENTS

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INTRODUCTION

This brief is submitted on behalf of the Respondents, Stanley F. Whitman, Dudley A. Whitman, and William F. Whitman, who as individuals jointly own the shopping center in Bal Harbour, Florida, known as the Bal Harbour Shops. Counsel for said Respondents will refer to the parties in the same manner as the Petitioner, the Dade County Property Appraiser, did in his brief.

References to the appendices appearing at the end of the Petitioner's Brief will be designated by the letter of the particular appendix in that brief followed by the page number within that letter.

Those Appendices are designated A through F.

Respondents have attached three (3) appendices to their brief and have designated these as G, H, and I in order to avoid confusion between the two (2) sets of appendices. The Respondents' appendices consist of the following:

Appendix G - Taxpayers' Response to Appraiser's Motion For Rehearing.

Appendix H - Appraiser's Request for Production of Income Information addressed to each of the three (3) Respondents

Appendix I - Trial Court's Order of June 1, 1984 Requiring Production.

STATEMENT OF THE FACTS AND OF THE CASE

The brief of the Petitioner is based entirely on a significant misrepresentation which appears in the initial sentence of the Petitioner's Statement of the Facts and of the Case. The Property Appraiser tells the Court in that sentence that he used all three standard approaches to value in preparing his 1981 assessment on the real property involved in this appeal, when in fact he used only one approach, an income approach. The Appraiser states in the initial sentence of his brief that he used a cost approach and refers the Court to Appendix A-44. This is a reference to a page in the testimony given before a Special Master appointed by the Property Appraisal Adjustment Board to hear testimony and make recommendations to the Board. The pertinent testimony given is as follows:

> Mr. BLAKE: Conversely now, if you take the converse of this--Frank, I do not want to be argumentative--but suppose the income would not support the value. Then you would take the position that you are using the cost approach.
>
> THE PROPERTY APPRAISER: That is incorrect.
>
> MR. BLAKE: All right; but you have not done a cost approach on these.
>
> THE PROPERTY APPRAISER: We certainly have.
>
> MR. BLAKE: They tell me that it is not available.
>
> THE PROPERTY APPRAISER: I cannot find the building jackets.

Mr. BLAKE: How is that then?

THE PROPERTY APPRAISER: It is unavailable to me.

MR. BLAKE: It is unavailable.

THE PROPERTY APPRAISER: There is a cost approach done on the properties.

MR. BLAKE: They were not available for me, the cards.

THE PROPERTY APPRAISER: I do not have them with me either.

(Whereupon, the above hearing was concluded at 4:26 p.m.)

The reference to Mr. Blake is to Alfred H. Blake, the former Dade County Property Appraiser, who represented the taxpayers at the administrative hearing before the Special Master. After the hearing, the Special Master filled in the pre-printed form that appears as Petitioner's Appendix D and was called upon in *so* doing to check one or more boxes indicating the method or methods used by the Property Appraiser in deriving his assessment. The Special Master did not check the box labeled "Replacement Cost," and thus indicated that he did not feel that the cost approach had been utilized by the Appraiser in deriving his assessment on the property.

The Petitioner Appraiser also indicates in the initial sentence in his Brief that he used a comparable sales approach and refers to item 2 in Appendix D as the authority for his statement. Therein, the Special Master, Ralph I. Lipshaw, indicates that the Property Appraiser's assessment was based on

both a comparable sales approach and an income approach. He did *so* by placing an X in two of the three boxes indicating the approaches used.

Although the Special Master checked the box indicating that the Property Appraiser had used a comparable sales approach in deriving his assessment, the transcript of testimony taken before the Special Master (Appendix A, Pages 27-46) contains not a single reference to a comparable sales approach or even to a single comparable sale. There is substantial discussion of comparative square foot assessments on leaseable space in the Bal Harbour Shops and in other shopping malls, and there is a lengthy explanation by the Property Appraiser as to how he derived both his assessment and his overall rate of capitalization, but there is no mention of any comparable sale or explanation of how comparable sales were used to derive the Bal Harbour Shops assessment for 1981 anywhere in the Property Appraiser's testimony.

Conclusive proof that the Appraiser used only an income approach is to be found in the Income Analysis Sheet prepared by Frank Jacobs, one of the Appraiser's principal assistants. A copy of that Income Analysis Sheet is attached hereto as Page 9 in Appendix G, which is part of the taxpayers' response to the Appraiser's Motion for Rehearing in the District Court of Appeal. The Analysis Sheet reflects that the Property Appraiser estimated the gross income of the two adjacent real property folios (12-2226-06-0060 and

12-2226-06-0020) that comprise the Bal Harbour Shops at $2,250,500.00. He subtracted three percent or $67,515 from the estimated gross income figure as a vacancy factor allowance to obtain an adjusted gross income of $2,182,985. From this figure he deducted his hypothecated expenses of $235,000 (11%) to obtain his estimated net operating income of $1,947,985. He then divided this net operating income by an overall rate of .10 to get a valuation of $19,479,850. The overall rate of 10 represents a capitalization rate of 7.94 added to the then prevailing ad valorem tax rate of 2.06.

The Appraiser then subtracted $973,990 (or 5%) from the $19,479,850 as an adjustment for the eighth-factor described in Section 193.011, Florida Statutes, which factor in pertinent part is as follows:

> The net proceeds of the sale of the property, as received by the Seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements.

After deducting the $973,990 eighth-factor adjustment from the $19,479,850 valuation, the Property Appraiser valued the two parcels at $18,505,860. He then attributed $225,838 to the auxiliary parcel (12-2226-06-0020) and $18,280,022 to the principal parcel (12-2226-06-0060).

It was the 1981 assessment on the principal parcel that the taxpayers challenged administratively, and it is this assessment in the amount of $18,280,022 that is shown as the

challenged assessment on the Special Master's Report and Recommendation Sheet which forms Appendix D to the Petitioner Appraiser's Brief. That Special Master's Report indicates that, prior to the hearing before the Special Master, the Appraiser's staff conceded that the challenged assessment was too high and should be reduced to $18,101,841 from $18,280,022. That recommendation was not acceptable to the taxpayers who then made their presentation to the Special Master. The Special Master recommended a reduction to $16,291,656, and that recommendation was accepted by the County's Property Appraisal Adjustment Board. The Appraiser then challenged the reduced assessment by his Complaint which commenced the litigation at the trial court level. (A. 1-3). In the litigation the taxpayers indicated that they accepted the hypothetical net income attributed to the property by the Appraiser, but wished only to question the correctness of the 7.94 percent capitalization rate applied to the net operating income by the Appraiser.

One further fact demonstrates that the Petitioner Appraiser could have only used the income approach to value as his sole approach when he assessed the property of the taxpayers as of January 1, 1981. That fact is the Appraiser's failure to allocate his total assessment between land and improvements as he is required to do by Section 192.001(18), Florida Statutes, which in pertinent part defines "Complete Submission of the Rolls" as follows:

> (18) "Complete submission of the rolls" includes, but is not necessarily limited to, accurate tabular summaries of valuations as prescribed by department rule; a computer tape copy of the real property assessment roll including for each parcel total value of improvements, land value, the two most recently recorded selling prices, the value of any improvement made to the parcel in the 12 months preceding the valuation date, the type and amount of any exemption granted, and such other information as may be required by department rule; . . . (Emphasis supplied).

An allocation of the total value of the property between land and improvements is also required by the General Real Property Standard Assessment Procedures and Standard Measures of Value contained in the Florida Department of Revenue's Manual of Instructions for Ad Valorem Tax Administration at several places. On Page 1 of the Section designated General Real Property the Manual states:

> There are two types of improvements which are considered in the appraisal process; these are improvements to the land and improvements on the land. Improvements to the land are land improvements, the value of which are included in the value of the land. Some examples of these improvements are privately owned irrigation systems, drainage systems, sea walls, driveways and walks, canals and bridges. Improvements on the land are building structures. They are valued separate and apart from the land.

Section 12D-8.11 of the Manual described above also makes clear that there must be separate land and building assessments made on improved real property.

What the Property Appraiser did in the instant case is quite evident. He hypothesized a net operating income of

$1,947,985, applied a capitalization rate of ten percent and thus derived a value of $19,479,850. He then deducted $973,990 or five percent from this figure because of the eighth factor in Section 193.011, Florida Statutes, and thus derived an assessment of $18,505,860. He took this figure based solely on the income approach to value and never bothered to allocate this figure between the land and improvement portions of his assessment, as the law requires. This is reflected in the Appraiser's admission on Page 28 of Appendix A where the Appraiser began his presentation before the Special Master with his announcement:

> THE PROPERTY APPRAISER: Agenda 21040.
>
> The total preliminary assessment is eighteen million two hundred eighty thousand and twenty-two dollars. The property appraiser's office is recommending an adjusted figure of eighteen million one hundred and one thousand eight hundred and forty-one dollars. The assessment is a total value assessment with no breakdown for land and buildina.
>
> Agenda 21041. The total preliminary assessment, two hundred and twenty-five thousand eight hundred thirty-eight dollars.
>
> The adjustment is to a new figure of three hundred twenty-three thousand six hundred thirty-five dollars.
>
> These two agenda numbers comprise what is known as the Bal Harbour Shops, which are located in Bal Harbour. (Emphasis supplied).

The Appraiser's failure to allocate the assessment between land and improvements is also reflected in the Special Master's Findings of Fact, Conclusions of Law and

Recommendations addressed to the PAAB (which document constitutes Appendix D in the Petitioner's Brief). There is no division of the total assessment into land and improvement components, which rather conclusively indicates that only an economic approach was utilized by the Appraiser, who simply applied his capitalization rate to the net operating income that he estimated for the property assessed.

A concise statement of the relevant facts in the case is set forth in the paragraphs below. It is taken in large part from the Statement of Facts set out in the taxpayers' petition for certiorari addressed to the Third District Court of Appeal.

The Property Appraiser in this case valued the Bal Harbour Shops property for 1981 initially at $18,280,022. The Whitmans filed a petition with the County's Property Appraisal Adjustment Board contesting the assessed valuation determined by the Property Appraiser. The petition was heard by a special master who, after hearing the Appraiser's reduced figure of $18,101,841 and other testimony, recommended a reduction in the assessed value. The Property Appraisal Adjustment Board of the County then adopted the recommendation of the special master, and the 1981 assessment was thus reduced from $18,101,841 to $16,291,656 on the pertinent parcel. The Property Appraiser was aggrieved by the reduced valuation and filed suit against the three individual owners of the shopping center in an endeavor to have the assessment restored to the revised preliminary assessment figure of $18,101,841.

On November 18, 1983 the Property Appraiser filed a request for the production of detailed income information addressed to each of the three individuals who own the subject property. A copy of that request addressed to one of the three partners is contained in the Appendix as Exhibit H. The request for production addressed to the other two owners was identical to the request contained in the Appendix, save for the name of the owner asked to furnish the information. On November 25, 1983 the Property Appraiser addressed a set of detailed interrogatories consisting of 14 legal size pages of questions to each of the three owner-partners. These interrogatories were answered in a detailed joint response, but the three requests for the production of detailed income information were not responded to.

In due course the Property Appraiser's counsel set down a motion to compel the production of the detailed income information sought from each of the three owners. On June 1, 1984 the Circuit Court entered an order granting the motion to compel. This order permitted the Whitmans to follow one of two courses. They could produce all the income information sought by the Property Appraiser by no later than June 6, 1984 or, in the alternative, they could pay the balance of the ad valorem taxes due for 1981 based on an assessment of $18,101,841 without prejudice as a condition precedent to seeking a review of the order to compel in the District Court of Appeal. A copy of the trial court's order of June 1, 1984 is contained in the Appendix as Exhibit I.

A petition for certiorari seeking a review of the order to compel the production of detailed income information by the three individual owners was filed with the Third District Court of Appeal on July 2, 1984. In due course, this resulted in the Third District's opinion of February 5, 1985 which this Court is now asked to review by the Property Appraiser.

SUMMARY OF ARGUMENT

The Property Appraiser essentially contends that income tax and income and expense records on which tax returns are based are always and invariably relevant in an ad valorem tax challenge. He errs in this contention because they are not invariably relevant, even though they are generally relevant in tax challenges. Such income and expense information is not relevant (a) when the land involved in the tax suit is unimproved and yields no income, or (b) when the Property Appraiser has valued the property using only a comparable sales approach, or (c) when the Property Appraiser has valued the property using only a replacement cost less depreciation approach, or (d) where, as in the case sub judice, the Property Appraiser uses only an income approach with hypothesized income, expense and net operating income figures based on general economic information he possesses, and the taxpayer accepts rather than challenges such financial figures. A holding that the taxpayer must produce his actual income figures even though he is prepared to accept the hypothesized figures of the Appraiser in the instance cited can only serve the purpose of giving the Appraiser a fallback position in case his capitalization rate proves erroneously low. This would deny a taxpayer due process rights. This is particularly so for a taxpayer who shoulders the heavy burden of showing the Property Appraiser to be in error - because he must do so in

order to overcome the presumption of correctness in favor of the assessment - and then has the Appraiser respond, "No matter; I can justify the assessment by shifting to a completely different approach to value."

Where the Property Appraiser uses solely an economic approach to value and errs in his application of the economic approach, it would be inequitable and unfair to permit the Appraiser to shift to another approach to value that he had previously rejected as inappropriate or as inferior to the economic approach actually utilized. Where the Property Appraiser uses 2 or 3 approaches to value in the derivation of his original assessment and his records so reflect, he should be able to justify his assessment on the basis of any approach that he actually used. But permitting him to shift to a wholly new approach that he once considered and rejected subjects the taxpayer to a never-ending shell game and denies him due process rights because of the presumption of correctness that he must overcome.

The taxpayer are not saying that income tax returns and income and expense information are not able to be discovered in ad valorem tax challenges. They are saying instead that in the particular circumstances of a given case, such financial information may not be discoverable because it is irrelevant and/or privileged.

ARGUMENT

POINT I IN PETITIONERS' BRIEF

The Respondents find the Petitioners' Point I a whole potpourri of matters grouped together in separate sections designated A, B, C, D and E respectively. Respondents will endeavor to respond to each of these separate sections in turn.

A
BACKGROUND OF THE ACTION

The Petitioners seem determined to state as frequently as possible that the Property Appraiser used all three standard approaches to value in deriving his 1981 assessments. They say *so* in the second sentence in the initial paragraph in this section of their Brief, again in the final paragraph on Page 6 of this section, and a third time in the penultimate paragraph in this section. Constant repetition will not render the untrue true, and the District Court correctly found that only an income approach had been used by the Appraiser, (B-2), a fact that this Court should accept.

Apart from the oft-repeated misrepresentation, the Respondents have little or no quarrel with the content of this section. The section is essentially a further statement of the facts and of the case which the Petitioners have for some reason chosen to include in their argument rather than in their statement of the facts and the case.

The major portion of this section however seems to be an attempt to prove that the taxpayers have stubbornly refused to produce their personal federal income tax returns to the Dade County Property Appraiser and the members of his staff over a period of years with fierce determination. This fact is not germain to the instant case in any way. However, the fact is true, and the taxpayers will not deny it in this brief or elsewhere. Income from the shopping mall is included in their personal federal income tax returns, together with a substantial amount of other highly personal information, and they are loath to produce this information to the Property Appraiser and his thousand or *so* employees. They will do *so* if the law requires it, but they will not if the law does not require it.

To conclude this section the taxpayers will quote the introductory section of the Third District's opinion in the case under review. It states:

> The Whitmans, hereafter called the taxpayers, are partners in the ownership of a shopping center in Bal Harbour, Florida, known as the Bal Harbour Shops. In a suit brought by the Property Appraiser of Dade County to restore a 1981 assessment that had been reduced by the Property Appraisal Adjustment Board, the taxpayers were ordered to produce for examination and inspection their personal income tax returns and other financial records pertaining to the income ad expenses of the property for the three-year period beginning in 1980. They seek review of that order by writ of certiorari. We grant the writ and quash the order.

The Property Appraiser valued the Bal Harbour Shops property for 1981 at $18,101,841. The taxpayers challenged the assessment before the County's Property Appraisal Adjustment Board. The Board adopted the recommendation of a special master that the assessment be reduced from $18,101,841 to $16,291,656. The Property Appraiser, aggrieved by this result, filed suit against the taxpayers, seeking to have his assessment restored, and in that suit requested that the taxpayers produce personal income tax returns and other income and expense statements on the property for 1980, 1981 and 1982. Over the taxpayers' objection, the trial court compelled the production.

It is undisputed that the Property Appraiser, using an income approach to arrive at value, formulated his 1981 assessment on the Bal Harbour Shops without having access to the actual income and expense records of the taxpayers which he now seeks. It is also undisputed that the taxpayers challenged the assessment, not by questioning the amount of net income attributed to the property by the Appraiser, but rather by questioning the capitalization rate which the Appraiser applied to the hypothesized net income figure. Under these circumstances, say the taxpayers, the production of these and like records may not be compelled.

B

ALTHOUGH INCOME INFORMATION IS GENERALLY RELEVANT IN AD VALOREM TAX CASES, IT IS NOT RELEVANT WHEN BOTH PARTIES AGREE TO THE HYPOTHESIZED REVENUES, EXPENSES, AND NET OPERATING INCOME OF THE PROPERTY.

In Section B under Point I the Property Appraiser seeks to refute an argument that the taxpayers advanced to the Third District Court of Appeal, and which that Court rejected.

The taxpayers took the position that the income information sought by the Property Appraiser in the litigation stage should not be required to be produced because Section 195.027(3), Florida Statutes, and its implementing Administrative Rule 12D-1.05, gave the Property Appraiser the right to obtain this information only during the period in which he was formulating his assessment roll and needed the information for that formulation. The taxpayers then went on to contend that, since the income information could only be obtained during the assessment roll formulation period, it could not be obtained by the Property Appraiser during the subsequent litigation phase.

The District Court of Appeal rejected this argument when it held:

> . . . But while necessity may be the sine qua non of pre-assessment entitlement to a taxpayer's financial records, it appears that mere relevance is the only predicate for post-assessment discovery under the rules of civil procedure. Indeed, as the Appraiser correctly observes, this court in Homer v. Connecticut General Life Insurance Co., 212 So.2d 490 (Fla. 3d DCA 1968), directly held that a taxpayer's income and expense records are relevant and thus discoverable in litigation involving the correctness of an assessment, notwithstanding that such records were not used by the Appraiser in making the assessment. As we there said, the issue being litigated is "the amount of the assessment, not the manner of arriving at it." Id. at 492.
>
> In the present case, however, the taxpayers, unlike the taxpayers in Homer v. Connecticut General, do not base their claim that the records are not relevant solely on the fact that the Appraiser did not use them

> in making the assessment. Instead, these taxpayers assert that the records are not relevant because they are probative only of the income earned from the ownership of the property, an issue which is not being litigated. Although the taxpayers challenge the total assessment, they have conceded that the income figure hypothesized by the Appraiser is correct. Under such circumstances, it is clear to us that ordering the production of these records over objection is an abuse of discretion, As the committee note to Florida Rule of Civil Procedure 1.350 states, the trial court must "weigh the need for discovery and the likely results of it against the right of privacy of the party or witness or custodian." Here, there being no disputed issue to which the taxpayers' records are germane, there is no need for discovery, see Jacobs v. Jacobs, 50 So.2d 169 (Fla. 1951), and the taxpayers' right of privacy would be needlessly invaded if production of the records were required. See e.g., Palmar v. Palmar, 402 So.2d 20 (Fla. 3d DCA 1981) (where party stipulates that he can adquately pay an increase in child support, inquiry into his present financial circumstances is foreclosed); Schottenstein v. Schottenstein, 384 So.2d 933 (Fla. 3d DCA), rev. denied, 392 So.2d 1378 (Fla. 1980) (same); Meltzer v. Meltzer, 356 So.2d 1263 (Fla. 3d DCA 1978). cert. denied, 370 So.2d 460 (Fla. 1979) (same).

Thus, the Third District held that personal income information and tax returns can be obtained from taxpayers by the Property Appraiser during ad valorem tax litigation when such information is relevant in a particular case. Such information is relevant when the amount of income generated by the assessed property is an issue in the case -- the Appraiser, the taxpayers and the Third District Court of Appeal are all in agreement on this general principal of law. But when the

amount of income generated by the assessed property is not relevant, as in the instant case where it is not in dispute, then it is improper for the trial court to disregard the taxpayers' rights to privacy and to order the production of highly personal, non-relevant information involving the taxpayers' income.

The Property Appraiser makes a great to-do about the taxpayers' admission that income information is generally relevant in ad valorem tax cases. But the Third District Court said so several years ago, far more tellingly than undersigned counsel has done, in its opinion in Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3d DCA 1982), re. den., 429 So.2d 5 (Fla. 1983) and in several other significant cases including Homer v. Connecticut General Life Insurance Co., 213 So.2d 490 (Fla. 3d DCA 1968). Generally speaking, actual income data is both relevant and admissible in property tax cases where income is in dispute. But, nonetheless, there are exceptions to this general rule because there are specific ad valorem tax cases where income information is not relevant. Income information is not relevant when the property whose assessment is challenged is unimproved and not income-producing, or when the Appraiser has valued improved property using only a comparable sales approach or only a replacement cost approach or a combination of these two methods. Similarly, actual income information will not be relevant when, as here, the taxpayers accept without question

the hypothesized income and expense figures that the Property Appraiser attributes to their property and challenge only the capitalization rate applied to the net operating income by the Appraiser.

The taxpayers will certainly admit that actual income data is relevant in ad valorem tax challenges when the net operating income is in dispute. However, they also maintain that actual income data is not relevant when the Property Appraiser hypothesizes the income and expenses to be derived from the property and the taxpayers accept his conclusions without question.

C

ALTHOUGH THE THIRD DISTRICT'S OPINION IN THE INSTANT CASE HELD THE TAXPAYERS' INCOME RECORDS NOT PRIVILEGED, IT CORRECTLY HELD THEM TO BE IRRELEVANT IN THE PARTICULAR CIRCUMSTANCES OF THIS CASE.

The taxpayers did make the argument to the Third District Court of Appeal that their personal income tax returns and their other personal income information were privileged and therefore not discoverable under Rule 1.350(b), Fla. R.Civ.P. after the preliminary assessment had been formulated by the Appraiser. This contention was based on the following concept. When the statute giving the Property Appraiser access to taxpayers' income tax returns is limited to a particular time, i.e., only when necessary to determine value during the

actual formulation of the tax roll, the application of the principle of expressio unius est exclusio alterius would indicate that those tax returns and income information are not required to be made available at other times. On this basis and on the basis of this Court's pronouncement that "there is no requirement for the property owner to make such revelation as a predicate to its consideration in line with Fla. Stat. Section 193.011, F.S.A." (Palm Corp. v. Homer, 261 So.2d 822 [Fla. 1972]), the taxpayers contended that the income tax returns and financial records sought by the Property Appraiser were privileged except during that limited period in which the statute said that the Appraiser might have access to them, if they were needed to calculate an assessment.

The Third District rejected this argument and held as follows:

> Although an individual's financial affairs are not clothed with a privilege or immune from inquiry, the confidential nature of such affairs is well recognized. See Fryd Construction Corp. v. Freeman, 191 So.2d 487 (Fla. 3d DCA 1966). More specifically, Section 195.027(3), Florida Statutes (1979), evinces this same respect for the private nature of the financial records of its citizen-taxpayers by requiring a showing of necessity as a predicate for pre-assessment production. Department of Revenue Rule 12D-1.05, which, in addition to carrying over the statutory requirement of necessity, provides for the expeditious return of the records and maintains their confidentiality in the hands of the Appraiser, shows this same sensitivity to the private nature of financial records.

The Third District's rationale was that, in the pre-litigation stage, the Property Appraiser was entitled to the income tax information he sought only during his formulation of the assessment rolls and only when he could show need for such information in order to derive assessments. In the post-litigation phase, however, the privilege fell away and the Appraiser then became entitled to whatever was relevant.

The Third District showed great sensitivity to the taxpayers' right to privacy, however, when it issued its opinion. It knew and recognized that in the Dade County community it has never been the practice of the Dade County Property Appraiser to attempt to compel taxpayers to produce their federal income tax records or their detailed income and expense records during the period in which the preliminary assessment roll is being formulated despite any legal entitlement thereto. The information is frequently sought by the Property Appraiser from the taxpayer on a voluntary basis, but never by compulsion while the preliminary assessments are in process of being determined.

Financial records relating to actual income and expenses are sought to be compelled through requests for production only when a taxpayer challenges his assessment in a court of law. Compelled production of these cumbersome and oftentimes extremely personal financial records thus becomes a kind of harassment against those who dare to challenge their ad valorem assessments. Production by compulsion is never sought

against a non-contesting taxpayer, but only against those who challenge their assessments. This Court may take judicial notice of this practice and may, if it chooses to take judicial notice, recognize it as an instrument of harassment used against only those who challenge their ad valorem assessments.

The Third District was aware of both the Property Appraiser's desire to use actual income and expense figures (rather than hypothesized figures) and the taxpayers' understandable wish to keep their personal finances private, and in effect said in its opinion that income tax returns and personal income information were discoverable in ad valorem tax cases, but only when they were clearly relevant or necessary to determine the issues in dispute.

The taxpayers believe the Third District looked carefully at the definition of "relevance" in Section 90.401, F.S., which states:

> Definition of relevant evidence. Relevant evidence is evidence tending to prove or disprove a material fact.

and concluded that the actual income information sought was not clearly relevant or material in a situation where the adversary parties both accepted the Appraiser's hypothesized net operating income and disagreed only as to the capitalization rate to be applied to that net operating income. In those circumstances the only issue in dispute and the only material issue was the correctness of the capitalization rate used by the Appraiser. The Appraiser's posture was obviously based on

a desire for a successful fallback position should his capitalization rate be found erroneous by the trial court.

In the instant case in its present posture there is one issue and only one issue that remains, the correctness of the Property Appraiser's capitalization rate. The taxpayers contend that this is the only issue in dispute, and that the income information sought from them by the Property Appraiser is irrelevant to that single remaining issue.

D

THE INCOME RECORDS AND TAX RETURNS OF THE TAXPAYERS WERE NOT RELEVANT TO THE SINGLE REMAINING ISSUE IN THE INSTANT CASE.

The Appraiser finds fault with the Third District's opinion and argues that the issue is the total amount of the assessment, regardless of the manner of deriving it. Should the Court accept his contention, he will then probably argue to the trial court that he can justify the assessment under a comparable sales approach to value or under a replacement cost less depreciation approach, even if he cannot justify the assessment under the income approach, the only approach he used in deriving his original assessment. Or he may concede that his capitalization rate is erroneous, but claim that that factor is offset by his underestimation of net operating income under the income approach to value. He is in fact asking the Court's leave to slither and slide from one position to another in the hope that he can justify his assessment under some valuation method.

The Property Appraiser's position is unjust and inequitable because his assessment comes carefully wrapped in a presumption of correctness which a challenging taxpayer must overcome. Even when a Special Master and the Property Appraisal Adjustment Board reduce the assessment after an administrative hearing, the presumption of correctness follows and adheres to the Property Appraiser's original assessment. Bystrom v. Equitable Life Assurance Society of the United States, **416 So.2d** 1133 (Fla. 3rd DCA, **1982);** rev. den., **429** So.2d 5 (Fla. 1983). Should the Property Appraiser institute suit for the purpose of increasing an assessment reduced by the Property Appraisal Adjustment Board to its original valuation, the burden of overcoming the insulating presumption of correctness still remains on the taxpayer who obtained the reduction administratively.

This imposes an onerous burden on the taxpayer. He may not simply present an expert valuer who testifies to a value lower than the Property Appraiser's assessment and expect to win. He must first overcome the presumption of correctness, by showing that the Property Appraiser's assessment or method of calculating the assessment was erroneous. Where an MAI Appraiser and the County's Property Appraiser testify to different values for a given property, the Property Appraiser wins -- absent a showing of error -- because his assessment carries the presumption of correctness that remains until overcome. Thus, the taxpayer may win his suit only if he can

demonstrate that the Property Appraiser's assessment is erroneous. To do this, he must first ascertain how the Property Appraiser calculated and derived his valuation and be able to demonstrate an error in the method or calculations used.

The Property Appraiser is now saying to this Court that he wants the opportunity to shift to another and completely different basis for calculating the assessment, should he have made an error in the single method he used to derive his original assessment. The taxpayers argue that this would place an unfair and intolerable burden on them, a burden not compatible with due process. Once they bear the heavy burden of overcoming the presumption of correctness by demonstrating the error in the Appraiser's method of valuation, they should not be faced by an Appraiser who gleefully declares that he can justify his assessment under a completely different theory of valuation. The Property Appraiser would doubtless maintain that in these circumstances he remains entitled to the presumption of correctness and that the taxpayer would once again have to overcome the presumption by demonstrating the Property Appraiser's error under the new method of valuation. At this point, because of the presumption of correctness, the woebegone taxpayer would find himself faced with a kind of shell game in which his chance to challenge an unfair and excessive assessment would be virtually nil. An interesting rhetorical question would be whether the Property Appraiser could shift to a third method or approach to valuation, should the taxpayer find an error in the second method used by him.

The taxpayers in this case are not saying that the Property Appraiser cannot use any method or combination of methods of valuation in deriving an initial assessment on a property. They do say, however, that once the Appraiser has derived his assessment by any method he wishes or any combination of methods and they then demonstrate an error in the method used, he should not be able to slide into another completely different valuation method and confront the taxpayers with a new position insulated by the all-encompassing presumption of correctness.

The Property Appraiser also maintains that his assessment on a property is an indivisible unity which will not permit an attack on any component part of it. This is not the law of Florida and never has been. In Homer v. Hialeah Race Course, Inc., **249 So.2d** 491 (Fla. 3rd DCA 1971), the Court held:

> A further attack is made by the appellants on the propriety of the law suit itself. The taxing authorities contend that the cause should have been dismissed by the circuit court because the plaintiff-appellee chose to challenge only a portion of the ad valorem tax assessment on its subject property. The above procedure, however, was not error. In Haines v. Leonard L. Farber Company, Inc., Fla. App. **1967, 199** So.2d 311, the court stated: "The land owner should be able to use the same method (of treating the separate parcels of property and improvements separately) in the contesting of an assessment, that is by contesting the basic appraisal and not the addition." See also Metropolitan Dade County v. Tropical Park, Inc., supra. No error was committed in failing to dismiss the cause of action because the taxpayer did not challenge the entire assessment. (Emphasis supplied).

The taxpayers would also point out that Chapter 12D-8 of the Rules of the Florida Department of Revenue, Division of Ad Valorem Tax, currently in effect, encompasses Rule 12-8.11. This Rule requires the Property Appraiser to maintain certain minimum data requirements. Among these requirements is the division of the assessment on improved property into land value and building value. Certainly a taxpayer aggrieved over one of these two components that comprise his assessment should be entitled to challenge that component alone. Any other result would tend to broaden litigation into areas not in conflict and involve wholly separate parts of assessments which the taxpayer has no wish to challenge. It is also unlikely that courts would sustain an assessment where the Property Appraiser conceded that there was an over assessment on a land parcel, but that that over assessment was compensated for by an under-assessment on the improvement that stood on the land parcel. Yet the position of the Property Appraiser in this litigation is supportive of that posture and the Appraiser's petition for certiorari to this Court should therefore be denied.

The taxpayers would also point out that the opinion of the District Court does not conflict with this Court's opinion in Blake v. Xerox, 447 So.2d 1348 (Fla. 1984).

In the Xerox case the Dade County Property Appraiser used a method of valuation, which this Court denominated as the "List Price less depreciation method," in which the list prices

of the various machines adjusted for depreciation formed the basis of the assessed value. The Xerox Company contended that an income capitalization method was superior and would produce a more equitable valuation result. This Court held that, regardless of which method of valuation was theoretically superior, the Court should uphold the Property Appraiser's method if it was supported by any reasonable hypothesis of legality.

In the instant case there is no disagreement between the parties as to the method of valuation to be used. The Property Appraiser utilized only an income capitalization method. The taxpayer accepts the income capitalization method as the proper method for valuing the property, and there is thus no difference between the Appraiser and the taxpayer as to the valuation method to be used. The taxpayer accepts both the method of valuation chosen by the Appraiser and the determination of net operating income as calculated by the Appraiser. Only the capitalization rate remains in dispute.

It will be clear to the Court that the Xerox case involves a wholly dissimilar legal issue. In the Xerox case there was a difference of opinion as to the best and fairest method of valuation, while in the instant case there is no disagreement as to the method of valuation or the net income attributed to the property by the Appraiser, hut only as to whether the valuation method chosen by the Appraiser was properly implemented by him.

E

REGARDLESS OF STATEMENTS THAT THEY ARE PREPARED TO PRODUCE CERTAIN DOCUMENTS, THE TAXPAYERS ARE NOT ESTOPPED WHEN THEY FOLLOW THE GOVERNING COURT'S DECISION.

The argument advanced by the Property Appraiser in his Section E of Point I is a "red herring across the trail" in every sense of the word. The taxpayers through undersigned counsel did represent to the District Court of Appeal in writing that they were prepared to furnish, in addition to the full and detailed answers given to the 14 solid pages of interrogatories submitted, any and all of the massive quantity of further information sought by the Appraiser, except for personal income tax returns and other information relating to the income arising from the property assessed.

The District Court of Appeal then issued its opinion which indicated that the income and expenses comprising the net operating income derived from the properties involved were no longer in issue (since both sides agreed to the figures hypothesized by the Appraiser), and that the sole remaining issue in the cause was the capitalization rate. With that conclusion by the Third District Court of Appeal, it appeared to undersigned counsel that the whole gamut of information sought by the Appraiser was now irrelevant to the sole remaining issue in the case.

When the Property Appraiser surprisingly renewed his motion to compel in the trial court after the issuance of the

Third District's opinion, the taxpayers again told the Court through undersigned counsel that they had no objection to producing the whole passel of information sought by the Appraiser, save for the income tax returns and other income information, but that the Court should hesitate to order the production of documents that the District Court of Appeal had just said were irrelevant to the single issue that remained for determination. Immediately following undersigned counsel's comments to the trial judge to this effect, opposing counsel agreed and commented:

> MR. WEISS: To respond to that, it may be that my motion is premature. It may be that it would be mooted by an appropriate, what we regard an appropriate decision in the Supreme Court.
>
> If Your Honor feels that that's the situation, and actually it is, maybe it would be appropriate to hold the motion in abeyance. That might be the most proper thing.

Having indicated to the trial court that the matter should be held in abeyance until the Supreme Court's opinion in the cause issues, the Appraiser's raising this matter as a point in this certiorari review seems highly inappropriate. Undersigned counsel will tell this Court, as he told the District Court of Appeal, that the taxpayers have no objection of any kind to producing the information sought by the Appraiser, save and except for personal income tax returns and other information relating to the income and expenses generated by the property involved in this suit. They will not however

encourage any court to issue an order directing them to produce the items in question when the opinion of the highest court thus far to address the substantive issue involved declares such items to be irrelevant to the case.

The final sentence on Page 24 of the Property Appraiser's Brief is also puzzling. It indicates that the Third District's opinion, influenced by the taxpayers' expression of willingness to produce all information sought by the Appraiser, save for income information, contained a quoted sentence requiring the taxpayers to produce their personal income tax returns and other financial records pertaining to income and expenses. Counsel for the Property Appraiser has completely misread the applicable sentence in the Third District's opinion, i.e., the second sentence in the opinion. That sentence is merely a statement by the Third District of its understanding of the trial court's order, and its understanding is eminently correct. The Third District then proceeded to quash the trial court's order.

POINT II

THE TAXPAYERS NEVER WAIVED THEIR OBJECTION TO THE PROPERTY APPRAISER'S MASSIVE REQUEST FOR DOCUMENTS

The Appraiser contends in his second argument that the taxpayers' failure to formally object in writing to the income information sought by him waived their right to do *so* at any and all future stages in the litigation. The taxpayers take issue with this position based on Insurance Co. of N. America v. Noya, 398 So.2d 836 (DCA 5th, 1981). Therein the petitioner insurance company sought review by certiorari of an order requiring it to produce certain documents subject to a subpoena duces tecum. The trial court's order required the production of the documents because of the insurance company's failure to file objections. The Fifth District reversed based on the insurance company's contention that certain of the documents sought had the benefit of the "work-product" privilege and other documents were entitled to protection under the attorney-client privilege. The Court's opinion recites on page 838:

> Rule 1.140(b) and (c) expressly require a party to file timely motions to quash, or for a protective order, or written objections, in order to limit discovery of documents and materials otherwise within the scope of discovery. Failure to take such timely action waives these objections, but it does not bar a party from asserting a privilege or exemption for matters outside the scope of permissible discovery.

The taxpayers in the instant situation maintain that their federal income tax returns and the original documents reflecting their income from the assessed property (and on which their federal income tax returns are based) constitute privileged or exempt documents not discoverable under Rule 1.350(b), Fla.R.Civ.P., once the preliminary assessment on their property has been formulated by the Property Appraiser. The taxpayers take the position that these tax documents are not discoverable: (a) because that was the position this Court took in Palm Corporation v. Homer, 261 So.2d 822 (Fla., 1972) when it said: "There is no requirement for the property owner to make such revelation..."; and (b) because of the stringent limitation contained in §195.027(3), Florida Statutes, which reads in pertinent part:

> Access to a taxpayer's records shall be provided only in those instances in which it is determined that such records are necessary to determine... the value of the taxable nonhomestead property...

and (c) because of the unequivocal result obtained when the expressio unius rule is applied to the above quoted statutory language.

There is thus no automatic right to discovery as contended by the Property Appraiser, particularly when the material sought has become irrelevant to the issues before the trial court.

The taxpayers' position with regard to the specific point at issue has been buttressed by the recent opinion of the

Fourth District Court of Appeal in Austin v. Barnett Bank of South Florida, N.A., 472 So.2d 830 (Fla. 4th DCA, 1985) in which the Court stated:

> As we interpret Rule 1.380(d), Florida Rules of Civil Procedure, its proscription that "the failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 1.280(c)" does not apply where the matters sought to be discovered are claimed to be privileged. This follows from the fact that Rule 1.280(c) refers to issuance of a protective order only "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...." and does not refer to privilege. We think the omission was intentional and that the word "objectionable" in Rule 1.380(d) therefore should be construed as referring only to items which are within the scope of discovery; that is, not privileged (see Insurance Co. of North America v. Noya, 398 So.2d 836 (Fla. 5th DCA 1981), but to which objection is made for one of the reasons set forth in Rule 1.280(c). Thus Rule 1.380(d) does not require timely objection to privileged matters. See Gross v. Security Trust Co., 462 So.2d 580 (Fla. 4th DCA 1985). We certify direct conflict with American Funding, Limited v. Hill, 402 So.2d 1369 (Fla. 1st DCA 1981), on this issue.

Cf. in this connection Gross v. Security Trust Co., 462 So.2d 580 (Fla. 4th DCA 1985).

POINT III

IN THIS PARTICULAR CASE INVOLVING PARTICULAR CIRCUMSTANCES, THE PERSONAL INCOME TAX RETURNS AND THE INCOME INFORMATION SOUGHT BY THE PROPERTY APPRAISER ARE IRRELEVANT TO THE CASE AND SHOULD NOT BE REQUIRED TO BE PRODUCED.

The Property Appraiser has raised a host of miscellaneous general propositions of law under this point, most of which are axiomatic and beyond dispute. He begins by contending that, when the Property Appraiser files a tax suit against a taxpayer because of an administrative reduction granted by the PAAB, he is entitled to challenge the PAAB decision by the same means afforded the taxpayer. This is a correct statement of law, and need not be argued.

He then contends that income tax returns and income and expense records on which tax returns are based are always and invariably relevant in an ad valorem tax challenge. He errs in this contention because they are not invariably relevant, even though they are relevant in most tax challenges. Such income and expense information is not relevant (a) when the land involved in the tax suit is unimproved and yields no income, or (b) when the Property Appraiser has valued the property using only a comparable sales approach, or (c) when the Property Appraiser has valued the property using only a replacement cost less depreciation approach, or (d) where, as in the case sub judice, the Property

Appraiser uses only an income approach with hypothesized income, expense and net operating income figures based on general economic information he possesses, and the taxpayer accepts rather that challenges such financial figures. A holding that the taxpayer must produce his actual income figures even though he is prepared to accept the hypothesized figures of the Appraiser in the instance cited can only serve the purpose of giving the Appraiser a fallback position in case his capitalization rate proves erroneously low. This would deny a taxpayer due process rights. This is particularly *so* for a taxpayer who shoulders the heavy burden of showing the Property Appraiser wrong - because he must do *so* in order to overcome the presumption of correctness in favor of the assessment - and then has the Appraiser respond, "No matter; I can justify the assessment by shifting to a completely different approach to value."

Where the Property Appraiser uses solely an economic approach to value and errs in his application of the economic approach, it would be inequitable and unfair to permit the Appraiser to shift to another approach to value that he had previously rejected as inappropriate or as inferior to the economic approach utilized. Where the Property Appraiser uses 2 or 3 approaches to value in the derivation of his original assessment and his records *so* reflect, he should be able to justify his assessment on the basis of any approach that he actually used. But permitting him to shift to a wholly new approach that he once considered and rejected subjects the

taxpayer to a never-ending shell game and denies him due process rights.

The taxpayers are not saying that income tax returns and income and expense information are not able to be discovered in ad valorem tax challenges. They are saying instead that in the particular circumstances of a given case, such financial information may not be discoverable because it is irrelevant and/or privileged.

CONCLUSION

Based on the argument submitted in this Brief, the Court is respectfully requested to affirm the opinion of the District Court of Appeal, Third District of Florida, as that opinion appears at 464 So.2d 182.

Respectfully submitted,

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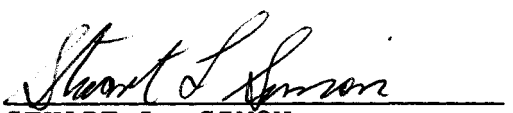
By: 
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