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.
_____/

INITIAL BRIEF OF PETITIONER FRANKLIN B. BYSTROM AS PROPERTY APPRAISER OF DADE COUNTY ON THE MERITS

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INTRODUCTION

This brief is written on behalf of petitioner Franklin B. Bvstrom, as Dade County Property Appraiser. He will be referred to in this brief as the Property Appraiser. Petitioner Randall Miller, as Executive Director of the State Department of Revenue, will be referred to as DOR.

The Whitmans, respondents herein, own the luxury shopping center in Bal Harbour, Florida, known as the Bal Harbour Shops. The Whitmans will be referred to collectively as the taxpayer.

References to the appendices to this brief will be designated by the letter of the appendix, followed by page number, as follows:

A. Pleadings and papers filed in the trial court.

3. Opinion and decision of the district court.

:. Request for production submitted to the trial court, explanation of the relevance of each request, and corresponding certified letter requesting production of documents prior to PAAB hearing.

). PAAB findings of fact, conclusions of law and recommendations.

.. Trial court order being reviewed.

Trial court order reserving ruling on motion to compel stipulated production and hearing transcript.

SUMMARY OF THE ARGUMENT

Petitioners, the Dade County Property Appraiser and the State Department of Revenue, seek reversal of the district court decision and reinstatement of the trial court order compelling production of property records and taxpayer records in the tax assessment action filed by the Property Appraiser in the circuit court. Either of the Property Appraiser's two independent arguments is sufficient to show that the trial court did not abuse its discretion in ordering the documents produced: (1) every applicable judicial precedent holds that the documents requested are relevant to the property valuation claims and defenses of the parties; or (2) because the district court correctly concluded that the documents requested are not subject to any privilege, the taxpayer's admitted failure to respond to the document request as mandatorily required by the rules of civil procedure conclusively waives every available objection to production.

STATEMENT OF THE FACTS AND OF THE CASE

The Dade County Property Appraiser used all three standard approaches to value in preparing the 1981 assessment of the luxury Bal Harbour Shops mall: cost (A. 44), comparable sales (App. D ¶2), and income (ibid.).

In a suit brought by the Appraiser to restore the 1981 assessment of the Bal Harbour Shops that had been reduced by the Property Appraisal Adjustment Board (PAAB), the taxpayer was ordered (App. E) to produce for examination and inspection the following documents related to the subject property as of the January 1, 1981 tax assessment date: appraisals, mortgage documents and loan applications, rent roll and tenant leases, casualty insurance policy, profit and loss statement, balance sheet, accountant's statements, sales data, financial statement, portions of income tax returns "relating to the operation of the subject property'' and other documents believed by the taxpayer to support the assessment reduction approved by the PAAB. (App. C). The taxpayer did not respond to the request for production and the Property Appraiser moved to compel production. (A. 18-19). After a hearing, the trial court ordered the taxpayer to produce the documents. (App. E). Without objection, the trial judge ordered that the documents "be treated with confidentiality by the Property Appraiser" and that the taxpayer retained the "right to object to the admission of such information at final hearing or to request that the court file be sealed." (App. E). The issue in this case

is whether the district court erred in finding that the trial court had abused its discretion in compelling production of the documents requested by the Property Appraiser.

The taxpayer souqht review of the trial court order compelling production by petition for writ of certiorari. The district court qranted the writ and quashed the order of the trial court. (App. B). The Property Appraiser's motion for rehearinq or clarification was denied. This appeal ensued, requesting this Court to take jurisdiction because the decision of the district court (1) expressly and directly conflicts with decisions of this Court and of another district court of appeal on tax assessment and discovery of financial records issues, and (2) substantially impairs the ability of county property appraisers, as constitutional officers, to ensure that all property in the state is placed on the tax rolls at "just (fair market) value."

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE TRIAL COURT HAD ABUSED ITS DISCRETION BY ORDERING PRODUCTION OF CONCEDEDLY RELEVANT TAXPAYER AND PROPERTY RECORDS WHERE THE TAXPAYER ADMITTED THAT IT HAD NOT TIMELY OBJECTED TO THE PRODUCTION REQUESTED AND THE DISTRICT CORRECTLY CONCLUDED THAT THE DOCUMENTS WERE NOT PRIVILEGED

A. BACKGROUND OF THIS ACTION

The Dade County Property Appraiser valued the Bal Harbour Shops for 1981 at $18,010,841. The Property Appraiser used all three standard valuation approaches in preparing the assessment: comparable sales (App. D, ¶2), income (ibid.) and cost. (A.44). The taxpayer challenged the assessment before the County's Property Appraisal Adjustment Board (PAAB). The PAAB reduced the assessment 10%.

The Property Appraiser filed the suit below to restore his preliminary assessment of the Bal Harbour Shops, alleging that the PAAB-ordered reduction violated the constitutional and statutory provisions and administrative regulations requiring that all property in the state be assessed at its "just (fair market) value". The Property Appraiser further alleged that in reducing the subject assessment the PAAB violated the Department of Revenue (DOR) regulation which prescribes that the Property Appraiser's determination is entitled to a presumption of correctness which can be

rebutted only by the presentation of evidence to the Property Appraisal Adjustment Board which excludes every reasonable hypothesis of a legal assessment. Rule 12D-10.03(3), F.A.C. (Florida Administrative Code), citing Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1969).

The taxpayer herein answered the Property Appraiser's complaint, alleging that it was "untrue" both that the Property Appraiser's preliminary assessment of $18,101,841 was the just valuation of the Bal Harbour Shops (A.4 ¶7) and that the PAAB reduction placed the subject property on the tax **roll** at an amount less its just value. (A.5 ¶8). The taxpayer denied generally the allegation regarding the Appraiser's presumption of correctness and the taxpayer's burden of proof before the Property Appraisal Adjustment Board. (A.5 ¶11). The taxpayer's denial places squarely in issue all three approaches to valuation[1/] and whether the assessment exceeds just value. There is nothing in the trial court record even to suggest that these issues were somehow modified by stipulation or discovery. (See App.A).

1/ The three standard hypotheses of property assessment discussed by Florida courts are the three standard approaches used by fee apparisers. They are the comparable sales or direct market approach, the cost approach, and the income or economic approach. Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County, 219 So.2d **101** (Fla. 3d DCA 1969); McNayr V. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967).

The Third District has explained the burden of going forward and the burden of proof in an action where the Property Appraiser seeks to restore his preliminary assessment after it has been reduced by the PAAB. That court has said:

> [I]f the property appraise; shows that his assessment was made in substantial compliance with Section 193.011, then the burden shifts to the taxpayer, not merely to establish that the taxpayer's evidence as to valuation of the property is more convincing than the property appraiser's, but rather to overcome the property appraiser's assessment by excluding every reasonable hypothesis of a legal assessment.

Bystrom v. Equitable Life Assurance Society of the United States[2/], 416 So.2d 1133, 1145 (Fla. 3d DCA 1982), rev. den., 429 So.2d 5 (Fla. 1983) (Pearson, Hubbart, JJ., concurring). Accord, Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984); Bystrom v. Bloom, 472 So.2d 819 (Fla. 3d DCA 1985); Muss v. Blake, 416 So.2d 2, 3 (Fla. 3d DCA), rev. den., 424 So.2d 762 (Fla. 1982).

2/ It is noteworthy (not to say supremely ironic) that the district court reversed trial judge Turner in Equitable for excluding actual income data of the subject property from admission at trial, 416 So.2d at 1140, and then found that the same trial judge had abused his discretion in the case at bar for permitting discovery of actual income data of the subject property. (B.5, 464 So.2d at 185).

Each year for the past several years, the Dade County Property Appraiser has sought from the taxpayer market data of the actual operation of the Bal Harbour Shops to assist in assessing the subject property. (A. 29). Annually, the taxpayer protests its tax assessment. As with respect to all taxpayers who petition the PAAB for reduced assessments, the Property Appraiser annually requests the relevant data from the Bal Harbour Shops prior to the PAAB hearing. Certified letters to the taxpayer requesting data relating to the 1981 assessment are included in Appendix C. (C. 4-5). Such data would be useful both in defending the assessment at the PAAB and preparing subsequent assessments.

For years the taxpayer has refused to submit to the Property Appraiser any of the market data requested. (A.29). Annually, the Property Appraiser has been forced to prepare and defend his assessment of the Bal Harbour Shops without the benefit of the actual income, cost or market data of the subject property.

The PAAB Special Master noted the intransigence of the taxpayer sub judice in refusing, unlike many other taxpayers in Dade County, to submit the actual income data with respect to subject property:

> THE SPECIAL MASTER: Well, I think you will agree with me that that [income] is the overriding issue on the valuation of the properties. You

know, the question that comes to my mind is: Do the principals -- obviously they do -- why wouldn't they give the assessor the actual figures so we can deal from actuality rather than projection?

MR. BLAKE [the taxpayer's agent]: They won't give it to me.

THE SPECIAL MASTER: They won't give it to you either.

MR. BLAKE: That is right.

THE SPECIAL MASTER: They are not acting in good faith to you. To me, it is a primary promise. (A.38).

The foregoing excerpt of proceedings was read to the trial judge at the hearing on the taxpayer's motion to alter or amend the agreed order compelling production.

The Special Master professed that he was "disturbed" (A.39) at the taxpayer's failure to produce documentation of the income in respect of the Bal Harbour Shops leases. He suggested that if the taxpayer had data showing that the assessment exceeded a value estimate based on actual rentals, the documentation would have been furnished to the Property Appraiser and to the PAAB. (A. 40).

Despite the utter lack of any evidence or testimony by the taxpayer regarding the actual income or expenses of the Bal Harbour Shops, the Special Master's principal finding of fact was:

> Expense ratio warrants change reflected below [i.e., 10% reduction in assessment] -- expenses should approximate 20% -- rentals tend to high side less 10%. (App. D ¶6B).

The Appraiser has thus been forced by the taxpayer's lack of cooperation to impute or hypothesize gross income and expenses of operation and to develop a capitalization rate in relation to the hypothecated net income. The value estimate which results is the Property Appraiser's income approach to valuation. Contrary to the finding of the district court that the Property Appraiser used only an income approach in preparing the 1981 assessment of the Bal Harbour Shops, the record plainly reflects that a comparable sales approach and a cost approach to valuation were also performed. (App.D ¶2, A.44).

It was against this backdrop that the Property Appraiser filed suit to reinstate the preliminary assessment and requested production "pursuant to Fla.R.Civ.P. 1.350" (C.1) of documents relevant to all three approaches to valuation essential to preparation of his case in chief and rebuttal.

B. THE TAXPAYER EXPRESSLY CONCEDED THE RELEVANCY OF THE PROPERTY RECORDS AND TAXPAYER RECORDS SOUGHT TO BE PRODUCED AND THE DISTRICT COURT'S CONCLUSION THAT THOSE RECORDS ARE NOT RELEVANT IS THEREFORE ERRONEOUS

The taxpayer's position herein is that unlike any other party in a civil proceeding it is immunized from pretrial discovery of records which the taxpayer candidly concludes are relevant. The taxpayer has neatly capsulized its entire argument:

> The argument made by the Appraiser under Point II C is persuasive in establishing that the "Omni" decision holds that actual income data is both relevant and admissible. It does not however establish that federal income tax returns and the confidential information on which such returns are based are discoverable by compulsion in ad valorem tax litigation. Such information may be obtained by the Property Appraiser on a voluntary basis, or on a compelled basis during the formulation of the preliminary assessment roll because of Section 195.027 (3), Florida Statutes, and its implementing Administrative Rule 12D-1.05. However, in light of the Florida Supreme Court statement in the Palm decision that "there is no requirement for the property owner to make such revelation" and the limitation in Section 195.027(3), Florida Statutes, that the appraiser shall have access to such information "only in those instances in which it determined that such records are necessary to determine . . . . the value . . . . . property," the taxpayer respectfully submits that the income information sought in the instant case by the Property Appraiser for litigation purposes (rather than for deriving the preliminary assessment) is not discoverable on a compelled basis. (Taxpayer's Reply to Response to Petition for Writ of Certiorari at 3-4.)

By quashing the trial court order compelling production in the within cause the district court effectively immunized the taxpayer from discovery relating to all three approaches to valuation. In doing so, the district court erroneously concluded that there was "no disputed issue to which the taxpayers' records are germane." (B.5, 464 So.2d at 185). This conclusion of lack of relevance, the linchpin in the district court's analyis, was reached despite the Property Appraiser's protestations and the taxpayer's own candid admission to the contrary quoted above.

C. THE PROPERTY RECORDS AND TAXPAYER RECORDS SOUGHT TO BE PRODUCED ARE NOT PRIVILEGED, AS CORRECTLY CONCLUDED BY THE DISTRICT COURT.

As indicated above, the taxpayer expressly conceded the relevance of the documents requested. Reply to Response to Petition for Writ of Certiorari at 3. The taxpayer likewise admitted, as the record plainly reflects, that the Property Appraiser's requests for production "have not been responded to." Petition for Certiorari at 3. Having conceded relevance and waived its right to apply for protective order by failing to apply for one, the taxpayer souqht refuge from disclosure in the last bastion remaininq, that of privilege:

> The taxpayer in the instant situation maintains that his federal income tax return and the original documents reflecting his income (and on which his federal income tax return is based) constitute privileqed or exempt documents that are not discoverable under Rule 1.350(b), Fla.R.Civ.P., once the preliminary assessment has been formulate? by the Property Appraiser. (Taxpayer's Reply to Response to Petition for Certiorari at 2.)

Income tax returns, however, are decidedly not privileged under Florida law and may be used in state court proceedings where relevant. Gollsneider v. Stein, 214 So.2d 628, 629 (Fla. 2d DCA 1968) (personal injury action); Fryd Construction Corporation v. Freeman, 191 So.2d 487 (Fla. 3d DCA 1966) (income tax returns held relevant to claim of damages in slander action, required to be produced for copying, admissible

so long as precautions were taken to protect their confidentiality). Id. at 489.[3/]

Florida courts hold income tax returns admissible even over plaintiffs' claims of fifth amendment self-incrimination privilege. Lely Estates, Inc. v. Polly, 308 So.2d 165, 167 (Fla. 2d DCA 1975) ("One who institutes a law suit waives any right he might have to avoid answering relevant questions [regarding income tax returns] even though the answers may be incriminating.").

Florida's liberal rules of pretrial discovery have even impelled the district court to reverse trial court orders denying access to income tax returns. E.g., Central Plaza Bank and Trust Company v. Lander, 320 So.2d 399, 400 (Fla. 2d DCA 1975) (Plaintiff's income held sufficiently relevant to defenses to require production of income tax returns even over the objection of the plaintiff.).

Moreover, in the leading case on accountant-client privilege, this Court held that statutory privilege waived and quashed a trial court order denying a plaintiff's motion

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3/ There can be no contention here that the confidentiality of the taxpayer's records has not been protected. Without objection from the Property Appraiser, trial judge Jack M. Turner, a veteran of some 28 years of continuous service on the trial bench, provided in the order quashed by the district court no less than three distinct protections of the confidentiality of the records compelled to be produced: (1) that the documents be treated with confidentiality by the Property Appraiser; (2) that the taxpayer retained the right to object to admissibility of the records at trial; and (3) that the taxnayer retained the right to request that the court file be sealed. (App. E ¶1).

for production of its adversary's books, records and CPA's report and audit, stating that:

> When a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily require that the privileged matter be offered in evidence, we think that he has waived his right to insist, in pretrial discovery proceedings, that the matter is privileged.

Savino v. Luciano, 92 So.2d 817, 819 (Fla. 1957).

The instant case proceeds as a result of the taxpayer's initiative below in administratively obtaining a reduced assessment. The taxpayer herein successfully obtained from the PAAB a $1,810,185 assessment reduction. In obtaining this reduction based expressly on purported "expense ratios" and "rentals" (App. D, ¶6B) with respect to the subject Property, the taxpayer herein has conclusively waived its right to object or to raise any privilege which might otherwise be asserted with respect to its income tax returns and all other documents evidencing the actual income or expenses of the subject property. Documents appearing to be "reasonably calculated to lead to the discovery" of market value data are likewise discoverable. Fla.R.Civ.P. 1.280 (b)(1).

Where a plaintiff claims personal injury and thereby places in issue his mental and emotional condition, a trial court may compel production of even such intensely personal and private records as those of an interviewing psychologist over the plaintiff's claim of federal statutory privacy privilege. Tootle v. Seaboard Coast Line R. Co., 468 So.2d

237 (Fla. 5th DCA 1984). This is true particularly where the statute relied upon by the plaintiff in support of its privilege claim provides an express exception permitting disclosure upon court order. Id. at 239. Accord, section 195.027(3), Florida Statutes (1981), upon which the taxpayer herein relies, which provides for disclosure of confidential taxpayer records "upon court order or order of an administrative body having quasi-judicial powers in ad valorem tax matters [PAAB]."

Federal case law requiring disclosure of relevant income tax records over claims of absolute privilege under the Internal Revenue Code accords with the foregoing Florida cases. See, e.g., Star v. Roqalny, 22 F.R.D. 256 **(E.D.** Ill. 1958). ("The law is well-settled that income tax returns are not privileged from discovery and production... ."). Id. at 258. Accord, Tollefsen v. Phillips, 16 F.R.D. 348 (D. Mass. 1954) ("The plaintiff, havinq made his earninqs an issue, can scarcely say that they are confidential information in this case."). The taxpayers sub judice, having obtained a $1,810,185 tax reduction from the PAAB on the purported basis of the "expense ratio" of the Bal Harbour Shops and income from its "rentals" (App. D ¶6B) can scarcely say that income and expense information and tenant leases and other property records are privileged or otherwise immune from pretrial discovery.

D. THE BAL HARBOUR SHOPS PROPERTY RECORDS AND TAXPAYER RECORDS SOUGHT TO BE PRODUCED ARE RELEVANT TO THE CLAIMS AND DEFENSES OF THE PARTIES, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THEIR PRODUCTION.

The polestar in a tax assessment case is the assessment. As the Third District has recognized in the past, the issue being litiqated is "the amount of the assessment, not the manner of arriving at it." Homer v. Connecticut General, 213 So.2d 490, 492 (Fla. 3d DCA 1968). The decision of the district court below reiterates this standard (B. 5, 464 So.2d at 185), but then condones the taxpayer's manipulation of the assessment procedure to deviate from and avoid that standard. The decision of the district court allows the taxpayer to pick and choose which of the several factors in the assessment formula he wishes to litigate and, if able to prove that one factor wronq, to upset the assessment, notwithstanding that the assessment itself may be absolutely correct. This was presumably not the intention of the district court and is clearly contrary to well-established principles of tax law.

Where the income approach *is* employed, capitalization rate and actual income and expenses are necessarily at issue in determining fair market value -- both are interdependent components of the single indivisible whole -- the assessment -

and one is meaningless without the other.[4/] The taxpayer cannot purport to "stipulate" to values used in an income capitalization formula without showing that the Property Appraiser overassessed the property in light of its actual operation.[5/]

As the Third District has said:

> The relevance of actual income data as rebuttal becomes apparent when the testimony of the Property Appraiser's predecessor in office, A.H. Blake, and the Taxpayers' appraiser, are examined together. In the Taxing Authority's case in chief, Mr. Blake stated that, in utilizing the income approach to arrive at just valuation, it becomes necessary to forecast the income of the property. He testified that the actual income would be the best way to measure the accuracy of that forecast.

Bystrom v. Equitable, 416 So.2d at **1139**.

4/ Based on the taxpayer's assertions, the district court determined that the amount of income generated by the subject property is not in issue. This conclusion misapprehends the income approach to valuation of property.

Fair market value as determined by the income approach is derived essentially by dividing annual net operating income by the rate at which such income is capitalized. (In very simplified terms, capitalized means the rate at which the investor will receive a return of and on his investment.) Based on this formula, it can be seen that operating income and rate of capitalization have a direct effect on market value.

5/ The Court will note that the Property Appraisal Adjustment Board's reduction (which the Property Appraiser is challenging in the principal action below) was based on the income and expense factors, and not upon the capitalization rate. (App. D ¶6B).

The conclusion of the district court that actual income is not at issue in a tax assessment case involving income-producing property expressly and directly conflicts with the recent decision of this Court in Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984), on the same question of law. Under Xerox, the taxpayer challenging an assessment must show that the property appraiser's valuation is unsupported by *any* of the three standard approaches to value: market, cost and income (or economic). The Property Appraiser's request for production below included items directed to discovery of information related to all three approaches. Moreover, the records of the PAAB proceeding explicitly indicate that the Property Appraiser's determination herein is based on all the approaches to valuation: replacement cost (A. 44), comparable sales (App. D 42) and income (ibid.).

Additionally, the taxpayer herein has not stipulated to the validity of the Property Appraiser's entire income approach, which involves the application of a capitalization rate to the revenue and expenses of the subject property. In fact, even assuming arguendo the possibility of doing so, the record before the trial court (App. A) is wholly devoid of any indication that the taxpayer desired to narrow the issues to anything less than the three judicially recognized standard approaches to valuation. A decision such as that of the district court (App. B), insofar as it decides an issue not raised by the pleadings, denies due process to the Property Appraiser. McCaleb v. Mathis, 459 So.2d 1162 (Fla. 2d DCA 1984).

Moreover, where, as here, the taxpayer attempts to "accept" only one hypothesized component in the income appraisal formula, the actual income cannot be eliminated as an obiect of discovery by a ournorted stipulation by the taxpayer. The development (and therefore the review) of a "cap" rate depends on the amount of income projected by the evaluator. The amicus curiae brief of the Florida Property Appraisers' Association and John Seay, as Flaqler County Property Appraiser, fully explains the dynamic relationship between income and capitalization rate and clarifies the interdependence between these two factors of the income equation:

$$\frac{\text{GROSS INCOME - EXPENSES}}{\text{CAPITALIZATION RATE}} = \text{MARKET VALUE}$$

Based on the foregoinq arqument and the Xerox decision and its progenitors, it is apparent that the taxpayer cannot limit the issue before the trial court to the "propriety" of the can rate. Even assuming that as a matter of law the taxpayer were able to dispel the Property Appraiser's presumption of correctness by challenging the sate at which income is capitalized, a factor not listed in section 193.011, Florida Statutes (1981), the taxpayer would then be reuuired to show substantial competent evidence in support of its claim to reduced assessment. Bystrom v. Hotelerama Associates, Ltd., 431 So.2d 176 (Fla. 3d DCA), rev. den., 441 So.2d 631 (Fla. 1983). With respect to income-producinq property such as the Bal Harbour Shops, this can be accomplished only by

the presentation of the actual income and expense data sought by the Property Appraiser's request for production. Thus, the conclusion of the district court that income is not at issue in this proceeding is clearly erroneous.

Even if it were possible to "concede" the income hypothesized by the Property Appraiser, no such concession is of record herein. The closest approximation to any such concession is the taxpayer's representation to the district court:

> In the instant case the taxpayers indicated that they were prepared to accept the gross revenue, expense, and net revenue attributed to their property by the Appraiser, and wished to challenge only the capitalization rate applied by the Appraiser to the property's hypothesized net income. (Taxpayer's Petition for Certiorari at 7).

This very equivocal language, stating what the taxpayer "wished" and would be "prepared" to do served as the basis for the district court's decision. Such purported representation is far more tenuous than the one rejected by this Court in Orlowitz, 199 So.2d at 97, and should be viewed with appropriate circumspection in light of the taxpayer's representation to the district court and subsequent change of heart concerning production of non-income-related records. See App. F. Moreover, as a matter of law, representations of counsel are not evidence, Sloan v. Sloan, 393 So.2d 642, 644 (Fla. 4th DCA 1981), and do not serve to create a record. Hill v. State, 471 So.2d 567, 568 (Fla. 1st DCA 1985). See also Metropolitan Dade County v. Resources Recovery, 462 So.2d 570 (Fla. 3d DCA 1985).

Because the hypothesized capitalization rate is inextricably intertwined with the hypothesized income to which it relates, neither can be scrutinized by the court except in light of the other. The purported attempt to "concede" the income hypothecated by the Property Appraiser is certainly not intended by the taxpayer to admit the validity of the assessment. The actual income and expense records and the other property and taxpayer documents requested therefore relate to claims and defenses still very much at issue.

The fact that actual income and expense data remain relevant to the trial court's consideration distinguishes the instant case from the divorce cases cited by the district court and brings the instant case within the rule of this Court's decision in Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967). In quashing the district court's decision in Orlowitz, this Court agreed with Mrs. Orlowitz's contention that the Third District decision denying access to her husband's financial records had the effect of denying to the court information concerning issues other than the husband's ability to pay alimony. In the instant case, the decision of the Third District denying the Property Appraiser access to mortgage appraisals, leases, rent rolls, operating statements, insurance policies, and other documents relating exclusively to Bal Harbour Shops, and not otherwise indicative of the taxpayer's personal finances, has the effect of denying to the trial court information admittedly relevant to the valuation of the subject property, the ultimate issue in this tax assessment action.

The district court decision here souqht to be reviewed represents a clear departure from the essential requirements of law since it is predicated upon (1) a finding of lack of relevance where the record indicates that the parties aqree that the matter sought to be discovered is relevant: and (2) ostensible consideration of the confidential nature of some of the documents sought to be discovered, where the trial court itself expressly provided for protection of the confidentialitv of all documents ordered to be produced. (App. E ¶1).

The decision of the district court below expressly and directly conflicts with this Court's Orlowitz decision on the question of whether a litigant may discover matters relatinq to income and financial data where not all issues relatinq to such discovery have been foreclosed. The decision of the district court below expressly and directly conflicts with this Court's decision in Xerox to the extent that the district court's decision provides that a taxpayer may obtain and defend a reduced tax assessment and then dictate to the trial court which valuation issues the taxpayer "wishes" to address. To maintain harmony with this Court's decisions governing ad valorem tax matters and with the well-established statewide policy of liberal pretrial discovery, the district court's decision should be reversed and the trial court's order compelling production reinstated.

E. THE TAXPAYER IS ESTOPPED TO OBJECT TO PRODUCTION OF DOCUMENTS TO WHICH IT HAS STIPULATED ON THE RECORD.

Ostensibly seeking a narrowing of the issue before the district court to review of that portion of the trial court's decision compelling production of personal income tax returns and other income-related information, the taxpayer herein filed a Reply to Response to Petition for Writ of Certiorari (relating matters which occurred after entry of the order being reviewed), in which the taxpayer represented to the district court as follows:

> The taxpayer has already answered without objection 14 solid pages of interrogatories submitted to him by the Property Appraiser in which he described in detail the financing obtained for the original acquisition of the property, the mortgages obtained at the time of said acquisition, the current status (including amounts still owing) of such mortgages, the insurance coverage carried on the property assessed, and all appraisals made on such property. He is prepared to furnish all this information to the Appraiser on request and any other information sought except his personal income tax return and any other information relating to the income arising from his operation of the subject property. (Taxpayer's Reply to Response to Petition for Writ of Certiorari at 1).

It is quite apparent from the Third District opinion that the court accepted the taxpayer's above-quoted representation and confined its review to requests for production of items unrelated to the cost and market approaches: "[T]he taxpayers were ordered to produce for examination and inspection their personal income tax returns and other financial records pertaining to the income and expenses of the property..." (B. 1, 464 So.2d at 183).

Based on counsel's express representation to the Third District that mortqaqe, insurance and appraisal requests were not being contested and would be furnished "on request", the Property Appraiser moved the trial court to compel production. (App. F). At hearinq, the taxpayer's counsel conceded that at least three of the four documents requested were within the scope of his representation (App. F, transcript at 10), but refused to nroduce them. (Id. at 11). He argued that the Third District opinion fully quashing the lower court order protected his client from discovery of any of the documents requested. (Id. at 10). The trial court judiciously entered an order deferrinq ruling pending review by this Honorable Court. (ADD. F).

It is well settled that "a party is estopped to make...objection inconsistent with the position previously asserted. by him which position was successfully maintained.'' Smith v. Urquhart, **129** Fla. **742, 176** So. **787, 788 (1937).** The taxpayer's refusal to produce documents it had stipulated to the district court it would furnish upon request (App. F) illuminates the character of the taxpayer's consistent Posture in this proceedinq, but should be reviewed on the basis of the well-founded equitable principle quoted above. See also McKee v. State, **450 So.2d 563** (Fla. 3d DCA **1984).**

As a result of the taxpayer's representations that it would produce documents unrelated to income and expenses, the district court confined its review of the discovery issue

before it solely to income-related documents. Now the taxpayer has disavowed its representation to the district court that it is prepared to furnish "to the Appraiser upon request" the documents relating to the financing, mortgages, insurance coverage of the Bal Harbour Shops "and all appraisals made on such property." See App. F. In so doing, the taxpayer has not only invited this Court to look askance at its representations, but has also forced this Court to review the entirety of the document production ordered by the trial court. Accordinsly, the Propertv Appraiser's document requests are included verbatim in Appendix C of this brief along with authorities demonstratinq the relevance of each request.

The specific reauests for production track Department of Revenue Rule 12D-1.05, F.A.C., as was graphically demonstrated to the trial judge at the hearing on the motion to compel production of documents. See C. **1-3**, a copy of the request for production and correspondinq provisions of Rule 12D-1.05, in the form submitted to the trial court at hearinq.

POINT II

THE TAXPAYER HAS CONCLUSIVELY WAIVED ITS RELEVANCY OBJECTION BY ADMITTEDLY FAILING TO RESPOND TO THE PROPERTY APPRAISER'S DOCUMENT REQUEST

The taxpayer herein conclusively waived any relevancy objection (and any other objection with the possible exception of privilege) it might have by failing to respond to the Property Appraiser's request for production within 30 days. The Property Appraiser's request for production (C. 1-3) was specifically made pursuant to Fla.R.Civ.P. 1.358, which governs such requests for production in all civil proceedings. Fla.R.Civ.P. 1.010. Any objection to production must be made in writing within 30 days after service of the request. Fla.R.Civ.P. 1.350(b). Delay beyond the 30-day limitation constitutes a waiver of the objection. See U.S. v. 58.16 Acres of Land, 66 F.R.D. 570, 572 (E.D. Ill. 1975) (Tardy objection to interrogatories deemed waived by delay).

Herein, the request for production was served November 18, 1983. (C.3). Not until April 30, 1984, did the taxpayer articulate its objection to the requested production by serving a motion to alter or amend (A.23-24) a previously entered agreed order compelling production. (A.21). Such a five-month-plus lapse between the request for production

and the filing of an objection is without more sufficient to justify the trial court's order which was quashed by the district court. (App.E).

Both the Property Appraiser and the taxpayer repeatedly brought to the attention of the district court in every single submission to that court the taxpayer's failure to respond to the request for production or otherwise to object timely. Taxpayer's Petition for Certiorari at 3; Property Appraiser's Response to Petition for Writ of Certiorari at 2; Property Appraiser's Motion for Rehearing, at 3, 5; Taxpayer's Response to Motion, section 11, at 6.

As the taxpayer itself succintly stated:

> [T]he three requests for production... have not been responded to.

Petition at 3. It is patent that the district court overlooked the taxpayer's candid explicit admission that it had failed to object to the request for production or to move for a protective order as required by the applicable rules of civil procedure. The district court found not once but twice that production was compelled "[o]ver the taxpayer's objection." (B. 2, 5, 464 So.2d at 183, 185). The taxpayer has specifically conceded that no such objection was made. This dispositive concession was overlooked by the district court.

The taxpayer's failure to respond to the request for production is critical where, as in the district court, the standard of review was "abuse of discretion," since the taxpayer's failure to object was itself sufficient to require the trial court to compel the production requested. See Fla.R.Civ.P. 1.380(d), which provides that a failure to respond may not be excused on the ground that the discovery sought is objectionable. Accord, American Funding, Ltd. v. Hill, 402 So.2d 1369 (Fla. 1st DCA 1981), specifying that Fla.R.Civ.P. 1.380(d) provides that a failure to respond timely to requests for production constitutes a conclusive waiver of the right to object. American Funding expressly distinguishes Insurance Company of North America v. Noya, 398 So.2d 836 (Fla. 5th DCA 1981), as follows:

> In Noya, the court was not addressing a party's failure to respond to a request for production and did not have to consider Rule 1.380(d) which states that the failure to respond "... may not be excused on the ground that the discovery sought is objectionable... ." (402 So.2d at 1371).

Cf. Austin v. Barnett Bank of South Florida, N.A., 472 So.2d 830 (Fla. 4th DCA 1985), certifying direct conflict with American Funding only on the requirement ~~vel~~ ~~non~~ of timely objection to privileged matters. (No such privilege issue is present here, since by footnote the district court below correctly disposed of the taxpayer's privilege contention. (B.5 n.4, 464 So.2d at 185 n.4).)

The standard governing the district court's review of decisions of the trial court in matters associated with pretrial discovery is evident abuse of discretion. E.g., Lorei v. Smith, 464 So.2d 1330, 1333 (Fla. 2d DCA 1985), citing this Court's decision in Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967). This Court has cited with favor the following statement of the test for review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. [Citation omitted].

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

It is apparent that the decision of the trial court compelling production herein (App.E) was not an abuse of discretion in view of the taxpayer's admitted failure to respond. Even if the documents requested were not patently discoverable and relevant and therefore compellable over objection, the taxpayer's failure to respond herein waives all objections (with the possible exception of privilege, Austin v. Barnett) and is itself sufficient to justify the trial court's order compelling production.

The quashal by the district court is based on the clearly erroneous finding that the trial court ordered

production over the taxpayer's objection. As a result of its erroneous factual finding of objection, the district court failed to apply the correct rule of law, which is set forth in Fla.R.Civ.P. 1.380(d) and in the American Funding case. Because the district court decision is erroneous as a matter of law, the decision should be reversed and the order of the trial court reinstated.

POINT III

THE PUBLIC POLICY OF THIS STATE AUTHORIZES COUNTY PROPERTY APPRAISERS TO FILE SUIT TO ENSURE THAT ALL PROPERTY IN THIS STATE IS ASSESSED AT FAIR MARKET VALUE, AND THE PROPERTY APPRAISER HAS FULL RIGHTS OF DISCOVERY IN ANY SUCH ACTION.

As a constitutional officer of the State of Florida, article VIII, section 1(d), Florida Constitution (1980), the nroperty appraiser has the responsibility of ensuring that all property in the county is assessed at its just value, section 193.011, Florida Statutes (1981), and that all property owners pay their full and equal share of taxes to defray the costs and expenses of government. Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp., Inc., 355 So.2d 1202, 1204-05 (Fla. 1978).

After determining that the reduction of the 1981 assessment received by the taxpayer herein from the Property Appraisal Adjustment Board was contrary to law and below just value, the Dade County Pronertv Appraiser filed the ~~de novo~~ action below to reinstate his original assessment as authorized by sections 194.032(6)(a) [renumbered section 194.036, Florida Statutes (1983)] and 194.181(1)(b), Florida Statutes (1981). These statutes entitle the property appraise: to challense PAAB decisions "by the same means afforded the taxpayer." Williams v. Law, 368 So.2d 1285, 1287 (Fla. 1979). The "means afforded the taxpayer" (and all other civil litiga s, Fla.R.Civ.P. 1.010) include liberal pretrial discovery and limitation of the scope of issues only by virtue of allegatio in the pleadinas. See Fla.R.Civ.P. 1.050, 1.100(a), 1.110(b)(c) and (d) and McCaleb v Mathis.

The taxpayer's argument below that the defending taxpayer is immunized from pretrial production of documents by a statutory privilege created by section 195.027 was explicitly and correctly rejected by the district court. (B. 5 n.4, 464 So.2d at 185 n.4). Moreover, any such contention raises the specter of a separation of powers violation, inasmuch as it inherently advances the position that the legislature is empowered to regulate the conduct of judicial proceedinqs. Regulation of all iudicial practice and procedure is the constitutional preserve of this Court, and. of this Court alone. Article V, section 2(a), Florida Constitution (1980). As a result of this Court's exclusive qovernance **of** iudicial proceedings, any conflict between the taxpayer's purported statutory immunity only from postassessment discovery and the Property Appraiser's entitlement to pretrial discovery must be resolved in favor of the latter. Fla.R.App.P. 9.010.

Moreover, the Third District has stated that in a tax assessment case, the amount of the assessment, not the manner of arriving at it, is the issue. Homer v. Connecticut General Life Insurance Company, 213 So.2d 490, 492 (Fla. 3d DCA 1968). Consequently, a taxpayer's income and expense records are relevant and thus discoverable in litiqation involving the correctness of an assessment, notwithstanding that such records were not used by the Appraiser in making the assessment. Id. Accord, Whitman v. Overstreet, 230 So.2d 46 (Fla. 3d DCA 1969) (same taxnayer as sub judice, again complaining of its tax assessment and again challenging the relevance of prejudicial evidence directlv relating to the subject property and its market value).

As a result of the foregoing, the Third District held in the "Omni" case:

> [T]he assessment may be defended by the presentation of any legally competent and relevant evidence proving or tending to prove the fair market value of the property [Citation omitted]. The necessary correlative of this proposition is that the presentation of any legally competent or relevant evidence is probative of just valuation.
>
> As substantive evidence, the actual income of the property is clearly relevant in reaching a valuation that conforms to the willing buyer-willing seller concept.

Bystrom v. Equitable, 416 So.2d at 1138.

It is well settled that in any proceeding instituted by a taxpayer to contest the tax assessment of his property, the defendant taxing authorities possess full rights of discovery. In Homer v. Connecticut General, 213 So.2d at 490, the taxing authority defendants had filed a Motion for Production of various taxpayer records relating to income attributable to the Fontainebleau Hotel, the tax assessment of which was there in dispute. The Third District held that the trial court abused its discretion in denying the discovery being souqht by the taxing authorities. The district court there found relevant the income tax returns, records of income and expenditures, mortgages, and insurance policies beinq requested, whether or not they would subsequently be admissible as evidence at trial. The selfsame documents as those found relevant by the district court in Connecticut General have now been found irrelevant and objectionable. Moreover, the order requiring their production has been deemed an abuse of discretion.

In accord with Connecticut General are the only two other district court cases governing tax assessment discovery. In Greenwood v. Firstamerican Development Corp., 265 So.2d 89 (Fla. 1st DCA 1972), the First District reversed as unduly restrictive a trial court order limiting to the tax year involved production to the Volusia County Property Appraiser of deeds, books of account, ledgers, mortgages and records of ownership. ~~See also~~ County of Volusia v. Union Camp Corp., 302 So.?~160 (Fla. 1st DCA 1974), (trial court reverse for denying the Volusia County Property Appraiser access to documents relating to the acquisition of Property whose assessment was being litigated). Sub iudice, the Third District has reversed the trial court for granting the Dade County Property Appraiser access to just such "acquisition information". (C. 1 ¶2). The Property Appraiser has also requested production of other documents relating to actual transactions with respect to the subject property other than its acquisition. Such documents include leases (C. 1 ¶3), loan applications and mortgages (C. 2 ¶6), appraisals (C. 2 ¶7) and rent rolls (C. 3 ¶11).

Thus, the taxing authorities do have full and complete rights to discovery and to the protection of the Florida Rules of Civil Procedure to assist them in conducting discovery. That the Property Appraiser is the plaintiff and not the defendant in the instant proceedings fails to deprive the Appraiser of the rights to discovery and the

protection of the Florida Rules of Civi Procedure applicable in all civil litigation. Fla.R.Civ.P. 1.010. See Williams v. Law. This is particularly true where, as here, the apprais r is involved in this action at the instance of the taxpayer, which obtained administratively rather than judicially a substantial tax benefit and which persists in defending this action rather than admit the rectitude of the Appraiser's best opinion of value as expressed in the preliminary assessme t.

In Dade County alone, 21,591 PAAB petitions were filed in 1981. One of these resulted. in the cause within. Given such an enormous number of petitions, it is a statistical certainty that a number of PAAB decisions will reduce assessments below the constitutional/statutory fair market value standard. and be so eareaious as to impel the Property appraiser to exercise his statutory entitlement to file suit to restore the preliminary assessment.

Taxpayers must not be permitted to obtain a windfall from the property appraisal adjustment board on the basis of "rentals" and "expenses" unsuoported by any evidence and then, without attempting to limit the issue by pleading (A. 1-5), tell an appellate court that only the capitalization rate is at issue and raise a shield of purported immunity or privilege when the property appraiser brings an action to restore the assessment to fair market value and seeks discovery admittedly relevant and admissible on the issue of valuation. Taxpayer's Reply to Response to Petition for Writ of Certiorari at 3. By its decision herein permitting

the taxpayer to slither and slide from one position to another, the district court has substantially impaired the discovery rights of the property appraiser in a tax assessment action and has shackled a constitutional officer in the performance of his duty to ensure that all property in the county is assessed at fair market value, article **VII**, section 4, Florida Constitution (1980), so that all property owners pay their full and equal share of taxes to defray the costs and expenses of government.

The discovery riqhts of all 67 property appraisers in this state have been effectively curtailed bv the district court decision. The district court formed the mistaken impression that requested documents relate only to an issue not in controversy. By forming this mistaken impression, the district court rendered a decision in direct conflict with decisions of its sister courts on the same question of discovery of taxnayer records and dramatically out of harmony with controllinq Precedents established by this Court reqardinq both ad valorem tax matters and discovery of financi l data.

The policy of liberal pretrial discovery can be vindicate only by sustaininq the order *of* the trial judge herein requiri g the taxpayer to produce the relevant records. (App. E). The corresponding policy of confidentiality of taxpayer records is appropriately safesuarded by the three-part Protection ordered bv the trial judge. (App. E ¶1).

If reasonable men could differ as to the ropriety of the action taken by the trial court, then the action of that court is not unreasonable and there can be no finding of an abuse of discretion. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). The trial court did not abuse its discretic in the case at bar, but was entirely correct in compelling Droduction of relevant nonprivileged property records and taxpayer records.

The record plainly reflects both that the Property Appraiser used all three standard approaches to value in preparing the 1981 assessment of the Bal Harbour Shops (A. 44, App. D. ¶2) and that the income and expenses of the property are very much at issue. (App. D ¶6B). See Blake v. Xerox. The taxpayer waived its riqht to object to Droduction of the property records and taxpayer records. In shielding the taxpayer from concededly relevant discovery, the district court both misapprehended the legal effect of the evidence and palpably misconceived the facts. Under the circumstances at bar, each such error is reversible. Whitman v. Pet Incorporated, 335 So.2d 577 (Fla. 3d DCA 1976), cert. dismissed, 348 So.2d 951 (Fla. 1977).

The decision of the district court is plainly erroneous, narticularly in view of the taxnayer's admitted failure to respond to the Property Aspraiser's production request. Public policy and judicial precedents qoverning pretrial discovery and tax assessment actions mandate that property appraisers statewide be placed on an eaual footing with all other litigants and accorded the same riqhts of discovery.

CONCLUSION

Based on the foregoing argument and authority, this Honorable Court is respectfully requested to reverse the decision of the district court of appeal and remand the cause with instructions to quash the writ of certiorari and to reinstate the order of the trial court compelling production of documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Initial Brief of Petitioner were furnished by mail this 7th dav of October, 1985, to: Stuart L. Simon, Esquire, Fine Jacobson Schwartz Nash Block & England, P.A. 2401 Douglas Road, Miami, Florida 33134; J. Terrell Williams, Assistant Attorney General, Room LL04, The Capitol, Tallahassee, Florida 32301; Larry Levy, Esquire, P.O. Box 82, Tallahassee, Florida 32302; and to John M. Hathaway, Esquire, P.O. Drawer 1537, 149 West Marion Avenue, Punta Gorda, Florida 33950.

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