IN THE SUPREME COURT OF THE STATE OF FLORIDA

FRANKLIN B. BYSTROM,
et al.,

Petitioners,

vs.

S. F. WHITMAN, et al.,

Respondents.
_____/

CASE NO. 66,916

On Discretionary Review to the

THIRD DISTRICT COURT OF APPEAL OF FLORIDA

(Case No. *84-1431)*

INITIAL BRIEF ON THE MERITS OF PETITIONER, DEPARTMENT OF REVENUE, STATE OF FLORIDA

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PRELIMINARY STATEMENT

The Petitioner, State of Florida, Department of Revenue, will be referred to as the "Department". The Petitioner, Franklin B. Bystrom, Dade County Property Appraiser will be referred to as the "Property Appraiser". The Respondents, S. F. Whitman, D. A. Whitman and W. F. Whitman will be referred to collectively as the "Taxpayers".

The term "trial court" will be used to refer to the Honorable Jack M. Turner of the Eleventh Judicial Circuit Court of Dade County, Florida. The term "District Court" will be used to refer to the Third District Court of Appeal of Florida.

The symbol "A" will be used to refer to the Appendix located at the back of this brief of the Department.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Department of Revenue, State of Florida, adopts the Statement of the Case and Facts set forth in the Brief on the Merits of Petitioner, Franklin B. Bystrom, Property Appraiser of Dade County.

SUMMARY OF ARGUMENT

This Court has repeatedly held that a party to an action has a right to discover any evidence, not privileged, that may be relevant to the subject matter of the action, and that pre-trial discovery may not be limited by the precise issue as framed in the pleadings of a party. It is undisputed that the challenged tax assessment involved in this case was made by utilizing the income approach to value. Consequently, data concerning the actual income and expenses applicable to the subject property could obviously lead to evidence which may support the final assessment figure arrived at by the Property Appraiser utilizing the income approach.

It is a fundamental rule of law relating to pre-trial discovery that trial courts have wide discretion in granting or denying discovery motions, and that such discovery orders of the trial court should be affirmed on appeal unless such an abuse of discretion is shown so as to constitute a departure from the fundamental requirements of law. The record in this case is totally devoid of any showing of a gross abuse of discretion on the part of the trial court. The decision of the District Court constitutes an unwarranted restriction on the capability of a Property Appraiser to seek evidence in pre-trial discovery to support a challenged tax assessment, and the decision is not based on any existing legal precedent in the statutory or case law of the State of Florida.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT PREVENTING THE PROPERTY APPRAISER FROM OBTAINING THE TAXPAYERS' FINANCIAL RECORDS RELATING TO THE ACTUAL INCOME EARNED ON THE SUBJECT PROPERTY ERRONEOUSLY ALLOWS THE TAXPAYERS TO LIMIT PRE-TRIAL DISCOVERY BY VIRTUE OF HOW THEY FRAME THE ISSUES IN THEIR PLEADINGS.

This is an action wherein the 1981 ad valorem tax assessment on certain real property in Dade County owned by the taxpayers is at issue. It is undisputed that the Property Appraiser used an income approach to valuing the subject property without having access to the actual income and expense records of the taxpayers. (A-2) It is further undisputed that the Taxpayers challenged the total assessment arrived at by the Property Appraiser utilizing the income approach to value. (A-2) However, the Taxpayers did not question the net income attributed the property by the Property Appraiser, but only challenged the capitalization rate utilized by the Property Appraiser in applying the capitalization of income formula. (A-2)

Notwithstanding these undisputed facts, the District Court reversed the order of the trial court granting the Property Appraiser's motion to compel certain financial records of the Taxpayers pertaining to the actual income and expenses generated from the subject property (A-5). The District Court's holding prohibits the Property Appraiser from discovering the actual

income and expense data from the subject property, even though the District Court expressly acknolwedged in its decision that it had previously 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 (A 4-5). See, Homer v. Connecticut General Life Ins. Co., 213 So.2d 490, 492 (Fla. 3d DCA 1968) and Bystrom v. Equitable Life Assur. Soc., 416 So.2d 1133, 1138 (Fla. 3d DCA 1982).

The reason given by the District Court for reversing the trial court's order granting discovery was that, even though the Taxpayers challenged the total assessment made by utilizing the income approach, the Taxpayers only took issue with the capitalization rate and not the amount of income attributed to the property by the Property Appraiser. The District Court thereby concluded that any actual income and expense data related to the subject property was not discoverable, since the Taxpayers had not questioned in their pleadings the income figures utilized by the Property Appraiser in making the challenged assessment.

The Department respectfully submits that the rationale underlying the District Court's decision is clearly erroneous and should be rejected by this Court for several reasons. First, the decision of the District Court is in direct conflict with prior decisions of this Court relating to the scope of pre-trial

discovery. This Court ruled 30 years ago in the case of Charles Sales Corp. v. Rovenger, 88 So.2d 551, 553 (Fla. 1956), that:

> . . . It will be noted that the test [for pre-trial discovery] is relevancy to the subject matter of the action rather than to the precise issues framed by the Pleadings. . . (Citations omitted) (e.s.)

In the later case of Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967), this Court reaffirmed its holding that the scope of pre-trial discovery cannot be limited by admissions or stipulations contained in the pleadings or motions of a party. In the Orolwitz case, the order of a trial court denying discovery was reversed. The trial court order prohibited the defendant wife in a divorce action from discovering data relating to the husband's financial worth because of representations in the husband's motion for protective order concerning his alleged financial capability to comply with any reasonable court order requesting the husband to pay costs, fees or other allowances. This Court allowed the discovery of such financial data by quoting with approval from the case of Parker v. Parker, 182 So.2d 498 (Fla. 4th DCA 1966), as follows at page 98 of the Orlowitz opinion:

> "We must say, based upon our understanding of the Rules and the philosphy behind them, that we do not look with favor upon the husband's position in-not wishing to reveal any of the details of his financial position and his effort to bridle the dependents' discovery rights by substituting his secondary non-verifiable conclusion in lieu of primary detailed facts. The adversary and the court are entitled to the whole factual picture to the end that an independent complete understanding and evaluation may be had." (e.s.)

Consequently, the obvious conflict between the decision of the District Court and the holdings of this Court in the Charles Sales Corp. and Orlowitz cases is readily apparent. The decision of the District Court should not be affirmed because such affirmance would have the effect of reversing this Court's established holding that the opposing party and the courts "are entitled to the whole factual picture" relating to the financial position of a taxpayer or any other party to a suit where the financial data is or may be relevant to the subject matter of the action (rather than relevant to the precise issues as framed in the objecting party's pleadings).

The fatal fallacy in the rationale underlying the District Court's decision is further exemplified by one of the basic rules of ad valorem tax relating to the heavy burden of proof imposed on a taxpayer in overcoming the presumption of correctness attending the Property Appraiser's assessment. See, Blake v. Xerox, 447 So.2d 1348 (Fla. 1984). The District Court in its own prior opinions has held that the issue in an action challenging a tax assessment is the amount of assessment and not the methodology utilized in arriving at the assessment. See, Homer v. Connecticut General Life Ins. Co., supra; and City National Bank of Miami v. Blake, 257 So.2d 264 (Fla. 3 DCA 1972).

On page 492 of the Connecticut General Life Insurance Co. opinion, the District Court held that:

> . . . However, we must agree with appellants who point out that the amount of the assessment, not the manner of arriving at it, is the issue being defended in this case. The 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 assessed property. . . . (e.s.)

In the later case of City National Bank of Miami v. Blake, supra, the District Court concluded on page *266* of the opinion that:

> . . . A tax assessment is presumed correct, and in order to successfully challenge it, the taxpayer must present proof which excludes every reasonable hypothesis of a legal assessment. That is, an assessor may reach a correct result for the wrong reason. (e.s.)

In this proceeding, if discovery is allowed and the Taxpayers' records reflect that the actual income generated from the subject property is higher than the income attributed to the property by the Property Appraiser, then the total amount of the assessment could be upheld by the courts as not being excessive, even though the taxpayers might convince the Courts that the capitalization rate utilized by the Property Appraiser was improper. Such a result is entirely possible in that the final assessment figure computed by utilizing the income approach may remain substantially the same because an increase in the amount of income attributable to the property could offset any increase in the capitalization rate applied to the income figure.

Thus, the irony of the rationale underlying the District Court's decision is that it may very well prevent the Property Appraiser from obtaining from the records of the Taxpayers financial data which may support the total assessment figure, even though the Taxpayers were to prevail in their argument that the capitalization rate applied by the Property Appraiser

is incorrect. The irony is further magnified in view of the District Court's prior holdings that "discovery of material which is relevant to the subject matter of the cause is permitted, even though the information gained may be inadmissible as evidence at trial". Homer v. Connecticut General Life Ins. Co., supra, at page *492;* and Southern Mill Creek Products Co. v. Delta Chem. Co., 203 So.2d *53,* 55 (Fla. **3d DCA** 1967).

POINT II

THE DECISION OF THE DISTRICT COURT REVERSING THE TRIAL COURT'S ORDER GRANTING DISCOVERY TOTALLY FAILS TO COMPLY WITH THE ESTABLISHED TEST FOR APPELLATE REVIEW OF TRIAL COURT ORDERS GRANTING OR DENYING DISCOVERY MOTIONS.

It is a well established rule of law in Florida applicable to appellate review of trial court orders relating to pre-trial discovery that the trial courts possess broad discretion in supervising the scope of discovery and that an order of a trial court granting or denying discovery should be affirmed, except where such an abuse of discretion has been shown so as to depart from the essential requirements of law. Orlowitz v. Orlowitz, supra, at page 98; Burroughs Corp. v. White Lumber Sales, Inc., 372 So.2d 122 (Fla. 4th DCA 1979); and Abelson v. Bosem, 329 So.2d 330 (Fla. 3d DCA 1976).

Furthermore, one of the basic legal principles relating to pre-trial discovery in this State is that any matter, not privileged, which is relevant to the subject matter involved in the pending action is subject to discovery. See, Fla.R.Civ.P., 1.280(b)(1); and Charles Sales Corp. v. Rovenger, supra, at page 553.

There is absolutely no showing in the record of this case that the Taxpayers' income and expense records relating to the subject property were privileged. Neither is there any showing in the record that the requested discovery would be so unduly burdensome to the Taxpayers so as to justify denying the Property Appraiser the right to inspect the financial data requested.

An apparent grounds for the trial court's order granting the Property Appraiser's request for discovery is the case of Bystrom v. Equitable Life Assurance Society, supra, wherein the District Court specifically ruled on page 1138 of the opinion that the actual income generated by the property is clearly relevant in reaching a valuation that conforms to the willing buyer-willing seller concept. Said ruling of the District Court in the Equitable Life Assurance Society case was obviously based upon the elementary rule of ad valorem taxation that the income approach is one of the three basic approaches to valuation which must be considered by the property appraiser in making an assessment. See, Powell v. Kelly, 223 So.2d 305 (Fla. 1969); and McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1964).

The consideration of income as a criteria in determining the just valuation of property for ad valorem taxation has also been expressly codified into statutory law as subsection 193.011(7), F.S. Consequently, the discovery of evidence pertaining to the actual income generated from the subject property involved in an ad valorem tax case clearly goes to the very heart of the evidentiary process in the defense of, or attack on, the validity of a tax assessment of income producing property.

The decision of the District Court, if left intact, might be viewed as a judicially created "special exception or waiver" that would arguably relieve a taxpayer challenging an ad valorem assessment from the duty of producing obviously relevant documentary evidence for discovery pursuant to F.R.C.P.

1.350, as would be required of all other parties to a civil action.

There is absolutely no legal precedent in Florida law for excepting a party from complying with the discovery portions of the Florida Rules of Civil Procedure merely because such party happens to be a taxpayer challenging an ad valorem tax assessment. The ruling of the trial court granting the discovery clearly does not constitute a fundamental departure from the essential requirements of law and should be upheld.

CONCLUSION

The Department respectfully submits that if the District Court decision is left intact then said decision, representing the latest case law discussing the subject matter, will likely be cited by taxpayers and their attorneys as authority for the proposition that the appellate courts of Florida are now taking a more restrictive view as to the extent of pre-trial discovery allowed to Property Appraisers in ad valorem tax cases. If this perceived view were to gain state-wide approval in the trial courts, then it could pose a threat to the Legislature's goal of achieving full "just value" tax rolls in all of the counties in this state.

The Department further sumits that a final appellate court ruling preventing a Property Appraiser from seeking to discover actual income and expense information that may support his overall assessment is totally repugnant to the prevailing liberal view of the scope of pre-trial discovery incorporated into the Florida Rules of Civil Procedure and would impose an unwarranted handicap on Property Appraisers in their defense of challenged ad valorem tax assessments.

The decision of the District Court should be quashed and this Court should remand this case with instructions to affirm the order of the trial court granting discovery.

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits of Petitioner, Department of Revenue, State of Florida, & Appendix has been furnished by mail to DANIEL A. WEISS, Assistant County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130 and STUART L. SIMON, ESQ., 2401 Douglas Road, Miami, Florida 33134, this 2nd day of October, 1985.

Respectfully submitted,

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