O/a 1-9-86

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)

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

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F.R.C.P.

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Preliminary Statement

This brief is submitted on behalf of the Department of Revenue of the State of Florida. in reply to Point III of the Brief of Respondents.

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. References to annendices refer to appendices to the Brief of Co-petitioner Franklin B. Bystrom, as Property Appraiser of Dade County, on the Merits. All emphasis is supplied by counsel-.

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT NO REASONABLE PERSON WOULD TAKE THE VIEW ADOPTED BY THE TRIAL COURT ORDERING PRODUCTION OF PROPERTY RECORDS AND TAXPAYER RECORDS WHERE SUCH RECORDS ARE SPECIFICALLY DESIGNATED AS SUBJECT TO PRODUCTION UNDER THE FLORIDA PROPERTY ASSESSMENT ADMINISTRATION AND FINANCE LAW AND THE CORRESPONDING DEPARTMENT OF REVENUE REGULATION.

SUMMARY OF ARGUMENT

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

It is a fundamental rule of law relating to pre-trial discovery that trial courts have wide discretion in granting or denyinq 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 totallv devoid of any showinq 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 challenqed 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

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT NO REASONABLE PERSON WOULD TAKE THE VIEW ADOPTED BY THE TRIAL COURT ORDERING PRODUCTION OF PROPERTY RECORDS AND TAXPAYER RECORDS WHERE SUCH RECORDS ARE SPECIFICALLY DESIGNATED AS SUBJECT TO PRODUCTION UNDER THE FLORIDA PROPERTY ASSESSMENT ADMINISTRATION AND FINANCE LAW AND THE CORRESPONDING DEPARTMENT OF REVENUE REGULATION.

A. 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.

The District Court cited with approval Jacobs v. Jacobs, 50 So.2d 169 (Fla. 1951), for the proposition that where there is no disputed issue to which requested documents are germane, there is "no need for discovery." Application of the former Equity Rules in Jacobs limited Production of documents to matters related. to "the issues made by the pleadings". 50 So.2d at 173.

Florida Rule of Civil Procedure 1.350(a), however, Prescribes a broader range for discovery of documents, namely, those "within the scone of Rule 1.280(b)", i.e., documents "relevant to the subject matter of the nending action." Both federal and state courts have recognized the wider latitude of discovery provided by the rules of civil procedure. The point was well put in a case decided shortly after the Federal Rules of Civil Procedure were first adopted:

> To limit an examination to matters relevant to only the precise issues Presented by the pleadings, would not only he contrary to the express purposes of rule 26 1/ * * *, but also miqht result in a complete failure to afford plaintiff an adeauate opnortunity to obtain information that would be useful at the trial.

Stevenson v. Melady, 1 F.F.D. 329, 330 (D.C.N.Y. 1940).

This Court has likewise expressly noted the greater liberality of the modern rules of pretrial discovery as contrasted with the precursor Equity Rules:

> We think the case of Jacobs v. Jacobs, Fla. 1951, 50 So.2d 169, is distinquishable on its facts and also because it applied old Equity Rules 48 and 49, while the instant case involved the more liberal existing rule of civil procedure. Rule 1.280(b), F.R.C.P. In any event, we think the pronouncements in Parker v. Parker, supra, are more likely to nroduce a better result and decrees based on facts found in the record than the procedure followed in the Jacobs case.

Orlowitz v. Orlowitz, 199 So.2d 97, 98-99 (Fla. 1967).

Indeed, the "Scope of Discovery" provision expressly states: "It is not qround for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fla.R.Civ.P. 1.280(b)(1).

Finally, the United States Supreme Court has also spoken on the meaninq of relevancy in the discovery context. Writing for a unanimous Court, Justice Powell said:

1/ Fla.R.Civ.P. 1.280 is derived from Fed.R.Civ.P. 26. See Committee Note, 1972 amendment to Fla.R.Civ.P. 1.280.

> The key phrase in this definition - "relevant to the subject matter involved in the pending action" - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. See Hickman v. Taylor, 329 U.S. 495, 501, 67 S.Ct. 385, 388-389, 91 L.Ed. 451 (1947). Consistent with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Id. at 500-501, 67 S.Ct. at 388. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389 57 L.Ed. 253 (1978).

Adverting to the Jacobs rule, the district court erroneously restricted the scope of discovery, fettering the Property Appraiser in his attempts to use procedural rights to which all civil litigants are entitled. Fla.R.Civ.P. 1.010. The District Court applied an erroneous rule of law in determining the issue before it and effectively obliterated the Property Appraiser's rights to discover an entire spectrum of documents and records. By applying an erroneous rule of law in this case, see Orlowitz, the District Court committed reversible error. Holland v. Gross, 89 So.2d 255 (Fla. 1956).

B. 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.

In this proceeding, the taxpayers sought review of a trial court order granting the Property Appraiser's motion to compel discovery of a variety of property records and

taxpayer records. App. E. The documents sought form the core of the taxing authorities' discovery requests from the taxpayer. The records were ordered produced subject to the following protections provided by the trial court sua sponte, since the taxpayers failed to move for a protective order:

(1) that the records be treated with confidentiality by the Proprty Appraiser;

(2) that the taxpayer retained the right to object to the admission of the documents at trial; and

(3) that the taxpayer retained the right to request that the Court file be sealed. App. E, ¶1.

Under Fla.R.Civ.P. 1.350(a), a narty may request another party to produce documents that constitute or contain matters within the scope of Rule 1.280(b). Rule 1.280(b)(1) defines the scope of discovery as "any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the narty seeking discovery or the claim or defense of any other party... ." Accord, Charles Sales Corn. v. Rovenger, 88 So.2d 551, 553 (Fla. 1956).

Trial courts are accorded broad discretion in discovery matters and an order of a trial court granting or denying discovery should be affirmed, except where such an abuse of discretion has been shown as to depart from the essential requirements of law. Orlowitz v. Orlowitz, 199 So.2d 97, 98 (Fla. 1967); Lorei v. Smith, 464 So.2d 1330, 1333 (Fla.

2d DCA 1985) (citing Orlowitz). A trial judge's discretion is abused only where no reasonable person would take the view adopted by the trial court. Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). ~~See also~~ the seminal discussion of the discretionary power of the trial court in Castlewood International Corp. v. La Fleur, 322 So.2d 520, 522-23 (Fla. 1975) (Overton, J., concurring).

Before the decision of the District Court ~~sub~~ judice, an unbroken line of cases had held income data not merely discoverable but admissible at trial in tax valuation cases. Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972) (see especially Justice Ervin's statement that income information was a statutorily-required component of the taxpayer's proofs at trial, dissent, 261 So.2d at 826); Bystrom v. Hotelerama Associates, Ltd., 431 So.2d 176 (Fla. 3d DCA), rev. denied, 441 So.2d 631 (Fla. 1983); Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3d DCA 1982), rev. denied, 429 So.2d 5 (Fla. 1983).

Similarly, Florida courts had consistently 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. Homer v. Connecticut General Life Insurance Co., 213 So.2d 490, 492 (Fla. 3d DCA 1968). ~~See also~~ Equitable, 416 So.2d at 1138. In keeping with the broad scope of pretrial

discovery, trial courts have consistently been reversed for failing to provide adequate post-assessment access to federal income tax returns ad other taxpayer records. County of Volusia v. Union Camp Corp., 302 So.2d 160 (Fla. 1st DCA 1974); Greenwood v. Firstamerica Development Corporation, 265 So.2d 89 (Fla. 1st DCA 1972).

Faced with the unequivocal rule of law directly controlling the issue before the District Court, the taxpayer in this case justifiably conceded the relevance and admissibility of the document production sought by the Dade County Property Appraiser and compelled by the trial court:

> 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.
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> * * *
>
> [T]he 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.

Taxpayers' Reply to Response to Petition for Writ of Certiorari at 3-4.

Having conceded the relevance and admissibility of the documents sought, the taxpayers argued that they were immunized or exempted from any post-assessment production of records by S195.027(3), Florida Statutes, and Department of Revenue Regulation 12D-1.05 implementing that statute.

The District Court adopted the taxpayer's contention that §195.027(3) and Rule 12D-1.05 authorize only pre-assessment production of records, **464** So.2d at **184,** overlooking the plain language of the statute and regulation authorizing access to taxpayer records by the Department of Revenue and the Auditor General, both of which are statutorily mandated to conduct post-assessment proceedings.[2]

Pursuant to Fla.R.Civ.P. 1.350, the Dade County Property Appraiser requested production of the very documents listed in the access to taxpayer financial records regulation of the Department of Revenue, Rule 12D-1.05, Florida Administrative Code. App. C. 1-3. By bottoming his request for production on Rule 12D-1.05, the Property Appraiser thoroughly negates taxpayers' relevancy objections since the Third District has ruled that inclusion of specific items in the Department of Revenue's access to financial records regulation assumes the relevancy of such data. Equitable, **416** So.2d at 1139.[3]

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[2]This point is fully developed in the initial Brief of Amicus Curiae, C. Ray Daniel, as Property Appraiser of Hillsborough County, and the Property Appraisers Association of Florida, at 17-31.

[3]Ironically, the Third District reversed Judge Jack M. Turner for excluding income data evidence at trial, Equitable, **416** So.2d at 1138-40, and has now reversed Judge Turner for permitting discovery of the very same income-related data! **464** So.2d at 183-85.

The Property Appraisal Adjustment Board ordered a substantial assessment reduction based on "expenses" and "rentals", App. D. ¶6B, although no evidence of any such expenses or rentals was submitted by the taxpayers. A. 27-46, 38-40. It is well established that

> an administrative body, no matter how broad its discretion, must show, when its orders are properly challenged in the courts, that its conclusions are based upon record evidence and do not rest solely upon confidential information of which the applicant is not apprised and as to which the administrative body gives such credence as to permit it to override a complete denial of derogatory implications by an applicant when he is questioned.

Coleman v. Watts, 81 So.2d 650, 652-53 (Fla. 1955).

In this ~~de novo~~ proceeding, the Property Appraiser is challenging the Property Appraisal Adjustment Board-ordered reduction. Annual operating revenue and losses are highly relevant in the review of any assessment of income-producing property. §193.011(7), Florida Statutes. Income data is relevant both as substantive and rebuttal evidence. Exclusion of income and expense data at trial is reversible error. Equitable, 416 So.2d at 1139-40.

The taxpayers urge upon this Court adoption of the view that only the correctness of the Property Appraiser's capitalization rate is at issue. Br. 24. This position wholly misconceives the burden of a taxpayer challenging a property assessment.

A taxpayer can obtain judicial review by proving that the property appraiser failed to comply with some requirement of law or that he is guilty of some wrongdoing other than an erroneous but good faith exercise of his lawful discretion. By proving entitlement to judicial review in an overassessment action, the taxpayer does not necessarily prove that it is entitled to judicial relief. The mere fact that the property appraiser may have erred in some particular (such as selection of a rate of income capitalization) does not prove that the assessment exceeds fair market value. The error may be harmless. The property appraiser may be right for the wrong reasons. City National Bank of Miami v. Blake, 257 So.2d 264 (Fla. 3d DCA 1972).[4]

The mere fact that the taxpayers sub judice may be able to find some technical flaw in their property assessment does not establish their right to relief. Where, as in Dade County, the Property Appraiser assesses more than 500,000 parcels of realty annually, it is conceivable that if a taxpayer searches long enough and hard enough he may find some error in the tax roll. No act of omission or commission on the part of any property appraiser, however, shall operate to defeat the payment of

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[4] This discussion of the taxpayer's burden of proof and prima facie case is taken from William M. Barr's authoritative entry on "The Overassessment Action" in Florida State and Local Taxes, Vol. 11, Chapter 8.

taxes. S197.056 (1), Florida Statutes (1981) [renumbered 197.0151 (1), Florida Statutes (1983)].

To demonstrate entitlement to relief, the taxpayer must plead and prove that his property assessment exceeds 100% of fair market value. Deltona Corp. v. Bailey, 336 So.2d 1163, 1167 (Fla. 1976); Dade County v. Salter, 194 So.2d 587 (Fla. 1966). Of this, the polestar of overassessment actions, the taxpayers and the district court sub judice seem to have lost sight. If the taxpayers prove that the Property Appraiser is guilty of some legal error or wrongdoing, without proving that the error or wrongdoing resulted in an assessment in excess of 100% of fair market value, the taxpayers fail to prove a prima facie case of overassessment. The District Court herein is not the first court to fall into error by taking its eye off the polestar. See Palm Corp. v. Homer, 261 So.2d 822, 826 (Fla. 1972)(Ervin, J., dissenting).

To sustain their burden of proof, the taxpayers in the case at bar must present proof which excludes every reasonable hypothesis of a legal assessment. Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984); Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1969); Powell v. Kelly, 223 So.2d 305 (Fla. 1969). The hypotheses referred to are generally the three basic methods of property valuation, i.e., (1) cost, (2) market and (3) income approaches. Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County, 219 So.2d 101 (Fla. 3d

DCA, cert. denied, 225 So.2d 911 (Fla. 1969); McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967). Data related to all these hypotheses is a fortiori discoverable in any overassessment action.

In light of the foregoing, Florida courts have consistently authorized the property appraiser post-assessment discovery of a broad range of documents. In Homer v. Connecticut General Life Insurance Co., 213 So.2d 490 (Fla. 3d DCA 1968), the Third District reviewed an interlocutory order denying access to the selfsame mortgage, insurance and income and expense data sought in this case. There the court stated:

> 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.

Id. at 492. Accord, Equitable, 416 So.2d at 1138; Whitman v. Overstreet, 230 So.2d 46 (Fla. 3d DCA 1969). Thus, the taxing authorities are entitled to explore fully any matter "proving or tending to prove the fair market value of the property."

Similarly, in Hecht v. Tax Assessor, 32 Fla.Supp. 114 (Fla. 11th Cir.Ct. 1969), aff'd sub nom. Hecht v. Dade County, 234 So.2d 709 (Fla. 3d DCA 1970), the trial court rejected the taxpayers' argument that the tax assessor could not call an outside appraisal expert to testify at trial because the assessor was bound by his own valuation opinions in his answers to interrogatories. Sub judice, the District Court has misconceived the de novo character

of the trial court proceeding in limiting the Property Appraiser's discovery rights.

Consistent with property assessment cases subjecting taxpayer records to discovery are the federal and Florida cases declaring that copies of income tax returns in the hands of a taxpayer "are held subject to discovery." St. Regis Paper Company v. United States, 368 U.S. 208, 219, 82 S.Ct. 289, 7 L.Ed.2d 240, 249 (1961); Central Plaza Bank and Trust Company v. Lander, 320 So.2d 399 (Fla. 2d DCA 1975); Lely Estates, Inc. v. Polly, 308 So.2d 165 (Fla. 2d DCA 1975); Fryd Construction Corp. v. Freeman, 191 So.2d 487 (Fla. 3d DCA 1966).

State taxing officials are expressly authorized by Congress to obtain federal income tax returns and other confidential taxpayer records to assist in the administration of state tax laws. 26 U.S.C. §6103. Moreover, even where (unlike here) a privilege is implicated, a party waives its right to claim such privilege where the party's claims place in issue matters which are ordinarily privileged. Savino v. Luciano, 92 So.2d 817, 819 (Fla. 1957).

The taxpayers have placed the income and expenses of the Bal Harbour Shops squarely in issue by obtaining an assessment reduction from the Property Appraisal Adjustment Board explicitly based on "rentals" and "expenses". App. D ¶6B. It would be unjust and inequitable to prevent the taxing authorities from

obtaining the evidence necessary to disprove the taxpayers' claim that the subject property was assessed in excess of fair market value. As this Court has said:

> One cannot come into a court of equity seeking relief and then refuse to answer questions pertaining to the matter about which relief is sought. Equity in other words is not a place to conceal but one for full disclosure as to the matter in litigation. If a litigant refuses to answer, he forfeits his right to ask for relief in equity.

Hagerty v. Southern Bell Telephone & Telegraph Co., 199 So. 570, 572 (Fla. 1940).

In addition, such disclosure would not contravene the public policy favoring confidentiality of tax returns. The trial judge expressly ordered the compelled records to be treated with confidentiality by the Property Appraiser. App. E. ¶1. Similarly, the traditional concern with the privacy of tax returns, Fryd Construction Corp. v. Freeman, 191 So.2d 487 (Fla. 3d DCA 1966), is not present here, since taxpayer financial records are by general law confidential in the hands of the taxing authorities. Sections 192.105, 193.074, 195.027(3), 195.084(1), Florida Statutes.

Discovery issues are to be decided in light of the purposes intended to be achieved by the rules of civil procedure. As the court said in King v. Califano, 183 So.2d 719, 723 (Fla. 1st DCA 1966):

> To attain...a just determination and to ascertain the truth in controversies is the ultimate and noble objective of our court system. Our procedural rules are designed as

> a vehicle to aid the court, the [finder of fact], and the litigants to reach that objective as nearly as humanly possible. It is thus contrary to the intent and spirit of those rules to allow one party to use them to take an unfair advantage of the other party, such as in presenting a half-truth and then objecting to the other party's effort to present the whole truth from the same evidentiary source.

Accord, Kaminsky v. Travelers Indemnity Co., 474 So.2d 287, 288 (Fla. 3d DCA 1985). This latter description fits the situation in the case at bar, wherein the taxpayers have obtained a 10% reduction in the 1981 assessment of the luxury Bal Harbour Shops mall on the purported basis of low income and high expenses, and now assert that all they desire the trial court to consider is the capitalization rate, which constitutes merely a single component of the income capitalization valuation formula.

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 submits 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 Reply Brief on the Merits of Petitioner, Department of Revenue, State of Florida, has been furnished by mail to DANIEL A. WEISS, Assistant County Attorney, Suite 2810, Metro-Dade Center, 111 N.W. 1st Street, Miami, Florida 33128-1993; to STUART L. SIMON, ESQUIRE, 2401 Douglas Road, Miami, Florida. 33134; and to LARRY LEVY, ESQUIRE, P.O. Box 82, Tallahassee, Florida 32302, this 10th day of December, 1985.

Respectfully submitted,

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