047

1-29

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE

Petitioner

v.

ORANGE COUNTY, FLORIDA, a political subdivision of the State of Florida, BATTAGLIA FRUIT CO., INC., and BATTAGLIA PROPERTIES, LTD.

Respondents

CASE NO. 80,685
5TH DCA NO. 92-102

APPEAL FROM
THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS

Scott E. Wilt, Esq.
MAGUIRE, VOORHIS & WELLS, P.A.
2 So. Orange Ave.
P.O. Box 633
Orlando, Fl. 32801
Fla. Bar # 220150
(407) 843-4421

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

This case involves conveyances occurring and deeds delivered under threat of condemnation and in lieu of eminent domain proceedings. The issues to be decided arise from the application of § 201.01, Fla. Stat., as amended by Sec. 6, Ch. 87-102, Laws of Florida (effective June 30, 1987), which amendment added the following language:

> "...Unless exempt under S. 201.24, or under any state or federal law, if the United States, the state, or any political subdivision of the state is a party to a document taxable under this chapter, any tax specified in this chapter shall be paid by a non-exempt party to the document..." R-129.

This language will be referred to as "the 1987 Amendment".

"Petitioner" refers to the Florida Department of Revenue. "Orange County" refers to Respondent Orange County, Florida, a political subdivision of the State of Florida. "Battaglia" refers to Respondents Battaglia Properties, Ltd., and Battaglia Fruit Co., Inc.

Respondents have filed an Appendix with this Answer Brief. References to the Appendix are made by the reference "Respondents' Appendix [item letter]".

STATEMENT OF THE CASE

Respondents agree with Petitioner's Statement of the Case with the following exceptions:

1. Petitioner states on p. 5, Initial Brief, that a payment made to Petitioner "was paid out of funds deposited by Battaglia". Orange County, in fact, provided the funds deposited in the court registry and the cash bond referred to in the Circuit Court's ruling. The Circuit Court did not make any finding about the source of those funds. The source of the funds has not been an issue in this case. It appears that Petitioner appears to wishes to make it an issue by asserting in footnote 9 of the Initial Brief that Battaglia provided the funds paid to Petitioner out of the court registry deposit. Orange County supplied those funds and, to the extent compliance with the Circuit Court's order constitutes payment, Orange County has paid the documentary stamp tax.

2. Petitioner states that it has received "full payment of the judgment entered against Battaglia", p. 5, Initial Brief. Petitioner seems to imply some legal significance or relevance of this fact to this case. The payment occurred because the Circuit Court ordered the payment. Further, Respondents were faced with the prospect of interest continuing to accrue on the amount which Petitioner asserted to be due, thereby increasing Respondents exposure if they wished to appeal the Circuit Court decision, which they did want to do. If Respondents prevail in this Court as they did in the 5th DCA, Respondents will seek a refund from Petitioner of the documentary stamp tax and interest paid.

3. Petitioner states that the 5th DCA ruled that the Legislature lacked the power to waive Orange County's immunity from tax. The opinion does not contain any express ruling to this effect. If such a ruling is implicit in the 5th DCA opinion, that ruling is correct. See pp. , infra.

STATEMENT OF FACTS

Respondents agree with Petitioner's Statement of the Facts, with one exception. In Paragraph 12, Petitioner states that Orange County "was exempt from payment of the documentary stamp tax". Orange County is **immune** from the tax. Freedom from documentary stamp taxation in the instant case is based on **immunity**, not exemption, as the 5th DCA correctly concluded.

SUMMARY OF ARGUMENT

POINT I

WHEN A PROPERTY OWNER CONVEYS PROPERTY TO A COUNTY UNDER THREAT OF CONDEMNATION AND IN LIEU OF EMINENT DOMAIN PROCEEDINGS AND THE COUNTY IS CONTRACTUALLY BOUND TO PAY ANY DOCUMENTARY STAMP TAX ASSESSED BY THE DEPARTMENT OF REVENUE ON THE TRANSACTION, THE TRANSACTION IS IMMUNE FROM SUCH TAXATION.

The application of §201.01, Fla. Stat., under the facts of this case results in indirect taxation upon Orange County. Orange County is immune from taxation. The application of §201.01, Fla. Stat., as amended by the 1987 Amendment, is unconstitutional.

Nothing in Ch. 201.01, Fla. Stat., nor in the 1987 Amendment, purports to waive Orange County's immunity from taxation. Orange County did not intend to and did nothing to waive its immunity from taxation.

POINT II

WHEN A PROPERTY OWNER CONVEYS PROPERTY TO A COUNTY UNDER THREAT OF CONDEMNATION AND IN LIEU OF EMINENT DOMAIN PROCEEDINGS, THE TRANSACTION IS IMMUNE FROM DOCUMENTARY STAMP TAXATION.

A deed delivered under threat of condemnation and in lieu of eminent domain proceedings is not "...a document taxable under [Ch. 201.01, Fla. Stat.]". Freedom from documentary stamp tax would apply only to such a deed. There would not be any blanket transactional tax immunity based on the mere fact that Orange County was a party to the deeds.

Deeds executed and delivered under threat of condemnation should not be taxable under §201.01, Fla. Stat., because payment of

the tax would be imposed on the party as to whom the transaction is involuntary.

Taxation of a deed delivered under threat of condemnation would deprive the grantor of that deed the right to just compensation under the Florida Constitution.

Taxation of such a deed would transfer county ad valorem tax revenue to the state and indirectly violate a Florida constitutional prohibition against ad valorem taxation by the state.

ARGUMENT

POINT I

WHEN A PROPERTY OWNER CONVEYS PROPERTY TO A COUNTY UNDER THREAT OF CONDEMNATION AND IN LIEU OF EMINENT DOMAIN PROCEEDINGS AND THE COUNTY IS CONTRACTUALLY BOUND TO PAY ANY DOCUMENTARY STAMP TAX ASSESSED BY THE DEPARTMENT OF REVENUE ON THE TRANSACTION, THE TRANSACTION IS IMMUNE FROM SUCH TAXATION.

The Fifth District Court of Appeal ("DCA") correctly concluded that § 201.01, Fla. Stat., as applied to the facts of this case, would improperly impose documentary stamp tax on Orange County. Orange County, as a political subdivision of the State of Florida, enjoys the same immunity from taxation as the State itself. This case involves immunity from tax, in contrast to exemption from tax.

Orange County is immune because it is part of the state itself, i.e. it is a political subdivision of the state. The 1987 Amendment acknowledges such status and immunity with the language "any political subdivision of the state". The immunity of Florida counties has been long recognized and undisputed. The cases cited by the 5th DCA are controlling authority on this point. Park-N-Shop v. Sparkman, 99 So. 2d 571 (Fla. 1959); Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975) ("The State's immunity from taxation is so well established that little elaboration is needed here").

Petitioner recognizes that Orange County is immune. Fla. Admin. Code Rule 12B-4.103 states that counties are immune, so immune that under this rule, Petitioner would not recognize payment of the documentary stamp tax by Orange County ("The affixing of stamp tax to an instrument by the state, county, municipality or a

political subdivision thereof does not constitute payment of the tax..."). Petitioner's waiver argument in its Initial Brief can not be reconciled with this rule. On the one hand, Petitioner argues that Orange County waived its immunity and must pay, but Petitioner's rule would not allow Petitioner to recognize payment by the county. Petitioner appears to have gone too far in this rule and identified municipalities as tax immune. Municipalities are not immune; the legislature may grant exemption for municipalities. City of Orlando v. Hausman, 534 So. 2d 1183 (Fla. 5th DCA 1988).

The Fifth DCA correctly applied Lewis v. Florida Bar, 372 So. 2d 1121 (Fla. 1979) as controlling authority. The fact pattern in Lewis and the instant case are substantively the same. In Lewis, The Florida Bar borrowed money from Barnett Bank to build the Florida Bar headquarters. As part of the loan agreement, The Florida Bar agreed to pay all taxes which might be due. No documentary stamp tax was paid at the closing of the loan. FDOR assessed Barnett Bank, the "private" party, for the documentary stamp tax plus interest and penalty. Barnett Bank, in turn, made demand on The Florida Bar's contractual obligation to pay all taxes. The Florida Bar paid FDOR's assessment under protest. The Florida Bar sought a refund. FDOR denied the refund. Litigation ensued.

This Court decided Lewis on the basis of (1) the immunity from taxation of the Florida Bar and (2) the ultimate liability of the Florida Bar to pay documentary stamp tax because of an obligation to do so established by written agreement.

Petitioner tried to distinguish Lewis on three grounds. One was that Lewis was decided prior to the 1987 Amendment. Petitioner argues that the 1987 Amendment legislatively overruled Lewis. The Legislature did not state, in the 1987 Amendment nor in the legislative history of the 1987 Amendment, that it intended to legislatively overrule Lewis. The February staff report, Respondents' Appendix A, shows that the Legislature intended to legislatively overrule State ex rel Green, 173 So. 2d 129 (Fla. 1955). Green is the only case mentioned in any of the legislative history. By referring to the February staff report, we can avoid the conjecture continaed in Petitioner's footnote 37 about which cases the staff might have been referring to.

In targeting Green, the Legislature apparently intended to eliminate the type of "blanket" transactional tax immunity which Petitioner says Green produced. "Blanket" immunity means that a document would not be subject to documentary stamp tax if one of the parties to the document was immune from taxation. The 1987 Amendment identified the immune entities to be "the United States, the state **or any political subdivision of the state**".

As noted in Maas Brothers, Inc. v. Dickinson, 195 So. 2d 193, 197 (Fla. 1967): "[T]he judicial pronouncements of this Court...were before the legislature and if it had been intended to bring instruments of the nature we are concerned with here under the law, the legislature had every opportunity to do so, but did not". If the Legislature had intended to legislatively overrule Lewis, it could have done so. But, Appellants submit that the Legislature did not do so with the 1987 Amendment.

The instant case does not involve transactional tax immunity of the breadth that Petitioner describes in its argument. Respondents have sought to establish that deeds delivered under threat of condemnation are immune, and particularly so when the payment of the tax liability would fall upon a tax immune entity like Orange County.

Lewis did not create a "blanket" type of immunity. Lewis only holds that if the application of Ch. 201, Fla. Stat., results in the indirect imposition of documentary stamp tax on a tax immune entity, the application of Ch. 201 is unconstitutional. Nowhere in the Lewis opinion is there even a suggestion that the decision was reached because one party to the document was tax immune. If this had been the ruling, the opinion would have been much shorter.

Lewis, Arvida Corporation v Florida Dept. of Revenue, Case No. 74-1341-CA-01 (12th Circuit), affirmed per curiam 378 So. 2d 355 (Fla. 2d DCA 1980), cert. denied 383 So. 2d 1192 (Fla. 1980), and Dept. of Revenue v. Florida Municipal Power Agency, 473 So. 2d 1348 (Fla. 1st DCA 1985), did not create any "blanket" type of immunity from documentary stamp tax. Those opinions have a much narrower scope, dealing as they do with indirect taxation of a tax immune entity and conveyances made and documents delivered under threat of condemnation. Cohen-Ager, Inc. v. Department of Revenue, 504 So. 2d 1332 (Fla. 1st DCA 1987) demonstrates that, contrary to Petitioner's statements, no "blanket" immunity had been recognized for documents to which a county was a party. In Cohen-Ager, the 3rd DCA held that the non-immune party to a deed to Dade County had to pay the documentary stamp tax on the deed. Cohen-Ager did not

involve a conveyance under threat of condemnation and in lieu of eminent domain proceedings.

Another distinction Petitioner claims for Lewis is that the documentary stamp tax was involuntarily imposed upon the Florida Bar, but that Orange County voluntarily agreed to pay the documentary stamp tax in the instant case.

It is ironic that Petitioner tries to distinguish Lewis on this basis because it has been Respondents contention all along that the involuntary nature of a conveyance under threat of condemnation and in lieu of eminent domain produces non-taxability of deeds delivered under such circumstances. If this Court were to conclude that the basis for Lewis was the involuntary imposition of the documentary stamp tax, then this Court should also conclude, as Respondents argue under Point II, infra, that a deed delivered under threat of condemnation and in lieu of eminent domain proceedings is not "...a document taxable under this chapter [201, Fla. Stat.]", quoting from the 1987 Amendment, and is therefore not subject to documentary stamp taxation.

Petitioner says that Battaglia entered into an arms length transaction with Orange County. That is not true. The transaction between Respondents was brought about because of the sovereign authority of Orange County to take or condemn Battaglia's property. This is far different than the facts in Lewis which show that the Florida Bar and Barnett voluntarily entered into a loan agreement. Because the nature of the transaction between Respondents was involuntary as to the private party upon whom Petitioner would visit liability for documentary stamp tax, interest and penalty,

Petitioner's arguments based upon the Florida Bar/Florida Realtor ("FAR/BAR") form contract for residential real estate sales are not germane. Petitioner's suppositions about the standard Florida Bar real estate contract are irrelevant and not supported in any way by the record. The FAR/BAR contract contemplates a voluntary transaction, i.e. a willing seller. The transactions in the instant case were not voluntary on Battaglia's part. Orange County and Battaglia did not use the Florida Bar contract.

Petitioner exaggerates the facts in Lewis and misconstrues the opinion when asserting that Lewis was determined as it was because the Florida Bar was involuntarily forced by Barnett Bank to pay the documentary stamp tax. Petitioner says that the Florida Bar's agreement to pay the documentary stamp tax in Lewis was part of a "contract of adhesion". An adhesion contract has been characterized as being unilateral in nature, forced upon an unknowing and unwilling party for services which can not be readily obtained elsewhere. Jones v. Dressel, 623 P. 2d 370, 374 (Colo. 1981). A contract was found not to be an adhesion contract where it was not shown that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation, that the services could not have been obtained elsewhere and that the offended party was uneducated, inexperienced or uninformed. Clinic Masters, Inc., v. District Court in and for El Paso County, 556 P. 2d 473, 475 (Colo. 1976).

The Lewis opinion does not reflect facts which support Petitioner's suppositions and speculation about the nature of the transaction in that case. The Lewis opinion does not contain even

a hint that the basis for the decision was that the Florida Bar had been victimized by an adhesion contract. If this had been the rationale, then the remedy should have been to strike the offending part of the contract. This was not the relief granted in Lewis, indicating that the Lewis decision had nothing to do with adhesion terms or the involuntary indirect imposition of the tax upon the tax immune Florida Bar.

Petitioner argues that but for the "contract of adhesion", this Court would have concluded that the Florida Bar waived its immunity from taxation when the Florida Bar agreed as part of the loan transaction to pay all taxes. There is no basis whatsoever in Lewis to support Petitioner's argument. The law pertaining to waiver, infra, pp. 13-17, does not support Petitioner's inference that the Florida Bar could have waived its immunity from tax.

The last distinction which Petitioner attempts is that Lewis involved separation of powers, as a contrast to immunity. In Lewis, this Court ruled that loan document could not be taxed under the circumstances of that case because the Florida Bar was immune from taxation. This Court found that the Florida Bar was immune because it is a part of the judicial branch of government. It was the immunity which made the Florida Bar non-taxable. The source of the immunity was not material to the decision. Petitioner confuses the source of the immunity with the reason for non-taxability. The 5th DCA correctly rejected Petitioner's separation of powers argument.

Petitioner raises the argument of waiver in two aspects, (1) that the 1987 Amendment waived Orange County's immunity from

documentary stamp taxation and (2) that Orange County waived its immunity from taxation.

The argument that the Legislature intended to waive tax immunity by adopting the 1987 Amendment is patently contrary to legislative intent expressed in the 1987 Amendment and to the description of that intent given by Petitioner in this case. In the 1987 Amendment, the Legislature stated: "[Any] tax specified in this chapter [201, Fla. Stat.] shall be paid by a non-exempt party to the document". The Legislature clearly intended that tax immune entities not be taxed. Further, a waiver should not be recognized which would transgress public policy. Fla. Jur. 2d, Estoppel and Waiver, §87, p. 544. The tax immunity of the state and counties in Florida has been a longstanding matter of public policy and of the organic law of this state. See Park-N-Shop v. Sparkman, supra; Dickinson v. City of Tallahassee, 325 So. 2d 1, 4 (Fla. 1975) ("There are compelling policy reasons for the doctrine [of tax immunity]..."). This argument of waiver by the Legislature should be rejected outright as completely contrary to and irreconcilable with the 1987 Amendment, with public policy and with Petitioner's other arguments.

Petitioner claims that State v. Alford, 107 So. 2d 27 (Fla. 1958) and Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975) support Petitioner's argument that the Legislature could waive Orange County's tax immunity. Initial Brief, pp. 37 - 40. Neither decision supports such a claim.

This Court in Alford ruled that the "exemption" of state owned lands from taxation is "not dependent upon statutory or

constitutional provisions but rests upon broad grounds of fundamentals in government". The distinction drawn by this Court indicates that the "broad grounds of fundamentals in government" are a source of "exemption" **superior** to "statutory or constitutional provisions". That this is the Court's conclusion is apparent because this Court refers to the latter source of "exemption" as being more limited in scope than an "exemption" based upon "broad grounds of fundamentals in government". The quoted language used by this Court reflects that the "exemption" of the state owned lands would exist whether or not it had been included in a statute.

This is precisely the 5th DCA's and Respondents' position. The focus of the instant action is not upon the language of the 1987 Amendment "[u]nless exempt". The focus of this case is upon **tax immunity**, not upon tax exemption. The former is part of the organic law of the state and its constitution and is not dependent upon any grace or favor of the Legislature. In discussing Alford, Respondents used quotations around "exemption" because this Court in Alford was obviously dealing with immunity, although it used the term "exemption". This possible confusion must be avoided in order to correctly understand the merits of the instant case, as the 5th DCA did.

In Alford, this Court also declared invalid a statute which professed to authorize taxation of state owned lands, title to which was held by the Game and Fresh Water Fish Commission. The language quoted by Petitioner to the effect that the Legislature

could allow state land to be taxed was mere dicta because this Court ruled that the act under review did not do so.

In Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975), this Court ruled that the state had not waived its immunity from taxation. The City of Tallahassee sought to levy and collect a non-ad valorem tax on all utilities purchased by the State and its agencies from the city. The city argued that constitutional provision for cities to levy taxes implied a waiver of immunity. The state argued that it was immune from taxation and that **any waiver of that immunity must be expressly stated in the Constitution or statute.** This Court held that the state was immune from the city's utility tax, and ruled that there had not been an express waiver of that immunity. Dickinson defeats Petitioner's claim that the 1987 Amendment had the effect of waiving the immunity of Orange County, as a political subdivision of the state, from documentary stamp tax.

There is absolutely nothing in the record of our case which supports Petitioner's claim that Orange County waived its immunity. There is no evidence that Orange County intended to waive its immunity. Waiver is the intentional or voluntary relinquishment of a known right. Fla. Jur. 2d, Estoppel and Waiver, §86, p. 540; §89, p. 547. The record in the instant case shows that at the time of the written agreements between the Respondents and of the delivery and recording of deeds from Battaglia to Orange County, Orange County, as well as Battaglia, concluded that no documentary stamp tax was payable upon said deeds. This conclusion was consistent with Petitioner's administrative rules, Fla. Admin. Code

Rule 12B-4.014(15)(b), in force at the time of the written agreements between the Respondents and of the delivery and recording of deeds from Battaglia to Orange County. Orange County could not have waived its immunity from taxation under the circumstances contained in the record of this case which clearly show that Orange County proceeded in accordance with and consistent with its immunity from taxation, i.e. no documentary stamp tax was affixed to the deeds. Perhaps if Orange County had affixed documentary stamp tax to the deeds when the deeds were recorded, Petitioner's waiver argument would carry some weight, but those are not the facts of this case. The record in the instant action does not contain any evidence supporting the assertion or the conclusion that Orange County waived it tax immunity.

Much of Petitioner's argument appears based upon Petitioner's unsupported claim that the tax base of the state has been eroded by Green, Lewis, and other decisions. Such an argument was rejected in Alford, when this Court was asked to consider that the non-taxability of the lands in Charlotte County held by the Game and Fresh Water Fish Commission placed an undue burden upon the remaining taxpayers in Charlotte County. Alford, supra, at p. 30. This Court should again reject such an argument which attempts to justify imposing documentary stamp tax upon Orange County due to alleged erosion of the documentary stamp tax base. Even if that were true, Petitioner's motivation to raise as much tax revenue as possible can not be allowed to outweigh matters of constitutional import such as tax immunity of the counties of this state. Petitioner should be collecting taxes when and where proper, but

not otherwise. Taxes should not be imposed on a tax immune entity, be it the Florida Bar or Orange County.

Petitioner argues that the Fifth DCA ruled that there was "transactional tax immunity". Initial Brief, p. 12. The Fifth DCA did not make such a ruling. If the Fifth DCA had wished to decide the case on that basis, the opinion would simply have stated that Orange County was the grantee of the deeds, end of story. The Fifth DCA would not have needed to consider the immunity argument and the contractual liability issue, which it obviously made the crux of its opinion.

When one understands that this case involves tax **immunity**, not tax exemption, many of Petitioner's arguments become irrelevant. First, arguments pertaining to statutory construction of the language in the 1987 Amendment '[u]nless otherwise exempt ...under any **state** or federal **law**" are not relevant. Initial Brief, pp. 26. The issue is not whether non-taxability occurs because of exemption. Freedom from documentary stamp tax in our case is a function of immunity.

Second, the history of documentary stamp taxation, Initial Brief, pp. 16, et. seq., begs the question of whether Orange County's immunity controls the outcome of the instant case. Petitioner's presentation of this history is also based on a flawed premise, namely that the Lewis, Arvida and FMPA created "blanket" transactional immunity for documents to which the state or a political subdivision of the state was a party. That is not the case. See Cohen-Ager, supra. Petitioner expresses its displeasure

with Green and Lewis, but that is no reason for ignoring or overruling those decision.

Third, the taxability of capital gains under the Internal Revenue Code, Initial Brief, pp. 18-19, has no bearing on how Orange County's tax immunity affects the instant case. Referring to capital gains taxation points out the irony that the Internal Revenue Service is kinder to taxpayers than Petitioner would be. Taxpayers are permitted to defer payment of any capital gains realized when the property upon which the gain is realized has been sold involuntarily under threat of condemnation and in lieu of eminent domain proceedings. 26 USC §4384. Petitioner would not allow such deferral of documentary stamp tax. Capital gains tax is upon the gain realized. The incidence of the tax is the gain. The incidence of the capital gains tax is caused by or attributable to the person who has generated the gain, which would be the owner or taxpayer. If no gain, no tax. Documentary stamp tax is imposed upon the document or the paper upon which the document is written. The incidence of the tax is the execution and delivery of the document. The incidence of the documentary stamp tax is caused by the decision of the government, Orange County in this case, to acquire the private citizen's property involuntarily under threat of condemnation. The analogy to federal income taxation of cpaital gains does not fit our case.

Petitioner relies heavily on Dept. of Revenue v. A. Duda. & Sons, Inc., Case No. 91-2585, (Fla. 5th DCA, October 30, 1992) a decision by a different panel of the 5th DCA than that which decided the instant case. Duda is presently the subject of a

Motion for Rehearing. In Duda, the panel never addressed the issue of **immunity**. This alone is sufficient to distinguish Duda from our case. Further, there is no indication in the Duda opinion of certain significant facts. Petitioner makes representations about certain facts in Duda, such as the tax immune entities in that case not agreeing to pay or reimburse the documentary stamp tax, but such representations are not supported by the reported opinion. In our case, the documentary stamp tax liability would pass through to Orange County. If there was no similar circumstance in the Duda case, this too would be a critical distinction. The Duda panel relied heavily on an analogy between capital gains tax and documentary stamp tax. As shown, supra, that analogy is not material to our case.

Petitioner contends that the 1987 Amendment would have no meaning if the 5th DCA's decision stands. Initial Brief, p. 26. Given the narrow scope of the 5th DCA's decision, that could not be the case. The 1987 Amendment will avoid blanket transactional immunity. **Voluntary** conveyances to a county will be taxable. Documentary stamp tax will be assessable and collectible even if a county is a party to the document. See Cohen-Ager, supra. The 5th DCA ruled only that a deed given **under threat of condemnation and in lieu of eminent domain proceedings** is immune from taxation if the tax is indirectly imposed on a tax immune entity.

Petitioner argues that as a result of the 5th DCA's decision private parties will be able to avoid documentary stamp tax by contracting that liability to the county or the tax immune entity involved in the transaction. That would be an unjustified

extension of the 5th DCA's ruling. The 5th DCA's decision is limited to those conveyances made **under threat of condemnation.**

POINT II

WHEN A PROPERTY OWNER CONVEYS PROPERTY TO A COUNTY UNDER THREAT OF CONDEMNATION AND IN LIEU OF EMINENT DOMAIN PROCEEDINGS THE TRANSACTION IS IMMUNE FROM DOCUMENTARY STAMP TAXATION.

A deed delivered under threat of condemnation and in lieu of eminent domain proceedings is not "...a document taxable under [Ch. 201, Fla. Stat.]". That phrase should be construed strongly in favor of Respondents. Maas Brothers, Inc. v. Dickinson, 195 So. 2d 193, 198 (Fla. 1967) ("It is a fundamental rule of construction that tax laws are to be construed strongly in favor of the taxpayer and against the government").

The 5th DCA did not go far enough in its ruling. No documentary stamp tax can or should be imposed under the facts of the instant case because the document which Petitioner seeks to tax was delivered under threat of condemnation, in lieu of eminent domain proceedings and as a result of action taken by Orange County, a tax immune entity.

The non-taxability of a deed delivered under threat of condemnation and in lieu of eminent domain proceedings was recognized in Dept. of Revenue v. Florida Municipal Power Agency ["FMPA"], 473 So. 2d 1348 (Fla. 1st D.C.A. 1985), review denied 482 So. 2d 387 (Fla. 1986) and Arvida Corp. v. FDOR, Case No. 74-1341-CA-01, Respondents Appendix B (Twelfth Judicial Circuit Court in and for Sarasota County), affirmed Arvida Corp. v. FDOR, 378 So. 2d 355 (Fla. 2d DCA 1980), cert. denied 383 So. 2d 1192 (Fla. 1980).

FMPA and Arvida were based upon tax immunity. Arvida involved a conveyance by Arvida to Sarasota County under threat of

condemnation. The Arvida court considered FDOR's argument that Arvida, the non-exempt party, should pay the tax. The court concluded that would still constitute a tax on the deed which would be **prohibited by law** because of **Sarasota County's immunity** from taxation. There is no indication in the reported decision that there was any written agreement establishing Sarasota County's liability for the documentary stamp tax. By implication, the court in Arvida must have concluded that Sarasota County would have been liable to Arvida as a matter of law. Absent Sarasota County's liability, the court would have had no reason to analyze the county's immunity from taxation.

In FMPA, supra, FDOR sought to collect documentary stamp tax from Florida Power & Light ("FPL"). As a result of mandates from a federal agency, FPL had entered into a settlement with FMPA. FPL agreed to transfer to FMPA an interest in property. FMPA agreed to pay the documentary stamp tax. FMPA paid under protest. FMPA applied to FDOR for a refund. FDOR agreed that FMPA was not liable for documentary stamp tax. FDOR refunded FMPA's payment. FDOR then assessed FPL for the documentary stamp tax. Because of its contractual liability, FMPA filed suit against FDOR following FDOR's assessment against FPL.

The First DCA concluded that "[t]his situation is identical to that of condemnation" because of "...the transaction's forced nature, its raison d'etre..." Id. at pp. 1350-1. Having reached this conclusion, the court held that documentary stamp tax could not be imposed upon the conveyance because: "In a condemnation proceeding, the landowner is compensated for the value of the

property taken by the governmental entity. To impose a tax upon the conveyance would be an indirect tax on a tax immune body, the condemning governmental body". Id. at p. 1350. The 1st DCA applied Lewis as controlling authority. The court also referred to Fla. Admin. Code 12B-4.14(15)(b), in effect at that time, which rule recognized the non-taxability of a deed delivered under threat of condemnation. However, the opinion was based upon Lewis, which was decided before the rule referred to, and upon tax immunity principles. If the logic were otherwise, the court would need only to have cited to the rule. In FMPA, the tax immune entity, FMPA, had agreed in writing to pay any documentary stamp tax. The 1st DCA found that the contractual terms were not controlling in its decision and were not binding on Petitioner. For the 1st DCA, the decision that the deed in question could not be taxed was based on factors other than contractual liability. This supports Respondents argument that a deed delivered under threat of condemnation and in lieu of eminent domain proceedings is not taxable under Ch. 201, Fla. Stat., whether there is a written assumption by the tax immune grantee or not.

The logic of Justice Sundberg in his special concurrence in Lewis aids greatly in understanding and supporting the Respondents' contention that a deed delivered under threat of condemnation and in lieu of eminent domain proceedings is not a document taxable under Ch. 201, Fla. Stat. Sundberg reasoned that:

> If the taxable incidence arises from the act of an immune entity, then no tax may be collected. If the incidence arises from the act of an entity not immune, it makes no difference that the other party to the transaction may enjoy immunity - the tax may be collected. p. 1123.

In the instant action, the incidence of the documentary stamp tax on the deed arises from the act of Orange County declaring and acting to acquire private property through its eminent domain authority. The involuntary nature of the acquisition vis-a-vis the "private" party buttresses the conclusion that the incidence of the tax in this case arose from Orange County's act, not Battaglia's. In Lewis, Sundberg reasoned that since it was the Florida Bar's action which gave rise to the event which triggers possible taxation, it was the Florida Bar's immunity from tax which would control whether the documentary stamp tax would apply. Such reasoning applies without reference to the terms of a written agreement and without the need to resort judicial notice or suppositions.

In substance, a deed under threat of condemnation and in lieu of eminent domain is a substitute for and produces the same result as the final judgment in an eminent domain case. FDOR concedes that final judgments in eminent domain cases are not subject to documentary stamp tax. Fla. Admin. Code 12B-4.14(15). Petitioner explains that eminent domain judgments and decrees are not considered a taxable document or deed. Initial Brief, p. 25. However, there is no exemption "under §201.24 or under any state or federal law" for final judgments which transfer title to real property just as deeds do. Final judgments which transfer title to real property would appear to be included in "...writings whereby any lands, tenements, or other real property, or interests therein, shall be granted, assigned,transferred or otherwise conveyed to, or vested in the purchaser", §201.02, Fla. Stat.

A governmental entity exercising condemnation power can do so only if the end to be achieved serves a public purpose. The governmental entity must be exercising its governmental or sovereign authority in order for condemnation to be lawful. This is another aspect of deeds and conveyances under threat of condemnation which set them apart from every other type of conveyance. The conveyance is involuntary from the private party's perspective; it must promote and be part of the public purpose from the governmental participant's perspective.

In order to assure that the non-immune or non-exempt grantor in a deed under threat of condemnation receives "just compensation", the deed should be immune from taxation. In the instant case, Battaglia was far-sighted and fortunate that the written agreements with Orange County placed the liability on Orange County, although Respondents understood then, as they do now, that no documentary stamp tax should be imposed on the deeds delivered by Battaglia. However, what of those private parties conveying property to governmental agencies under threat of condemnation but who did not have such a contractual arrangement? This apparently was the case in Duda, supra. Having agreed upon and received what they believed was "just compensation", those parties were subsequently assessed by Petitioner. The compensation agreed upon and received has now been reduced by the amount of the assessment, which includes not just the tax, but interest and penalty. Is there still "just compensation"? The empirical conclusion is "NO!" Could the governmental agency refuse to reimburse the private party? Such refusal would likely lead to

inverse condemnation litigation. If the governmental agency could not legally refuse to reimburse, then the tax is, again, imposed on a tax immune entity.

The reason for the exemption and for preserving the exemption is captured in a phrase from the FMPA opinion. In the context of conveyances under threat of condemnation, "[i]t is the transaction's **forced nature, its raison d'etre**" that gives makes the transaction non-taxable. Because of the forced nature of conveyances under threat of condemnation, the documents to which a governmental agency is a party in that context should be treated differently than the documents in truly voluntary transactions to which a governmental agency is a party. The deeds delivered and recorded in the former situation should not be taxed, in part because to do so **involuntarily** subjects private citizens to the tax and ultimately could subject tax immune entities to the tax.

More importantly, taxing those private citizens who convey under threat of condemnation deprives them of just compensation and places them in a disadvantaged posture relative to those owners who go to court. In their written agreements, Respondents did all that they could to assure that Battaglia would receive the same "just compensation" which they would have received if they had gone to trial. The written agreements provided for severance damages and compensated Battaglia for attorney fees and appraiser fees which they had incurred. By the written agreements, Respondents assured that Battaglia would receive the just compensation guaranteed by the Florida Constitution, Article X, Sec 6, Fla. Con., and by statute, Sec. 73.091, Fla. Stat.

If Battaglia were later forced to pay the documentary stamp tax on the deed (which came about as a result of transaction which Battaglia did not initiate or enter into voluntarily) and could not recover that cost from the county, the "just compensation" which Appellants had strived to assure would have been reduced. As to Battaglia, that compensation would have been reduced involuntarily.

To illustrate, two people own equal interests in a single parcel of real property. A tax immune condemning authority has determined a public purpose and a need to acquire that property, through condemnation if necessary. Owner A agrees to sell her interest, under threat of condemnation, for $10,000.00 and without going through trial or judicial proceedings. Under Appellee's application of the 1987 amendment and Appellee's "new" rules, that owner must pay $600.00 in documentary stamp tax (plus penalty and interest if the tax was not paid at the time of recording based on a shared understanding that the deed was not subject to documentary stamp tax). Owner A receives $9,600.00 for her interest. The condemning authority has expended $10,000.00 (reduced by the $600.00 received in taxes).

Owner B insists on trial. Trial is held. Owner B hires a lawyer, an appraiser, an accountant and other professionals and consultants to assist her in obtaining just compensation. The jury verdict affirms the public purpose, concludes that title shall be transferred to the condemning authority and sets the value of Owner B's interest at $10,000.00. Owner B receives $10,000.00. Under Petitioner's application of the 1987 Amendment, and Petitioner's "new" rules, no documentary stamp tax is due because the title has

been transferred by the writing which is the court's order. Owner B nets $10,000.00. Owner B's professionals and consultants are entitled to $10,000.00 compensation. The condemning authority expends $20,000.00.

If we accept that $10,000.00 was "just compensation" for those identical interests, and if we insist that both identically situated parties receive "just compensation", then the condemning authority must somehow compensate for the tax liability which Petitioner insists exists when a deed is delivered to transfer title "under threat of condemnation", rather than title being transferred by the court order. The condemning authority is therefore unavoidably exposed indirectly to the tax for which it is otherwise immune. Either that, or Owner A receives less "just" compensation than Owner B.

Petitioner's interpretation and application of the 1987 amendment could increase eminent domain litigation and take some flexibility from the hands of condemning authorities. The costs to local governments which will acquire property through condemnation will necessarily increase, by either the increment of the documentary stamp tax on negotiated acquisitions under threat of condemnation or by the amount of litigation costs which would have been avoided by negotiated acquisition. The taxpayers in local government jurisdictions ultimately bear these costs. A transfer of tax revenue occurs with the ad valorem tax revenue paid to local governments being transferred to the state treasury via the documentary stamp tax.

If Respondents had entered into a stipulated final judgment containing identical terms to their written agreements, no documentary stmp tax liability could arise and Petitioner would not have tried to collect documentary stamp tax. By their agreements, Respondents intended to accomplish the same result as a stipulated final judgment, but without filing suit. If Petitioner position were accepted, form would triumph over substance. Worse yet, such a conclusion would seem to encourage litigation solely for the purpose of avoiding documentary stamp tax. Why not avoid filing suit and adding to courts' dockets if no purpose would be served except to avoid documentary stamp tax.

The arguments about imposing the documentary stamp tax on a tax immune body and the denial of just compensation unavoidably overlap. In order to assure that the same "just compensation" is paid to those owners who cooperate with condemning authorities (which are tax immune) as is paid to those owners who would litigate with the condemning authorities in eminent domain, the condemning authority should add an increment in the amount of the documentary stamp tax liability of the non-litigating owner to the price which would otherwise be agreed to. As the court noted in Cohen-Ager, supra, at p. 1335:

> The imposition of [documentary stamp] taxes will, therefore, be factored into the future bids as a cost item and **ultimately passed on to the county.**

This in turn presents a possible violation of the Florida Constitution. Article VII, §1(a), Florida Constitution, prohibits levying **state** ad valorem taxes on real estate and tangible personal property. Counties can only raise revenue through ad valorem taxes

on real property and tangible personal property (unless authorized by general law to levy other taxes). Article VII, §9(a), Fla. Const. The payment of documentary stamp tax by Orange County or any other county, whether imposed as a result of written agreement or waiver, by indirect or direct means, has the effect of transferring ad valorem tax funds from the county treasury to the state treasury. Such an occurrence would contravene the constitutional prohibition against state ad valorem taxes. If a county were to reimburse to the grantor of a deed delivered under threat of condemnation any documentary stamp tax paid by the grantor, whether this is done because a court has found a denial of just compensation or because the county has decided to do so voluntarily, see Op. Atty. Gen. 92-7 (January 23, 1992), the effect is to transfer money from the county ad valorem treasury to the state for the state documentary stamp tax. The state indirectly levies an ad valorem tax. Just as in Lewis, a violation of constitutional prohibition should not be allowed to be accomplished indirectly when it would be patently unlawful if attempted by more direct means.

CONCLUSION

The 5th DCA decided this case correctly on the grounds that §201.01, Fla. Stat. as applied, would unconstitutionally tax Orange County, a tax immune entity.

The 5th DCA did should also have ruled that the deeds in question were non-taxable because the deeds were delivered under threat of condemnation and in lieu of eminent domain proceedings.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. mail on January 4, 1993, to Jeffrey M. Dikman, Assistant Attorney General, Department of Legal Affairs, The Capitol - Tax Section, Tallahassee, Fl. 32399-1050.

Scott E. Wilt, Esq.
MAGUIRE, VOORHIS & WELLS, P.A.
2 So. Orange Ave.
P.O. Box 633
Orlando, Fl. 32801
Fla. Bar #225010
(407) 843-4421
Attorney for Appellants

BFCFDOR.006

REVISED: _____ BILL NO. SB 142

DATE: February 4, 1987 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boyle	Beggs	FTC	
2.			APP	
3.				
4.				

SUBJECT:

Tax Administration

BILL NO. AND SPONSOR:

SB 142 by
Senator Deratany

I. SUMMARY:

Sections 1, 9, 10, 15. Statute Reference Update

Present Situation:

Sections 72.011, 213.05, 213.053, and 220.53, F.S., cross refer to various other chapters or sections of the Florida Statutes for purposes of administration of revenue laws, jurisdiction of circuit courts in tax matters, and confidentiality and information sharing. Some of these cross references do not reflect current law and current administration by the department.

Proposed Changes:

Cross references to the above sections to revenue laws administered by the department are updated to reflect current law and current administration.

Sections 2, 3. Federal Extensions - Estate Tax

Present Situation:

Currently, the department must grant an extension of time to an estate's executor for filing a state return if federal authorities have granted an extension of time for filing a federal return. But an extension of the state filing time does not extend the time for paying the state tax unless hardship can be demonstrated.

Proposed Changes:

To obtain an extension of the time to file a Florida estate tax return, the executor must file with the department a copy of the federal extension request and must file it within 30 days after obtaining the federal extension. Also the Florida time for payment is automatically extended when the federal time for payment is extended. These changes conform Florida estate administration practices with federal practices.

Sections 4, 8. Speed-up of Documentary Stamp and Intangible Tax Collections

Present Situation:

Currently, under ss. 199.135 and 201.132, F.S., the clerks of circuit courts have until the 20th day of each month to send to the department documentary stamp and intangible taxes collected during the preceding month. These taxes become state revenues at the time they are collected.

Proposed Changes:

Clerks of circuit courts must send to the department not later than 7 working days after the close of each week documentary stamp and intangible taxes collected during the preceding week. This allows the state to use its own money more closely to the time it becomes the state's.

• Section 5. Compromise and Settle Intangible Tax Penalties

Present Situation:

In 1986, the department's authority to waive or settle penalties imposed under the state's revenue laws was broadened to allow the compromise or settlement of such penalties. This allows the department to more effectively administer and enforce the states revenue laws.

Proposed Changes:

Conforms the department's authority to compromise or settle penalties in s. 199.282, F.S., with similar changes made in 1986 in other revenue laws.

Section 6. Documents Evidencing Indebtedness Between Exempt Governmental Bodies and Nonexempt Parties.

Present Situation:

Under s. 201.24, F.S., obligations to pay money issued by governmental entities are exempt from the documentary stamp tax. For many years, transactions between nonexempt parties and governmental entities were held taxable unless exempted by state or federal law, the nonexempt party being liable for the tax. Early Florida Supreme Court cases upheld this principle. But in 1986, the Florida Supreme Court in State v. Green declared that all parties to documents representing transactions in which governmental entities were parties were totally exempt from the documentary stamp tax and the department was prohibited from collecting the tax on such documents.

Proposed Change

Provides that, except as otherwise exempt under state or federal law, the documentary stamp tax is to be paid by a party to a document other than the United States, the state, or a political subdivision of the state if any such governmental entity is a party to the document.

Sections 7, 16. Stock Transfers

Present Situation:

Section 201.04, F.S., imposes the documentary stamp tax on transfers of legal title to stocks. However, Congress, in Public Law 94-29, has preempted this statutory provision by exempting the taxation of transfers of stocks. Original issues of stock are still taxable.

Proposed Changes:

Section 201.04(1), F.S., which taxes transfers of stock is repealed.

Section 11. Technical Assistance Advisements

Present Situation:

Under previous administrations, the department entered into informal agreements on tax treatments of certain industries.

Records of many of these agreements were not retained in department files. Several of those agreements which have surfaced during audits create an estoppel against the department. While the department is not normally bound by misstatements of law, when a misstatement is in writing and the taxpayer relies on it, the department is bound. Some of the informal opinions have conflicted with department policy or with other informal opinions.

Proposed Changes:

Makes only technical assistance advisements or declaratory statements issued under chapter 120 binding upon the department. Informal opinions will no longer bind the department.

Section 12. Returned Check Penalty

Present Situation:

Currently returned checks are prosecutable under s. 832.05, F.S., but with respect to checks sent to the department in payment of taxes due, the identity of the person to penalize is so problematical that State Attorneys are reluctant to prosecute.

Proposed Changes:

Section 213.32, F.S., is created prohibiting the issuing of checks backed by insufficient funds or using a debit card to pay any tax administered by the department. The identity and intent requirements of chapter 832, F.S., are not reiterated in the new section, allowing the department to provide by rule for identification and prosecution of violators thereby facilitating the enforcement of the collection of state revenues.

Section 13. Corporate Definition

Present Situation:

Section 220.03(1), F.S., contains several incorrect internal cross references. The cross references should be to the definition of "corporation"; however, it is to the definition of "state."

Proposed Changes:

The appropriate cross references are corrected, referring to the definition of corporation.

Section 14. Interest on Overpayments

Present Situation:

Current statutory wording on the application of interest for overpayments is unclear as to whether interest applies to taxes only or to taxes and penalties. Current administration is that it applies only to taxes.

Proposed Changes:

Statutory language is clarified to apply interest only to taxes only.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

Non-exempt parties to a document to which exempt governmental entities are a party will have to pay documentary stamp taxes.

B. Government:

The speedup of documentary stamp and intangible taxes will generate the following non-recurring revenues (in millions) in 1987-88:

	General Revenue	TRUST FUND (Local Government)
Documentary Stamp Tax	18.5	6.3
Intangible Tax	3.5	0.5

III. COMMENTS:

None

IV. AMENDMENTS:

None.

O.R. 1283 PG 2031 899332

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL ACTION

ARVIDA CORPORATION,

Plaintiff,

vs.

DEPARTMENT OF REVENUE,
STATE OF FLORIDA,

Defendant.

CASE NO. 74-1341-CA-01

SUMMARY FINAL DECLARATORY JUDGMENT

THIS CAUSE came on for hearing upon the motions of the parties for entry of a summary judgment. The parties have agreed, and the Court finds, there is no dispute as to any material fact.

Defendant seeks to impose the documentary stamp tax and penalties provided for in Chapter 201, Florida Statutes, upon the Plaintiff. Plaintiff conveyed real property to Sarasota County, Florida, under threat of condemnation. Sarasota County is a governmental body not subject to the tax imposed by Section 201.12, Florida Statutes.

Defendant contends that since Section 201.02 imposes the liability for the tax on either grantor or grantee (or perhaps both), it makes no difference that Sarasota County is exempt. Plaintiff contends, among other things, that since one party to the transaction is exempt from taxation, neither party should be liable for the tax.

It appears to this Court that the question was clearly answered in State ex rel. Seaboard Airline Railroad Co. v. Green, 173 So.2d 129 (Fla. 1965). Although that case involved a conveyance from an agency of the United States to the railroad, the Supreme Court of Florida held that even if the railroad paid the tax imposed by Section 201.02, Florida Statutes, and not the exempt grantor, this would still be a tax on the deeds which is not permitted.

In this case, Sarasota County is exempt from the tax. If plaintiff were forced to pay the tax, this would still constitute a tax on the deed prohibited by law since Sarasota County cannot be taxed. Accord, The Florida Bar v. Lewis, 358 So.2d 897 (1st D.C.A. Fla. 1978). It is therefore,

STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of the instrument filed in this office. O.R. 1283 PG 2031
Witness my hand and official seal this 7-9-91
Clerk of Circuit Court.
by J Baker, Deputy Clerk

APPENDIX B

OFF. REC. 1283 PG 2032

ADJUDGED as follows:

1. The Court declares that the Plaintiff is not required to place documentary stamps or surtax on the deed to Sarasota County which is the subject of this action.

2. Plaintiff is not subject to the penalties provided by Chapter 201, Florida Statutes, for failure to pay the tax provided in Section 201.02, Florida Statutes.

3. Defendant is permanently enjoined from placing a lien on any real estate owned by Plaintiff for any amounts claimed due and owing by Defendant in this action.

4. The bond posted by Plaintiff in this case is released and the surety thereon discharged.

5. The Court reserves jurisdiction to tax costs.

DONE and ORDERED in Chambers in Sarasota County, Florida, this 18 day of January, 1979.

STEPHEN L. DAKAN, CIRCUIT JUDGE

Copies to:

William G. Lambrecht, Esq.

Joseph C. Mellichamp, III, Esq.

JAN 19 11 27 AM '79

FILED AND RECORDED

69932

STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of the instrument filed in this office.
Witness my hand and official seal this 7-9-91
Clerk of Circuit Court.
J Baker, Deputy Clerk

OFF. REC. 1283 PG 2032