047 12-18

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE,

Petitioner,

vs.

ORANGE COUNTY FLORIDA, et. al.,

Respondents.

_____/

CASE NO. 80,685

5th DCA NO. 92-102

APPEAL FROM THE DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON MERITS

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
Joseph C. Mellichamp, III
Senior Asst. Attorney General
Jeffrey M. Dikman*
Fla. Bar #274224
Assistant Attorney General
Department of Legal Affairs
The Capitol-Tax Section
Tallahassee, FL 32399-1050
(904) 487-2142

* COUNSEL OF RECORD
FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

CASES — PAGE(S)

CASES CONTINUED PAGE(S)

CASES CONTINUED PAGE(S)

AUTHORITIES

UNITED STATES CONSTITUTION

UNITED STATES CODE

INTERNAL REVENUE CODE

UNITED STATES TREASURY REGULATIONS

FLORIDA CONSTITUTION

FLORIDA STATUTES

AUTHORITIES CONTINUED

LAWS OF FLORIDA

FLORIDA ADMINISTRATIVE CODE

FLORIDA ATTORNEY GENERAL OPINIONS

ADDITIONAL AUTHORITIES

PRELIMINARY STATEMENT

The record on Appeal consists of one volume. When citing the record herein, the Department will use the following format: R: ___, followed by the page number(s) of the record.

STATEMENT OF THE FACTS AND CASE

A. STATEMENT OF THE FACTS

The facts are not in dispute. R:97 Finding of Fact #1. The pertinent facts are set forth in that part of an order entitled "Findings of Fact and Conclusions of Law Supporting Court's Order on Cross-Motions for Summary Judgment." R:97-103. Except where brackets appear (to substitute the word "Respondents" for "Plaintiffs", etc.), the Circuit Court's undisputed factual findings are quoted *verbatim*, in their entirety, as follows.[1]

1. [The Circuit Court] accept[ed] the representations of Counsel for the parties that there are no disputed issues of material fact. R:97, Finding of Fact ("hereinafter, "FOF"), #1.

2. [Respondents], Battaglia Fruit Co., Inc. and Battaglia Properties, Ltd. (hereinafter, jointly "Battaglia"), are Florida Corporations with their commercial domicile in Orange County. R:97, FOF #2.

3. [Respondent], Orange County, Florida, is a political subdivision of the State of Florida (hereinafter, "Orange County"). R:97, FOF #3.

---

[1] The Department does not suggest that the Respondents agreed to the Circuit Court's legal findings, but that Court's *factual* findings were undisputed.

4. [Petitioner], the Department of Revenue (hereinafter, "the Department") is an agency of the State of Florida, responsible, in part, for the assessment, levy and collection of taxes, including documentary stamp tax. R:98, FOF #4.

5. On December 27, 1988, Battaglia and Orange County executed two separate agreements for the sale of two separate parcels of land located in Orange County, Florida. R:98, FOF #5.

6. The agreements were executed by Battaglia under threat of condemnation and in lieu of eminent domain proceedings. R:98, FOF #6.

7. The agreements, which were filed with the Court as exhibits to the Motion to Add Plaintiff, set forth the material terms of the contracts for sale of realty between Battaglia and Orange County, including the purchase price for each of the properties. R:98, FOF #7.

8. As can be seen from a review of the agreements, Orange County and Battaglia contemplated that no documentary stamp taxes would be due on deeds executed under threat of condemnation. R:98, FOF #8.

9. Hence, when the deeds were executed by Battaglia and recorded on or about April 14, 1989, no documentary stamp taxes were paid by either party to the transaction. R:98, FOF #9.

10. On January 14, 1991, the Department issued two Notices of Proposed Assessment of tax, interest and penalty against Battaglia. The penalty portions of the assessments were subsequently withdrawn, leaving only tax and interest at issue. R:98, FOF #10.

11. Battaglia timely protested the proposed assessments by filing [a Circuit Court] action, and has also posted a cash bond pursuant to Section 72.011, Florida Statutes. R:98, FOF #11.

12. Although Orange County is contractually obligated to Battaglia to reimburse Battaglia for the payment of the documentary stamp taxes at issue, the Department did not assess Orange County, which was exempt from payment of the documentary stamp tax. R:99, FOF #12.

13. It is undisputed that Battaglia and Orange County relied, in part, on a provision of the Department's rules which has since been repealed. The repealed provision, contained within Florida Administrative Code Rule 12B-4.14(15)(b), erroneously recited that deeds executed under threat of condemnation were exempt from documentary stamp taxation. R:99, FOF #13.

14. It is also undisputed that the April 14, 1990[2] deeds, giving rise to the assessment, were executed prior to the repeal of the aforementioned rule provision but subsequent to the enactment of Chapter 87-102, Section 6, Laws of Fla.[3], which amended Section 201.01, Florida Statutes, effective June 30, 1987, to provide in pertinent part:

> Unless exempt under §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

---

[2] As finding of fact number 9 shows, the correct date was April 14, 1989, not April 14, 1990, but this difference, which is attributable to typographical error, would not be material. Either date is post-1987 amendment.

[3] A copy is also attached hereto as Appendix "A."

taxable under this chapter, any tax specified in this chapter shall be paid by a nonexempt party to the document. (e.s.)

B. STATEMENT OF THE CASE

Battaglia filed suit in circuit court pursuant to §72.011, Florida Statutes, challenging the documentary stamp tax assessments which had been issued solely against Battaglia. R:31-35. The Department filed its answer. R:36-38. Battaglia, together with Orange County, then moved for Orange County to be added as an additional party Plaintiff. The Department did not oppose this motion. R:39-53. The Circuit Court granted the unopposed motion and added Orange County as a party Plaintiff. R:60-61.

Respondents, Battaglia and Orange County, moved for summary judgment. R:54-56. In response, the Department cross-moved for summary judgment. R:57-59. In support of the Department's cross-motion, the Department also filed a memorandum of law with exhibits. R:117-136. One exhibit consisted of a Legislative Staff Report entitled "Senate Staff Analysis and Economic Impact Statement," Committee Substitute for Senate Bill 142, dated May 7, 1987. R:131-134, attached hereto as Appendix "B."

Respondents provided the Court with additional legal materials, by way of an "appendix." R:62-96. Respondents' appendix included, among other things, an earlier but practically identical February 4, 1987, version of the above-quoted legislative staff report. R:70-73.

Both the motion and the cross-motion for summary judgment were heard on November 25, 1991. R:1-30. After hearing the

arguments of counsel, and having been provided by each party with the materials described above, the Circuit Court entered summary judgment against Battaglia (but not against Orange County), for a sum certain. R:104-106. The Circuit Court also directed the Clerk to disburse these sums to the Department out of the Court registry. R:104-106.

The Department received its check from the Clerk in the sum of $25,814.96. This check, which was paid out of funds deposited by Battaglia, represents full payment of the judgment entered against Battaglia.

The Circuit Court also entered a separate order entitled "Findings of Fact and Conclusions of Law Supporting Court's Order on Cross-Motions for Summary Judgment." R:97-103. That order sets forth in detail the Circuit Court's findings of fact and legal reasoning. Respondents timely appealed to the Fifth District Court of Appeal. R:107-108.

Prior to briefing, the Department informed the District Court, by written notice, that there was simultaneously pending before that very same District Court a closely related but not identical appeal in Department of Revenue v. A. Duda & Sons, Case No. 91-2585 (Fla. 5th DCA October 30, 1992).[4] The Department filed these notices because both cases involved documentary stamp taxes assessed against private companies on deeds executed in lieu of threatened condemnation by County government. Moreover, both cases involved the same time period (i.e., after the

[4] A similar notice was also filed in A. Duda & Sons, advising the Court of the pendency of the instant case.

enactment of a 1987 amendment but prior to corresponding amendment of the Department's rules).

Notwithstanding these notices, the two appeals were not consolidated and were instead assigned to separate panels of the District Court. After separate oral arguments, on separate days, before two separate panels of the same District Court of Appeal, two separate opinions were rendered.[5] Neither opinion references the other.

Although the District Court reversed the Circuit Court's decision *against* the Department in A. Duda & Sons, the same District Court also reversed the lower Court's decision in the instant case, which had been *in favor of* the Department.

In reversing the Circuit Court in the instant case, the District Court held that the Department had "indirectly taxed" Orange County because Orange County's contract (unlike the contracts of other counties in A. Duda & Sons) provided for reimbursement to Battaglia. The District Court also ruled that the Legislature lacked the power to waive the tax immunity of a county, and that hence, any "indirect tax" against a County was unconstitutional.

---

[5] *Compare*, the opinion in A. Duda & Sons, Appendix "C" with the opinion in the instant case, Appendix "D."

Finally, the District Court certified the following question to this Court:

> 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, IS THE TRANSACTION IMMUNE FROM SUCH TAXATION EVEN THOUGH THE DEPARTMENT OF REVENUE IMPOSES THE TAX DIRECTLY UPON THE PROPERTY OWNER?

The Department timely petitioned for discretionary review by this Court. On October 28, 1992, this Court entered an Order Postponing Decision on Jurisdiction and Briefing Schedule. The Department submits this brief in accordance with that schedule.

SUMMARY OF ARGUMENT

The Circuit Court correctly found, as a question of undisputed fact, that Orange County was *not* assessed documentary stamp tax liability. R:99, paragraph 12. This undisputed *fact* was clear from Battaglia's own Complaint. R:31-35. The challenged assessments, which are attached to the Complaint, assess tax liability against Battaglia, *not* against Orange County. R:34-35. Similarly, the Final Judgment awards judgment against Battaglia, *not* against Orange County. R:98, paragraph 10: R:105.

The Department's actions in assessing Battaglia were wholly consistent with the provisions contained within Chapter 87-102, §6, Laws of Fla., Appendix "A," which provides:

> Unless exempt under §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 nonexempt party to the document. (e.s.)

Nevertheless, contrary to the above-quoted statute, and also to *the undisputed facts*, the District Court erroneously concluded, as a question of *law*, that the Department was "indirectly" and *unconstitutionally* taxing Orange County. That is, the District Court erroneously held that Orange County's immunity from taxation extended to the entire "transaction" with Battaglia. *See*, Appendix "D."

In reaching these erroneous conclusions, the District Court relied primarily upon a *judicially created* notion of *transactional* tax immunity. However, the District Court failed to take into account that this *judicially created* notion of transactional immunity had been *legislatively superceded in 1987, by the above-quoted amendment.*

The *judicial creation* of a doctrine of *transactional* tax immunity represented a *departure* from earlier state case law, and also, a departure from federal laws on which Florida's documentary stamp tax is patterned. Earlier federal and state documentary stamp tax case law held that governmental immunity was *personal* to the governmental entity. Then, a series of cases created a doctrine extending the tax immunity of a governmental entity to an entire *transaction* with that entity.

In 1987, the Legislature rejected this unduly expansive notion of *transactional* tax immunity, which had eroded Florida's tax base. Instead, the Legislature reinstituted the *earlier* case law standard of *entity* tax immunity. A statutory return to the earlier immunity standard made Florida law, once again, harmonious with federal documentary stamp tax law.

The decision of the District Court in the instant case and in a simultaneously pending related case *agreed* with the Department on the issue of statutory construction. See, Florida Department of Revenue v. A. Duda & Sons, Inc., Case No. 91-2585 (Fla. 5th DCA October 30, 1992), attached as Appendix "C." That is, the District Court's disagreement with the Department was over the *constitutionality* of the statute as applied in the instant case, not over the meaning of the amendment.

The District Court's determination that the statute had been unconstitutionally applied was erroneous. The District Court based its decision on an *erroneous belief* that this Court's decision in Lewis v. The Florida Bar, 372 So.2d 1121 (Fla. 1979) was indistinguishable. Yet, the Florida Bar decision is easily *distinguishable* from the instant case.

First, in the Florida Bar decision, the Supreme Court took *judicial notice* of the indisputable fact that lenders "universally require" borrowers to pay taxes arising in connection with loan documentation. This judicial notice of *universality* was the springboard from which the Supreme Court concluded that the Florida Bar was being indirectly taxed.

In the instant case, the Court can take judicial notice that *sellers* ordinarily pay documentary stamp taxes on a deed, although this is subject to negotiation. Also, the Court can take judicial notice of the nonfinal decision in A. Duda & Sons, appendix "C," wherein other governmental entities required the *seller* to pay the tax; correctly and properly refusing to reimburse the private taxpayer for any of its personal tax liabilities.

In other words, the Department did not "indirectly tax" Orange County; Orange County voluntarily agreed (unlike the local governments involved in A. Duda & Sons) to reimburse Battaglia for some of its tax liabilities. By voluntarily agreeing to pay the tax, which had never been assessed against Orange County, Orange County *waived* any conceivable claim of immunity from its own contractual undertaking.

The Florida Bar decision is also distinguishable for a second reason: it involved separation of powers issues. The Florida Bar is an arm of the judicial branch of government. The judicial branch of government is a co-equal branch of government to the Legislature. Orange County, on the other hand is merely a

creation of the Legislature.[6] Unlike the Florida Bar case, no separation of powers issue even arises in the instant case. Counties are not a fourth branch of government and have no special constitutional protection from legislative waiver of immunity. The Florida Bar decision is distinguishable because it predates the controlling amendment in question, which was designed, in part to overcome this particular decision.

Finally, the District Court erred in determining that the immunity of Orange County from direct taxation (or its immunity from allegedly "indirect" taxation), could not be constitutionally *waived* by statute or by contract. In both Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975) and State v. Alford, 107 So.2d 27 (Fla. 1958) this Court held *that, absent specific constitutional prohibition, immunity could be waived* by a proper legislative enactment. There is no specific constitutional prohibition against the instant legislative waiver of immunity. Furthermore, unlike the general act in Dickinson, and the special act in Alford, the *legislative waiver is clear* in Chapter 87-102, §6, Laws of Florida. Yet, the District Court *misread* these decisions as holding that any legislative waiver would be *unconstitutional*.[7]

---

[6] Article VIII, §1(a), Fla. Const. provides that Counties are inferior governments which may be entirely abolished by statute, without constitutional amendment.

[7] However, the Department does agree with one holding of the District Court: the holding that the plain and unambiguous language of the 1987 amendment superceded an earlier enacted administrative rule. *See*, Opinion in A. Duda & Sons, Appendix "C."

ARGUMENT

The District Court certified the following question:

> 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, IS THE *TRANSACTION IMMUNE* FROM SUCH TAXATION *EVEN THOUGH* THE DEPARTMENT OF *REVENUE IMPOSES THE TAX DIRECTLY UPON THE PROPERTY OWNER? (e.s.)*

A review of the District Courts decision, reveals three fundamental errors in its reasoning, which are as follows:

> A. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT A COUNTY'S "IMMUNITY" FROM EXCISE TAXATION EXTENDS TO AN ENTIRE *"TRANSACTION"* WITH A PRIVATE PARTY.
>
> B. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT A CONTRACT, TO WHICH THE DEPARTMENT WAS *NOT* A SIGNATORY, DETERMINED THE LAWFULNESS OF THE DEPARTMENT'S ASSESSMENT.[8]
>
> C. THE DISTRICT COURT ERRONEOUSLY ASSUMED THAT IT WOULD BE *UNCONSTITUTIONAL* FOR THE LEGISLATURE TO *WAIVE* THE TAX IMMUNITY OF A COUNTY.

A. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT A COUNTY'S "IMMUNITY" FROM EXCISE TAXATION EXTENDS TO AN ENTIRE *"TRANSACTION"* WITH A PRIVATE PARTY.

The Circuit Court correctly found, as a question of undisputed fact, that Orange County was *not* assessed documentary stamp tax liability. R:99, paragraph 12. This undisputed *fact*

---

[8] As will be discussed below, the same District Court recently reached an opposite and correct conclusion in a related case. That case differed factually in one respect only: in Department of Revenue v. A. Duda & Sons, Case No. 91-2585 (Fla. 5th DCA, October 30, 1992) Appendix "C," the counties involved, unlike Orange County, refused to contractually agree to reimburse Duda for its documentary stamp tax liability. The Department believes that this factual distinction is immaterial, since the Department was not privy to either the Duda contract negotiations or the Battaglia contract negotiations. The ability of the Department to consistently and equally enforce the tax statutes should *not* be dependent on the outcome of negotiations to which neither the Legislature nor the Department were ever involved. See Florida Municipal Power Agency, infra.

was clear from Battaglia's own Complaint. R:31-35. The challenged assessments, which are attached to the Complaint, assess tax liability against Battaglia, *not* against Orange County. R:34-35. Similarly, the Final Judgment awards judgment against Battaglia, not against Orange County. R:98, paragraph 10: R:105.[9]

Nevertheless, contrary to *the undisputed facts*, the District Court erroneously concluded, as a question of *law*, that the Department was "indirectly" taxing the County. The District Court erroneously held that Orange County's immunity from taxation extended to the entire "transaction" with Battaglia. *See*, Appendix "D."

In reaching these erroneous conclusions, the District Court relied primarily upon a *judicially created* notion of *transactional* tax immunity. However, the District Court erred in failing to take into account that this judicial doctrine of transactional tax immunity had been *legislatively superceded in 1987.*[10]

The judicial creation of a doctrine of *transactional* tax immunity represented a *departure* from earlier state and federal case law. Earlier federal and state documentary stamp tax case law held that governmental immunity was *personal to the governmental*

---

[9] It is interesting to note that the Department's judgment against Battaglia was satisfied out of moneys deposited into the registry of the Court by Battaglia, not out of moneys deposited by Orange County. R:98, FOF #11. However, the Department does *not* suggest that the source of funds used to satisfy a judgment should govern the validity of the assessment and judgment *against Battaglia*.

[10] The controlling 1987 amendment, which superceded pre-1987 case law, (hereinafter, "the amendment"), is contained within Ch. 87-102, §6, Laws of Fla. *See*, Appendix "A."

entity. Then, a series of cases created a doctrine extending the tax immunity of a governmental entity to an entire *transaction* with that entity.

In 1987, the Legislature, by enacting Chapter 87-102, §6, Laws of Fla., rejected this unduly expansive notion of *transactional* tax immunity, which had eroded the State's tax base. Instead, the Legislature, through the 1987 amendment, reinstituted the earlier case law standard of *entity* tax immunity. This amendment made Florida law, once again, harmonious with federal law.

The Circuit Court properly declined to revive the judicially created and legislatively superceded doctrine of *transactional* tax immunity. Instead, the Circuit Court correctly recognized that the judicially created doctrine of transactional tax immunity had been legislatively *superceded* by a controlling *1987* statutory amendment. R:100-102. Therefore, the superceded doctrine was inapplicable to the *1989* deeds at issue.

Section 201.01, Fla. Stat., (1987), as amended, provides in pertinent part:

> Unless exempt under §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 nonexempt party to the document.

It was undisputed that Battaglia executed the deeds in question, for consideration, in *1989* and that they were also recorded in *1989*. R:98, FOF #9. Under the plain language of §201.01, Fla. Stat. (1987), as *amended*[11] the deeds were clearly

---

[11] The amendment became effective June 30, 1987. *See*, Ch. 87-102, §29, Laws of Florida.

taxable to *Battaglia*, even though they were not taxable to Orange County.

The Circuit Court correctly applied the amendment according to its plain and unambiguous terms. The Circuit Court refused to misconstrue the clear phrase "shall be *paid* by the nonexempt party to the document" (e.s.) as if it read "shall *not* be paid by either party to the document." Nor would the Court read the phrase "unless otherwise provided by law" to refer to superceded case law.[12] Finally, neither the Circuit Court nor either panel of the District Court (which heard this and a related appeal) accepted Respondents' argument that the phrase "by law" kept in force a superceded administrative rule.[13]

In A. Duda & Sons, the *same* District Court *clearly agreed* with the Department that the 1987 amendment language (quoted earlier) was plain and unambiguous.[14] The facts of A. Duda & Sons were similar to the instant case. In A. Duda & Sons, the Department

---

[12] See, Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979) which correctly holds that the words "by law" in a statute refer to statutory law, not to case law.

[13] *See,* A. Duda & Sons, Appendix "C," which cited Hulmes v. Division of Retirement, Dept. of Admin., 418 So.2d 269, 270 (Fla. 1st DCA 1982), *review denied*, 426 So.2d 26 (Fla. 1983) for the proposition that a rule is only operative and binding from its effective date until it is modified or superseded by subsequent legislation and that a rule "expires with the repeal of the statute from which it gains its life."

[14] Indeed, both the decision of the District Court in the instant case and the decision of the same appeals court in a simultaneously pending *related case* reveal that the District Court *agreed* with the Department on the issue of statutory construction. See, A. Duda & Sons, Inc., supra, That is, the District Court's disagreement with the Department was over the *constitutionality* of the statute as applied in the instant case, not over the meaning of the statute.

had assessed documentary stamp tax liability against a private company on deeds executed to a county and another immune body "in lieu of condemnation."

The only factual difference between A. Duda & Sons and the instant case is that in A. Duda & Sons, the governments involved, unlike Orange County, did *not* contractually agree to reimburse the private party for its tax liabilities. Under these very similar facts, the same District Court found that the assessment against Duda was lawful.[15]

1. HISTORY OF DOCUMENTARY STAMP TAX

In order to understand the significance of the amendment, and how the Fifth District Court of Appeal could reach such conflicting results in two practically identical cases, the Department must first discuss, chronologically, the statutes and case law which preceded the amendment.

A chronological discussion of the statutes and cases must begin with the original enactment of the documentary stamp tax. The documentary stamp tax is an excise tax, as opposed to a property tax, and is created by Ch. 201, Fla. Stat. This tax was patterned after *federal* documentary stamp tax statutes repealed by the federal government in 1968.

Hence, the Florida Supreme Court expressly held in Gay v. Inter-County Tel. and Tel. Co., 60 So.2d 22 (Fla. 1952), that federal law can provide guidance, and observed:

---

[15]Florida's *statutes* have *never* recognized an immunization of the entire *transaction* between an immune and a nonimmune entity. This "transactional immunity" concept is the result of a recent body of case law, which directly departed not only from earlier state case law, but also from the federal law upon which Florida's documentary stamp tax was patterned.

> This documentary Stamp Act is similar to the Federal Act 26 U.S.C.A §1800, et. seq., and therefore takes the same construction in the Florida courts as given to the Federal Act in the Federal courts.
>
> Gay, at 23.

Although Gay did not involve the precise issue arising in the instant case, the mandate that Florida courts should look to federal law in resolving documentary stamp tax issues clearly applies here. Looking to federal law, Florida courts did, at one point, correctly resolve the issue presented here: whether to immunize both parties to a transaction wherein only *one* of the parties is immune from tax.

Originally, the Florida case law correctly held that in transactions between immune and nonimmune entities, the nonimmune entity should pay the documentary stamp tax. For example, in Plymouth Citrus Grower's Ass'n v. Lee, 27 So.2d 415 (Fla. 1946), the Florida Supreme Court held that a note executed in favor of a federal instrumentality was *not* exempt from taxation, citing Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931).[16]

Similarly, the First District Court of Appeals correctly followed the guidance of federal law in determining that a non-exempt, nonimmune entity should pay the documentary stamp tax in Choctawatchee Electric Cooperative, Inc. v. Green, 123 So.2d 357 (Fla. 1st DCA 1961).

---

[16] The Court in Plymouth also found the following federal cases to be distinguishable: Federal Land Bank v. Crosland, 261 U.S. 374 (1922), and Pittman v. Home Owner's Loan Corp., 308 U.S. 21 (1939). These same *distinguishable* federal cases were later *misconstrued* in the State v. Green decision, *infra*, which failed to address the Plymouth decision or the federal case law cited therein.

In Choctawatchee, the District Court took note of various federal decisions permitting the taxing authority to assess the nonexempt, nonimmune party engaged in a transaction with an immune governmental entity. Based on federal decisions, the First District Court correctly held that a corporation which had executed promissory notes in favor of the United States Government was nevertheless *liable* for payment of the documentary stamp tax.[17]

Indeed, the intent of the federal documentary stamp tax law, to *tax* the nonexempt, nonimmune party, could not be clearer. The applicable Internal Revenue Code provision, 26 U.S.C. §4384 (1954) provided in pertinent part:

> . . .The United States or any agency or instrumentality thereof shall not be liable for the tax with respect to an instrument to which it is a party and affixing of stamps thereby shall not be deemed payment of the tax, *which may be collected by assessment from any other party liable therefore. (e.s.)*

Pursuant to this Internal Revenue Code Provision, the Treasury Department promulgated Treasury Regulation §47.4384-1(c), which provided in pertinent part:

> The affixing of stamps to an instrument by the United States or any agency or instrumentality thereof does not constitute payment of the tax, and a *non-exempt party remains liable for the tax in such case. (e.s.)*

Florida case law first began to *depart* from the federal law upon which it was patterned in State v. Green, 173 So.2d 129

---

[17] In reaching this holding, the Court in Choctawatchee noted that "[s]imilar constructions have been placed upon comparable acts by courts in the federal jurisdiction." Choctawatchee, at 359, citing Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931).

(Fla. 1965). In that decision, the Florida Supreme Court held, for the first time, that a state could not impose documentary stamp tax on mortgages or deeds where one party to the transaction was a tax immune agency of the United States.

In deciding State v. Green, the Florida Supreme Court *failed to address* the Plymouth, and Choctawatchee decisions, as well as the federal case law cited therein. Instead, the Court relied on three cases: Federal Land Bank v. Crosland, 261 U.S. 374 (1922); Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939)[18] and Laurens F.S.& L. v. South Carolina Tax Com., 365 U.S. 517 (1961).

The Federal Land Bank, Pittman, and Laurens cases, upon which State v. Green erroneously relied, are distinguishable from the instant case in two important respects. First, in each of these United States Supreme Court cases, the tax in question was prohibited by an express *statute* or act. In contrast, there is no statute or act prohibiting the tax on Battaglia and, in fact, the amended statute specifically *mandates* that a tax be imposed on Battaglia.

Second, unlike State v. Green, and the cases cited therein, the instant case does not involve the federal government. Virtually any state tax case involving the federal government raises Supremacy Clause and other uniquely federal issues which do not arise in the instant case.

After the State v. Green decision, several Attorney General Opinions were published holding that transactions involving tax

---

[18] The Federal Land Bank and Pittman cases had previously been distinguished in Plymouth.

immune governmental bodies and nonimmune parties were taxable with the nonimmune party being liable for the tax.[19] The Attorney General cautiously included a caveat in its 1971 and 1975 opinions pointing out that this position could not be applied to transactions where the tax immune body was a *federal* [20] agency, consistent with the State v. Green decision. The State v. Green decision is distinguishable from the instant case not only because it involved the federal government, but also, because it predates the controlling statutory amendment.

Whether one agrees with the rationale of Choctawatchee and Plymouth, or instead agrees with the rationale of State v. Green, one must agree that these cases greatly differ in their resolution of the same fundamental issue: whether to immunize an entire transaction from documentary stamp tax when only *one* party to the transaction is immune.

This gap between the Choctawatchee and Plymouth cases, on the one hand, and the State v. Green case, on the other hand, was further widened in 1979. In that year, the Florida Supreme Court extended the rationale of State v. Green when it addressed the validity of the State's documentary stamp tax on transactions involving tax immmune entities of the *state* government.

---

[19] See, 1975 Fla. Op. Att'y Gen. 075-206 (July 15, 1975); 1972 Fla. Op. Att'y Gen. 072-350 (October 12, 1972); 1971 Fla. Op. Att'y Gen. 071-100 (May 12, 1971); 1970 Fla. Op. Att'y Gen. 070-171 (December 8, 1970); and, 1970 Fla. Op. Att'y Gen. 070-169 (December 4, 1970).

[20] The issue of whether deeds to a federal agency may now be taxed to a nonexempt grantor is not before this Court.

In Lewis v. The Florida Bar, 372 So.2d 1121 (Fla. 1979) the State had attempted to impose documentary stamp taxes on a bank where a loan had been made to the Florida Bar. The Court took judicial notice of the fact that "lenders universally require borrowers to assume the burden of taxation" and held that the state could not impose the tax. The Florida Bar, at 1122.

The decision of the Florida Supreme Court in Lewis v. The Florida Bar was misread by the District Court in the instant case. The District Court erroneously believed that Lewis v. The Florida Bar was indistinguishable.

The Florida Bar decision is easily distinguishable from the instant case for three reasons. First, in the Florida Bar decision, the Supreme Court took *judicial notice* of the indisputable fact that lenders "universally require" borrowers to pay taxes arising in connection with loan documentation. This judicial notice was the springboard from which the Supreme Court concluded that the Florida Bar was being indirectly taxed.

If lenders did not "universally require" borrowers to pay such taxes, then, this Court would have undoubtedly reached a different result in Lewis v. The Florida Bar. *If* the Florida Bar had been able to simply go to another lender who was willing to absorb the tax, then, it could not have been said that the Department was indirectly taxing an immune body.

If the Florida Bar's contract had not been a contract of adhesion, the Court would have most likely concluded that the Florida Bar, by "agreeing" to absorb the tax, had waived its immunity. However, because of the universality of the lender's

requirements, the contract was one of adhesion and, in the reasoning of the majority of this Court,[21] the Florida Bar had not, simply by agreeing to a loan, waived its immunity from taxation.

Here, the Court can take judicial notice that *sellers* ordinarily pay documentary stamp taxes on a deed, although this is subject to negotiation.[22] Also, the Court can take judicial notice of the nonfinal decision in A. Duda & Sons, Appendix "C," wherein other governmental entities required the *seller* to pay the tax. Furthermore, those governmental entities, correctly and properly, refused to reimburse a private taxpayer for any of its personal tax liabilities.

In other words, the Department did not "indirectly tax" Orange County; Orange County voluntarily agreed, unlike the local governments involved in A. Duda & Sons, to reimburse Battaglia for *some*[23] of its tax liabilities. By voluntarily agreeing to

---

[21] The Department does not agree with the reasoning in Lewis v. The Florida Bar. The Department believes that Justice England's dissent in that case was better reasoned. Nevertheless, even under the reasoning of the majority in that case, the decision does not apply to the facts here, which involve a true arms length negotiation between Battaglia and Orange County.

[22] The Florida Bar/Realtor accord standard contract, widely used by real property practitioners in this state, forms a basis for judicial notice that sellers ordinarily pay documentary stamp taxes on a deed. The Florida Bar, Florida Real Property Practice I, (Second Edition) §3.8 M., p. 72, (1971).

[23] Orange County did not agree to reimburse Battaglia for all of its tax liabilities, such as any income tax liability arising from "capital gains" on the transaction. Orange County should similarly have refused to reimburse Battaglia for documentary stamp tax liability. *See,* Fullilove v. United States, 71 F.2d 852 (5th Cir. 1934), which is discussed in A. Duda & Sons, supra, Appendix "C."

pay the tax, which had never been assessed against Orange County, Orange County waived any conceivable claim of immunity from its own contractual undertaking.

The Florida Bar decision is also distinguishable for a second reason: it involved separation of powers issues. The judicial branch of government is a co-equal branch of government to the Legislature, unlike Orange County, which is merely a creation of the Legislature,[24] Unlike the Florida Bar case, no separation of powers issue even arises in the instant case.

Finally, the Florida Bar decision is distinguishable because it predates the controlling amendment in question, which was designed, in part to overcome this particular decision. Moreover, it is important to remember that the Florida Bar decision was, from its inception, controversial. Indeed, Chief Justice England issued a strong dissent, stating in part:

> The department did not, as the Bar contends, attempt to circumvent the Bar's immunity or to do indirectly what it cound not do directly[25] when it sought to tax the bank in accordance with section 201.01.[26] It sought only to enforce an unambiguous statute against one of the several persons expressly liable for the tax. It is unprecedented,

---

[24] Article VIII, §1(a), Fla. Const., provides that Counties are inferior governments which may be entirely abolished by statute, without constitutional amendment.

[25] Given the facts of the instant case, which did not involve a co-equal branch of government, or any other provision of the Florida Constitution, the Florida Legislature could have waived the County's immunity by statute, and imposed a tax directly upon the local governments, but chose to tax nonimmune parties instead.

[26] Whether or not the statute was "unambiguous" before the amendment, as Chief Justice England stated, the statute is certainly unambiguous now that it has been amended.

> absurd, and probably unlawful to require the department of revenue to examine contracts of persons legally subject to the tax in order to ascertain whether the financial burden of the tax is shifted to another party. . . Until today, the taxability of this type of transaction- where one party to a loan is immune or exempt from tax was clearly proper in Florida.

The Florida Bar at 1123 (C.J., England, dissenting).

The Florida Bar decision was controversial because it departed from earlier Florida and federal decisions. Compare, Florida Bar with Plymouth, supra, and Choctawhatchee, supra, and the federal case law cited therein. Although State v. Green, supra, immunized from documentary stamp tax liability virtually any transaction involving the federal government, the Florida Bar decision extended this transactional immunity rationale to co-equal branches of government.

The decision of this Court in Lewis v. The Florida Bar furthered the process of eroding the State's tax base. This process first started with a misreading of federal authorities in State v. Green, supra. However, the erosion of the state's tax base did not stop with the decision in Lewis v. the Florida Bar.

The State's formerly recognized ability, to collect documentary stamp taxes from a *nonimmune, nonexempt party*, was *further* diminished in 1980. In that year, a Sarasota Circuit Court extended the *transactional immunity* rationale of State v. Green and Lewis v. The Florida Bar to a local branch of government in Arvida Corporation v. Department of Revenue, 378 So.2d 355 (Fla.

2d DCA 1980), affirmed, without opinion.[27] The Circuit Court of Sarasota County held that no tax could be imposed on a transfer of land from Arvida to the *county* under threat of condemnation. The Circuit Court disregarded the "legal incidence"[28] of the tax and held that the entire *transaction* was exempt.

Prior to Arvida, the Department's rules had provided that *judgments and decrees* vesting real property in a condemnor are exempt from the documentary stamp tax. Fla. Admin. Code Rule 12B-4.14(15). This rule was premised on the *nonexistence of a taxable document or deed*, and *not* upon any erroneous notion that taxing the transaction would deprive a party of "full compensation" or "just compensation."[29] *See*, 1958 Fla. Op. Att'y Gen. 058-31 (January 28, 1958). See also, R:122. However, *deeds* issued under threat of condemnation were treated as taxable to the nonexempt, nonimmune party under the Department's rules. See, Fla. Admin. Code Rule 12B-4.13(4); R:122.

---

[27] The *per curiam* affirmation in Arivida does not constitute precedent. *See*, Department of Legal Affairs v. District Court of Appeals, 434 So.2d 310 (Fla. 1983). Nevertheless, the Department, while disagreeing with the decision, could not simply ignore it. This decision was therefore reflected in amended (now *superceded*) rules, upon which the Circuit Court erroneously relied. R. 119. The *per curiam* decision in Arvida is also discussed herein because Department of Revenue v. Florida Municipal Power Agency, 473 So.2d 1348 (Fla. 1st DCA 1985) discussed and relied upon this decision.

[28] The "legal incidence" of a tax refers to the person upon whom the statutes impose tax liability, without regard to contractual shiftings of liability between parties.

[29] The "full compensation" issue is separately addressed in A. Duda & Sons, Inc., and in a later section of this brief.

After Arvida, the Department's rules were amended to conform with this adverse decision, and these amended rules, together with the Arvida and Florida Bar decisions, formed the basis of the Court's decision in Department of Revenue v. Florida Municipal Power Agency, 473 So.2d 1348 (Fla. 1st DCA 1985). R. 122. In the Florida Municipal Power Agency case, the Court held that the Department could not impose a documentary stamp tax on a nonimmune party to a deed where that deed was equivalent to one executed under threat of condemnation.

Respondent erroneously argued below that the words "unless exempt. . . under any state or federal *law*," which appear in the amendment, should be broadly construed so as to include all "common law" exemptions. However, the District Court in A. Duda & Sons, properly rejected this erroneous and strained construction.

The District Court's rejection of Respondents' statutory construction argument (both in the instant case and in A. Duda & Sons) is correct for various reasons. First, this Court has previously rejected the argument that the words in a statute *unless otherwise provided "by law,"* should include case law. *See,* Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979).

Second, as discussed previously, Respondents' construction would render the entire amendment meaningless. The *preamendment* case law provides for *transactional tax immunity* where a tax immune body is a party to the transaction. In contrast, the plain language of the *amendment* specifically *rejects* a transactional standard and provides instead that the nonexempt, nonimmune party to the transaction *should pay* the tax.

It was undisputed below that Battaglia, unlike Orange County, was a nonexempt, nonimmune party to the transactions giving rise to the assessments at issue.[30] Moreover, Battaglia did *not* argue below that the particular deeds at issue fell within the exemption created by §201.24, Fla. Stat. (1987), which pertains solely to governmental *debt*. In fact, Battaglia did not cite any statutory provision which would have exempted them from the plain language of the amendment.

Battaglia's statutory construction arguments were rejected as without merit because these arguments ignored the first principle of statutory construction: that legislative intent must be determined primarily from the plain language of a statute.[31] The generally acknowledged reason for the plain language rule is that the Legislature must be assumed to know the meaning of the words and to have expressed its intent by the use of the words found in the statute. Thayer v. State, 335 So.2d 815 (Fla. 1976); S.R.G. Corporation v. Department of Revenue, 365 So. 2d 687 (Fla. 1978). Where the legislative intent as evidenced by the statute is plain and unambiguous, there is no necessity for any construction or interpretation of the statute, and the courts

---

[30] Battaglia did not claim to be a tax immune government or other tax-exempt entity.

[31] The District Court went into greater detail on statutory construction in the related A. Duda & Sons, Appendix "C." In the instant case, the District Court merely noted that there were several arguments which it found to be without merit, without itemizing those arguments.

need only to give effect to the plain meaning of its terms. State v. Eagan, 287 So.2d 1 (Fla. 1973).[32]

Both the Circuit Court and the District Court also rejected Battaglia's fallback argument that a rule *predating* the controlling amendment could be used in order to "construe" the plain and unambiguous amendment. R:101, paragraph 6. Florida Administrative Code Rule 12B-4.014(b), repealed after enactment of the amendment, provided that, under the *pre-amendment* statute and accompanying case law, a deed given under threat of condemnation was exempt to all parties. It is self-evident that a rule predating a statutory amendment can shed no light upon the meaning of a subsequent amendment.[33]

By relying upon a superceded rule provision, Battaglia also ignored a well-established principal that rules can *not* enlarge, modify or contravene the provisions of a statute. To the extent that the Department's rule purported to exempt Battaglia from tax, in contravention of the clear provisions of the statutory amendment, the rule was invalid. Department of Natural Resources

---

[32] It is apparent from reading the District Court's decision in A. Duda & Sons, Appendix "C," and the decision in the case before this Court, Appendix "D," that the District Court entirely agreed with the Department on the issue of statutory construction.

[33] After the passage of the controlling statutory amendment, the Department withdrew the statutorily superceded rule provision, in effect, revising its rule to reflect the change in the statutes.

v. Wingfield Development, 581 So.2d 193 (Fla. 1st DCA 1991).[34]

Moreover, Respondents placed undue reliance upon case law *predating* the amendment,[35] when the very purpose of the legislature in enacting the amendment was to overcome recent cases and return to an earlier body of law. The intent to substantially change the law is evident from the plain language of the amendment, and from the legislative history.

Prior to the amendment, although no exemption existed in the statutes, no provision existed in the statute expressly stating that when a nonimmune and an immune party engaged in an otherwise taxable transaction, the nonimmune, nonexempt party would pay the tax. In contrast, the amendment expressly states that the nonexempt, nonimmune party should pay the tax, even though the exempt or immune party need not pay the tax.

This intent, to overcome recent case law, and return to an earlier body of law, is evident from Senate Committee Staff Reports filed by the Department. The Committee Substitute for Senate Bill 142, Staff Report of the Committee on Finance,

---

[34] As a final point, the Department wishes to squarely address an unrelated question as to whether the Department was estopped by its rule from enforcing the statute. The Department was not estopped because a mistatement of law can not give rise to estoppel. State, Dept. of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); Austin v. Austin, 350 So.2d 102 (Fla. 1st DCA 1977), *cert. denied*, 357 So.2d 184 (Fla. 1978). In the event of a conflict between a rule and a statute, the statute prevails. *See*, A. Duda & Sons, Appendix "C."

[35] Respondents erroneously rely upon Florida Municipal Power Agency, *supra*, and The Florida Bar, *supra*, which are distinguishable cases interpreting and applying preamendment statutes in light of the preamendment departmental rules. The Florida Bar decision is also distinguishable for the other reasons set forth previously.

Taxation and Claims, dated May 7, 1987, and attached hereto as Appendix "B" provides:

> 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.[36] *Early* Florida Supreme Court cases *upheld this principle.* But in 1986[37], the Florida Supreme Court declared that all parties to documents representing transactions in which governmental entities were parties were totally exempt from the documentary stamp tax and that the department was prohibited from collecting the tax on such documents.
>
> Proposed Changes:
>
> 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. (e.s.)

As the emphasized portion of the Staff Report demonstrates, the purpose of the amendment was to overcome recent Florida case law and to return Florida to an earlier body of law.

It is well-settled in Florida that he who would shelter himself under an exemption from a taxing statute must show clearly that he is entitled under the law to the exemption. Further, the law is to be strictly construed as against the person claiming the exemption and in favor of the taxing power. Green v. Pederson, 99 So.2d 292 (Fla. 1954). While doubtful language in taxing statutes should be resolved in favor of the

---

[36] *See*, the dissenting Opinion of Chief Justice England in the Florida Bar decision, wherein he states "[u]ntil today, the taxability of this type of transaction-where one party to a loan is immune or exempt from tax-was clearly proper in Florida." *See also*, Plymouth and Choctawatchee decisions, *supra*.

[37] The Department asserts that the 1986 *date is in error*, as no Florida Supreme Court case corresponding to this date and issue exists. The Florida Bar and Florida Municipal Power cases most clearly fit the description in the staff report.

taxpayer, the *reverse* is applicable in the construction of exemptions and exceptions from taxation. United States Gypsum Co. v. Green, 110 So.2d 409 (Fla. 1959); Straughn v. Camp, 293 So.2d 689 (Fla. 1974); Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); and State ex. rel. Szabo Food Services of North Carolina, Inc. v. Dickinson, 286, So.2d 529 (Fla. 1973).

Although the District Court agreed with the Department and the Circuit Court on the issue of statutory construction, it erred in determining that the statute was unconstitutional as applied.

B. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT A CONTRACT, TO WHICH THE DEPARTMENT WAS *NOT* A SIGNATORY, DETERMINED THE LAWFULNESS OF THE DEPARTMENT'S ASSESSMENT.

The District Court premised its entire opinion on a single irrelevant fact: that Orange County had voluntarily agreed, in a contract to which the Department was not a party, to reimburse Battaglia for its documentary stamp tax liability. Orange County entered this agreement even though *sellers* ordinarily pay the documentary stamp taxes on a deed.[38]

The facts in A. Duda & Sons are practically identical to the instant case. In A. Duda & Sons, as in the instant case, the Department had assessed documentary stamp tax liability against a private company on deeds executed to a county (and to another immune body) "in lieu of condemnation."

---

[38] This Court can judicially notice that while buyers ordinarily pay taxes associated with financing, sellers ordinarily pay taxes on a deed. The Florida Bar/Realtor accord form contract is an industry standard for purposes of judicial notice. The Florida Bar, Florida Real Property Practice I, supra.

The only factual difference between A. Duda & Sons and the instant case is that in A. Duda & Sons, the governments involved, unlike Orange County, did *not* contractually agree to reimburse the private party for its documentary stamp tax liabilities. Under these very similar facts, the same District Court found that the assessment against Duda was lawful.

Under the District Court's erroneous reasoning in the instant case, the validity of the assessment is not dependent upon any provision of the Florida Constitution, any provision of the Florida Statutes, or any action or inaction by the Department of Revenue. Instead, the District Court erroneously reasoned in the instant case that the validity of the Department's assessment hinges upon the actions taken by third parties in negotiating agreements, and it does not matter that the Department was not part of the negotiations, or that the Department did not sign the actual agreements.

If the District Court's erroneous opinion in the instant case is permitted to stand, parties will have it within their power to nullify tax assessments by contract. Under the District Court's opinion, a taxpayer would easily be able to obtain an agreement from the County to reimburse its tax expenses, and this transactional immunity would then extend to private parties as well. This is obviously not what the Legislature had in mind when it enacted the amendment to §201.01, Fla. Stat., (1987), which provides:

> 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 nonexempt party to the document.* (e.s.)

Giving a taxpayer the power, through an agreement with a third party, to nullify tax assessments is contrary to the holding in Department of Revenue v. Florida Municipal Power Agency, 473 So.2d 1348 (Fla. 1st DCA 1985). Although the Department does not agree with the entire holding in that decision, the Department does agree with the First District Court's reasoning when it held, at page 1351:

> As to the third and final issue, we agree with DOR that the fact that the parties to the transaction have entered into effective agreement between themselves as to which of the parties will pay the documentary stamp tax, should not and does not mean that such agreement is effective against DOR.

The District Court misconstrued the Florida Bar decision as being inconsistent with the concept set forth in Florida Municipal Power Agency, supra. The Florida Bar decision was limited to certain contracts of adhesion involving loan transactions. This is because lenders "universally require" borrowers to pay documentary stamp taxes in connection with loans. In contrast, buyers of real property, including governmental buyers excersizing their right to threaten condemnation, do not universally agree to reimburse taxpayers for related tax expenses.

2. FULL COMPENSATION

Battaglia argued below that if it had been forced to pay documentary stamp taxes due and owing on a deed in lieu of condemnation, as required by §201.01, Fla. Stat., then this would have impaired its right to "full compensation" under Art. X, §6, Fla. Const.

As the District Court in A. Duda & Sons correctly noted, documentary stamp taxation of a deed executed in lieu of condemnation is no different constitutionally than the constitutional taxation of income arising from condemnation proceedings. The tax burden on "involuntary" sellers should be no different than that which is imposed upon any other seller for fair market value. Condemnation should not result in special tax breaks or in tax-free profits.

Statutory and case law squarely permit income taxation of capital gains arising in the circumstances of the instant case where a deed is given, for consideration, under threat of condemnation. See, I.R.C. §1033(a)(2) and §220.13, Fla. Stat., which permits corporate income taxation, at the federal and state levels, of capital gains income arising from the proceeds of a condemnation proceeding.[39]

In Fullilove v. United States, 71 F.2d 852 (5th Cir. 1934), the Fifth Circuit rejected a "just compensation"[40] challenge to income taxation of capital gains arising in connection with eminent domain proceedings. In Fullilove, the Fifth Circuit held that where the taxpayer failed to reinvest the proceeds of forced sale in like kind property, the taxation of capital gains income arising from the sale did *not* deprive the taxpayer of its right

---

[39] Although the income tax statutes permit a *deferral* of capital gain where the proceeds are promptly reinvested in like kind property, the proceeds are never tax *exempt* or immune, and where, as here, the proceeds are not reinvested in like kind property, there is no deferral either.

[40] There is no reason to believe that "just compensation" under the federal constitution varies greatly from "full compensation" under the Florida constitution.

to "just compensation." The Fifth Circuit's holding in Fullilove is consistent with the principles established in Florida eminent domain case law, that the right to receive "full compensation" is not absolute. See, Division of Administration v. Grant Motor Co., 345 So.2d 843 (Fla. 2d DCA 1977).

There is no logical reason why documentary stamp taxation of a deed given under threat of condemnation would be unconstitutional, where taxation of the capital gains income arising from the same transaction would be constitutional. The right to receive "full compensation" or "just compensation" simply does not include the right to tax-free proceeds.

In a voluntary sale, profits and proceeds are taxed. To receive "full compensation" or "just compensation," the involuntary seller should be treated as well as the voluntary seller for fair market value. Granting tax-exempt status to the proceeds of sale is not only contrary to the plain language of the amendment, but also, gives the involuntary seller *more* than just compensation since he, unlike any other seller, would be receiving special tax breaks not available to other sellers for fair value.

C. THE DISTRICT COURT ERRONEOUSLY ASSUMED THAT IT WOULD BE *UNCONSTITUTIONAL* FOR THE LEGISLATURE TO *WAIVE* THE IMMUNITY OF A COUNTY FROM TAXATION.

The Department has previously explained that it did not tax Orange County. R:99, paragraph 12. Although Orange County voluntarily agreed in a contract to reimburse Battaglia for some of its tax liabilities, this agreement did not affect the Department, which had never signed the agreement.[41] Nevertheless, the contract, to which the Department was not a party, formed the basis for the District Court's erroneous conclusion that the assessment against Battaglia was *unconstitutional*.

The District Court erroneously concluded, because of a contract, that the Department was engaged in an unconstitutional form of "indirect taxation" of Orange County. The Department denies this. However, even if, *arguendo*, the Department had indirectly taxed Orange County, any such immunity from indirect taxation has been expressly waived by statute.

Any immunity which is not constitutionally based can be waived by statute. The Department does not dispute that some immunities are indeed constitutionally based. For example, the immunity of the United States Government from unconsented state taxation is based upon the Supremacy Clause of the United States Constitution. The immunity of the Florida Courts from taxation is founded upon the separation of powers contained within the basic framework of the Florida Constitution. *See, e.g.* Lewis v.

---

[41] The Department assessed the tax against Battaglia, obtained judgment against Battaglia and then received payment from Battaglia. R:31-35; R:104-106.

The Florida Bar, *supra.* Similarly, certain municipal property is specifically exempted from taxation under Art. VII, §3(a), Fla. Const.

In contrast to the constitutionally based immunities of the federal government and the Courts, the immunity of a county from excise taxation is not specifically found in the Constitution and can be lawfully *waived* by the Legislature, by statute. There is nothing in the constitution which immunizes a County from direct or indirect excise taxation. Moreover, it is clear from the constitution that Orange County is a creature of statute [42] only, and thus, its immunities may be *waived* by statute.

Any incidental impact upon Orange County arising from the taxation of Battaglia is a result of Orange County's own actions. Therefore, Orange County's immunity from the alleged indirect taxation has been *waived twice*: (1) through Orange County's own *voluntary* agreement to reimburse Battaglia for the tax, and also, (2) through the legislative enactment of the 1987 amendment.

The 1987 amendment clearly *waives* any immunity which Orange County enjoys from the alleged indirect taxation. The District Court erroneously declared these waivers unconstitutional. However, this error was predicated upon a misreading of precedent.

One of the cases misconstrued by the District Court was State v. Alford, 107 So.2d 27 (Fla. 1958). In that decision, the Supreme Court was faced with the question of whether certain

---

[42] Article VIII, §1(a), Fla. Const.

lands belonging to the Constitutionally created Game and Fresh Water Fish Commission[43] could be taxed by Charlotte County pursuant to a statutory amendment. The County argued that authorization to impose the tax was provided by law. In finding that the tax could not be lawfully imposed, the Supreme Court held:

> That, within constitutional limits, the Legislature may provide for the taxation of lands or other property of the State, is readily conceded. The question arises, however, whether the subject act actually does so provide.

Alford, at 29.

The District Court erroneously cited the State v. Alford case for the proposition that the Legislature lacks the power to tax a county. If anything, State v. Alford teaches us that the Legislature can *waive* any tax immunity of a county, by statute, absent some constitutional prohibition.

This Court should look behind the general *label* of "immunity" and determine the underlying basis for the "immunity." If Orange County's immunity was specifically constitutionally based, then this could be a problem with any statute purporting to waive the immunity. However, *since Orange County's immunity is not so based, the only issue (other than whether Orange County was taxed to begin with) is whether there has been statutory waiver of any such immunity.*

In the words of this Court in State v. Alford, at page 29:

> Although our statutes specifically exempt such state owned lands, such exemption is not dependent upon statutory or constitutional provisions but rests upon broad grounds of fundamentals in government.

---

[43] The Game and Fresh Water Fish Commission, unlike Orange County, can not be abolished without constitutional amendment.

(footnote ommitted)

If an immunity is based "upon broad grounds of fundamentals in government," rather than on the constitution, then, this type of nonconstitutional immunity can be waived by statute. The immunity of Orange County from alleged "indirect taxation" was the type of immunity which the Legislature can, and did, lawfully waive.

The decision in Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975) was also misconstrued by the District Court. Dickinson actually supports the Department's proposition that the Legislature can *waive*, by statute, any nonconstitutional immunity.

Dickinson involved an effort by a city to tax the State. [44] Nevertheless, one issue in Dickinson, as in the instant case, was whether the Legislature had *waived* an immunity. In the instant case, the District Court misread the Dickinson decision and misidentified the issues. The issue is not whether Orange County is immune. The issues are whether Orange County's immunity has been *waived*, either by contract or by statute, and whether Orange County has been taxed at all.

The decision in Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571 (Fla. 1959) which was cited by the District Court, is distinguishable. In that case, the County had agreed in a land lease that the tenants would not be obligated to pay certain

---

[44] Just as a city is inferior to the State, a county is likewise inferior to the State and, accordingly, are subject to the legislative prerogatives in the conduct of their affairs. Weaver v. Heidtman, 245 So.2d 295 (Fla. 1st DCA 1971).

County ad valorem taxes or municipal taxes. Business competitors of the tenants, who leased from private entities, and who did not enjoy the same tax exemption (conferred by contract) filed suit. The Court ruled that the County was immune from taxing itself, and that it could not renege on its contract and tax its tenants.

Park-N-Shop is distinguishable because the Department never entered into a contract excusing Battaglia from payment of its taxes. While Orange County agreed to reimburse Battaglia for its tax liability, the Department never agreed to this arrangement between Battaglia and Orange County.

The District Court also erroneously relied upon Orlando Utilities Commission v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1970) and City of Orlando v. Hausman, 534 So.2d 1183 (Fla. 5th DCA 1988) for the proposition that the Legislature lacks the authority to *waive* a county's immunity from taxation. Those cases, unlike the case before this Court, involved the scope of a *specific constitutional* exemption of certain municipal property from ad valorem taxation. The Court in those cases merely found the exemption in question to be inapplicable. These cases are completely irrelevant to the issues presented here.

The District Court also cited Cohen-Ager, Inc. v. Department of Revenue, 504 So.2d 1332 (Fla. 1st DCA 1987) for the erroneous proposition that the Legislature lacks the authority to *waive* the immunity of a County. That case held that a certain reconveyance by a contractor back to the County was not exempt from documentary stamp tax, even though this would increase the county's cost of completing the project. This case does not address the issues presented here.

Only one other authority was cited by the District Court for the erroneous proposition that the Legislature lacked the authority to *waive* the immunity of a County. The District Court cited Andrews v. Pal-Mar Water Control District, 388 So.2d 4 (Fla. 4th DCA 1980). That case simply held that a water management district, as an immune entity, was entitled to a refund of certain ad valorem taxes which it had been directly assessed and which it had directly paid. This case does not support the proposition that the Department's actions constitute "indirect taxation." This case also does not support the proposition that a County's immunity from direct or "indirect" taxation can not be *waived*.

In summary, both Dickinson and Alford held *that immunity could be waived* by a proper legislative enactment. Unlike the general act in Dickinson, and the special act in Alford, the legislative waiver is clear in Chapter 87-102, §6, Laws of Florida.

CONCLUSION

WHEREFORE, the Department prays that this Court reverse the decision of the District Court, based upon the points of error discussed within this brief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Joseph C. Mellichamp, III
Senior Asst. Attorney General
Jeffrey M. Dikman*
Fla. Bar #274224
Assistant Attorney General
Department of Legal Affairs
The Capitol-Tax Section
Tallahassee, FL 32399-1050
(904) 487-2142

* COUNSEL OF RECORD
FOR THE PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief has been furnished by regular U.S. Mail, first class postage pre-paid addressed to: **Scott E. Wilt, Esq.**, MAGUIRE, VOORHIS & WELLS, P.A., P.O. Box 633, Orlando, Florida 32801 this 23rd day of November, 1992.

Jeffrey M. Dikman
Assistant Attorney General

APPENDIX

presented for recording. The clerk shall note the amount received upon the instrument. If the instrument is being recorded in more than one county, the tax may be paid to the clerk of circuit court in any such county; and upon request, such clerk shall notify the clerks of circuit court in the other counties as to such payment.

(b) Where no instrument is recorded, the tax shall be paid to the department as provided by rule~~, which shall give a receipt~~.

(c) No later than 7 working days after the end of each week, ~~On or before the 20th day of each month~~, each clerk shall transmit to the department all nonrecurring intangible taxes collected during the preceding week ~~month~~, together with a report certifying the amount of tax collected with respect to ~~list of~~ all instruments upon ~~the recording of~~ which the tax was paid. Each clerk shall be compensated 0.5 percent of any tax he collects under s. 199.133 as collection costs in the form of a deduction from the amount of tax due and remitted by him, and the department shall allow the deduction to the clerk remitting the tax in the manner as provided by the department.

Section 5. Subsection (7) of section 199.282, Florida Statutes, 1986 Supplement, is amended to read:

199.282 Penalties for violation of this chapter.--

(7) Interest and penalties attributable to any tax shall be deemed assessed when the tax is assessed. Interest and penalties shall be collected in the same manner as tax. The department may settle ~~waive~~ or compromise tax, interest, or penalties under the provisions of s. 213.21 ~~paragraph (3)(b), except that the penalty imposed under paragraph (3)(b) shall not be waived or compromised~~.

Section 6. Section 201.01, Florida Statutes, is amended to read:

201.01 Documents taxable, generally.--There shall be levied, collected, and paid the taxes specified in this chapter, for and in respect to the several documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things described in the following sections, or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing, or thing, or any of them, is written or printed by any person who makes, signs, executes, issues, sells, removes, consigns, assigns, records, or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, recorded, or shipped in the state. 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 nonexempt party to the document. The documentary stamp taxes required under this chapter shall be affixed to and placed on all recordable instruments requiring documentary stamps according to law, prior to recordation. With respect to mortgages or trust deeds which do not incorporate the certificate of indebtedness, a notation shall be made on the note or certificate that the tax has been paid and that the proper stamps have been affixed to the mortgage or trust deed.

Section 7. Section 201.05, Florida Statutes, is amended to read:

201.05 Tax on stock certificates.--

APPENDIX A

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

SUBJECT:

Tax Administration

BILL NO. AND SPONSOR:

CS/SB 142 by Senate FT&C and Senator Deratany

I. SUMMARY:

Sections 1, 9, 10, and 13. 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.

Sections 2 and 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 and 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.

Under s. 201.11(2), F.S., agents of the Department of Revenue who collect the documentary stamp tax may retain 0.5 percent of

taxes collected as a collection allowance. No such provision exists for clerks of circuit courts who collect and remit intangibles taxes.

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. Clerks may retain 0.5 percent of any intangibles tax they collect on a collection allowance.

Sections 5 and 13. 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 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 Changes:

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 and 14. 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 and s. 201.04(2), F.S., defining "stock" is transferred to s. 201.05 under which a tax is imposed on stock certificates.

Section 10. Confidentiality and Information Sharing

Present Situation:

Under s. 213.053, F.S., all information contained in returns, reports, accounts, or declarations received by the Department of Revenue is confidential except for official purposes. The department may disclose such information to the taxpayer who provided the information; to the Comptroller; to the Secretary of the Treasury, to the Commissioner of Internal Revenue, or the Secretary of the Department of the Interior, of the United States, or any state for official purposes; to the Auditor General; to the Division of Alcoholic Beverages and Tobacco in the Department of Business Regulation; or to anyone pursuant to an order of a judge of a court of competent jurisdiction or a subpoena duces tecum. All such disclosures must be related to official duties.

Proposed Changes:

The Department of Revenue is authorized to disclose taxpayers' names and addresses within affected taxing boundaries to the governing body of a county or subcounty district levying a local option tax or any state tax distributed to local governments based on placed of collection. The local government must request the disclosure by resolution which shall provide for the same confidentiality and penalties for violating confidentiality to which the department is subject.

Section 12. 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 11. 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

The dealer collection allowance for the intangibles tax will result in a loss from General Revenue of approximately $284,000 in 1987-88 and $310,000 in 1988-89, and from the Revenue Sharing Trust Fund for Counties of approximately $347,000 in 1987-88 and $378,000 in 1988-89.

III. COMMENTS:

The act will take effect upon becoming a law.

IV. AMENDMENTS:

None.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

FLORIDA DEPARTMENT OF REVENUE,

Appellant,

v. CASE NO. 91-2585

A. DUDA & SONS, INC.,

Appellee.

_____/

Opinion filed October 30, 1992

Appeal from the Circuit Court
for Seminole County,
C. Vernon Mize, Jr., Judge.

Victoria L. Weber, General Counsel and
Lisa R. Echeverri, Assistant General
Counsel, Department of Revenue, Tallahassee,
and Robert A. Butterworth, Attorney General,
Joseph C. Mellichamp, III, Senior Assistant
Attorney General, Jeffrey M. Dikman,
Assistant Attorney General, and Kevin J.
O'Donnell, Assistant Attorney General,
Tallahassee, for Appellant.

Darryl M. Bloodworth and Renee A. Roche
of Dean, Mead, Egerton, Bloodworth,
Capouano & Bozarth, P.A., Orlando, for
Appellee.

GOSHORN, C.J.

The Department of Revenue appeals from the final judgment entered in favor of A. Duda & Sons, Inc., pursuant to an order granting Duda's summary judgment motion. In the trial court, Duda successfully challenged the Department's assessment of documentary stamp taxes on certain conveyances made

to public entities under threat of condemnation. The Department argues the trial court erred (1) in ruling that section 201.01, Florida Statutes (1987) as amended was ambiguous; (2) in holding that Duda's constitutional right to full compensation would be impaired if Duda was required to pay documentary stamp taxes; and (3) in permitting Duda to rely upon the tax immunity of an exempt governmental body. We reverse.

In 1988, Duda executed three deeds in favor of public entities under threat of condemnation. No documentary stamp tax was paid on any transaction. The parties agreed that no documentary stamp tax was due on the first deed to Brevard County because no consideration was paid. However, in 1989, the Department assessed Duda with liability for documentary stamp taxes, interest, and penalties totalling $68,925.33 on a second deed to Brevard County and on a deed to the St. Johns River Water Management District. In October 1990, the Department agreed to abate the penalties totalling $14,193.80, but upheld its assessment of documentary stamp taxes. Duda filed a declaratory judgment complaint asking that the trial court declare no stamp taxes are due. After a hearing, the trial court entered judgment in favor of Duda, agreeing that the statutory authority for assessing the tax was ambiguous and must be construed in favor of Duda and that payment of the tax by Duda would have impaired Duda's constitutional right to full compensation. The trial court concluded that section 201.01 as applied was unconstitutional.

Section 201.01, Florida Statutes (1991) provides that specified taxes must be levied and collected on certain documents. It provides in pertinent part:

> 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 docu-

> ment taxable under this chapter, any tax specified in this chapter shall be paid by a nonexempt party to the document. The documentary stamp taxes required under this chapter shall be affixed to and placed on all recordable instruments requiring documentary stamps according to law, prior to recordation. With respect to mortgages or trust deeds which do not incorporate the certificate of indebtedness, a notation shall be made on the note or certificate that the tax has been paid and that the proper stamps have been affixed to the mortgage or trust deed. [Emphasis added].

The underlined portion of the statute became effective on June 30, 1987. Ch. 87-102, §§ 6, 29, Laws of Fla. It is undisputed that this amendment was in effect on the date of the conveyances at issue.

However, a problem arises because a contrary Department of Revenue rule was also in effect at the time of the conveyances. Florida Administrative Code Rule 12B-4.14(15)(b) provided that a conveyance of realty to a municipality, county, state, or the United States made "under threat of condemnation" was not subject to the documentary stamp tax. The Department of Revenue did not amend its rules to conform with the amended statute until 1989.[1]

Duda successfully argued to the trial court that the 1987 amendment to section 201.01 was ambiguous and that the legislative intent of the amendment was unclear. The asserted ambiguity stems from the failure of the statute to expressly address transactions made under threat of condemnation. Duda also construes the phrase "unless exempt under section 201.24 or under any state or federal law" to include case law exemptions predating the 1987 statutory amendment, not just statutory exemptions. Duda does not contend that the

---

[1] Currently, Rule 12B-4.014 provides that judgments and decrees in eminent domain proceedings by which title to real property is vested in the condemnor are not subject to the documentary stamp tax unless a deed is given. Rule 12B-14.002(3) explicitly states that a city, county, or the state is not liable for the tax on a taxable transaction, but the transaction itself is not exempt. The nonexempt party to the transaction is liable for the tax.

deeds are exempt under the provisions of section 201.24, which relate to governmental debt, nor has Duda cited any other statutory provision which would exempt the deeds from the plain language of the statute.

We find Duda's arguments without merit. First, the language of section 201.01 is clear. If a political subdivision of the state is a party to a taxable deed transaction, the tax must be paid by the nonexempt party to the document. This language is broad enough to encompass conveyances made under threat of condemnation. We reject the suggestion that every possible transaction giving rise to a taxable document must be listed in the statute for the transaction to be covered by the statute.

Second, a conflict between a statute and an administrative rule, which rule was promulgated prior to a statutory amendment and enacted in reliance on case law existing prior to the amendment, does not give rise to an ambiguity in the statute. In the event of a conflict between a statute and an administrative regulation on the same subject, the statute governs. Nicholas v. Wainwright, 152 So. 2d 458, 460 (Fla. 1963); Canal Ins. Co. v. Continental Casualty Co., 489 So. 2d 136, 138 (Fla. 2d DCA 1986). A regulation is operative and binding from its effective date "until it is modified or superseded by subsequent legislation . . . and it expires with the repeal of the statute from which it gains its life." Hulmes v. Division of Retirement, Dept. of Admin., 418 So. 2d 269, 270 (Fla. 1st DCA 1982), review denied, 426 So. 2d 26 (Fla. 1983). The regulation relied on by Duda was superseded by the 1987 statutory amendment and was of no force or effect on the date of Duda's

conveyances.[2] Thus, no conflict or ambiguity existed in the instant case. To the contrary, the plain statutory language governed.

Even assuming arguendo that some ambiguity exists in the statute, the legislature's intent in adopting the amendment is not in doubt. The Senate Staff Analysis and Economic Impact Statement, dated May 7, 1987, provides:

> 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 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 Changes: 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.

The legislature clearly intended to supercede any conflicting pre-1987 case law and return the law to its previous state, i.e., to make the nonexempt party liable for the documentary stamp tax unless that party is otherwise exempt under state or federal law.

Duda next argues that if it were required to pay the documentary stamp taxes, then it would be deprived of its constitutional right to full compensation. See Art. X, § 6(a), Fla. Const. ("No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."). See also U.S. Const. amend. V ("[N]or shall private property be

---

[2] Duda makes no argument that it was misled by or relied upon the regulation at the time that it entered into the agreement to sell its property.

taken for public use, without just compensation."). In response, the Department contends that the right to receive "full compensation" or "just compensation" does not include the right to receive tax free proceeds.

To support its contention, the Department relies on Fullilove v. United States, 71 F.2d 852 (5th Cir. 1934). In Fullilove, the plaintiffs sold land to the city "under the imminence of expropriation" at a price agreed upon by the parties. Id. at 853. The Internal Revenue Service taxed the plaintiffs on their profit. Id. The plaintiffs argued that

> if required to pay income taxes on the profit received from the sale of their land, they would to the extent of such payment be deprived of the just compensation secured to them by the Fifth Amendment to the Constitution of the United States, and by a similar provision of the Constitution of Louisiana.

Id. The court rejected the plaintiffs' argument, noting that the city had fully compensated the plaintiffs for their property and that the city could not have been required to pay more than its value:

> Appellants are not in [a] position to claim they did not receive just compensation for their land, since the price was fixed by an agreement to which they were parties. It makes no difference that, if they had not agreed upon a price and made the sale voluntarily, the city would have taken their property under the power of eminent domain. There is no claim on their part of coercion, or that they could have obtained a better price by going to court.

Id. at 854.

We agree with the Department's contention and find that the logic of Fullilove applies here. If taxation of capital gains realized from a sale made under threat of condemnation is constitutional, then no legal or logical reason exists why taxation of a deed given under similar threat is not also constitutional. Duda and the tax exempt public entities came to a voluntary agreement concerning a fair price, i.e., full compensation, for the property.

Full compensation for property taken by eminent domain consists of two elements, the value of the property taken and severance damages to the remainder, if any. Division of Admin., State Dept. of Transp. v. Grant Motor Co., 345 So. 2d 843, 845 (Fla. 2d DCA 1977). Full compensation is limited to payment for loss of tangible property. Id. at 846. As to intangibles, business damages and lost profits are not included in the term full compensation.

> The payment of compensation for intangible losses and incidental or consequential damages, however, is not required by the constitution, but is granted or withheld simply as a matter of legislative grace.

Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So. 2d 926, 928 (Fla. 1983).

In short, compensation is constitutionally required for the physical property taken, but recovery for intangible damages is governed by legislative largesse. The legislature has seen fit to require compensation for business damages under section 73.071, Florida Statutes (1991), and for costs, attorney's fees, and appraisal fees under section 73.091, Florida Statutes (1991). However, no statute provides for the recovery of the documentary stamp tax fees paid by the condemnee as a consequence of a forced sale. As previously noted, section 201.01 expresses the legislature's intent to the contrary. Accordingly, we hold that the imposition of the documentary stamp tax on a conveyance made pursuant to a voluntary agreement by the parties before the filing of a petition for eminent domain, does not impair or implicate the constitutional right to full compensation for property taken for public use.

REVERSED and REMANDED.

SHARP, W., J. and GRIDLEY, W. C., Associate Judge, concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

ORANGE COUNTY FLORIDA, BATTAGLIA FRUIT CO., INC., and BATTAGLIA PROPERTIES, LTD.,

Appellants,

v. CASE NO. 92-102

FLORIDA DEPARTMENT OF REVENUE,

Appellee.

_____/

Opinion filed October 16, 1992

Appeal from the Circuit Court
for Orange County,
W. Rogers Turner, Judge.

Scott E. Wilt of Maguire, Voorhis & Wells, P.A., Orlando, for Appellants.

Robert A. Butterworth, Attorney General, Joseph C. Mellichamp, III, Senior Assistant Attorney General, and Jeffrey M. Dikman, Assistant Attorney General, Tallahassee, for Appellee.

DIAMANTIS, J.

Appellants Orange County, Florida, Battaglia Fruit Co., Inc. and Battaglia Properties, Ltd. appeal the final summary judgment upholding the assessment of documentary stamp taxes imposed by appellee Florida Department of Revenue. We reverse.

On December 27, 1988 Battaglia Fruit Co., Inc. (BFC) and Battaglia Properties, Ltd. (BPL) each entered into an agreement with Orange County, Florida to sell parcels of real property to Orange County under threat of

condemnation and in lieu of eminent domain proceedings. Each agreement contains the following provisions regarding expenses of the sale:

> 7. Expenses of sale shall be apportioned as follows:
> (A) All taxes to the date of closing shall be paid by BUYER at closing.
> (B) Documentary stamps on the deed are not required because the Property is being acquired under threat of condemnation.
>
> * * *

Both parties agree that pursuant to the terms of this provision any documentary stamp tax must ultimately be paid by Orange County.[1]

Two warranty deeds were executed by BFC and BPL, and Orange County recorded the deeds. Neither party to the transaction paid documentary stamp taxes.

The Florida Department of Revenue (DOR) subsequently issued two notices of proposed assessment of tax, interest, and penalty[2] to BFC and BPL. BFC and BPL instituted an action challenging the assessment and seeking a declaration of their liability for payment of the assessments. BFC and BPL claimed that the assessment was improper because it would result in an indirect tax upon Orange County. Orange County was later added as a plaintiff to the action. Appellants and appellee both moved for summary judgment and agreed that there were no factual issues. The trial court entered final summary judgment in favor of DOR. Although appellants have raised several

---

[1] In setting forth the undisputed facts in its final judgment, the trial court stated that the agreements were executed by BFC and BPL under threat of condemnation and in lieu of eminent domain proceedings, and that Orange County is contractually liable to BFC and BPL for payment of the documentary stamp taxes at issue.

[2] DOR subsequently withdrew the assessed penalties.

points on appeal, we conclude that only one possesses merit and requires reversal of the trial court's order.

Appellants contend that DOR's assessment of tax is improper because Orange County is immune from direct taxation and therefore DOR may not, by assessing a tax on BPL and BFC, impose indirectly a tax that would be prohibited if imposed directly upon Orange County. DOR meanwhile contends that the tax is proper because it is imposed upon BFC and BPL pursuant to section 201.01 of the Florida Statutes (1989). DOR argues that Orange County is only immune from direct taxation and not from the indirect taxation which results from Orange County's contractual agreement with BFC and BPL to pay the documentary stamp tax.

It is well established that the state and its political subdivisions, like a county, are immune from taxation because there is no power to tax them. Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975); State ex rel. Charlotte County v. Alford, 107 So.2d 27 (Fla. 1958); Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla. 1957); City of Orlando v. Hausman, 534 So.2d 1183 (Fla. 5th DCA 1988), rev. denied, 544 So.2d 199 (Fla. 1989); Andrews v. Pal-Mar Water Control District Department of Revenue, 388 So.2d 4 (Fla. 4th DCA 1980); Orlando Utilities Commission v. Milligan, 229 So.2d 262 (Fla. 4th DCA 1969) cert. denied, 237 So.2d 539 (Fla. 1970). See also Cohen-Ager, Inc. v. State, Department of Revenue, 504 So.2d 1332, 1334 at n.3 (Fla. 1st DCA 1987) rev. denied, 518 So.2d 1274 (Fla. 1987). We recognize that section 201.01 as amended in 1987 provides for payment of the documentary stamp tax by the nonexempt party. However, Orange County is more than statutorily exempt from taxation: Orange County is immune from taxation. See Dickinson v. Tallahassee, 325 So.2d at 3; Park-N-Shop, Inc. v. Sparkman, 99 So.2d at 573-

574; City of Orlando v. Hausman, 534 So.2d at 1184; Orlando Utilities Commission v. Milligan, 229 So.2d at 264. A tax exemption emanates from the beneficence of the legislature and presupposes the power to tax, while immunity from taxation flows directly from the Constitution and is not subject to the ever-transitory and fleeting benevolence of the legislature.

In Lewis v. The Florida Bar, 372 So.2d 1121 (Fla. 1979), the Florida Bar executed a promissory note which was secured by a mortgage. The mortgage provided that the Florida Bar, as mortgagor, would pay all taxes, stamp tax, or other charges assessed under the mortgage. In Lewis, the Florida Supreme Court adopted the rationale of the district court and held that to impose a tax upon a note given by the Florida Bar, a tax-immune arm of government, where such body contractually agrees to pay the tax pursuant to the customary practice of lenders requiring borrowers to pay the tax, results in an unconstitutional application of the statute in that an indirect tax is levied upon a tax-immune body.[3]

In applying the rationale of Lewis to the instant case, it is clear that the imposition of a documentary stamp tax on the deeds given under threat of condemnation, where the tax-immune entity has contractually agreed to pay the tax,[4] results in an indirect tax upon that tax-immune entity. The imposition of a tax on the deeds under the circumstances of this case

---

[3] Appellee attempts to distinguish *Lewis* upon the ground that the Florida Bar, as an arm of the Florida Supreme Court, is a coequal branch of government. We reject this distinction because *Lewis* turns on the issue of immunity from taxation which flows from the coequality of the judicial branch of government.

[4] We agree with appellee that the agreement between the parties as to which of the parties will pay the documentary stamp tax does not bind appellee. However, this is not determinative of the case because appellee does not contest the fact that under the parties' agreement Orange County, a tax-immune body, must ultimately pay the tax.

constitutes an unconstitutional application of section 201.01 because the "legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." Lewis v. The Florida Bar, 372 So.2d at 1122.

Because of the rationale of Lewis and of the importance of this matter to the counties of the state and to the Department of Revenue,[5] we certify the following question to the Florida Supreme Court:

> 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, IS THE TRANSACTION IMMUNE FROM SUCH TAXATION EVEN THOUGH THE DEPARTMENT OF REVENUE IMPOSES THE TAX DIRECTLY UPON THE PROPERTY OWNER?

Accordingly, we reverse the trial court's order and remand this cause with directions to enter final summary judgment in favor of appellants.

REVERSED and REMANDED.

HARRIS, J. and McNEAL, R. T., Associate Judge, concur.

---

[5] Appellee argues that *Lewis* should be revisited and the dissenting opinion's analysis, which looks to the "legal incidence of the tax" to determine tax liability, should be adopted in this case regardless of the contractual agreement which requires Orange County to pay the tax. It is axiomatic that we are bound by *Lewis* regardless of whether we find the Department's argument to be worthy of consideration.