

097

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE,

Petitioner,

CASE NO. 80,685

vs.

5th DCA NO. 92-102

ORANGE COUNTY FLORIDA, et. al.,

Respondents.

APPEAL FROM THE DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON MERITS

FILED

SID J. WHITE

JAN 20 1993

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

Respectfully submitted,

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STATEMENT OF THE FACTS AND CASE

The material facts are not in dispute. R:97, Finding of Fact #1.¹ However, Respondents now allege on appeal, without any record authority, fact that Orange County was the "source" of funds deposited into the Court's Registry by Battaglia.² Compare, R:98, Finding of Fact 11 with Respondents' Brief at page 2.

The Department *agrees* with Respondents' statement, on page 2 of its Answer Brief that "[t]he Circuit Court did not make any finding about the *source* of those funds. The *source* of the funds has not been an issue in this case." (e.s.) Therefore, the statement by Battaglia regarding the source of the funds which it deposited into the Circuit Court's registry should be disregarded by this Court.

Moreover, contrary to Respondents' assertions, at page 2 of their Answer Brief, footnote 9 of the Department's Initial Brief does not "attempt" to make the "source" of the deposited funds an issue. See, Answer Brief, at page 2. The Department's footnote 9 clearly provides that the "source" of funds should not be controlling. See, Initial Brief, at page 13, footnote 9. The Department's position was that the assessment and judgment were against Battaglia, not against Orange County and that these are the controlling facts.

¹ The material facts are that the assessment and judgment were against Battaglia, not whether Battaglia or a third party paid that judgment. See, R:99, paragraph 12; R:31-35; R:34-35, attached as appendix "1"; R:98, paragraph 10, R:105.

² Battaglia *deposited* the funds into the Court's registry. These funds were later used to satisfy the Department's assessment and judgment *against Battaglia*. See, R:98, Finding of Fact 11.

SUMMARY OF ARGUMENT

I. ORANGE COUNTY COULD NOT CONTRACTUALLY IMMUNIZE BATTAGLIA FROM TAXATION.

Whether Orange County is "immune" from taxation or "exempt" from taxation is not an issue in this case. The undisputed facts are that Orange County was never taxed at all. R:99, paragraph 12; R:31-35; R:98, paragraph 10; R:105. Battaglia was taxed, and the tax against Battaglia was lawful. See, assessments, attached as appendix "1." Any contract between Orange County and Battaglia solely governed the rights of those parties vis-a-vis each other and could not "immunize" Battaglia from paying the assessment against it.

II. DEEDS EXECUTED UNDER "THREAT OF CONDEMNATION" ENJOY NO STATUTORY EXEMPTION NOR CONSTITUTIONAL IMMUNITY FROM TAXATION.

Orange County could have lawfully refused to reimburse Battaglia for its private documentary stamp tax liabilities (just as it did not agree to reimburse Battaglia for the capital gains tax liability, if any, arising from the sale). Other counties have refused similarly situated taxpayers. For example, in Florida Department of Revenue v. A. Duda & Sons, Case No. 91-02585 (Fla. 5th DCA October 30, 1992), attached as Appendix "C" to the Initial Brief, Brevard County and the St. Johns Water Management District did not agree to reimburse Duda for documentary stamp tax liability on a deed in "lieu of threatened condemnation." Orange County could have done the same thing.

The District Court in A. Duda & Sons correctly held that the refusal to reimburse Duda for the tax did not violate Duda's right to receive "full compensation," relying in part on Fullilove v. United States, 71 F.2d 852 (5th Cir. 1934).

ARGUMENT

I. ORANGE COUNTY COULD NOT CONTRACTUALLY IMMUNIZE BATTAGLIA FROM STATE TAXATION.

Contrary to Respondents' assertions, whether Orange County is "immune" from taxation or merely "exempt" from taxation is not even an issue in this case. The undisputed facts are that Orange County was never taxed at all.

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. See also, appendix "1" hereto. Similarly, the Final Judgment awards judgment against Battaglia, *not* against Orange County. R:98, paragraph 10: R:105.

There is no factual basis for Orange County's assertion that it was "taxed." The voluntary agreement by Orange County to reimburse Battaglia's private documentary stamp tax liabilities was an action taken by Orange County and Battaglia, not by the Legislature or by the Department.

Respondents concede that under Section 201.01, Fla. Stat. (1989), "[t]here would not be any blanket transactional tax immunity based on the mere fact that Orange County was a party to the deeds." Respondents' brief, at page 5. Nevertheless, Respondents erroneously argue that the Department could not tax Battaglia in this case, based upon negotiated terms of a contract to which the Department was not a party.

The private contract of parties should only govern the legal rights of parties who *sign* that contract vis-a-vis *each other*.³ Although Respondents realize that contracts do not bind nonsignatories, they ask this Court to prohibit the Department from taxing Battaglia, based upon the terms of a contract exclusively negotiated between Battaglia and Orange County.

If this Court accepts the erroneous threshold proposition that *freely negotiated* reimbursement contracts between a governmental body and a private party permit the private party to claim "indirect taxation" of an immune body, then wouldn't any such real estate and tax reimbursement contract, even outside the threat of condemnation, also bar the taxation of the private party?

If Orange County had also contractually agreed to reimburse Battaglia for the capital gains tax liability on this transaction-would this have immunized Battaglia from income tax liability, under a theory of "indirect taxation?" The answer is that, regardless of the generosity of Orange County in agreeing to reimburse Battaglia, whether for documentary stamp tax liability or income tax liability, this generosity of Orange County should not come at state expense.

³ See, Department of Revenue v. Florida Municipal Power Agency, 473 So.2d 1348, 1351 (Fla. 1st DCA 1985) where the Court reasoned: "[a]s 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."

In enacting Chapter 87-102, §6, Laws of Florida, the Legislature chose not to immunize private parties dealing with County government, and Orange County could not, by its *contract*, supercede the will of the Legislature and essentially "immunize" Battaglia from taxation.

The notion of "indirect taxation," which was first articulated in Lewis v. The Florida Bar, 372 So.2d 1121 (Fla. 1979)⁴ is erroneously relied upon by Respondents. Unlike the facts in Lewis (where the Court took judicial notice that lenders "universally" require borrowers to pay taxes on loan transactions) here, the Court can take judicial notice that *sellers ordinarily* pay documentary stamp taxes on a deed, although this is subject to negotiation.⁵

Although Respondents argue that condemning authorities routinely agree to reimburse for tax liabilities, this Court can take judicial notice of the now final decision⁶ of the Fifth District Court in A. Duda & Sons, (Attached to the Initial Brief as Appendix "C") wherein *other* governmental entities required the

⁴ The dissent correctly notes in Lewis v. The Florida Bar that prior decisions utilize the doctrine of "lawful incidence," rather than the economic impact test articulated in Lewis.

⁵ 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).

⁶ The Fifth District denied Duda's motion for rehearing or for certification. Duda now seeks discretionary review in this Court.

nonimmune seller to pay the tax.⁷ Duda also involved a deed executed in lieu of and under threat of condemnation, but the governmental entities in Duda did not agree to reimburse Duda for any of its personal tax liabilities. See, attached appendix "2."

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*⁸ of its tax liabilities. By voluntarily agreeing to pay the tax, which had never been assessed against Orange County, Orange County waived any claim of "indirect taxation."

Finally, Respondents have completely misunderstood the Department's argument when they state that "Petitioner argues that Orange County waived its immunity and must pay. . . ." Respondents' Answer Brief, at page 8. The Department has never asked Orange County to pay anything in this case. The Department

⁷ Respondents argue that the facts are unclear in the reported Duda decision as to *who* contractually agreed to pay the tax. The reported facts are sufficiently clear because Duda was the *only* party plaintiff. Duda argued that the taxes assessed against it deprived it of "full compensation" in a threatened condemnation. Also, Respondents and the District Court were earlier provided with a complete copy of the Circuit Court's findings of fact in Duda. See, appendix 2 hereto entitled "Department's Notice of Related Appeal," with attached Circuit Court order in Duda. This appendix is part of the District Court's record in the instant case and should be judicially noticed.

⁸ 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" to Initial Brief.

assessed Battaglia, and judgment was obtained against Battaglia. R:34-35; R:98, paragraph 10: R:105.

Contrary to Respondents' implications, the Department has never sought to "use" the contract between Orange County and Battaglia as a vehicle for taxing Orange County. If this were the Department's position, the Department would have issued the assessment against Orange County, on the theory that Orange County's immunity had been waived by statute and by contract. Instead, it is Orange County which seeks to "use" its contract to "immunize" Battaglia, thereby avoiding a contractual undertaking between Battaglia and Orange County for reimbursement.

Any immunity which Orange County enjoys from taxation is not transferrable to Battaglia. Battaglia should not be permitted by this Court to hide behind its contract with Orange County. Nor should Orange County be permitted to claim "indirect taxation," when no action was ever taken by the Department, directly or indirectly, to tax Orange County.

**II. DEEDS EXECUTED "UNDER THREAT OF CONDEMNATION"
ENJOY NO STATUTORY EXEMPTION NOR CONSTITUTIONAL IMMUNITY
FROM NONDISCRIMINATORY TAXATION.**

Respondents erroneously argue, in part II of their Answer Brief:

A. That the statutory phrases "deeds, instruments or writings" whereby "real property," is "conveyed," for "consideration"⁹ are ambiguous and should be construed so as to exclude deeds given under "threat of condemnation."

⁹ The words in quotation marks appear in Section 201.02, Florida Statutes, (1989).

B. That deeds given in lieu of condemnation proceedings and under threat of condemnation can not be constitutionally taxed.

These arguments will be separately addressed below.

A. THE TAX STATUTE IS CLEAR AND UNAMBIGUOUS.

The District Court correctly found, on page 2 of its Opinion, that "two warranty deeds" were executed by Battaglia. This finding was based upon the *undisputed* findings of fact of the Circuit Court that deeds were executed and recorded. See, R:98. Section 201.02, Florida Statutes (1989) defines the following documents to be taxable:

201.02 Tax on deeds and other instruments relating to real property or interests in real property.--

(1) On *deeds, instruments, or writings* whereby any lands, tenements, or other *real property*, or any interest therein, shall be granted, assigned, transferred, or otherwise *conveyed* to, or vested in, the purchaser or any other person by his direction, on each \$100 of the *consideration* therefor the *tax* shall be 55 cents. (e.s.)

There can be no doubt that warranty "deeds" were executed which "conveyed" "real property" for "consideration." These were undisputed factual findings of the Circuit Court relied upon by the District Court. See, R:98, and District Court's Opinion, at page 2. Battaglia's Complaint alleged that the "assessments relate to conveyances of real property made by Plaintiffs to Orange County, Florida." R:32, paragraph 6. There was never an argument over whether deeds had issued or over whether consideration was received. These were undisputed facts.

Moreover, there is simply no ambiguity in the above statute which would permit this Court to construe these particular "warranty deeds" to fall outside the definition of a "deed,

instrument, or writing" conveying "real property" for "consideration." This argument by Respondents, raised for the first time on this appeal, ignores the first principle of statutory construction: that legislative intent must be determined primarily from the plain language of a statute.

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

If the Legislature had wanted to narrowly define the phrase "deeds, instruments, or writings," so as to exclude those conveyances motivated by threat of condemnation (or motivated by some other reason favored by the Legislature), the Legislature could easily have done this. However, if the Legislature had this intent in mind, it would have more likely passed an exemption statute exempting such instruments from taxation.

Instead, the Legislature passed a broad and unambiguous tax statute whereby "deeds, instruments, or writings," which "conveyed" "real property" for "consideration" are taxable. Moreover, the Legislature chose not to pass an exemption statute for deeds executed "under threat of condemnation." This is all

clear from the plain, broad language of the tax statute, and the absence of an exemption statute altogether.

It is clear from §201.02, Florida Statutes, (1989) that the Legislature instead chose to tax all deeds and similar instruments conveying real property, based upon the amount of "consideration" received for the sale, rather than based upon the motivation for the sale.¹⁰

Apparently, the Legislature realized that sellers in condemnation situations receive (either in Court or by negotiation) the same *fair market value* "consideration" for their properties as ordinary sellers. This explains why the Legislature chose not to create a special tax break for persons or corporations selling "under threat of condemnation."

Congress made a similar decision to that made by the Florida Legislature when determining that income arising from condemnations or threatened condemnations should not go untaxed. See, I.R.C. §1033(a)(2), (1989). Although Congress, as a matter of legislative grace, permits, under narrow circumstances, a deferment of tax liability, there is no tax *exemption* given to income arising from condemnation situations.¹¹

¹⁰ Otherwise, a deed of commercial property given under threat of condemnation for \$10 million *fair market value* "consideration" would go untaxed while a voluntary sale of a modest home for *fair market value* might have to be taxed at a higher rate.

¹¹ "Just compensation" challenges to the constitutionality of the federal income tax statute (concerning condemnation and threatened condemnations) have been rejected. See, Fullilove v. United States, 71 F.2d 852 (5th Cir. 1934), which is cited in A. Duda & Sons (appendix "C" to Initial Brief).

Respondents' argument that this Court should perform reconstructive surgery on the statutory words "deeds, instruments or writings," so as to exclude the deeds which Battaglia, executed, conveying real property for good and valuable "consideration," should be rejected.

B. THERE IS NO CONSTITUTIONAL BAR TO TAXING BATTAGLIA.

Respondents erroneously argue that Battaglia's contractual negotiation for tax reimbursement could not be refused because of the "full compensation" clause contained within Article X, Section 6 of the Florida Constitution.¹² The District Court in Duda properly rejected an identical "full compensation" line of argument relying, in part, on the decision in Fullilove v. United States, 71 F. 2d 852 (5th Circ. 1934) (holding that "just compensation" under the United States Constitution was not impaired where Fullilove was assessed income tax liability on capital gains arising from a deed given under threat of condemnation).¹³

Now, Respondents argue that the Department is levying an ad valorem tax in violation of Article VII, §1(a), Florida Constitution. The Department did not levy an ad valorem tax. The Department assessed an excise tax under §201.02, Florida Statutes (1989) against Battaglia. See, copies of assessments,

¹² It is interesting that Brevard County and the St. John's Water Management District did not reimburse a similarly situated taxpayer in A. Duda & Sons. See, Notice filed with District Court, appendix "2" hereto.

¹³ This Department refers the Court to Part II of its Initial Brief for further discussion on the subject of "full compensation."

R:34-35, attached to Battaglia's Complaint and reattached hereto as Composite Appendix "1."

Apparently, Respondents base their theory on the unverifiable and irrelevant allegation¹⁴ that the judgment against Battaglia (which was paid out of moneys deposited into the registry of the Court by Battaglia) was satisfied from sums originally provided by Orange County to Battaglia, which Battaglia then used to deposit into the Court registry, in compliance with the bond requirement of §72.011, Florida Statutes.

Orange County should be estopped from arguing (without record support) that it put up Battaglia's §72.011 cash bond out of ad valorem proceeds and then arguing that the Department is levying an ad valorem tax when it receives payment from the Circuit Court registry funds. Like the contract between Battaglia and Orange County, the Department can not control these agreements and arrangements between other persons and should be free to proceed directly against a private taxpayer who executes a deed.

The Department has no way of knowing the origin of moneys deposited into the Court's registry under §72.011. Moreover, as Respondents concede, at page 2 of their brief, "the Circuit Court

¹⁴ As Respondents concede in their brief, at page 2 "the Circuit Court did not make any finding about the source of those funds. The source of the funds has not been an issue in this case." All that is known from the record is that Battaglia deposited funds into the Court's registry. R:98, Finding of Fact 11.

did not make any finding about the source of those funds. The source of the funds has not been an issue in this case."

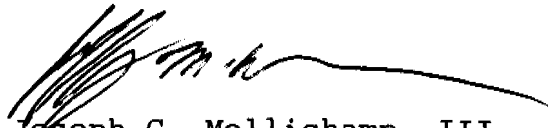
Even if, *arguendo*, the "judgment" was satisfied from the wrong funds, this would not affect the validity of the Department's assessment against Battaglia, which predated the judgment. At most, it would afford Orange County an opportunity to file a refund claim. Upon any refund to Orange County, the assessment against Battaglia would remain unsatisfied and enforceable against Battaglia.

CONCLUSION

WHEREFORE, the assessments against Battaglia on the deeds which it executed should be sustained, as well as the judgment entered thereon. The decision of the Fifth District Court of Appeals should be reversed, and the case should be remanded. This remand should be without prejudice to Orange County's right to file a refund claim for any moneys which it claims to have tendered into the Court registry and also without prejudice to the Department's rights, should a refund be granted, to proceed and enforce its judgment against Battaglia.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

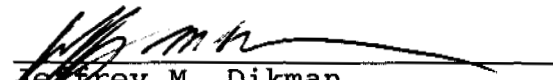


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply 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 15th day of January, 1993.


Jeffrey M. Dikman
Assistant Attorney General

INDEX TO APPENDIX

ASSESSMENTS AGAINST BATTAGLIA.1

NOTICE OF RELATED ACTION FILED WITH
DISTRICT COURT; ATTACHMENT TO NOTICE
WHICH INCLUDES TRIAL COURT'S FINDINGS
OF FACT IN A. DUDA & SONS v. DOR.2



STATE OF FLORIDA
DEPARTMENT OF REVENUE

TALLAHASSEE, FLORIDA 32389-0100

DR832
2442

J. THOMAS HERNDON
Executive Director

01/14/91

PLEASE REPLY TO:
POST OFFICE BOX 5130
TALLAHASSEE, FLORIDA
32314-5130
FAX 904-487-3348

BATTAGLIA PROPERTIES, LTD., ETAL
POST OFFICE BOX 398
WINTER GARDEN, FL 32787

AUDIT NUMBER: 9029715627 -190
TAX: DOCUMENTARY STAMP TAX
ID NUMBER: 555580757
AUDIT PERIOD:
04/14/89

DEAR TAXPAYER:

The Department of Revenue herewith presents you with a Notice of Proposed Assessment of tax, penalty, and interest on a deficiency revealed by an audit of your tax records, as described below, for the period contained in the above referenced section. Schedules describing the items forming the basis for this assessment () are enclosed, or (X) have been delivered to you prior to receipt of this Notice of Proposed Assessment.

TAX: DOCUMENTARY STAMP TAX ASSESSMENT AUTHORITY: Ch. 213.34, F.S.

Table with 2 columns: Description and Amount. Rows include Tax, Penalty, Fraud Penalty, Interest through OCTOBER 16, 1990, and Total Assessed.

Plus additional daily interest to be computed from 10/17/90 at the rate of \$ 1.49 per day.

Please return the enclosed copy of this letter within sixty (60) days along with your remittance of the assessment amount plus additional daily interest. Your check or money order should be made payable to the Florida Department of Revenue.

If you have any objections to or are otherwise aggrieved by this examination and proposed assessment, you must respond to us by MARCH 15, 1991 or such additional time as may be authorized by the Department in writing to contest the assessment pursuant to the informal protest provisions printed on the attached page.

In the event you do not wish to avail yourself of the informal protest provisions referred to, this proposed assessment will become a Final Assessment on MARCH 15, 1991 and no relief can be granted beyond the sixtieth day from that date (MAY 14, 1991) by the Department of Revenue, the Department of Administration or the courts of this state.

J. THOMAS HERNDON, EXECUTIVE DIRECTOR

By [Signature] Georgia A. Chapman
Georgia A. Chapman, Chief
Bureau of Audit Standards
Phone: (904) 822-6949



STATE OF FLORIDA
DEPARTMENT OF REVENUE

DR632
2442

TALLAHASSEE, FLORIDA 32399-0100

PLEASE REPLY TO:
POST OFFICE BOX 5130
TALLAHASSEE, FLORIDA
32314-5130
FAX 904-487-3348

J. THOMAS HERNDON
Executive Director

01/14/91

BATTAGLIA FRUIT CO., INC., ETAL
POST OFFICE BOX 398
WINTER GARDEN, FL 32787

AUDIT NUMBER: 9029614740 -190
TAX: DOCUMENTARY STAMP TAX
ID NUMBER: 555580756
AUDIT PERIOD:
04/ 14/89

DEAR TAXPAYER:

The Department of Revenue herewith presents you with a Notice of Proposed Assessment of tax, penalty, and interest on a deficiency revealed by an audit of your tax records, as described below, for the period contained in the above referenced section. Schedules describing the items forming the basis for this assessment () are enclosed, or (X) have been delivered to you prior to receipt of this Notice of Proposed Assessment.

TAX: DOCUMENTARY STAMP TAX ASSESSMENT AUTHORITY: Ch. 213.34, F.S.

Tax.....	\$	15,004.55
Penalty.....	\$	3,751.14
Fraud Penalty.....	\$	0.00
Interest through OCTOBER 15, 1990	\$	2,713.12
Total Assessed.....	\$	21,468.81

Plus additional daily interest to be computed from 10/16/90 at the rate of \$ 4.93 per day.

Please return the enclosed copy of this letter within sixty (60) days along with your remittance of the assessment amount plus additional daily interest. Your check or money order should be made payable to the Florida Department of Revenue.

If you have any objections to or are otherwise aggrieved by this examination and proposed assessment, you must respond to us by MARCH 15, 1991 or such additional time as may be authorized by the Department in writing to contest the assessment pursuant to the informal protest provisions printed on the attached page.

In the event you do not wish to avail yourself of the informal protest provisions referred to, this proposed assessment will become a Final Assessment on MARCH 15, 1991 and no relief can be granted beyond the sixtieth day from that date (MAY 14, 1991) by the Department of Revenue, the Department of Administration or the courts of this state.

J. THOMAS HERNDON, EXECUTIVE DIRECTOR

By Georgia A. Chapman
Georgia A. Chapman, Chief
Bureau of Audit Standards
Phone: (904) 922-6949

DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

ORANGE COUNTY FLORIDA AND
BATTAGLIA FRUIT COMPANY, INC.,

Appellants/Plaintiffs,

vs.

FIFTH DCA Case No. 92-00102

L.T. Case No. CI91-4180
(ORANGE)

FLORIDA DEPARTMENT OF REVENUE,

Appellee/Defendant.

DEPARTMENT'S NOTICE OF RELATED APPEAL

The State of Florida, Department of Revenue (hereinafter, "the Department"), through its undersigned Counsel, files this Notice that the following case, now pending before this Court, involves similar, but not identical issues: Florida Department of Revenue, Appellants v. A. Duda & Sons, Inc., Appellees, Fifth DCA Case No.: 91-02585, Seminole County Case No. 90-6786-CA16-G.

DEPARTMENT OF LEGAL AFFAIRS

LEGAL SECTION

FILE COPY

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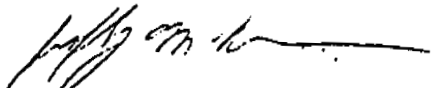
1-22-92

DUCKETED BY N

A copy of the Circuit Court's Order in the related case, containing findings of fact and conclusions of law, is attached hereto.

Respectfully submitted,

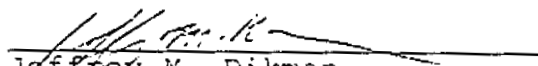
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Attorneys for Appellant
*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice and attachments has been furnished by regular U.S. Mail, first class postage pre-paid addressed to: Renee Roche, Esq., Dean, Mead, Egerton, et. al., P.O. Box 2346, Orlando, Florida 32802-2346, and to Scott E. Wilt, Esq., Maguire, Voorhis & Wells, P.A., Two South Orange Plaza, P.O. Box 633, Orlando, Florida, 32802, this 22nd day of January, 1992.


Jeffrey M. Dikman
Assistant Attorney General

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
SEMINOLE COUNTY, FLORIDA

A. DUDA & SONS, INC.,

Plaintiff,

vs.

CASE NO.: 90-6786-CA16 G

FLORIDA DEPARTMENT OF REVENUE,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on September 5, 1991 on the motion for summary judgment filed by Plaintiff, A. Duda & Sons, Inc. ("Duda"), and on the motion for summary judgment filed by Defendant, the Florida Department of Revenue (the "DOR").

After reviewing both of the motions for summary judgment, the affidavits, memoranda and case authorities in support thereof, hearing argument of counsel, and considering the uncontested facts as stipulated by the parties, the Court makes the following findings and conclusions of law:

Undisputed Facts

1. In 1988, Duda donated certain real property to the Brevard County Board of County Commissioners subject to the condition that the land subsequently be conveyed to the Department of Transportation of the State of Florida to be used for purposes of transportation, maintenance of roadways or other ancillary uses. No consideration for the conveyance was paid by Brevard County or received by Duda. The parties have stipulated

that no documentary stamp taxes are due in connection with this conveyance.

2. In 1988, a second conveyance was made by Duda to Brevard County, Florida. This conveyance was made under threat of condemnation and no documentary stamp taxes were paid.

3. On or about March 9, 1990, Duda received a notice of proposed assessment of tax, penalty and interest from DOR, Bureau of Audit Standards. This assessment arose out of the conveyances in Brevard County, Florida described in paragraphs 1 and 2 above.

4. In 1988, the St. John's River Water Management District (the "District") notified Duda that the District intended to acquire property owned by Duda in Lake County, Florida for public use. Duda realized that the District would take the necessary steps to condemn the property, and thus arranged a voluntary sale with the District. On November 30, 1988, Duda conveyed the property to the District under threat of condemnation. No documentary stamp taxes were paid.

5. On or about October 30, 1989, Duda received a notice of proposed assessment of tax, penalties and interest from the DOR, Bureau of Audit Standards. This assessment arose out of the real estate transaction in Lake County, Florida more particularly described in paragraph 4 above.

6. In all of the conveyances described above, it is undisputed that had Duda known that documentary stamp taxes were due, Duda would have included the amount of such taxes as part of the purchase price of the real property and passed this cost on to the public entities involved. Alternatively, Duda would have

required formal condemnation proceedings to occur to ensure that the property was taken under a condemnation order whereby no taxes would have been owed.

7. In 1987, §201.01 Fla. Stat. (1987) was amended to add the following language:

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.

The new statute was effective June 30, 1987 and was therefore effective at the time the above-described conveyances were made.

8. At the time the above-described conveyances were made, the DOR rules provided that "judgments and decrees in eminent domain proceedings by which title to real property is vested in a condemner are not subject to the documentary stamp tax." Rule 12B-4.014(a). These rules also provided that conveyances of realty to a municipality, county, state, the federal government, or any political subdivision or agency thereof "under threat of condemnation" were not subject to the documentary stamp tax. Rule 12B-4.014(b).

9. On December 5, 1989, after all of the conveyances described above, the DOR enacted significant amendments to its rules. Rule 12B-4.014 was amended to provide that "Judgments and decrees in eminent domain proceedings by which title to real property is vested in a condemner are not subject to the documentary stamp tax, unless a deed is given." Subsection (b) of Rule 12B-4.014, which provided that conveyances under threat of condemnation were exempt, was deleted. Rule 12B-4.013 was

amended to provide that "[c]onveyances of property made to an exempt or non-exempt grantee under threat of condemnation are subject to the documentary stamp tax." (Underlined portion added by amendment.) Finally, the amendments provided that a state, county or municipality is not liable for the tax in a taxable transaction; a transaction with a state, county or municipality, however, is not exempt and the non-exempt party to the transaction is liable for the tax. Rule 12B-14.002(3).

10. The conveyances at issue in this case were made after the 1987 amendment to §201.01 Fla. Stat. and before the rule changes described in paragraph 9 above.

11. Duda timely filed this action in December, 1990 seeking a declaration that documentary stamp taxes are not due on the transactions described above. Duda deposited the disputed amount of taxes, \$71,722.86, into the registry of the court in accordance with §72.071, Fla. Stat. (1989).

Conclusions of Law

12. The entities to whom the conveyances were made in this case are immune from taxation. Andrews v. Pal-Mar Water Control District, 388 So.2d 4 (Fla. 4th DCA 1980), rev. den., 392 So.2d 1371 (Fla. 1980); Park-N-Shop v. Sparkman, 99 So.2d 571 (Fla. 1957), State v. Alford, 107 So.2d 27, 29 (Fla. 1958); Dickinson v. Tallahassee, 325 So.2d 1 (Fla. 1975).

13. Duda was entitled to "full compensation" for the value of the real property at issue in this case. Art. X, §6, Florida Constitution, §73.071 Fla. Stat. (1989).

14. Because the public entities are immune from taxation, Duda could not have passed the cost of the documentary

stamp taxes on to them. This increase to the cost of the transactions would have amounted to an impermissible indirect tax on tax immune entities. Department of Revenue v. Florida Municipal Power Agency, 473 So.2d 1348 (Fla. 1st DCA 1985), rev. den., 482 So.2d 347 (Fla. 1986); Lewis v. The Florida Bar, 372 So.2d 1121 (Fla. 1979).

15. Payment of documentary stamp taxes by Duda in this case would have impaired Duda's constitutional entitlement to full compensation. Art. X, §6, Florida Constitution, §73.071 Fla. Stat. (1989).

16. The 1987 amendment to §201.10 Fla. Stat., does not constitute a statutory waiver of the tax immune status of the public entities involved in this case. To constitute a waiver, the statutory language must be unambiguous. Dickinson v. Tallahassee, supra. Here, the statutory language is ambiguous as to the intent of the legislature and accordingly must be construed in favor of Duda. Maas Brothers, Inc. v. Dickinson, 195 So.2d 193 (Fla. 1967). Moreover, because of the ambiguities of the statute, Duda was entitled to rely on the language of the then-existing DOR rules which specifically exempted the transactions at issue from taxation.

17. Because Duda has been assessed the tax by the DOR, it has a personal stake in the outcome of this litigation, and has standing to raise any and all arguments herein, including the constitutionality of §201.01 Fla. Stat.

Based upon the foregoing findings of fact and conclusions of law it is therefore

ORDERED AND ADJUDGED as follows:

A. Duda's motion for summary judgment is hereby GRANTED for the following reasons:

(1) The 1987 amendment to §201.01 Fla. Stat. is ambiguous and must be construed in favor of Duda. In light of the ambiguities in the statute and the unambiguous language of the regulations in place at the time of the conveyances at issue, no taxpayer could have reasonably anticipated that any documentary stamp taxes would be due in connection with the transactions in question.

(2) Section 201.01 Fla. Stat. is unconstitutional as applied to the facts of this case. To impose taxes on conveyances made under threat of condemnation will result in an indirect tax on a tax immune body, or will preclude landowners from recovering full compensation for their property.

B. The DOR's motion for summary judgment is hereby DENIED.

DONE AND ORDERED in chambers in Sanford, Seminole County, Florida this 16th day of Oct, 1991.

/s/ C. VERNON MIZE, JR.
C. Vernon Mize
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Renee A. Roche, P.O. Box 2346, Orlando, FL 32802 and to Jeffrey M. Dikman, Assistant Attorney General, Department of Legal Affairs, The Capitol-Tax Section, Tallahassee, FL 32399-1050, this 17th day of Oct, 1991.

/s/ MARY ANN ROBINSON
Judicial Assistant