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IN THE
SUPREME COURT OF FLORIDA

CASE NO. 80,952

SECTION 3 PROPERTY CORP.,

Petitioner

v.

JOEL W. ROBBINS, as Property Appraiser
of Dade County, Florida,

Respondents.

BRIEF ON THE MERITS BY THE STATE OF FLORIDA, DEPARTMENT OF REVENUE AS AMICUS CURIAE, IN SUPPORT OF JOEL W ROBBINS, AS PROPERTY APPRAISER FOR DADE COUNTY, FLORIDA

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QUESTION PRESENTED

WHETHER THERE IS A RIGHT TO A JURY TRIAL UNDER ARTICLE I, SECTION 22, FLORIDA CONSTITUTION (1968) IN A TAX ASSESSMENT CASE?

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INTEREST OF THE DEPARTMENT

The Department of Revenue (Department) files this amicus brief supporting the position of the Respondent, Joel W. Robbins, Property Appraiser of Dade County, etc. The Department is the state agency empowered by law to administer ad valorem taxation and other taxation laws. The question of whether there is a right to a jury trial in a tax action affects all litigation concerning the taxing statutes that the Department is empowered by law to administer.

STATEMENT OF THE CASE

Respondent, Joel W. Robbins, the Property Appraiser of Dade County, Florida, (Robbins) filed an action in circuit court to contest the granting of an agricultural exemption to property owned by Petitioner, Section 3 Property Corporation (Section 3). Section 3 filed a timely demand for a jury trial and Robbins moved to strike the demand. The Circuit Court denied Robbins' Motion to Strike Demand for Jury Trial. Robbins sought a writ of certiorari from the Third District Court of Appeal to quash the Order. The district court granted the writ, quashing the circuit court's order, but certified the following question as one of great public importance to the Florida Supreme Court: Is there a right to a jury trial under Article I, Section 22 of the Florida Constitution (1968), in a tax action to challenge a Property Appraiser's grant of an agricultural exemption? See, 17 Fla. L. Weekly D2645 (November 29, 1992).

SUMMARY OF ARGUMENT

The right to a jury trial is preserved by the Florida Constitution, Article I, Section 22. The constitutional right does not extend beyond those causes to which the right attached in 1845. This Court has not extended the right to demand trial by jury to causes which were not heard by a jury in Florida as of 1845. For example, there is no right to a trial by jury in matters of probate, in juvenile proceedings, in partition, nor in inverse condemnation cases. Lavey v. Doig, 25 Fla. 611, 6 So. 259 (1889); Pugh v. Bowden, 54 Fla. 302, 45 So. 499 (1907); Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904); Department of Agriculture and Consumer Services v. Bonanno, 568 So. 2d 24 (Fla. 1990).

Florida tax cases have historically been heard by the circuit courts sitting in equity and by administrative bodies. Florida provided no right to a trial by jury as of 1845 in tax matters. Early Florida statutes and case law demonstrate that Florida tax matters were decided without a jury at the time its first Constitution was adopted. Heard by a court since that time, tax cases sound in equity. Therefore, tax matters do not fall within the constitutional guarantee to a jury trial.

As for other jurisdictions, Georgia and Alabama have both explicitly determined that, in tax matters, there is no constitutional right to a jury trial. Two states admitted to the union during the same period as Florida - Michigan and Iowa - have found that no right to a jury trial exists in tax cases. Of those states which have ruled on the matter, and which do not

provide for jury trial by statute, all have found that there is no constitutional right to a jury trial in tax matters.

In the federal courts, the weight of opinion also finds that the Seventh Amendment to the Federal Constitution affords no common law right to a jury trial in tax matters. Suits against the federal government are permitted only by statute. Governments are otherwise immune from suit. Nicholl v. United States, 74 U.S. 125 (7 Wall.) 122, 19 L.Ed. 125 (1868). Any right to a tax refund arises by operation of statute. Id. Thus, there is no federal right to a jury trial in a tax protest case. Wickwire v. Reinecke, 275 U.S. 101, 48 S.Ct. 43 (1927).

These decisions also find support in the sound public policy of assuring a steady public revenue and, thereby, the payments necessary for a civilized society. It was Professor Cooley, in his 1886 treatise (Cooley, Law of Taxation), who offered that the introduction of a jury into the determination of a tax case would lead to anarchy. This Court has acknowledged that a tax is an **enforced** pecuniary burden. Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943, 945 (Fla. 1992).

This Court, likewise, should find no constitutional right to a jury trial in tax matters. Such a finding is in accord with the common law as it existed during 1845 in Florida, with the prior decisions of Florida Courts finding that tax matters sound in equity, and with the great weight of the law as determined by Florida's sister states and by the federal courts.

ARGUMENT

Analysis of the question presented requires that this Court determine whether a right to a trial by a jury of one's peers existed at the time Florida was admitted to the Union on March 3, 1845. In re Forfeitture of 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1986). The determination requires an answer to the following questions: 1) was there a common law cause of action in Florida forming the basis for a tax assessment challenge as of 1845; and 2) if so, did the cause of action provide for a jury trial.

Florida currently imposes two types of tax: direct and indirect.[1] Direct taxes are ad valorem - based on the assessed value of the property made subject to a tax. An excise tax is an indirect tax that is laid upon the manufacture, sale, or consumption of commodities within the state, or upon the license to pursue certain occupations or upon corporate privileges. City of DeLand v. Florida Public Service Co., 119 Fla. 804, 161 So. 735, 738 (1935). See also, §192.001(1), Fla. Stat.

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[1] The burdens of taxation do not arise from contractual obligations; neither are they "debts" in the ordinary commercial meaning of that term. Kathleen Citrus Land Co. v. City of Lakeland, 124 Fla. 659, 169 So. 356, 358 (Fla. 1936). Instead, taxes are enforced contributions from persons and property, imposed by the sovereign, to achieve some public purpose. Smith v. Lummus, 149 Fla. 660, 6 So. 2d 625, 627 (1942).

I. HISTORY

A. BACKGROUND

1. Assessment

Historically, if a taxpayer disagreed with an assessment, no judicial redress was permitted. Appeals from the decision of the assessor or the local board of assessment were heard by a board of equalization. In re B and L Farms Co., 184 F. Supp. 801 (S.D. Fla. 1960); Dick v. State ex rel. Harris, 153 So. 2d 844 (Fla. 2nd DCA 1963). City of Tampa v. Palmer, 89 Fla. 514, 105 So. 115, 120-121 (1925). An appeal to an equalization board was limited to a complaint that an assessment was excessive or treatment unequal. State ex rel. Gracy v. Bank of Neosho, 120 Mo. 161, 25 S.W. 372 (1894); Oregon & West Mortgage Savings Bank v. Jordan, 16 Or. 113, 17 P. 621 (1888). Similar boards, as they existed in other states, were considered to be an adequate remedy at law barring equity jurisdiction over tax assessment issues. Monroe v. Town of New Canaan, 43 Conn. 309 (1876); Powers v. Bowman, 53 Iowa 359, 5 N.W. 566 (1880). These proceedings were administrative and not judicial in nature. In re B and L Farms Co., supra; Kansas Pacific Railway Co. v. Ellis County Commissioners, 19 Kan. 584 (1878),; Kirst, Administrative Penalties and Civil Jury, Vol. 126 U. Pa. L. Rev. 1281, 1315-1316 (1978).

No judicial challenge was recognized. A suit against the sovereign was barred, especially in tax matters. Martin v. C.I.R., 756 F.2d 38, 40 (6th Cir. 1985); Mathes v. C.I.R., 576 F.2d 70 (5th Cir. 1978). The rule was designed to preserve the

power of government. If the courts were to require the government to defend all such suits, it "would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person." Nicholl v. United States, 74 U.S. 125, (7 Wall.) 122, 19 L.Ed. 125 (1868).

Equity courts heard tax cases when the taxpayer alleged that the tax was invalid or illegal. Blume v. McMullen, 154 Fla. 494, 18 So. 2d 31 (1944); Wade v. Murrhee, 75 Fla. 494, 78 So. 536 (1918). See also Rhodes v. Cushman, 45 Ind. 85 (1873). But equity courts would not be open to hear an attack premised upon an allegedly excessive assessment. King v. Gwynn, 14 Fla. 32 (1871). See also Decker v. McGowan, 59 Ga. 805 (1877); George v. Dean, 47 Tex. 73 (1877).

2. Collection

Under common law, collection of assessed taxes took three forms: voluntary payment; involuntary or compulsed payment; and physical seizure of goods, real property or the person. Of course, as today, the most common form of payment was the voluntary payment to the tax collector. Involuntary collection on behalf of the Crown, Federal Government and States during the 1700's and early 1800's was accomplished by revenue collectors. These collectors were not necessarily "employees" of government, but were commissioned agents receiving a percentage of their collections. Alternatively, a taxpayer could inform the collector of a protest when the tax was paid and, in such a case, the tax payment would be considered involuntary. See, e.g.,

Elliot v. Swartwout, 35 U.S. (10 Pet.) 137, 9 L.Ed. 373 (1836). Finally, the taxpayer could refuse to pay the tax and await a physical seizure of his property by the tax collector.

The collection methods were nonjudicial in nature. See Cheatham v. Norvekl, 92 U.S. (2 Otto) 85, 23 L.Ed. 561 (1876). Since collections were not known to the common law, there was no common law provision for the government to bring suit to collect money in the absence of a statute. Board of Supervisors v. Johnson, 7 So. 390 (Miss. 1890); Packard v. Tisdale, 50 Me. 376 (1862). Nor was there a common law right to judicially challenge the procedures followed by the tax collector before the tax collector acted.

In Florida, the procedure for the imposition, assessment and collection of taxes has always been legislative/ administrative in nature. Exercise of this power is an attribute of the sovereign. Fleischer Studios, Inc. v. Paxson, 147 Fla. 100, 2 So. 2d 293 (1941); Ridgeway v. Reese, 100 Fla. 1304, 131 So. 136 (1930). It is within the legislature's power to enact taxes and secure prompt collection of those taxes. Chatlos v. Overstreet, 124 So. 2d 1 (Fla. 1960). The duty to pay a tax is purely of statutory creation and tax collections must stay within the bounds of the statute. Maas Brothers, Inc. v. Dickinson, 195 So. 2d 193 (Fla. 1967).

3. Refunds

Whether money or property could be refunded depended upon how the money was paid or collected, and who held the money and property at the time a refund was sought. Recovery of money

under the common law was limited to situations where payment of the tax was involuntary and the tax or property was still in the hands of the tax collector. Total denial of a recovery was common where payment was voluntary, or the money was already in the hands of the sovereign.

a. Voluntary Payment

Money voluntarily paid to a tax collector or government was never refundable to the taxpayer under the common law. Elliot v. Swartwout, 35 U.S. (10 Pet.) 137, 154-156, 92 L.Ed. 373, 379-381 (1836); Cooley, Law of Taxation, p. 809 n. 1 (1886); see also Johnson v. Atkins, 44 Fla. 185, 32 So. 879, 881 (1902); Dickins v. Jones, 14 Tenn. (6 Yerg.) 483 (1834); Louisville & Nashville Railroad Co. v. Hopkins County, 87 Ky. 605, 9 S.W. 497 (1888); Younger v. Board of Supervisors, 68 Cal. 241, 9 P. 103 (1885). Unless altered by statute, there was no common law right of recovery of taxes paid voluntarily even if the tax was illegally imposed. See State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1952).[2]

b. Involuntary Payments And Seizures

There existed at common law a right to recover tax paid involuntarily or when seized by a tax collector. The cause was a tort action against the tax collector. Nevertheless, no cause of action would lie against the sovereign once the sovereign had the money. Elliot v. Swartwout, 35 U.S. (10 Pet.) 137, 154-156, 92 L.Ed. 373, 379-381 (1836), at 156 - 158; Kirst,

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[2] The federal government and Florida have passed statutes permitting a refund of taxes paid. See Act of Feb. 26, 1845, 5 Stat. at Large, Chap. 22, 727; §215.26, Fla. Stat.

supra, pp. 1328-1338, especially at page 1331. The action against the tax collector was one for damages caused by the collector's sale of land and goods, for example. Trespass and false imprisonment causes were sometimes the vehicle used for bringing such actions against a tax collector.[3] However, many of the same jurisdictions which permitted such actions, when faced with the question presented here, have ruled no right to a jury trial exists. Kirst, supra.

B. HISTORY OF FLORIDA TAX PROCEDURES

1. Florida's Revenue Sources In Territorial Times

When Florida was a territory, it collected revenues primarily from ad valorem taxation. In 1822, during the first session of the territorial legislative council, Florida passed its first revenue act, creating taxes on such disparate wealth as land, (25 cents per 100 acres), slaves (50 cents a head), billiard tables ($50 each), and auctioneer's licenses ($50). An Act To Raise a Revenue in the Territory of Florida, Laws of Florida Territory, 1st Session (1822), p. 67. The Florida Territory also imposed a license tax on auctioneers and an excise tax of 1% on all sales at auction. Id. Under this early statute, the tax assessor was appointed by the county courts from the ranks of the local militia. Id. at Section 6, p. 69. The Sheriff collected the taxes. Id. at Section 16, p. 71. Licenses were purchased from the circuit court. Id. at Section 5, p. 68. Taxpayers gave a list of their property, as of the previous

[3] See e.g., Baks v. Hazeltine, 1 Vt 81 (1828), an action for trespass for breaking and entering the defendant's house, taking away his goods, etc.

October, to the assessor. Those who failed to do so were fined $5 and assessed double tax. Id. at Section 11, p. 70. The 1822 statute made no provision for a taxpayer's protest of the assessor's list, nor for refund, but had numerous safeguards to prevent the assessor or the territorial treasurer from absconding with collected funds. Id. at Sections 18, 21, 23 and 27, pp. 72-75.

The Florida Territory amended its tax statutes regularly - 1823, 1824, 1828, 1829, 1832, 1834, 1836, 1839, 1841, 1843, and 1845.[4] During its years as a territory, Florida repealed its taxing statutes, (1823, 1829, 1839), reinstated them in other forms, (1824, 1831, 1841), and generally was a model of revenue experimentation. For example, having passed a series of ad valorem and excise taxes in 1822, Florida promptly repealed them, allowed for a refund of the taxes paid under that statute from the tax collector (who received funds from the territory), and instituted a head tax in 1824.[5]

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[4] Laws of Florida Territory, 2d Session (1823), p.70; Laws of Florida Territory, 3rd Session (1824), Laws of Florida Territory, 7th Session (1828), p. 236; Laws of Florida Territory, 8th Session (1829), p. 130; Laws of Florida Territory, 10th Session, (1832), pp. 31, 128; Laws of Florida Territory, 12th Session (1834), p. 39; Laws of Florida Territory, 14th Session (1836), p. 52; Laws of Florida, 17th Session, (1839), p. 12; Laws of Florida, 19th Session (1841), p. 43; Laws of Florida Territory, 21st Session (1843), p. 92; Laws of Florida Territory, 23rd Session (1845), p. 42.

[5] See, Laws of Florida Territory for 1st, 2nd and 3rd Sessions, supra.

2. Beginning In 1828, Florida Provided Statutory Refunds And Administrative Review For Taxpayers

The year 1828 saw substantial revisions made to the revenue statute, raising the rate on land assessments, creating an excise tax on merchandise and, for the first time, providing for review of an assessment or a refund of taxes. See Laws of Florida Territory, 7th Session (1828), p. 236.

Review was accomplished by the county courts without a jury. The county court performed the ministerial acts of hiring the assessor and collector, and certifying the tax rolls. The county court was also, by this statute, granted the authority to hear tax cases and could exonerate a taxpayer from an assessment or require a refund from the tax collector.[6]

The Legislative Council created a right to a hearing on tax matters before the county courts, but provided no statutory authority for a jury to be impaneled. Importantly, the Territorial Legislative Council made specific provision for jury trials in its act for the protection of mortgagees, but, again, did not do so in tax suits.[7] The lack of a provision for a jury trial in tax matters was in keeping with the revenue acts of the adjacent states of Alabama and Georgia, and with the two states admitted to the union during the same period as was Florida - Iowa and Michigan. Rush v. Department of Revenue of the State of

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[6] An Act to Raise a Revenue for the Territory of Florida, Laws of Florida Territory, 7th Session (1828), p. 236. (Lodged with the Clerk as document number 2. Hereinafter, documents lodged with the Clerk will be cited as LC-#.)

[7] Act for the Protection of Mortgagees, Laws of Florida Territory, 20th Session (1842), p. 11.

Alabama, 416 So. 2d 1023, 1024 (Ala. Civ. App. 1982), Fowler v. Strickland, 243 Ga. 30, 252 S.E.2d 459 (1979), Davis v. City of Clinton, 55 Iowa 549, 8 N.W. 423 (1881), State v. Iron Cliffs Co., 54 Mich. 350, 20 N.W. 493 (1884).

While empowered to hear tax controversies, the county courts of that time exercised inferior judicial functions and were akin to administrative boards, possessing authority corresponding to that exercised in other states by county commissioners. Cooley on Taxation at 46, Second Edition (1886) (comparing the power to levy, a power also held by the county courts); An Act to Establish County Courts, and Prescribe Their Jurisdiction, Laws of Florida Territory, 11th Session (1833), p. 42. Acting as an administrative body, the county courts would not use a jury to hear tax cases.

Further, the common law seizure procedures which permitted tort remedies were not used in Territorial Florida. In Florida seizures did not take place without notice, and taxpayers had the opportunity for review of their assessment prior to payment by an administrative body. See Laws of Florida Territory, 7th Session (1828), p.236. The ad valorem assessment dispute at issue in this case is identical in nature to the assessment dispute procedures known at Florida common law. This dispute is not similar in any way to the seizures of English common law that received tort remedies against the tax collector. To find a tax assessment case to be similar in nature to a tortious seizure case would be as incorrect as finding a suit in partition to be similar in nature to a suit in trespass.

3. Florida's Treatment Of Tax Cases Circa 1845

In 1845 taxpayers could obtain county court review of tax assessments, and they could be exonerated from an assessment or be granted a refund pursuant to the 1828 statute. After Florida became a state in March of 1845 and during the first session of the First General Assembly of the State of Florida, the Boards of County Commissioners were established. Ch. 11, at 32, Laws of Fla. (1845) (LC-3). Part of their duties were to hear tax matters, both assessment protests and refund actions. Ch. 10, §30, Laws of Fla. (1845)(LC-3). The authority granted the Boards tracked that previously granted to the county courts. Both could grant relief from overtaxation by refund or exoneration from assessment. Both certified the tax rolls. Both had the power to levy tax. Compare, An Act to Raise a Revenue in the Florida Territory, Laws of Florida Territory, 7th Session (1828)(LC-2), with Chapter 10, Laws of Florida (1845)(LC-3).

The 1845 statute was passed in July with elections authorized to take place in October. The first page of the records of the Leon County Clerk shows the result from the first election for seats on the Board of County Commissioners. See (LC-4(a)). There are a number of cases extant from the Leon County Board of County Commissioners, showing how the Board heard tax cases, and made decisions about refunds and assessments. These were full evidentiary hearings with petitions for redress being submitted, oaths being administered, and testimony being taken and recorded. As some of the assessments date from 1844, it appears that pending cases were transferred over from the county court. See (LC-4).

One of the first actions of the Board was as follows: "On the application of William Bloxham to have a double tax remitted for the year 1845, satisfactory cause being shown on oath. It was ordered that a single Tax be collected and the excess remitted." (LC-4(c)). The Board also heard relatively complex cases. In a case heard October 28, 1845, the Board held that no state taxes should have been assessed on the property of Southern Life Insurance Co., as the company was in receivership (bankruptcy) at the time of the assessment. The Board held the assessment illegal. (LC-4(b)). In each case, no jury was impanelled.

In summary, taxpayers in Florida in 1845 had tax protest rights and relief unknown at English common law. Florida taxpayers could request assessment relief or refunds from an administrative body with an "appeal" to the equity courts. The rights and relief were statutorily provided by the Territorial Legislative Council and the State Legislature. However, in 1845 juries were not used either by equity courts or by the administrative boards that heard tax matters. Thus, there is no constitutional right to a jury trial in tax cases as juries were not used at Florida common law in such matters.

4. Florida's Tax Practices After 1845

Beginning in 1847, the legislature acknowledged the fact that certain taxpayer protests were heard in equity courts with the passage of Chapter 151, Section 4, Laws of Fla. (1847). Tax cases had been heard in equity prior to Florida's statehood, as was stated above. This can be seen by reference to the 1837

Leon County Circuit Court case of Apalachicola Land Co. v. Robert Forbes, Sheriff, Second Judicial Circuit (1837) (LC-1). Apalachicola involved an appeal from a county court decision upholding an assessment. The Circuit Court reviewed the record and found the assessment illegal. The Circuit Court interpreted the law under the 1828 statute and made its legal determination sitting in equity.

The progeny of Chapter 151, Section 4, Laws of Florida, is now found in Section 68.01, Florida Statutes. The section refers to a tax challenge as "an action in chancery." In the case of Department of Revenue v. University Square, Inc., 336 So. 2d 371 (Fla. 1st DCA 1976), a corporate taxpayer brought a declaratory action to contest the legality of an excise tax, i.e. a documentary stamp tax assessment. The First District Court of Appeal treated the case as one heard in equity and held that circuit courts have exclusive original jurisdiction in all cases involving the legality of any tax assessment. Id.

During its statehood, Florida Courts have held that tax actions sound in equity. Powell v. Kelly, 223 So. 2d 305, 307 (Fla. 1969); Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880, 883 (1932). Florida has made use of administrative hearings for fact finding in ad valorem, cigarette and liquor taxes. Chs. 194, 210, and 561, Fla. Stat. In over one hundred and fifty years of Florida tax contests, Petitioner has been unable to cite a single tax case where a jury was used. Florida's long practice of hearing tax matters administratively or in a court of equity follows the tradition laid down at common law.

5. Current Florida Tax Procedures

A taxpayer who wishes to challenge an ad valorem tax in court must now follow the procedures set forth under Sections 194.171 and 194.181, Florida Statutes. Prior to seeking relief in circuit court, the taxpayer may seek redress before a Value Adjustment Board ("VAB") pursuant to Sections 194.015, 194.032 and 194.034, Florida Statutes. The VAB may appoint a special master for the purpose of "taking testimony and making recommendations to the board." Section 194.035, Fla. Stat. "Appeals" may then be taken pursuant to either Sections 194.036 or 194.171, Florida Statutes.[8]

The actions of a property appraiser in making an ad valorem assessment are clothed with a presumption of correctness, and the determination, in order to be overcome, must be affirmatively met by appropriate and sufficient allegations and proofs, excluding every reasonable hypothesis of a legal assessment. Markham v. Kauffman, 284 So. 2d 416 (Fla. 4th DCA 1973), cert. denied, 294 So. 2d 653 (1974); Manufacturers National Corporation v. Blake, 287 So. 2d 129 (Fla. 3rd DCA 1973), cert. denied, 294 So. 2d 91 (1974); Straughn v. Tuck, 354

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[8] For a taxpayer who wishes to challenge an excise tax, Section 72.011, Florida Statutes, gives the taxpayer the choice of filing an action in Circuit Court or with the Division of Administrative Hearings pursuant to Chapter 120, Florida Statutes. Prior to bringing suit, an aggrieved taxpayer may seek redress through an informal tax conference with the agency. Section 213.21, Fla. Stat.

So. 2d 368 (Fla. 1977); USS Agri-Chemicals v. Stewart, 476 So. 2d 327 (Fla. 2nd DCA 1985).[9]

C. GENERAL RIGHT TO TRIAL BY JURY UNDER THE FLORIDA CONSTITUTION

1. Preservation Of Common Law Right That Existed In Cases At Law

The right to a jury trial is preserved by the Florida Constitution, Article I, Section 22. The constitutional right does not extend beyond those cases in which it was a matter of right in 1845. Pugh v. Bowden, 54 Fla. 302, 45 So. 499 (1907). This Court has not extended the right to jury trials to matters where a jury was not used in Florida in 1845. As was previously stated, there is no right to a trial by jury in matters of probate, in juvenile proceedings, in partition, nor in inverse condemnation cases.[10] Lavey v. Doig, 25 Fla. 611, 6 So. 259 (1889); Pugh v. Bowden, 54 Fla. 302, 45 So. 499 (1907); Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904); Dept. of Agriculture and Consumer Services v. Bonanno, 568 So. 2d 24 (Fla. 1990). Florida did not permit a jury trial in tax

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[9] The Department of Revenue enjoys the same presumption of correctness when issuing its tax assessments. Hunter v. Carmichael, 133 So. 2d 584 (Fla. 2nd DCA 1961).

[10] Contra, The Printing House, Inc. v. State of Florida, Department of Revenue, 18 Fla. L. Weekly D244 (Fla. 1st DCA December 31, 1992), finding a right to a jury trial in excise tax matters. The First District did not look to the state of the law in Florida in 1845 to determine if a jury trial was available in tax cases. The First District found a tax assessment case not to be in the nature of a common law tax assessment case, nor in the nature of a common law tax refund case, but in the nature of a tortious seizure case.

proceedings when she joined the Union in 1845. Now this right may not be extended absent legislative action.

2. Tax Matters Are Equitable In Nature

Since the time Florida was a Territory, tax matters have been heard in equity. Apalachicola Land Co. v. Robert Forbes, Sheriff, Second Judicial Circuit (1837); Powell v. Kelly, 223 So.2d 305, 307 (Fla. 1969); Day v. City of St. Augustine, 139 So. 880, 883 (Fla. 1932); Department of Revenue v. University Square, Inc., 336 So. 2d 371 (Fla. 1st DCA 1976). The right to a jury trial does not apply when the right or remedy is equitable in nature.[11] Prior to the merger of law and equity, equitable demands enforced in the courts of chancery were not triable by jury. Hughes v. Hannah, 39 Fla. 365, 22 So. 613, 615 (1897); Hathorne v. Panama Park Co., 44 Fla. 194, 32 So. 812 (1902); Nelson v. State ex rel. Fisher, 84 Fla. 631, 94 So. 680 (1922); Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927).

3. The Distinction Of Law And Equity For Substantive Purposes Survives The Merger Of Law And Equity For Procedural Purposes.

In 1967, when the revised Florida Rules of Civil Procedure consolidated law and chancery, the rule eliminating the distinctions between them for procedural purposes was not intended to abolish the substantive distinction. Adams v.

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[11] This Court has found that tax cases sound in equity. Powell v. Kelly, 223 So. 2d 305, 307 (Fla. 1969); Day v. City of St. Augustine, 139 So. 880, 883 (Fla. 1932). Should the Court now determine that there is a constitutional right to a jury trial, it must perforce recede from these earlier opinions. The Court must also determine that Section 68.01, Florida Statute, is unconstitutional because it authorizes tax cases to be heard in Chancery.

Citizens Bank of Brevard, 248 So. 2d 682 (Fla. 4th DCA 1971). Therefore, the rule requiring that equitable claims be tried without a jury is not altered by the consolidation of law and chancery. Id. See also, King Mountain Condo. Assoc. v. Gundlach, 425 So. 2d 569 (Fla. 4th DCA 1982); Emery v. International Glass & Mfg., Inc., 249 So. 2d 496 (Fla. 2nd DCA 1971). Even in "mixed" actions invoking both legal and equitable relief it has been held that a jury trial can be had for compensatory trespass damages, but not for equitable claims. R.C. #17 Corp. v. Korenblit, 207 So. 2d 296 (Fla. 3rd DCA 1968); Padgett v. First Federal S & L Assoc., 378 So. 2d 58 (Fla. 1st DCA 1979).

Since 1967, Florida Courts have continued to observe and strictly enforce the pleading requirements for law and equity. Acquafredda v. Messina, 408 So. 2d 828 (Fla. 5th DCA 1982); State Farm Mutual Auto Ins. Co. v. Green, 579 So. 2d 402 (Fla. 5th DCA 1991). Thus, the rule of nonjury trials for equitable cases has not been lost or abolished merely by the merger of law and equity for procedural purposes. The distinction between law and equity for substantive purposes remains intact.[12] Indeed, it can be reversible error for a trial court to submit "traditionally" equitable issues to a jury for

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[12] In federal courts, equitable claims are treated the same as in Florida Courts. In Sheila's Shine Products, Inc., v. Sheila Shine, Inc., 486 F.2d 114 (5th Cir. 1973), the Court held at page 122:

> So long as a party is granted a jury trial on issues properly triable by jury it may not complain that equitable issues were disposed of by the trial court.

determination. Lincoln Tower Corp. v. Dunhall's-Florida, 61 So. 2d 474 (Fla. 1952); Cooley v. Cody, 377 So. 2d 796 (Fla. 1st DCA 1979); Allen v. Estate of Dutton, 394 So. 2d 132 (Fla. 5th DCA 1980); Hall v. Brookville Glass, 586 So. 2d 1306, 1308 (Fla. 5th DCA 1991); and Chabad House-Lubavitch of Palm Beach County, Inc., v. Banks, 602 So. 2d 670, 672 (Fla. 4th DCA 1992).

4. Matters Heard In Equity At Common Law Receive No Constitutional Jury Trial Right

Although the specific tax statutes and procedures of today did not exist in 1845, tax cases were known at Florida common law, but were heard in equity or administratively and did not receive a jury trial. The Florida Territorial statutes and early cases and statutes of the State of Florida demonstrate that the proceedings of like nature at common law - tax assessment protests and refund actions - have remained unchanged for 150 years. This analysis, based on the standards outlined by this Court in In re Forfeiture 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1986), shows conclusively that there is no right to a jury trial in tax matters.

This analysis stands in contrast to the Petitioner's claim of a right to a jury trial. Petitioner claims that this Court found a right to a jury trial in a "county tax assessor's suit" citing, Hollywood, Inc., v. City of Hollywood, 321 So. 2d 65 (Fla. 1975). However, this Court granted a jury trial only as to dedication and adverse possession of the property, issues unrelated to tax matters. Id. at 71.

Petitioner relies on Ozier v. Seminole County Property Appraiser, 585 So. 2d 357 (Fla. 5th DCA 1991);

Firstamerica Development Corp. v. County of Volusia, 298 So. 2d 191 (Fla. 1st DCA 1974); City of South Miami v. State, ex rel. Gibbs, 143 Fla. 524, 197 So. 109 (1940); and Dickinson v. Allen, 215 So. 2d 747 (Fla. 2nd DCA 1968), reversed on other grounds, 223 So. 2d 310 (Fla. 1969). Ozier, on remand, merely stated that a particular fact issue is to be "decided by the jury" in a case where the Plaintiff's demand for a jury trial was never challenged by the adverse party nor questioned by the Court.

Firstamerica merely observes that a request for a jury trial was stipulated by the parties, and such does not suffice as authority for Petitioner's contentions. City of South Miami v. State, ex rel. Gibbs, 143 Fla. 514, 197 So. 109 (1940), involved quo warranto proceedings to determine the franchise power of the City to tax lands "where no municipal benefits accrued thereto." Id. at 111. This Court held, as a matter of law, that the City was entitled to a jury trial. However, a quo warranto proceeding is unlike a proceeding brought by a taxpayer to challenge a tax assessment.

Finally, the Dickinson Court restated this Court's well-established rule that the "slightest doubt" upon any issue of material fact should preclude summary judgment allowing the case to be submitted to a jury. Id. at 749. But, as authority for its rule, the Dickinson Court cited its own decision in Booth v. Mary Carter Paint Company, 182 So. 2d 292 (Fla. 2nd DCA 1966) "and cases collated therein." Turning to Booth, supra, it can be readily seen that the cause of action there at issue was for wrongful death of a motorist and not for a tax challenge. As for

those cases "collated therein," not one of the four involved a tax case.

D. THE MAJORITY OF STATES THAT HAVE RULED ON THE CONSTITUTIONAL RIGHT TO A JURY TRIAL IN TAX MATTERS HAVE HELD THAT NONE EXISTS

1. States Adjacent To Florida And States That Entered The Union Near 1845 Have Found No Right To A Jury Trial In Tax Matters.

The State of Georgia found in the mid-nineteenth century that there is no right to a jury trial in a tax case and it follows that course today. Harper v. Comm'rs of Elberton, 23 Ga. 566, 568 (1857); Fowler v. Strickland, 243 Ga. 30, 252 S.E.2d 459 (1979). Alabama, admitted to the Union in 1819, first ruled that there was no right to a jury trial in a tax case in State v. Bley, 164 Ala. 547, 50 So. 263 (1909). Alabama, like Florida, has a constitutional provision that maintains the right to jury trial as it existed at common law. Id. at 264. The Alabama Supreme Court wrote that tax matters, "belong to that class of cases in which the right of trial by jury has never existed." Id.

The State of Florida was the 27th state admitted to the United States. Michigan was the 26th, and held in 1884 that there was no right to a jury trial. State v. Iron Cliffs Co., 54 Mich. 350, 20 N.W. 493 (1884). The State of Iowa, admitted in 1846, determined in the case of Davis v. City of Clinton, 55 Iowa 549, 8 N.W. 423, 424 (1881), that there is no constitutional right to a jury trial. Florida should follow the decisions of these sister states that share similar constitutional provisions

and tax histories. These cases provide guidance in an area where Florida has limited recent case law, and look to common law tax history of state tax proceedings more similar to Florida's.

2. Some States Have Moved All Tax Matters To State Tax Courts And Others Have Found No Right To A Jury Trial In Tax Cases.

Hawaii, New Jersey, Minnesota and Oregon, all have tax matters heard in specialized tax courts without a jury. See Haw. Rev. Stat. §232-7 and §232-17 (1989); N. J. Stat. Ann. 2A:3A-4, (1990); Minn. Stat. Ch. 271 (1990); Or. Rev. Stat. §§305.410, 305.425 (1989). Placing jurisdiction over tax matters in specialized courts would be contrary to any constitutional right to a jury trial if one existed. The States which have not granted by statute the right to a jury trial have uniformly found that no constitutional right to a jury trial exists in tax cases. See Commonwealth of Pennsylvania v. Marco Electric Manufacturing Corp., 32 Pa. Commw. 360, 379 A.2d 342 (1977); Ewert v. City of Winthrop, 278 N.W.2d 545 (Minn. 1979); State, Dept. of Taxes v. Tri-State Industrial Laundries, Inc., 138 Vt. 292, 415 A.2d 216 (1980); State Line Elevator v. State Board of Tax Comm'rs, 526 N.E.2d 753 (Ind. Tax 1988), aff'd., 528 N.E.2d 501 (Ind. Tax 1988); Jernigan v. Jackson, 704 S.W.2d 308 (Tenn. 1986); Coeur D'Alene Lakeshore Owners and Taxpayers, Inc. v. Kootenai County, 104 Idaho 590, 661 P.2d 756 (1983); Rush v. Alabama Department of Revenue, 416 So. 2d 1023 (Ala. Civ. App. 1982); C.W. Matthews Contracting Co., Inc. v. South Carolina Tax Commission, 267 S.C. 548, 230 S.E.2d 223 (1976); and, Sonleitner v. Superior Court, 158 Cal. App.2d 258, 322 P.2d 496 (Ca. 2d DCA 1958).

3. Opinions Concerning States With Statutory Rights To A Jury Trial In Tax Matters Sometimes Have Dicta Finding A Constitutional Right To A Jury Trial.

Oklahoma's Supreme Court finding that a statutory right to a jury trial existed, wrote in dicta that a common law right to a jury trial existed. Hamil v. Walker, 604 P.2d 377 (Okl. 1979). The decision is unusual. The opinion analyzes an assessment protest and asserts that there is a right to a jury trial. However, the decision was to remand to the trial court, requiring the taxpayer to pay the full amount of tax at issue, and then receive a jury trial pursuant to state statute. Id. at 379. Rhode Island, in Briggs Drive, Inc. v. Moorehead, 103 R.I. 555, 239 A.2d 186 (1968), held that the taxpayer had a statutory right to a jury trial in Rhode Island. However, the opinion also contained dicta finding that a common law right to a jury trial exists in tax refund cases. The opinion made this assertion in a single footnote. Id. at 187, n.1.

These decisions offer support only for the argument that a taxpayer has a right to a jury trial when provided by state statute. Each opinion's gratuitous conclusion on the common law question is contrary to the great weight of authority, including the opinion of the United States Supreme Court. Nicholl v. United States, 74 U.S. 125, (7 Wall.) 122, 19 L.Ed. 125 (1868).

E. FEDERAL DECISIONS

Lest Petitioner give the impression that it is entitled to a jury under the Seventh Amendment of the United States Constitution, there is ample authority to the contrary. The Seventh Amendment right to a jury trial does not apply in state courts. In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 434 (Fla. 1986); Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979); Ruth v. Sorenson, 104 So. 2d 10 (Fla. 1958); Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217, 36 S.Ct. 595, 596-97 (1916).

To look uncritically at a few federal decisions in an effort to analyze the right to a jury trial in a state tax law case would be of no guidance. This method of analysis is misleading for a number of reasons, each of which will be addressed separately.

1. Federal decisions are based upon interpretations of the Seventh Amendment to the United States Constitution, which does not apply to the states.

2. The vast weight of the federal decisions have found no "common law" or "constitutional" right to a jury trial in federal tax cases.

3. To the extent a right to trial by jury exists in federal tax practice, it exists only in district court refund cases where a statute has granted that right. No right to trial by jury exists in federal tax assessment challenges.

Because of these vast, material differences in the history of federal and state tax rights and procedures, reliance on certain federal case law decisions misleads one as to the true nature of federal and state tax law practice.

1. Federal Decisions Rely On Application Of Seventh Amendment

Two federal decisions have been cited by other courts discussing the right to trial by jury. United States v. New Mexico, 642 F.2d 397, 400 (10th Cir. 1981) and Damsky v. Zavatt, 289 F.2d 46 (2nd Cir. 1961). However, the Seventh Amendment does not apply to the states. This has long been the holding of the United States Supreme Court[13], Federal Courts of Appeal[14], State Supreme Courts[15], and this Court.[16] Uncritical reliance on the two federal cases would thus be mistaken. Moreover, those decisions are in conflict with decisions of the United States Supreme Court and other Circuit Courts of Appeals on the question.

The United States Supreme Court first faced the question in Wickwire v. Reinecke, 275 U.S. 101, 48 S.Ct. 43 (1927). There a taxpayer brought an action to recover taxes paid. The taxpayer initially sought to argue a right to a jury trial but the question was not asserted in the brief on the merits. Id. at

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[13] Minneapolis & St. Louis Railroad v. Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916)

[14] Woods v. Holy Cross Hospital, 591 F.2d 1164, 1171 n.12 (5th Cir. 1979), cf., Hattaway v. McMillian, 903 F.2d 1440, 1451 n. 16 (11th Cir. 1990).

[15] See, e.g., Bendick v. Cambio, 558 A.2d 941 (R.I. 1989); Sealey by and through Sealey v. Hicks, 309 Or. 387, 788 P.2d 435 (1990), cert. den., _____ U.S. _____, 111 S.Ct. 65 (1990); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989); Coueur D'Alene Lakeshore Owners and Taxpayers v. Kootenai County, 661 P.2d 756 (1983).

[16] Ruth v. Sorensen, 104 So. 2d 10 (Fla. 1958); Dudley v. Harrison McCready & Co., 127 Fla. 687, 173 So. 820 (Fla. 1937); Florida East Coast Railway Co. v. Hayes, 67 Fla. 101, 64 So. 504 (1914).

105. The Supreme Court nevertheless gave the position short shrift by stating that the "right of the petitioner to a jury in such a case is not to be found in the Seventh Amendment to the Constitution, but merely arises by implication from the provisions of Section 3226, Revised Statutes (26 USCA §156)." Id.

Since then, with the exception of the 10th Circuit Court of Appeals, the United States Courts of Appeal have consistently ruled that no common law right to a trial by jury exists in federal tax cases. See, Masat v. C.I.R., 784 F.2d 573, 575 (5th Cir. 1986) (assessment case, Tax Court); Parker v. C.I.R., 724 F.2d 469, 472 (5th Cir. 1984) (no constitutional right to jury; right only exists if statutes so provides); Bagur v. C.I.R., 603 F.2d 491, 500 n. 11 (5th Cir. 1979) (no constitutional right to jury trial in refund cases in either Tax Court or District Court); Martin v. C.I.R., 756 F.2d 38, 40 (6th Cir. 1985)(assessment case, Tax Court); Blackburn v. C.I.R., 681 F.2d 461, 462 (6th Cir. 1982)(assessment, Tax Court); Funk v. C.I.R., 687 F.2d 264, 266 (8th Cir. 1982)(assessment, Tax Court); (no right of action at common law against sovereign; no statutory right granted in Tax Court); Dahl v. C.I.R., 526 F.2d 552 (9th Cir. 1975); Olshausen v. C.I.R., 273 F.2d 23, 28 (9th Cir. 1959), cert. den., 363 U.S. 820 (1960).

Thus, the right to a trial by jury in a federal refund case has been conferred on the taxpayer by the actions of Congress and is not based upon a constitutionally derived right. The first federal statute to grant a right to a jury trial was

enacted in 1845. See Act of Feb. 26, 1845, 5 Stat. at Large, Chapter 22, 727. The statute has been revised over time and is now found in 26 U.S.C. 2402. But this statute applies only to demands for a refund brought to the federal district court and the demand may only be made after the taxpayer has paid the entire disputed amount into the federal treasury. Even the federal right to a jury trial arises only by statute and does not extend to an assessment case brought in the Tax Court.

The 10th Circuit Court of Appeals departed from established law when it held that there is a Seventh Amendment right to a jury trial in a tax case in United States v. New Mexico, 642 F.2d 397 (10th Cir. 1981). The court acknowledged that the remedy being sought was equitable. Nevertheless, it found that "the right of a taxpayer to a jury trial in refund cases is rooted in the common law and was preserved by the Seventh Amendment. The right of a federal taxpayer to a jury trial when he pays the tax and sues to recover is recognized by statute." Id. at 401. The analysis was based upon a determination of the rights of taxpayers to tax review at English Common Law. Id. at 400-01. However, as was shown above, the tort right to a jury trial in a tortious seizure case is unlike a right to a jury trial in a tax assessment case.[17]

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[17] The 10th Circuit's decision was admittedly result oriented. The court found it anomalous for the federal government to statutorily allow a jury trial in tax matters where the federal government was a defendant but not where it was a plaintiff. Id. at 401. The 10th Circuit then ignored all case law to the contrary and found a common law right to a jury trial to allow the federal government, as plaintiff, a jury trial.

2. Under The U.S. Supreme Court Test To Determine A Seventh Amendment Right To A Jury Trial, There Is No Right To A Jury Trial In A Florida Tax Case

The United States Supreme Court, in Ross v. Bernard, 396 U.S. 531, 538, n. 10, 90 S.Ct. 733 (1969), set out a three part test to determine if a right to a jury trial exists for federal purposes which may be of some guidance to this Court. The factors are: 1) whether the action was in equity or law prior to the merger of law and equity; 2) what remedy is being sought; and 3) reference to the abilities and limitations of juries. Id. If this three part test is applied to the law and history in Florida, the results show that there is no right to a jury trial in tax matters.

Florida has traditionally determined that tax actions sound in equity. Powell v. Kelly, 223 So. 2d 305 (Fla. 1969); Day v. City of St. Augustine, 139 So. 880 (Fla. 1932); Department of Revenue v. University Square, Inc., 336 So. 2d 371 (Fla. 1st DCA 1976). This is in keeping with Florida's history of administrative review of tax matters while a Territory and during its early years as a state. See An Act to Raise a Revenue in Florida Territory, Laws of Florida Territory, 7th Session (1828), p. 239. See also, Ch. 10, §30, at 21, Laws of Fla. (1845).

The remedies a taxpayer may receive in a Florida court are equitable in nature - an injunction or a declaratory statement to prohibit collection of an invalid assessment. Mandamus may also be employed to force the ministerial act of making a refund. See e.g., Department of Revenue v. University Square, Inc., 336 So. 2d 371 (Fla. 1st DCA 1976) (declaratory

judgment action used in assessment protest); Seaboard Air Line R. Co. v. Gay, 160 Fla. 445, 35 So. 2d 403 (1948) (mandamus action used for tax refund).

As to the third factor, a jury is distinctly unsuitable to determine tax controversies. As one commentator has put it, "to make juries the assessors of the claims of the state upon individuals could only introduce anarchy". Cooley on Taxation, supra, at 47. The complexities of railroad assessments, corporate income tax assessments, and the myriad other areas of state taxation have driven several states and the federal government to the creation of specialized tax courts. The expertise necessary to make consistent determinations in the field of taxation is, it is respectfully submitted, beyond the competence of the jury system.

Employing the United States Supreme Court's Ross analysis, this Court should be guided to find that there is no constitutional right to a jury trial in a tax case because the cause of action is equitable, the remedies are equitable, and the jury system is distinctly unsuitable to hear these cases.

F. POLICY

1. The Policy Reasons For Not Allowing Jury Trials In Tax Cases Are The Same Now As They Were In England In 1791 and In Florida In 1845.

In the business of collecting taxes, it is hard enough to find volunteers. Professor Cooley, in his Treatise on the Law of Taxation, wrote that introducing jurors into tax cases, "would not so much strengthen the judicial department as it would weaken the legislative;" and that, although jury independence was useful

in some areas of the law, in the field of taxation, it "could only introduce anarchy". Cooley on Taxation, supra, at 47. Juries cannot be expected to interpret tax statutes in the consistent manner necessary to provide equal protection to taxpayers. As long as a taxpayer receives due process, notice and a right to be heard, the constitutional necessities for tax assessment, collection and enforcement have been met. Cooley on Taxation at 48-49. In tax matters, there are constitutional rights to equal protection and due process, but no right to a jury trial.

The U.S. Supreme Court held in 1868 that tax refunds were permitted only by statute because the government is immune from suit by its citizens. Nicholl v. U.S., 74 U.S. 125 (7 Wall.) 122, 19 L.Ed. 125 (1868). The Court held that, "The allowing a suit at all, was an act of beneficence on the part of the Government." Id. at 124. Relying on its previous decision in Elliott v. Swartwout, (10 Pet. 153), (1836) the Court stated that even had the tax been paid involuntarily, there would be no recovery from the government without a statute. The Court held that this was so because of the government's need for reliable amounts of funds and that to hold otherwise would be "disastrous" to the fisc. Nicholl at 128.

State courts have also made similar policy findings. There must be prompt payment of taxes to maintain the government. This consideration, "leaves no room for the supposition that . . . trial by jury [was] within the contemplation of the people when consenting to any general provision of the

Constitution." State v. Bley, 164 Ala. 547, 50 So. 263 (1909). The California Supreme Court wrote, "The idea that every taxpayer is entitled to the delays of litigation is unreason." People v. Skinner, 115 P.2d 488, 492 (Ca. 1941).

The same policy concerns advanced in the nineteenth century apply with equal vigor in the twentieth. The State of Florida, since territorial days, has statutorily granted review of tax matters for its citizens, but has never provided for a jury. This practice is in keeping with the common law, it is constitutionally inoffensive, and it flows from valid policies which have been upheld by the courts for nearly two centuries.

CONCLUSION

This Court should uphold the decision of the Third District Court of Appeal and find that no constitutional right to a jury trial exists for tax matters. This decision would be in accord with the law of Florida in 1845, with the prior decisions of Florida Courts finding tax matters to sound in equity, and in accord with the great weight of the law of the other states and the federal government.

Respectfully submitted,

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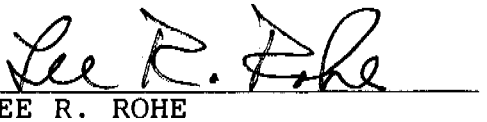

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jay W. Williams, Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. First Street, Miami, FL 33128-1993 and William A. Fragetta, Esquire, Courvoisier Centre, Suite 300, 501 Brickell Key Drive, Miami, FL 33131-2608 this 24th day of February, 1993.

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