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.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

		Page
TABLE OF CITATIONS		ii
ARGUMENT		1
I.	RESPONDENT HAS CITED NO AUTHORITY HOLDING THAT A PRIVATE PARTY MAY NOT OBTAIN A JURY TRIAL IN A TAX ASSESSMENT CASE, PARTICULARLY WHEN THE PRIVATE PARTY IS THE DEFENDANT IN THE CASE	1
II.	THE COMPLEXITY (OR PURPORTED COMPLEXITY) OF THE ISSUES IN THIS CASE DO NOT AFFECT SECTION 3'S ENTITLEMENT TO A JURY TRIAL	3
III.	CASE AUTHORITY CITED BY ROBBINS AND BY THE DEPARTMENT OF REVENUE SUPPORTS SECTION 3'S POSITION	5
IV.	FEDERAL CASE AUTHORITY IS INSTRUCTIVE AS TO SECTION 3'S ENTITLEMENT TO A JURY TRIAL IN THIS CASE	8
V.	THE MOST RECENT FLORIDA CASE AUTHORITY SUPPORTS A DETERMINATION OF SECTION 3'S ENTITLEMENT TO A JURY TRIAL	10
CONCLUSION		12

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TABLE OF CITATIONS

Page

Allen v. Estate of Dutton,
394 So.2d 132 (Fla. 5th DCA 1981) 7, 8

Bystrom v. Hotelerama Associates,
511 So.2d 987 (Fla. 1987) 1

City of South Miami v. State ex rel Gibbs,
143 Fla. 524, 197 So. 109 (Fla. 1940) 2

Damsky v. Zavatt,
289 F.2d 46 (2d Cir. 1961) 5, 9

Dick v. State ex rel. Harris,
153 So.2d 844 (Fla. 2d DCA 1963) 6, 7

Dickinson v. Allen,
215 So.2d 747 (Fla. 2d DCA 1968) 1, 2

Emery v. International Glass and Manufacturing, Inc.,
249 So.2d 496 (Fla. 2d DCA 1971) 7

Firstamerica Development Corp. v. County of Volusia,
298 So.2d 191 (Fla. 1st DCA 1974) 2, 3

Hightower v. Bigoney,
156 So.2d 501 (Fla. 1963) 4

Hollywood, Inc. v. City of Hollywood,
321 So.2d 65 (Fla. 1975) 2, 10

In re: B&L Farms, Co.,
184 F. Supp. 801 (S.D. Fla. 1960) 6, 7

In Re: Forfeiture of 1978 Chevrolet Van,
493 So.2d 433 (Fla. 1986) 5, 6, 8, 11

King Mountain Condominium Association v. Gundlach,
425 So.2d 569 (Fla. 4th DCA 1979) 7

Masat v. C.I.R.,
784 F.2d 573 (5th Cir. 1986) 9

Ozier v. Seminole County Property Appraiser,
585 So.2d 357 (Fla. 5th DCA 1991) 1

Parker v. C.I.R.,
724 F.2d 469, 472 (5th Cir. 1984) 9

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Pugh v. Bowden,
54 Fla. 302, 45 So. 499 (1907) 5

Rizzo v. Euclid Urbana Co.,
118 So.2d 553 (Fla. 2d DCA 1960) 4

State ex rel. Landis v. S.H. Kress and Co.,
115 Fla. 189, 155 So. 823 (1934) 4

The Printing House, Inc. v. State of Florida, Department of Revenue, 18 F.L.W. D244 (Fla. 1st DCA Dec. 31, 1992) . . 10, 11

United States v. McMahon,
569 F.2d 889 (5th Cir. 1978) 9, 10

United States v. New Mexico,
642 F.2d 397 (10th Cir. 1981) 8, 9

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ARGUMENT

I. RESPONDENT HAS CITED NO AUTHORITY HOLDING THAT A PRIVATE PARTY MAY NOT OBTAIN A JURY TRIAL IN A TAX ASSESSMENT CASE, PARTICULARLY WHEN THE PRIVATE PARTY IS THE DEFENDANT IN THE CASE

Respondent Joel W. Robbins' ("Robbins") Answer Brief argues unequivocally that no Florida court has ever conducted a jury trial in what Robbins characterizes as a "tax challenge" case. Robbins states no authority for this proposition, and simply asks this Court to accept as conclusive his statement that he has been unable to find any reported cases involving the jury trial of a tax challenge case. As Robbins is the party challenging Petitioner Section 3 Property Corp. ("Section 3")'s entitlement to jury trial, it is incumbent upon Robbins to cite authority holding that a jury trial is *not* available any "tax challenge" case; Robbins has not done so. Moreover, Robbins necessarily sidesteps the case authority cited in Petitioner's Initial Brief, which explicitly discussed jury trials for such cases, and remanded cases to trial courts on that basis. *See Ozier v. Seminole County Property Appraiser*, 585 So.2d 357 (Fla. 5th DCA 1991); *Dickinson v. Allen*, 215 So.2d 747 (Fla. 2d DCA 1968). Robbins cannot assert that a jury trial was not permitted or conducted in these cases.

Robbins attempts to distinguish Section 3's case authority by arguing that the discussion of entitlement to jury trial in those cases was dicta and/or tangential. However, Robbins' answer brief (at pp.16-17) sets forth a string cite of cases (beginning with *Bystrom v. Hotelerama Associates*, 511 So.2d 987 (Fla. 1987)) in support of his argument that "tax challenge cases are tried non-jury," despite the fact that none of these cases even addresses the

entitlement to and/or availability of jury trial. Apparently, Robbins has merely cited a list of cases which were tried non-jury, with no other bearing on the issues presented in Section 3's Petition.

Moreover, Robbins' answer brief (as well as the Florida Department of Revenue's *amicus curiae* brief) repeatedly and incorrectly characterizes this case as a "tax challenge" case, in which a taxpayer has sued a government agency and/or representative to challenge a tax assessment. In this case, the Dade County Property Appraiser sued Section 3; at the time the property appraiser filed his lawsuit, Section 3 was in no way "challenging" the governing property tax assessment. Neither Robbins nor the Department of Revenue has cited any authority for denying a requested jury trial to a *defendant* taxpayer in an action where the governmental agency or representative is the party seeking to alter the status quo. Notwithstanding Robbins' strained efforts to distinguish *Hollywood, Inc. v. City of Hollywood,* 321 So.2d 65 (Fla. 1975), and *City of South Miami v. State ex rel. Gibbs,* 143 Fla. 524, 197 So. 109 (Fla. 1940), that authority strongly supports the concept that a defendant taxpayer is entitled to a jury trial in such cases.

Robbins' analysis (at pp.13-14) of *Firstamerica Development Corp. v. County of Volusia,* 298 So.2d 191 (Fla. 1st DCA 1974) undercuts his entire principal argument that it is "universally understood" that there is no entitlement to a jury trial in cases involving tax assessments. First, Robbins amazingly posits that in

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Dickinson (a case factually on point with this case) "the issue of whether a jury trial would have been proper was never discussed by the Court and never raised as an issue on appeal." Robbins offers no clue as to how he is privy to what was discussed by the court and/or argued by the parties in *Firstamerica*. Moreover, even if Robbins' speculations in that regard were correct, he offers no clue as to why both the trial court and the First District Court of Appeal would specifically note the waiver of a right which (as per Robbins) Florida courts universally recognize as nonexistent.

At p.23, Robbins asserts that "[t]he respondent is aware of no case of any type whatsoever where a jury has been called upon to determine if an administrative or judicial officer has abused his discretion or exercised his discretion in an unreasonable manner." Here and throughout his answer brief, Robbins relies on his own opinion and speculation -- rather than on any case or statutory authority -- as to whether a jury trial is appropriate. Robbins has cited no authority holding that a jury may *not* be "called upon to determine such issues." Presumably, no such authority exists, or Robbins would have cited such authority in his brief rather than rely on his own opinions on that issue.

II. THE COMPLEXITY (OR PURPORTED COMPLEXITY) OF THE ISSUES IN THIS CASE DO NOT AFFECT SECTION 3'S ENTITLEMENT TO A JURY TRIAL

Both Robbins and the Department of Revenue have argued that the issues in a case involving a property tax assessment are overly complex and beyond the ken of a jury to make findings of fact. Robbins and the Department argue that the complexity of these

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issues precludes their presentation to a jury, and requires that the trial judge act as the finder of facts. Such an argument runs directly contrary to Florida law.

Where a right to jury trial exists, a party may not be deprived of that right because of the complexity of factual issues involved in the case. *State ex rel. Landis v. S.H. Kress and Co.*, 115 Fla. 189, 155 So. 823 (1934). The court may not usurp the jury's role as fact-finder because the case is complicated and/or involves mathematical problems which the jury may need to resolve. *Hightower v. Bigoney*, 156 So.2d 501 (Fla. 1963); *Rizzo v. Euclid Urbana Co.*, 118 So.2d 553 (Fla. 2d DCA 1960). As a party's right to jury trial is determined independently of an evaluation of the case's complexity, the complexity (or lack of same) of this case's factual issues is irrelevant in determining whether the Third District Court of Appeal erred in directing the striking of Section 3's demand for jury trial.

At pp. 23-24 of his answer brief, Robbins appears to argue that there are no factual determinations to be made in "tax challenge" cases. Accordingly, argues Robbins, there is no need for a jury or anyone else to make findings of fact in this case. Robbins cites no remotely on-point authority in support of such a position. Moreover, Robbins does not endeavor to explain why he propounded detailed discovery requests to Section 3 at the time of the filing of his complaint; surely, discovery on factual issues would be meaningless and unnecessary if the trial court was merely to act as an appellate tribunal in this case.

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III. CASE AUTHORITY CITED BY ROBBINS AND BY THE DEPARTMENT OF REVENUE SUPPORTS SECTION 3'S POSITION

In *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961) (relied on by the Department of Revenue in support of its principal arguments), the Court of Appeals held a husband entitled to a jury trial as to the determination of his personal liability regarding taxes assessed against him, a portion of which taxes (argued the husband) were his wife's responsibility. The court in *Damsky* specifically distinguished cases brought by a taxpayer from actions brought by the Government to collect taxes. 289 F.2d at 51. The court held that a taxpayer *was* entitled to a jury trial in a government's action to collect taxes.

The Department of Revenue cites *Pugh v. Bowden*, 54 Fla. 302, 45 So. 499 (1907) as holding that "there is no right to trial by jury... in juvenile proceedings" -- and, by analogy, in "tax challenge cases." (Department of Revenue's brief at pp.3,18). In fact, this Court in *Pugh* held unconstitutional a Florida statute authorizing the commitment of a juvenile without a jury trial, and held that defendants were entitled to jury trials in juvenile proceedings. 45 So. at 501. In directing the trial court to conduct a jury trial prior to committing a juvenile defendant to the state reform school, this Court in *Pugh* stressed the overriding importance and necessity of trial by jury.

The Department of Revenue's brief (at p.26) cites *In Re: Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433 (Fla. 1986) as holding that "[t]he Seventh Amendment right to a jury trial does

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not apply in state courts." In fact, the pertinent language from that case states:

> Although the Seventh Amendment guarantee to the right of trial by jury is only binding upon federal courts, this Court has recognized that federal decisions construing same are helpful and persuasive in construing this state's constitutional provision of like import.... Therefore, it is apparent to us that reference to the "common law" in regard to the right to a jury trial under our state constitution is the result of reliance on federal decisions construing that right under the seventh amendment to the United States Constitution.

493 So.2d at 435. This severely undermines the Department of Revenue's protracted argument, elsewhere in its brief, that federal decisions upholding taxpayers' entitlement to jury trial in analogous situations are inapplicable. Moreover, this Court in *1978 Chevrolet Van* reemphasized that "the constitutional right to trial by jury is not to be narrowly construed," and that "this right is not limited strictly to those specific proceedings in which it existed before the adoption of [Florida's] constitution, but should be extended to proceedings of like nature as they may arise." *Id.*

A central thesis of the Department of Revenue's brief is that "[h]istorically, if a taxpayer disagreed with an assessment, no judicial redress was permitted." (Department of Revenue's brief at p.6). In support of this proposition, the Department has cited *In re: B&L Farms, Co.*, 184 F. Supp. 801 (S.D. Fla. 1960), and *Dick v. State ex rel. Harris*, 153 So.2d 844 (Fla. 2d DCA 1963). Those decisions contradict and/or do not remotely relate to the proposition for which they are cited.

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In *B & L Farms*, the court stated that a Florida taxpayer who disagreed with an assessment had a "judicial remedy [which] may be pursued in the Circuit Courts of the State by suit timely instituted." 184 F.Supp. at 802. *Dick* concerned a mandamus proceeding by a board of county commissioners to compel a tax assessor to perform particular duties. Dick does not even deal with a taxpayer disagreeing with an assessment, let alone does it hold or state that "no judicial redress was permitted" to such a taxpayer.

The Department of Revenue's brief cites other cases without regard to whether their content actually supports or relates to the Department's arguments. At p. 20, the Department cites *Emery v. International Glass and Manufacturing, Inc.*, 249 So.2d 496 (Fla. 2d DCA 1971) and *King Mountain Condominium Association v. Gundlach*, 425 So.2d 569 (Fla. 4th DCA 1979), for the statement that "the rule requiring that equitable claims be tried without a jury is not altered by the consolidation of law and chancery." *Emery* contains no such statement or reference, and the entitlement to a jury and/or a non-jury trial is not even mentioned in that case. Meanwhile, the court in *King Mountain Condominium Association* emphasized that "[t]he 1967 merger of Florida's law and equity procedures has given rise to difficult questions concerning the constitutional right to a jury trial." 425 So.2d at 570.

At pp.20-21, the Department of Revenue inaccurately cites *Allen v. Estate of Dutton*, 394 So.2d 132 (Fla. 5th DCA 1981), as holding that "it can be reversible error for a trial court to

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submit 'traditionally' equitable issues to a jury for determination." *Allen* does not hold, state or suggest that it is or can be reversible error for a trial court to submit "traditionally" equitable issues to a jury. *Allen* simply and briefly affirms a trial court ruling that a party was not entitled to a jury trial on the "undue influence" issue in a probate proceeding.

IV. FEDERAL CASE AUTHORITY IS INSTRUCTIVE AS TO SECTION 3'S ENTITLEMENT TO A JURY TRIAL IN THIS CASE

Despite Robbins' and the Department of Revenue's attempt to drive a nonexistent wedge between federal "Seventh Amendment" decisions and the determination of a Florida taxpayer's entitlement to jury trial in a court action instituted by the government, this Court has unequivocally stated that such federal decisions are instructive and are to accorded considerable weight and consideration. *In re Forfeiture of 1978 Chevrolet Van*, 493 So.2d at 435. Federal precedent is instructive in determining whether Section 3 is entitled to a jury trial in the action which Robbins has commenced against Section 3.

In *United States v. New Mexico*, 642 F.2d 397 (10th Cir. 1981), the court held that the defendant was entitled to a jury trial in the United States' action for declaratory and injunctive relief, and for recovery of taxes which a U.S. subcontractor had paid to the defendant. Contrary to the historical analysis propounded by Robbins and the Department of Revenue, the Tenth Circuit Court of Appeals found both "English precedents for a jury trial of an action to recover taxes assessed and paid," and that "early

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American cases indicate that juries were used when a taxpayer sued to recover taxes illegally exacted." 642 F.2d at 400-01. Accordingly, the court stated: "We are persuaded that the right of a taxpayer to a jury trial in refund actions is rooted in the common law." *Id.* at 401. *See also, Damsky v. Zavatt*, 289 F.2d 46 (2nd Cir. 1961).

At p. 28 of its brief, the Department of Revenue strenuously attempts to dilute the *United States v. New Mexico* holding by means of a string-cite of cases (starting with *Masat v. C.I.R.*, 784 F.2d 573 (5th Cir. 1986)), denying jury trials in federal tax cases. However, these cases contain a common denominator which the Department of Revenue fails to note. Each of these decisions makes specific reference to 28 U.S.C. §§ 2402 and 1346 (a)(1) and holds that a taxpayer who "elects to bring suit in the Tax Court" to contest a deficiency is not entitled to a jury trial. *Parker v. C.I.R.*, 724 F.2d 469, 472 (5th Cir. 1984). These same cases provide that a taxpayer that sues for a refund in the district court (after paying the tax allegedly owed) *is* entitled to a trial by jury. Id. Florida has no equivalent to the U.S. Tax Court, and in any event the taxpayer is the defendant in this suit. Accordingly, the particular federal statutory and procedural factors controlling *Masat, Parker, et. al.*, do not come into play here.

The holding in *U.S. v. McMahon*, 569 F.2d 889 (5th Cir. 1978), supports a finding of Section 3's entitlement to a jury trial in this case. In *McMahon*, the U.S. Government sued a corporate

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officer, alleging that the officer had failed to pay withholding taxes, and seeking to collect the allegedly unpaid taxes and a 100% penalty. The court in *McMahon* held:

> There can be no question that the proceedings brought by the United Stated in this case seeking a collection of the 100% penalty from McMahon. . . is a "suit at common law" within the intendment of the Seventh Amendment.

569 F.2d at 889.

In this case, a [county] government official is the plaintiff seeking to overturn an assessment, to the defendant taxpayer's detriment. State and federal authority provide that a federal taxpayer is entitled to a jury trial when the government sues him/her in an effort to obtain a judgment providing for the payment of additional tax monies. Accordingly, the Court of Appeal erred in disapproving the trial court order denying Robbins' Motion to Strike Section 3's Demand for Jury Trial.

V. THE MOST RECENT FLORIDA CASE AUTHORITY SUPPORTS A DETERMINATION OF SECTION 3'S ENTITLEMENT TO A JURY TRIAL

In *The Printing House, Inc. v. State of Florida, Department of Revenue*, 18 F.L.W. D244 Fla. 1st DCA Dec. 31, 1992) the First District Court of Appeal entered an order granting a taxpayer plaintiff's petition for writ of certiorari from a circuit court order striking the taxpayer's demand for jury trial. In that case, the taxpayer had filed a complaint against the Department of Revenue, challenging proposed assessments for sales and use tax, for local government infrastructure tax, and for criminal justice tax. The court emphasized (citing *Hollywood, Inc. v. City of Hollywood*, 321 So.2d 65 (Fla. 1975)) that "[i]f there is any

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question as to whether a party is afforded a right to jury trial, such question should be resolved, if at all possible, in favor of the party seeking a jury trial." 18 F.L.W. at D245. The court rejected the Department of Revenue's arguments against entitlement to a jury trial and found that "the circuit court's order striking the demand for jury trial at this [extremely early] stage of the proceedings was a departure from the essential requirements of law." *Id.*

In reaching its decision, the court in *Printing House* -- in accordance with *In re Forfeiture of 1978 Chevrolet Van,* 493 So.2d 433 (Fla. 1986) -- took into account that "[w]hile the Seventh Amendment to the United States Constitution is only binding upon federal courts, Florida courts should look to federal decisions construing the right to jury trial under the U.S. Constitution." 18 F.L.W. at D246. In reaching its decision, the First District Court of Appeal explicitly noted that it was guided by the "following language" from *United States v. New Mexico,* 642 F.2d 397, 401 (10th Cir. 1986):

> The English case law demonstrates that the common law right to a jury trial pre-dates the Seventh Amendment and any federal statutes. We are persuaded 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.

Id.

In his answer brief, Robbins cites *Printing House* with approval, in support of his arguments, and takes no quarrel with the First District Court of Appeal's adoption of the holding in *United States v. New Mexico.* While the Department of Revenue's

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brief goes to great pains to characterize the *New Mexico* holding of a common law right to jury trial in tax cases as an anomaly, the Department disregards the fact that Florida's First District Court of Appeal has wholeheartedly accepted and embraced that holding. Contrary to the positions exposed by Robbins and the Department of Revenue: (a) Florida courts *are* to look at federal Seventh Amendment decisions in determining the right to jury trial in Florida tax cases; (b) Florida courts have accepted federal decisions holding that there is a common law right to jury trial in such cases.

CONCLUSION

For the foregoing reasons, and for those set forth in Petitioner's Initial Brief, Petitioner Section 3 Property Corporation respectfully requests that this court enter an order reversing the District Court of Appeal's November 22, 1992, order, and reinstating the trial court's May 19, 1992 order in full force and effect.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Jay W. Williams, Assistant Dade County Attorney, 2810 Metro-Dade Center, 111 N.W. First Street, Miami, FL 33128-1993; and Eric J. Taylor, Lee R. Rohe, Lisa M. Raleigh, and Lealand L. McCharen, Assistant Attorneys General, Office of the Attorney General, The Capitol - Tax Section, Tallahassee, FL 32399-1050 this 20th day of April, 1993.

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