IN THE
SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,

Petitioner,

v.

THE PRINTING HOUSE, INC.,

Respondent.

_____/

Case No. 81,602

[1st DCA Case No. 92-2725]
[Circuit Ct. Case No. 92-409]

FL Bar No. 039317

RESPONDENT'S BRIEF IN REPLY TO AMICUS CURIAE

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PRELIMINARY STATEMENT

Amicus Curiae, C. Raymond McIntyre, Highlands County Property Appraiser, and the Property Appraiser's Association of Florida, will be referred to herein as the "APPRAISERS' ASSOCIATION."

ARGUMENT

The Appraisers' Association takes the same position as the Department of Revenue that property tax disputes under Section 194.171, Florida Statutes, and excise tax disputes under Section 72.011, Florida Statutes, are identical when considering whether the right to trial by jury exists under either Statute. The Appraisers' Association states that the issue presented in Section 3 Property Corp. v. Joel W. Robbins, Case No. 80,952, and this issue in this Appeal regarding The Printing House, can be simply stated as "whether the right to trial by jury obtains in tax cases under Florida Law." [Appraisers' Association Brief, Page 1]. The two (2) Statutes are fundamentally different, however, just as real property taxes and excise taxes are fundamentally different.

First and foremost, an action regarding excise taxes brought pursuant to Section 72.011, Florida Statutes, requires for the taxpayer to pay the disputed taxes into the Registry of the Court, or obtain a bond, or obtain a waiver, as a pre-requisite to bringing suit. It is mandatory and jurisdictional. Section 72.011, Florida Statutes. An action brought pursuant to Section 194.171, Florida Statutes particularly does not require payment of

the disputed amount, and therefore Section 194.171 would not place a taxpayer in a position of suing for a refund. Thus, the historical common law right to a jury trial after having paid the tax would not apply to a proceeding under Section 194.171. As presented to this Court by The Printing House in Respondent's Answer Brief on the Merits, the underlying fundamental distinction is that if a tax is paid, and thereafter liability for the tax is challenged (wherein the taxpayer seeks a refund), such taxpayer is entitled to a jury trial. Section 194.171, Florida Statutes, does not require such payment of tax. Additionally, Section 72.011, Florida Statutes, as noted by the First District Court of Appeal below, applies to specifically enumerated classes of taxes, and does not encompass challenges to proposed property taxes. The Printing House v. Department of Revenue, 614 So. 2d 119 (Fla. 1st DCA 1992).

The Appraisers' Association states further that "Florida's excise taxes, such as the Sales and Use taxes, did not come into being until 1950 and the first Florida Constitution was adopted in 1845." Such a statement clearly ignores established Florida law.

Whether or not a certain cause of action "existed" in 1845 is not determinative; to determine whether a tax issue such as the issue in this appeal was afforded a jury trial at common law, it is the nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law which guide the analysis, not whether the specific tax proceeding existed before the adoption of Florida's Constitution. In re:

Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1986).[1] Even the Department of Revenue accepts the fact that certain types of excise taxes existed long before the enactment of Section 72.011, Florida Statutes.

The Appraisers' Association, as well as the Department of Revenue, argue that the Florida Territory chose not to follow a "pre-trial seizure" of a taxpayer's property (and they state that a pre-trial seizure previously occurred under English Common Law), and that therefore the Florida Territory chose to abandon or modify any right to a jury trial in tax liability challenges. As argued by them, The Printing House would be entitled to a jury trial only if (1) the tax had, in fact, been actually paid by The Printing House and (2) such payment had been involuntarily made (i.e. "seized").

Both parties, however, appear to concede that under pre-Florida Territorial Law, there was a right to a jury trial after the tax was collected, in that a taxpayer was then suing for a refund. The Appraisers' Association and the Department, however, hold fast to their position that the Department has only issued "proposed" assessments against The Printing House, that such assessments are not yet final and collectible, and that The

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[1] The Ninth Circuit has recently found that a discrimination action brought pursuant to a Federal Statute was afforded a jury trial not on a statutory basis, but on Seventh Amendment grounds. Smith v. Barton, 914 F. 2d 1330 (9th Cir. 1990). The Court cites United States v. State of New Mexico, 642 F. 2d 397 (10th Cir. 1981), and centers the right to a jury trial analysis on the nature of the action and its comparison with a common law action brought in the Courts of England.

Printing House has not paid any part of the assessments into the State Treasury.

The assessments against The Printing House, however constitute the final position of the Department, and are therefore final for purposes of Court action and for purposes of collection. Rule 12-6.004, Florida Administrative Code. In the instant case, upon the assessments being presented to The Printing House, The Printing House filed a protest of the assessments with the Department [February 16, 1990 Protest Letter attached to Complaint "D"]. Further, and more importantly, Section 212.15, Florida Statutes subjects The Printing House to a second degree felony if payment of the assessed taxes is not made. Thus, non-payment clearly results in a severe sanction. The Department's December 26, 1989 Notices of Assessment stated that such taxes must be paid by The Printing House within a certain amount of time, or a protest entered. [Notices attached to Complaint as Exhibits "A," "B," and "C," Appendix to Petitioner's Reply Brief on the Merits.] The Department's December 2, 1991 Response to The Printing House's protest again reflects that payment, or a legal action pursuant to Chapter 72, Florida Statutes, must be brought within sixty (60) days of the date of the denial of the protest. [December 2, 1991 response attached to the Complaint as Exhibit "E"]. If this action pursuant to Chapter 72 had not been brought in the Circuit Court below, or if this action is unsuccessful, no further steps are necessary for the Department to begin collection.

The distinction drawn by the Appraisers' Association and the Department that Florida Territorial Law changed in 1828 such that no "seizure" of a taxpayer's property occurred and that therefore a clear substantive change occurred from English Common Law, is not supported by Florida law. Failure to pay the tax is a second degree felony, failing to bring suit challenging the "assessments" waives any challenge, and if suit is brought under Section 72.011, Florida Statutes challenging liability, payment of the challenged tax must be paid into the Registry of the Court.

Payment made by a taxpayer in bringing a challenge to a tax liability pursuant to Chapter 72 can only be considered to be, by definition, an involuntary payment. In North Miami v. Seaway Corp., 9 So. 2d 705 (Fla. 1942), the Florida Supreme Court established the standards that a taxpayer must meet in order to recover taxes already paid. The taxpayer may protest payment, but one of the standards is that the tax must have been paid under compulsion or the legal equivalent. The North Miami Court found that payment of a tax to avoid onerous penalties is generally considered as involuntary and compulsory. North Miami 9 So. 2d at 707. The Fourth District Court of Appeal later found that even the threat that sanctions would be imposed if such taxes were not paid renders the payment of the illegal tax involuntary. Broward County v. Mattel, 397 So. 2d 457 (Fla. 4th DCA 1981). Where non-payment subjects taxpayers to severe sanctions, as here, payment is deemed involuntary. City of Miami v. Florida Retail Federation, 423 So.

2d 991 (Fla. 3rd DCA 1992); Ves Carpenter Contractors, Inc. v. City of Dania, 422 So. 2d 342 (Fla. 4th DCA 1982).

Assuming that this Court finds a jury trial to only be afforded a taxpayer who pays the contested amount and thereby is seeking a "refund," or, alternatively, that this Court finds a jury trial to only be afforded a taxpayer who, pursuant to Section 72.011(3)(b), Florida Statutes, tenders actual payment of such final assessed amounts, including penalties and interest, into the Registry of the Court, then The Printing House should be allowed leave of Court to pay such contested amount due to this being an interlocutory appeal. The Statute, however, draws no distinction between tendering such funds into the Registry of the Court, obtaining a waiver of such payment from the Department of Revenue, or filing a cash bond. Thus, any of the three (3) options, in substance, equate to a common law action for a refund which was afforded a jury trial.

Finally, the Appraisers' Association and the Department claim that Florida Territorial law modified English Common Law such that the Florida Territory abrogated the right to a jury trial in an excise tax dispute prior to Florida's statehood in 1845. In support of their position, they cite only to Laws of Florida Territory, Seventh Session (1828), Cooley's Treatise on the Law of Taxation, Second Edition (1866), and Apalachicola Land Company v. Robert Forbes, Sheriff, Second Judicial Circuit (1837).

The 1828 Act, as outlined in The Printing House's Answer Brief on the Merits, merely lodges jurisdiction for property taxes and

excise taxes into the jurisdiction of County Court. County Courts, however, clearly utilized jury trials. Act of the Legislative Council of the Territory of Florida, November 20, 1828; Act of the Legislative Council of the Territory of Florida, November 22, 1828; Act of the Legislative Council of the Territory of Florida, November 23, 1928. As admitted by the Department, the 1828 Acts do not state that there is no right to a jury trial, and, contrary to the Appraisers' Association and the Department's position, the territorial acts do not specify that tax assessments and tax refunds are to be treated identically; assessments and refunds are only placed within the same jurisdiction of the County Court, but there is no procedural nor substantive unification for the two types of matters. Thus, any right found at common law prior to 1828 regarding the right to a jury trial if the tax had been previously paid is not legislatively modified.[2]

Cooley's Treatise of the Law of Taxation reaches the conclusion that the ministerial act of certifying tax rolls, or of overseeing the pre-payment assessments, were activities performed without a jury. Cooley's opinion is consistent with English Common Law, which did not afford a jury trial prior to the tax being paid.

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[2] On November 6, 1829, the Territorial Legislative Council adopted the common law of England in effect on July 4, 1776. Act of the Legislative Council of the Territory of Florida, November 6, 1829, Section 1. This Act was carried forward into Section 2.01, Florida Statutes, where Florida adopted the Common Law of England when Florida became a State in 1845. [Legislative history of Section 2.01, Florida Statutes.]

Finally, as stated by The Printing House in its Answer Brief on the Merits, Apalachicola Land Company v. Robert Forbes, Sheriff, Second Judicial Circuit (1837), involved a situation where the taxes had not yet been paid. Clearly the case was not a refund case. Further, and perhaps most importantly, the decision involved a tax on real property, which, as discussed above and discussed in The Printing House's Answer Brief, is clearly distinctive and severable from excise taxes. The 1837 decision is also nine years after the Florida Territorial Government adopted the common law of England in effect on July 4, 1776.

CONCLUSION

WHEREFORE, THE PRINTING HOUSE, urges this Court to uphold the First District Court of Appeal below, and affirm the historical right to jury trial in excise tax refund actions.

Respectfully submitted,

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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/~~Hand-Delivery/Telecopy~~ to Hon. Robert A. Butterworth by and through Lealand L. McCharen, Esq., and Lisa M. Raleigh, Esq., Department of Legal Affairs, Tax Section, The Capitol, Tallahassee, FL, 32399-1050, and to Larry E. Levy, Counsel for Amicus Curiae, Post Office Box 10583, Tallahassee, FL 32302, this 19th day of July, 1993.

LORENCE JON BIELBY