

IN THE
SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

CASE NO. 81,602

Petitioner,

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

v.

THE PRINTING HOUSE, INC.,

Fla. Bar No. 0393517

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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QUESTION PRESENTED

The First District Court of Appeal has certified, as a question of great public importance, the following question:

Is a taxpayer entitled to a jury trial, pursuant to Article I, Section 22 of the Florida Constitution, in a tax refund case under Section 72.011(1), Florida Statutes, where one of the conditions of Section 72.011(3), Florida Statutes, has been met?

In its Initial Brief on the Merits, the Department of Revenue incorrectly stated that: "However, it is uncontested factually that this is not a tax refund case, but a tax assessment protest." This statement is incorrect, in that The Printing House squarely presented to the First District Court of Appeal that the provisions of Section 72.011(3), Florida Statutes places a taxpayer in the position of suing for a refund of such assessment, and that therefore this is a tax refund case.

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STATEMENT OF THE CASE AND FACTS

The Printing House disagrees with several aspects of the Statement of the Case and Facts presented by the State of Florida, Department of Revenue [hereinafter " the Department"]. The Department incorrectly stated that The Printing House petitioned the First District Court of Appeal for a Writ of Mandamus. The Printing House petitioned for the issuance of a Writ of Certiorari to review the Order of the Circuit Court below granting the Department's Motion to Strike a Demand for Jury Trial. The First District Court of Appeal in The Printing House v. Department of Revenue, 614, So.2d 1119 (Fla. 1st DCA 1992), granted the Writ of Certiorari and quashed the Order striking The Printing House's demand for jury trial.

The Department also stated that in the Circuit Court action The Printing House alleged that in two earlier audits, the Department "failed to" assess use tax on certain purchases, and that the action below is a challenge to proposed assessments. These statements are also incorrect.

The Printing House's Complaint in Circuit Court challenged three (3) separate Notices of Proposed Assessment of Tax, Penalty and Interest, the total of the assessments together with penalty and interest through December 4, 1989 being \$1,017,620.29, plus interest since September 5, 1989. The three separate Notices, from which this action was initiated, although promulgated as "proposed assessments," constituted the final position of the Department of Revenue and are therefore final for purposes of court action. Rule

12-6.004, Florida Administrative Code.¹

Therefore, any reference by the Department as to this challenge being to a "proposed" assessment is incorrect.

Regarding any "failure" by the Department to assess use tax in previous audits of The Printing House, such statement is also incorrect. Prior to the 1989 audit which resulted in the tax assessments at issue in this suit, The Printing House had been audited by the Department on at least two (2) prior occasions. During the two previous audits, the Department determined that no tax liability had been incurred by The Printing House for the purchase of color separation materials in its color separation process. The Printing House relied upon the findings by the Department in such two prior audits that such process was not taxable, and thereafter did not change any procedures nor policies following the two prior audits. [Complaint, attached as Appendix 1, ¶19].

The First District Court of Appeal certified the instant question to this Court as being of great public importance, and the Department seeks this Court's discretionary review pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure.

¹ Pursuant to Section 72.011(3)(b)2, Florida Statutes, upon the filing of a suit in Circuit Court to contest the legality of an assessed tax, the taxpayer is required to either tender into the registry of court the amount of the contested assessment, or file a cash bond or a surety bond for the amount of the contested assessment (basically "paying" the tax) [See, argument below under Section III]. By letter dated January 23, 1992, the Department of Revenue waived such requirement for The Printing House [January 23, 1992 letter attached as Appendix 2, and attached to the Complaint as Exhibit "F"].

SUMMARY OF ARGUMENT

The First District Court of Appeal below correctly found that a taxpayer is entitled to a jury trial in Florida under Section 72.011, Florida Statutes. Such decision by the District Court is consistent with English and Florida common law, preserved by Florida's first Constitution and all constitutions thereafter.

In the trial court below, The Printing House contests the "legality" of an assessment of tax, penalty and interest, and brought suit against the Department of Revenue pursuant to Section 72.011, Florida Statutes. Such statute requires the payment of such contested tax, penalty and interest as a prerequisite to suit, thereby placing the taxpayer in a position of suing for a refund of the payment of such tax.

This type of action was known in both English and Florida common law, and received a jury trial. In such type of action, at common law, the right to a jury trial was well known and duly granted, and therefore such right was preserved by the Florida State Constitution. The right to trial by jury in Florida is preserved by Article I, Section 22 of the Florida Constitution; such provision has been interpreted as guaranteeing the right to trial by jury in those cases in which such right was enjoyed at the time Florida's Constitution became effective in 1845. Thus, if such right to jury trial existed at common law (English common law or Florida common law), the right exists today, as preserved by our Constitution, provided such right was not abrogated by Florida Territorial Act or practice prior to Florida's adoption of its

Constitution in 1845.

The Department has failed to provide this Court with any Florida territorial act which denied a jury trial to a challenge of an excise tax, after such tax had been paid. Further, the Department only directs this Court's attention to one reported decision regarding territorial practice, Apalachicola Land Company v. Robert Forbes, Sheriff, 2nd Jud. Cir. (1837). Such case, however, specifically dealt with an action to enjoin and restrain the sheriff from collecting such tax and is therefore inapplicable due to (a) the taxes having not yet been paid and therefore the taxpayer not being in the posture of suing for a refund, and (b) the decision is silent as to whether a jury trial had been requested or demanded by the plaintiff.

This action has been brought pursuant to Chapter 72, Florida Statutes, which allows a taxpayer to bring suit in Circuit Court after having paid the contested amount of tax. Chapter 72, by its terms, applies to certain enumerated classes of taxes and specifically does not encompass challenges to proposed property taxes. The District Court below, therefore, was correct in finding that Florida case law adjudicating the right to jury trial in a proceeding pursuant to Section 194.171, Florida Statutes (1991), or its predecessor statutes, is not controlling as to the question of a jury trial in an action under Chapter 72.

While State statutes can generally modify the common law or completely change the common law, where common law rights are preserved under a State's constitution, [as in the case of the

right to trial by jury secured by Florida Constitution, Article I, Section 22], such rights cannot be legislatively abrogated. This right is supported by Florida's particular constitutional and statutory scheme regarding the challenge of tax assessment matters under Chapter 72, and has not been receded from by any territorial act or decision. Many federal decisions, as well as certain state court decisions, have interpreted excise tax cases wherein the taxpayer sues for a refund, in a manner consistent with the First District Court below, requiring a jury trial.

Federal decisions additionally hold that the Seventh Amendment requires a jury trial to determine liability for any civil penalty imposed by a state or governmental authority. The Department seeks a twenty-five percent (25%) penalty from The Printing House herein, and pursuant to applicable federal case law The Printing House is entitled to a jury trial to determine liability of such penalty.

It is clear in Florida that the constitutional right to a trial by jury is not to be narrowly construed. Further, questions as to the right to trial by jury should be resolved, if at all possible, in favor of the party seeking a jury trial. The Printing House urges this Court to affirm the First District Court of Appeal.

I. FLORIDA'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY

The right to a jury trial is generally guaranteed by constitutional provisions in most states. In Florida, the right to a jury trial is specified in Art. I, Section 22, of the Florida Constitution as follows:

The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the numbers of jurors, not fewer than six, shall be fixed by law.

(emphasis supplied). Florida's First Constitution of 1838, which became effective upon Florida's admittance to the Union in 1845, and all subsequent Constitutions, contained similar provisions. B.L.Y. v. M.A. 18 Fla. L. Weekly S 265 (Fla. April 30, 1993). In re: Forfeiture of 1978 Chevrolet Van, 493 So.2d 433, (Fla. 1986).

Florida's constitutional provision is similar to provisions contained in most state constitutions. One commentator notes:

[T]he general provisions of the state constitutions are uniformly construed as not conferring a right to a trial by jury in all classes of cases; but merely as guaranteeing the continuance of the right in those classes of cases in which it existed either at common law or by statute in the particular state at the time of the adoption of the constitution, except as modified by the constitution itself.

50 C.J.S. Juries Section 10 at 723 (1947). Thus, the right to a trial by jury in Florida is guaranteed in those civil actions in which the common law gave the right at the time the Florida constitution became effective on March 3, 1845. Dudley v. Harrison, McCready & Co., 173 So. 820 (Fla. 1937).² The Constitution of 1838 became effective on March 3, 1845 when Florida was admitted into the Union. 5 U.S. Stat. 788. See also, State v. Webb, 335 So.2d 826, (Fla. 1976); Pugh v. Bowden, 45 So. 499 (Fla. 1907). Such a constitutional right to jury trial cannot be taken away or impaired by a trial Court. Flint River Steamboat Co. v. Roberts, 2 Fla. 102 (Fla. 1848) [no comparable reporter

² Trawick, Florida Practice and Procedure, Section 23-2 (1990).

citation].³

The territorial legislative council adopted the common law of England in effect on July 4, 1776, except as modified by statute. This act was carried forward into Section 2.01, Florida Statutes, where Florida adopted the common law of England existing on July 4, 1776. If an actual statute adopted before March 3, 1845 changed the right to a jury trial, the change is valid. Thereafter, the legislature had no power to change the constitutional right to a jury trial. Hathorne v. Panama Park Co., 32 So. 812 (Fla. 1902).⁴

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 the case at bar 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 guides the analysis, not necessarily an inquiry as to 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). Thus, the substantive posture of an action brought under Section 72.011, Florida Statutes as being in

³ In those actions where the constitution did not carry forward and thereby did not guarantee a jury trial, the Legislature may grant or deny the right to a jury trial. The Legislature may thereby extend such right to a class of cases where a right did not exist at common law. Wiggins v. Williams, 18 So. 859 (Fla. 1895); a jury trial may not be denied, however, where such right did exist at common law. Hughes v. Hannah, 22 So. 613 (Fla. 1897).

⁴ Florida has not statutorily modified such right regarding tax refund litigation after 1845. See Florida Territorial Law, Section I B. below. Even if Florida had modified such right, if the modification denied such right, the modification would be invalid, Hughes v. Hannah, 22 So. 613 (Fla. 1897).

the position of suing for a refund takes on heightened importance as refund actions have historically been granted jury trials under English common law.

A. English Common Law Clearly Indicates That A Taxpayer Had A Right To A Jury Trial In a Tax Refund Suit.

To determine whether a tax issue such as the issue below 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. If there is any question as to whether a party is afforded the right to a jury trial, such questions should be resolved, if at all possible, in favor of the party seeking a jury trial. Hollywood, Inc. v. City of Hollywood, 321 So.2d 65 (Fla. 1975). Further, a litigant's right to trial by jury is a valuable one which should not be denied. Beck v. Barnett National Bank, 117 So.2d 45 (Fla. 1st DCA 1960).

A complete review of English and American precedent for jury trial in an action to recover taxes assessed and paid is set out and discussed in Kirst, Administrative Penalties and Civil Jury, Vol. 126, U. Pa. L. Rev., No. 6, Page 1281, 1313-1320 (1978). [Attached as Appendix 3]. It is axiomatic that American colonists utilized English common law in structuring their court system in the new world prior to the Declaration of Independence. English tax history in the 1700's is equally relevant to Florida's constitutional provision, especially since Section 2.01, Florida Statutes adopted the common law of 1776. There is also evidence to establish that a jury trial on liability in taxpayer cases was part

of the common law known in early American colonial procedure. United States v. State of New Mexico, 642 F.2d 397 (10th Cir. 1981), Thurston v. Martin, 23 F.Cases 1189 (C.C.D.R.I. 1830).

In examining English common law precedent, it is important to distinguish the collection of the three different kinds of revenue as well as the differences among the various English courts. The three different kinds of revenue included: the King's ordinary revenue, the King's extraordinary revenue, and the local taxes. According to Blackstone's Commentaries on the Law (1 W. Blackstone, Commentaries, 281-306.), the King's ordinary revenue came from eighteen different sources, including the rents of the demesne lands, shipwrecks, treasure-trove, forfeitures for all offenses, escheats, and custody of idiots. The King's extraordinary revenue included the land tax, malt tax, customs on merchandise imported and exported, internal excise duty, salt duty, post office duty, stamp duty, house and window duty, and servant duty. Blackstone's at 306-26. Local taxes such as the poor rate were not part of the royal revenue but were raised and spent locally under the authority of parliamentary statutes. Blackstone's at 359-65. Distinctions among the three types of taxations are important because collection procedures were not the same and the place of the jury differed in litigation involving each type of tax. Kirst at 1314.

No distinction was made in English common law regarding a voluntary/involuntary payment of tax; the use of a jury arose after collection of the tax, wherein the taxpayer paid the tax and

thereafter challenged liability for the tax. Kirst, at 1281.

Under English common law, and usually in the English Court of Exchequer, any dispute as to the liability for payment of a tax, was granted a jury trial. Kirst, at 1320. The Court of Exchequer dealt exclusively with revenue matters, and this Court has recognized that a jury trial was afforded to litigants in the Court of Exchequer. In re: Forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986).

In the instant case, the taxes claimed by the Department of Revenue are comparable to the King's extraordinary revenue. The extraordinary revenue were taxes to which most of the colonists were subject to in England, so the basic tax collection procedures for the extraordinary revenue were more familiar to the colonists. These were the procedures transplanted to the New World, later to become part of the background of the seventh amendment (Kirst at 1315) and similar state constitutional provisions preserving the right to jury trial.

Generally, with respect to the King's extraordinary revenue, the Revenue was collected through a series of various levels of tax collectors, all of whom ultimately submitted such taxes to a receiver general who in turn forwarded the taxes to the Exchequer in London. Apparently, local collectors had the power to levy and sell goods or chattels for non-payment. Such a distress and sale was not authorized by judicial order or lawsuit, but by a precept from local commissioners. Kirst at 1316. Therefore, a claim of inaccurate assessment did not involve the judges because review of

assessments was also done by local commissioners as an administrative function; it was not a common law suit and had no jury trial. Local taxpayers could dispute the amount of taxes due to the local commissioners but either paid the local collector voluntarily, or the local collector levied and sold their property. Kirst at 1316.

While these taxes apparently were collected without using common law actions in the courts, a dispute over the legality of such a tax was afforded a jury trial. Kirst at 1316. Since there was no common law right to a jury trial before the tax was collected because the collection process did not involve the judicial function (as emphasized below by the Department of Revenue), the right to a jury trial only arose after collection of the tax from the taxpayer, in an action challenging liability for the tax. Kirst at 1317, 1320. The often-stated reason for allowing nonjudicial collection of taxes was the absolute necessity that the government be able to collect quickly the revenue needed for operating; therefore, the courts did not interfere with collection by an administrative agency. Kirst at 1295. Florida's statutory scheme in Section 72.011, Florida Statutes, preserves this goal. Here, The Printing House has, in effect, "paid" the tax assessment, and as outlined below, this action is precisely the type of action that was afforded trial at common law - after payment of the tax.

B. Florida Territorial Law did not Modify nor Abridge the English and Colonial Common Law Right to a Jury Trial.

The Department takes the position in its Initial Brief that upon Florida becoming a State in 1945, taxpayers who protested an

illegal assessment or sued to receive a refund for taxes paid into the State treasury received a bench trial before the County courts and, further, that because no statutory authority for a jury in tax matters was provided, that such review was accomplished without a jury. The Department bases its position upon an 1828 Act to Raise a Revenue for the Territory of Florida, which provided in Section 22 that the County court had jurisdiction to grant relief to such persons as may have been improperly taxed or overtaxed. The section included taxpayers who had not yet paid the tax, and those who had already paid the tax.⁵ The section is silent, however, as to whether a jury was afforded the taxpayer.

The Department concludes that because disputes over improper taxation were to be resolved by County court pursuant to Section 22 of such Act, that a taxpayer therefore did not receive a jury trial on such dispute. Further, the Department states that tax review was accomplished by the County courts, acting as an administrative body. This is incorrect. Section 2 of an Act during the same Legislative session, creating county courts, provides:

Section 2. Be it further enacted that the county courts so established shall be courts of record and shall have and exercise an original and exclusive jurisdiction in all causes where the sum in controversy is more than \$50 and less than \$100; they shall have appellate jurisdiction over the judgments of justices of the peace, and concurrent jurisdiction with the superior court in all civil cases, both in law and equity; and writs of certiorari, mandamus and prohibition shall issue from the county to the justices' courts,

⁵ Acts of the Legislative Council of the Territory of Florida, November 20, 1828 (attached at Appendix 4).

which shall be tested by the judge of the county courts awarding the same.

Acts of the Legislative Council of the Territory of Florida, November 22, 1828 [attached as Appendix 5].

Historically, prior to the two 1828 Acts referenced above, the United States government by way of an Act of March 30, 1822 (3 U.S. Stat. 654) established the territorial government of Florida (Section 6 of such Act) whereby the judicial power was vested in two superior courts (later three superior courts) and in such inferior courts and justices of the peace as the Legislative Council of a territory may, from time to time, establish. [3 U.S. Stat. 654 attached as Appendix 6]. As created by Section 2 of the 1828 Act, as quoted above, therefore, county courts expressly had concurrent jurisdiction with the superior courts and had such jurisdiction in all civil cases, both in law and in equity.⁶ Thus, it is clear that juries were allowed and utilized on a regular basis in county court prior to Florida statehood, and the legislative empowerment for county courts to have jurisdiction over tax matters did not preclude a taxpayer from being afforded a jury trial. Thus, there is no support for the Department's position that tax disputes were limited to bench trials under Florida

⁶ In a later Act of the same session of the Legislative Council of a Territory of Florida, Section 1, passed November 23, 1828, a provision was made for all jurors in civil cases to receive for their services twenty-five cents each for every verdict by them delivered. The Act also refers to both superior and county courts, substantiating the concurrent ability of county courts to not only have jurisdiction over all civil cases both in law and in equity, but also being afforded the use of juries. [Act of the Legislative Council of the Territory of Florida, passed November 23, 1828, attached as Appendix 7].

territorial law.⁷ In fact, none of the revenue raising acts relating to the establishment of county courts from 1822 up to 1845 prohibited jury trials in a tax matter, or indicated that such disputes would be dealt with in a summary nature.

The Department, however, directs this Court's attention to the first session of the First General Assembly of the State of Florida, wherein the Boards of County Commissioners were established. Chapter 11, at 32, Laws of Florida (1845). According to the Department, a portion of the Boards of County Commissioners duties were to hear tax matters, both assessment protests and refund actions.⁸ First and foremost, any act or action of the First General Assembly of the State of Florida would have occurred, by necessity, after Florida became a State and after Florida's first Constitution of 1838, which became effective on March 3, 1845. Once enacted, the Florida constitutional right to jury trial

⁷ There is also no support for territorial Florida having created a "summary system" for tax protests and tax refunds. The 1828 Act, as well as subsequent Acts prior to 1838, provide no support for a summary system being utilized in territorial Florida. A summary proceeding, defined as a proceeding by which a controversy is settled or disposed of in a prompt, simple manner without the aid of a jury, must be authorized by legislative authority. 1 Am. Jur. 2d Actions, Section 3, N.1; 1 Fla. Jur. 2d, Actions, Section 2. Further, summary proceedings are such proceedings as are not in accordance with the course of the common law, and therefore statutory enactment is necessary in order to overturn common law.

⁸ The Department further states that records of the Leon County Clerk shows a number of cases from the Leon County Board of County Commissioners, showing how the Board heard tax cases, and made decisions about refunds and assessments. The notes are not decipherable by the undersigned counsel, but whether or not such cases were heard by the Board of County Commissioners is not determinative as to whether a tax refund suit is entitled to a jury trial.

cannot be taken away or impaired. Flint River Steamboat Company v. Roberts, 2 Fla. 102 (Fla. 1848). Even if the initial Legislature had modified such right, if the modification denied the right to a jury trial, the modification would be invalid. Kluger v. White, 281 So.2d 1 (Fla. 1973); Hughes v. Hannah, 22 So. 613 (Fla. 1897). Further, the specific cases to which the Department makes reference in its Initial Brief all deal with the collection of such tax, or the assessment of such tax. None of such cases appear to involve the refund of such tax, after the taxpayer has made payment.

The lone decision referenced by the Department in support of pre-statehood Florida deciding tax cases without a jury in an equity proceeding is the 1837 Leon County Circuit Court case of Apalachicola Land Company v. Robert Forbes, Sheriff, 2nd Jud. Cir. (1837).

The Apalachicola Land case, however, specifically dealt with an action to enjoin and restrain the sheriff from collecting the tax. The first paragraph of such decision states:

This is a bill in equity filed on behalf of the above-named company to enjoin or restrain the defendant sheriff of Gadsden County from the (indecipherable) and collecting taxes for county purposes on the land belonging...

Apalachicola Land Company v. Robert Forbes, Sheriff, 2nd Jud. Cir. (1837), Page 1. [emphasis supplied]. [Attached as Appendix 8]. Thus, the Apalachicola Land decision involved a situation where (a) the taxes had not yet been paid, and (b) the decision is silent as to whether a jury trial had been requested or demanded by the plaintiff. The Department, therefore, has provided this Court with

no territorial act nor decision which diminished nor abrogated the common law right to a jury trial.

C. **Post Statehood Statutes and Decisions did not Modify nor Abridge the Common Law Right to a Jury Trial in a Tax Refund Suit.**

The Department further suggests that after Florida entered the United States in 1845, equity courts have, by statute, been granted jurisdiction regarding tax matters. The Department cites Section 68.01, Florida Statutes, and further cites Powell v. Kelly, 223 So.2d 305 (Fla. 1969), and Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880 (1932).

The 1932 Day decision notes that Chapter 8586, Acts of 1921, General Laws of Florida, conferred jurisdiction on courts of equity cases involving the legality of any tax, assessment, or toll. The Day court noted:

"The statute [Chapter 8586] is in consonance with a constitutional provision on the same subject. [Section 11, Article V, Constitution of 1885].

Day v. City of St. Augustine, 139 So. 880, 883 (Fla. 1932).

Section 11 of Article V of the 1885 Constitution, however, provided as follows:

Section 11. The Circuit Courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts, and in all cases involving the legality of any tax, assessment, or toll; . . . [emphasis added]

Section 11, Article V, Constitution (1885). The 1885 constitutional provision therefore granted jurisdiction to Circuit Courts in all cases in equity, and then separately granted jurisdiction in the Circuit Courts as to all cases involving the

legality of any tax, assessment, or toll. The 1885 constitutional provision, however, did not incorporate challenges to the legality of any tax or assessment into equity.

Further, and more importantly, the history of Chapter 8586, Acts of 1921, General Laws of Florida, provides that such chapter relates only to ad valorem taxation. By 1941, Section 1, Chapter 8586, Laws of Florida, 1921, was codified in Section 196.01, Florida Statutes (1941). Section 196.01, Florida Statutes was transferred to Section 194.171 in 1969, and substantially re-written. Chapter 69-55, Laws of Florida, Section 2. The purpose in the re-numbering of Section 196.01 to 194.171, was stated in Chapter 69-55, Laws of Florida:

WHEREAS, those Chapters of the Florida Statutes relating to ad valorem taxation being Chapters 192, 193, 194, 195, 196, 197, 199 and 200, have, over the years, become disorganized, confusing, and unsystematic in arrangement due to frequent revisions and amendments . . . [emphasis supplied]

In 1969, at the same time as the re-numbering of Section 196.01, Florida Statutes to Section 194.171, Florida Statutes, Chapter 69-140, Laws of Florida, Section 6, substantially re-worded Section 196.01 to eliminate reference to Courts of Chancery and to clarify that Circuit Courts have exclusive original jurisdiction at law of all matters relating to property taxation. Chapter 69-140, Laws of Florida. It is clear that the provision relied upon by the Day Court [Chapter 8586, Laws of Florida, Section 1 (1921)], which became Section 196.01 and which was transferred to Section 194.171, is limited to ad valorem tax assessment matters. The instant action is not an ad valorem tax matter, and Section 72.011 does not

involve ad valorem tax disputes.

Section 68.01, Florida Statutes, provides a remedy in Chancery regarding an alleged illegality for a tax assessment. The remedy under Section 68.01, however, is extremely narrow and requires a narrow definition of the term "assessment." Louisville and N.R. Company v. Board of Public Instruction for Jackson County, 39 So. 480 (Fla. 1905). The remedy is only concerned with mistakes or errors pertaining to the clerical acts of extending on the tax rolls the names of the party assessed, the description of the property, the value fixed by the proper tribunal, the millage for various purposes and the total amount of the tax. Louisville, 39 So. 480. Thus, Section 68.01 embraces only those assessments in which there is error on the face of the assessment. Knight v. Matson, 43 So. 695 (Fla. 1907).⁹

Section 68.01 provides:

68.01 Declaring Tax Assessment Invalid - When an assessment is made against any person, body politic or corporate and payment is refused on an allegation of illegality of the assessment, the person, body corporate or politic may file an action in chancery setting forth the alleged illegality. The court has jurisdiction to decide the matter and if the assessment is illegal, shall declare the assessment not lawfully made.

⁹ Instances where the statute may operate are the misnaming of the owner, misdescription of the land, duplicate listing of the same land, or an arithmetical mistake in carrying out the totals. Louisville and N.R. Company v. Board of Public Instruction for Jackson County, 39 So. 480 (Fla. 1905). The statute is clearly of limited application. Dade County v. Hardee, 47 So. 350 (Fla. 1908). The extent of the Court's authority is to declare the assessment unlawful. Jackson County v. Thornton, 33 So. 291 (Fla. 1902).

First and foremost, Section 68.01 was initially enacted in 1848, three years after Florida became a state and ten years after the Constitution of 1838. Any such legislative enactment would therefore have no effect upon the constitutionally preserved right to a jury trial.

Second, the statute clearly applies only if payment is refused--not if payment has been made. Comparatively, under Section 72.011, payment of the disputed tax is mandatory. Finally, Section 68.01 is not mandatory--the clear language states that a person, body corporate or politic may file an action in chancery. The statute makes no reference to a common law action. Regarding the Robbins decision and Chapter 194

The Department compares Chapter 194, Florida Statutes, with Chapter 72, Florida Statutes, and suggests that tax proceedings under these two statutes are of like nature, do not allow for a jury trial, and that actions contesting property tax assessment [Chapter 194] and actions contesting the legality of certain tax assessments or denial of refund of taxes [Chapter 72] were considered together at Florida common law and denied a jury trial. The two statutes, however, are distinctively different.

As found by the District Court below:

Chapter 72, by its terms, applies to certain enumerated classes of taxes, fees, surcharges, permits, interests, and penalties, and does not encompass challenges to proposed property taxes. Judicial and administrative review of proposed property taxes, pursuant to notice provided under Section 200.069, Florida Statutes (1991) is exclusively by administrative or judicial review as set out in Chapter 194, Florida Statutes.

Accordingly, we find that case law adjudicating the right to jury trial in a proceeding pursuant to Section 194.171, Florida Statutes (1991) or its predecessors, is not controlling as to the question now presented.

The Printing House v. Department of Revenue, 614 So.2d 1119, 1122 (Fla. 1st DCA 1992). Chapter 72 was clearly intended by the Legislature not to encompass challenges to proposed property taxes.

The Department further states that the provisions of Section 72.011 and Section 194.171 provide taxpayers with identical rights to judicial review. This is not correct. Section 72.011 requires payment of the disputed tax as a prerequisite to bringing suit. Section 194.171 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.

Further, Section 194.171, or its predecessors, was first enacted in 1848, ten years after Florida's first Constitution of 1838. Thus, assuming that Chapter 194 was an attempt by the Florida Legislature to deny a jury trial in certain tax matters which had previously enjoyed the right to a jury trial at common law, such statutory intent is prevented by the constitutional guarantee of the right to a jury trial.

The 1828 Acts of the Legislative Council of the Territory of Florida, Section 22, does seem to imply that property taxes and excise taxes were both within the jurisdiction of county court. The 1828 Act, however, is silent as to a jury trial, and as

discussed above, county courts were afforded the use of juries. No territorial act nor specific pre-statehood decision removed or receded from the English common law right to a jury trial, and, more importantly, there are no territorial acts nor decisions which in any way suggest that a tax liability challenge for excise taxes is to be denied a jury trial.

The Department has failed to provide this Court with any act or decision which affirmatively denies or abrogates the common law right to a jury trial where an excise tax has been paid and liability for the tax is challenged. The Department argues that no territorial or state act grants a jury trial in such matters. Florida need not codify its constitutionally preserved common law right to a trial by jury in tax cases. Such right has been incorporated into our State Constitution and by Section 2.01, Florida Statutes, and is therefore preserved notwithstanding specific codification.

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 and Section 72.011, Florida Statutes notably applies to excise taxes, not property taxes.

The Department urges this Court to uphold the Third District Court of Appeal decision in Robbins v. Section 3 Property Corp., 609 So.2d 670 (Fla. 3rd DCA 1992), the appeal of which is presently pending before this Court. The Robbins decision, however, involved

a challenge to the grant of an agricultural exemption to property, and did not involve a challenge to the payment of tax but rather involved a governmental challenge to an agricultural exemption, wherein the property owner is the defendant. Further, and more importantly, the taxpayer had not paid the tax and is not in a position of suing for a refund of the tax.

In reaching its finding, the Robbins court examined Section 194.171, and its predecessor section, and concluded that property tax disputes are equitable in nature, thereby allowing no right to a jury trial. The Robbins court, therefore, may not have deemed it necessary to analyze the historical precedent and origins for the right to jury trial in tax matters in Florida. Notwithstanding the clear distinction between Chapter 194 and Chapter 72, as outlined above, the sweeping statements by the Robbins court that "tax challenge cases implicate the equitable jurisdiction of the courts," may, upon closer inspection, not provide sufficient clarification as to the limitations of the Court's decision.

II. A TAXPAYER CHALLENGING THE "LEGALITY" OF A FEDERAL TAX ASSESSMENT HAS A RIGHT TO A JURY TRIAL IN FEDERAL COURT.

Although the Seventh Amendment to the United States Constitution guaranteeing right of trial by jury is binding only in federal courts, the construction of the Seventh Amendment¹⁰ closely

¹⁰ The Seventh Amendment of the United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rule of the common law.

parallels the right of trial by jury guaranteed in Art. I, Section 22, of the Florida Constitution. [Dudley v. Harrison McCready & Co., 173 So. 820 (Fla. 1937)], and clearly served as the basis for the right of trial by jury guaranteed by our Florida Constitution. Florida courts should look to federal decisions construing the right to jury trial under the United States Constitution. In re: Forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986). Hawkins v. Rellim Inv. Co., 110 So. 350 (Fla. 1926). As noted in Dudley, federal decisions construing the Seventh Amendment to the Constitution of the United States are frequently helpful and persuasive in construing state constitutional provisions of like import. Dudley v. Harrison McCready & Co., 173 So. 820 (Fla. 1937).

In United States v. State of N.M., 642 F.2d 397 (10th Cir. 1981), sales tax on services had been paid to New Mexico by a United States subcontractor. The United States alleged that the tax was not authorized or required by New Mexico law. The Court concluded that the State of New Mexico has a Seventh Amendment right to a jury trial. Although based on the Seventh Amendment, the Tenth Circuit finds a common law recognition of the right of a taxpayer to a jury trial in refund cases, and particularly distinguishes many precedents that are relied upon by the Department in its Initial Brief. In fact, the U.S. Court states that:

"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 in refund cases is rooted in the common law and was preserved by the Seventh Amendment."

United States v. State of N.M., 642 F.2d at 401.

Since 1954, the modern right to a jury trial has been codified in a federal tax refund suit. 28 USC §2402 (1970). The relevant congressional hearings and reports traced the right to a jury trial to the common law precedents discussed in Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836) and made clear that the 1954 statute was a reaffirmation of common law liability of the tax collector recognized by the Supreme Court in 1836. Kirst at 1336 - 1337. The drafters of the Seventh Amendment were seeking to protect the fundamental rights present in the common law system. Kirst at 1334.

It is important to note that the Seventh Amendment would still guarantee a jury trial in such actions even if the United States Code did not. In statutorily allowing a jury trial in a tax refund suit, and by providing an administrative forum where the taxpayer challenges the amount of tax but has not paid it, the federal system carries forward English common law. Florida's bifurcated system under Section 72.011, Florida Statutes (as discussed below), is nearly identical to the federal bifurcated system, and therefore an action in Circuit Court for a "refund" logically and historically affords either litigant the right to a jury trial.

As noted by the First District Court below, the Florida Legislature authorized an administrative procedure for contesting tax assessments by enacting Section 72.011, Florida Statutes, in 1981, but explicitly excepted from this administrative procedure "actions for refund of taxes previously paid." Florida Export Tobacco Company, Inc. v. Department of Revenue, 510 So.2d 936, 954

(Fla. 1st DCA 1987), rev. denied, 519 So.2d 986 (Fla. 1987). The First District Court of Appeal analogized Section 72.011 to federal procedure available under the Internal Revenue Code. The Florida Export Tobacco court observed that:

Moreover, this statutory scheme substantially parallels the federal practice and procedure regarding income taxes under the Internal Revenue Code. See, 1 Fla. State and Local Taxes, ¶10.04[1] (Fla. Bar 1984). Notably, the federal procedure requires that refund actions be filed in federal district courts (where a jury trial may be obtained) or in the Court of Claims.

Florida Export Tobacco Company, Inc. v. Department of Revenue, 510 So.2d 936, 954-955 (Fla. 1st DCA 1987) (emphasis supplied, footnotes omitted). Clearly Judge Zehmer (by citing Florida State and Local Taxes, Vol. 1), concludes that Florida's statutory scheme affords a jury trial to a taxpayer challenging the "legality" of an assessment in circuit court. Additionally, and more importantly, the First District in its decision below placed emphasis upon the Florida Bar publication, Florida State and Local Taxes, and in particular the passage therein which provides:

"...at any rate, the notion has long prevailed that all tax cases are in equity and therefore are to be tried by a judge without a jury. That seems clearly erroneous in the ad valorem area, and there is nothing to support that view in Section 72.011, Florida Statutes."

The Printing House, Inc. v. Department of Revenue, 614 So.2d 1119, 1124 (Fla. 1st DCA 1992) [citing Florida State and Local Taxes, Vol. I, ¶10.04(5)(b)] (Fla. Bar 1984).

In its Initial Brief, the Department of Revenue incorrectly and misleadingly states that the Tenth Circuit Court of Appeals

stands alone amongst federal circuits in finding that (a) there is a common law right to a trial by jury in federal tax cases, and (b) that if such right to a trial by jury exists in federal tax practice, it exists only where a statute has granted that right.

First and foremost, each of the federal decisions cited by the Department which purportedly find there to be no common law right to a trial by jury are cases against the Commissioner of the Internal Revenue [C.I.R.], and are therefore cases before the federal tax court, a specialized court where a litigant has not paid the tax. Each of the decisions makes specific reference to 28 USC Section 2402 and 1346(a)(1), and each of such decisions are identical in that a taxpayer who "elects to bring suit in tax court" to contest a deficiency, is not entitled to a jury trial. Parker v. C.I.R., 724 F.2d 469, 472 (5th Circuit 1984). These same cases, as stated in the Parker decision, provide that a taxpayer that pays the tax and thereafter sues for a refund in the District Court is entitled to a trial by jury. Parker v. C.I.R., 724 F.2d 469 (5th Circuit 1984).

Second, the Tenth Circuit and the Second Circuit have each found the Seventh Amendment to be based upon a common law right to a jury trial, carried forward by the Seventh Amendment. United States v. Anderson, 584 F.2d 369 (10th Cir. 1978) [holding that an action to collect taxes was an action for debt at common law, and a taxpayer's right to a jury trial was preserved by the Seventh Amendment]; Damsky v. Zavatt, 289 F.2d 46 (2nd Cir. 1961) [in actions regarding taxes at common law there was a right to a jury

trial, carried forward by the Seventh Amendment].

Two separate circuits, therefore, have independently found there to be a common law right to a jury trial; such a common law right can hardly be disputed by the Department. The federal statute is based upon the Seventh Amendment, which in turn is clearly based upon the English and Colonial right to jury trial.

III. THE DISTRICT COURT CORRECTLY FOUND THAT AN ACTION UNDER SECTION 72.011 IS AN ACTION FOR A TAX REFUND.

As outlined above, English tax history prior to 1776,¹¹ provided that the right to a jury trial in a tax matter arose after collection of the tax from the taxpayer, in an action challenging liability for the tax.

The historical evolution of Section 72.011, Florida Statutes suggests that it is now the statutory method by which a taxpayer may contest in the Circuit Court the legality of any assessment or denial of refund of tax, such as the assessment by the Department herein.¹² Section 72.011(3)(b)(1) and (2), Florida Statutes, contain a mandatory prerequisite for the taxpayer in an assessment case to pay to the applicable Department all uncontested tax, and pay into the registry of the court the entire contested amount including penalties and interest, unless such requirement is waived

¹¹ Carried forward into Florida territorial law, and into Section 2.01, Florida Statutes.

¹² Section 72.011 was amended in 1991 to provide that a taxpayer may contest the legality of a denial of a tax refund in the same manner as a tax assessment; the new provision applies to refund denials issued on or after July 1, 1991. [This tax challenge falls under the new amendment]. Chapter 91-112, Section 2 and 4.

by the Department, or file a bond for such amount unless the bond is waived. This statutory language clearly follows the common law approach of allowing a taxpayer to challenge the liability for an assessment after collection. In that under Section 72.011(3) the taxpayer must pay the amount of such tax, obtain a waiver of such payment, or file a bond, the taxpayer is placed in the position of suing for a refund of such assessment. Such a procedure in the common law courts involved a jury trial. Kirst at 1317, and citations therein.

The Department concedes that under English common 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 Department, however, takes the position that the District Court of Appeal was incorrect in finding a Section 72.011 tax liability challenge to be "in the posture of a refund."

As outlined above, however, Section 72.011, Florida Statutes, allows the Department to waive in writing the requirement that the taxpayer tender into the registry of the court the amount of the contested assessment. [Section 72.011(3)(b)(1)]. This waiver is recognized by the statute as an alternative means of satisfying the prerequisites to suit, and does not alter the fundamental right to a jury trial established by common law. In the instant case, the Department did waive in writing the requirement that The Printing House tender the amount of the contested assessment into the registry of the court. It should be noted, however, that such waiver included a guarantee as to the total amount of the

assessment, along with interest and penalty. [Appendix 1; Exhibit G to Complaint]. This case is therefore, by statute, in the posture of a suit for refund, precisely the same posture as a common law action for refund where a jury trial was guaranteed.¹³

The procedural aspects of Section 72.011, Florida Statutes, reflects the historical tension between the Circuit Court and the Department of Revenue regarding jurisdiction over tax matters. The Department historically attempted to assert exclusive jurisdiction over tax matters through the Administrative Procedures Act. See, Florida State and Local Taxes, Vol. I, Section 10.04(2), pp. 349-352 (1984). However, the District Courts of Appeal in Florida have continued to preserve Circuit Court jurisdiction over tax matters pursuant to Florida's Constitution. See, Florida State and Local Taxes, Vol. I, Section 10.04(2), pp. 349-352 (citing Department of Revenue v. University Square, Inc., 336 So.2d 371 (Fla. 1st DCA), cert. denied, 342 So.2d 1101 (Fla. 1976)). As such, the bifurcated process provided in Section 72.011¹⁴ preserves the common law right to a jury trial in tax matters in actions in Circuit Court unless otherwise waived by the taxpayer. Even in a situation where a Complaint contains both legal and equitable claims, a timely

¹³ It is interesting that in the Circuit Court the Department waived payment by The Printing House (after The Printing House guaranteed the entire payment) only to thereafter argue below and here that The Printing House only challenges the assessment and is not suing for a refund.

¹⁴ The statute alternatively allows the taxpayer to choose between either filing an action in circuit court (and obtaining a jury trial) or filing a Petition under Chapter 120 (thereby waiving the right to a jury trial).

request to try the legal issues before a jury must be granted. Widera v. Florida Power Corporation, 373 So.2d 714 (Fla. 2nd DCA 1979).

The Department states that this action is not a refund action, and suggests that recovery of funds 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, prior to the funds being transferred over to the sovereign.

English tax history prior to 1776, and carried forward into Florida territorial law, and into Section 2.01, Florida Statutes, provided that the right to a jury trial in a tax matter arose after collection of a tax from a taxpayer, in an action challenging liability for the tax. The mandatory prerequisite for suit under Section 72.011(3)(b)(1), and (2), Florida Statutes, clearly follows the common law approach of allowing a taxpayer to challenge the liability for an assessment after collection. Second, no distinction was made in English common law regarding a voluntary/involuntary payment of such tax--the use of a jury arose after collection in common law actions challenging liability for the tax. Kirst, Administrative Penalties and the Civil Jury, Vol. 126 U. PA. L. Rev. No. 6, Page 1281 (1978).

Under English common law, and usually in the English Court of Exchequer, any dispute as to the liability for payment of a tax, was granted a jury trial. Kirst, at 1320. The Court of Exchequer dealt exclusively with revenue matters, and this Court has recognized that a jury trial was available in the Court of

Exchequer. In re: Forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (1986).

Under any reasoned analysis of Chapter 72, Florida Statutes and its origins, no taxpayer challenging an assessment could be considered to have "voluntarily" paid the tax, as every challenge requires payment or a waiver. A taxpayer is therefore compelled to pay, clearly an involuntary payment. The distinction urged by the Department, that the taxpayer should only be afforded a jury trial if the State seized the taxpayer's property, contradicts not only the historical origins of tax liability challenges under English common law, but also contradicts any modern civilized tax liability challenge. Assuming that this Court finds there to be a distinction between taxes voluntarily and involuntarily paid to the State of Florida, ample Florida case law supports the finding that payment by The Printing House of this tax is, by definition, involuntary. North Miami v. Seaway Corp., 9 So.2d 705 (Fla. 1942); Broward County v. Mattel, 397 So.2d 457 (Fla. 4th DCA 1981); City of Miami v. Florida Retail Federation, 423 So.2d 991 (Fla. 3rd DCA 1982); Ves Carpenter Contractors, Inc. v. City of Dania, 422 So.2d 342 (Fla. 4th DCA 1982).

- A. If the Waiver of Payment of the Tax Precludes a Jury Trial, The Printing House Should be Allowed to Pay the Tax.

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,"¹⁵ or, alternatively, that this Court finds a jury trial to only be afforded a taxpayer who, pursuant to Section 72.011(3)(b)1 tenders actual payment of such final assessed amount, including penalties and interests, 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.

The purpose of the Constitutional provisions guaranteeing the right to a jury trial is to preserve the right in substance; it has long been held that the Constitutional guarantees may not be avoided by a procedural change that results in deprivation of the benefit of trial by jury. Wiggins v. Williams, 18 So. 859 (Fla. 1895). For example, at common law, a taxpayer either paid the local collector voluntarily, or the local collector levied and sold their property. In either event, the taxpayer was able to challenge the liability for the tax in the courts, where he received a jury trial, a judicial function. In Florida, a review of assessments is not done by local commissioners and when the tax is disputed the collection process does involve the judicial function, by way of Section 72.011, Florida Statutes. Thus, the

¹⁵ Or pays the tax and thereafter seeks a refund pursuant to Section 215.26, Florida Statutes.

basic common law concepts and structure is preserved in Florida's statutory scheme.

IV. OTHER STATE DECISIONS SUPPORT A TAXPAYER'S RIGHT TO A JURY TRIAL WHEN CHALLENGING THE LEGALITY OF A PAID TAX ASSESSMENT.

The Department cites a number of decisions from other states which appear to deny a jury trial in certain types of tax disputes. In each of the state decisions cited by the Department, however, the particular state either:

A. Did not have a constitutional provision at statehood which carried forward a jury trial in tax liability cases, or

B. During that state's common law period before statehood, a jury trial was not allowed in a tax matter, or

C. The taxpayer was denied a jury trial on procedural grounds [where the case dealt with tax deficiencies, or the amount of the tax] or the taxpayer had not paid the tax and was therefore not in a refund posture.

The Department, additionally, states that Hawaii, New Jersey, Minnesota and Oregon all have tax matters heard in specialized tax courts without a jury, and that specialized courts would be contrary to any constitutional right to a jury trial, if one existed at all. Such statement by the Department ignores (A), (B) and (C) above. Each of those four states either did not preserve by their individual constitution the right to a jury trial (which has been preserved in Florida), or during that state's common law period before statehood, a jury trial was not allowed in a tax matter. When presented with constitutional jury trial issues, this Court has closely examined the substantive cause of action, and

found in favor of a jury trial despite the majority of state courts holding to the contrary. B.L.Y. v. M.A., 18 Fla. L. Weekly S 265 (April 29, 1993).

In at least four states, however, a taxpayer is affirmatively allowed a jury trial in a state action where, as here, tax liability is challenged and (a) a constitutional right to a jury trial exists, and (b) the taxpayer has paid the tax and is therefore in the position of requesting a refund. Hamil v. Walker, 604 P.2d 377 (Okla. 1979); Briggs Drive, Inc. v. Moorehead, 239 A.2d 186 (R.I. 1968); Waters v. Daines, 4 Vt. 601 (1832); Bates v. Hazeltine, 1 Vt. 81 (1828); Mille Lacs County v. Morrison, 22 Minn. 178 (1875).

In Hamil v. Walker, 604 P.2d 377 (Okla. 1979) the Supreme Court of Oklahoma equated a common law debt action to an action by a taxpayer challenging the legality of an assessment. The Hamil Court found that the taxpayer was entitled to a jury trial, on facts and law strikingly similar to the case at issue herein. In Hamil, the taxpayer challenged the legality of State Income Tax assessments levied against him by the Oklahoma Tax Commission. On appeal, the taxpayer claimed that he had been denied a right to a trial by jury, which is mandated by both the Seventh Amendment of the United States Constitution and Oklahoma's Constitution. Similarly, The Printing House challenges the legality of state assessments for sales and use taxes, a local government infrastructure surtax, and a criminal justice tax. Notably, Oklahoma Constitution Article II, Section 19, like Florida's

Constitutional provision, provides that "the right of trial by jury shall be and remain inviolate . . ." Oklahoma statutory provisions like Florida statutory provisions, did not explicitly provide for a jury trial in tax matters, as in Florida. Okla. Stat. Ann. Tit. 12, Sec. 556 (West 1988).

The Oklahoma Supreme Court noted that the right to a jury trial provided in Oklahoma's Constitution was based on the right as guaranteed under both the United States Constitution and according to common law.¹⁶ In directly looking to English common law, the Court concluded:

The right to trial by jury declared inviolate by the Okla. Const. Art. II, Section 19 refers to the right as it existed in the Territories at the time of the adoption of the Constitution. It is based on the right as guaranteed under the United States Constitution, and according to common law. A study of the historical survey of the Court of Exchequer as delineated in Damsky v. Zavalt, 289 F.2d 46, 49, 52 (2nd Cir. 1961) reflects that under the common law of England in 1791, an action by the Crown to recover a judgment for taxes was a suit at common law for debt in which the right of a jury trial existed.

Hamil, 604 P.2d at 379. See also, United States v. Anderson, 584 F.2d 369, 373 (10th Cir. 1978), holding that because an action to collect taxes was an action for debt at common law, the taxpayer's right to a jury trial was preserved by the Seventh Amendment and thereby preserved in Oklahoma State Court.

¹⁶ One factual difference between Hamil and the instant case is that Hamil did not follow proper procedures prior to seeking a jury trial on the matter. Proper statutory procedures in Oklahoma required Hamil to pay the full tax allegedly owed and then sue for a refund, in order to have been entitled to a jury trial on the tax assessment. Oklahoma procedure is therefore identical to English common law, and Sec. 72.011, Fla. Stat.

The Hamil Court also found the Oklahoma constitutional provision on the right to a jury trial to be similar to the guarantee of a right to jury trial under the United States Constitution. The Hamil court relied extensively on the historical analysis of the Court of Exchequer in Damsky v. Zavatt, 289 F.2d 46 (2nd Cir. 1961); the Damsky Court noted that the Exchequer was established as a third court of common law¹⁷, essentially functioning as a Court "for the profit of the King . . ." (citations omitted) Damsky, 289 F.2d at 49. In essence, the common law recognized the King's power to sue in debt for his taxes; and in common law actions there was a right to trial by jury. Damsky, 289 F.2d at 49.

The case of Briggs Drive, Inc. v. Moorehead, 239 A.2d 186 (R.I. 1968), involved a complaint for relief by a taxpayer from an alleged over assessment by the tax assessors of a municipality. The taxpayer moved to strike the municipal taxing officials' claim for a jury trial. The Supreme Court of Rhode Island, in reciting a lengthy statutory history, found a statutory basis for the municipality's right to a trial by jury in a tax assessment case, but also stated that a taxpayer had a common law right to a jury trial in a tax refund suit.

Close readings of decisions from other states, cited by the Department clearly distinguishes those decisions from the case at

¹⁷ Actually there were four national Courts of importance in England: Common pleas, King's Bench, Exchequer, and Chancery. (See Kirst, Administrative Penalties and Civil Jury, 126 U. Pa. L. Rev., Page 1281, 1313 (1978)).

bar, and further supports a jury trial in a tax refund case. The other state decisions either (a) were based upon the common law in that state not affording a jury trial in a tax matter, (b) involved that particular state's Constitution not preserving a common law right to jury trial, or (c) the taxpayer was denied a jury trial on procedural grounds or the taxpayer had not paid the tax and was therefore not suing for a refund.

For example, in both Jernigan v. Jackson, 704 S.W.2d 308 (Tenn. 1986) and Rush v. Alabama Dept. of Revenue, 416 So.2d 1023 (Ala. Civ. App. 1982), there is no mention in either opinion as to the common law of that State prior to statehood, nor any indication that either Tennessee or Alabama ever respectively adopted any English common law at the time either state was ceded to the federal government. Florida, however, specifically adopted the common law of England with the constitution. Knapp v. Fredricksen, 4 So.2d 251 (Fla. 1941); Dudley v. Harrison, McCready & Co., 173 So. 820 (Fla. 1937). As such, the courts in both Tennessee and Alabama construed their respective constitutional provisions as not providing for a jury trial in tax matters unless authorized by statute, due to each State's unique individual pre-constitutional history. In Jernigan, it is not clear whether the case was also predicated on the taxpayer disputing an erroneous amount of assessment versus challenging the legality of tax in toto. A challenge of the tax in toto clearly encompassed English common law causes of action in debt or assumpsit. Kirst, at 1320, citing English decision Earl of Radnor v. Reeve, 126 Eng.Rep. 1345 (c.p.

1801), among others. In Rush, Alabama specifically did not allow a jury trial in a tax related case prior to adoption of the Alabama State Constitution, and therefore a statute must create such a right. Rush v. Alabama Department of Revenue, 416 So.2d 1023 (Al. Civ. App. 1982).

Other states that have issued decisions regarding tax assessments have been confronted with specific administrative procedures or summary procedures set out by various state statutes to recover particular taxes. See C.W. Matthews Cont. Co. v. South Carolina Tax Comm., 230 S.E.2d 223 (S.C. 1976); and, Sonleitner v. Superior Court, 322 P.2d 496 (Cal. 2nd DCA 1958). Yet, even the Seventh Amendment to the United States Constitution does not apply in administrative proceedings which were unknown to the common law. Auffmordt v. Hedden 137 U.S. 310, (1890).¹⁸

Several Georgia decisions dealt solely with special statutory proceedings for tax matters and did not apply to the common law guarantee. Those special proceedings were not known at the time of the adoption of the States' particular constitutional provisions, or such special proceedings may have set forth practices and

¹⁸ But see Sonleitner, 322 P.2d at 498, which also makes sweeping general characterizations regarding the lack of a right to a jury trial in common law taxation matters, and as such directly conflicts with the in-depth analysis of English law provided in other cases and directly conflicts with Hamil (Oklahoma), Briggs Drive (Rhode Island), as well as several Federal Circuits. Suffice it to say that the Sonleitner analysis, at least with respect to statutory penalties, is counter to and clearly overruled or superseded by the United States Supreme Court's recent decision and analysis in Tull v. U.S., wherein penalties are clearly an issue triable by a jury. Tull v. U.S., 481 U.S. 412 (1987), discussed below.

procedures different from the common law regarding a tax matter at the time of the adoption of the state's Constitution. Dunkin v. Proctor, 24 S.E.2d 791 (Ga. 1943), Fowler v. Strickland, 252 S.E.2d 459 (Ga. 1979), Harper v. Commissioners of Elberton, 23 Ga. 566, 568 (1857). For example, the Fowler case cited Hicks v. Stewart 186 S.E. 802 (Ga. 1936). The Hicks Court specifically noted that the statute governing tax proceedings required a summary hearing where no right to jury trial existed in Georgia with respect to summary proceedings. Hicks, 186 S.E. at 803. Pennsylvania and Minnesota decisions are equally inapplicable. Commonwealth of Pennsylvania v. Marco Electric Manf. Corp., 379 A.2d 342 (Pa. 1977), specifically dealt with and was limited to a tax code. Similarly, the case of Ewert v. City of Winthrop, 278 N.W.2d 545 (Minn. 1979) the holding was limited to special administrative assessments. Vermont has an altogether different statutory scheme. In State, Dept. of Taxes v. Tri-State Industrial Laundries, Inc., 415 A.2d 216 (Vt. 1980), the Court provides an example of the fundamental differences between Florida law and Vermont law. In Vermont, the state established specific statutory procedures (an Administrative Procedures Act "APA") to deal strictly with tax matters - i.e. a remedy unknown at common law. In that case, the taxpayer attempted to obtain a jury trial on appeal after proceeding through an administrative hearing process which was designed to resolve issues of fact. The appellate process considered only issues of law. The court noted that the taxpayer's argument for a jury trial under Vermont's general constitutional

provision was deficient in two respects:

First, it is well established that this provision does not extend the right of trial by jury, but merely secures it to the extent that it existed at common law at the time of the adoption of the Constitution. Therefore, this provision does not apply to an appeal from a determination of the commissioner of taxes, because such action was unknown at common law. Second, because the Superior Court is limited in this case to review on the record established before the agency, there is no "issue of fact...joined in a court of law," and therefore the jury trial provision is inapplicable by its own terms.

Tri-State, 415 A.2d at 220. The request for a jury trial in Tri-state took place in the context of an administrative proceeding. An administrative proceeding did not exist at common law. Therefore, the taxpayer was not entitled to a jury trial based upon Vermont's constitutional provision preserving the right to a jury trial. Furthermore, the case is factually distinct from the instant case in that the dispute involved a tax deficiency, i.e. a dispute over the amount of the tax. Such a dispute at common law, as previously stated, did not involve use of the jury. In fact, had the case involved a dispute over the "legality" of the tax and had the taxpayer brought a common law action challenging such legality outside the scope of the administrative process, Vermont law indicates that the taxpayer would have been entitled to a jury trial. Such common law actions challenging the legality of a tax before a jury in Vermont did exist at common law and were recognized by the courts of Vermont. See Waters v. Daines, 4 Vt. 601 (1832); Bates v. Hazeltine, 1 Vt. 81 (1828).

The cases decided by the various other state Supreme Courts are unique and decided based upon that state's particular practice at the time of the adoption of its constitution, which may have altered common law¹⁹, or are decided in the context of new statutory proceedings which did not recognize the right to a jury trial in those particular proceedings.²⁰ None of the other state decisions cited by the Department directly confront whether or not a Plaintiff could have brought an alternative common law cause of action outside the scope of that state's particular summary, statutory or administrative proceeding and obtained a right to a jury trial.

¹⁹ See, e.g., Harper v. Commissioners of the Town of Elberton, 23 Ga. 566 (Ga. 1857); Hicks v. Stewart Oil Co., 186 S.E. 802 (1936) [Georgia practice prior to statehood altered common law]; Sonleitner v. Superior Court, 322 P.2d 496 (Cal. 2nd DCA 1958) [no right under California Constitution to jury trial for collection of taxes].

²⁰ In Indiana [State Line Elevator v. B.D. of Tax Com'rs, 526 N.E.2d 753 (Ind. Tax 1988)], Idaho [Coeur D'alene Lakeshore v. Kootenai County, 661 P.2d 756 (Idaho 1983)], and Michigan [Meyer v. Department of Treasury, 341 N.W.2d 516 (Mich. App. 1983)] [the Courts dealt with specific statutory procedures whereby tax commissions, tax tribunals or tax boards statutorily resolved tax matters without the intervention of a jury]. The rationale of the State Line Elevator Court in the Indiana case is difficult to discern because the Court did not delve into a discussion of common law precedent; however, apparently Indiana maintains a specific statutory scheme similar to an administrative or summary proceeding whereby tax matters are considered. In fact, the State Line Elevator Court noted that Indiana statutes (I.C. 33-3-5-2 and I.C. 33-3-5-13) provide that the [tax] court shall hear [tax] appeals without the intervention of a jury. As such, the dispute was not over the "legality" of the tax and the Court does not address whether a taxpayer can maintain a separate common law cause of action challenging the "legality" of a tax and thereby obtain a jury trial.

The Idaho Coeur D'alene Lakeshore decision is a perfect example of the need to examine closely a state's particular constitutional and statutory scheme. Coeur D'alene Lakeshore v. Kootenai County, 661 P.2d 756 (Idaho 1983). As such, the Coeur D'alene Lakeshore case can quickly be dismissed as not relevant authority because the Idaho Constitution, Article VII, §11 creates a State Tax Commission and allows the duties thereof to be imposed by statute. The Constitution of the State of Idaho inherently abrogated the common law right to a jury trial in taxation matters. In Michigan [Meyer v. Department of Treasury, 341 N.W.2d 516 (Mich. App. 1983)], the Michigan court succinctly stated that a hearing before the Michigan Tax Tribunal is not a proceeding that existed at common law prior to the adoption of the Michigan Constitution in 1835.²¹ Once again, the Michigan court leaves open the possibility of a taxpayer who challenges the "legality" of a tax based upon a common law cause of action outside the scope of the Michigan Tax Tribunal.

²¹ It should be noted that unlike most states, the Michigan Constitution in Article III, §7 preserves the common law through its Constitution but apparently allows the Legislature to change or modify the common law. Art. 3, §7 of the Michigan Constitution provides:

The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

V. THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DENYING A JURY TRIAL WHERE THE STATE SEEKS A PENALTY.

The Department of Revenue seeks not only payment of the assessment for sales tax from The Printing House, but also seeks approximately twenty-five percent (25%) of the assessed amount as a penalty.²² Tull v. U.S., 481 U.S. 412 (1987) holds that the Seventh Amendment requires a jury trial to determine liability for any civil penalty imposed by a State or governmental authority. Such a finding by the Tull court was based, in part, upon the English common law courts finding that a civil penalty was a particular species of an action in debt that was within the jurisdiction of courts of law, requiring a jury trial. Tull, 481 U.S. at 418. Further, a civil penalty was a type of remedy at common law only available in a court of law. Tull, 481 U.S. at 422. Tull involved the application of the Seventh Amendment to the Clean Water Act [33 U.S.C. 1319(b)] to determine whether a right to a jury trial existed regarding liability for civil penalties where nothing in the Act or its legislative history granted such a right. The Court examined whether the statutory action under the Clean Water Act was more similar to suits that were tried at common law in courts of law or more similar to suits tried at common law in courts of equity, by analyzing both the nature of the action and the remedy sought. Further, actions by the government to recover

²² This 25% penalty is sought for non-payment even after the previous two audits of The Printing House by the Department of Revenue stated that certain transactions were not taxable and therefore no payment of tax was due following those previous audits. (Complaint, ¶¶18, 19 and 20, Appendix I).

civil penalties under statutory provisions have historically been viewed as one type of action in debt requiring trial by jury. Tull, 481 U.S. at 418 - 419. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity. Tull, 481 U.S. at 418.²³ Since the Clean Water Act [imposing a maximum penalty of \$10,000 per day of violation], was based more upon the goals of punishment and deterrence, the Seventh Amendment guaranteed Tull the right to a jury trial to determine liability. Thus, an action for enforcing civil penalties is clearly one at law and not one at equity.²⁴

Assuming that the penalty portion of the assessment challenged by The Printing House is considered as being independent of the assessment itself, Tull clearly holds that if a penalty is joined in the same proceeding as an arguably equitable claim, the right to a jury trial on the legal claim, including all issues common to both claims, remains intact. Tull, 481 U.S. at 425. The right to a jury trial cannot be abridged by characterizing the penalty as "incidental" to the non-penalty claims. Tull, 481 U.S. at 425 [citing Curtis v. Loether, 415 U.S. 189 (1974)]. In applying the analysis and interpretation of the Seventh Amendment by the United

²³ A court of equity at common law was wholly without jurisdiction and thereby incapable of enforcing civil penalties. See, Porter v. Warner Co., 328 U.S. 395 (1946).

²⁴ The Fifth Circuit Court of Appeals similarly found that where the government seeks a penalty, such action is a suit at common law within the intent of the Seventh Amendment. U.S. v. McMahon, 569 F.2d 889 (5th Cir. 1978).

States Supreme Court in Tull to the Florida Constitutional right to a trial by a jury, The Printing House is entitled to a jury trial to determine the underlying liability of The Printing House for civil penalties which the Department seeks to impose.

The Department argued below that it is within the administrative power of the government to assess and collect taxes and penalties, and that an administrative agency therefore has the power to enforce such penalties without the necessity of involving judicial power, relying upon Atlas Roofing Company v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977). The Tull decision, however, does not suggest otherwise, and affirmatively states that a taxpayer is entitled to a jury trial to determine liability for such penalty.

The Atlas decision was decided ten years prior to Tull, and it significantly did not decide whether a defendant could obtain a civil jury trial by paying the penalty assessed by an administrative agency in bringing a civil action for a refund, which is the fundamental argument by The Printing House regarding the penalty provision. In Tull, the United States Supreme Court noted that it specifically had declined in its Atlas opinion to decide whether the Seventh Amendment right to a jury trial applies to a civil action to collect a civil penalty. The Supreme Court in Tull answered the question in the affirmative. Tull, 481 U.S. at 416. Thus, the Tull court addressed the Atlas decision, and found that an action regarding civil penalties is one at law and not one at equity and thereby requires a jury trial.

VI. PUBLIC POLICY CONSIDERATIONS

The Department urges this Court to deny a jury trial to a taxpayer in that "there must be prompt payment of taxes to maintain the government," and that "allowing a suit at all, was an act of beneficence on the part of the government."

First and foremost, the Declaration of Independence was the result, at least in part, of the colonists' revolt regarding British taxes. These United States each enjoy constitutional liberties, not the least of which is the right to trial by jury. Any infringement on such right must be closely scrutinized and, if there is any question as to whether a Florida litigant is afforded the right to a jury trial, such question should be resolved, if at all possible, in favor of the party seeking a jury trial. Hollywood, Inc. v. City of Hollywood, 321 So.2d 65 (Fla. 1975). Such a right to trial by jury is a valuable right which should not be denied. Beck v. Barnett National Bank, 117 So.2d 45 (Fla. 1st DCA 1960).

Contrary to the Department's argument, there has been the "prompt payment of taxes" here, and such prompt payment is guaranteed by Section 72.011, which requires payment of such contested tax as a prerequisite to suit. This challenge is not a challenge as to the collection of tax, but is a challenge brought after payment of the tax, in challenging liability for such tax.

Finally, it does not bode well for the citizens of Florida to be denied a jury trial for the determination of fact issues where a State authority claims taxes are due. The facts below are a

perfect example of State bureaucratic inefficiency. In two previous audits, the Department specifically found that no tax liability had been incurred by The Printing House, following which The Printing House relied upon such findings. In a third subsequent audit, the Department assessed tax on the exact same transactions, and then, additionally, demanded a penalty along with interest thereon. This type of behavior is precisely the reason a taxpayer is afforded the right to a jury trial. To hold otherwise prevents citizens from sitting in judgment over their State government, and prevents a necessary check upon our administrative branch.

CONCLUSION

This case contests the legality of assessed, taxes, interest and penalties, pursuant to Section 72.011, Florida Statutes. The purpose of Florida Constitutional provisions guaranteeing the right to a jury trial is to preserve the right in substance; it has long been held that the constitutional guarantees may not be avoided by a procedural change that results in deprivation of the benefit of trial by jury. Wiggins v. Williams, 18 So. 859 (Fla. 1895).

Tax refund cases and cases challenging the legality of a tax were recognized by the English common law actions of debt, assumpsit, trover or trespass in the English Courts of Exchequer, King's Bench, or common pleas (not Chancery), in all of which a jury trial was provided and guaranteed. Therefore, The Printing House challenge consists of a type of cause of action that was recognized by at English common law and afforded a jury. Florida

common law, as carried forward by our Constitution did not alter or limit the right to jury trial in a taxpayer challenge to the legality of an assessment. Furthermore, according to the Tull decision, the type of remedy sought is an important factor to consider under a Seventh Amendment analysis. In this case, the Department attempts to levy a civil penalty which is punitive in nature. Tull would require that the issue of underlying liability be determined by a jury.

Florida's bifurcated method of contesting the legality of a tax assessment, pursuant to Section 72.011, Florida Statutes, allows a choice between Circuit Court (and a jury trial), and an administrative proceeding. The Printing House has chosen Circuit Court and has demanded a jury trial. Such bifurcated process closely parallels to the federal practice, where jury trials may be obtained and granted in similar instances. Although such jury trials in Federal Court are provided by statute, such right is preserved by the seventh amendment and could not be abridged even if no such statute existed. Similarly, no such statute need be enacted to preserve a Florida taxpayer's constitutionally protected jury trial. A jury trial was available at English common law, at Florida pre-constitution common law, and in Florida under Art. I, Sec. 22, of the Florida Constitution. The pleadings demonstrate that there are appropriate issues of fact to be determined.

Finally, as noted in one treatise on Florida tax law:

In an action to recover taxes illegally paid, questions of law are to be determined by the Court and questions of fact should be determined by the jury under appropriate instructions.

23 Florida Law and Practice, Taxation Section 366. Therefore, based on the policy and structure and Section 72.011, Florida Statutes, and the English common law as adopted by Florida in 1845, the right to a trial by jury has been guaranteed to The Printing House to challenge the legality of the Department of Revenue's assessment. The Printing House urges this Court to uphold the First District Court, and affirm the historical right to jury trial in excise tax refund actions.

Respectfully submitted,

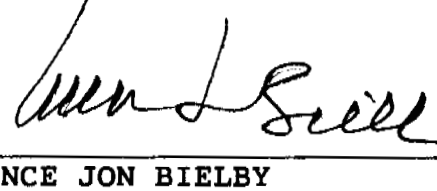
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/~~Hand Delivery/Teletype~~ 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, this 7th day of JUNE, 1993.



LORENCE JON BIELBY