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SUPREME COURT OF FLORIDA

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DEPARTMENT OF REVENUE,

Petitioner,

vs. CASE NO. 81,602

THE PRINTING HOUSE, INC.,

Respondent.

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PETITIONER'S 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?

However, it is uncontested factually that this is not a tax refund case, but a tax assessment protest. Therefore the Florida Department of Revenue presents the following question:

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

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STATEMENT OF THE CASE AND OF THE FACTS

This appeal arises from a First District Court of Appeal decision reversing a Circuit Court Order that struck Respondent's, The Printing House, Inc.'s, (The Printing House) demand for a jury trial. The Printing House filed its Complaint on January 29, 1992, to challenge three separate Notices of Proposed Assessment of Tax, Penalty and Interest. (See Complaint attached as Appendix 1). The action was brought under Chapter 72, Florida Statutes to challenge the proposed assessments. Basically, the Printing House alleged that in two earlier audits, the Florida Department of Revenue (The Department) failed to assess use tax on certain purchases and should be estopped from assessing tax during the audit period at issue. Id. The Printing House requested a jury trial, the Department moved to strike the request, the matter was briefed to the Circuit Court by memoranda of law, and the demand for jury trial duly struck by Order of the Court dated July 7, 1992. (Attached as Appendix 2) The Printing House petitioned the First District Court of Appeal for a writ of mandamus reversing the Circuit Court's decision. The First District granted the petition, but certified the taxpayer's right to a jury trial question to the Florida Supreme Court.

THE NATURE OF RELIEF SOUGHT

The Department respectfully requests an opinion from the Court reversing the First District Court's opinion and reinstating the Circuit Court Order striking the demand for jury

trial on the basis that there is neither a statutory nor constitutional right to a jury trial in tax cases in Florida.

SUMMARY OF ARGUMENT

This Court has held that the Florida Constitution maintains the right to a jury trial in civil matters only where permitted either by statute or at common law at the time Florida's first Constitution became effective. There is no statute providing for jury trials in tax cases in Florida, as such cases are heard in equity. At the time the first Florida Constitution became effective in 1845, tax assessment protest and refund cases were heard and decided by County Court judges sitting in special session and acting as an administrative body. This non-jury method was common in other states to ensure expeditious imposition and collection of taxes. Jury trials were not available in Florida for tax matters at the time the first Florida Constitution became effective and so the right to jury trial does not carry forward under Article I, Section 22 of the present Florida Constitution.

The First District Court of Appeal erred in its decision that Florida taxpayers in excise tax cases are entitled to jury trials. The First District Court of Appeal did not follow the law of this Court to determine the constitutional right to a jury trial in Florida. First, the First District correctly stated that under no legal theory are tax assessments entitled to a jury trial. However, the First District departed from the law in finding that the security requirements of § 72.011, Florida

Statutes put this tax assessment case "in the posture of a refund" and in finding a jury trial right under the Seventh Amendment.

At common law in Florida, both assessment protests and refunds were identical procedurally and did not receive jury trials. The First District's assertion that the case at bar is a refund action is thus irrelevant to the analysis of this case. In finding a refund akin to an assessment, the First District improperly reached an interpretation of "the nature of the proceeding", when tax proceedings virtually identical to those used today were in use in 1845 and did not receive a jury trial. The First District has attempted to broaden the scope of jury trials rights beyond that contemplated by the drafters of the Florida Constitution.

The First District Court erred in relying on the federal case of United States v. New Mexico, 642 F.2d 397 (10th Cir. 1981) in finding a common law right to a jury trial. The First District erroneously found New Mexico persuasive because the Seventh Amendment does not apply to the States. The Florida standard is to look to English common law as of 1776 and statutes and cases in Florida between 1776 and the date Florida's first constitution became effective. The Seventh Amendment analysis looks solely to English common law of 1791 and ignores state common law evolution.

The First District Court erred in declining to follow the Third District Court of Appeal's decision finding no right to a jury trial in a tax case. Robbins v. Section 3 Property Corp.,

609 So.2d 670 (Fla. 3d DCA 1992). The Third District correctly found that tax cases have traditionally been heard in equity. The First District erred in finding Robbins distinguishable as an ad valorem tax case as opposed to an excise tax case. At the time Florida's first Constitution became effective, both ad valorem and excise taxes were known in Florida, and were contested identically, without a jury.

There is no Florida statute granting a right to a jury trial in an action brought under Chapter 72. The Florida statutes and the common law at the time Florida's first Constitution became effective permitted tax contests, but without a jury. As tax cases were heard in equity at common law it would be error to grant a request for a jury trial. There are Florida cases dating to 1837 showing tax contests heard in equity. There are no recorded Florida tax cases heard by a jury. This court should reverse the First District Court of Appeal, approve the Third District Court of Appeal, and affirm the Circuit Court's striking of the Appellant's demand for a jury trial.

ARGUMENT

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

Analysis of the question presented requires that this Court determine whether a right to a trial by a jury of one's peers existed at the time Florida's first Constitution became effective. In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1986). The determination requires an answer to the

following questions: 1) was there a common law cause of action in Florida forming the basis for a tax assessment challenge as of 1845; and 2) if so, did the cause of action provide for a jury trial. Only if the cause of action was unknown at common law is it necessary to look to the nature of the proceeding to determine if there was a jury trial right at common law.

In this case, there were common law causes of action for tax assessments and refunds of both ad valorem and excise taxes in Florida at the time Florida's first constitution became effective. Neither assessment protests nor tax refund actions received a jury trial, as such actions were heard in equity. The First District Court erred in not looking to Florida's common law in making its determination as to a taxpayer's right to a jury trial.

The constitutional right to a jury trial does not extend beyond those cases in which it was a matter of right in 1845. Pugh v. Bowden, 54 Fla. 302, 45 So. 499 (1907). This Court has not extended the right to jury trials to matters where a jury was not used in Florida in 1845. For example, there is no right to a trial by jury in matters of probate, in juvenile proceedings, in partition, nor in inverse condemnation cases. Lavey v. Doig, 25 Fla. 611, 6 So. 259 (1889); Pugh v. Bowden, 54 Fla. 302, 45 So. 499 (1907); Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904); Dept. of Agriculture and Consumer Services v. Bonanno, 568 So. 2d 24 (Fla. 1990). The Court should follow these cases and not expand the right to a jury trial beyond that known at Florida common law.

In a recent case, this Court reiterated that it is Florida common law that controls in determining the right to a jury trial. B.J.Y. v. M.A., 18 Fla. L. Weekly 265 (April 29, 1993). This Court wrote that the right to a jury trial, "turns on whether such a right existed by statute or under the common law in effect . . . at the time the Constitution of Florida was adopted." Id. After a review of the Florida common law in the area, this Court declined to follow decisions in other states. This analysis is crucial to this case, as it is clear that jury trials were not available at common law in Florida in tax matters.

B. HISTORY OF FLORIDA TAX PROCEDURES

1. Florida's Treatment Of Tax Cases When Florida's First Constitution Became Effective

In 1845 taxpayers could obtain county court review of tax assessments, and they could be exonerated from an assessment or be granted a refund pursuant to an 1828 statute. The 1828 revenue statute amended both ad valorem and excise tax provisions, and, for the first time, provided for review of an assessment or a refund of taxes. See Laws of Florida Territory, 7th Session (1828), p. 236.

Tax review was accomplished by the county courts without a jury. The county court performed the ministerial acts of hiring the assessor and collector, and certifying the tax rolls. The county court was also, by this statute, granted the authority

to hear tax cases and could exonerate a taxpayer from an assessment or require a refund from the tax collector.[1]

The Legislative Council created a right to a hearing on tax matters before the county courts, but provided no statutory authority for a jury to be impaneled. Importantly, the Territorial Legislative Council made specific provision for jury trials in its act for the protection of mortgagees, but, again, did not do so in tax suits.[2] The lack of a provision for a jury trial in tax matters was in keeping with the revenue acts of the adjacent states of Alabama and Georgia, and with the two states admitted to the union during the same period as was Florida - Iowa and Michigan. Rush v. Department of Revenue of the State of Alabama, 416 So. 2d 1023, 1024 (Ala. Civ. App. 1982), Fowler v. Strickland, 243 Ga. 30, 252 S.E.2d 459 (1979), Davis v. City of Clinton, 55 Iowa 549, 8 N.W. 423 (1881), State v. Iron Cliffs Co., 54 Mich. 350, 20 N.W. 493 (1884).

Empowered to hear tax controversies, the county courts of that time exercised inferior judicial functions and were akin to administrative boards, possessing authority corresponding to that exercised in other states by county commissioners. Cooley, Treatise on the Law of Taxation at 46, Second Edition (1886) (comparing the power to levy, a power also held by the county

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[1] An Act to Raise a Revenue for the Territory of Florida, Laws of Florida Territory, 7th Session (1828), p. 236. (Lodged with the Clerk as document number 2. Hereinafter, documents lodged with the Clerk will be cited as LC-#. Please see Petitioner's Notice of Filing which was filed concurrently with this Brief.)

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

courts); An Act to Establish County Courts, and Prescribe Their Jurisdiction, Laws of Florida Territory, 11th Session (1833), p. 42. Acting as an administrative body, the county courts could not use a jury to hear tax cases.

Further, the common law seizure procedures which permitted tort remedies were not used in Territorial Florida. In Florida seizures did not take place without notice, and taxpayers had the opportunity for review of their assessment prior to payment by an administrative body. See Laws of Florida Territory, 7th Session (1828), p. 236. This was a substantial departure from the tax practices of common law England, where seizure of goods without notice gave rise to early cases in tort and trespass against the tax collector. See, e.g., Baks v. Hazeltine, 1 Vt. 81 (1828).

The excise tax assessment dispute at issue in this case is identical in nature to the assessment dispute procedures known at Florida common law. This dispute is not similar in any way to the seizures of English common law that received tort remedies against the tax collector, which was the erroneous holding of the First District in following United States v. New Mexico, 642 F.2d 397 (10th Cir. 1981). It was in its failure to acknowledge the Florida common law that the First District Court was remiss in its analysis of taxpayer's rights to a jury trial.

Also at the time Florida's first Constitution became effective, tax cases heard outside the administrative forum were heard in circuit court in equity. This can be seen by reference to the 1837 Leon County Circuit Court case of Apalachicola Land

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

In summary, taxpayers in Florida in 1845 had tax protest rights and relief unknown at English common law. Florida taxpayers could request assessment relief or refunds from an administrative body with an "appeal" to the equity courts. The rights and relief were statutorily provided by the Territorial Legislative Council and the State Legislature. However, at the time Florida's first Constitution became effective, juries were not used either by equity courts or by the administrative boards that heard tax matters.

The taxes imposed and the rights and remedies available to aggrieved taxpayers were the same at the time Florida's first Constitution became effective as they are today. At both times, taxpayers could select either administrative remedies or equitable remedies in a court. No jury was available at Florida common law, nor is one available today. Thus, there is no constitutional right to a jury trial in tax cases as juries were not used at Florida common law in such matters.

C. TAX MATTERS ARE EQUITABLE IN NATURE

Florida Courts have held that tax actions sound in equity. Robbins v. Section 3 Property Corp., 609 So. 2d 670 (Fla. 3d DCA

1992); Powell v. Kelly, 223 So. 2d 305, 307 (Fla. 1969); Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880, 883 (1932). In over one hundred and fifty years of Florida tax contests, Petitioner has been unable to find a single tax case where a jury was used. Florida's long practice of hearing tax matters administratively or in a court of equity follows the tradition laid down at common law. The First District Court was able to find a jury trial right only by ignoring Florida common law, a violation of the legal standards of analysis set by this Court in In re Forfeiture 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1986).

Since the time Florida was a Territory, tax matters have been heard in equity. Apalachicola Land Co. v. Robert Forbes, Sheriff, Second Judicial Circuit (1837); Powell v. Kelly, 223 So.2d 305, 307 (Fla. 1969); Day v. City of St. Augustine, 139 So. 880, 883 (Fla. 1932); Department of Revenue v. University Square, Inc., 336 So. 2d 371 (Fla. 1st DCA 1976). The right to a jury trial does not apply when the right or remedy is equitable in nature.[3] Prior to the merger of law and equity, equitable demands enforced in the courts of chancery were not triable by jury. Hughes v. Hannah, 39 Fla. 365, 22 So. 613, 615 (1897); Hathorne v. Panama Park Co., 44 Fla. 194, 32 So. 812 (1902);

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

Nelson v. State ex rel. Fisher, 84 Fla. 631, 94 So. 680 (1922); Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927).

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

In 1967, when the revised Florida Rules of Civil Procedure consolidated law and chancery, the rule eliminating the distinctions between them for procedural purposes was not intended to abolish the substantive distinction. Adams v. Citizens Bank of Brevard, 248 So. 2d 682 (Fla. 4th DCA 1971). Therefore, the rule requiring that equitable claims be tried without a jury is not altered by the consolidation of law and chancery. Id. See also, King Mountain Condo. Assoc. v. Gundlach, 425 So. 2d 569 (Fla. 4th DCA 1982); Emery v. International Glass & Mfg., Inc., 249 So. 2d 496 (Fla. 2nd DCA 1971). Even in "mixed" actions invoking both legal and equitable relief, it has been held that a jury trial can be had for compensatory trespass damages, but not for equitable claims. R.C. #17 Corp. v. Korenblit, 207 So. 2d 296 (Fla. 3rd DCA 1968); Padgett v. First Federal S & L Assoc., 378 So. 2d 58 (Fla. 1st DCA 1979).

Since 1967, Florida Courts have continued to observe and strictly enforce the pleading requirements for law and equity. Acquafredda v. Messina, 408 So. 2d 828 (Fla. 5th DCA 1982); State Farm Mutual Auto Ins. Co. v. Green, 579 So. 2d 402 (Fla. 5th DCA 1991). Thus, the rule of nonjury trials for equitable cases has not been lost or abolished merely by the merger of law and equity for procedural purposes. The distinction between law and equity

for substantive purposes remains intact.[4] Indeed, it can be reversible error for a trial court to submit "traditionally" equitable issues to a jury for determination. Lincoln Tower Corp. v. Dunhall's-Florida, 61 So. 2d 474 (Fla. 1952); Cooley v. Cody, 377 So. 2d 796 (Fla. 1st DCA 1979); Allen v. Estate of Dutton, 394 So. 2d 132 (Fla. 5th DCA 1980); Hall v. Brookville Glass, 586 So. 2d 1306, 1308 (Fla. 5th DCA 1991); and Chabad House-Lubavitch of Palm Beach County, Inc., v. Banks, 602 So. 2d 670, 672 (Fla. 4th DCA 1992).

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

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

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

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

This court should approve the decision of the Third District Court of Appeal in Robbins v. Section 3 Property Corp, 609 So. 2d 670 (Fla. 3d DCA 1992). The First District Court declined to follow the Third District's ruling. The First District misapprehended the law when it found that the law regarding a taxpayer's right to a jury trial differs depending or whether ad valorem or excise taxes are challenged. The provisions of § 72.011 and § 194.171 give taxpayers identical rights to judicial review. The taxpayer's right to protest an assessment or refund denial under § 72.011 begins with a final assessment, just as § 194.171 begins with the roll being certified. In both situations the taxpayer must pay uncontested amounts, and must file an action within 60 days of finality of the assessment or the roll being certified.

The tax proceedings under these statutes are proceedings of like nature, do not allow for a jury trial, and neither type of tax received a jury trial at Florida common law. The litigation options available today to a taxpayer are markedly similar to those available in 1845, as a taxpayer could chose either an administrative remedy or an equitable challenge in court in tax cases.

The First District found a right to jury trial based on a single Federal case but failed to consider Florida's ad valorem cases. In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1986). The similarity of all taxpayers' rights to jury trial at the time Florida's first constitution became effective makes analysis of ad valorem cases imperative to the analysis of

whether a taxpayer has a right to a jury trial to protest an excise tax asssessment.

Analyzing ad valorem tax statutes comparatively with excise tax statutes is necessary to determine a taxpayer's right to a jury trial in Florida. Under the Florida Constitution, the taxpayer's right to a jury trial is no greater that it was when Florida's Constitution was adopted in 1845. State v. Webb, 335 So. 2d 826 (Fla. 1976). See also 50 C.J.S. Juries §10 at 723 (1947). The Court must look to a taxpayer's right to a jury trial in tax cases in 1845 to determine a taxpayer's right to a jury trial in an excise case in 1993. Thus the cases of Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880 (Fla. 1932) and Robbins, 609 So. 2d 670, cannot be distinguished from the case at bar because the jury trial right for all Florida taxpayers are the same.

The First District failed to follow the Third District's decision on ad valorem tax jury trial rights in determining jury trial rights for excise taxes. This is a counterpoint to the First District's comparison of jury trial rights in what were essentially seizure cases to the protest of an unpaid tax assessment. Protests of unpaid tax assessments were known at English common law and did not receive a jury trial. Comparison of the nature of the case is appropriate only when the cause of action analyzed was unknown at common law. The panel's determination that this tax assessment protest is "in the posture of a refund case" is without foundation in statute or case law and overlooks the state of the law both in 1791 England and in 1845 Florida.

The First District should have followed the Third District's decision in Robbins v. Section 3 Property Corp., 609 So. 2d 670.S

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

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

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

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

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

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

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

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

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

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

E. THE FIRST DISTRICT SHOULD NOT HAVE LOOKED TO FEDERAL DECISIONS

The First District Court erred in looking to a federal case to determine a Florida taxpayer's right to a jury trial. Unable to find any case law anywhere finding a jury trial right in a tax assessment case, the First District court devised new rules of law to create a jury trial right for Florida taxpayers. The First District Court failed to follow the guidelines of this Court.

First, the District Court held that the The Printing House, in promising to pay the amount assessed if the assessment was upheld, transformed the case from an assessment protest to a case "in the posture of a refund." This is the logical equivalent of saying that if a borrower promises to repay a valid loan, then the borrower is transformed to a lender. In doing so, the Court distorted the analytical requirements of "the nature of the proceeding." Tax assessment protests were known at common law and were not allowed a jury trial. The court's analysis of "the nature of the proceeding" was unnecessary.

Second, the First District Court declined to discuss Florida's statutory and common law of refunds and assessments being heard without a jury, avoided the fact that in 150 years there has never been a single recorded Florida tax case heard by a jury, and based its opinion upon the persuasive value of a lone federal case. This was unnecessary and dangerous judicial legislation in a simple case. Florida did not permit a jury trial in tax proceedings at the time her first Constitution became effective. Now this right may not be extended absent

legislative action. In short, the Seventh Amendment right to a jury trial does not apply in state courts. In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 434 (Fla. 1986); Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979); Ruth v. Sorenson, 104 So. 2d 10 (Fla. 1958); Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217, 36 S.Ct. 595, 596-97 (1916).

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

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

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

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

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

1. Federal Decisions Rely On Application Of Seventh Amendment

Two federal decisions were cited by the First District in discussing the right to trial by jury; United States v. New

Mexico, 642 F.2d 397, 400 (10th Cir. 1981) and Damsky v. Zavatt, 289 F.2d 46 (2nd Cir. 1961). However, the Seventh Amendment does not apply to the states. This is because the Florida standard is to look to English common law as of 1776 and statutes and cases in Florida between 1776 and the date Florida's first Constitution became effective. The Seventh Amendment analysis looks solely to English common law of 1791, and ignores state common law evolution. Uncritical reliance on the two federal cases would thus be mistaken. Moreover, those decisions are in conflict with decisions of the United States Supreme Court and other Circuit Courts of Appeals on the question.

The United States Supreme Court first faced the question in Wickwire v. Reinecke, 275 U.S. 101, 48 S.Ct. 43 (1927). There a taxpayer brought an action to recover taxes paid. The taxpayer initially sought to argue a right to a jury trial but the question was not asserted in the brief on the merits. Id. at 105. The Supreme Court nevertheless gave the position short shrift by stating that the "right of the petitioner to a jury in such a case is not to be found in the Seventh Amendment to the Constitution, but merely arises by implication from the provisions of Section 3226, Revised Statutes (26 USCA §156)." Id.

Since then, with the exception of the 10th Circuit Court of Appeals, the United States Courts of Appeal have consistently ruled that no common law right to a trial by jury exists in federal tax cases. See, Masat v. C.I.R., 784 F.2d 573, 575 (5th Cir. 1986) (assessment case, Tax Court); Parker v. C.I.R., 724

F.2d 469, 472 (5th Cir. 1984) (no constitutional right to jury; right only exists if statute so provides); Bagur v. C.I.R., 603 F.2d 491, 500 n. 11 (5th Cir. 1979) (no constitutional right to jury trial in refund cases in either Tax Court or District Court); Martin v. C.I.R., 756 F.2d 38, 40 (6th Cir. 1985)(assessment case, Tax Court); Blackburn v. C.I.R., 681 F.2d 461, 462 (6th Cir. 1982)(assessment, Tax Court); Funk v. C.I.R., 687 F.2d 264, 266 (8th Cir. 1982)(assessment, Tax Court); (no right of action at common law against sovereign; no statutory right granted in Tax Court); Dahl v. C.I.R., 526 F.2d 552 (9th Cir. 1975); Olshausen v. C.I.R., 273 F.2d 23, 28 (9th Cir. 1959), cert. den., 363 U.S. 820 (1960).

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

The 10th Circuit Court of Appeals departed from established law when it held that there is a Seventh Amendment right to a jury trial in a tax case in United States v. New Mexico, 642 F.2d

397 (10th Cir. 1981). The court acknowledged that the remedy being sought was equitable. Nevertheless, it found that "the right of a taxpayer to a jury trial in refund cases is rooted in the common law and was preserved by the Seventh Amendment. The right of a federal taxpayer to a jury trial when he pays the tax and sues to recover is recognized by statute." Id. at 401. The analysis was based upon a determination of the rights of taxpayers to tax review at English Common Law.[5] Id. at 400-01. However, the English tort right to a jury trial in a tortious seizure case is unlike a right to a jury trial in a tax assessment case.[6]

F. POLICY

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

In the business of collecting taxes, it is hard to find volunteers. Professor Cooley, in his Treatise on the Law of Taxation, wrote that introducing jurors into tax cases, "would

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[5] The 10th Circuit relied on the research of a law review article, Kirst, Administrative Penalties and Civil Jury, 126 U. Pa. 1281, 1313-1320, for its findings on English precedent. This reliance was misplaced as the article's research was flawed. The author did not properly distinquish between the jury trial rights available in tax seizure cases and the unavailability of jury trials in tax assessment and tax refund cases.

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

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

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

State courts have also made similar policy findings. There must be prompt payment of taxes to maintain the government. This consideration, "leaves no room for the supposition

that . . . trial by jury [was] within the contemplation of the people when consenting to any general provision of the Constitution." State v. Bley, 164 Ala. 547, 50 So. 263 (1909). The California Supreme Court wrote, "The idea that every taxpayer is entitled to the delays of litigation is unreason." People v. Skinner, 115 P.2d 488, 492 (Ca. 1941).

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

CONCLUSION

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

Respectfully submitted,

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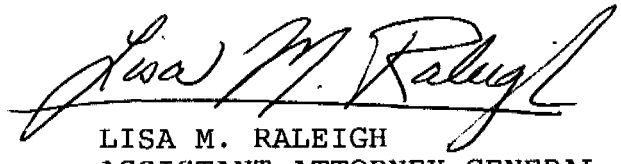

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON MERITS has been furnished by U.S. Mail to LORENCE JON BIELBY, FRED F. HARRIS, JR., FRANCES M. CASEY, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida, 32302, this 17th day of May, 1993.

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ASSISTANT ATTORNEY GENERAL