SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,

Petitioner,

vs. CASE NO. 81,602

THE PRINTING HOUSE, INC.,

Respondent.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LISA M. RALEIGH
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 858498

LEALAND L. McCHAREN
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 400343

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL-TAX SECTION
TALLAHASSEE, FL. 32399-1050
(904) 487-2142

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STATEMENT OF THE CASE AND FACTS

The Petitioner stands by its Statement of the Case and Facts as set out in its Brief on the Merits and disagrees with certain statements in Respondent's Statement of the Case and Facts.

Respondent refers to certain prior audits in its Statement of the Case and Facts. There is nothing in the record before this Court that would indicate that Petitioner "determined" that the items assessed in the audit at issue herein were nontaxable in a prior audit. The First District Court's Opinion on this point is in error.

The assessments at issue in this case are, in fact, proposed assessments. (See Notices of Proposed Assessment attached as Appendix A.) While they certainly represent Petitioner's position on the taxability of certain items, they are not enforceable or collectable until there is an opportunity for review by a Court of competent jurisdiction. Section 72.011, Florida Statutes (1991).

SUMMARY OF ARGUMENT

There is a very specific moment in Florida's history which this Court has always looked to in determining whether a right to a jury trial exists in a particular case. The repeated ruling of this Court is that the right is determined by whether it existed when Florida's first Constitution became effective on March 3, 1845. In re: Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433 (Fla. 1978). In making that determination, it is the state of Florida law and practice at that time which are conclusive on the issue.

Respondent has argued, based on an incorrect interpretation of English Common Law, that because Petitioner has not presented a pre-1845 statute which prohibits a jury trial, the right clearly existed in 1845. This assertion is plainly erroneous when the totality of the law and practice of Florida's territorial and early statehood experiences are examined. In 1828, the Florida Territory radically altered its tax system for the contest of tax assessments and for obtaining tax refunds. Since 1828 in Florida there is no pretrial seizure of the taxpayer's property, as occurred at English Common Law. This change, together with the enactments of the first session of the Florida Legislature and acts passed soon thereafter, clearly demonstrate that there was no right to a jury trial in tax contest cases in Florida in 1845.

The instant case is not a refund action; nor is it in the posture of a refund action. Petitioner has issued proposed assessments. They represent Petitioner's final position for

purposes of initiating litigation to contest and oppose them, but they are not yet final and collectible. Once an action to contest assessments has begun within the jurisdictional limits of Section 72.011, Florida Statutes, the State cannot enforce the assessments nor take any action to collect the taxes the State believes to be due.

Respondent has not paid any part of the assessments into the State Treasury. The security requirements for circuit court actions under Section 72.011, Florida Statutes, are not a payment of the assessments for which Respondent must obtain a refund. Rather, there is nothing more on the part of Respondent in this case than a promise to pay <u>if</u> the assessments are determined to be valid. While Respondent asserts on several occasions in its Answer Brief on the Merits that it has paid or has "in effect" paid the assessment; it finally states that it has only promised to pay if it loses the assessment contest.

Further, it is irrelevant to the determination of this case whether this contest involves an assessment or a refund of state taxes, because both situations were treated identically at Florida Common Law. Both the Respondent and the First District misapprehended the law in this area and created a "red herring" issue of whether this case is an assessment or "in the posture of a refund," in an attempt to create a right to a jury trial in a tax case.

In regard to any right to a jury trial in tax refund actions, the federal cases relied on by Respondent do not apply in this case. The federal right to a jury trial which exists in

refund cases is purely a creation of statute and not from the common law. Respondent relies heavily on United States v. New Mexico, 642 F.2d 397 (10th Circuit 1981) which appears to contradict this principle. Petitioner submits that New Mexico is incorrect in finding an English Common Law right to a jury trial. The case directly contradicts both the word and the clear meaning of the United States Supreme Court and has not been followed by other Federal Circuit Courts. Lastly, Respondent's claim to a federal right to a jury trial to contest a tax penalty is in conflict with United States Supreme Court case law on the issue.

ARGUMENT

I. THE RIGHT TO A JURY TRIAL IN FLORIDA IS DETERMINED BY FLORIDA LAW AND PRACTICE AS OF THE EFFECTIVE DATE OF FLORIDA'S FIRST CONSTITUTION IN 1845.

Florida's first Constitution became effective on March 3, 1845 upon Florida's admission to statehood. It is at that moment that the right to trial by jury now contained in Article I, Section 22, Florida Constitution, was guaranteed and preserved. This Court has repeatedly ruled that unless the right to jury trial for a particular cause of action existed in Florida in 1845, it is not preserved by the Florida Constitution. This principle was most recently reaffirmed by this Court in B.J.Y. v. M.A., 18 Fla. L. Weekly 265 (April 29, 1993). Although the right to a jury trial has been viewed expansively in Florida, this right will not be created for or extended to cases where it was not a matter of right in 1845. Pugh v. Bowden, 54 Fla. 302, 45 So. 499, 501 (1907).

Petitioner submits that Respondent's analysis of the English Common Law found at pages 8 though 11 of its Answer Brief on the Merits is both misguided and inapplicable to the instant case. All that Respondent's analysis might prove is that the English Common Law provided for a jury trial in tax seizure cases. As Respondent itself admits at page eleven of its Answer Brief," ... the right to a jury trial only arose after collection of the tax from the taxpayer...". (referring to Kirst, Administrative Penalties and Civil Jury, Vol. 126 V. Pa. L. Rev., No. 6, pages 1317, 1320). This jury trial right at English Common Law arose only when there was a prejudicial seizure from the taxpayer. The taxpayer either paid the money or his goods were seized before he had any right to contest whether the tax was, in fact, owed. This is indeed the "tax tyranny" Respondent refers to which ignited the fires of revolutionary ardor in this country.

Even if, however, Respondent's analysis of English Common Law were correct, it has no application to the instant case. When the Legislative Council of the Territory of Florida passed An Act to Raise Revenue in the Florida Territory, Laws of the Florida Territory, 7th Session (1828) (LC-2)[1] the entire structure of tax assessments and tax contests in Florida forever changed. For the first time, there was no pretrial forced payment of tax or seizure of goods. Instead, notices of tax assessed were issued. A failure to pay resulted in one's name being placed on "delinquent" list. This delinquent list was then

[1] Document's lodged with the Clerk and referenced in Petitioner, Florida Department of Revenue's Notice of Lodging filed May 17, 1993, will be cited as (LC-#).

presented once a year to a special session of the County Court which was authorized to rule on assessments and grant refunds. Also, for the first time, refund relief for voluntary payments made in error was available. This right of action simply did not exist at English Common law. State ex. rel Victor Chemical v. Gay, 74 So. 2d 560, 562 (Fla. 1954) (refund of voluntarily paid taxes is a matter of governmental grace).

With this revolutionary change in Florida tax law, the jury trial right in what Respondent refers to as "refund" cases vanished because the triggering event, prejudicial seizure, no longer existed. In its essence, Florida's 1828 law continues to this day.[2] Proposed assessments are issued but the State neither seizes nor takes anything from the taxpayer unless and until there is a determination of the correctness of the assessment by a Court or administrative forum. The jurisdictional prerequisites of Section 72.011, Florida Statutes, must, of course, be complied with.

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[2] Respondent mistakenly claims that Florida's tax review system parallels the federal system. In Florida a taxpayer may have an assessment or a refund reviewed in either an administrative forum or in equity before a circuit court. Sections 68.01, 72.011 and 120.575, Florida Statutes (1991). This is essentially the same system as existed in Florida in 1845. However, in the federal system, assessment protests are heard only in the United States Tax Court, which also hears tax refund cases. 26 U.S.C. §§ 6214, 6512 (1990). Tax refund cases only may also be heard by United States District Courts or by the United States Claims Court. 28 U.S.C. § 1346(a)(1)(1990). The United States Bankruptcy Courts also have jurisdiction to hear tax matters. 11 U.S.C. § 505 (1990). Of all these federal forums, only United States District Courts and Claims Courts allow jury trials, which are permitted only by statute. 28 U.S.C. § 2402 (1990).

The 1828 territorial statute eliminated the tax seizure action which was the only basis for Respondent's contention that English Common Law grants a jury trial right in Florida in a tax case. Analysis now must turn to the effect of that 1828 statute. As Respondent agrees, the Common Law could be changed in Florida by statute prior to the effective date of the first Florida Constitution in 1845. While the 1828 statute does not state that there is no right to a jury trial, Petitioner submits that there are clear indicators that the statute was never understood to include a jury trial right. Cooley, Treatise on the Law of Taxation, Second Edition (1866), states that the county courts of the period exercised inferior judicial functions and were much more akin to administrative boards with the powers usually associated with boards of county commissioners in states other than Florida.[3] Thus, acting essentially as an administrative body a county court would not have used a jury trial to hear tax cases. Also, the ministerial act of certifying the tax rolls, done by the county court in the same special session as tax cases were heard, is an activity always done without a jury. An Act to Raise Revenue in the Florida Territory, Laws of Florida Territory, 7th Session (1828).

Respondent attempts to distinguish Apalachicola Land Company v. Robert Forbes, Sheriff, 2d Jud. Cir. (1837), by claiming that the cited case is an assessment protest, not in "the posture of suing for a refund," and that the decision is silent as to

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[3] This Court has cited Cooley as an authority on taxation in other cases. Johnson v. Adkins, 44 Fla. 185, 32 So. 879 (1902).

whether a jury trial was requested. Respondent's Answer Brief on the Merits at 4. The Respondent misapprehends the law. Florida Territorial law treated tax assessment and tax refund cases identically, so it is irrelevant whether the case cited is an assessment or a refund. An Act to Raise Revenue with Florida Territory, Laws of Florida Territory, 7th Session (1828). The case is not silent as to whether a jury trial was requested; the case was heard in equity, which does not permit jury trials. See, Lincoln Tower Corp. v. Dunhall's-Florida, Inc., 61 So. 2d 474, 476 (Fla. 1952); Cooley v. Cody, 377 So. 2d 796, 798 (Fla. 1st DCA 1979). Apalachicola Land is simply the earliest recorded case in over 150 years of Florida tax cases, every one of which has been heard in equity, without a jury.

In addition to case law, however, are the actions of the first session of the Florida Legislative in 1845. While Respondent is correct that the right to jury trial in a particular type of case cannot be abrogated by statute after 1845, the early Florida statutes are still illuminating and indicative of the right as it existed in 1845. At the first session of the Florida Legislature, Chapter 10, Section 30, at 30, Laws of Florida (1845) was enacted. This act essentially carried over the tax assessment and contest provisions of the 1828 revenue act, but Section 30 gave the power to hear all tax disputes at the trial level to an elected Board of County Commissioners. Clearly, this placed all tax and refund cases before what, in modern terms, is an administrative forum.

Everyone has strong personal opinions about the taxes they pay. Yet Respondent has shown nothing that would indicate a hue and cry over this alleged legislative usurpation of an immemorial common law right. In fact, contemporary accounts of Florida's first legislative session show no concern on this point at all.[4] Nor is it reasonable to believe that the first Florida Legislature, at its first session, would pass a statute that was in violation of the new Florida Constitution, as asserted by the Respondent.

In 1848, the Florida Legislative enacted Chapter 151, Section 4, Laws of Florida (1848) which is the direct predecessor statute to the present Section 68.01, Florida Statutes, which

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[4] See Petitioner, Florida Department of Revenue's, Second Notice of Lodging filed with the Clerk with this brief. In The Floridian of November 22, 1845, there is a report of the Governor's address on November 17, 1845, to a joint session of the House and Senate which states that ". . . the subject of taxation is one on which the public mind is ever justly sensitive . . .". In that same edition of November 22, 1845, the Governor again addresses a joint session on November 18, 1845, and discusses trial by jury in criminal cases stating that ". . . no department of the government has the power to suspend the right to trial by jury . . .". (emphasis in original) Thus, both taxation and jury trials were before the Legislature and the public and yet there was no indication that anyone had lost a right to trial by jury in tax cases. In The Florida Sentinel of July 8, 1845, it is stated that the Committee on Finance and Public Accounts reported out a bill entitled, "An Act to Raise Revenue for the State of Florida." The report was concerned only with revenues and the necessity of imposing some type of taxes. There was no mention or discussion of whether a jury trial right was being abrogated. On August 12, 1845, The Florida Sentinel analyzed the recently passed revenue act which was Chapter 10, Laws of Florida (1845). It had been approved by the Governor on July 24, 1845. This analysis is essentially an editorial but gives no indication of concern over what Respondent would present as an illegal and unconstitutional abrogation of a common law right. Again, all of this further indicates that there was no jury trial in tax contests in Florida prior to 1845.

clearly provided that all tax disputes would be heard in Chancery. Again, there is no record of an outcry that a valuable common law right had been lost. Ever since 1845, all recorded Florida tax cases have been held to sound in equity and therefore are heard without a jury. See, e.g., Robbins v. Section 3 Property Corp., 609 So. 2d 670 (Fla. 3d DCA 1992) and the cases cited therein.

It is literally inconceivable that for 148 years the entire legal profession in Florida, the judicial branch of government, and the Florida Legislature have been oblivious to what Respondent would propose to be a clearly established right in Florida. Rather, the actions of the early Florida Legislature reflect and demonstrate what the Florida common law and practice were in 1845. Petitioner submits that there was no right in Florida to a jury trial in any tax matter in 1845. This was so universally known and recognized that laws authorizing a Board of County Commissioners to hear tax disputes occasioned no comment or conflict. This is particularly evident as the Leon County Board of County Commissioners heard tax disputes from pre-1845 years. See, (LC-4).

II. THIS ACTION IS NOT A REFUND ACTION

Respondent contends, and the First District Court of Appeal ruled in its opinion below, that the instant case is "in the posture of a refund." The Printing House v. Department of Revenue, 614 So. 2d 1119 (Fla. 1st DCA 1992). Consequently, in the First District's opinion, because tax refund actions are entitled to a jury trial, the instant case also receives a jury

trial. These are two major intuitive leaps of faith; both of which fall short.

The First District Court and the Respondent misapprehend the law of the evaluation of a constitutional right to a jury trial in Florida. In Florida in 1845, tax refund cases and tax assessment cases had identical legal rights to administrative and equitable review. If, for an 1845 Florida taxpayer, refunds and assessments were treated procedurally identically, then it is irrelevant now whether the case at bar is a refund or an assessment in determining the right to a jury trial.

Regardless, this case is not a refund case as determined by the First District Court. Nothing has been taken from the Respondent by the State and the Respondent has made no voluntary payment in error into the State Treasury. The provisions of Section 72.011(3), Florida Statutes, require depositing the disputed tax amount into the registry of the Court, posting a bond, or obtaining a waiver from the Department of Revenue of these provisions. The First District Court held that the provisions of Section 72.011(3), Florida Statutes, constitute the equivalent of payment of the tax for which a refund is now sought. See, The Printing House v. Department of Revenue, 614 So.2d 1119, 1123 (Fla. 1st DCA 1992).

This is error by the First District Court. While Respondent obtained a waiver of Section 72.011(3), Florida Statutes, even if it had deposited the full contested amount into the Registry of the Court, this would still not be a refund case. That money would still belong to Respondent. The State of Florida has no

right to take such money, or to use it, or to invest it, or earn interest on it, or to control it in any way. All that Section 72.011(3), Florida Statutes means, in this regard, particularly in the case of a waiver, is that parties such as Respondent are promising to pay an assessment if, and only if, they lose. The State is entitled to the money only if it wins. Again, it is this entire structure in Florida of non-seizure of money or goods to pay tax assessments before trial that undermines Respondent's analysis and application of English Common Law to this case.

Further, tax refunds in Florida are governed completely by statute. Section 215.26(4), Florida Statutes, provides that this section is the exclusive method of obtaining a refund in Florida. The title of the section is "Repayment of funds paid into the State Treasury through error." Section 215.26(1) provides three circumstances under which a refund may be made. All three require that the money has been actually paid into the State Treasury. There is no refund of tax in Florida absent this payment into the Treasury. Payment into the Treasury, unlike the provisions of Section 72.011(3), Florida Statutes, gives the state full control and spending authority over the funds. This crucial difference demonstrates that this case is not a refund case nor is it "in the posture" of a refund action. Even Respondent, after contending four times that it has effectively "paid" the tax at issue, admits that it has, in fact, only promised to pay the assessment if it loses. Respondent's Answer Brief at pages 3, 19, 20, 23 and 46.

The second major intuitive leap of faith by the First District Court, that tax refund cases have a Common Law right to a jury trial will be discussed in the next section of this brief.

III. FEDERAL DECISIONS ARE NEITHER DETERMINATIVE NOR PERSUASIVE ON THE ISSUES OF THIS CASE

The First District Court of Appeal's holding that tax refund actions are entitled to a jury trial as matter of Common Law right is based on a thoroughgoing misinterpretation and misapplication of the federal cases and the state of the Common Law in 1791 when the United States Constitution was ratified.

It is true that in federal suits for refund of taxes previously paid, there is a right to trial by jury. The First District Court's error was in finding that this federal right arises from the Common Law and out of the Seventh Amendment rather than by statute. In this regard, both the First District Court and Respondent rely heavily on United States v. New Mexico, 642 F. 2d 397, 398 (10th Circuit 1981) which states:

> The English case law demonstrates that the common law right to a jury trial predates 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 in the Seventh Amendment.

The Tenth Circuit Court of Appeals may well be persuaded on this point. The United States Supreme Court is not so persuaded. In a case cited by Petitioner in its Brief on the Merits but overlooked by Respondent in its Answer Brief on the Merits, the United States Supreme Court flatly and unequivocally holds that the federal right to a jury trial in tax refund cases is purely a creation of statute. In Wickwire v. Reinecke, 275 U.S. 101, 106 (1927), the Court held:

> . . . 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 [Comp. St. §5959]), which has reference to a suit at law. It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial - if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied. (Citations omitted) e.s.

Petitioner submits that the New Mexico decision is simply wrong. The words of the United States Supreme Court are clear. There is no Common Law right to jury trial in any federal tax case as even Respondent would agree that tax assessment contests have never received this right. Thus, the entire holding of the First District Court on this point is without foundation. Even if the instant case were a refund action, there would be no Common Law right to a jury trial.

IV. FEDERAL LAW DOES NOT ALLOW FOR A JURY TRIAL WHERE THE STATE SEEKS A PENALTY IN A TAX CASE

Respondent incorrectly asserts that a pollution case concerning a civil penalty stands for the proposition it is entitled to a jury trial on the penalty portion of a tax assessment under the Seventh Amendment. Tull v. U.S., 481 U.S. 412 (1987). This case does not apply. Federal courts have ruled on the matter of civil penalties in tax proceedings and there is no right to a jury trial. Helvering v. Mitchell, 303 U.S. 391 (1938).

In the landmark case of Helvering v. Mitchell, the U.S. Supreme Court upheld the administrative power of the government to assess and collect taxes and penalties. Quoting with approval the case of Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1865) the Court wrote:

> In accord with this settled judicial construction, the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of involving judicial power.

Helvering at 399 (emphasis added).

This right of the government to collect penalties solely within an administrative agency by its nature precludes a right to a jury trial. Here we have a statutory obligation to collect and remit sales tax, an assessment, and a civil penalty. Florida's common law practice of bench trials in tax cases violates no Seventh Amendment right to a jury trial because of the right of government to place tax protests of penalties into an administrative proceeding without a judge or a jury. Tull, a non-tax case, has no place in the analysis of whether Respondent has a right to a jury trial in this tax case.

CONCLUSION

This Court should reverse the First District Court of Appeal in this case and approve the decision in Robbins v. Section 3 Property Corp., 609 So. 2d 670 (Fla. 3d DCA 1992). This Court should 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 other states and the Federal government.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LISA M. RALEIGH
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 858498

LEALAND L. McCHAREN
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 400343

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL-TAX SECTION
TALLAHASSEE, FL. 32399-1050
(904) 487-2142

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief 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 and Larry E. Levy, Esquire, Post Office Box 10583, this 28th day of June, 1993.

LEALAND L. McCHAREN
ASSISTANT ATTORNEY GENERAL