"The Greatest Show On Earth," Or Just Another Shell Game?: A Review Of The 1986 Florida Supreme Court Decisions Concerning Taxation*

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Abstract

The number of tax cases heard by the Florida Supreme Court in a given year is always quite small in comparison with the number of cases the court decides in areas such as constitutional or criminal law.

KEYWORDS: taxation, game, decisions
line of cases, one clearly acknowledges the significance of many of these decisions.

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* This article covers only those 1986 Florida Supreme Court cases with a direct impact on state tax issues. There were some 1986 cases, not covered by this article, which were affected by tax considerations, even though the cases themselves did not affect the tax laws of Florida. One example of such a case was MCI Telecommunications Corp. v. Florida Pub. Serv. Comm’n, 491 So. 2d 539 (Fla. 1986), in which the court determined that even though the Commission had the power to prevent local telephone companies from obtaining windfalls due to changes in tax procedure, it had acted arbitrarily in using that power to the benefit of only one long distance company. While a change in tax procedure was clearly a factor in the MCI decision, there was no challenge to that procedure. Thus, the tax consideration in MCI was merely a catalyst in a challenge involving the broader question of the Commission’s power.

Two other examples of the types of cases not covered in this article are Eldred v. North Broward Hosp. Dist., 498 So. 2d 911 (Fla. 1986) (deciding that a special taxing district was covered by the same limited liability as a municipality or county), and Peep v. Division of Bond Fin., 493 So. 2d 1013 (Fla. 1986) (in which a private taxpayer sought to invalidate the issuance of expressway expansion bonds, claiming that they did not have a public purpose).

** Associate Professor of Law, Stetson University, College of Law; LL.M in Taxation, University of Florida, 1983; J.D., University of Tennessee, 1982; B.A., University of Georgia, 1978.

The author wishes to express his thanks to Deborah Crumbley for her invaluable research help on this project.
II. A Case with National Impact: *Shell Oil v. D.O.R.*

In 1986, the Supreme Court of Florida rendered a decision that will almost certainly be appealed to the United States Supreme Court, because it is a decision with national impact, involving the Florida Supreme Court's interpretation of a federal statute. More specifically, the case dealt with the issue of "whether the State of Florida is prohibited by 43 U.S.C. § 1333(a)(2)(A) from imposing a tax upon income derived from the sale in the United States of oil extracted from the Outer Continental Shelf?" The court answered this question by holding that the Florida Department of Revenue could indeed tax oil derived from the Outer Continental Shelf, as long as it was sold in a place other than on the Outer Continental Shelf.

In order to understand the impact of the court's decision, and why it must be overruled on appeal, we must turn our attention to the specific facts of the *Shell* litigation. Simply stated, Shell Oil, which is a Delaware corporation, operated several oil wells on the Outer Continental Shelf (OCS). Most of the oil derived from those wells was transferred to third parties within the boundaries of the fifty states by Shell's own pipelines. While Shell treated all sales of its oil as taxable under the federal income tax laws, it claimed that it should be allowed to exclude the sales of OCS oil from its computation of its Florida tax base. Shell based its contention upon 43 U.S.C. § 1333, a federal statutory provision which states that state taxation laws shall not apply to the Outer Continental Shelf.

The Department of Revenue disagreed with Shell's interpretation of section 1333, arguing that the State of Florida was precluded from

3. 496 So. 2d 789 (Fla. 1986).
4. Id.
5. This was the question certified by the First District Court of Appeal to be of great importance in *Shell Oil v. D.O.R.*, 461 So. 2d 959, 963 (Fla. 1st Dist. Ct. App. 1984).
6. Hereinafter, D.O.R.
7. *Shell Oil*, 496 So. 2d at 791. The Outer Continental Shelf [hereinafter OCS] is defined as the property located beyond the three mile limit of state jurisdiction, 43 U.S.C. § 1331 (1982).
8. Had Shell transferred its oil to another company's pipelines, it could have argued that the sales were made at the well head, which would clearly exempt such sales from Florida's taxing power. Thus, the fact that Shell used its own pipelines to transfer the oil to shore was a major factor in the D.O.R.'s argument.
I. Introduction

The number of tax cases heard by the Florida Supreme Court in a given year is always quite small in comparison with the number of cases the court decides in areas such as constitutional or criminal law. My colleagues, particularly those who teach or practice criminal or constitutional law, would argue that tax cases are dry and boring, and thus, the supreme court avoids them whenever possible. I could counter that the district courts of appeal do such an outstanding job in handling tax cases that only those "certified to be of great public importance" ever reach the supreme court. However, instead of trying to impress upon nonbelievers that tax cases are truly inspiring, I will simply review the tax cases decided by the Florida Supreme Court in 1986.

In addition to a review of judicial determinations, I will discuss the impending decision by the Florida Legislature concerning sales taxation of legal services. The exemption from sales tax currently enjoyed by attorneys and their clients is scheduled to expire in 1987. Clearly, whether the legislature extends the exemption, or simply allows it to expire could be the single most important state tax issue for 1987.

1. Fla. Const. art. V, § 3(b)(4), states that the supreme court has jurisdiction to review district court cases certified to be of great public importance, or certified to be in conflict with other district courts. Of course, there are other provisions which grant the supreme court jurisdiction over tax cases. For example, the court must review a decision by a district court which holds a taxing statute invalid. Fla. Const. art. V, § 3(b)(1). Furthermore, the court can review district court decisions which hold state statutes to be valid, or which expressly affect a class of constitutional officers. Fla. Const. art. V, § 3(b)(3).

2. I am not sure I believe it myself, which might explain the often feeble attempts at humor which appear in this article. Please be assured that, while it is easy to underestimate the excitement generated by tax cases, I have not underestimated their importance or their effect.

2.1. As of the date of publication of this article the legislature has repealed Fla. Stat. 212.08(3)(d) (1949). As a result, legal services will be subject to a sales tax beginning in July of 1987. The author's views on taxation of legal services remain unchanged. See in re: Advisory Opinion to the Governor, request of May 12, 1987, 12 Fla. L. Weekly 375 (Fla. July 14, 1987).
taxing OCS oil, only if such oil was sold at the wellhead. That is, once Shell transferred the OCS oil to one of the fifty states for sale, it was no longer exempt from taxation. The supreme court accepted the D.O.R.'s position.

The majority of justices reasoned that Shell did not realize any gain until it actually sold the oil, and that it is the realization of gain which gives rise to appropriate taxation. Thus, since Shell sold its oil at a place other than the OCS, its oil sales were completely taxable. The court stated that "taking Shell's argument to its logical conclusion, no state could impose any kind of tax on any final product which eventually might be derived from OCS production... Congress never intended such a sweeping result when it passed the Outer Continental Shelf Lands Act." Unfortunately, what the court failed to understand was that taking its argument to its logical conclusion, very little, if any, OCS oil, or any oil for that matter, is actually sold at the wellhead. Congress could not have intended such a restrictive result when it passed section 1333. In fact, that Congress created a state tax exemption for OCS oil, at all, tends to disprove the stand taken by the majority of justices on the Florida Supreme Court.

It should be added that the Court's argument concerning when realization occurred is irrelevant, once we conclude that Congress intended to exempt all OCS oil from taxation. After all, once an item is legislatively exempt from taxation, it is meaningless to discuss the time or place of its disposition. It is true, there was a gain derived when Shell sold its OCS oil, but that gain was not, nor could it ever be a taxable gain.

Should the Florida court's decision be allowed to stand, there would be no reason why the other states should refrain from taxing OCS oil sold other than at the wellhead. Furthermore, the Florida court's opinion directly conflicts with the decision of the United States Supreme Court in Ramah Navajo School Board v. Bureau of Revenue, which held that no state has jurisdiction to tax in an area of exclusive federal jurisdiction. The fact that Congress intended for the Outer Continental Shelf to be an area of exclusive federal jurisdiction is clearly evidenced by 43 U.S.C. § 1333(a)(3) which provides:

The provisions of this section for the adoption of state law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction over the seabed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Therefore, because of the negative national impact of the Florida Supreme Court's decision in Shell Oil, and because it is in conflict with federal law as espoused by Congress and the United States Supreme Court, it should be overruled. Since the Florida Supreme Court has

40. 43 U.S.C. § 1333(a)(3) (1982) exempts OCS oil from state taxation. The State of Florida would argue that the OCS oil was exempt, but that the revenue from such oil was taxable if sales occurred outside of the OCS. The state's argument seems absurd in light of § 1333(a)(3) of the OCS Lands Act, which prohibits states from asserting domain over OCS resources or revenue.
41. 456 U.S. 832 (1982).
42. The judiciary has also held that a state "has no valid interest in imposing a severance tax on OCS lands." Maryland v. Louisiana, 451 U.S. 725, 732 n.26 (1981).
43. 456 U.S. 832 (1982). The Supreme Court has held that a state is precluded from exerting indirect, as well as direct, taxation in areas of exclusive federal jurisdiction. Ramah Navajo School Bd. v. Bureau of Revenue, 456 U.S. 832 (1982).
44. "The Florida decision in Shell offers the fact that the State of Florida's tax laws conflicting with 43 U.S.C. § 1333. Thus, the Chief Justice in his dissenting opinion in Shell (supra, p. 1060) states: "(Florida)'s decision marks the boundary that is required by the Act.'"
45. 456 U.S. 832 (1982).
taxing OCS oil, only if such oil was sold at the wellhead.10 That is, once Shell transferred the OCS oil to one of the fifty states for sale, it was no longer exempt from taxation. The supreme court accepted the D.O.R.'s position.

The majority of justices reasoned that Shell did not realize any gain until it actually sold the oil, and that it is the realization of gain which gives rise to appropriate taxation.11 Thus, since Shell sold its oil at a place other than the OCS, its oil sales were completely taxable. The court stated that "taking Shell's argument to its logical conclusion, no state could impose any kind of tax on any final product which eventually might be derived from OCS production.... Congress never intended such a sweeping result when it passed the Outer Continental Shelf Lands Act."12

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The provisions of this section for the adoption of state law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.16

Therefore, because of the negative national impact of the Florida Supreme Court's decision in Shell Oil, and because it is in conflict with federal law as espoused by Congress17 and the United States Supreme Court18 it should be overruled. Since the Florida Supreme Court has

10. The state based its contention on the idea that once the oil left the OCS, it was no longer OCS oil. Shell, on the other hand, claimed that OCS oil was always OCS oil, and was never subject to state taxation. Shell Oil, 496 So. 2d at 790.
11. Realization is an event which triggers taxation. For example, an owner of corporate stock might be excited that her shares have increased in value according to the financial papers. However, she receives no real benefit from the increased value of her shares until she sells them; if she does not sell the shares, and they go down in value, she will never benefit from the temporary value surge. Thus, we say that the shareholder does not realize a gain until she sells the stock. Similarly, the court in Shell Oil held that no gain was realized until Shell's oil was sold. For a further discussion of realization, see Helvering v. Horst, 311 U.S. 112 (1940).
12. Shell Oil, 496 So. 2d at 791.
13. The fact that the vast majority of OCS-drilled oil is eventually sold within some state boundary was not contested. However, it should be added that there is an established practice in the oil and gas industry to determine the value of the oil at the wellhead. In fact, the United States government is required by statute to make such evaluations when it pays for OCS oil and gas. 43 U.S.C. § 1333(2) (1982). Thus, the D.O.R. would have no problem determining the value of oil to be excluded from state taxation. Shell Oil, 496 So. 2d at 796.
14. 43 U.S.C. § 1333 (1982) exempts OCS oil from state taxation. The State of Florida would argue that the OCS oil was exempt, but that the revenue from such oil was taxable if sales occurred outside of the OCS. The state's argument seems absurd in light of § 1333(a)(3) of the OCS Lands Act, which prohibits states from asserting domain over OCS resources or revenues.
16. The judiciary has also held that a state "has no valid interest in imposing a severance tax on OCS land." Maryland v. Louisiana, 451 U.S. 725, 752 n.26 (1981).
17. 43 U.S.C. § 1333(a)(3) (1985) (emphasis added). The United States Supreme Court has held that a state is precluded from exerting indirect, as well as direct, taxes in areas of exclusive federal jurisdiction. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982).
18. Chief Justice Boyd's dissenting opinion in Shell discloses the fact that the State of Florida's tax laws are in direct conflict with 43 U.S.C. § 1333. Thus, the Chief Justice argues that article VI, clause 2 (the supremacy clause) of the United States Constitution precludes Florida from taxing OCS oil. Shell Oil, 496 So. 2d at 792 (Boyd, J., dissenting).
19. E.g., Ramah Navajo School Bd., 458 U.S. at 832.
III. Statutory Construction: Mikos v. Ringling Brothers-Barnum & Bailey

Step right up ladies and gentlemen, boys and girls to the greatest show in Florida. Actually, the Ringling Brothers case was not the greatest show in Florida, but it was a reasonably interesting decision, as far as ad valorem tax cases go. After all, most ad valorem tax cases involve mundane properties, such as shopping centers, mobile home complexes, and boats while Ringling Brothers involved the propriety of taxing the animals, costumes and props used by a traveling circus.

Specifically, the question raised by Ringling Brothers was whether Sarasota County could impose a tax on the four property (animals, props, and costumes) of the circus, if that property was only present in Sarasota county for two-and-one-half months each year.26 The Florida Supreme Court decided, in a per curiam opinion, that the traveling property could not be subject to taxation by Sarasota County.27

The supreme court had jurisdiction to hear this matter, because the Second District Court's opinion in Ringling Brothers conflicted with the Third District Court of Appeal's holding in Autotote Limited, Inc. v. Bystrom.28 The findings in both cases hinged upon an interpret-

20. The rehearing was denied on November 24, 1986.
21. The United States Supreme Court would have jurisdiction because there has been a decision in the Florida Supreme Court involving a federal statute. See, e.g., Matthews v. Zane, 8 U.S. 382 (1808), and Cohens v. Virginia, 19 U.S. 264 (1824). As of the date of this article the United States Supreme Court has granted certiorari for Shell Oil. See also Shell Oil v. D.O.R., 55 U.S. L. W. 3807 (June 1, 1987) in which the Court invited the Solicitor General to file a brief expressing the views of the United States.
22. 497 So. 2d 630 (Fla. 1986).
23. E.g., Bystrom v. Whitman, 488 So. 2d 520 (Fla. 1986).
26. This was the question certified by the district court in Mikos v. Ringling Bros.-Barnum & Bailey, 475 So. 2d 292 (Fla. 2d Dist. Ct. App. 1985).
27. Ringling Bros., 497 So. 2d at 631.
28. 475 So. 2d at 292.
29. 454 So. 2d 661 (Fla. 3d Dist. Ct. App. 1984), review denied, 461 So. 2d 113 (Fla. 1985).
32. In 1979, the definition of permanently located appeared in Fla. Stat. § 192.037(5) (1979). However, the section now appears as Fla. Stat. § 192.032(5) (1986).
33. It was because of this amendment that the Second District Court of Appeal retreated from its earlier ruling that the Ringling property was permanent. See Ringling Bros., 368 So. 2d at 887-89.
34. Ringling Bros., 497 So. 2d at 633.
35. Id. at 632.
36. Id.
37. Fla. Stat. § 192.035(5) (1985). (emphasis added). Fla. Stat. § 192.032(2) (1986) envisions the fact that property might be brought into the state after January 1 every year, and then removed prior to January 1 of the next year. The statute allows the appraiser to tax such property.
denied Shell Oil's petition for a rehearing, the natural recourse would be for Shell to seek an appeal in the United States Supreme Court.

III. Statutory Construction: Mikos v. Ringling Brothers-Barnum & Bailey

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Specifically, the question raised by Ringling Brothers was whether Sarasota County could impose a tax on the tour property (animals, props, and costumes) of the circus, if that property was only present in Sarasota county for two-and-one-half months each year. The Florida Supreme Court decided, in a per curiam opinion, that the traveling property could not be subject to taxation by Sarasota County.

The supreme court had jurisdiction to hear this matter, because the Second District Court's opinion in Ringling Brothers conflicted with the Third District Court of Appeal's holding in Autotote Limited, Inc. v. Bystrom. The findings in both cases hinged upon an interpretation of subsections 192.032(2) and (5) of the Florida Statutes as they existed in 1983. Section 192.032(2) provides that property can be assessed for ad valorem tax purposes if it acquires permanent situs in the taxing jurisdiction. Until 1979, the definition of permanence was determined on a case by case basis. However, in 1979, the Florida Legislature amended section 192.032 by adding a definition of "permanently located." According to section 192.032(5) of the Florida Statutes, permanently located means "habitually located or typically present for the 12-month period preceding the date of assessment." Interestingly, the Florida Supreme Court's opinion insisted that the court was bound to follow the clear and unambiguous meaning of the statute, and then the court read into the statute a requirement that simply does not comply with the statute's plain meaning. This is, the court seemed to cite the language "typically present for the 12-month period preceding the date of assessment" as imposing a rigid time constraint upon the definition of permanence. Therefore, the court reasoned that, since the circus touring property was only located in Sarasota County for ten weeks each year, it was not permanently located in Sarasota County.

In its rigid interpretation of the statute, the court seemed to overlook the words "typically present." This phrase should be read as an illustration of the types of property which will generally be classified as permanently located. That is, it is true that property typically present in a place for a twelve month period is most likely permanently located. However, it is not necessarily true that property present for only six weeks at a time is typically present in the place where it is located.

32. In 1979, the definition of permanently located appeared in Fla. Stat. § 192.037(7) (1979). However, the section now appears as Fla. Stat. § 192.032(5) (1986).
33. It was because of this amendment that the Second District Court of Appeal retreated from its earlier ruling that the Ringling property was permanent. See Ringling Bros., 368 So. 2d at 887-89.
34. Ringling Bros., 497 So. 2d at 633.
35. Id. at 632.
36. Id.
months prior to assessment should never be considered permanently located. "Typically" simply means "in the majority of instances." Furthermore, the supreme court totally ignored the disjunctive phrase "habitually present or ..." Clearly, the circus tour property was habitually present from November to January each year. In fact, the property even returned to the same permanent facility, in Venice. Therefore, it can certainly be asserted that the tour property was habitually located in Sarasota County, even if it was not typically present for the 12-month period preceding the date of assessment. The Legislature, by its use of the disjunctive in section 192.032, clearly dictated that the standard used for determining habitual location would be different than the standard used for determining typical presence for a twelve-month period. Section 192.032(5) was intended to guide the courts in their determination of whether property was permanently situated for ad valorem tax purposes; it was not intended to be a binding standard for the courts to apply. In fact, it would be absurd for the Legislature to impose a non-flexible definition of permanence which would be applied to a tremendous variety of property, being used in an even greater variety of ways. Or, to put it more succinctly, the definition of permanence should not be so rigid that it cannot possibly take into account the difference between a circus animal and a shopping center.

IV. Various Challenges to Taxing Authorities

In addition to the Shell Oil and Ringling Brothers cases, the supreme court heard three cases directly related to taxation. These cases could be characterized, generally, as challenges, by either the states or individual taxpayers, against the authority of taxing bodies. More specifically, these challenges involved the propriety of property assessments by an appraiser, the use of tax revenues by a city, and the ability of the Division of Bond Finance to issue taxable, as opposed to tax-exempt, bonds. I should warn the reader that, unlike the Shell and Ringling Bros. cases, these cases should only be read by hardened tax jocks.

A. Assessments: Bystrom v. Whitman

In federal income taxation there is a basic tax postulate known as the "pig theory." Simply stated, the pig theory says that a taxpayer can be a pig, but if he becomes a hog, he will be butchered. In the case of

44. A tax jock might be described as a person who covers his copy of the I.R.C. in plastic so that he can read it in the shower.
45. 488 So. 2d 520 (Fla. 1986).
46. For excellent examples of how the pig theory has been applied to federal tax law, see Crane v. Commissioner, 331 U.S. 1 (1947), and Diamond v. Commissioner, 56 T.C. 530 (1971), aff'd, 492 F.2d 286 (7th Cir. 1974). Crane involved a taxpayer who wanted to include non-recourse financing on property she acquired as part of her basis for depreciation purposes. On the other hand, she did not want to include the nonrecourse financing as part of her amount realized when she sold the property. Thus, she wanted to treat the nonrecourse financing inconsistently so that she could benefit from greater depreciation deductions provided by a higher basis, while enjoying a much lower taxable gain on the property when it was sold. The United States Supreme Court would not allow such a result, and therefore forced the taxpayer to include the nonrecourse financing as part of her amount realized when she disposed of the property. The Crane decision was clearly a result of the Court's negative reaction to a taxpayer who was trying to have the best of both worlds. This assertion is supported by the fact that Crane was actually beneficial to every other taxpayer. That is, the Crane decision allowed taxpayers to include nonrecourse financing in their basis for depreciation, which, in turn, lead to excellent tax shelters. Taxpayers could enjoy huge deductions with very little capital risk, since nonrecourse financing would require no personal liability on the part of the borrower. Unfortunately, Mr. Diamond was forced to enact 26 U.S.C. § 465 (1986), which limits the deductions created through nonrecourse financing. Yet, one can still sense the joy the Supreme Court took in butchering Ms. Crane some forty years after the decision was rendered.

Diamond is the epitome of taxpayer hogdom. Generally, one cannot value an interest in future profits, as a partnership, because those profits are uncertain. Thus, when a taxpayer performs services in return for an interest in partnership future profits, there are generally no tax consequences. Mr. Diamond received a profit interest for his services, and reported no service income arguing that the profits interest was an asset not a profit. Unfortunately, Mr. Diamond sold the interest for $40,000 three weeks after he valued. Diamond received a capital gain against which he took long-term losses. Had Diamond been a mere pig, had he sold the interest a year later, for the Tax Court to have previously held in example, he would have been okay. After all, the Tax Court had previously held in the Bystrom v. Whitman case, that no taxable event occurred on the Herman M. Hale, 24 T.C.M. 1497 (1965), that no taxable event occurred on the receipt of a profits interest. What angered the Tax Court, and caused the subsequent eruit of a profits interest. What angered the Tax Court, and caused the subsequent
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40. Id.; see Ringling Bros., 368 So. 2d at 884.

41. 496 So. 2d at 789.

42. 497 So. 2d at 630.

43. State v. Division of Bond Fin., 495 So. 2d 183 (Fla. 1986); Bystrom v. Whitman, 488 So. 2d 520 (Fla. 1986); State v. City of Daytona Beach, 484 So. 2d 1214 (Fla. 1986).

ability of the Division of Bond Finance to issue taxable, as opposed to tax-exempt, bonds. I should warn the reader that, unlike the Shell and Ringling Bros. cases, these cases should only be read by hardened tax jocks. For example, only a tax jock might be described as a person who covers his copy of the I.R.C. in plastic so he can read it in the shower.

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45. For excellent examples of how the pig theory has been applied to federal tax law, see Crane v. Commissioner, 331 U.S. 1 (1947), and Diamond v. Commissioner, 56 T.C. 550 (1971), aff'd, 492 F.2d 286 (7th Cir. 1974). Crane involved a taxpayer who wanted to include non-recourse financing on property she acquired as part of her basis for depreciation purposes. On the other hand, she did not want to include the nonrecourse financing as part of her amount realized when she sold the property. Thus, she wanted to treat the nonrecourse financing inconsistently so that she could benefit from greater depreciation deductions provided by a higher basis, while enjoying a much lower taxable gain on the property when it was sold. The United States Supreme Court would not allow such a result, and therefore forced the taxpayer to include the nonrecourse financing as part of her amount realized when she disposed of the property. The Crane decision was clearly a result of the Court's negative reaction to a taxpayer who was trying to have the best of both worlds. This assertion is supported by the fact that Crane was actually beneficial to every other taxpayer. That is, the Crane decision allowed taxpayers to include nonrecourse financing in their basis for depreciation, which, in turn, lead to excellent tax shelters. Taxpayers could enjoy huge deductions with very little capital risk, since nonrecourse financing would require no personal liability on the part of the borrower. Because of Crane, Congress was forced to enact 26 U.S.C. § 465 (1966), which limits the deductions created through nonrecourse financing. Yet, one can still sense the joy the Supreme Court took in butchering Ms. Crane some forty years after the decision was rendered.

Diamond is the epitome of taxpayer hogdom. Generally, one cannot value an interest in future profits of a partnership, because those profits are uncertain. Thus, when a taxpayer performs services in return for an interest in partnership future profits, there are generally no tax consequences. Mr. Diamond received a profits interest for his services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services, and reported no service income arguing that the profits interest could not be services. Had Diamond been a mere pig, he would have sold the interest a year later, for the Tax Court had previously held in example, he would have been okay. After all, the Tax Court had previously held in the case of Herman M. Hulse, 24 T.C.M. 1497 (1965), that no taxable event occurred on the realization of a profits interest. What angered the Tax Court, and caused the subsequent receipt of a profits interest. What angered the Tax Court, and caused the subsequent receipt of a profits interest. What angered the Tax Court, and caused the subsequent receipt of a profits interest. What angered the Tax Court, and caused the subsequent receipt of a profits interest. What angered the Tax Court, and caused the subsequent receipt of a profits interest. What angered the Tax Court, and caused the subsequent receipt of a profits interest.
Bystrom v. Whitman, the Florida Supreme Court officially adopted the pig theory as a state tax concept. The facts of Whitman were not complex. Basically, the Whitmans owned a shopping center in Bal Harbour, Dade County. When the Dade County Property Appraiser assessed the 1981 value of the shopping center, the Whitmans refused to make their income data available to him. Thus, the appraiser, Bystrom, was forced to use a hypothetical income figure in making his calculation of the property's value.

The method used by Bystrom in calculating the property value was called the income approach. In order to obtain the value of property using the income approach, Bystrom divided his hypothetical income figure by something called the capitalization rate. The capitalization rate was defined as the rate of return of the taxpayers' initial investment. The Whitmans challenged the capitalization rate used by Bystrom, arguing that it was too low. Their argument was prompted by the fact that a lower capitalization rate (denominator) naturally gave rise to a high property value under the appraiser's chosen formula.

However, when the appraiser again asked for information, which was properly discoverable, and which the appraiser needed for trial, the taxpayers again refused to supply the necessary figures. The trial court, therefore, ordered the taxpayers to produce the income statements requested by the appraiser. The Third District Court of Appeal held that the trial court had abused its authority in requiring the taxpayers to produce income information, since they were only chal-

butchering of Diamond, was the fact that Diamond asserted that the profits interest had no value, and then sold it off $40,000 three weeks later. 47. 488 So. 2d at 520. Actually, the pig theory has been invoked by the supreme court in other scenarios. E.g., Hagerty v. Southern Bell, 145 Fla. 51, 199 So. 570 (1940).

48. I refer to this litigation as the Whitman case, because Bystrom was the Dade County Tax Appraiser at the time the facts of the case arose.

49. Fla. CONST. art. VII, § 4. mandates just valuation for all property for ad valorem tax purposes. The income or economic approach is a valid method for making such appraisals. See, Bystrom v. Equitable Life Assurance Soc'y, 416 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1982), review denied, 429 So. 2d 5 (Fla. 1983).

50. As the rate of return, or capitalization rate increases, the value of the property decreases. After all, as the capital is returned to the owner, there is less capital remaining in the property, and thus less value remaining to be taxed.

51. Simple math dictates this result. For example, while 3 is greater than 2, ⅔ is less than ⅔. Therefore, the smaller the denominator, the greater the fraction.


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Thus, the stage was set for the application of the pig theory. Had the Whitmans not challenged the capitalization rate, they would have been fine. True, they would have been pigs in that they did not supply the income information needed for appraisal, but taxpayers are allowed to be pigs. Unfortunately, when the Whitmans challenged the capitalization rate, but continued to refuse to release their net income from the property, which Bystrom needed to defend his position, they became hogs. As the Florida Supreme Court stated:

In defending its position both the adverse party and the court are entitled to the whole factual picture. In light of the strong legal presumptions involved, this is particularly true in a case of property appraiser defending a tax assessment. Yet, the taxpayers appear to want the best of both worlds, challenging one portion of the valuation formula while unilaterally binding the appraiser on all other matters. Moreover, the taxpayers wish to challenge the assessment while preventing the appraiser for obtaining the information needed to defend the assessment.

Thus, the supreme court quashed the decision of the district court, and refused to reward the taxpayers' lack of cooperation. If nothing else, the pig theory reminds taxpayers that there can often be more to tax litigation than the dry application of statutes and mathematical formulations.

B. Use of Tax Revenue: State v. City of Daytona Beach

Imagine how exciting it would be if the Supreme Court of Florida was faced with the issue of whether a special taxing district could use its tax increment revenues to fund improvement revenue bonds. Believe it, or not, in 1986 the supreme court heard a case involving that very issue.


55. Bystrom, 488 So. 2d at 522.

56. Id.

57. 484 So. 2d 1214 (Fla. 1986).

58. Id.
Gershon: "The Greatest Show On Earth," Or Just Another Shell Game?: A Review

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54. Fla. Const. art. V, § 3(3).
55. Bystrom, 488 So. 2d at 522.
56. Id.
57. 484 So. 2d 1214 (Fla. 1986).
58. Id.
The controversy arose when the City of Daytona Beach sought validation of its Downtown Area Improvements Bonds. The bonds were to be used to finance the acquisition and construction of a marina, streets, sidewalks, lighting and other improvements for portion of Daytona Beach which had been designated a slum or blighted area. Because the bonds were revenue bonds, the city did not need to hold a referendum in order to issue them. However, because the city planned to pay the bonds, in part, from tax increment revenue from special taxing districts, the state sought to have them invalidated.

The state attorney argued that special tax district funds, including ad valorem taxes, could be used only to further the respective purposes of the district. He contended that the downtown redevelopment project did not serve to further the purposes of such special taxing districts as the East Volusia Mosquito Control District, or the Halifax Hospital Medical Center, each of which contributed a portion of its ad valorem taxes to the redevelopment trust fund. As authority for his position, the state attorney cited State ex rel. City of Gainesville v. St. Johns River Water Management District, a district court opinion which held that a water management district "as a special taxing district created for water management purposes, is prohibited by Article VII, Section 9(a), Florida Constitution, from levying taxes for, or making appropriations to, the redevelopment trust fund." The city countered that the only funds it required from the special taxing districts were tax increment revenues. In general tax increment financing "is based on the premise that a portion of the increased ad valorem taxes generated as a result of the property improvement should be available to pay for the redevelopment." That is, downtown improvement will increase property values, which will in turn increase

59. The city made this designation through its own resolution, Daytona Beach, Fla., Res. 81-415 (1981).
60. FLA. CONST. art. VII, § 11(c).
61. The other sources for repayment were not challenged. They include the operating revenue of the Marina and revenues from the utilities service tax.
62. Daytona Beach, 484 So. 2d at 1215.
63. Id.
64. 486 So. 2d 1067 (Fla. 1st Dist. Ct. App. 1982).
65. FLA. CONST. art. VII, § 9(a), provides that "special districts may be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes."
66. Daytona Beach, 484 So. 2d at 1215.
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70. 1984 Fla. LAWS 539.
71. FLA. STAT. § 163.353 (Supp. 1984).
72. Id. § 163.387.
73. Daytona Beach, 484 So. 2d at 1216.
74. Id.; the dissenters were Justices Shaw and McDonald, and Chief Justice Boyd.
75. Id.
76. They cited FLA. CONST. art. VII, §§ 9(a) and 12(a), in support of their contention.
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C. Issuance of Taxable Bonds: State v. Division of Bond Finance

There is no statutory language which expressly prohibits the Division of Bond Finance (DBF) from issuing taxable bonds. On the other hand, there is no express statutory authority which would allow the DBF to issue taxable bonds. Thus, when the DBF sought to issue potentially taxable Home Ownership Mortgage Revenue Bonds, the State of Florida claimed that such bonds were invalid because the DBF should only be allowed to issue tax-exempt bonds.

The supreme court did not agree with the state’s argument. It held that, because the Legislature empowered the DBF to issue bonds, and did not specify whether the bonds had to be tax-exempt, the DBF could issue taxable bonds. The court noted, further, that the legislature had amended section 215.84 of the Florida Statutes to provide for interest waivers for taxable bonds issued on behalf of state agencies. The court, therefore, reasoned that the Legislature would not have provided for an interest waiver on bonds, if they could not be issued.

86. N. M. STAT. ANN. § 7-9-3 (1978).
88. Some of the information used in this portion of the survey comes from the summer 1984 edition of Survey of Sales & Use Taxation in the United States, published by the Business Research Bureau of the University of South Dakota in cooperation with the South Dakota Department of Revenue.
89. 1986 Fla. Laws 166. This is the committee substitute for House Bill No. 1307. [Hereinafter CS/HB 1307].
90. The exemption is found in Fla. STAT. § 212.08(7)(d) (1949).
92. The actual estimate is 156.7 million dollars. These figures are based on the conference report of the House of Representatives as prepared on July 7, 1986 by the committee on Finance and Taxation. The Florida Legislature will provide information on CS/HB 1307 free of charge.
93. This is, in large part, due to the fact that Florida does not have a state income tax. In fact, Florida cannot have an individual income tax, unless the state constitution is amended. Fla. CONST. art. VII, § 3(b).
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involuntarily.\textsuperscript{94} For example, people use lawyers for such things as criminal defense and protection from infringements upon constitutional rights by the state. It might be interesting to see whether criminal prosecutions or civil rights infringements would increase when the state found itself in need of money. After all, the state would have an automatic financial stake in every litigation; it would benefit by generating the need for attorneys.

Another inherent problem with the sales tax on legal services is that legal services are not like candy bars,\textsuperscript{95} or toaster ovens. Legal services are professional services, often provided to a client who needs access to the legal system which is designed to protect his, or her, rights. There is no logic in telling a mother who is attempting to enforce a child-support order, granted under the authority of a court in Florida, that she must pay a sales tax in addition to her attorney’s fees.

Yet another problem with the sales tax arises when an attorney performs services on a contingency fee basis. If the client wins, he will be forced to pay a tax of five-percent\textsuperscript{96} on top of the lawyer’s fee. On the other hand, if the client loses, there will be no fee and, thus, no sales tax. This would, in effect, give the State of Florida a stake in the outcome of every case involving a contingency fee.

It should be noted that the problems discussed in this section are in no way the only problems that would be caused if the Florida Legislature fails to retain the tax exemption for legal services. Citizens of the State of Florida can only hope that the vision of their Legislature will override its greed when it makes its decision to tax, or not to tax in July of 1987.\textsuperscript{97}

VI. Conclusion

One can readily see that, in 1986, the Supreme Court of Florida

\textsuperscript{94} Rayford Taylor, general counsel and lobbyist for the Florida Bar, as quoted in Marotte, supra note 91, at 22.

\textsuperscript{95} In 1966, the legislature repealed the exemption from sales tax of candy priced at .25 or less. FLA. STAT. § 212.08(1) (1957).

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The above list shows just a fraction of the types of services affected by CS/HB 1307. See supra note 2.1 for a description of the Florida Legislature’s actions in this area.

\textsuperscript{98} These are only rough estimates, for which there is no actual authority.

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