

October 30, 1997

<u>SPECIAL MASTER'S FINAL REPORT</u>	<u>DATE</u>	<u>COMM.</u>	<u>ACTION</u>
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee FL 32399-1100	11/03/97	GO WM	Favorable

Re: SB 18 - Senator Clary
HB 941 - Representative Melvin
Relief of Ray Construction of Okaloosa County, Ltd.

THIS IS AN EQUITABLE CLAIM FOR \$18,230.46;
\$2,479.96 FOR FOUR DOCUMENTARY STAMP TAX
ASSESSMENTS PAID TO THE DEPARTMENT OF
REVENUE AND \$15,750.50 IN ATTORNEY'S FEES AND
COSTS AGAINST THE STATE OF FLORIDA TO
COMPENSATE CLAIMANT FOR EXCESS
DOCUMENTARY STAMP ASSESSMENTS PAID TO
THE DEPARTMENT OF REVENUE AND FOR
ATTORNEYS' FEES AND COSTS.

FINDINGS OF FACT:

Although this is an equitable claim bill, the facts upon which it is based have been litigated in both trial and appellate courts. The relevant facts, as found by these courts, are set out below.

Ray Construction of Okaloosa County, Ltd., (Ray Construction) is a limited partnership owned by Timothy Ray and Thomas Ray. R & R Land, Ltd, (R & R) is also a limited partnership owned by Timothy and Thomas Ray.

At the time of the events at issue, the partnerships operated as follows: R & R purchased acreage and developed it into subdivision lots, which it sold to Ray Construction, a residential construction business, for \$6,000 per lot; however, the sale was not completed until after Ray Construction built a home on the lot and then sold the lot and home.

Closings on the two sales were essentially simultaneous. Ray Construction paid the \$6,000 to R & R and R & R executed a quitclaim deed for the lot to Ray Construction. Ray Construction then executed a warranty deed to the third party purchaser for the lot and home. The amount of documentary tax stamps placed on the quitclaim deed was calculated using the \$6,000 as consideration for the conveyance. The amount of documentary tax stamps placed on the warranty deed was calculated using the full amount of the purchase price for the home and lot.

The Florida Department of Revenue (department) audited four of these transactions and determined that \$6,000 was not the correct amount of consideration to use in calculating the amount of documentary tax stamps placed on the quitclaim deeds. The department determined that the fair market value of the lot and the home, that is, the full amount of the purchase price for the lot and home, should have been used as consideration in the transaction between R & R and Ray Construction. As a result, in three of the audits the department assessed additional taxes against Ray Construction using the fair market value in determining the tax due. In the fourth audit, the department determined that the amount of documentary tax stamps which had been placed on the quitclaim deed was the minimum amount allowed, not the amount due on \$6,000 consideration. In this instance, the department issued a tax warrant against Ray Construction for the difference between the minimum amount and the amount due based on the full purchase price for the lot and home. Ray Construction paid the tax warrant.

Ray Construction brought suit to obtain a declaratory judgment as to the correct consideration to be used in calculating documentary taxes on 60-100 additional transactions conducted in the same manner. Ray Construction also sought to recover both the amount of additional taxes sought by the department and the amount paid on the tax warrant. In the suit, Ray Construction paid into the court registry the amounts of additional documentary taxes sought by the department in the other three transactions.

LEGAL PROCEEDINGS:

The claimant's suit for declaratory judgment was brought after the statutory 60-day period for contesting tax

assessments. According to footnote 1 of the appellate court decision, the notices of tax assessment were received by Ray Construction on the following dates: February 26, 1993; June 21, 1993; July 21, 1993; and July 23, 1993. Each notice gave the date on which the assessment became final. These dates were: April 25, 1993; August 17, 1993; September 14, 1993; and September 19, 1993, respectively. Ray Construction filed suit on February 24, 1994. According to the itemized billing records submitted by Ray Construction's attorney, discussed below, Ray Construction first contacted its attorney about these matters on February 1, 1994.

Because the suit was brought after the expiration of the statutory 60 day period, the department filed a motion to dismiss, asserting a lack of subject matter jurisdiction due to the failure to timely file. The circuit court denied the motion.

At trial, the department argued that the quitclaim deeds transferred more than title to the lots. The department argued that R & R and the partners had an ownership interest in the houses constructed on the lots because they provided the security for Ray Construction's line of credit for construction and that each quitclaim deed also conveyed this interest in the house. Therefore, the department argued, the amount of documentary stamps placed on the quitclaim deeds should have been calculated using the fair market value of the lot and the houses.

The circuit court reviewed the statute and found that the only circumstances in which fair market value was used to determine the amount of the consideration given for the property was when the property conveyed was exchanged for other property. In such circumstances, the statutory consideration received for the conveyed property is presumed to be the fair market value of the property received. The court found that in the transfers at issue, however, the only consideration received by the transferor, R & R, was the \$6,000. As such, fair market value was not relevant and could not be used.

The circuit court entered a declaratory judgment directing that in calculating the proper amount of documentary stamps to be attached to the quitclaim deeds in similar transactions

the actual consideration of \$6,000 was to be used. The court also entered a judgment against the department for: the amount paid on the tax warrant, as adjusted by the additional amount of taxes actually owed; the amount of the additional taxes sought by the department and paid into the court registry by Ray Construction; and costs incidental to bringing the suit.

The department appealed the judgment. The appellate court upheld the declaratory judgment. However, it overturned the portion of the judgment awarding Ray Construction the amount of the additional tax assessments, holding that as the action was not timely filed, the circuit court was without jurisdiction to make such an award.

On remand, the circuit court entered an amended final judgment: entering the declaratory judgment; dismissing the counts for recovery of the amounts of additional tax assessments; ordering the clerk of court to disburse the amounts paid into the court registry to the department; and ordering the department to pay costs to Ray Construction. The department paid costs to Ray Construction in the amount of \$540.00.

CONCLUSIONS OF LAW:

Section 72.011(2), F.S., provides that no action may be brought to contest a document's excise tax assessment after 60 days from the date the assessment becomes final. The circuit court found that Ray Construction's lawsuit was brought after this 60 day period had run for each assessment at issue. As such, no legal remedy could be had for those assessments.

Section 201.02, F.S., provides that the document excise tax on instruments transferring an interest in real property is 70 cents on each \$100 of consideration. The only instance in which the fair market value of the property being transferred is at issue under the statute is if the consideration paid or given in exchange for the interest in real property includes property other than money. In such circumstances, it is presumed that the consideration is equal to the fair market value of the interest in real property. As the consideration given for the property transferred in the transactions between R & R and Ray Construction was limited to the \$6,000, the

fair market value of the property, and the issue of what interest was conveyed by the quitclaim deed, was irrelevant. According to the trial and appellate courts, the correct consideration to be used in calculating the amount of documentary tax stamps in the transfers at issue and in similar transactions is the amount of actual consideration, \$6,000.

ATTORNEYS FEES:

Section 768.28, F.S., the statutory authority for tort claim bills to satisfy excess judgments against the state, limits attorney fees to 25 percent of any judgment or settlement. s. 768.28(8), F.S. However, this claim bill is not based on a tort judgment against the state but rather on an action seeking a declaratory judgment under chapter 86, F.S., and contesting a tax assessment under chapter 201, F.S. As such, the limitation on attorney's fees to 25 percent of any judgment or settlement in s. 768.28(8), F.S., does not apply.

Courts cannot award attorney fees in the absence of a specific statutory or contractual provision for such an award. Neither chapter 86 nor chapter 201 of the Florida Statutes provides for an award of attorney's fees. However, s. 57.111, F.S., (1996 Supp.), the Florida Equal Access to Justice Act, may apply. This section provides that, unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. Thus, for this section to apply, four conditions must be met: Ray Construction must be a small business party; the action must have been initiated by a state agency; Ray Construction must have been a prevailing small business party in the action; and the agency's action must not have been substantially justified or there must not have been special circumstances which would make the award unjust.

The section defines the term "small business party" to include a partnership which has its principal office in this state and has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million. However, the limitations concerning the number of employees or net worth do not apply in any action

under s. 72.011, F.S., or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, F.S., or interest thereon, or penalty therefor. Regardless of its number of employees or its net worth, Ray Construction should qualify as a small business party as this was an action to contest a tax assessment under the referenced statutes.

The section defines the term "initiated by a state agency" to mean that the state agency: either filed the first pleading in any state or federal court in this state; filed a request for an administrative hearing pursuant to chapter 120, F.S.; or was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency. Arguably, this action was one in which the agency was required by law to advise a small business party of a clear point of entry, the filing of an assessment contest, after some recognizable investigatory event, the audit.

The section defines the term "prevailing small business party" to include a case in which a final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired. Ray Construction did obtain a declaratory judgment in its favor which was upheld on appeal.

The section provides that a proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency. The record contains no evidence on this issue.

Arguably, Ray Construction could have received an award of attorney fees and costs under this section. It clearly could have applied for such an award. To apply for an award under this section, the attorney for the prevailing small business party must submit an itemized affidavit to the court or to the Division of Administrative Hearings which states the nature and extent of the services rendered by the attorney as well as the costs incurred in preparations, motions, hearings, and appeals in the proceeding. The application for an award of

attorney's fees must be made within 60 days after the date that the small business party becomes a prevailing small business party. There is nothing in the record indicating that Ray Construction's attorney filed such an application.

Had he done so, the department could have opposed the application by affidavit. If it had, the court or the administrative law judge would have conducted an evidentiary hearing and issued a judgment or a final order. If the department did not contest the application, a judgment or order would have been issued without a hearing.

The section defines the term "attorney's fees and costs" to mean the reasonable and necessary attorney's fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding. Under the statute, no award of attorney's fees and costs for an action initiated by a state agency shall exceed \$15,000.

The claim bill provides for payment of \$2,479.96 for four documentary stamp tax assessments paid to the Department of Revenue. The claimant failed to initiate his challenge to the assessments within the required 60-day period. However, while not expressly stated by the trial court or the appellate court, but for this failure, the claimant would not have to pay the assessments.

The claim bill provides for payment of \$15,750.50 in attorney's fees and court costs. The awarded court costs have been paid by the department. Ray Construction's attorney has provided itemized fee statements which document that Ray Construction paid slightly over \$15,750.50 in attorney fees in this matter exclusive of those costs included in the award.

RECOMMENDATIONS:

Accordingly, I recommend that SB 18 be reported FAVORABLY.

Respectfully submitted,

Glenn Lang
Senate Special Master

Special Master's Final Report -- SB 18
October 30, 1997
Page 8

cc: Senator Clary
Representative Melvin
Faye Blanton, Secretary of the Senate
Richard Hixson, House Special Master