

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IRVIN L. OLDEN,)
)
 Petitioner,)
)
vs.) CASE NO. 94-6636RX
)
STATE OF FLORIDA,)
DEPARTMENT OF REVENUE,)
)
 Respondent.)
_____)

FINAL ORDER

Pursuant to written notice a formal hearing was held in case number 93-4326RGM before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings, on February 24, 1993, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Irvin L. Olden, pro se
 9 Fox Valley Drive
 Orange Park, Florida 32073

For Respondent: Francesco M. Negron, Jr.
 Jeffrey M. Dikman
 Assistant Attorneys General
 Tax Section, Capitol Building
 Department of Legal Affairs
 Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issue in this case is whether Petitioner, Irvin L. Olden, has standing to challenge the validity of Rule 12B-4.012(2), Florida Administrative Code, pursuant to Section 120.56(1), Florida Statutes.

PRELIMINARY STATEMENT

On November 23, 1994, Petitioner, Irvin L. Olden, filed a Petition for Administrative Determination of Invalidity challenging the validity of Rule 12B-4.012(2), Florida Administrative Code, pursuant to Section 120.56(1), Florida Statutes, with the Division of Administrative Hearings. The matter was assigned case number 94-6636RX. The case was assigned to Hearing Officer Don W. Davis by Order of Assignment entered December 8, 1994.

On December 12, 1994, Hearing Officer Davis entered an Order Establishing Prehearing Procedure and a Notice of Hearing. The final hearing was scheduled for January 4, 1995. A Joint Motion for Continuance was subsequently granted by

Order Granting Motion for Continuance entered December 22, 1995. The final hearing was rescheduled for February 24, 1995.

On January 5, 1995, Petitioner filed a Motion for Summary Judgment. The motion was denied by Hearing Officer Davis by Order Denying Motion for Summary Judgment entered January 11, 1995. A Motion for Reconsideration of Summary Judgment, filed on January 17, 1995, was denied by an Order Denying Motion for Reconsideration entered January 24, 1995.

On January 30, 1995, Petitioner filed an Objection and Request for Hearing Officer Recusal. On February 1, 1995, an Order of Recusal was entered. Hearing Officer Davis recused himself and the case was assigned to the undersigned.

On February 17, 1995, Petitioner filed a Request for Determination/Delay Pending Determination. Petitioner for the third time sought a final determination of this matter by summary judgment. Petitioner also sought a continuance of the hearing. A motion hearing was held by telephone on February 23, 1995 to consider Petitioner's Request. After hearing argument of the parties, the Request was denied.

On February 24, 1995, immediately before the commencement of the final hearing of this case, Respondent filed Respondent's Motion to Dismiss for Lack of Standing. Argument on the Motion was heard after the commencement of the final hearing. After hearing argument of the parties, the undersigned informed the parties that the Motion to Dismiss for Lack of Standing would be granted by Final Order. The parties were also informed that they could file written arguments concerning the Motion by proposed final orders which would be considered before this Final Order was entered.

On March 7, 1995, Petitioner filed an Amendment to Petition for Administrative Determination of Invalidity. Pursuant to the Amendment, Petitioner struck certain language from his Petition. Petitioner also filed a pleading titled "Objections/Arguments Against Motion for Dismissal".

A transcript of the final hearing was filed on March 21, 1995. Proposed final orders were, therefore, to be filed on or before March 31, 1995. Respondent filed a proposed final order containing proposed findings of fact. A ruling on each proposed finding of fact has been made either directly or indirectly in this Final Order or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto. Petitioner did not file a proposed final order.

FINDINGS OF FACT

1. The Respondent, the Florida Department of Revenue (hereinafter referred to as the "Department"), notified Petitioner, Irvin L. Olden, by a Revised Notice of Intent to Make Documentary Stamp Tax and Discretionary Surtax Audit Changes (hereinafter referred to as the "Revised Notice"), that he owed \$164.45 in documentary stamp tax, plus penalty of \$41.11 and interest thru June 6, 1994 of \$70.71. See Petitioner's exhibit 3. The Revised Notice was entered May 31, 1994.

2. Mr. Olden was informed in the Revised Notice that the "legal basis" of the proposed audit changes was "Chapters 201.01, 201.02, 201.08, 201.17, F. S." and "Rules 12B-4.012(1) and (2), F.A.C."

3. Mr. Olden filed a written protest to the Revised Notice by letter dated June 23, 1994. On July 12, 1994, the Department issued a letter in response to the written protest. Petitioner's exhibit 2. In pertinent part, Mr. Olden was informed:

Your Quit Claim Deed recorded November 6, 1990, transferred half interest in real estate from Sue H. Olden to Irwin L. Olden. There was a \$60,000 mortgage on the property. According to Rules 12B-1.012 (1) and (2), and 12B-1.013 (25) and (32), Florida Administrative Code, this transfer is taxable because of the mortgage on the property. The rules state that any deed is taxable if consideration for the property is given. The rules go on to state that a mortgage on the property is consideration. The rules are attached.

The letter incorrectly referred to Rule 12B-1.012(1) and (2), Florida Administrative Code, and Rule 12B-1/013(25) and (32), Florida Administrative Code. The Department intended to refer to Rules 12B-4.012 and 12B-4.013, Florida Administrative Code.

4. Mr. Olden timely challenged the proposed assessment of tax pursuant to Section 120.57(1), Florida Statutes.

5. On November 23, 1994, Mr. Olden also filed a petition with the Division of Administrative Hearings challenging the validity of Rule 12B-4.012(2), Florida Administrative Code, pursuant to Section 120.56, Florida Statutes.

6. Rule 12B-4.012(2), Florida Administrative Code (hereinafter referred to as the "Challenged Rule"), provides, in pertinent part:

(2) Definitions:

(a) "Consideration" under s. 201.02, F.S., includes but shall not be limited to, money paid or to be paid, the amount of any indebtedness discharged by a transfer of any interest in real property, mortgage indebtedness and other encumbrances which the real property interest being transferred is subject to, notwithstanding the transferee may be liable for such indebtedness. Where property other than money is exchanged for interest in real property, there is the presumption that the consideration is equal to the fair market value of the real property interest being transferred. [Emphasis added].

7. Mr. Olden specifically challenged the portion of the Challenged Rule emphasized in finding of fact 6. Mr. Olden alleged that the Challenged Rule is an invalid exercise of delegated legislative authority as defined in Section 120.52(8)(b) and (c), Florida Statutes.

8. The language of the Challenged Rule which Mr. Olden has alleged is invalid had an effective date of February 13, 1991.

9. Although not clearly stated in Mr. Olden's petition, Mr. Olden's standing to challenge the Challenged Rule is based upon the fact that the Department relied on the Challenged Rule in the Revised Notice and the letter in response to Mr. Olden's written protest.

10. Pursuant to the Department's Motion to Dismiss for Lack of Standing filed by the Department on February 24, 1995, the Department stipulated to the following:

5. The Department stands by its assessment in the assessment proceeding. The statute which was recited in the Department's assessment provides ample authority for the assessment without reference to a subsequently promulgated rule. . . .

6. The Department does not seek to retroactively apply a rule to a transaction which preceded the effective date of that rule. Any statement in the Notice of Proposed Assessment which indicates an intention to apply a rule on a retroactive basis is hereby withdrawn.

. . .
9. However, while the rule is valid, it now appears that Petitioner lacks standing to challenge a rule which is not intended to be applied to Petitioner. Petitioner has standing to challenge the assessment and to challenge the Department's prerule application of the Section 201.02, Fla. Stat. (1990). . . .

10. Now that the Department formally withdraws any reference to the rule in support of its assessment against the Petitioner, there is no reason for this matter to proceed further.

11. Counsel for the Department reiterated the Department's position at hearing.

CONCLUSIONS OF LAW

A. Jurisdiction.

12. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.56, Florida Statutes.

B. Burden of Proof.

13. The burden of proof in this proceeding was on Mr. Olden. See *Adam Smith Enterprises v. Department of Environmental Regulation*, 533 So.2d 1260, (Fla. 1st DCA 1990); and *Agrico Chemical Co. v. Department of Environmental Regulation*, 365 So.2d 759 (Fla. 1st DCA 1979).

C. Standing.

14. Section 120.56(1), Florida Statutes, provides, in pertinent part, the following:

(1) Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

15. In order to conclude that a person is a "substantially affected" person, it must be proved:

1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a . . . hearing, and 2) that his substantial injury is of a type or nature the proceeding is designed to protect.

Florida Society of Ophthalmology v. Board of Optometry, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988), rev. denied, 542 So.2d 1333 (1989). See also Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981); and Professional Firefighters of Florida, Inc. v. Department of Health and Rehabilitative Services, 396 So.2d 1194 (Fla. 1st DCA 1981).

16. When the Department expressly withdrew any reliance upon the Challenged Rule for its Revised Notice, Mr. Olden could no longer prove that he would suffer any injury from the Challenged Rule. Any injury that Mr. Olden may now suffer will be caused by Chapter 201, Florida Statutes, and the Department's application thereof to Mr. Olden.

17. Mr. Olden has failed to allege any facts in his petition, as amended on March 7, 1995, that would support a finding that the Challenged Rule has had, or will have, any application to Mr. Olden.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Petitioner has failed to allege sufficient facts which would support a finding that he is substantially affected by Rule 12B-4.012(2), Florida Administrative Code, Therefore, the Petition for Administrative Determination of Invalidity, as amended, filed by Irvin L. Olden is DISMISSED.

DONE and ORDERED this 20th day of April, 1995, in Tallahassee, Florida.

LARRY J. SARTIN, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of April, 1995.

APPENDIX
Case Number 94-6636RX

The Department has submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Final Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted. Mr. Olden did not file a proposed order.

The Department's Proposed Findings of Fact

- 1 Accepted in 1.
- 2 Accepted in 2.
- 3 Accepted in 5.
- 4 Accepted in 4.
- 5 See 2-3 and 9.
- 6 See 2 and 9.
- 7 Accepted in 3.
- 8 Accepted in 8.
- 9 Accepted in 10.
- 10 Accepted in 11.
- 11 Accepted in 10.

COPIES FURNISHED:

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NOTICE OF POSSIBLE RIGHT TO JUDICIAL REVIEW

ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER MAY BE ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.