OA 5-9-85

047

SUPREME COURT OF FLORIDA

CASE NO. 65,825

FILED
SID J. WHITE
MAR 7 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

JAMES F. REDFORD, JR., et al.,:

Appellants, :

vs. :

STATE OF FLORIDA, DEPARTMENT OF REVENUE, :

Appellee. :

BRIEF AMICUS CURIAE

EASTERN AIR LINES, INC.
and
PAN AMERICAN WORLD AIRWAYS, INC.

JOSEPH F. JENNINGS
KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKERN, P.A.
799 Brickell Plaza
Miami, FL 33131
Telephone: (305) 358-8181

Attorneys for EASTERN AIR LINES, INC.

DARREY A. DAVIS
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, FL 33131-2398
Telephone: (305) 577-2858

Attorneys for PAN AMERICAN WORLD AIRWAYS, INC.

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INTRODUCTORY STATEMENT

EASTERN AIR LINES, INC. and PAN AMERICAN WORLD AIRWAYS, INC. are among the "lessees" referred to throughout the pleadings in the Trial Court and in the Opinion and Order of the District Court of Appeal. The lessees are not parties. The Trial Judge ruled it was not necessary to make the lessees parties. (R.40)

STATEMENT OF CASE

On January 31, 1980, the Floride Department of Revenue (hereafter the "DOR") filed its Complaint asking the Trial Court to make a de novo finding that certain leasehold interests of the lessees at Miami International Airport in Dade County, Florida, are not entitled to be granted ad valorem tax exemptions on the 1979 Dade County tax roll. The DOR also asked the Trial Court to enjoin and restrain the Defendants, PROPERTY APPRAISAL ADJUSTMENT BOARD (hereafter the "BOARD") and PROPERTY APPRAISER of Dade County (hereafter the "APPRAISER"), from making any certification on the 1979 Dade County tax roll that the possessory leasehold interests are exempt; and to declare null and void any certification or other official action already taken to reflect that the leasehold interests are exempt. (R.4)

The DOR's Complaint alleged that at all times material the leasehold interests were utilized by the lessees for commercial,

profit-making purposes, functioning in governmental-proprietary capacities; that the APPRAISER placed the possessory leasehold interests of the lessees on the 1979 Dade County tax roll as non-exempt, taxable property; that subsequently, the BOARD held hearings, reviewed the actions of the APPRAISER, determined that he was in error, and decided that the lessees' interests in the leasehold were entitled to an exemption; that the decisions of the BOARD in overturning the APPRAISER's actions are void, illegal and unlawful. (R.1-5)

The Defendants, BOARD and APPRAISER, after denial of Motions to Dismiss, filed their Answers admitting that the lessees hold a possessory interest in government owned land; denied that the leaseholds were utilized for commercial, profit-making purposes, functioning in governmental-proprietary capacities; admitted the BOARD granted exemptions to the lessees; and filed certain Affirmative Defenses. (R.72-76, 77-80)

By their affirmative defenses, the APPRAISER and BOARD pleaded: (1) failure to join the lessees as indispensable parties; (2) the BOARD is estopped from maintaining its action by its own regulations set forth in the Florida Administrative Code, Chapter 12D-7.16(2); (3) that the leaseholds are exempt pursuant to the said regulations and Sections 125.019 and 159.15, Florida Statutes; (4) that the leaseholds are exempt from ad valorem taxation in accordance with Sections 196.001, 196.012 and 196.199, Florida

Statutes; (5) the DOR had approved and certified the roll, including the tax exemptions of the lessees and, therefore, the DOR is guilty of laches and is estopped; and (6) the previous approval and certification of the subject tax exemptions by the Plaintiff and the Defendants placed the tax exemptions beyond the further jurisdiction of the parties. (R.74-75)

There was no reply by the DOR to the Affirmative Defenses.

Thereafter, on July 27, 1982, the DOR filed its Motion for Summary Judgment on the issues of whether the decisions of the BOARD granting exemptions from ad valorem taxation for the year 1979 as to the leasehold interests of certain lessees at the Miami International Airport are in violation of Florida Statute 196.001(2); that the utilization of the leasehold interests by the lessees for the purpose of providing air transportation for a charge is proprietary in nature and constitutes a "governmental-proprietary" function, as opposed to a "governmental-governmental" function; that, therefore, the leasehold interests of the lessees are not entitled to the exemption provided under Florida Statutes 196.012(5) and 196.199(2)(a) (1979). (R.101-105A)

On August 19, 1982, the BOARD and APPRAISER filed their Joint Motion for Summary Judgment on grounds: (1) the Court lacked jurisdiction for failure to join indispensable parties, to wit: the lessees; (2) the DOR is estopped by virtue of its own regulations; and (3) the leaseholds are exempt pursuant to Florida Statutes

125.019 and 159.15, and Florida Administrative Code, Chapter 12D-7.16(c). (R.106-108)

The Trial Court entered its Summary Final Judgment on the 22nd day of September, 1982, denying the Joint Motion of the BOARD and the APPRAISER, and granting the DOR's Motion for Summary Judgment. (R.215-218)

The Trial Court found, as undisputed, that the Miami International Airport was owned and controlled by Dade County, Florida; that on January 1, 1979, the lessees (including EASTERN AIR LINES, INC. and PAN AMERICAN WORLD AIRWAYS, INC.) held leasehold interests in property located at Miami International Airport; that the leasehold interests pertained to real property improvements acquired or constructed through the issuance and sale of revenue bonds by Dade County, Florida; and the leasehold interests were utilized by the lessees for the air transportation of passengers and property for a charge and related support services. The Court further found that the BOARD, after hearings on petitions challenging property assessments, overturned the APPRAISER's action in placing the leasehold interests on the 1979 Dade County Property Appraisal roll as taxable property.

The Trial Court concluded that there was no genuine issue of fact relating to the issue of the ad valorem taxability of a leasehold interest of the private lessees; that pursuant to Florida Statute 196.001(2), the leasehold interests of the lessees are

subject to taxation; that the leasehold interests are Miami International Airport were being utilized by the Lessees for commercial, profit-making purposes on the assessment date; that the utilization of the leasehold interest by the lessees does not constitute a "governmental, municipal or public purpose function"; that the utilization of the leasehold interests at Miami International Airport by the lessees for the purpose of providing air transportation of passengers and property for a charge is "proprietary" in nature and constitutes a "governmental-proprietary" function, as opposed to a "governmental-governmental" function, and, therefore, the leasehold interests are not entitled to the exemption provided under Sections 196.012(5) and 196.199(2)(a), Florida Statutes; that Sections 125.019 and 159.15, Florida Statutes, are not controlling; and that the remaining issues raised by the Defendants are insufficient as a matter of law. (R.215-217)

The Trial Court ordered that the decisions of the BOARD purporting to exempt the leaseholds are void; that the leasehold interests of the respective lessees are subject to ad valorem taxation and that the APPRAISER shall prepare a supplement to the assessment roll containing assessments of the subject leasehold interests and certifying it to the Dade County Tax Collector. (R.218)

On appeal, the District Court of Appeal of Florida, Third District, rejected all issues raised by the BOARD and APPRAISER and determined that its inquiry was limited by Section 195.092, Florida Statutes, to whether the DOR has the power to compel

obedience to its decision that the subject property be placed on the tax roll. The Third District affirmed the Trial Court's Order determining that the leasehold interests should be placed on the assessment rolls and certified for collection.

STATEMENT OF FACTS

In the year 1979, the Dade County Property Appraiser certified the tax roll which showed the leasehold interests of the lessees as being exempt. (R.73,74,78,96,109,216). The DOR approved the tax roll containing these exemptions in accordance with Section 193.144(5), Florida Statutes. (R.74,78,216) Later, the DOR reversed itself and directed the APPRAISER to place the leasehold interest on the tax roll as taxable property. The APPRAISER complied with the DOR's directive and reversed the exemption previously granted to the lessees.

The BOARD then held hearings to review the exemption of the respective lessees and made findings of fact, among other things, that the taxpayer is a non-governmental lessee of certain real property located at Miami International Airport; that the leased facilities were acquired and/or constructed by Dade County through the issuance of special revenue bonds and/or general revenue bonds; that the taxpayer performs a governmental function and serves a governmental purpose which could properly be performed or served by an appropriate governmental unit; that the taxpayer performs

a function and serves a purpose which would be a valid subject for the allocation of public funds; and that the taxpayer utilizes the leased property exclusively in connection with the performance of the above-described public function and purpose.

POINTS INVOLVED

POINT I

WHETHER A TAXPAYER IS ELIGIBLE FOR TAX EXEMPTION IS A QUESTION OF FACT AND IS NOT TO BE DETERMINED BY SUMMARY JUDGMENT.

POINT II

THE 1979 EXEMPTION GRANTED BY THE PROPERTY APPRAISAL ADJUSTMENT BOARD TO THE LEASEHOLD INTERESTS OF EASTERN AIR LINES, INC. AND PAN AMERICAN WORLD AIRWAYS, INC. IS VALID UNDER THE CONTROLLING PROVISIONS OF SECTION 196.199(5), FLORIDA STATUTES.

POINT III

THE LEASEHOLD INTERESTS OF EASTERN AIR LINES, INC. AND PAN AMERICAN WORLD AIRWAYS, INC. QUALIFY FOR EXEMPTION UNDER THE PROVISIONS OF SECTION 196.012(5) AND SECTION 196.199(2), FLORIDA STATUTES, AS CONSTRUED AND APPLIED BY DECISIONS OF THE SUPREME COURT OF FLORIDA.

ARGUMENT

POINT I

WHETHER A TAXPAYER IS ELIGIBLE FOR TAX EXEMPTION IS A QUESTION OF FACT AND IS NOT TO BE DETERMINED BY SUMMARY JUDGMENT.

The BOARD held a hearing and made Findings of Fact and Conclusions of Law with respect to the eligibility of the lessees to an exemption. No action was taken by the taxing authorities to attack the individual lessees exemptions.

Whether a taxpayer is eligible for tax exemption status on the basis of its use of property leased from a political subdivision of a state is an issue of fact and not of law. Dade County v. Marine Exhibition Corp., 330 So.2d 459, at Page 460 (Fla. 1976), and the cases cited there.

Nowhere is Sections 196.001(2) and 196.199, Florida Statutes, does there appear the word "charge" or the words " . . . for a profit making venture . . .". Those latter words appeared in Section 196.25, Florida Statutes:

> "The predecessor to Subsection 196.001(2) and Section 196.199, Florida Statutes, enacted in 1971, was Section 196.25, Florida Statutes, enacted in 1969, which in turn was a verbatim reenactment of Section 192.62, Florida Statutes, enacted in 1961.
>
> Section 196.25, Florida Statutes, provided in pertinent part as follows:
> '(1) any real or personal property which for any reason is exempt or immune from taxation but is being used, occupied, owned, con-

> trolled or possessed, directly or indirectly by a person, firm, corporation, partnership or other organization in connection with a profit making venture, whether such use, occupation, ownership, control or possession is by lease, loan, contract of sale, option to purchase or in any wise made available to or used by such person, firm, corporation, partnership or organization, shall be assessed and taxed to the same extent and in the same manner as other real or personal property."
>
> Williams v. Jones, 326 So.2d 425, at Page 434, (Fla. 1976)

Therefore, there was no basis for the Third District accepting the DOR's argument that because the lessees are a profit making organization, it follows that they are not entitled to an exemption. The effect of the Third District Court of Appeal's opinion and order is to determine that the question of fact made by the BOARD can be set aside by the DOR.

Merely because both parties move for a Summary Judgment does not mean that in actuality no issue exists. This is especially the case where affirmative defenses are asserted by the Defendants and no reply thereto is made by the Plaintiff. There were no affidavits contradicting or denying the affirmative defenses. That it is error to grant a Summary Judgment udner such circumstances has been determined. General Dev. Utilities Inc. v. Davis, 375 So.2d 20 (Fla. 2d DCA 1979); Clark v. Munroe, 407 So.2d 1036 (Fla. 1st DCA 1981); Francis v. General Motors Corporation, 287 So.2d 146 (Fla. 3rd DCA 1974).

Even assuming that the admission by the BOARD, but not the

APPRAISER, that the " . . . leases were utilized by the Lessees for the purpose of air transportation of passengers and property for a charge . . .", it was still improper for the Court to infer that the word "charge" is sufficient to make the use of the leasehold such as to disqualify it for exempt status. A genuine triable issue may exist in circumstances where the evidence is uncontradicted if such evidence is susceptible of conflicting inferences. Hobby v. Scott, 298 So.2d 436 (Fla. 4th DCA 1974); Schmidt v. Bowl America Florida, Inc., 358 So.2d 1385 (Fla. 4th DCA 1978).

POINT II

THE 1979 EXEMPTION GRANTED BY THE PROPERTY APPRAISAL ADJUSTMENT BOARD TO THE LEASEHOLD INTERESTS OF EASTERN AIR LINES, INC. AND PAN AMERICAN WORLD AIRWAYS, INC. IS VALID UNDER THE CONTROLLING PROVISIONS OF SECTION 196.199(5), FLORIDA STATUTES.

For more than twenty-five years, EASTERN AIR LINES, INC. and PAN AMERICAN WORLD AIRWAYS, INC.'s leasehold interests have been granted exemption from ad valorem taxes by the Dade County taxing authorities, or the exemption has been established by judicial proceedings involving the specific leasehold interests. The use of the property covered by the leasehold interests has not been changed and the leases are still in effect.

Section 196.199(5), Florida Statutes, in pertinent part provides:

> "If the exemption in whole or in part is granted, or established by judicial proceeding, it shall remain valid for the duration of the lease unless the lessee changes its use, in which case the lessee shall again submit an application for exemption. . . ."

The Trial Court failed to consider the provisions of Section 196.199(5), and entered summary final judgment on the basis of cited court decisions construing and applying Sections 196.001(2) and 196.199(2), Florida Statutes, which likewise did not consider Section 196.199(5).

It is submitted that consideration must be given to the right of exemption mandated by the Legislature.

This cause should be remanded with directions that the District Court of Appeal's opinion be quashed and that the Complaint be dismissed in the light of Section 196.199 (5), supra.

POINT III

THE LEASEHOLD INTERESTS OF EASTERN AIR LINES, INC. AND PAN AMERICAN WORLD AIRWAYS, INC. QUALIFY FOR EXEMPTION UNDER THE PROVISIONS OF SECTION 196.012(5) AND SECTION 196.199(2), FLORIDA STATUTES, AS CONSTRUED AND APPLIED BY DECISIONS OF THE SUPREME COURT OF FLORIDA.

The Supreme Court has prescribed the criteria for exemption of leasehold interests in publicly-owned real property based on the interpretation and application of Sections 196.012(5) and

196.199(2), Florida Statutes. The Court held that the exemptions contemplated by the cited statutes relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions and that the particular function is determined by "the utilization of leased property from a governmental source." If it is determined as a fact that the leased property is being utilized for commercial, profit-making purposes, the function is proprietary and not governmental and the exemption prescribed by the statutes is inapplicable. See Williams v. Jones, 326 So.2d 425 (Fla. 1976); Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976); Markham v. Maccabee Investments, Inc., 343 So.2d 16 (Fla. 1977); Walden v. Hillsborough County Aviation Authority, 375 So.2d 283 (Fla. 1979).

In these controlling cases, the Court makes a factual determination of the "function by utilization." In each instance the Court found that the facts showed the leasehold interest was being utilized purely for commercial, profit-making purposes constituting "governmental-proprietary" functions, as opposed to "governmental-governmental" functions.

In Williams v. Jones, supra, the undisputed facts established that the property was utilized for the operation of purely commercial enterprises as barber shops, plumbing businesses, laundries and restaurants. In Volusia County, supra, the factual "utilization

by utilization" consisted of the operation of an automobile racetrack. In Markham, supra, the admitted function was the operation of theater facilities. And in Walden, supra, the Court based its decision on the finding of fact that the leased property was utilized "to sell food and beverages to the public in a variety of ways, including a buffet, a dining room, cocktail lounges, and fast food service facilities," as well as a cafeteria and stores for the sale of general and special merchandise.

These decisions do not indicate that the Court considered Section 196.199(5), Florida Statutes, which provides for continuation of an exemption granted by the taxing authorities or established by judicial proceedings, which is applicable in the present case. Also, it does not appear that the Court considered the effect of Section 196.199(6), Florida Statutes, which provides that "No exemption granted before June 1, 1976, shall be revoked by this chapter if such revocation will impair any existing bond agreement."

It is submitted that exemption of EASTERN AIR LINES' and PAN AMERICAN's leasehold interests in the real property at the county-owned Miami International Airport (and the other airlines named in the Complaint) depend on the determination of the factual issue whether "function by utilization" involves a governmental or public purpose, as prescribed by Section 196.012(5), Florida Statutes.

Section 196.012(5), Florida Statutes, in pertinent part provides:

> "Governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of . . . the state or any of its political subdivisions . . . is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. . . ."

Accordingly, the operation of a transporation system for the use and benefit of the public, and for which charges are made for the transportation services, serves a governmental purpose which could properly be performed by an appropriate governmental unit, and a valid subject to the allocation of public funds, as prescribed in Section 196.012(5).

It would be unrealistic to entertain the idea that a ground transportation system serves a public purpose which could properly be performed by Dade County and for which public funds may be allocated, while an air transportation system does not equally serve a public purpose.

The leasehold interests of the airlines have never been subject to ad valorem taxes. This is because of the historical public purpose served in performing "governmental-governmental" functions under the "function by utilization" test as indicated

by a series of Court decisions.

Pursuant to the power conferred by Chapter 22963, Laws of Florida, as amended, Dade County in 1946, purchased the Miami International Airport, formerly known as the 36th Street Airport or Pan American Airport, from Pan American World Airways, Inc. The acquisition of the airport was accomplished pursuant to contract whereby the Dade County Port Authority issued revenue bonds payable solely from the revenues to be derived from the operation of the airport, including rents. Pan American agreed to purchase the revenue bonds, thereby providing the funds with which the Port Authority would pay Pan American for the purchase of the airport and its facilities.

State v. Dade County, 157 Fla. 859, 27 So.2d 283, approved the Port Authority's first issue of revenue bonds and the purchase agreement under which the Miami International Airport was acquired. The Court recognized the public purpose of the airport facilities, and held that in developing and operating the Miami International Airport the Port Authority was serving a County purpose.

The further construction and expansion of the facilities at Miami International Airport was held to constitute an essential government requirement, a County necessity, and a County purpose. Seaboard Airlines Railroad Co. v. Peters, Fla. 1949, 42 So.2d 448.

State v. Dade County, 62 So.2d 404 (Fla. 1953), upheld the Dade County Port Authority plan to enter into a lease agreement

with National Airlines, Inc., whereby the airline was to rent a warehouse and overhaul shop to be constructed at the Miami International Airport by the Port Authority, which would finance the construction by issuing revenue bonds payable solely from rentals paid by the airline.

And in State v. Dade County, 84 So.2d 41 (Fla. 1955), the Supreme Court approved proposed revenue bonds to be issued for the purpose of constructing additional hangars and an office building for National Airlines, Inc., pursuant to the same lease agreement involved in State v. Dade County, supra.

And in State v. County of Dade, 210 So.2d 200 (Fla. 1968), the Supreme Court approved a lease agreement providing for rentals sufficient to retire revenue bonds issued to finance the cost of constructing new buildings on the leased area to accommodate National Airlines, Inc. The Court stated that:

> "This is in fact a conventional lease agreement designed to finance buildings on the leased area to accommodate National's expansion, which in turn also contributes primarily to the continued development of the Miami International Airport . . . ."

The public purpose of the development and operation of the aviation facilities at Miami International Airport has been well established by the legislative declaration and judicial determination. The accomplishment of this public purpose by means of revenue bond financing suported by rentals derived from lease agreements with

the airlines has been consistently approved. It is accurate to state that the phenomenal growth of the Miami International Airport could not have been otherwise achieved. The immunity of the leasehold interests from ad valorem taxation constituted an integral part of the planned expansion program. It was a motivating consideration upon which the lease arrangements were predicated.

In City of Opa-Locka v. Metropolitan Dade County, 247 So.2d 755 (Fla. 3rd DCA 1971), cert. den. 252 So.2d 802, identical leasehold interests at the Opa-Locka Airport (owned by Dade County and operated by the Dade County Port Authority) were considered as immune from taxation by Dade County and not assessed for ad valorem taxes for 1966, 1967 and 1968. The City of Opa-Locka sought to compel the County to assess the property interests created by the leases of airport facilities. As pointed out by the Court, the County took the position that:

> "The Legislature has declared which of the commercial enterprises carried on upon airport premises are primarily conducted in the public interest and which primarily served a private purpose. Those activities which directly relate to commercial aviation and without which an airport cannot function efficiently or successfully, fall within the ambit of the foregoing statutes and primarily serve a public or municipal purpose."

The Trial Court and Appellate Courts upheld the County's position that the leasehold interests of the airlines were not tax-

able, and properly excluded from the 1966, 1967 and 1968 tax rolls.

And in Dade County v. Pan American World Airways, Inc., 275 So.2d 505 (Fla. 1973), the Supreme Court of Florida held:

> "We cannot recede from this clear governmental purpose which was determined in 1946 and has continued in the same manner and at the same location by the same governmental entity for over a quarter of a century. It cannot be a 'public purpose' in order to provide the initial financing and then, having become affluent, reject its basic public purpose in order to create an additional basis for taxation.
>
> Therefore, the property at the Miami International Airport leased to the airline is clearly leased and used for the public purpose of providing indispensable air transportation and an air terminal to that great metropolitan area as an essential public service, . . ."

This determination that Pan American's leasehold interest is not subject to ad valorem taxes for the reason that it is utilized to serve a public purpose has not been overruled by the Supreme Court. The decision in Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976), merely notes in a footnote that "Section 196.001, Florida Statutes (1975) supersedes the statutory provisions considered in Dade County v. Pan American World Airways, Inc., 275 So.2d 505 (Fla. 1973)."

The public purpose determination remains intact. The same

leasehold interest remains in force and effect without any change in the use for a public purpose. The same "function by utilization" is unchanged.

CONCLUSION

The Third District Court of Appeal's opinion and order should be quashed with directions that the Department of Revenue's Complaint be dismissed.

Respectfully submitted,

KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKERN, P.A.
Attorneys for EASTERN AIR
LINES, INC.
799 Brickell Plaza
Miami, FL 33131
Telephone: (305) 358-8181

By: _____
JOSEPH F. JENNINGS, ESQ.

STEEL HECTOR & DAVIS
Attorneys for PAN AMERICAN
WORLD AIRWAYS, INC.
4000 Southeast Financial Center
Miami, FL 33131-2398
Telephone: (305) 577-2858

By: _____
DARREY A. DAVIS, ESQ.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief Amicus Curiae was mailed to STEVEN A. SCHULTZ, ESQ., Attorney for Appellant, 1200 Republic National Bank Building, 150 S. E. Second Avenue, Miami, FL 33131; JAMES K. KRACHT, ESQ., Assistant County Attorney, Attorney for Appellant, 1626 Dade County Courthouse, 73 West Flagler Street, Miami, FL 33130, J. TERRELL WILLIAMS, ESQ., Assistant Attorney General, Attorney for Appellee, Department of Legal Affairs, The Capitol, LL04, Tallahassee, FL 32301, and DAVID LINN, ESQ., Assistant General Counsel, Department of Revenue, P. O. Box 6668, Tallahassee, FL 32301, this 6th day of March, 1985.

KIMBRELL, HAMANN, JENNINGS, WOMACK, CARLSON & KNISKERN, P.A.
and
STEEL HECTOR & DAVIS

By: _____
JOSEPH F. JENNINGS, ESQ.