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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 65,825

(District Court Case Nos. 82-2227 and 82-2228)

JAMES F. REDFORD, JR., et al.,
as members of and constituting the
Property Appraisal Adjustment Board of Dade County, Florida;
and
FRANKLIN B. BYSTROM,
Dade County Property Appraiser

Petitioners,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Respondent.

PROPERTY APPRAISAL ADJUSTMENT BOARD'S INITIAL BRIEF

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STATEMENT OF THE CASE

On January 31, 1980, the Florida Department of Revenue (hereinafter the "DOR") filed its Complaint herein, containing various allegations directed against the Dade County Property Appraisal Adjustment Board (hereinafter the "Board") and the Dade County Property Appraiser (hereinafter the "Property Appraiser"). Certain of said allegations are factual and others are mere conclusions of law. (R. 1-5) *

On March 3, 1980, the Board and the Property Appraiser filed respective motions to dismiss, which were subsequently denied by the Trial Court on May 21, 1980. (R. 6-11, 40)

Thereafter, on June 20, 1980, the Board and the Property Appraiser served their respective answers and affirmative defenses. (R. 72-80)

On April 24, 1981, the DOR served on the Board its Request for Production of Documents, Request for Admissions of Fact and Initial Interrogatories. (R. 84-100) None of these discovery documents was directed to the Property Appraiser. The Board, however, fully responded to the discovery sought by the DOR in due course. (R. 84-100)

On July 21, 1982, the DOR filed a Motion for Summary Judgment, requesting the Court to enter summary judgment in its favor, based upon the pleadings and the Board's responses to the discovery documents theretofore filed by the DOR. (R. 101-105A)

On August 19, 1982, the Board and the Property Appraiser filed their Joint Motion for Summary Judgment, based upon separate

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*Citations to "R". are from the Index to Record on Appeal from the Circuit Court.

and distinct issues from those relied upon by the DOR in its Motion for Summary Judgment. (R. 106-108)

On September 9, 1982, the Trial Court heard argument on the respective motions for summary judgment, received memoranda of law in support and in opposition thereof; and, thereafter, on September 22, 1982, the Trial Court entered a final order granting the DOR's Motion for Summary Judgment and denying the Board's and Property Appraiser's Joint Motion for Summary Judgment. (R. 156-210, 215-218)

Appeal was taken to the Third District Court of Appeal (R. 211, 212), which received briefs and oral argument. The Third District rendered its decision on July 30, 1984 which affirmed in part and vacated in part the Trial Court's Summary Judgment. The Appellants filed their Joint Notice to Invoke the Discretionary Jurisdiction of this Court on August 29, 1984. Jurisdictional briefs were filed and thereafter, on February 15, 1985, this Court accepted jurisdiction to review the decision of the Third District Court of Appeal.

STATEMENT OF FACTS

On January 1, 1979 (i.e. the relevant taxing date herein), each of the lessees (the "Lessees") identified in Paragraph 5 of the Complaint (except Miami Aviation Corp.) held a leasehold interest on real property located at the Miami International Airport (herein the "Leasehold Interests"). (R. 2, 3, 72, 77, 78, 81, 82, 84, 89, 90, 215) Said Lessees are not parties to this lawsuit.

The Miami International Airport is owned, operated and controlled by Dade County, Florida, a political subdivision of the State of Florida. (R. 2, 3, 72, 77, 215)

The subject Leasehold Interests pertain to real property and improvements thereon, acquired and/or constructed through the issuance and sale of revenue bonds by Dade County, Florida, acting as the Dade County Port Authority. (R. 3, 72, 78, 215)

The Property Appraiser initially granted ad valorem tax exemption to the subject Leasehold Interests for 1979. (R. 73, 74, 78, 96, 109, 216) Thereafter, the DOR approved the tax roll containing such exemptions in accordance with §193.114(5), Florida Statutes. (R. 74, 78, 216) Later, however, the DOR reversed itself and directed the Property Appraiser to place such Leasehold Interests on the tax roll as taxable property. (R. 73, 74, 78, 96, 109, 216) The Property Appraiser complied with such directive and the Board held extensive hearings to review the exemptions on its own motion pursuant to §194.032 and §196.194, at which time the Lessees appeared in support of their respective tax exemptions. (R. 3, 73, 74, 78, 90-96, 109, 216) The DOR was not present at such hearings and did not review any of the evidence introduced thereat.

After conducting such hearings, the Board granted exemption to the subject Leasehold Interests and officially certified the 1979 tax roll in due course, reflecting all such Leasehold Interests as exempt property. (R. 109, 110, 216) Shortly thereafter, the Property Appraiser also certified said tax roll containing the subject exemptions to the Dade County Tax Collector in accordance with §193.122, Florida Statutes. (R. 3, 4, 73, 74, 78, 216)

In granting the subject tax exemptions, the Board and the Property Appraiser found, inter alia, that all of the Lessees holding the Leasehold Interests were either commercial air carriers of

passengers and/or cargo, or were engaged in providing vital air support services (e.g. fuel stations, overhaul, repair and maintenance facilities and the like) which were necessary for the operation of the mass transportation system at Miami International Airport. (R. 74, 79, 84, 90, 95, 96, 109, 110, 215-217)

After the Board granted the tax exemptions, as aforesaid, and after the tax roll was certified to the Tax Collector, the DOR unilaterally requested that the Property Appraiser file suit against the Board allegedly in accordance with §194.032(6)(a)(3) of the Florida Statutes. The Property Appraiser refused to file suit against the Board as so requested. (R. 3, 4, 79, 109, 110)

This action was then initiated by the DOR pursuant to §195.092 of the Florida Statutes for the expressed purposes of: (R. 4, 110)

1. Obtaining a judicial declaration that the Leasehold Interests of the Lessees described in Paragraph 5 of the Complaint should not have been granted exemption by the Board and the Property Appraiser for the tax year 1979; and

2. Nullifying any previous actions by the Board and the Property Appraiser in granting and certifying said exemptions; and to retroactively recertify the said Leaseholds as taxable property on the 1979 tax roll.

INTRODUCTORY STATEMENT

The Complaint filed by the DOR essentially alleges that the Board and Property Appraiser (hereinafter sometimes collectively referred to as the "Taxing Authorities") improperly granted tax exemption to the subject Lessees in violation of §196.001(2) and

§196.199(2) of the Florida Statutes.* Consequently, the DOR requested the Circuit Court to nullify the exemptions granted by the Taxing Authorities and compel the Property Appraiser to retroactively assess the leasehold interests for the year 1979.

§196.001 provides in relevant part as follows:

> Property subject to taxation. - Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law: ...
> (2) all leasehold interests in property of the ... state, or any political subdivision ....

§196.199(2) provides in relevant part as follows:

> Property owned by the following governmental units, but used by non-governmental lessees shall only be exempt from taxation under the following conditions:
> (a) leasehold interests in property of ... the state or any of its several political subdivisions ... shall be exempt from ad valorem taxation only when the lessee serves or performs a governmental, municipal, or public purpose or function, as defined in §196.012(5).
> (b) The exemption provided by this subsection shall not apply to those portions of a leasehold estate which are used predominantly for a private, commercial purpose and serve no governmental, municipal, or public purpose.**

* * *

For purposes of the above-quoted statutes, §196.012(5) mandates that "governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest ... is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served

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*Unless otherwise indicated, all references to statutes in this brief shall be to those in effect as of January 1, 1979, the relevant taxing date herein.

** In this brief, emphasis is supplied unless otherwise stated.

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."

In connection with the foregoing, the DOR alleged that since the Lessees holding the subject Leasehold Interests were airlines and other commercial enterprises, they were not entitled to exemption under §196.199(2). No evidence whatsoever was introduced in the Trial Court regarding the specific functions performed by any such Lessees or the capability of any governmental unit to perform the same or allocate public funds therefor. Further, no evidence was adduced regarding "those portions of the leasehold estates", if any, which "served no governmental, municipal, or public purpose". The sole criteria upon which the DOR relied in asserting taxability was the "commercial, profitmaking" character of the Lessees. (R. 3, 82, 109-132) The Circuit Court accepted that view and entered its Summary Judgment accordingly. (R. 215-218)

The Taxing Authorities, however, contested the entry of Summary Judgment in favor of the DOR on various grounds, to wit: (R. 106-108, 156-210)

1. Genuine issues as to material facts existed with respect to whether or not the subject tax exemptions were proper.

2. The Lessee airlines and others providing vital support services involved in this case are impressed with the character of a public utility which satisfies the exemption criteria of §196.199 and related statutes, despite the fact that such Lessees are private, commercial enterprises.

3. The DOR failed to negate the affirmative defenses raised by the Board and Property Appraiser in their respective answers.

Essentially relying on their affirmative defenses, the Taxing Authorities simultaneously moved for summary judgment which was ultimately denied by the Circuit Court. (R. 106-108) Those affirmative defenses can be summarized as follows: (R. 73, 74, 79, 80, 106)

1. The Circuit Court lacked jurisdiction due to the failure of the DOR to join the Lessees as indispensable parties.

2. The DOR was estopped from maintaining this action since its own regulation appearing in Florida Administrative Code, Chapter 12D-7.16(2) specifically authorized the granting of the subject tax exemptions by the Taxing Authorities.

3. The Leasehold Interests are granted specific exemption under Florida Statutes §125.019 and §159.15 which pertain to projects acquired and/or constructed by counties through the issuance of revenue bonds.

The Taxing Authorities asserted in the Third District that the Trial Court erred by not determining that the existence of material issues of fact and the foregoing unrebutted defenses defeated the DOR's Motion for Summary Judgment.

Moreover, the Taxing Authorities further contended that the failure of the DOR to join the Lessees as indispensable parties resulted in the Circuit Court entering a summary final judgment which cannot be lawfully implemented. Said judgment essentially provides that the Property Appraiser should retroactively place the subject Leasehold Interests on the 1979 tax roll and that the Tax Collector should thereafter proceed to collect the taxes assessed "pursuant to the appropriate statutory procedures." (R. 215-218) However, at this time, the Property

Appraiser has no statutory authority by which he can "back assess" the Leasehold Interests; and such absence of statutory authority cannot be cured or replaced by the existence of an order entered by the Circuit Court. The Circuit Court has no power to order a public official to perform an act which he would not otherwise have the authority to perform. The so-called "back assessment" statute, Florida Statutes §193.092, cannot be applied to retroactively assess property for more than a three year period or to assess property which was affirmatively granted exemption in a prior year, on the theory that such property had previously "escaped taxation". In this case, the three year limitation period has now expired and, in any event, under well established judicial precedent, the Leaseholds did not "escape taxation" in 1979, as contemplated by the back-assessment statute.

Further, the summary judgment cannot be implemented without contravening established principles of due process and applicable Florida Statutes. The judgment, in its present form, does not provide for notice of the proposed assessment to be given by the Property Appraiser to the Lessees; nor the opportunity of appeal to the Board, at least with respect to issues of valuation. (R. 215-218)

None of the foregoing arguments was recognized as valid by the Third District. That Court simply avoided the issues so raised and erroneously rendered a decision based solely on an analysis of the power granted the DOR under §195.092, Florida Statutes. The Third District basically attributed to the DOR, under that statute, a power so pervasive that it could by directive issued to the Taxing Authorities, override the mandates of all the laws creating

and governing the Board and Appraiser. The Third District decided that a "merit determination" as to the taxability (or exemption) of the Leaseholds was improper, but nevertheless the DOR had the absolute authority to order that such property be placed on the tax rolls by the Taxing Authorities. That decision was confined solely to a discussion of the relative powers of the governmental agencies involved in this litigation and totally ignored the issues raised on appeal by the Appellants. The failure of the Third District to consider and rule on such other issues constitutes error and, further, perpetuates the errors committed below by the Trial Court.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED BECAUSE IT IMPROPERLY PERMITS THE DOR TO PERFORM DUTIES AND FUNCTIONS OF THE PROPERTY APPRAISER AND THE BOARD IN THE ABSENCE OF LEGAL AUTHORITY.

Petitioner Board hereby adopts and incorporates herein by this reference, the argument set forth under this Point by Franklin B. Bystrom, the Dade County Property Appraiser, in his Brief filed concurrently herewith.

POINT II

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED BECAUSE IT UNCONSTITUTIONALLY DEPRIVES 25 TAXPAYERS OF PROCEDURAL DUE PROCESS BY TAKING AWAY PROPERTY RIGHTS WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD.

Petitioner Board hereby adopts and incorporates herein by this reference, the argument set forth under this Point by Franklin B. Bystrom, the Dade County Property Appraiser, in his Brief filed concurrently herewith.

POINT III

THE AFFIRMANCE BY THE THIRD DISTRICT RESULTS IN THE ERRONEOUS GRANT OF THE DOR's MOTION FOR SUMMARY JUDGMENT DESPITE THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT.

The Third District's opinion essentially states that the only factual inquiry in this case of any significance is whether or not the DOR ordered the Appraiser and Board to take certain actions. If so, then they must comply with such order. According to the Third District, not only is a "merit determination" unnecessary for purposes of determining "lawfulness" of such order, but any such "merit determination" is improper.

On this appeal, the Taxing Authorities assert that by so ruling, the Third District not only erred in perpetuating the errors committed by the Trial Court but compounded such errors. At least the Trial Court recognized that a judicial determination was necessary with respect to the "lawfulness" of the DOR's order, prior to its enforcement under §195.092. The Third District entirely by-passed that procedure and instead, ruled that no matter whether such order is lawful or not, it must be obeyed. Even §195.092 does not contemplate that the DOR is vested with such pervasive power. To the contrary, said statute specifically refers to the enforcement of "lawful" orders of the DOR and therefore judicial review is implicitly required thereunder.

In addition to the foregoing, the Taxing Authorities contend that many other issues of fact existed which precluded the entry of summary judgment in the Trial Court. Following is a discussion of those issues, which were totally ignored on appeal by the Third District.

A. Statutory Issues of Fact in General. The DOR based its Motion for Summary Judgment on the purported failure of the Lessees

to satisfy the exemption requirements of §196.199(2)(a) relating to leasehold interests of private lessees in governmentally owned property. That subsection, together with certain other relevant provisions contained in §196.199 are set forth as follows:

> 196.199 Exemptions for property owned by governmental units. -
> (2) Property owned by the following governmental units, but used by non-governmental lessees, shall only be exempt from taxation under the following conditions:
> (a) Leasehold interests in property of ... the state or any of its several political subdivisions ... shall be exempt from ad valorem taxation only when the lessee serves or performs a governmental, municipal, or public purpose of function, as defined in s. 196.012(5). In all such cases, all other interests in the leased property shall also be exempt from ad valorem taxation.
> (b) The exemption provided by this subsection shall not apply to those portions of a leasehold estate which are used predominantly for a private, commercial purpose and serve no governmental, municipal, or public purpose.
>
> * * *
>
> (5) .... 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.
>
> * * *
>
> (6) No exemption granted before June 1, 1976, shall be revoked by this chapter if such revocation will impair any existing bond agreement.
>
> * * *

§196.012, containing definitions incorporated by reference into the above-quoted statute, provides in relevant part as follows:

196.012 Definitions. - For the purpose of this chapter the following terms are defined as follows ... :
(1) "Exempt use of property" means predominant or exclusive use of property for ... governmental use, as defined in this chapter.
(2) "Exclusive use of property" means property that is used 100 percent for exempt purposes.
(3) "Predominant use of property" means property used for exempt purposes in excess of 50 percent but less than exclusive.

* * *

(5) 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.

* * *

§196.001 provides that "Unless expressly exempted from taxation, ... all leasehold interests in property of the State ... or any political subdivision ... " shall be subject to taxation.

The DOR asserts and the Trial Court held that with respect to the operation of the foregoing exemption statutes (i.e. §196.012 and §196.199), the sole factual determination to be made is whether or not the private lessee is a commercial, profitmaking enterprise. If so, then the leasehold interest is taxable. We disagree.

If the sole criteria for determining taxability under said exemption statutes is the "commercial, profitmaking" character of the lessee, then such statutes would have no subject matter upon which to operate and would be rendered meaningless. The Legislature

cannot be presumed to have enacted meaningless statutes. See e.g. Sharer v. Hotel Corporation of America, 144 So.2d 813 (Fla. 1962); Littman v. Commercial Bank & Trust Co., 425 So.2d 636 (3rd DCA, 1983); State v. Zimmerman, 370 So.2d 1179 (4th DCA, 1979); and State Dept. of Pub. Wel. v. Galilean Childrens Home, 102 So.2d 388 (2nd DCA, 1958). By use of clear and unambiguous language, these statutes are intended to grant exemption to leasehold interests in governmentally owned real property held by nongovernmental, private lessees. Inherently, any such nongovernmental, private lessees must be commercial and profitmaking. The Board therefore submits that the subject exemption statutes demand factual inquiries beyond the commercial character of the lessee; otherwise, they would be internally inconsistent and rendered inoperative.

§196.012 and §196.199, respectively, contain specific language requiring factual inquiries other than the commercial character of the lessee. For purposes of illustration, the Court's attention is directed to the following statutory provisions:

1. §196.012(1) - defines "exempt use of property" as meaning "predominant or exclusive use" for, inter alia, governmental purposes.

2. §196.012(2) - defines "exclusive use of property" as being used "100 percent for exempt purposes."

3. §196.012(3) - defines "predominant use of property" as being used "for exempt purposes in excess of 50 percent but less than exclusive."

The above definitional provisions require quantitative factual inquiries in order to determine the extent to which any leasehold interests may be exempt.

We further point out that §196.012(5) mandates that

"governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest ... 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." This provision demands several factual inquiries, namely, whether or not the function served by the lessee could be performed by a governmental unit or would otherwise be a valid subject for the allocation of public funds.

Further factual determinations are required under §196.199, to wit:

1. Subsection (2)(a) - whether the "lessee serves or performs a governmental, municipal, or public purpose or function, as defined in s. 196.012(5)."

2. Subsection (2)(b) - identification of "those portions of a leasehold estate which are used predominantly for a private, commercial purpose" and those portions which "serve no governmental, municipal, or public purpose." Exemption is denied only to such portions.

3. Subsection (5) - determination as to whether or not any of the leaseholds had previously been granted an exemption as a result of a judicial proceeding. If so, the statute provides that such exemption shall remain valid for the duration of the lease, unless the lessee changes its use.

4. Subsection (6) - provides that no exemption granted before June 1, 1976, shall be revoked if such revocation will impair any existing bond agreement. This provision requires an examination of any existing bond agreements and a determination as to whether or

not the same would be impaired by an imposition of tax against the leasehold.

In the instant case, no evidence whatsoever was introduced pertaining to the foregoing factual matters, other than the fact that the Lessees involved herein are "commercial, profitmaking entities."

As stated by the Supreme Court in Dade County v. Marine Exhibition Corp., 330 So.2d 459 (Fla. 1976), "eligibility for tax exemption on the basis of a "public" use of property leased from a political subdivision of the state is an issue of fact, not law." See also, City of Bartow v. Roden, 286 So.2d 228 (2nd DCA, 1973).

In the case sub judice, the Trial Court and the Third District failed to recognize and consider the factual elements set forth under the exemption statutes, aforesaid. Moreover, the lower courts committed the same error with respect to substantially the identical factual issues as they relate to the affirmative defenses raised by the Taxing Authorities. The DOR was not required to negate such affirmative defenses, factually or otherwise. (R. 101-105A, 109-132, 156-210)

B. "Public Purpose" Issues of Fact. As discussed above, §196.199(2)(a) provides that leasehold interests in county-owned real property shall be exempt from ad valorem taxes only when the lessee serves or performs a governmental or public purpose of function, as defined in §196.012(5). This "public purpose exemption" for leasehold interests has been recognized by the Florida Legislature and the judiciary for several years, although the same has appeared in various forms.

In the early case of Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla. 1958), the Supreme Court was first confronted with an attempt to assess a private leasehold interest. At that time, however, the Court concluded that no statutory authority then existed which would

authorize an assessment against a leasehold interest and, accordingly, enjoined the taxing authorities from taking any further action.

In response to Park-N-Shop, the Florida Legislature enacted Chapter 61-266, Laws of Florida, codified at §192.62, Fla. Stat. (1963). That statute was subsequently reenacted as §196.25, Fla. Stat. (1969) and remained in effect until the 1971 general revision of the tax statutes, pursuant to Chapter 71-133, Laws of Florida. §196.25 (and its predecessor, §192.62) was the first statute authorizing the taxation of private leasehold interests in government owned property. The same statute, however, set forth an exemption for leasehold interests held by private lessees in the performance "of a public function or public purpose authorized by law ... "

In 1968, the Supreme Court revisited the issue of leasehold taxation in the case of Hillsborough County Aviation Authority v. Walden, 210 So.2d 193 (Fla. 1968). In that case, the Court recognized that the issue of "public purpose" was a factual determination to be made by the trial court and upheld the lower court's findings that a certain airport lessee (a restaurant) was entitled to exemption and others were not. The so-called "predominant public purpose" test was originally articulated in the Hillsborough County Aviation Authority case and remained the accepted doctrine through 1973, at which time the Supreme Court decided Dade County v. Pan American World Airways, Inc., 275 So.2d 505 (Fla. 1973).

In the Pan American case, the Supreme Court was concerned with the taxability of airline leasehold interests at the Miami International Airport under then §196.25. As earlier noted, that statute provided an exemption for leasehold interests in governmentally owned property under circumstances where the lessees served a "public

purpose." In finding that the airline in that case was entitled to exemption, the Florida Supreme Court discussed the applicability of the "predominant public purpose" doctrine in the following manner:

> "In our judgment the airline provides a recognized public purpose which justifies leases such as those in the instant case between the county and the airline and the use of public financing for the facilities used by airlines. The scholarly opinion by Chief Judge Pearson in City of Opa Locka v. Metro Dade County, 247 So.2d 755 (Fla. App. 3rd 1971) ... supports our position in saying: (pp.758-759)
>
> > "The operation of airports by counties is clearly for a public purpose, as is the operation of airport facilities and projects.
>
> * * *
>
> "The present airport began as "Pan American Airport" or "36th Street Airport."
>
> * * *
>
> The present petitioner at that time came before this Court in Seaboard Air Line R. Co. v. Peters, 43 So.2d 448 (Fla. 1949), seeking our sanction of ... revenue certificates without a vote of the freeholders of Dade County for such financing, urging that "Miami International Airport" was of extreme importance ....
>
> The assertions in that case referred to the millions of dollars involved and the millions of passengers passing through this important international air facility and left no doubt whatever of its important public purpose .... State v. Brevard County, 126 So. 353 (1930), confirmed the Legislature's power to declare county purposes with which the courts would not interfere.
>
> In our language in that case we said, inter alia:
>
> > "Our modern airports render a public service similar to other governmental functions which promote the health, comfort and safety of the people and the general welfare of our State and Nation."

... we approved petitioner's request "solely on the ground that the development and acquisition of Miami International Airport under successive acts of the Legislature ... have made it an essential function of local government and being so the duty of Dade County under the law to support and maintain it is as pressing as it is to maintain any other governmental function or necessity" ....

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 ....

Accordingly, the airline, under the test established in Walden, meets the requirement of a public purpose in order to come within the statutory exemption of §196.25 (1969) (formerly §192.62), under which all leasehold interests in this proceeding are exempt under that statutory section from ad valorem taxes.*

* * *

We return now to the main thrust of appellant's argument, which urges us to hold that the leased property does not satisfy the constitutional tax exemption for "municipalities" in Article VII, §3(a), or Article XVI, §16, on the theory that the property is not used exclusively for public purposes inasmuch as the airline has a private purpose of engaging a profit-

*The Supreme Court then pointed out, by footnote, that §196.25 had been repealed in 1971 and was covered in a completely new Chapter 71-133, "with exemptions being expressly included in present §196.199, effective December 31, 1971."

> making venture. We cannot accept this contention and for good reason.
>
> * * *
>
> Under our decisions, "public purposes" are projects primarily and predominantly for the public benefit even though there may be some incidental private purpose, too.
>
> * * *
>
> .... The incidental private purpose of a profitmaking venture by the airline has merged into the meaning of the stipulated "public purpose" ....

Accordingly, the Supreme Court rejected the contention that the profitmaking motive of the airline destroyed the "public purpose" character of its operation. Historically, the Supreme Court had recognized the public purpose served by airlines but prior to the Pan American case, supra, its discussions were generally limited to revenue bond validation cases. One such case cited in Pan American was Seaboard Air Line R. Co. v. Peters, 43 So.2d 448 (Fla. 1949), in which the Court stated that:

> "Airports are as essential to commerce as terminals are to railroad or harbors to navigation, or as docks and harbor facilities are to marine shipping.
>
> * * *
>
> The airway, in many respects, may be compared to a system of arterial highways or a system of railroads contacting the different communities of the country, or as bridges or links connecting streams or expanses of water areas. The lanes of travel through the air, over both land and water, are now and were established with the same caution and precision that an engineer adopts in chartering the course of a highway or surveying the location of a proposed railroad system. An airport or safe landing field is a vital and indispensable link in this system of transportation. Our modern airport renders a public service similar to other govern-

> mental functions which promote the health, comfort and safety of the people and the general welfare of our state and nation.
>
> * * *
>
> What constitutes a county purpose is not static and inflexible. If we had been confronted with this question in the days of the pony express, we would have doubtless held the act bad, but in a day when the country is air-minded, when travel and commodity conveyance by air is such a vital part of the daily life and is so intimately connected with the general welfare we must refrain from holding that it is not a proper county purpose as contemplated by the constitution."

Later, in the bond validation case of State v. County of Dade, 210 So.2d 200 (Fla. 1968), the Supreme Court reviewed a proposed revenue bond issue of approximately $35,000,000 intended for the construction of facilities at the Miami International Airport to be rented and used by an airline. The bond issue had been challenged on the basis that it violated the constitutional prohibition against the county, pledging credit for the benefit of a private corporation (§10, Art. IX, Fla. Const.). In rejecting that argument, the Court discussed the public purpose nature of the airline (in this case, National Airlines) in the following manner:

> Frankly, we do not feel that this is an open question. This Court has consistently gone along with the authority as appears from our opinions cited herein. National, as in the previous cases, is not just a private corporation which might be classified as a newcomer. It has demonstrated its experience and it likewise is a public service corporation engaged in serving the public in a great transportation system.
>
> * * *
>
> Objection is made because National is to have the exclusive use and control of this facility and that they will no doubt earn

> profits on the same. It is quite obvious that National must make a profit to stay in business. It is a well known fact that they are not running a great airline as an eleemosynary institution. On the other side, the authority has an obligation to avail itself of competent and dependable agencies such as National, as chosen in this case, to perform this public function for the use and benefit of the public. It would seem to follow that National must of necessity have control of the premises upon which they are paying the lease.
>
> This is a common method used the world over to finance public improvements. There are some areas where the money is to be found and there are other areas where the know-how is to be found and one of the many functions of government is to utilize these two in promoting those functions which are so highly essential and necessary for the public and as to this project we determine again that it is a public purpose and the financing as shown here is consistent with the law of this State and in no way is it inconsistent with the Constitutions of the State of Florida or the United States.

At the time the Supreme Court decided Pan American, the strong public purpose language contained in the previously decided bond validation cases no doubt influenced the Court's conclusion that the airline facilities represented an indispensable element of a modern mass transportation system, which compelled a determination that the airline's leasehold interest satisfied the "predominant public purpose" test for purposes of tax exemption. The "incidental private purpose of making a profit" was deemed to be irrelevant with respect to the tax exemption issue, as well as the revenue bond validation cases.

Since the Supreme Court decided the Pan American case in 1973, no appellate court has again reviewed the question of whether or not airline leasehold interests are entitled to tax exemption under the applicable Florida Statutes. There have been other

leasehold tax exemption cases, however, upon which the DOR relied in the Circuit Court to convince the Trial Judge in this case that such leaseholds are no longer entitled to exemption (i.e. for the tax year 1979).

The major case upon which the DOR initially relied was Williams v. Jones, 326 So.2d 425 (Fla. 1976). In that case, the Supreme Court discussed the availability of leasehold tax exemptions for various leasehold interests held by lessees located on Santa Rosa Island. Such lessees were basically divided by the Court into two major categories, i.e. "commercial and residential leaseholders." In denying tax exemption to such leaseholders, the Court appeared to narrow the previously recognized "predominant public purpose" test in the following manner:

> The commercial taxpayers are represented by enterprises such as the operation of barbershops, plumbing businesses, beauty shops, laundries, rental cottages or rental units, motels, restaurants and camp grounds.
>
> * * *
>
> The operation of the commercial establishments represented by appellants' cases is purely propreitary and for profit. They are not governmental functions.
>
> * * *
>
> The exemptions contemplated under §196.012(5) and §196.199(2)(a), Florida Statutes, relate to "governmental - governmental" functions as opposed to "governmental - proprietary" functions.

Thereafter, in Volusia County v. Daytona Beach Racing, etc., 341 So.2d 498 (Fla. 1977), the Supreme Court was again confronted with a leasehold tax exemption case involving the Daytona International Speedway. Relying on its previous decision in Williams v. Jones, the Supreme Court rejected the contention that the Speedway was entitled

to tax exemption and stated:

> Section 196.001, Florida Statutes, (1975) makes "all leasehold interests in property ... of the state or any political subdivision ... " subject to taxation unless otherwise exempted.
>
> Other statutory provisions exempt privately held leaseholds of governmental property from taxation "only when the lessee" Section 196.199(2)(a), Florida Statutes (1975), "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 would otherwise be a valid subject for the allocation of public funds." Section 196.012(5), Florida Statutes (1975). The lessee in the present case does not serve a governmental purpose.
>
> The corporation's operation of the speedway "is purely proprietary and for profit." Williams v. Jones, 326 So.2d 425, 433 (Fla. 1975) (reh. den. 1976). The corporation exists in order to make profits for its stockholders and uses the leasehold to further that purpose. This use is determinative: "It is the utilization of leased property from a governmental source that determines whether it is taxable under the constitution." Straughn v. Camp, supra, at 695.
>
> * * *
>
> Operating an automobile racetrack for profit is not even arguably the performance of a "governmental - governmental" function.

In the Volusia County case, the Supreme Court referred to its earlier decision in Daytona Beach Racing and Rec. Fac. Dist. v. Paul, 179 So.2d 349 (1965), wherein it upheld a leasehold tax exemption for the same speedway project for the tax years 1960 and 1961. The earlier tax exemption case relied heavily on the Supreme Court's decision in State v. Daytona Beach Racing and Recreational Facilities District, 89 So.2d 34 (Fla. 1956), wherein the Court approved the

issuance of revenue bonds to construct the Daytona Beach Speedway. In Volusia County, however, the Court explained that in the interim, the 1968 Florida Constitution was adopted, the Legislature had enacted §196.199 and related provisions, and repealed the predecessor of §196.25 and also specifically repealed a special statutory exemption directed to the Daytona Beach Speedway. Based on such changes in the law, the Supreme Court adopted the Williams v. Jones "function by utilization" test and confirmed the taxability of the leasehold interests in the Daytona Speedway.

Subsequently, in 1978, the First District Court of Appeal decided St. Johns Associates v. Mallard, 366 So.2d 34 (1st DCA, 1978), and in doing so relied on the "function by utilization" test enunciated by the Supreme Court in Williams v. Jones. The First District Court of Appeal, in St. Johns Associates, was determining the taxability of a private leasehold interest in real property owned by the Jacksonville Port Authority, which property was utilized by the lessee for purposes of servicing and storing imported automobiles, pending their shipment by the importer for sale to its customers. In connection therewith, the First District Court of Appeal discussed the appellant's reliance upon the "predominant public purpose" test theretofore enunciated by the Supreme Court in Hillsborough County Aviation Authority v. Walden, and the Pan American case, supra, (at pages 36-37). The Appellate Court rejected such reliance on the "predominant public purpose" test and stated that:

> We conclude that a more recent line of cases mitigates against St. Johns argument that an exemption exists.
>
> * * *
>
> Therefore the test formerly applied in those cases relied upon St. Johns

> i.e., predominant public use, no longer has continuing efficacy and we must look instead to the use actually made of the property leased to determine its tax exempt status.
>
> Legislative declarations ... do not necessarily make the function a commercial lessee performs governmental. It is rather the actual use made of the leased property which determines whether it is taxable under the Constitution. See Straughn v. Camp, supra.

More recently, in the case of Walden v. Hillsborough Cty. Aviation Auth., 375 So.2d 283 (Fla. 1979), the Florida Supreme Court reviewed a case involving the taxability of certain leasehold interests at the Tampa International Airport, wherein the lessees operated various retail commercial establishments, including, restaurants, lounges, fast food service facilities, gift shops, duty-free shops and other retail shops selling newspapers, tobacco products, magazines and books. The lessees contended that the leasehold interests were exempt under Chaper 196 of the Florida Statutes because they performed public functions and purposes which could properly be performed by the Authority or which would otherwise be a valid subject for the allocation of public funds. The Supreme Court rejected the lessees' argument and stated in relevant part as follows:

> We conclude that our decision in Williams is controlling in that the leasehold interests of Host, Dobbs and Bonanni are properly subject to ad valorem taxation.
>
> * * *
>
> In Williams, we were faced with the question of whether commercial leaseholders of county owned Santa Rosa Island were entitled to exemption .... The commercial leaseholders, operating such diverse enterprises as barbershops, plumbing businesses, laundries, and restaurants, argued that the operation of their businesses constituted a governmental or

> public purpose or function, and thus their leaseholds were exempt from ad valorem taxation .... We rejected this argument and held that the exemptions contemplated by sections 196.012(5) and 196.199(2) relate to "governmental - governmental" functions as opposed to "governmental - proprietary" functions and ... we held that the particular function is determined by "the utilization of leased property from a governmental source."
>
> * * *
>
> Because the leased property was being utilized for commercial, profitmaking purposes, we held that the function was proprietary, not governmental, and that the exemptions were inapplicable.
>
> We reaffirmed this "function by utilization" test in Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976) ....
>
> * * *
>
> It is undisputed that these leaseholds are being utilized for commercial, profit-making purposes, and for this reason, they have a "governmental - proprietary" function. Having such a function, they are taxable.
>
> * * *

As earlier noted, the appellate courts of this State have not considered any leasehold tax exemption case since Pan American involving lessees performing an aeronautical (or directly related) function. Clearly, the courts have historically treated airlines and support services (such as overhaul and repair facilities) as the essence and foundation of the airport mass transportation system. The earlier leasehold tax exemption and revenue bond validation cases indisputably recognize the importance of such functions and even refer to the entities performing the same as agencies of local government. In light of that recognition, the Taxing Authorities

urge that the Lessees involved in this case satisfy the so-called "function by utilization" test originally articulated by this Court in Williams v. Jones, supra. We submit that the aeronautically oriented Lessees involved herein are true agencies of government in that the mass transportation function performed by them is impressed with the character of a public utility. There is no doubt that the discontinuance of such a function by the private sector would immediately compel an appropriate governmental unit to directly maintain the system. Such an element of compulsion would not be present with respect to any of the functions performed by the lessees involved in any of the other cases since Williams v. Jones. The instant case is unique in that the Lessees utilize the premises herein for a function which would have to be performed directly by a governmental unit in the absence of such private agencies. Mass transportation has always been an appropriate governmental function and, in fact, is traditionally performed by government (e.g. bus, subway and rail systems).

Certainly, the revenue bond validation cases which approved the issuance and sale of revenue bonds for the Miami International Airport are at least presumptive and that such projects are a valid subject for the allocation of public funds. Of course, this is an express statutory element with respect to the availability of an exemption under §196.199(2) and related §196.012(5).

Although the bond validation cases may not be conclusive as to the question of tax exemption, we submit that an actual allocation of public funds must at least raise a presumption of "public purpose" under the exemption statutes, which presumption may be rebutted by proper evidence. No doubt that a revenue bond

issue may be authorized to finance a public airport, but that individual commercial lessees located therein may not be entitled to tax exemption. However, those lessees directly involved in providing aeronautical transportation are different by virtue of the fact that they represent the essence of the revenue bond project, without which the entire transportation system would collapse.

In conclusion, the Taxing Authorities assert that the Trial Court erred in this case by determining that the sole material fact was whether the Lessees were commercial, profitmaking entities. The Third District simply ignored the entire issue. The question of tax exemption is a matter of fact, and not law. See Dade County v. Marine Exhibition Corp.,330 So.2d 459 (Fla. 1976). Other relevant and material facts pertaining to the specific functions performed by the Lessees (and their relationship to the air transportation system) were required to be considered by the Third District and the Trial Court in applying the "function by utilization" test developed in Williams v. Jones. The Trial Court ignored the possible application of all such other facts and considered only the commercial character of the Lessees in determining that the subject tax exemptions were unavailable. If no commercial enterprise can obtain an exemption simply because it is profitmaking, then §196.199(2) would be rendered meaningless. The Legislature cannot be presumed to have enacted a meaningless piece of legislation. See e.g. Sharer v. Hotel Corporation of America, 144 So.2d 813 (Fla. 1962); Littman v. Commercial Bank & Trust Co., 425 So.2d 636 (3rd DCA, 1983); State v. Zimmerman, 370 So.2d 1179 (4th DCA, 1979); and State Dept. of Pub. Wel. v. Galilean Childrens Home, 102 So.2d 388 (2nd DCA, 1958). By its very terms, §196.199(2) pertains to private lessees of government owned property.

See Lykes Bros. Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1978). Therefore, said statute would have no subject matter upon which it could operate if profit motive is the sole criteria for exemption.

C. Factual Issues Relating to Affirmative Defenses. It is well settled that a party moving for summary judgment has the burden of conclusively refuting any affirmative defenses raised by the other party, including any factual allegations contained therein. See e.g. City of Miami v. Gates, 393 So.2d 586 (3rd DCA, 1981); First Ind. Bank v. Stottlemyer & Shoemaker, 384 So.2d 952 (2nd DCA, 1980); Johnson & Kirby, Inc. v. Citizens Nat. Bank, 338 So.2d 905 (3rd DCA, 1976); and City of Hallandale v. State ex rel. Sage Corporation, 298 So.2d 437 (4th DCA, 1974).

In the case at bar, the Taxing Authorities raised several affirmative defenses, none of which were refuted, factually or otherwise by the DOR. (R. 73, 74, 79, 80) Nevertheless, the Trial Court entered summary judgment against the Taxing Authorities.

Affirmative Defense #2 alleges that the Leasehold Interests are entitled to exemption under §125.019 of the Florida Statutes (formerly known as the Port Authority Act). The cited statute provides specific exemption from ad valorem taxes for projects (and all property, rights, easements and franchises relating thereto) financed through the issuance of revenue bonds. In order to have negated this defense, the DOR should have been compelled to prove the non-existence of the operable facts. To the contrary, however, the record clearly reflects that the leased facilities were in fact financed through revenue bonds. Assuming that "public purpose" is also a fact required in order to establish the subject tax exemption, the DOR should have been required to disprove such facts as would be relevant to that issue.

However, the Trial Court subjected the DOR to no such burden (i.e. other than to show the commercial character of the Lessees).

The fourth Affirmative Defense raised by the Board alleged that the subject Leasehold Interests were exempt from ad valorem tax in accordance with §196.001, §196.012 and §196.199 of the Florida Statutes. The interrelationship of these statutes has previously been discussed in this brief. We contend that several issues of material fact existed with respect to the application of these exemption statutes (other than the commercial character of the Lessees), none of which were required to be negated by the DOR at the Trial Court level.

The fifth Affirmative Defense raised by the Board essentially alleges that the DOR was guilty of laches and is estopped from attacking the Taxing Authorities' actions in granting the subject tax exemptions. Specifically, the Board's defense is that the DOR, on August 16, 1979, officially approved and certified the tax roll, containing the leasehold tax exemptions, in accordance with §193.114 of the Florida Statutes. As a result, the DOR was estopped from initiating and maintaining this action. No evidence of any kind was received by the Trial Court in connection with the allegations contained in this Affirmative Defense.

POINT IV

THE THIRD DISTRICT ERRED IN FAILING TO RECOGNIZE THAT THE TRIAL COURT LACKED JURISDICTION DUE TO THE FAILURE OF THE DOR TO JOIN THE NAMED LESSEES AS INDISPENSABLE PARTIES.

Failure to join indispensable parties to an action is grounds for dismissal and constitutes reversible error. See e.g.

Martinez v. Balbin, 76 So.2d 488 (Fla. 1954); Commodore Plaza, etc. v. Saul J. Morgan Ent., Inc., 301 So.2d 783 (3rd DCA, 1974); and Kimball v. Florida Bar, 537 F.2d 1305 (5th Cir., 1976).

An indispensable party has been defined by the Third District Court of Appeal in the following manner:

> "An 'indispensable party' is one who has not only an interest in the subject matter of the controversy, but an interest of such a nature that a final decree cannot be rendered between other parties to the suit, or cannot be rendered without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Unless such a person is made a party, the Court will not proceed to a final determination." [See National Title Insurance Company v. Oscar E. Dooley Associates, Inc., 377 So.2d 730 (3rd DCA, 1980); and Great Southern Aircraft Corporation v. Kraus, 132 So.2d 608 (Fla. 3rd DCA, 1961)]

The failure to join indispensable parties is jurisdictional and may be raised for the first time on appeal; and can even be raised by the court on its own motion. See Kimball v. Florida Bar, 537 F.2d 1305 (5th Cir., 1976); and Martinez v. Balbin, 76 So.2d 488 (Fla. 1954).

In the instant case, the Lessees designated in Paragraph 5 of the Complaint are indispensable parties and should have been joined as defendants. The Taxing Authorities raised this issue in the Trial Court on Motion to Dismiss and again as an affirmative defense. The Trial Court, however, entirely disregarded said issue and ultimately entered summary judgment in favor of the DOR, despite the absence of the real parties in interest. The Third District also ignored the issue and thus perpetuated the error committed below.

It is clear that a tax exemption is a valuable property right and cannot be taken without due process of law. In Hollywood Jaycees v. State, Department of Revenue, 306 So.2d 109 (Fla. 1975), this Court

reviewed a case wherein the taxpayer had been granted exemption from taxation by the Broward County Board of Tax Adjustment. After the granting of such exemption, the Department of Revenue (pursuant to a previously existing statute) administratively reversed the decision of the board and invalidated the previously granted tax exemption. No notice of hearing was afforded the taxpayer; nor was it given any opportunity to be heard. The Florida Supreme Court quashed the decision of the Department of Revenue on grounds that the taxpayer was not properly joined as a party to the administrative proceedings and was therefore deprived of a property right (i.e. its tax exemption) without due process of law. See also State v. Carey, 164 So. 199 (Fla. 1935).

The same type of result will prevail in this case if the Trial Court's summary judgment is affirmed in the manner mandated by the Third District. The summary judgment constitutes an order declaring that the tax exemptions previously granted to the Lessees are void, that the 1979 tax roll be amended accordingly and that the Dade County Tax Collector (who is also not a party) proceed to collect the taxes due. The Lessee/taxpayers were earlier granted exemption by the Defendant Taxing Authorities and, in essence, the DOR is attempting (and has succeeded under the Third District's opinion) to cause a judicial revocation of such exemption without the presence of the real parties in interest. Here, the Circuit Court was chosen by the DOR as the forum to nullify tax exemptions previously granted by the Board, rather than utilizing its own administrative powers, as was the case in Hollywood Jaycees. In either event, however, the result would be the same - a deprivation of property without due process of law. The Trial Court failed to recognize these basic

principles of equity and entered judgment in favor of the DOR. The Third District essentially affirmed the Trial Court in this regard, thus perpetuating the error.

In addition to the foregoing, we further point out that the failure to join the affected Lessees as parties has deprived the Property Appraiser of any jurisdiction to exercise his power of back-assessment under §193.092. As more fully discussed below under Point V, the Summary Judgment herein essentially compels the Property Appraiser to back-assess the subject Leasehold Interests for the tax year 1979. However, the Property Appraiser cannot now comply with that order without violating the three year limitation period set forth in §193.092. Had the Lessees been joined as parties herein, said limitation period may have been tolled.

POINT V

THE THIRD DISTRICT ERRED IN FAILING TO RECOGNIZE THAT THE TRIAL COURT ERRONEOUSLY ORDERED THE PROPERTY APPRAISER TO "BACK-ASSESS" THE SUBJECT LEASEHOLD INTERESTS IN VIOLATION OF APPLICABLE STATUTORY LAW AND CONTRARY TO PRINCIPLES OF DUE PROCESS.

A. Violation of Back-Assessment Statute (§193.092). The power to tax is vested solely in the Legislature and that power may be exercised only pursuant to a valid statute containing definite limitations. See State ex rel. Housing Auth. of Plant City v. Kirk, 231 So.2d 522 (Fla. 1970); Cassidy v. Consolidated Naval Stores Company, 119 So.2d 35 (Fla. 1960); Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571 (Fla. 1958); State v. Lee, 7 So.2d 110 (Fla. 1942); Fleischer Studios v. Paxson, 2 So.2d 293 (Fla. 1941); Horne v. City of Ocala, 196 So. 441 (Fla. 1940); West Virginia Hotel Corporation v. W.C. Foster Co., 132 So. 842 (Fla. 1931); Stewart v. Daytona and New Smyrna Inlet Dist.,

114 So. 545 (Fla. 1927); State v. Beardsley, 94 So. 660 (Fla. 1922); Department of Revenue v. Young Am. Builders, 358 So.2d 1096 (1st DCA, 1978); C.D. Utility Corporation v. Maxwell, 189 So.2d 643 (4th DCA, 1966); Dade County v. Deauville Operating Corp., 156 So.2d 31 (3rd DCA, 1963); and Overstreet v. Chatlos, 135 So.2d 870 (3rd DCA, 1962). The Legislature may lawfully delegate to counties, acting through their constitutionally authorized and duly elected taxing officials, the authority to assess and impose taxes for county purposes. See Cassidy v. Consolidated Naval Stores Company, supra; West Virginia Hotel Corporation v. W.C. Foster Co., supra; and Stewart v. Daytona and New Smyrna Inlet Dist., supra. It is well established, however, that the courts of this State have no power to assess or levy taxes. See cases cited, supra; Dickinson v. Seaboard Coast Line Railroad Company, 231 So.2d 28 (1st DCA, 1970); Overstreet v. Dean, 219 So.2d 752 (3rd DCA, 1969); and Haines v. Leonard L. Farber Company, 199 So.2d 311 (2nd DCA, 1967).

In the instant case, the Trial Court entered a final summary judgment, ordering the Property Appraiser to "prepare a supplement to the 1979 Dade County real property assessment roll, containing assessments of the subject Leasehold Interests and ... certify said supplemental roll to the Dade County Tax Collector for collection, pursuant to the appropriate statutory procedures." The Third District affirmed the Trial Court's judgment in this respect.

The Trial Court thus effectively ordered the Property Appraiser to exercise his power of back-assessment under §193.092 of the Florida Statutes. That section provides in relevant part as follows:

> 193.092 Assessment of property for back taxes. -
> (1) When it shall appear that any ad valorem tax might have been lawfully

> assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of three years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property as may have escaped taxation, at and upon the basis of valuation applied to such property for the year or years in which it escaped taxation, noting distinctly the year when such property escaped taxation and such assessment shall have the same force and effect as it would have had if it had been made in the year in which the property shall have escaped taxation, and taxes shall be levied and collected thereon in like manner and together with taxes for the current year in which the assessment is made. But no property shall be assessed for more than three years arrears of taxation ...."

The judiciary has no inherent or independent power to "back-assess" property, directly or by ordering a property appraiser to do so. Specific statutory authority for such an assessment must exist. In State v. Beardsley, 94 So. 660 (Fla. 1922), this Court was confronted with an attempted back-assessment of personal property and stated in relevant part that:

> "The first and principal question presented by the record in this case is whether or not there was any legal authority for the assessment for taxation of personal property for past years in which such property had escaped taxation ...."
>
> We may assume as settled law that, in order to enforce the payment of an ad valorem tax, through and by means of the instrumentalities provided by law, there must first be a valid assessment of the property upon which such tax is attempted to be imposed. [Case citations omitted]

> That a state may, by appropriate legislation and action thereunder, reach bakward and collect taxes upon taxable property which has escaped taxation for a given year or years through the mistake or error of the assessor or the failure or neglect of the owner to return it, is well settled in this state and elsewhere. [Case citations omitted]
>
> .... In the absence of statute, back-assessment for previous years on omitted property are not authorized.
>
> * * *
>
> From the premises, it follows that to sustain the assessment of property for taxation for past years in which such property has escaped taxation, statutory authority must exist.

The question thus presented in this case is whether or not the Property Appraiser has the statutory power to "back-assess" the Leasehold Interests as ordered by the Trial Court (and affirmed by the Third District). The summary judgment subject to this appeal, cannot be relied upon as a substitute for such statutory authority. The mere existence of the Trial Court's order cannot render lawful an act performed by the Property Appraiser which would otherwise be unlawful. See e.g. State v. McNayr, 133 So.2d 312 (Fla. 1961); State v. Harvey, 68 So.2d 817 (Fla. 1953); and Dance v. City of Dania, 114 So.2d 697 (2nd DCA, 1959). In short, if §193.092 does not authorize the Property Appraiser to back-assess the Leasehold Interests in this case, then the final summary judgment cannot be lawfully implemented.

The back-assessment statute, §193.092, cannot be invoked to assess property beyond a period of three years. At this point in time, the three year limitation period has expired and, accordingly, the Property Appraiser is now precluded from rendering an assessment pursuant to said statute. Moreover, we note that in the case sub

judice the Leasehold Interests had never "escaped taxation" under the back-assessment statute, as that phrase has been defined by the Florida courts. See e.g. Korash v. Mills, 263 So.2d 579 (Fla. 1972); United Tel. Co. v. Colding, 408 So.2d 594 (2nd DCA, 1982); Underhill v. Edwards, 400 So.2d 129 (5th DCA, 1981); Markham v. Friedland, 235 So.2d 645 (4th DCA, 1971); and Okeelanta Sugar Refinery, Inc. v. Maxwell, 183 So.2d 567 (4th DCA, 1966). In Underhill, supra, the Fifth District Court of Appeal reviewed a case, wherein the Volusia County Property Appraiser attempted to back-assess a portion of a hospital building which had been granted exemption in a prior year. The Appellate Court in determining that the property involved therein had not "escaped taxation" as contemplated under the back-assessment statute, stated in relevant part as follows:

> The Trial Court also correctly determined that the first floor of the new wing which had been assessed as "exempt" on the 1976 tax roll could not be back-assessed, because the property had not "escaped taxation" for that year. It had not been missed, overlooked or forgotten. Okeelanta Sugar Refinery, Inc. v. Maxwell, Fla. App. 1966, 183 So.2d 567.
>
> * * *
>
> After certification of the tax roll a change "reevaluating" the amount of the valuation will not be allowed. Korash, supra. The determination that a parcel of property is exempt is as much a part of the assessment process as is the determination of its taxable value, and the judgment of the assessor must be applied in reaching that conclusion. We hold, therefore, that a determination in 1977 that the property should not have been exempted in 1976 is a change in judgment and is prohibited under the cited cases.

The Board therefore contends that the Property Appraiser cannot lawfully implement the provisions of the final summary judgment

entered by the Trial Court as affirmed by the Third District. The sole statutory authority upon which such action might be taken by the Property Appraiser is §193.092. However, that statute cannot now be relied upon because:

1. The three year limitation period set forth therein has long expired; and

2. The Leasehold Interests were always on the 1979 tax roll, although classified as exempt property. Consequently, they did not "escape taxation" as contemplated under the back-assessment statute.

As earlier discussed, the Lessees were not joined as indispensable parties to this action. Had they been so joined, at least the three year limitation period set forth in §193.092 may have been tolled. Of course, such was not the case.

B. Violation of Due Process. As noted above, the summary judgment from which this appeal was taken, provides in relevant part that "the Dade County Property Appraiser shall forthwith prepare a supplement to the 1979 Dade County real property assessment roll containing assessments of the subject Leasehold Interests and shall certify said supplemental roll to the Dade County Tax Collector for collection pursuant to the appropriate statutory procedures." The Third District affirmed that portion of the summary judgment so stating.

Should the Property Appraiser implement the foregoing order, the same would deprive the Lessees of due process under §9, Article I of the Florida Constitution and §1, Article XIV of the Federal Constitution.

Pursuant to the back-assessment statute, §193.092, if such an assessment is rendered it is required to be "levied and

collected ... in like manner and together with taxes for the current year in which the assessment is made." In accordance with §194.011 (1983) each taxpayer is required to be notified of the assessment and is entitled to file an appeal to the property appraisal adjustment board in accordance with §194.032. The summary judgment entered by the Trial Court, as affirmed by the Third District, does not provide for any such notice or right of appeal, but instead, purportedly orders the Tax Collector to proceed with the collection process forthwith. A valid assessment is the first prerequisite to a valid tax and its enforcement. See e.g. State v. Beardsley, 94 So. 660 (Fla. 1922); C.D. Utility Corporation v. Maxwell, 189 So.2d 643 (4th DCA, 1966); and St. Joe Paper Company v. Ray, 172 So.2d 646 (1st DCA, 1965).

In the case of Root v. Wood, 21 So.2d 133 (Fla. 1945), this Court was confronted with circumstances similar to the case at bar. Root involved an attempted back-assessment of intangible personal property which was allegedly undervalued by the taxpayer for the three year period immediately preceding the date of the back-assessment. Such assessment was made by the Dade County Tax Assessor at the direction of the Comptroller (the predecessor to the DOR) after notification to the taxpayer. The taxpayer then petitioned the Board of Equalization (the predecessor to the Property Appraisal Adjustment Board) for review, but its protest was ignored on grounds that the Tax Assessor and the Board of Equalization felt that they were bound by the order of the Comptroller and had no discretion in the matter. Consequently, the taxpayer was denied any opportunity to resist the additional tax assessment by the taxing authorities. The taxpayer therein filed suit. At trial, the lower court held that the additional assessment was illegal on the theory that the property had not

"escaped" taxation, but the taxpayer had been guilty of fraud in filing the relevant tax returns, resulting in a dismissal of the taxpayer's complaint. On appeal, the Supreme Court upheld the lower court's adjudication that the additional tax was illegal but reversed on the issue of fraud. In so doing, this Court stated in pertinent part as follows:

> "The sole and only question may be encompassed in the following: was the final decree correct? As to that part adjudicating the additional tax to be illegal, we answer this question in the affirmative. In all other respects, we answer in the negative for the reasons following.
>
> * * *
>
> When the intangible tax roll is prepared by the tax assessor, he is required to submit it to the Board of County Commissioners who sit as a board of equalization for the purpose of hearing complaints, taking testimony, reviewing, revising and equalizing the assessments. The Board may make such changes and assessments as seem just ....
>
> If increases in assessments are made, notice thereof shall be published and the owners given an opportunity to complain and give testimony on a day certain as to such increases.
>
> * * *
>
> The Comptroller is authorized to prescribe forms and to make rules and regulations to execute the intent of the intangible tax act .... He may also make recommendations to the Governor with reference to the conduct of tax assessors, tax collectors, county commissioners ... with reference to the performance of their duties ....
>
> * * *
>
> We find nothing ... to authorize the Comptroller to make assessments of intangible personal property. We find

that duty vested exclusively in the tax assessor subject to revision by the Board of Equalization .... The duty of the Comptroller is to investigate intangible personal property tax rolls and see that all property owners have "made proper returns" and have returned all "property subject to taxation" and "advise the tax assessor of his findings."

* * *

In at least three different sections of the act, the duties of tax assessors with reference to the assessment of intangibles is defined but we find nothing within its four corners that even remotely refers to the Comptroller as being vested with that power.

* * *

We do not think ... that such an assessment can be made by anyone other than the tax assessor and that it should be made as required by §199.09 after notice to the taxpayer giving him opportunity to be heard and give evidence in support of the integrity of his return. §199.29 authorizing back-assessments requires that they be made in "like manner" as those of the year in which the assessment is made. <u>It is out of the question to contend that an ex parte assessment may be made against his intangibles without any notice whatever or without any opportunity to be heard when the assessment rolls have been long since approved and closed</u> ....

The record does not show that any aspect of the law was observed in making the assessment in question. In fact, we are constrained to believe that it was made under a complete misunderstanding of the law. No notice to the taxpayer was given; his protest was ignored; he had no opportunity to be heard; the Tax Assessor imposed the tax and the Board of Equalization approved it both disclaiming any responsibility whatever for it and both asserting that they were bound by the order of the Comptroller and had no power or discretion to con-

> sider or modify the assessment made by him. The tax roll was certified to the Tax Collector with directions to proceed to collect the tax without any opportunity to the taxpayer to be heard anywhere anytime.
>
> * * *
>
> Such a procedure is contrary to every principle of our constitutional theory and to construe the intangible tax law in this way would render it totally unconstitutional.

In the instant case, the taxpayer/Lessees appeared before the Board in the latter part of 1979 in support of the leasehold tax exemptions previously granted by the Property Appraiser, which said exemptions were subsequently denied at the direction of the DOR. The Board, after hearing, reinstated the exemptions and on January 31, 1980, the DOR initiated this suit. Sometime prior to the filing of this action, the Board and Property Appraiser certified the 1979 tax roll to the Tax Collector for collection in accordance with §193.122 of the Florida Statutes. Said tax roll reflected the Leasehold Interests as exempt property. Despite their classification as exempt property, said Leaseholds had memorandum values attributed to them on the tax roll. The Lessee/taxpayers did not have an opportunity to contest such values since that question was mooted for all practical purposes when the Board and Property Appraiser granted the exemptions herein attacked.

Based on the principles enunciated in Root v. Wood, supra, we submit that the Trial Court's Summary Judgment cannot be lawfully implemented by the Property Appraiser without first notifying the Lessees of the assessment and affording them the opportunity of appeal to the Board, at least as to issues of valuation. Of course, the Trial Court herein directed the Property Appraiser to entirely

by-pass any such procedural requirements and to simply certify the assessments to the Tax Collector for collection. Such a procedure would constitute a deprivation of due process under both the Florida and Federal Constitutions. In Root v. Wood, the Comptroller ordered such a procedure to be followed and in the instant case, the Trial Court did so. The existence of a court order in this case does not, however, change the ultimate result, i.e. a deprivation of due process. See also, Hollywood Jaycees v. State, Department of Revenue, 306 So.2d 109 (Fla. 1975).

POINT VI

THE SUBJECT LEASEHOLDS ARE EXEMPT FROM AD VALOREM TAX UNDER §125.019 OF THE FLORIDA STATUTES.

The subject airport facilities were constructed by Dade County (acting as the Dade County Port Authority) through the issuance and sale of revenue bonds, pursuant to Chapter 125 of the Florida Statutes (previously known as the "Port Authority Act").

§125.019 of the Florida Statutes provides in relevant part as follows:

> (1) All powers, acts and deeds hereby conferred or authorized are found to be and made a county purpose. Each project financed under the provisions of §125.011-§125.021 and the income therefrom ... shall at all times be free from taxation within the State. The exemption granted by this subsection shall not be applicable to any tax imposed by Chapter 220 on interest, income, or profits on debt obligations owned by corporations.

* * *

§125.011 further defines the term "project" as "any one or any combination of two or more of the following: public mass transportation ... and airport facilities of all kinds and includes,

but is not limited to ... airport facilities of all kinds for land and sea planes, including but not limited to, landing fields ... hangers, shops, buses, trucks and all other facilities for the landing, taking off, operating, servicing, repairing and parking of aircraft, and the loading and unloading and handling of passengers, mail, express and freight ... and may include all property, rights, easements, and franchises relating to any such project and deemed necessary or convenient for the acquisition, construction, purchase or operation thereof."

Part I of Chapter 159 of the Florida Statutes, entitled "The Revenue Bond Act of 1953", is the counterpart of Chapter 125 and provides additional authority for counties and municipalities to issue revenue bonds to finance the acquisition, construction and operation of "port facilities" and "mass transportation systems". The word "project" is defined in §159.02(4) as including "all property, rights, easements, and franchises relating thereto and deemed necessary or convenient for the construction or acquisition or the operation thereof."

§159.15 of the Revenue Bond Act, entitled "Tax Exemption and Eligibility as Investments", specifically provides exemption for "projects", as follows:

> (1) It is hereby found and determined that all of the purposes for which revenue bonds are authorized to be issued by this part constitute essential governmental purposes, and all of the properties, revenues, monies and other assets owned and used in the operation of such projects ... shall be exempt from all taxation by the state or county, municipality, political subdivision, agency, or instrumentality thereof. The exemption granted by this subsection shall not be applicable to any tax imposed by Chapter 220 on interest, income, or profits on debt obligations owned by corporations.
>
> * * *

Both §125.019 and §159.15 provide specific tax exemption for "projects" financed through the issuance of revenue bonds such as those involved in the case sub judice. Further, the word "projects" under both statutes is defined to include any and all "properties, rights and easements" in and to the physical facilities so financed.

The DOR asserted and the Trial Court essentially held that above-quoted tax exemption statutes do not apply to private leasehold interests, such as those involved herein. Further, the Circuit Court ruled that, in any event, §196.199, Fla. Stat., represents "the latest, more specific expression" of the Florida Legislature. We disagree. No Florida appellate court has yet considered the possible application of §125.019 (or §159.15) with respect to the taxation of private leasehold interests in revenue bond projects. To that extent, this is a case of first impression. The Third District entirely ignored the issue.

§125.019 and §159.15 were reenacted by the Legislature, along with other tax exemption statutes, in Chapter 73-327 of the Laws of Florida. All of the exemption statutes set forth therein were amended to preclude their application to the corporate income tax under Chapter 220 of the Florida Statutes. In addition, however, said reenactment included the following additional language which was incorporated into §159.31 (i.e. Part II of Chapter 159, entitled the "Florida Industrial Development Financing Act") and §159.50 (i.e. Part III of Chapter 159, entitled "Industrial Development Authorities"); §159.31 providing in part that:

> Nothing in this section, however, shall be construed as exempting from taxation or assessments the leasehold interest of any lessee in any project ... and if any project ... shall be occupied or operated by any private corporation ...

> the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately-owned property.

§159.50 similarly provides in relevant part as follows:

> Nothing in this section, however, shall be construed as exempting from taxation or assessments the leasehold interest of any lessee in any project or any other property or interest owned by any lessee.

The conspicuous absence of the foregoing language in §125.019 and §159.15, relating to "revenue bond projects", clearly reveals the intent of the Legislature to include leasehold interests in revenue bond projects within the operation and scope of these statutory tax exemptions. It is well settled that the acts and omissions of the legislative branch will not be treated by the courts as meaningless. See Carlile v. Game and Fresh Water Fish Comm'n., 354 So.2d 362 (Fla. 1978); Armstrong v. City of Edgewater, 157 So.2d 422 (Fla. 1963); Florida State Racing Commission v. Bourquardez, 42 So.2d 87, 90 (Fla. 1949); Raulerson v. General Finance Corp., 350 So.2d 1111 (1st DCA, 1977); Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (1st DCA, 1963); James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 657 (3rd DCA, 1962); and Florida Industrial Com'n. v. National Trucking Co., 107 So.2d 397 (1st DCA, 1958). The act of the Legislature in excluding certain language from the provisions of one statute which is expressly included in another, both of which statutes are adopted at the same time, must be regarded by the Court as intentional. (See cases cited supra) Further, in this connection, the Court must read all portions of Chapter 73-327 in pari materia in order to determine the true legislative intent. See e.g. State v. Gale Distributors, Inc.,

349 So.2d 150 (Fla. 1977); Major v. State, 180 So.2d 335 (Fla. 1965); Sanders v. State, 46 So.2d 491 (Fla. 1950); State v. Sullivan, 43 So.2d 438 (Fla. 1949); and State v. Nourse, 340 So.2d 966 (3rd DCA, 1976).

Based upon the foregoing, the Taxing Authorities assert that §125.019 provides specific tax exemption for the Leasehold Interests which are the subject matter of this action. There is no question but that the Legislature intended the interests of such Lessees to be exempt by virtue of (1) the all-inclusive definitional provisions contained in Chapter 125, and (2) the intentional omission by the Legislature in such statute (as well as §159.15) of language similar to that found in companion §159.31 and §159.50. As earlier noted, the latter tax exemption statutes were reenacted simultaneously with §125.019 and §159.15, at which time the Legislature could have easily inserted identical language requiring the taxation of leasehold interests. To the contrary, however, the Legislature intentionally refrained from doing so.

The Circuit Court in this case further stated in the Final Summary Judgment that §125.019 is inapplicable because "the subsequently enacted provisions of §196.199, F.S. (1979) represent the latest, more specific expression of the will of the Florida Legislature with respect to the requirements of exempting ... leasehold interests in governmentally owned property held by private lessees."

In essence, the Trial Court concluded that §196.199 superseded any legislative intent to grant leasehold tax exemptions under §125.019. The Taxing Authorities urge, however, that such an interpretation by the Trial Court is erroneous.

It is well settled that where statutory provisions appear contradictory, it is the duty of the judiciary to adopt, if possible,

a construction which harmonizes and reconciles those provisions. See e.g. Woodgate Develop. v. Hamilton Inv. Trust, 351 So.2d 14 (Fla. 1977); G.W.M. v. State, 391 So.2d 738 (4th DCA, 1980); and City of Indian Harbor Beach v. City of Melbourne, 265 So.2d 422 (4th DCA, 1972). Further, the same rule prevails despite the fact that the statutes under consideration were not enacted at the same time. See e.g. Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981); District Sch. Bd. of Lake City v. Talmadge, 381 So.2d 698 (Fla. 1980); Mann v. Goodyear Tire and Rubber Company, 300 So.2d 666 (Fla. 1974); and City of Coral Gables v. Board of Public Instruction, 313 So.2d 92 (3rd DCA, 1975).

The two statutes here under consideration (i.e. §125.019 and §196.199) are not irreconcilably repugnant and can be read in pari materia. We note that §196.199(6) specifically provides that "no exemption granted before June 1, 1976, shall be revoked ... if such revocation will impair any existing bond agreement." The Taxing Authorities urge that such reference contemplates the co-existence of the specific revenue bond exemption statute codified as §125.019 (as well as §159.15). No compelling reason exists to conclude that these statutes cannot operate co-extensively. The revenue bond exemption statute, §125.019, inherently contemplates that the underlying "project" must serve a public function or purpose. Otherwise, the revenue bonds therein authorized cannot be judicially validated. The question then becomes whether or not the "public purpose" necessary to support a revenue bond issue is conclusive as to the availability of a tax exemption under §125.019 (or §159.15). The Board submits that the answer to this question is negative. (See additional dis-

cussion under Point III-B above.) However, if the private lessee performs an essential function in the nature of a public utility which the government would otherwise be compelled to perform, then the "public purpose" requirements of the revenue bond exemption statute, §125.019 (and §159.15), should be deemed satisfied. In such case, the private lessee is effectively performing a vital governmental function as the agent for the governmental unit owning the property. In the instant case, that function consists of operating a vital mass transportation system located at the Miami International Airport. All of the Lessees involved herein are either airlines or entities providing vital support services such as fuel, overhaul, repair and maintenance facilities. Such activities by necessity constitute the essence and foundation of the mass transportation system, without which the entire purpose of the airport and related bond issues would be nullified. Such would not be the case, however, with other non-aeronautical lessees, such as restaurants, duty-free shops, gift shops and the like. A clear distinction can be made as to such non-aeronautical lessees for purposes of applying the specific revenue bond exemption statute. In conclusion, the Taxing Authorities urge that the Trial Court erroneously held that §196.199 represented the latest expression of the Legislature and thus superseded §125.019. Both statutes can be read in pari materia and should have been so interpreted. Courts must assume that later statutes were enacted with knowledge of prior existing laws, and favor the construction that gives a field of operation to both rather than construe one statute as being meaningless or repealed by implication. See e.g. Littman v. Commercial Bank & Trust Co., 425 So.2d 636 (3rd DCA, 1983).

CONCLUSION

Based upon the foregoing, the Board submits that the Trial Court erred in entering the Summary Final Judgment which was the subject of appeal to the Third District. Further, the Third District not only perpetuated but compounded the errors committed by the Trial Court. The Board requests this Court to reverse the decision of the Third District and remand this cause for further proceedings in accordance herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner, Dade County Property Appraisal Adjustment Board, was mailed this 7th day of March, 1985, to: J. TERRELL WILLIAMS, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capital, LL04, Tallahassee, Florida 32301; DAVID LINN, ESQ., Assistant General Counsel, The Department of Revenue, Post Office Box 6668, Tallahassee, Florida 32301; JAMES KRACHT, ESQ., Assistant County Attorney, 1626 Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130; DARREY A. DAVIS, ESQ., Steel, Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131; and JOSEPH A. JENNINGS, ESQ., Kimbrell, Hamann, Jennings, Womack, Carlson & Kniskern, P.A., 900 Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131.

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