OA 5-7-85 047

FILED
SID J. WHITE
APR 24 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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.

REPLY BRIEF OF PETITIONER, DADE COUNTY PROPERTY APPRAISAL ADJUSTMENT BOARD

STEVEN A. SCHULTZ, ESQ.
LAW OFFICES OF STEVEN A. SCHULTZ, P.A.
Attorney for Petitioner, Dade County
Property Appraisal Adjustment Board
1200 Republic National Bank Bldg.
150 S.E. Second Avenue
Miami, Florida 33131
Telephone: (305) 358-2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES (Continued):

STATUTES:

POINT I

THE PAAB DID NOT REMOVE A CLASS OF PROPERTY FROM THE TAX ROLLS AND THE DISTRICT COURT DID NOT SO RULE.

In the Department of Revenue's (hereinafter the "DOR") Statement of the Case and Facts, as well as its Summary of Argument and under Point I of its Answer Brief, it is asserted that the Respondent, Dade County Property Appraisal Adjustment Board ("PAAB"), granted "across-the-board" exemptions to the airline and related Leasehold Interests as a "class of property". In connection therewith, the DOR cites the opinion of this Court in Spooner v. Askew, 345 So.2d 1055 (Fla. 1977), wherein the Gadsden County Board of Tax Adjustment reduced the 1973 assessment roll involved in that case "by 30% based on the Board's conclusion that lands classified on the County's tax roll ... were assessed considerably higher than the lands of like classification and value on the tax rolls of certain neighboring counties."

At page 14 of its Answer Brief, the DOR states that the actions of the PAAB in this case "are comprehensive class related actions exceeding the limited authority of the Board to hear individual petitions and correspondingly to adjust individual assessments ...."

Finally, at page 15 of the Answer Brief, after again quoting the Spooner case, supra, the DOR summarizes by stating that "this case presents a rather unique situation where an adjustment board exempts or reduces the value of a category or class of property and the property appraiser declines to challenge the adjustment board decisions ...."

With respect to the foregoing, the PAAB submits that the factual representations made by the DOR to the effect that the PAAB herein granted "across-the-board" exemptions to a "class or species

of property" (i.e. private leasehold interests in governmentally-owned property) is absolutely unsupported by the record. In fact, the contrary is true. The PAAB held individual hearings with respect to each taxpayer and rendered separate written decisions in each case. Such written decisions were produced in the Trial Court at the request of the DOR and are currently in its possession. See also the Trial Court's "Summary Final Judgment" (at page 2), wherein it is recognized that the PAAB held hearings on separate petitions filed by taxpayers.

The DOR's Answer Brief represents the first time in this case that any allegations have been made which suggest that the PAAB granted "blanket" exemptions to the subject leaseholds. No such allegations were made at the Trial Court level or on appeal to the District Court.

Further, we point out that in the instant case, the PAAB actually denied exemption to various taxpayers holding leasehold interests at the Miami International Airport. The 26 taxpayers which were ultimately granted exemption by the PAAB were only commercial airlines and other entities providing direct aeronautical support services to such airlines (e.g. fuel, repair and maintenance facilities). All other leaseholds (i.e. a total of 65) held by taxpayers providing non-aeronautical services such as restaurants, duty-free shops and the like were denied exemption under the authority of Walden v. Hillsborough County Aviation Authority, 375 So.2d 283 (Fla. 1979).

The DOR has at all times been aware of the foregoing facts. Therefore, any efforts made by the DOR in its Answer Brief (particularly in the Statement of Facts and under Point I) to convey the notion that the PAAB acted on an "across-the-board" basis in granting the

exemptions in this case, as opposed to a separate and individual case by case basis, constitutes an absolute misrepresentation to this Court.

In conclusion, the PAAB submits that since the factual basis upon which the DOR relies under Point I of its Answer Brief is fallacious, the legal principles which the DOR asserts as applicable thereto simply do not apply.

POINT II

THE VARIOUS LESSEES ARE INDISPENSABLE PARTIES AND ARE DENIED DUE PROCESS UNDER THE DISTRICT COURT'S RULING.

Under Point II of its Answer Brief, the DOR states that its primary statutory authority in initiating this action was §195.092(1) of the Florida Statutes. That statute provides in relevant part as follows:

> The Department of Revenue shall have authority to bring and maintain such actions at law or in equity by mandamus or injunction, or otherwise, to enforce the performance of any duties of any officer or official performing duties with relation to the execution of the tax laws of the state, or to enforce obedience to any lawful order, rule, regulation, or decision of the Department of Revenue lawfully made under the authority of these taxing laws.*

The DOR further asserts that the above-quoted provision does not expressly or implicitly require that any or all of the owners of property potentially affected by such legal actions be joined as parties defendant. The PAAB responds by stating that

---

* In this Reply Brief, emphasis is supplied unless otherwise stated.

neither did the statute under which the DOR operated in the case of Hollywood Jaycees v. Department of Revenue, 306 So.2d 109 (Fla. 1975). In that case, §193.122(1) (1973) provided the DOR with authority to reverse the decisions of property appraisal adjustment boards without explicitly requiring the joinder of the affected taxpayer. In the Hollywood Jaycees case, the DOR did exactly that, and unilaterally reversed a decision of the property appraisal adjustment board granting an exemption to the taxpayer therein. No hearing was held at which time the affected taxpayer was afforded an opportunity to challenge the revocation of the subject tax exemption. This Court quashed the action of the DOR on grounds that the same violated principles of due process.

The instant case is identical to Hollywood Jaycees in that the Lessees involved herein obtained and have enjoyed a tax exemption since 1979 by action of the local taxing authorities. Here, the DOR has resorted to a Circuit Court action in order to cause the revocation of such tax exemptions without the joinder of the affected taxpayers. The fact that §195.092(1) does not explicitly require the joinder of such taxpayers, does not mean that principles of due process do not so require. This Court decided that such was the case under former §193.122(1) and the PAAB herein asserts that the same principles apply with respect to §195.092.

The DOR further asserts under Point II of its Answer Brief that it also has essentially "stepped into the shoes" of the Property Appraiser under §194.032(6)(a)3 of the Florida Statutes. That section provides that the DOR can, under certain circumstances, request the property appraiser of any county to file suit against a property appraisal adjustment board to "prohibit continuation of

the violation of the law or administrative rules and for a mandatory injunction to restore the tax roll to its just value ...."

In this case, the DOR in fact requested the Defendant Property Appraiser to file suit against the PAAB but the Property Appraiser refused to do so. The DOR now asserts that in light of such refusal, it somehow has succeeded to the Property Appraiser's position under that statute. The DOR further theorizes that once it has succeeded to the Property Appraiser's position under §194.032(6)(a)3, then the affected taxpayers can independently challenge a final judicial decision within 60 days from the rendition thereof. The District Court apparently agreed and so held.

In response to the foregoing arguments, the PAAB simply states that the statute relied upon obviously does not provide for the DOR to assume the status of a property appraiser refusing to file suit thereunder. The statute is clear and unamgibuous. The Property Appraiser alone has the power to file suit thereunder and he has no obligation to do so, despite the request of the DOR. Accordingly, §194.032(6)(a)3 is simply not applicable in this case, and the DOR's attempt to come within the purview thereof is without merit. The District Court's ruling to the contrary is erroneous.

In connection with the foregoing, the DOR further cites certain cases for the purported proposition that since the taxpayer is given a subsequent right to file suit to contest an altered tax assessment under §194.032(6)(a)3, that the same kind of theory should prevail in this case. In short, we respond by reiterating that said statute simply does not apply in this proceeding and any abstract discussion regarding the possible application of that statute herein is entirely inappropriate.

The fact remains that in the event of any subsequent litigation arising out of this case, the affected taxpayer/lessees will no doubt challenge the validity of any judicial decree revoking a previously granted tax exemption without notice or hearing.

Under Point II of the DOR's Answer Brief, it refers to §195.096 and §195.097 of the Florida Statutes, which grant authority to the DOR to take certain actions against property appraisers in connection with adjusting classes or strata of property on assessment rolls. Said statutes require in depth studies on a mass basis, as well as various statutory notices; and in 1979, a special appellate hearing before the now defunct assessment administration review commission under former §195.098 of the Florida Statutes. None of these statutes is applicable to the case at bar or the circumstances involved herein. None of the notice requirements, investigations, audits or appeals described in said statutes have been complied with or have any remote relationship to the instant case.

The only statutory provision relevant to the DOR's authority to review and approve the assessment rolls in this case is §193.114(5). The DOR in fact approved the assessment rolls involved herein and the PAAB hearings commenced upon such approval, pursuant to §193.114(5).

The review procedures set forth in §195.096 and §195.097 of the Florida Statutes, which are cited by the DOR for reasons unknown to the PAAB, are totally irrelevant to this case, and were never relied upon by the DOR either administratively or in the Trial Court. Accordingly, to attempt to further rebut the possible application thereof would serve no purpose, other than to confuse an already complicated case.

Finally, we note with interest that the DOR vigorously contends that since it is here dealing with a "class or strata of property", it should not be compelled to join the affected taxpayers as indispensable parties. It extrapolates the 26 taxpayers involved in this case to the possibility of "thousands of owners" being involved in other cases. Yet, at the same time, the DOR recognizes that even under the District Court's ruling, it will eventually be required to defend individual suits filed by each of the taxpayers involved herein. How is it possible that joining such taxpayers in this proceeding would constitute an impossible burden, but defending separate suits later would not?

POINT III

THE PAAB AND PROPERTY APPRAISER WERE NOT ESTOPPED FROM ARGUING THE EXISTENCE OF FACTUAL ISSUES IN THE TRIAL COURT IN OPPOSITION TO THE DOR'S MOTION FOR SUMMARY JUDGMENT.

Under Point III of its Answer Brief, the DOR asserts that the PAAB and the Property Appraiser (herein collectively the "Taxing Authorities"), should have been estopped in the Trial Court and on appeal from arguing the existence of genuine issues of material fact in opposition to the DOR's motion for summary judgment. Such assertion is based on grounds that since the Taxing Authorities simultaneously filed a Joint Motion for Summary Judgment alleging that there were no genuine issues of material fact as to their motion, they are thereby precluded from taking a contrary position with respect to the DOR's motion. In support of this theory, the DOR cites 40 Fla. Jur. 2d, Pleadings, §64 and notes the general rule that "an admission made in a pleading operates to affect a species of estoppel."

First, the PAAB responds by pointing out that the "Joint Motion for Summary Judgment" filed by the Taxing Authorities does not constitute a "pleading" under the Florida Rules of Civil Procedure. See Rule 1.100(a); and Guerdon Industries, Inc. v. Durrenberger, 359 So.2d 910 (1st DCA, 1978).

Secondly, we direct the attention of the Court to the author's comment appearing in Florida Statutes Annotated under the Summary Judgment Rule 1.510 (at Page 52), which states in relevant part as follows:

> "The fact that both parties move for summary judgment does not establish that there is no genuine issue of fact. Although a party may on his own motion assert that, accepting his legal theory, the facts are undisputed, he may be able and should be allowed to show that if his opponent's theory is adopted, a genuine issue of fact exists."

The above-quoted commentary is further supported by applicable case law. See e.g. General Dev. Utilities, Inc. v. Davis, 375 So.2d 20 (2nd DCA, 1979); Spear v. Martin, 330 So.2d 543 (4th DCA, 1976); Francis v. General Motors Corporation, 287 So.2d 146 (3rd DCA, 1974); and First Mortgage Corporation of Stuart v. deGive, 177 So.2d 741 (2nd DCA, 1965).

In the instant case, the DOR moved for summary judgment based on certain grounds. The Taxing Authorities, however, filed a Joint Motion for Summary Judgment based upon entirely separate and distinct issues. In the Trial Court, the Taxing Authorities argued the existence of genuine issues of material fact as to the DOR's motion. That position was clearly permissible and the Taxing Authorities were not estopped from so arguing, simply because

they filed a cross motion for summary judgment based on other separate and distinct grounds.

The Trial Court and District Court did not rule that the Taxing Authorities were estopped from arguing the existence of genuine issues of material fact as to the DOR's motion for summary judgment. In this regard, the lower Courts were correct.

POINT IV

PRIOR APPELLATE COURT DECISIONS HAVE NOT ELIMINATED THE "PUBLIC PURPOSE" TEST UNDER §196.199.

The DOR, in its Answer Brief, asserts under Point III, that the Appellate decisions since Dade County v. Pan American World Airways, 275 So.2d 505 (Fla. 1973), have so dramatically changed the law in this area, that no "commercial, profit-making" lessee can any longer qualify for tax exemption. Relying on Williams v. Jones, 326 So.2d 425 (Fla. 1976) and subsequent cases, the DOR alleges that the only critical inquiry is whether or not the lessee is "profit-making"; and that the actual function performed by said lessee is irrelevant. The Trial Court, accepting this view, granted the DOR's motion for summary judgment.

The PAAB disagrees with the foregoing interpretation, and submits that it is still necessary to determine the functional character of the particular lessee. If, as here, the function served by the lessee is in the nature of a public utility, then we believe that the statutory criteria under §196.199 is satisfied. In the instant case, the services performed by the Lessees constitute the essence of a mass transportation system which would have to be directly operated by the government in the absence of such Lessees. Truly, the Lessees

herein are acting as agents for the government in connection with the operation of the mass transportation system located at Miami International Airport.

As stated in the Initial Brief, since the Pan American case, no appellate court has specifically dealt with leasehold interests held by airlines or other entities furnishing vital air support services. The DOR indicates under Point III of its Answer Brief that such assertion is totally erroneous. It points to two Appellate Court per curiam affirmances in the cases of Butler Aviation - Palm Beach, Inc. v. Reid, 375 So.2d 590 (4th DCA, 1979) and Hudson v. Brown, 363 So.2d 582 (1st DCA, 1978). These cases apparently involved fixed base operators located in Palm Beach County and Leon County, which primarily serviced privately-owned aircraft (i.e. as opposed to scheduled airlines serving the general public). Such facts appear from affidavits filed in the trial courts in those cases, which affidavits are also included in the Appendix to the Answer Brief filed by the DOR herein. Of course, the Taxing Authorities were not parties to either the Butler Aviation or Hudson case, and can rely only upon the per curiam decisions rendered by the respective Appellate Courts therein. Pursuant to Florida law, however, a per curiam decision without opinion affirming a decree does not establish any point of law; and there is no presumption that the affirmance was on the merits. See e.g. Berek v. Metropolitan Dade Cty., 396 So.2d 756 (3rd DCA, 1981); Goldberg v. Graser, 365 So.2d 770 (1st DCA, 1979); Acme Specialty Corporation v. City of Miami, 292 So.2d 379 (3rd DCA, 1974); Schooley v. Judd, 149 So.2d 587 (2nd DCA, 1963), rev'd on other grounds, 158 So.2d 514 (Fla. 1963).

Accordingly, the PAAB reiterates that no Appellate case has discussed the application of the statutory leasehold tax exemption under §196.199 to commercial airlines or directly related support services subsequent to the Pan American case, supra. We urge that such functions are so essential to the health and welfare of the public that they in fact satisfy the statutory exemption requirements, even under the case law evolving since Pan American.

Finally, we again point out that if, as the DOR asserts and the Trial Court held, the only critical inquiry under §196.199 is to determine whether or not the Lessee is "profit-making", then that statute would be rendered meaningless and inoperable. By its very terms, it applies to "non-governmental lessees" which must contemplate "commercial, profit-making" enterprises. See also, Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878 (1978).

POINT V

THE SUMMARY JUDGMENT CANNOT BE LAWFULLY IMPLEMENTED BY THE PROPERTY APPRAISER.

In its Initial Brief, under Point V, the PAAB asserts that the Summary Judgment entered by the Trial Court cannot be lawfully implemented by the Property Appraiser and Tax Collector. In connection therewith, the PAAB pointed out that the judiciary has no inherent or independent power to render a tax assessment. Consequently, the Trial Court was empowered only to order the appropriate public official, in this case, the Property Appraiser, to assess the property retroactively for the tax year 1979. However, the sole statutory authority available to the Property Appraiser under which he can take such action is the so-called "back assessment" statute, §193.092. Unfortunately,

that statute cannot now be relied upon by the Property Appraiser, whether or not supported by the Trial Court's order, since the three-year limitation period contained therein has expired and, further, the subject Leasehold Interests did not "escape taxation" as that phrase has been judicially defined.

The DOR, however, asserts that nevertheless "a court has the legal authority to fashion a judicial remedy" to accomplish the desired result as was done in this case. We disagree. A court may not fashion a remedy which extends beyond its judicial power. The Trial Court's order herein is tantamount to the exercise of the legislative power to tax. The District Court's affirmance in this regard, perpetuates that error.

In further support of the DOR's contention, it cites various cases involving taxpayers challenging assessments, which cases extended for a period of more than three years prior to their final resolution. In each of such case, however, we note that the taxpayer was a party thereto, and therefore, the three-year back-assessment limitation would have been tolled (i.e. had the back-assessment statute applied). We further note that said cases do not in fact involve the exercise of the power of the Property Appraiser to back-assess under §193.092, but were simply cases in which taxpayers challenged various tax assessments. The instant case is entirely different, since it involves a determination of substantive legal rights of taxpayers who are not parties to the proceeding and essentially constitutes a back-assessment as to those taxpayers.

The DOR further cites the case of Higgs v. Property Appraisal Adjustment Board of Monroe County, 411 So.2d 307 (Fla. 3rd DCA, 1982), for the apparent proposition that the taxpayer is not an

indispensable party to a proceeding against the county property appraisal adjustment board. We note, however, that the Higgs case was initiated by the Monroe County Property Appraiser under §194.032(6)(a)3, which is a special statute authorizing such action by a property appraiser against a property appraisal adjustment board. Said statute specifically names the property appraiser as party-plaintiff, and may be invoked only by him for certain purposes and after compliance with strict statutory procedures. The case sub judice is entirely different in various respects. First, the Property Appraiser is not the Plaintiff herein, but rather a Defendant. Secondly, the statutory procedures set forth in §194.032(6)(a)3 were not followed. Finally, the Higgs case was directed at no specific taxpayer, whose assessment or exemption was in immediate jeopardy as a result of the Court's ruling.**

Based upon the foregoing, the PAAB maintains that the Trial Court's summary judgment, as affirmed by the District Court, cannot be lawfully implemented by the Property Appraiser and the Tax Collector (who is also not a party).

POINT VI

THE SUBJECT LEASEHOLD INTERESTS ARE EXEMPT UNDER §125.019 OF THE FLORIDA STATUTES.

The DOR, under Point VI of the Answer Brief, asserts that §125.019 of the Florida Statutes which exempts "projects" acquired and/or constructed through the issuance of revenue bonds, is not applicable to the subject Leasehold Interests.

The PAAB contends otherwise. First, the definition of "project" for purposes of Chapter 125 includes "all property, rights,

---

** The PAAB parenthetically submits that even if §194.032(6)(a)3 were to apply, the affected non-party taxpayer must nevertheless be assessed within the three-year back-assessment period.

easements and franchises relating to any such project" and would therefore contemplate a leasehold interest. Secondly, as noted in the Initial Brief, §125.019 was reenacted in 1973, along with several other bond related statutes, at which time the Legislature specifically required the taxation of leasehold interests in such other statutes, but not §125.019. The case of Mallard v. Tele-Trip Co., 398 So.2d 969 (1st DCA, 1981), cited by the DOR in its Answer Brief, is not analogous to the instant case. The taxpayer in Mallard contended that §624.520(1) (1971), providing for a preemption to the state of the power to levy excise taxes also applied to ad valorem taxes. The taxpayer then concluded that such preemption precluded the Duval County Property Appraiser from assessing an ad valorem tax against its leasehold interest located at the Jacksonville International Airport. The Court essentially held that §624.520(1) only applied to excise taxes and not ad valorem taxes; and confirmed the property appraiser's power to render the assessment therein. In this case, however, the PAAB is relying on §125.019, which does in fact apply to ad valorem taxes. No appellate court has yet considered the possible application of §125.019 to leasehold interests in revenue bond projects; and, to that extent, this case is one of first impression.

The DOR further denies the applicability of §125.019 because it is purportedly repugnant with §196.001 and §196.199, the "latest and more specific expressions of the legislature". The PAAB urges, however, that no such repugnancy exists and the same should be read in pari materia. In this connection, the PAAB relies upon the relevant discussion set forth under Point VI of the Initial Brief.

In addition, however, we further point out that both §196.001 and §196.199, respectively, state that private leasehold interests in governmental property are subject to taxation unless otherwise exempted by law. §125.019 specifically provides for such exemption and therefore is not repugnant, but is entirely consistent with §196.001 and §196.199.

Finally, the DOR asserts for the first time on this appeal that §125.019 violates Article VII, Section 10(c) of the Florida Constitution. The PAAB disagrees. Said constitutional provision is not self-executing and therefore, the legislature has the discretion to refrain from levying an ad valorem tax against leasehold interests in revenue bond projects. See Hertz Corporation v. Walden, 299 So.2d 121, 123 (Fla. 1974). In addition, the DOR has no standing to challenge the constitutionality of the legislative act in question (i.e. §125.019); and certainly, may not raise the issue for the first time on this appeal. See e.g. State v. Kirkman, 27 So.2d 610 (Fla. 1946); Steele v. Freel, 25 So.2d 501 (Fla. 1946); and Mariani v. Schleman, 94 So.2d 829 (Fla. 1957).

Respectfully submitted,

LAW OFFICES OF STEVEN A. SCHULTZ, P.A.
1200 Republic National Bank Bldg.
150 S.E. Second Avenue
Miami, Florida 33131
Telephone: (305) 358-2026

By: _____
Steven A. Schultz, Esq.
Attorney for Dade County
Property Appraisal Adjustment
Board

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner, Dade County Property Appraisal Adjustment Board was mailed this 22nd day of April, 1985, to: J. TERRELL WILLIAMS, ESQ., Assistant Attorney General, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32301; DAVID LINN, ESQ., Assistant General Counsel, Department of Revenue, The Carlton Building, Tallahassee, Florida 32301; JAMES KRACHT, ESQ., Assistant County Attorney, 1626 Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130; DARREY A. DAVIS, ESQ., 4000 Southeast Financial Center, Miami, Florida 33131; and JOSEPH A. JENNINGS, ESQ., 900 Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131.

Steven A. Schultz, Esq.