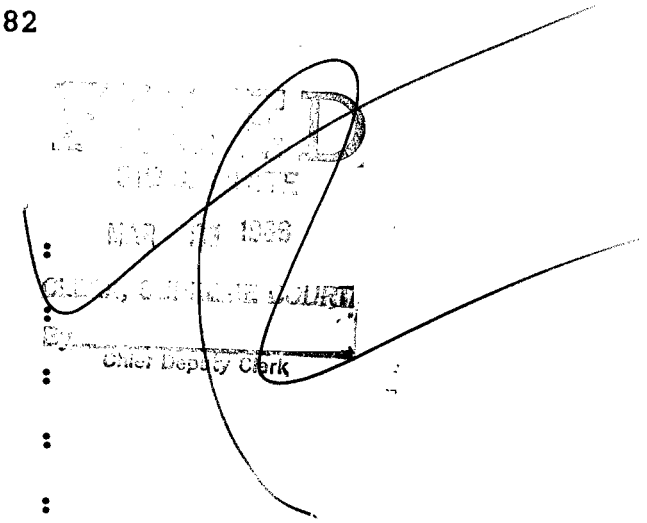
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,682



WILLIAM MARKHAM, as Broward County Property Appraiser,

Petitioner,

-vs-

NEPTUNE HOLLYWOOD BEACH CLUB, et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

This is a petition for discretionary review based on express and direct conflict with a decision of another District Court of Appeal on the same point.

Petitioner, William Markham, is the Broward County Property Appraiser. The Complaint alleges that the Respondents compose three groups: (a) developers who own unsold time-share estates, vacant land, whole-unit condominium parcels, and non-time share real estate; (b) condominium associations representing the interests of members of those associations, and (c) managing entitities, as required by Section 721.05(8), Florida Statutes, who are the entities responsible for operating the time-share plans alleged to be present in some of the properties. As used herein, the term "respondents" will refer to all three groups of respondents. Other parties to this appeal who are nominally respondents but whose interests coincide with Petitioner's are Joseph Rosenhagen, Broward County Revenue Collector, and Randy Miller, Executive Director of the State of Florida, Department of Revenue.

Respondents filed a Complaint on March 1, 1984, in the Circuit Court of the Seventeenth Judicial Circuit, Broward County. Count I was a statutory action seeking to contest tax assessments for the year 1983, brought under Chapter 194, Florida Statutes. The remaining counts sought declaratory relief that Section 192.037, Florida Statutes 1982, is unconstitutional.

Despite its impressive length, the Complaint fails to allege that the action was filed within sixty days of the date the 1983 Broward County tax rolls were certified for collection, as

required by Section 194.171(2), Florida Statutes. Respondents furthermore failed to comply with Section 194.171(3), Florida Statutes, in that they did not attach receipts from the Revenue Collector for the amount of taxes which in good faith were admitted to be due and owing. Subsection (6) of Section 194.171, Florida Statutes, provides that subsections (2) and (3) are jurisdictional, and that no court shall have jurisdiction in ad valorem tax cases until both the requirements of subsections (2) and (3) are met.

The Exhibits which are part of the Complaint for all purposes, show that the properties whose assessments are being contested in the case of the Neptune Hollywood Beach Club are Condominium Units 101 through 105, Building 1; Units 201 through 205 in Building 1; Units 106 through 108, 206 through 208, and 301 in Building 2; Units 109 through 112, 209 through 212 in Building 3; a parcel of real property described as Lots 21 and 22, Block 9, Hollywood Beach First Addition, Plat Book 1, Page 31, Broward County Public Records, and an assessment in the amount of $1,010 for residential personal property at the same location. (R-11-38)

Exhibit "B" indicates that Respondent Investrum, Inc. is the owner of a number of condominium units in Enchanted Isle Resort.

Exhibit "C" indicates that Hollywood International is the owner of all units in Hollywood Beach Hotel and Towers Condominium, and that the same entity is assessed for a parcel of real estate known as Lots 1, 2, 3 and the Broadwalk in Hollywood Beach Resubdivision, Block "E", according to the Plat thereof, recorded in Plat Book 7, Page 55, Broward County Public Records.

Isaac Gamel is alleged to be the owner of Tracts 62 and 63 less the North 500 feet, and less that portion in Emerald Isles West Condominium in the Everglades Land Sales Company Subdivision. Hollywood International is alleged to own Lots 1 through 5 and 8 through 11, Block 9 of Hollywood Beach, Plat Book 1, Page 27, Broward County Public Records.

Exhibit "D" to the Complaint appears to be a bill for commercial personal property assessed to Native Sun Motel, c/o Stanco Development Corp. The first Exhibit to the Complaint which appears to relate to time-share property is Exhibit "D", for all unit weeks in Native Sun Condominium Time Share, assessed at $3,056,680. The parties in the suit below which represented the Native Sun filed a voluntary dismissal on March 21, 1984. (R-257)

Exhibit "E" is for commercial personal property at Driftwood Beach Club. The second and third tax notices are for Lots 3-7 and 20-23, Lauerdale by the Sea Subdivision, Plat Book 6, Page 2, Broward County Public Records.

Candlelight Inn of Deerfield Beach, Ltd.; Avalon Condominium Association, Inc., Transco Financial Group, Ltd. and La Costa Beach Club Resort Condominium Association, Inc. were granted leave to intervene, but filed no pleadings in the trial Court.

The Property Appraiser filed a Motion to Dismiss the Complaint. (R-250-254) While numerous grounds were alleged, the primary grounds were that the Complaint failed to affirmatively allege that the action was brought within the sixty-day non claim period provided in Section 194.171(2), Florida Statutes, and for failure to make a "good faith payment" of the taxes admitted to be

due and file the receipt with the Complaint, as required by Section 194.171(3), Florida Statutes.

At a hearing on April 2, 1984, the trial Court granted the Property Appraiser's Motion to Dismiss, granting Respondents twenty days in which to file an amended Complaint. (R-273) On April 3, 1984, Respondents filed a Notice of Appeal to the District Court of Appeal, Fourth District, incorrectly characterizing the nature of the order appealed from as a final order.

At this juncture, Respondents substantially muddied the legal waters. Without seeking leave from the Fourth District Court of Appeal, Respondents submitted an Amended Order to the trial Court, which signed the same. (R-281) This Order granted the Property Appraiser's Motion to Dismiss, with prejudice! The order was requested and prepared by Respondents' counsel and signed by the trial Court on April 17, 1984.

The Property Appraiser feared that the trial Court had inadvertently committed error in granting the motion to dismiss with prejudice, since there was really no bar against Respondents' seeking declaratory relief concerning the constitutionality of Section 192.037, Florida Statutes, so long as the suit did not also seek to contest the assessments of specific properties. Accordingly, the Property Appraiser moved for rehearing of the Amended Order. (R-284-5) This motion was denied on April 30, 1984.

Respondents' appeal to the District Court of Appeal, Fourth District, resulted in a decision which reversed the order of dismissal, holding that the sixty-day time limit is only

applicable to those cases in which the assessment is challenged as being "voidable":

> The trial court dismissed plaintiffs' complaint because it was filed after the sixty-day limitation period which section 194.171(2), Florida Statutes, imposes on the filing of challenges to tax assessments.
>
> However, this sixty-day statute of limitations is applicable only to those cases in which the assessment is challenged as being voidable. It is well established that the limitation period does not apply to the filing of complaints which challenge an assessment as being void or unauthorized. Such challenges can be filed at any time. Lake Worth Towers, Inc. v. Gerstung, 262 So.2d 1 (Fla. 1972); St. Joe Paper Company v. Ray, 172 So.2d 646 (Fla. 1st.DCA 1965) To challenge an assessment as being unconstitutional is to challenge it as being void. Hansen v. Port Everglades Steel Corp., 155 So.2d 387 (Fla. 2nd.DCA 1963). Therefore, the complaint attacking the constitutionality of the assessment is not subject to the sixty-day limitation period. [Neptune Hollywood Beach Club, Inc. v. Markham, 473 So.2d 691 (Fla. 4th.DCA 1985) at 692.]

References to the Record on Appeal shall be "R-(page number)", and to the Appendix to this Brief, "A-(page number)".

STATEMENT OF THE FACTS

Since this case arises on consideration of a Motion to Dismiss, all well-pleaded allegations of the Complaint are treated as true. However, when an exhibit belies the allegations of the Complaint, the exhibit controls.

Paragraph 14 of the Complaint alleges that the Property Appraiser sent out a single tax assessment notice to each Condominium Association encompassing all taxes due from each individual time-share unit owner in the projects being developed by DEVELOPERS/UNIT OWNERS. No Exhibit to the Complaint except the tax bill for Folio 9307 CB 0001, (R-81), gives any indication that

what is being assessed is time-share property. To the contrary, Exhibits "A" and "B" describe whole-unit condominiums; Exhibit "C" describes whole unit condominiums and platted real estate; Exhibit "D" includes tangible personal property, and Exhibit "E" indicates that the assessment includes tangible personal property and platted real estate.

SUMMARY OF ARGUMENT

An action to contest a tax assessment must be filed within sixty days of certification of the assessment sought to be contested. The taxpayer must pay at least the amount of tax admitted in good faith to be due and owing, and file a receipt for that amount with the Complaint. Section 194.171(6), Florida Statutes 1983, first effective for the 1983 tax year, makes these requirements jurisdictional.

A taxpayer may avoid the statute if the assessment is "void". Assessments are "void" only in three limited instances in Florida: 1. The assessment is not authorized by law. 2. The property is not subject to tax. 3. The taxing official has engaged in affirmative wrongdoing. Otherwise, assessments are at best only "voidable". Every presumption in favor of constitutionality of a statute will be indulged in by the Courts. Accordingly, an assessment made pursuant to a statute cannot be simultaneously attacked with a challenge to the constitutionality of that statute on the grounds that the statute is unconstitutional and the assessment hence is "void".

Whatever error was committed by the trial Court in dismissing Respondents' challenge to the constitutionality of Section 192.037, Florida Statutes, with prejudice, was invited by Respondents, and therefore cannot be reviewed on appeal.

POINT I. THE TRIAL COURT CORRECTLY GRANTED THE TAXING AUTHORITIES' MOTION TO DISMISS THE COMPLAINT, WITH LEAVE TO AMEND.

The Complaint filed by Respondents lacks two essential allegations and one essential group of exhibits to properly allege jurisdiction to contest the assessments described in the Exhibits to the Complaint. Respondents specifically alleged in Paragraphs 1, 12 and 13 of the Complaint that it was filed pursuant to Chapter 194, Florida Statutes. (R-2, 3) Section 194.171(2), Florida Statutes, requires the Complaint in an action seeking to contest an assessment to affirmatively allege that the action to contest the assessment is filed within sixty days of certification of the assessment in question. Section 194.171(3), Florida Statutes, requires the Plaintiff to pay to the Revenue Collector of Broward County the amount of taxes admitted in good faith to be due and owing, and to attach a receipt for that amount and file it with the Complaint. Section 194.171(6), Florida Statutes, provides that the requirements of subsections (2) and (3) are jurisdictional. That language was added to the statute by the Legislature in Section 7 of Chapter 83-204, Laws of Florida, in reaction to the Cape Cave decision, infra.

In Coe v. I.T.T. Community Development Corp., 362 So.2d 8 (Fla. 1978), this Court held that the sixty-day provision was not a statute of limitation (which could be waived), but was instead a statute of nonclaim that had to be affirmatively pleaded by the Plaintiff. However, in Cape Cave Corp. v. Lowe, 411 So.2d 887 (Fla. 2d.DCA 1981), rev.den. 418 So.2d 1280 (Fla. 1982), the Second District Court of Appeal held that the predecessor statute,

without subsection (6), was a statute of limitations and not a statute of nonclaim. In Miller v. Nolte, 453 So.2d 397 (Fla. 1984), this Court determined that Section 194.171, Florida Statutes 1981, was indeed a statute of limitation and not a statute of nonclaim. The Legislature's addition of subsection (6) for tax years commencing in 1983 effectively supercedes the Cape Cave and Miller decisions, op.cit.

Respondents' attempt to avoid the operation of Section 194.171, Florida Statutes, was to allege that the assessments were "void". The Exhibits show on their faces that the assessments being contested are not "void". Section 196.001, Florida Statutes, declares that all real and personal property in Florida is subject to taxation unless specifically exempted by law. Exhibits "A" and "B" to the Complaint refer to whole-unit condominium properties. Section 718.120(1), Florida Statutes, requires a separate listing on the tax rolls of each separate condominium parcel. Subsection (3) of that statute requires condominium property divided into fee time share real property to be assessed as provided in Section 192.037, Florida Statutes. Exhibit "C" likewise refers to other than time-share property. Exhibit "D" does seek to contest the assessment of the time share estates at the Native Sun Motel, along with commercial personal property. The Court will recall that a voluntary dismissal was taken as to the Native Sun Motel property. Exhibit "E" refers to more personal property and platted lands in Lauderdale-by-the-Sea subdivision. From the Record on Appeal at R-135, it does appear that the Driftwood Beach Club is a time-share where each owner is conveyed an undivided 1/2,040 interest in platted lots and blocks.

When the time-share scheme is simply a conveyance of an undivided interest in land, it is doubtful whether the Property Appraiser may list the property on the tax rolls except by assessing all undivided interests in land together; Department of Revenue v. Morganwood Greentree, Inc., 341 So.2d 756 (Fla. 1976). Respondents will not be able to explain how these assessments would be rendered "unlawful" or "void". If facts existed about these assessments that would belie the official valuation notices or tax bills, such facts should have been pleaded with specificity in the Complaint.

The lengthy recitiation in the Statement of the Case, supra, as to identification of the properties as other than time-share is important because the Exhibits attached to the Complaint are a part thereof for all purposes, and control when at variance with the allegations of the Complaint. Harry Pepper & Associates, Inc. v. Lasseter, 247 So.2d 736 (Fla. 3d.DCA 1971). Those Exhibits conclusively show that the assessments being contested were not assessments on time share property, except in the case of the Native Sun. The "time share" statute, Section 192.037, Florida Statutes, is simply not applicable to the assessments of all other properties described in the Exhibits to the Complaint. Except for the Native Sun time-share, Respondents have no standing to constitutionally challenge Section 192.037, Florida Statutes, since they are not affected by it as to the specific properties sued upon. Department of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979), City of Cape Canaveral v. Chesnick, 227 So.2d 502 (Fla. 4th.DCA 1969).

Assuming arguendo that the contested assessments somehow

involve time share property, Respondents argue that the assessments are "void", thus excusing them from compliance with Section 194.171, Florida Statutes, based on the following argument:

1. The Property Appraiser scrupulously followed a statute, Section 192.037, Florida Statutes, in listing time share properties.

2. Section 192.037, Florida Statutes is unconstitutional.

3. Therefore, the contested assessments are unconstitutional, and "void".

It is respectfully submitted that this argument fails because it violates countless decisions of this Court to the effect that all statutory enactments of the Legislature are to be presumed to be lawful, and that every presumption will be indulged in in favor of their validity. State ex rel. Shevin v. Metz Construction Co., Inc., 285 So.2d 598 (Fla. 1973), Belk-James, Inc. v. Nuzum, 358 So.2d 174 (Fla. 1978). Only if another court had previously held the statute unconstitutional may a plaintiff in an ad valorem tax suit avoid the limitations statute when the assessments were made completely in accordance with the statute. Respondents effectively seek to have a trial court apply a "presumption of invalidity" to the time-share statute in applying their logic. Such a presumption has never existed in this State.

The decision of the Fourth District herein would seemingly authorize any assessment of real or personal property to be contested, without regard to the requirements of Sec. 194.171, F.S., by simply making the following allegations in the Complaint:

1. Assessments in excess of "just valuation" are contrary

to Art. VII, Sec. 4, Const.Fla. 1968, hence are unconstitutional.

2. To challenge an assessment as unconstitutional is to challenge it as being void. Neptune Hollywood Beach Club v. Markham, 473 So.2d 691 (Fla. 4th.DCA 1985).

3. The subject assessment was higher than "just valuation", hence is unconstitutional and void, and can be attacked without meeting the 60-day nonclaim statute and without tendering any taxes under protest before they become delinquent.

A tax assessment is "void" under three and only three limited circumstances:

1. The assessment is not authorized by law. In Illinois Grain Corporation v. Schleman, 114 So.2d 307 (Fla. 2d.DCA 1959), an assessment was stricken because there was no statutory authority to assess leasehold interests in publicly-owned property. The Legislature fixed this, Sec. 196.001[2], F.S.. In Lake Worth Towers, Inc. v. Gerstung, 262 So.2d 1 (Fla. 1972), this Court held an assessment of improvements to land void when the assessment was made contrary to a statute directing property appraisers not to assess improvements not "substantially completed". Maccabee Investments, Inc. v. Markham, 311 So.2d 718 (Fla. 4th.DCA 1975), rev'd on other grounds, 343 So.2d 16 (Fla. 1977) found an assessment "void" when property should have been exempted under Chapter 196, F.S., but see contra, Dade County v. TAN Airlines, 298 So.2d 570 (Fla. 3d.DCA 1974), cert.den. 305 So.2d 206 (Fla. 1974).

2. The property is not subject to tax. St. Joe Paper Co. v. Ray, 172 So.2d 646 (Fla. 1st.DCA 1965) held movable tangible personal property not physically located within the county not to be taxable. In Colding v. Herzog, 467 So.2d 980 (Fla. 1980), this

Court held that household goods were properly classified by the Legislature as not being subject to taxation. While the Court did not use the word "void", it certainly recognized the possibility that its decision might be so interpreted by others similarly situated by expressly making the decision prospective only. Overstreet v. Ty-Tan, Inc., 48 So.2d 158 (Fla. 1950) is a case where tangible personal property was not brought into Dade County until after the January 1 assessment date. Held, not subject to taxation for that year. The case relied on by the District Court of Appeal, Fourth District, Hansen v. Port Everglades Steel Corporation, 155 So.2d 387 (Fla. 2d.DCA 1963) falls into this category; in that case, it was demonstrated that imported steel was "immune" from taxation under the now-discredited "original package doctrine".

3. The taxing official has engaged in affirmative wrongdoing. In C. D. Utility Corporation v. Maxwell, 189 So.2d 643 (Fla. 4th.DCA 1966), the Property Appraiser improperly and arbitrarily back-assessed tangible personal property. It was held that the property appraiser could not arbitrarily, discriminatorily and capriciously assess real estate as personal property. Adams v. Reid, 396 So.2d 1182 (Fla. 4th.DCA 1981), dealt with the sufficiency of allegations of a Complaint stating that the Property Appraiser singled out a group of condominium apartment owners for increased assessment when other property owners were not tarred with the same brush. If the property owners proved their allegations, the assessments would be void.

In the case at bar, it is obvious that the assessment of the Native Sun time-share property was listed on the tax rolls in

exact compliance with law, e.g., Section 192.037, Florida Statutes, so there can be no claim that the assessments were not authorized by law. The assessment of the Driftwood Beach Club property would not be different with or without the existence of Section 192.037, Florida Statutes, since the developer was conveying undivided interests as tenancies in common to all purchasers. All the other properties described in the Exhibits to the Complaint were either whole-unit condominium parcels, platted lands, or commercial personal property, and not affected by Section 192.037, Florida Statutes. Real estate located in Broward County is subject to taxation, Sec. 196.001, F.S., so there can be no claim that the property was not subject to taxation. There is no allegation that the Property Appraiser engaged in affirmative wrongdoing of the sort involved in the C. D. Utility and Adams cases. The decision of the Fourth District creates a "presumption of invalidity" by allowing a property owner to escape the statutory requirements of contesting an assessment, properly made in accordance with a statute, by simply alleging that a statute is unconstitutional.

Respondents cite six cases in support of their contention that they could ignore Section 194.171, Florida Statutes. In West Virginia Hotel Corporation v. Foster, 132 So.2d 842 (Fla. 1931), the case arose under statutes that provided that tax assessment cases were "in equity" rather than "at law", as at present. The Amended Bill alleged that the hotel was appraised far in excess of its cash value, implying that other property was not, effectively alleging that the Property Appraiser committed an unlawful act in making the assessment. This Court held that the

payment requirement does not apply when the assessment must fall on the grounds of an illegal assessment, or if the tax or assessment be wholly void. This Court pointed out that in the case on which it was relying, there was a lack of statutory authority to assess and levy a tax on the stock of a national bank. Interestingly enough, this Court ordered the tax sale certificates cancelled only after a remand for the parties to determine the amount of taxes which could have been legally assessed, failng which the bill was ordered dismissed.

Respondents next rely on Hackney v. McKenney, 151 So. 524 (Fla. 1933). That case involved a claim of wrongdoing by the Property Appraiser in failing to assess significant amounts of property owned by local residents and appraising non-residents at more than full value. On rehearing, this Court held:

> In this state liability for ad valorem taxes does not depend on a proper assessment of particular property or of all taxable property. ...Whether the complaintant's property was duly assessed or not, it was subject to the statutory lien for all ad valorem taxes that were lawfully collectable against the property, and it was the duty of the complainant to make due return of his property for taxation. If complainant duly made his tax return and discovered taxable property of others was not being duly assessed for taxes, with the result that his taxes would thereby be not to a trifling degree, but substantially, increased, his remedy was upon proper allegations and proofs in an appropriate tribunal, judicial or executive, to require the assessing officers to do their duty. (citation omitted) It was not complainant's privilege to merely call attention of taxing officers to asserted illegal omissions of property from the assessment rolls, and to take no action to enforce his asserted rights until the period for paying taxes had about expired. There was a statutory lien upon his property for all lawful taxes, whether properly assessed or not; and even if judicial relief can be had after the period for voluntary payment of taxes had passed, the complainant should show what amount of taxes is lawfully payable and tender it in proper proceedings. Id. at 530

Respondents' third case is Ranger Realty Co. v. Hefty, 152 So.2d 439 (Fla. 1933), which makes the distinction that when the taxes contested are authorized by law, and the valuation is claimed to be excessive or the assessment is contested based on the alleged failure of the tax assessor to comply with statutory requirements, the tax admitted to be legal must be paid as a condition precedent to judicial review of the assessment under equitable principles.

Respondents' reliance on St. Joe Paper Co. v. Ray, 172 So.2d 646 (Fla. 1st.DCA 1965) is misplaced. That case involved an assessment for tangible personal property (a bulldozer) which St. Joe Paper Company contended was not located in Calhoun County on the January 1 assessment date. Obviously, tangibles must be located within the county to be taxed there, but a factual question was involved. If the property was in fact in the county, then the assessment was "voidable"; if not, it was "void". These questions were left to the finder of fact.

The fifth case cited, Integrated Container Services v. Overstreet, 375 So.2d 1146 (Fla. 3d.DCA 1979), involves a claim that modular shipping containers were not taxable while at rest in Florida between trips. It was held that the action was barred because the plaintiff there did not establish that the subject assessments were void. Therefore, failure to exhaust administrative remedies and failure to sue within the nonclaim period was held to bar the action. Id. at 1149.

Respondents rely on Coe v. I.T.T. Community Development Corp, 349 So.2d 654 (Fla. 1st.DCA 1977). The First District Court of Appeal held that the defense of the statute of nonclaim had to

be raised by affirmative defense and did not need to be pleaded. This Court ruled the exact opposite in reversing, 462 So.2d 8 (Fla. 1978).

The Fourth District Court of Appeal has decided that assessments are not void when the land is admittedly subject to taxation and the assessment authorized by law, although possibly erroneous in amount. Florida East Coast Railway Company v. Reid, 281 So.2d 77 (Fla. 4th.DCA 1973), citing most of Respondents' six cases. No one can seriously contend that platted lots, commercial personal property and condominium units are not subject to taxation, hence the assessments in the case at bar were at most "voidable" rather than "void".

In Millstream Corp. v. Dade County, 340 So.2d 1276 (Fla. 3d.DCA 1976), the requirement of tendering the "good faith" amount of taxes was found to be jurisdictional.

Respondents have sought in this action to contest the assessments without offering to help pay their fair share of the cost of Broward County government.

Finally, the Second District Court of Appeal has correctly decided the issue in Gulfside Interval Vacations, Inc. v. Schultz, 479 So.2d 776 (Fla. 2d.DCA 1985). In that case, a tax assessment challenge was filed as to time-share real property for the year 1983. Suit was filed in May, 1984, long after the 1983 rolls were certified for collection. As in the present case, Count I sought a declaratory decree as to the invalidity of the assessments, while Count II sought to declare Section 192.037, Florida Statutes to be unconstitutional. The taxing authorities' motion to dismiss the complaint for lack of subject matter jurisdiction was granted,

based on Section 194.171(2) and (6), Florida Statutes. The Second District Court of Appeal held that the statute means what it says, and upheld the trial Court's dismissal of the Complaint. Since the constitutionality of Section 194.171, Florida Statutes was not raised in the Complaint, the Second District refused to strike the statute on due process grounds, even though it indicated some discomfiture with application of the statute. It is submitted that in taxation, even more than any other field, the Legislature has the greatest freedom in classification; there is a presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden on one seeking to attack a legislative direction relative to taxes is to negate every conceivable basis which might support it. Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla. 4th.DCA 1983), rev.den. 434 So.2d 888 (Fla. 1983).

Should the decision of the Fourth District Court of Appeal stand, it would effectively annul Sec. 194.171, F.S., and place assessments in doubt for years after they had been made, and place upon the taxing bodies the substantial risk of having to make refunds of tax monies that had already been spent based on a claim that the assessment was in excess of just valuation, hence unconstitutional and "void".

POINT II. RESPONDENTS CANNOT COMPLAIN ABOUT THE DISMISSAL WITH PREJUDICE OF THE ACTION TO CONTEST THE CONSTITUTIONALITY OF SECTION 192.037, FLORIDA STATUTES, SINCE THEY INVITED WHATEVER ERROR MAY HAVE BEEN COMMITTED BY THE COURT IN SO DOING.

Chapter 82-226, Laws of Florida 1982, enacted Section 192.037, Florida Statutes, which prescribes the method of listing fee time share property on the tax rolls. Anyone wishing to contest the constitutionality of this section could certainly bring an action for declaratory relief under Chapter 86, Florida Statutes. In Count II of the Complaint, Respondents sought just such relief.

However, since Count I sought specific relief under Chapter 194, Florida Statutes to contest specific tax assessments of the properties described in Exhibits A through E attached to the Complaint, Respondents were required to comply with Section 194.171, Florida Statutes. Since the Complaint did not contain the necessary jurisdictional allegations, the Order of Dismissal granted Respondents twenty days in which to file an Amended Complaint. Rather than amending and perhaps eliminating the claims in Count I dealing with the assessments of specific properties, Respondents elected to submit a nunc pro tunc order to the trial Court, dismissing the entire Complaint with prejudice.

Since they chose to submit an amended Order to the trial Court that dismissed the Complaint with prejudice, Respondents invited whatever error was thereby committed by the trial Court's dismissing the claims only seeking declaratory relief with respect to the claimed unconstitutionality of Section 192.037, Florida Statutes. Respondents cannot claim on appeal that the declaratory

relief action based on Chapter 86, Florida Statutes, should not have been dismissed, since they themselves invited whatever error was thereby committed by the trial Court. See, Behar v. Southeast Banks Trust Company, N.A., 374 So.2d 572 (Fla. 3d.DCA 1979), F.E.C. Railway Co. v. Rouse, 178 So.2d 882 (Fla. 3d.DCA 1965); For Adults Only, Inc. v. State ex.rel. Gerstein, 257 So.2d 912 (Fla. 3d.DCA 1972). The last cited case involved a defendant's request to convert a temporary restraining order into a final order without further hearing. Since the error in issuing a permanent injunction had been invited by the defendants, they could not later complain.

CONCLUSION

The Exhibits to the Complaint indicate that the Property Appraiser made assessments for the year 1983 of whole-unit condominium parcels, platted real estate, commercial personal property, and one assessment of time-share estates for the Native Sun Motel, which was voluntarily dismissed. There is no allegation that the property was not subject to tax, that there was no statutory authority for the tax, or that the property appraiser engaged in wrongdoing. Accordingly, the assessments were "voidable" at best. In determining that an allegation claiming an assessment is void because the statute which was followed in making that assessment is unconstitutional, the Fourth District departed from the existing law that all statutes are to be presumed lawful, and created a "presumption of invalidity" to statutes that does not exist.

Respondents invited whatever error was committed in dismissing their action for declaratory relief and accordingly cannot complain here that the trial Court's order was improper.

Respectfully submitted,

GAYLORD A. WOOD, JR.

By: Gaylord A. Wood, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief and Appendix of Petitioner, WILLIAM MARKHAM, as Broward County Property Appraiser, was served by mail this 17th day of March, 1986, on LEONARD LUBART, ESQ., Greenspoon, Marder & Freeman, P.A., Attorney for Respondents, 12000 Biscayne Boulevard, Suite 204, Miami, Florida 33181-2710, on SUE DELEGAL, General Counsel of Broward County, Room 423 Government Center, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301, and on HON. JIM SMITH, Attorney General, Room LL-04 The Capitol, Tallahassee, Florida 32301, Attorney for Department of Revenue.

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