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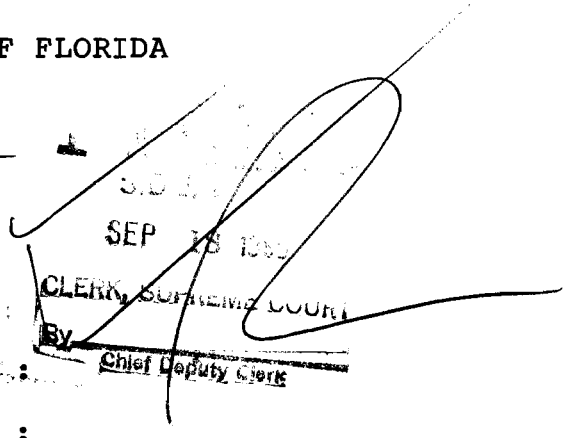
IN THE SUPREME COURT OF FLORIDA

CASE NO. _____



WILLIAM MARKHAM, as Broward County Property Appraiser,

Petitioner,

-vs-

NEPTUNE HOLLYWOOD BEACH CLUB, INC., et al.,

Respondents.

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

PETITIONER'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The Fourth District Court of Appeal ruled that a taxpayer need not meet the express jurisdictional requirements of Sec. 194.171(2) and (3), F.S., if it alleges that an assessment is "void" because a statute that was expressly followed by the Property Appraiser in listing the assessments of time-share estates on the tax rolls, Sec. 192.037(2), F.S., is alleged to be unconstitutional.

This holding expressly and directly conflicts with cases of this Court and other District Courts of Appeal which hold that an assessment is only "void" as opposed to "voidable" under three circumstances: (1) The assessment is not authorized by law, (2) The property is not subject to tax, or (3) the taxing official has engaged in affirmative wrongdoing. It conflicts with decisions of this Court that every presumption will be afforded the constitutionality of a statute.

Additionally, the decision directly and expressly affects a class of Constitutional officers, the sixty-seven Property Appraisers of Florida.

The District Court of Appeal's decision would enable any property owner to avoid the sixty-day limitation period and good faith payment requirement in <u>any</u> case by simply alleging that the assessment is in excess of "just valuation", as prescribed in Art. VII, Sec. 4, Const.Fla., 1968, hence "void". Great uncertainty would be caused in the tax laws were the decision of the District Court of Appeal allowed to stand. The taxing bodies would be deprived of all tax revenues pending the resolution of the litigation, again, contrary to the will of the Legislature.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Summary of Argument contained in Brief on Jurisdiction and and Appendix of Petitioner, WILLIAM MARKHAM, as Broward County Property Appraiser, was served by mail this 30th. day of September, 1985, on Greenspan, Marder & Freeman, Esqs., 12000 Biscayne Boulevared, Suite 204, North Miami, Florida 33181, and SUSAN DELEGAL, General Counsel of Broward County, 115 South Andrews Avenue, Suite 423, Fort Lauderdale, Florida 33301, Attorneys for Respondents. .

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By: Gaylord A. Wood

STATEMENT OF THE CASE AND FACTS

The 1981 Legislature created Chapter 721, F.S., "Real Estate Time Share Plans". Sec. 721.03(5), F.S., prescribes that the treatment of time-share estates for ad valorem tax purposes and special assessments shall be as prescribed in Chapters 192-200, F.S. Sec. 721.13, F.S. requires that each time-share plan have a "managing entity", which acts in the capacity of a fiduciary to the time-share estate owners. This entity by statute must collect all assessments for common expenses. Sec. 721.06(1)(h), F.S., requires the contract for sale of a fee time-share estate to provide in conspicuous type that for the purpose of ad valorem assessment, taxation and special assessments, the managing entity is the taxpayer, as the owner's agent, pursuant to Sec. 192.037, F.S.

The term "taxpayer" is defined in Sec. 192.001(13) as the person or entity in whose name property is assessed, including an agent of a time share period titleholder. Note that the term does <u>not</u> refer to the owner of the property. The 1982 Legislature created Sec. 192.037, F.S. That statute generally provides that the managing entity is the taxpayer as an agent of the time share period titleholder, and that fee time share real property shall be listed on the assessment rolls as a single entry for each time-share development. The assessed value of each time-share development is the value of the combined individual time-share estates contained therein. The statute requires the Property Appraiser to send a Statement of Proportions to the managing entity, showing the amount of the taxes which are attributable to each time-share estate owner, and the managing entity is

responsible for collecting real estate taxes from the time-share estate owners along with the regular maintenance assessments, and remitting them to the Tax Collector.

Section 196.001(1), F.S., is specific authority for the taxation of all real and personal property in this state, which would include fee time share property. There is no statute which provides that fee time share property is not subject to taxation. Section 718.120(3), F.S., provides that condominium property divided into fee time-share real property shall be assessed as provided in Section 192.037, F.S.

Respondents filed suit in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, to contest assessments made by the Property Appraiser of fee time share real property for the year 1983, seeking also to contest the constitutionality of only Sec. 192.037, F.S. Suit was filed after the expiration of the sixty-day nonclaim period provided in Sec. 194.171, F.S. No "good faith payment" of taxes was tendered to the Tax Collector, as provided in Sec. 194.171(3), F.S. According to Sec. 194.171(6), F.S., the requirements of subsections (2) and (3) are jurisdictional.

The Property Appraiser's Motion to Dismiss the Complaint for lack of subject matter jurisdiction was granted.

The District Court of Appeal, Fourth District 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.

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THIS COURT.

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". This doctrine held that property otherwise taxable was really not in the United States when imported until the "original package" was broken. Only then would it be subject to taxation.

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 assessments were 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. 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.

All statutes are to be given every presumption in favor of their constitutionality. State ex rel. Shevin v. Metz Construction Co., Inc., 285 So.2d 598 (Fla. 1973) The instant decision in effect 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.

The decision of the Fourth District Court of Appeal holds that an untimely and procedurally defective action to contest an assessment can proceed even when the assessment is made strictly in accordance with a Florida statute. The decision expressly and directly conflicts with the cases holding that an assessment is void only if the assessment is not authorized by law. This conflict with Illinois Grain and Lake Worth Towers creates jurisdiction in this Court.

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, EXPRESSLY AFFECTS PROPERTY APPRAISERS, A CLASS OF CONSTITUTIONAL OFFICERS.

Section 194.171, F.S., constitutes a very real protection to the revenues of the taxing bodies of Florida by requiring suit to be filed a very short time after the rolls are certified for collection and requiring the taxpayer to tender at least the amount of taxes admitted to be owing to the Tax Collector and file the receipt for that amount with the Complaint. This procedure also protects the Property Appraiser, since he or she will be able to contest assessments while the data upon which they were based is still fresh and can be preserved pending the outcome of the assessment contest. 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.
>
> 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.

The Legislature was so concerned by the decision in Cape Cave Corp. v. Lowe, 411 So.2d 887 (Fla. 2d.DCA 1982), aff'd 418 So.2d 1280 (Fla. 1982), followed in Miller v. Nolte, 453 So.2d 397 (Fla. 1984), that it enacted Sec. 194.171(6), F.S., to make the

sixty-day nonclaim statute and "good faith" payment requirements jurisdictional. Ch. 83-204, Laws of Florida 1983, effective July 1, 1983. The instant action was filed after the effective date of that change to the statute.

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".

CONCLUSION

The Property Appraiser in good faith assessed time-share estates, which are made subject to taxation by specific statutes, and listed them in strict conformity with Section 192.037, Florida Statutes. By allowing the taxpayer to challenge the assessments as "void", the decision of the Fourth District Court of Appeal expressly and directly conflicts with decisions of this Court. The decision expressly and adversely affects a class of Constitutional officers.

This Court should therefore review the decision on the merits.

Respectfully submitted,

GAYLORD A. WOOD, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on Jurisdiction and and Appendix of Petitioner, WILLIAM MARKHAM, as Broward County Property Appraiser, was served by mail this 16th. day of September, 1985, on Greenspan, Marder & Freeman, Esqs., 12000 Biscayne Boulevared, Suite 204, North Miami, Florida 33181, and SUSAN DELEGAL, General Counsel of Broward County, 115 South Andrews Avenue, Suite 423, Fort Lauderdale, Florida 33301, Attorneys for Respondents. .

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