IN THE SUPREME COURT OF FLORIDA

CASE NO.67,682

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

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case is here on petition for discretionary review from the Fourth District Court of Appeal from which Petitioner is claiming a jurisdictional basis for this Court to review the merits of the decision below. Plaintiffs (hereinafter referred to as "Respondents") are a group of Condominium Associations and Developers for Time-Share projects. Suit was filed in the Circuit Court to declare Sec. 192.037 Fla. Stat. (1983) unconstitutional on grounds that it violated Respondents' constitutional guarantees of Equal Protection and Due Process. The Circuit Court dismissed Respondents' complaint on the basis that suit was not filed within the sixty (60) day period set forth in Sec. 194.171 Fla. Stat. (1983). The Fourth District Court of Appeal reversed the decision of the Circuit Court, finding the Plaintiff's challange to Sec. 192.037 Fla. Stat. (1983) as violative of Respondents' constitutional rights was a challenge that the assessment thereunder was void, and therefore, the sixty (60) day period did not apply.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal is not in conflict with any prior decisions of this Court or other District Courts of Appeal. The court below held that under the rational of Hansen v. Port Everglades Steel Corporation, 155 So.2d 387 (Fla. 2d DCA 1963), an assessment is void when it is in violation of the constitutional guarantees of Equal Protection and Due Process, and as such, can be challenged without complying with the procedural requirements imposed under Sec. 194.171 Fla. Stat. (1983).

Petitioner alleges that the decision below conflicts with Lake Worth Towers, Inc v. Gerstung, 262 So.2d 1 (Fla. 1972). In Gerstung, this Court held that an assessment is void if not authorized by law, if the property is not subject to the tax, or there is some affirmative wrongdoing on the part of the Property Appraiser. If a statute is not constitutional, the assessment pursuant to it is clearly not authorized by law. See Hackney v. McKenney, 113 Fla. 176, 151 So. 524 (1933). As such, there is not a conflict between the decision below, Gerstung, or Hansen.

The decision of the Fourth District Court of Appeal does not expressly affect a class of constitutional or state officers. Petitioner's argument to the contrary is specious. The court below only held that where a statute authorizing an assessment is violative of the Constitution's guarantees of Equal Protection and Due Process, that the assessment is void, obviating the need to comply with the procedural requirements of Sec. 194.171 Fla.

Stat. (1983). The premise of Petitioner's argument is that the decision will have a potential effect on Property Appraisers who may be faced with the argument that because a valuation is too high, it is violative of the Constitution, and thus void. This argument is specious because it is not based on the facts that form the basis for the decision below. As no decision has been rendered regarding the constitutionality of excessive property appraisals, the issue of whether Property Appraisers are expressly affected by such a decision is not before the Court.

IS THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL THAT AN ASSESSMENT IS VOID IF MADE UNDER A STATUTE THAT VIOLATES DUE PROCESS AND EQUAL PROTECTION GUARANTEES IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS APPEAL HOLDING THAT AN ASSESSMENT UNDER AN INVALID LAW IS VOID?

In recognition of this Court's heavy case load, District Courts of Appeal were created to relieve this Court of its oppressive burden. The decisions of the District Courts of Appeal were intended to be final as opposed to intermediate way stations on the road to a higher court. To further this policy, the jurisdictional avenues for appeal were severely narrowed when the people of the State of Florida, in accord with the recommendations of this Court and the Florida Bar Association amended the Constitution by inserting "expressly and directly" in front of "conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Similarly, in that same year the Constitution was amended by placing "expressly" in front of "affects a class of constitutional or state officers." Art. V Sec. 3(b)(3) Fla. Consititution, See Jenkins v. State, 385 So.2d 1356, 1360-63 (Fla. 1980) (Chief Justice England concurring). Petitioner is attempting to lodge jurisdiction in this Court under both of the above mentioned methods. In doing so, however, he fails to demonstrate how the decision below expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law or expressly affects a class of constitutional or state officers.

The decision of the Fourth District Court of Appeal holding

that a statute which imposes a tax on a group of tax payers in violation of the constitutional guarantees of Equal Protection and Due Process is not a valid statute and an assessment under such a statute is void, and does not conflict with the decisions of this and other courts. Petitioner cites numerous cases which demonstrate the circumstances under which an assessment is void and relies upon such cases in support of the proposition that decisions of other District Courts of Appeal and this Court are in conflict with the decision of the Fourth District Court of Appeal below. Petitioner fails, however, to cite a single case which hold that an assessment under a statute which is in contravention of the Constitution's guarantees of Equal Protection and Due Process is merely voidable and not void. As such, Petitoner has failed to demonstrate how the decision below is in conflict with this Court or any of the District Courts of Appeal.

The consistency of the decision below with those of other District Courts of Appeal and this Court is evident. If a statute is unconstitutional, then clearly it is not a valid law; and any assessment made under it is not authorized by a valid law. As such, the decision below is consistent with and does not conflict with any other decisions.

In Gerstung, 262 So.2d 1 (Fla. 1972), (cited by the court below) this court was presented with a case similar to the one at bar. There, the tax collector argued that the taxpayer had failed to contest an assessment in a timely manner, maintaining

that because the assessment was merely voidable and not void, the taxpayer's failure to exhaust his administrative remedies and bring suit within 60 days barred him from challenging the assessment. In its decision, this Court stated the general rule that a void assessment is one "...not authorized by law, where the property is not subject to the tax assessed, or where the tax roll is illegal due to some affirmative wrongdoing by the taxing official."

The Fourth District Court of Appeal also relied on Hansen v. Port Everglades Steel Corporation, 155 So.2d 387 (Fla. 2d DCA 1963) for its decision. In Hansen, a challenge to an assessment on imported goods made after the expiration of the sixty (60) day period of limitations was held to have been brought in a timely manner where the assessment was based on an unconstitutional and thus void statute.

Gerstung and Hansen cited Hackney v. McKenney, 113 Fla. 176, 151 So. 524 (1933) as the leading case on the issue of whether a tax assessment is void as opposed to voidable. In MacKenney, this Court first enunciated two of the ways an assessment could be found void: "...or where a tax levy as made is not authorized by a valid law; or where though a tax levy be duly authorized by law, the illegality of the tax roll because of affirmative wrongdoing by the taxing officials, and not mere incorrectness or specific instances of unfairness in the assessment as made is duly shown."(emphasis added) Hackney, 151 So. 524, 528. It is from Hackney that Gerstung and Hansen, derive their three tests

for voidness. See Florida East Coast Railway Company v. Reid, 281 So.2d 77 (Fla. 4th DCA 1973). But Hackney did not limit the test for voidness to just those methods stated above. Instead, this Court said on page 528: "There may be other instances in which a tax Levy is void and relief from it may be had at any time when the right to redress has not been waived or otherwise lost."

Hansen and Hackney, when read together, stand for the proposition that assessments made under an unconstitutional statute are void. Thus, they are in complete harmony with the decision below. Hansen cannot be given the narrow interpretation advocated by the Petitioner; and the cited cases cannot be said to be in conflict with the decision below.

DOES THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL THAT AN ASSESSMENT IS VOID IF MADE UNDER A STATUTE THAT VIOLATES DUE PROCESS AND EQUAL PROTECTION GUARANTEES EXPRESSELY AFFECT PROPERTY APPRAISERS, A CLASS OF CONSTITUTIONAL OFFICERS?

Petitioner's argument that assessments in excess of just valuation will be challenged on grounds that such assessments are void and thus not owing, is specious. Petitioner is attempting to expand the holding below beyond the confines of its factual parameters and uses that expanded holding to further argue that it will affect a class of Constitutional Officers. The decision below stands for the simple proposition that assessments based on statutes which are in violation of the Constitution's guarantees of Equal Protection and Due Process are void. It does not lend itself to the scenario contemplated by Petitioner, and as such, is not before this Court for a determination whether a class of Constitutional Officers will possibly be affected in the future by challenges to valuations. In order for Petitioner to bring this case before this Court, he must demonstrate how the decision below "...<u>expressly</u> affects a class of constitutional or state officers..."(emphasis added) Florida Constitution Article 5, Section 3(b)(3). As the decision below does not expressly affect Property Appraisers in the fashion feared by Petitioner, this Court does not have jurisdiction.

CONCLUSION

The decision of the Fourth District Court of Appeal does not conflict with the decisions of this Court or the decisions of any other District Court of Appeal. Rather, the decision below is in complete accord and harmonizes with the decisions of this Court and other District Courts of Appeal. Secondly, the decision below does not expressly affect a class of constitutional officers. Such an argument is specious as it extends the holding below to cases which have not to this date come before a court of competent jurisdiction. As there is no jurisdiction to review this case, this Court should refuse jurisdiction and allow the decision of the Fourth District Court of Appeal to stand.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to GAYLORD A. WOOD, JR., 304 S.W. 12th Street, Fort Lauderdale, Florida 33315; SUSAN DELEGAL, General Counsel of Broward County, 115 South Andrews, Suite 423, Fort Lauderdale, Florida 33301, on this 11th day of October, 1985.

BY: Leonard Lubart
LEONARD LUBART