D/a 4-3-87.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,995

FRANKLIN B. BYSTROM, Property Appraiser of Dade County, Florida, STEVEN SMITH, Acting Tax Collector of Dade County, Florida; and P. RANDY MILLER, Executive Director of the Florida Department of Revenue,

Petitioners,

vs.

MANUEL DIAZ,

Respondent.
_____/

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT

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PREFACE

The Respondent, MANUEL DIAZ, was the Plaintiff in the trial court and the Appellant in the Third District Court of Appeal. The Petitioners were the Defendants in the trial court and the Appellees in the Third District Court of Appeal. In this brief, the parties will be referred to as the "Plaintiff" and the "Defendant" respectively.

The following symbol is used in this brief:

(R) - For the Record-on-Appeal herein consisting of Pages R1-R38.

The opinion of the District Court of Appeal is reported herein at, Diaz v. Bystrom, 487 So.2d 1112 (Fla. 3d DCA 1986).

I

STATEMENT OF THE CASE

The Defendants' "Statement of the Case and Facts" is incomplete and misleading and contains counsel's subjective view of the facts[1]. Therefore, the Plaintiff will properly restate the relevant facts and record below.

On or before March 1, 1982, as required by Section 193.461 Florida Statutes (1981), the Plaintiff requested that his 1982 property assessment on land in Dade County, Florida be reclassified back to agricultural in order to obtain the substantial exemption thereon. See, R2, para. 8; R14 ("Exhibit A"); R4, para. 4 (admitting allegation). On December 1, 1982, a special master for the Property Appraisal Adjustment Board (PAAB) recommend -ed that reassessment be denied. See R15, para. 3. More than nine (9) months later, on September 26, 1983, the PAAB issued its decision agreeing with the special master and on October 25, 1983 the Defendant Bystrom certified that the assessment should be collected. See, id.

Meanwhile, during the (10) month delay in concluding the administrative review of his reassement claim, the Plaintiff on August 29, 1983, had tendered his estimate in good faith of the 1982 taxes owing. See, R3 ("Exhibit A"); R15, para. 4. Additionally, on September 7, 1983, the Plaintiff also filed an action in the trial court contesting the denial of his agricultural exemption. See, R1-R2.

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1. For example at page 1, paragraph 4, defense counsel alleges as fact: "(T)he taxpayer ignored the minimal $1,009.01 tax bill on the 40-acre property. . ." There is no showing in this record as to the size of the property; whether $1,009.01 is a "minimal" tax bill nor that the Plaintiff "ignored" his 1983 taxes. The defense counsel's attempt in this manner to portray the Plaintiff as recalcitrant is improper and should be rebuked. See, e.g. Malcolm v. State, 415 So.2d 891, at 892, n2 (Fla. 3d DCA 1982). (the Court should expect better than that from government counsel).

The Defendants filed an Answer to said Complaint and alleged as affirmtive defenses, a.) that the property assessment as commercial property was correct and b.) that the action was barred because the Plaintiff did not tender a good faith payment under Section 194.171(3) Florida Statutes (1981)[2]. See, R4-R5.

The Plaintiff's action on his 1982 assessment was eventually set for trial during the week of July 2, 1984. Meanwhile, with respect to the following property assessment in 1983, the Plaintiff's land was reassessed by the Defendants to be agricultural with the concomitant agricultural exemption[3]. See, R14 ("Exhibit A"). The tax bill on this 1983 assessment was therefore undisputed by the Plaintiff and was paid in full by the Plaintiff on May 30, 1984. See, R13-R14.

On May 18, 1984, the Defendants filed a Motion to Dismiss the present challenge to the 1982 assessment, claiming that the Plaintiff's cause of action was absolutely barred because the good faith payment of the 1982 property taxes was nevertheless a delinquent payment precluding a lawsuit under §194.171(4) and (5) Florida Statutes (1981). See, R9-R10. The Defendants also alleged by affidavit that Plaintiff had made a payment on the 1982 taxes but not the 1983 taxes. See, R11. On June 6, 1984 the Plaintiff submitted a reply affidavit and exhibit, which demonstrated, as noted above, that the Plaintiff had paid all taxes and delinquent charges due in full. See, R13-R14.

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2. This may be the wrong statute. The Complaint for reassessment was filed while Section 194.171 Florida Statutes (Supp. 1982) was in effect. See, R1-R2.

3. Exhibit A is a document entitled, "Combined Tax Bill," which reflects a total value of $240,000 and an expemption of $186,000. See, id. Based on the three "subtotals" listed thereon, the tax bill for 1983 was $975.74. See, id. Under "Amount Due if Paid on," the document provides "Delinquent" and listed under that, "May 1,009.01." On May 30, 1984, the Plaintiff paid $1,009.01 to the Defendants. See, id.; (Affidavit of Counsel).

On June 19, 1984, the trial court entered a written order denying the Defendants' Motion to Dismiss, finding that no taxes were due or delinquent at the time of the hearing on the Defendants' Motion to Dismiss thereby the Court was not deprived of jurisdiction. See, R17.

On June 28, 1984, the Defendants' filed a pleading entitled, "Defendants' Motion for Rehearing," which in reality raised no new issues whatsoever. See, R18-R19. Instead, the motion begins at paragraph 1 by quoting from §194.171(5) Florida Statutes (1981), involving the joinder of state officials when a claim is made as to the constitutionality of an assessment. This argument again cites the wrong statute and was a sham because the proper state official, Randy Miller, was already joined in the case. See, R1. However, the Defendants in the remainder of said Motion proceed to argue exactly the same grounds for dismissal as were presented and rejected on June 19th. See, R18-R19. The Plaintiff filed a responsive memorandum contending, 1) that this cause was properly decided under Millstream v. Dade County, 340 So.2d 1276 (Fla. 3d DCA 1977), and Hilltop Ranch v. Brown, 308 So.2d 124 (Fla. 1st DCA 1975), and 2) that the application of the statute to bar the present cause of action would be an unconstitutional denial of due process and equal protection and the limitation of the statute is without rational basis. See, R20-R21.

On July 12, 1985, through a newly elected trial judge who had defeated the predecessor judge in this case, the court below entered its order granting the Defendants' Motion to Dismiss. See, R35-R38. The trial court in its findings of fact, noted that the Plaintiff made a good faith payment of his 1982 taxes before filing suit. See, R35-R36. However, the Court concluded that both the 1982 payment of taxes and the 1983 payment of taxes were not made until the taxes were delinquent. See, id. The Court

concluded therefore that under §194.171(5) Florida Statutes (1983) (as noted above, this too is the wrong statute) the Court had no jurisdiction to hear this cause because the Plaintiff did not pay his taxes before they became delinquent. See, R36-R38. The Court also therefore declined to find the statute unconstitutional. See, id.

On April 8, 1986, on appeal to the Third District Court of Appeal, the District Court unanimously rejected the Defendants' analysis of Section 194.171 and reversed the trial court's dismissal of this cause. See, Diaz v. Bystrom 487 So.2d 1114 (Fla. 3d DCA 1986). The Court first summarized the foregoing facts, thus:

> "Plaintiff, in a circuit court action, challenged a determination of the Property Appraiser as affirmed by the Property Appraiser Adjustment Board, that his property did not qualify for an agricultural exemption during the 1982 assessment period. On August 29, 1983, plaintiff tendered to the tax collector an amount he believed in good faith to be due and owing. While the challenge to the 1982 assessment was pending, the 1983 assessment because due and delinquent.
>
> "On May 18, 1984, defendants moved to dismiss the action which challenged the 1982 assessment, asserting as grounds therefor that plaintiff was delinquent in paying his 1983 property taxes which, by statute, divested the trial court of subject matter jurisdiction to hear the challenge to the 1982 assessment."
>
> Id., at 1112-1113.

In rejecting the Defendants' harsh position as to the application of Section 194.171, the District Court concluded that the statute must be construed in such a fashion as to insure that it comports with both sound reason and is constitutional under Articles I Section 21 and VII Section 13 of the Florida Constitution:

"The conclusion we reach accords with the plain meaning of the statute, with sound reason, and with constitutional guarantees of unfettered access to the courts.[1]

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1. The Florida Constitution provides in pertinent part:

Article I

Section 21. Access to courts.--The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

* * * * * * * * * * * *

Article VIII

Section 13. Relief from illegal taxes.--Until payments of all taxes which have been legally assessed upon the property of the same owner, no court shall grant relief from the payment of any tax that may be illegal or illegally assessed."

Id. at 1113

The Court then concluded consistent with other tax provisions, that the right to cure a jurisdictional defect was inherently required by the foregoing constitutional provisions and the only rational underlying purposes of the statute to force payments (delinquent and otherwise), to be paid, upon pain of dismissal:

"(T)he statute does not say that the jurisdictional bar cannot be lifted. To the contrary, section 194.171(6) (Fla. Stat. 1985) clearly contemplates that the court shall have jurisdiction after the requirements of the preceding sections, which establish the jurisdictional prerequisites, have been satisfied notwithstanding that the court may have been without jurisdiction to hear the cause after the taxes became delinquent.

* * * * * * * * * * * * * * * *

"As we read the statute, a challenge to a tax assessment may continue after a prior year's assessment becomes due but will, on

> a proper motion, be dismissed after the payments become delinquent. The purpose of the statutory scheme is obviously to insure prompt payments of taxes due, and to make available as revenues at least that amount of a tax assessment which the taxpayer does not dispute. Construing failure to make timely payment of a subsequent year's assessment as an incurable jurisdictional bar is counterproductive towards that end.[2]
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> ---
>
> 2. Compare with section 607.357, Florida Statutes (1985), on corporations--construed as revenue-producing--which makes payment of assessments a condition to bringing and maintaining a court action. The failure to file annual reports and pay taxes is a jurisdictional bar which is curable even where delinquency results in involuntary dissolution. See Cosmopolitan Distributors, Inc. v. Lehnert, 470 So.2d 738 (Fla. 3d DCA 1985)."

Id.

Indeed, the District Court also noted that the Defendants could offer no rational reason (comporting with due process and the Florida Constitution) to blindly impose the harsh, absolute rule of dismissal which they sought to employ herein:

> "Defendants were given an opportunity to justify, on policy grounds or otherwise, their harsh construction of the statute.
>
> They offered nothing that persuades us. By paying the taxes due in subsequent years, plus any accrued interest and penalties caused by the delinquency, plaintiff could and did cure the jurisdictional defects in accordance with section 194.171(6).
>
> "Reversed and remanded for further proceedings in accordance with this opinion."
>
> Id., at 1113-1114.

On June 2, 1986, the District Court denied the Defendants' Motion for Re-

hearing and Motion for Rehearing En Banc. See, id.

On December 10, 1986, this Court accepted this cause for review. Oral argument is presently set for April 3, 1987.

II

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE ORDER GRANTING THE DEFENDANTS' MOTION TO DISMISS.

III

SUMMARY OF ARGUMENT

The harsh construction of Section 194.171 in the various forms in which it has evolved since 1981, as urged by the Defendants, has no rational basis and therefore runs afoul of equal protection, fundamental due process and the requirement to access to the courts in Article I Section 21 of the Florida Constitution and Article VII, Section 13 prescribing the Florida Constitutional limit placed upon the right to seek relief from illegal taxes.

A statute should be construed in such a manner so as to not only effect its purpose but also to insure that it is constitutional. The purpose of the present statute, consistent with Article VII, Section 13 of the Florida Constitution, is to use the hammer of a threatened dismissal to insure that subsequent tax assessments are promptly paid. That purpose is accomplished by requiring that in order to maintain an assessment action, all taxes and delinquent fees for subsequent assessments must be paid or the cause will be dismissed. The payment of said assessments and fees prior to a dismissal and permitting such a defect to be "cured," both accomplishes the statutes' purpose and insures its compatibility with the Florida Constitution. Therefore, the Defendants' claim that such a construction of Section 194.171 "evicerates" their ability to promptly collect taxes, is completely specious. In the present cause for example, the entire property tax and a late fee collected within twelve (12) days of the Defendants' Motion to Dismiss.

IV

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN REVERSING THE TRIAL COURT'S ORDER GRANTING THE MOTION TO DISMISS.

The trial court in this cause dismissed the Plaintiff's Circuit Court Complaint as to the 1982 assessment, a.) because the 1982 "good faith" payment was delinquent and b.) because the uncontested 1983 assessment was paid late. See, R35-R38. This analysis was plainly erroneous.

Section 194.171 Florida Statutes (Supp. 1982), under which the present Circuit Court action was filed, provides inter alia, that:

> "(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under §193.122(2).
>
> "(3) Before a taxpayer may bring an action to contest a tax assessment, he shall pay to the collector the amount of the tax which he admits in good faith to be owing. The collector shall issue a receipt for the payment, and the taxpayer shall file the receipt with his complaint.
>
> "(4) No action to contest a tax assessment may be maintained, and any such action shall be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent." (Emphasis added)

Thus, under Section 194.171, as it was written in 1982, the only statutory prerequisite for filing the present challenge to the 1982 assessment was that the Plaintiff, "pay . . . the amount of tax which he admits in good faith to be owing." (Emphasis added) Nothing in the 1982 statute suggests that a complaint must be dismissed upon grounds of the delinquency of the

good faith tax payment upon which the Complaint is based. Section 194.171 at subsection (4) only refers to dismissal with respect to delinquency of assessment payments, "in years after the action is brought" (emphasis added). Therefore, the trial court's dismissal on the former ground had no basis in law whatsoever[4].

Furthermore, even considering subsequent enactments of Section 194.171, to the 1983 taxes, the District Court's reversal of the trial court's order is still sound. It is well settled that if a statutory question may be determined by statutory construction, the courts should avoid considering the constitutional question. Green v. State ex rel. Phipps, 166 So.2d 48 (Fla. 1964); Griffis v. State, 356 So.2d 297 (Fla. 1978). A fundamental rule is that a statute should be construed not only in such a manner such as to effectuate Legislative intent, McKibben v. Mallory, 293 So.2d 48 (Fla. 1974); Griffis v. State, but also in State v. Beasley, 317 So.2d 750, at 752 (Fla. 1975), the court delineated the requirement that a statute should be construed in such a manner as to be within Constitutional limits:

> "We have a responsibility to avoid a holding of unconstitutionality if a fair construction of the statute can be made within constitutional limits. The United States Supreme Court recognized this restrictive construction doctrine in Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965). The Fourth Circuit Court of Appeals adopted this doctrine in United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970), cert. denied, 397 U.S. 1044, 90 S.Ct. 1364 25 L. Ed.2d 654. The Fifth Circuit Court of Appeals acknowledged the restrictive constitutional construction doctrine in Wiegand v. Seaver, 504 F. 2d 303 (5th Cir. 1974)."

4. Even if the later provisions of the statute were applied, the Plaintiff would assert that "delinquent" under Section 194.171 does not mean the same delinquent as contended by the Defendants. The Plaintiff would assert that

Thus, in the present case, Article I, Section 21 provides that:

> "Section 21. Access to courts.--The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

See, State ex rel Lawson v. Woodruff, 134 Fla. 437, 184 So. 81 (1938) (this provision implements the inalienable rights under Florida's Constitution); Florida East Coast Railroad Co. v. State, 79 Fla. 66, 83 So.708 (1920) (right of judicial review to be broadly construed); Bailey v. Van Pelt, 78 Fla. 337, 80 So. 789 (1919) (reasonableness, lawfulness, arbitrariness and abuse of power discretion or authority of administrative agencies must be subject to judicial review):

Concurrent with the foregoing and directly applicable herein, Article VII, Section 13 of the Florida Constitution also provides the only Constitutional limitation placed upon a taxpayers right to seek judicial review:

> "Section 13. Relief from illegal taxes. --Until payment of all taxes which have been legally assessed upon the property of the same owner, no court shall grant relief from payment of any tax that may be illegal or illegally assessed." (Emphasis added).

It is apparent on the face of Article VII, Section 13 that the only limitation placed by the framers of Florida's Constitutional upon the right of judicial access for relief from illegal taxes, is that a property owner pay the taxes first. It is also apparent that the only penalty permitted for non-payment is that judicial relief will not be "granted" prior to such payment. The principle of statutory and Constitutional construction to be

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delinquent under Section 194.171 refers to the payment of funds due and collectible upon final administrative action as contemplated under 194.171(2). Otherwise, the requirement for filing suit that it be made within (60) days of any final administrative action in 194.171(2) is mere surplusage.

applied here is, "Inclusio Unius Est Exclusio Alterius." Where the drafters of the Florida constitution put in a single and particular limitation upon review of illegal taxes, it must be concluded that they did not intend any other limitation.

Thus, in the present cause, the District Court sought to construe Section 194.171 consistent with the purpose of prompt collection of taxes as permitted by the foregoing Article I Section 21 and Article VII Section 13 of the Florida Constitution. The District Court's construction permits the government use of the hammer of a potential dismissal to force collection of subsequent years taxes without placing the statute in a irreconciable collection with the Florida Constitution's guarantee of access to the Court's for relief from illegal taxes.

In Hilltop Ranch v. Brown, 308 So.2d 124 (Fla. 1st DCA 1975) the Court construed substantially identical language in a predecessor Section 194.171 Florida Statutes (1973) to mean that if a taxpayer pays his taxes he believes are owing before the hearing on a Defendant's motion to dismiss, then such a payment precludes dismissal since it relates back to the date of the original complaint. Accord, Cowart v. Perkins, 445 So.2d 654 (Fla. 2d DCA 1984); Brooks v. Interlachen, 332 So.2d 681 (Fla. 1st DCA 1976); cf; Millstream v. Dade County, 340 So. 2d 1276 (Fla. 3d DCA 1977) (distinguishing Brooks and Hilltop, supra); contra, Markhamv. Corlett, 453 So.2d 907 (Fla. 4th DCA 1984); Reid v. Lucom, 349 So.2d 661 (Fla. 4th DCA 1977). While deciding the cause on such grounds, however, the Hilltop Court also expressed grave doubts that a harsh construction of the literal language of Section 194.171, such as urged by the Defendants herein, would be unconstitutional because of the arbitrary and anamolous results and injustice which would result:

> "To reiterate the question now before us, must the payment required by F.S.§194.171(3) be made within the 60 day limitation period provided by F.S.§194.171(2) and is this a jurisdictional prerequisite? If the answers be in the affirmative, we note as dictum our concern with the constitutionality of subsection (3) and its apparent conflict with subsection (4). Subsection (3) appears to require the payment of the taxes prior to the filing of the complaint (which would have to be within 60 days of the certification of the assessment roll); thus requiring a contestant, in order to have access to the courts, to pay his taxes four months before any other citizen is compelled to pay. On the other hand, subsection (4) of the same statute only requires that the taxes be paid before they become delinquent in order for the suit to be maintained. Additionally, Article VII, §13 of the Florida Constitution, F.S.A., provides that the courts may not grant relief from the payment of taxes until the payment of legally assessed taxes has been made. It does not bar access to the court until payment has been made."

Similarly, in Collins v. Dade County, 164 So.2d 806, (Fla. 1964) the Court concluded that the limitations of Section 194.171 were not jurisdictional. But see, Adler v. Dade County, 231 So.2d 197, at 199 (Fla. 1970) (obiter dicta). Important to our present consideration, however, the Collins court concluded that any other construction of using only the literal language of Section 194.171 is probably unconstitutional:

> This interpretation is likewise consistent with the provisions of Article IX, Section 8, Florida Constitution, which merely requires that the payment of taxes conceded to be legally due is a condition to the granting of any relief rather than a condition to the filing of the complaint. Any other interpretation might well be held to violate this provision of the organic law. A similar resolution of the problem was reached by the District Court of Appeal, Third District, in Dade County Land Development Corp. et al. v. Dade County, Florida, 157 So. 2d 142." (Emphasis added). 164 So.2d at 809.

The Constitutional error and irrational statutory maze envisioned

by the Courts in Hilltop and Collins, is completely vitiated by the common sense constitutional construction provided by the District Court herein. At the same time that the government is permitted to force prompt payment of tax bills by instituting a motion to dismiss, the Constitutional right of access to the courts and restrained limitation on the right to contest illegal taxes remain inviolate. Any other construction using the literal language of Section 194.171 would render the Stattute unconstitutional as noted in Collins and Hilltop.

The Defendants' reliance upon decisions in Clark v. Cook 481 So.2d 929 (Fla. 4th DCA 1985), which was rejected by the present District court decision and Marshall v. Perkins, 11 FLW 1801 (Fla. 2d DCA August 13, 1986), for a contrary result is misplaced. Neither Cook nor Marshall reflect any reasoned consideration or analysis of the Florida Constitutional limitations considered by the present court. Additionally, neither Marshall nor Cook reflect any consideration whatsoever of the fact that the statute may be properly construed so as to effect both the government purpose in the statute of prompt collection of taxes and the constitutional right of judicial review by the Court not construing any potential dismissal as absolute.

Similarly, the Defendants' repeated claim that the present construction of Section 194.171 "evicerates" the right of the government to promptly collect taxes, is specious. In the present cause, the government got its 1983 taxes twelve (12) days after it filed its motion to dismiss in this cause. This just as well could have been twelve (12) days after the taxes were due if counsel had promptly presented the Motion. As the District Court found, this is prompt enough and there is no rational basis, nor could the Defendants offer one then or now for the harsh result of absolute dismissal, which they now urge herein.

V.

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, Manuel Diaz, prays that this Honorable Court will issue its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this 20 day of February, 1987, at Miami, Dade County, Florida.

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VI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was served by mail upon Daniel A. Weiss on this 20 day of February, 1987 at Metro Dade Center, 111 NW First Street, Suite 2810, Miami, Florida 33128-1993.

Emilia Diaz-Fox.
EMILIA DIAZ-FOX