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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,201

CAPITAL CITY COUNTRY CLUB, INC., a corporation not for profit,

Petitioner,

vs.

KATIE TUCKER, Executive Director of the Florida Department of Revenue, DICK BRAND, as Property Appraiser of Leon County, Florida, and JOHN CHAFIN, as Tax Collector of Leon County, Florida,

Respondents.

_____/

ANSWER BRIEF OF AMICUS CURIAE JOEL ROBBINS, PROPERTY APPRAISER OF DADE COUNTY, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

STATEMENT OF THE FACTS

Petitioner leases for private purposes 192 acres of City-owned land within the City limits of Tampa pursuant to a lease that requires Petitioner to pay all ad valorem and real estate taxes. For this privilege, Petitioner pays $1 a year, which even Petitioner concedes is "nominal." Pet. Int. Brief at 2. Petitioner paid without protest an intangible property tax on the leasehold allegedly pursuant to section 196.199(2)(b). Petitioner now argues that the value of the 99 year leasehold must be subtracted from the property subject to the real property taxes, leaving only the minimal value of residuary fee subject to the real property taxes. Thus, Petitioner argues, by paying $791.78 in intangible taxes, Petitioner is thereby entitled to avoid paying $30,186.65 in real property taxes.

The Trial Court and the First District Court of Appeals rejected Petitioner's arguments. The First District, however, certified this case as raising an issue of great public importance. The Supreme Court has reserved ruling on the jurisdictional issue and directed the parties to submit briefs on the merits.

SUMMARY OF ARGUMENT

I. The only issue of great public importance is the constitutionality of section 196.199(a)(b), Fla.Stat. which purports to classify some but not all leaseholds in government property used for private purposes as intangibles subject to favorable tax treatment. However, as explained below in

section III, this constitutional issue is not truly raised because the fairest interpretation of section 196.199(a)(b **is** that it **was** not intended to give such a tax break to a leaseholder like the petitioner who pays only a nominal rent. Thus, this case can be decided on the basis of statutory interpretation and the constitutional issue will have to await adjudication by a leaseholder who can be said to fairly come within the protections that the legislature attempted to create in section 196.199(2)(b).

If this honorable Court does not dispose of this case by holding that petitioner does not come within the provisions of section 196.199(2)(b), then this Court should hold 196.199(2)(b) as unconstitutional on two grounds. First, it violates equal protection by providing for the disparate tax treatment of persons in identical positions except for the payment of nominal rent which is rent in name only and not in substance (see section III of this brief). Second, it apparently allows for the taxation of real property at less than the full value of the unencumbered fee which violates the just valuation provision of the Florida Constitution. See, Schultz v. TM Florida-Ohio Realty, Ltd., 16 F.L.W. S225, 226 (Fla. March ***28***, 1991) (Florida Constitution and statutes require that valuation of real estate "must represent the value of all interests in the property - in other words, the fair market value of the unencumbered fee.");

11. Petitioner's second argument is that section 196.199(4) created, by inference, a whole new class of

property exempt from taxation, namely government property leased for private purposes prior to April 14, 1976. This argument must be rejected. First, tax exemptions in Florida are never created by inference. Second, the Florida Legislature did not have the power to exempt such property. As this court stated, "[a]t the time section 196.199(3) was enacted, the Legislature no longer possessed the constitutional power to authorize tax exoneration of property owned by a municipality and used for non-public purposes." Lykes Brothers, Inc. v. City of Plant City, 354 So.2d 878, 881 (Fla. 1978). Finally, Petitioner's convoluted legislature history completely misreads the legislature's purpose. The original section (3) of section 196.199 as created in chapter 71-133 was intended to establish June 1, 1971 as a deadline to limit the ability of governmental entities to enter into agreements to exempt property from taxation. It was not intended to create a new exemption for all government properties that had leases for private purposes prior to June 1, 1971.

111. Finally, section 196.199(2)(b) does not apply to Petitioner because that section applies only to leaseholders who pay actual rent. Petitioner pays only $1 a year for use of 192 acres of land within the city limits of one of the largest cities in Florida. Petitioners admit that, in such circumstances, their rent is only "nominal." Nominal means in name only and not in substance. It cannot be assumed that the legislature intended parties to receive vastly different tax

treatment based only on a nominal differences. Such a statutory distinction would not pass even a rational basis test and would violate equal protection.

ARGUMENT

I.

SINCE SECTION 196.199(2)(B) DOES NOT APPLY TO PETITIONER, THE CONSTITUTIONALITY OF 196.199(2)(B) IS NOT PROPERLY RAISED IN THIS CASE, AND THE SUPREME COURT SHOULD DECLINE JURISDICTION BECAUSE THIS CASE IS NOT OF GREAT PUBLIC IMPORTANCE BUT IS MERELY A SECOND APPEAL.

The only issue of great public importance in this appeal is the constitutionality of section 196.199(a)(b), Fla.Stat. which purports to classify some but not all leaseholds in government property used for private purposes as intangibles subject to favorable tax treatment. In one sense, the facts of this case dramatically frame this issue. In this case, the leaseholder has 99 years of use for private purposes of 192 acres of land within the city limits of one of the largest cities in Florida. For this lease, the leaseholder pays $1 annually, which even it concedes is "nominal," pursuant to a lease that makes petitioner responsible for all ad valorem taxes. Pet. Int. Brief at 2. Yet Petitioner maintains that payment of the nominal rent of $1 annually entitles it to pay $791.78 in intangible taxes and thereby avoid $30,186.65 in real property taxes. Any statute allowing such a result would collide with the just valuation and equal protection provisions of the Florida Constitution.

However, as explained below in section III, this constitutional issue is not truly raised because the fairest interpretation of section 196.199(a)(b) is that it was not intended to give such a tax break to a leaseholder like the petitioner who pays only a nominal rent. Thus, this case can be decided on the basis of statutory interpretation and the constitutional issue will have to await adjudication by a leaseholder who can be said to fairly come within the protections that the legislature attempted to create in section 196.199(2)(b).

Amicus Joel Robbins, Property Appraiser of Dade County, does believe, however, that the issue of the constitutionality of section 196.199(2)(b) is of great public importance. If this honorable Court does not dispose of this case by holding that petitioner does not come within the provisions of section 196.199(2)(b), then this Court should hold 196.199(2)(b) as unconstitutional on two grounds. First, it violates equal protection by providing for the disparate tax treatment of persons in identical positions except for the payment of nominal rent which is rent in name only and not in substance (see section III of this brief). Second, it apparently allows for the taxation of real property at less than the full value of the unencumbered fee which violates the just valuation provision of the Florida Constitution. See, Schultz v. TM Florida-Ohio Realty, Ltd., 16 F.L.W. S225, 226 (Fla. March 28, 1991) (Florida Constitution and statutes require that valuation of real estate "must represent the value of all

interests in the property - in other words, the fair market value of the unencumbered fee."); Valencia Center, Inc. v. Bystrom, 543 So.2d 214, 216 (Fla. 1989).

Petitioner's argument that a Property Appraiser cannot challenge the constitutionality of a statute in defending an assessment is wrong as this was precisely the posture that this Court allowed in Valencia Center. In addition, the first District did not uphold the constitutionality of 196.199(2)(b) in Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA 1985). The language that Petitioner and its Amicus cite is merely dicta. Higgs did not decide the merits of the constitutional claim, but held instead that any attempt to decide the issue given the state of the pleadings and record in that case at the time would be "premature." 468 So.2d at 378. Thus, the issue of the constitutionality of 196.199(2)(b) is a viable one, albeit not reached by the facts of the instant case because petitioner does not come within the terms of 196.199(2)(b).

II.

SECTION 196.199(3) DID NOT, BY INFERENCE, CREATE A NEW TAX EXEMPTION FOR ALL GOVERNMENT PROPERTY ENCUMBERED WITH LEASES FOR PRIVATE PURPOSES PRIOR TO APRIL 14, 1976.

Petitioner's second argument is that section 196.199(3) exempts from taxation, by inference, all municipal property encumbered by a private lease for private purposes prior to April 14, 1976. Petitioner argues that "The 1968 constitution does not prohibit the legislature from creating other statutory exemptions as part of a comprehensive taxing

methodology." Petitioner's Initial Brief at 15, n. 4. It further argues that "the thrust of 71-133 [the act creating 196.199(3)] was to place the first tax on the private use of government property." Id. at 18, n.5. It then argues that Chapter 71-133 placed this first tax only on government property encumbered by leases for private purposes after April 14, 1976 and therefore, Chapter 71-133 created, by inference, a tax exemption in perpetuity for all government property encumbered by leases for private purposes prior to April 14, 1976. Id. at 13. In this way, Petitioner's argument hops from one false premise to another false premise to reach a patently false conclusion.

In the first place, Petitioner's argument that a tax exemption was created by inference when there is no statutory language explicitly creating such an exemption is doubtful, at best. This argument runs contrary to the well-established principle that exemption statutes are strictly construed against the taxpayer; indeed, Florida has never recognized a tax exemption created "by inference." See, e.g. State ex rel. Szabo v. Dickinson, 286 So.2d 529, 530-31 (Fla. 1973); United States Gyspym Co. v. Green, 110 So.2d 409, 413 (Fla. 1959).

Secondly, Petitioner's argument that the Constitution allows the legislature to grant exemptions for municipal property leased for private purposes is false. This Court has already rejected this argument. Article VII, section 3(a) of the Florida Constitution (1968) states, "[a]ll property owned by a municipality and used exclusively by it for municipal

purposes shall be exempt from taxation." Such a constitutional provision "is a limitation upon and not a grant of the power of the legislature to exempt property from taxation." Hillsborough County Aviation Authority v. Walden, 210 So.2d 193, 195 (Fla. 1968).

In Lykes Brothers, Inc. v. City of Plant City, 354 So.2d 878, 881 (Fla. 1978), the Court rejected an argument virtually identical to the argument made by Petitioner in the instant case. In Lykes Brothers, the taxpayer had leased municipal property for private purposes prior to the effective date of Section 196.199 and claimed that it was exempted from taxation by an implied grandfathering provision. Addressing the question of whether the legislature even had the power to create such an exemption, the court held, "[a]t the time section 196.199(3) was enacted, the Legislature no longer possessed the constitutional power to authorize tax exoneration of property owned by a municipality and used for non-public purposes." "[D]ecisions construing the 1968 Constitution make clear that taxation of such property is no longer discretionary." Id.n.14.

In light of the constitutional prohibition and for other reasons, the Court in Lykes Brothers refused to interpreting 199.196(3), as creating by inference a tax exemption for government properties leased for private purposes prior to the date mentioned in the statute: "We do not read into the language of Section 196.199(3) a legislative attempt to exceed this constitutional limitation by giving legal effect to

otherwise invalid pre-1972 contracts, and thereby creating a new category of tax exemption." 354 So.2d at 881.

In the instant case, Petitioner is merely repeating the arguments rejected in Lykes Brothers, but is relying on section (4) of 196.199, rather than section (3). But the constitutional limitations and principles of statutory interpretation that apply to section (3) also apply to section (4), and the Court should reject Petitioner's attempt to read into the statute a intent to create a new exemption, even as this Court so refused in Lykes Brothers.

As the above discussion makes clear, Petitioners convoluted legislative-history argument must also be rejected. Clearly, if the legislature does not have the power to create an exemption for all government property encumbered by leases for private purposes prior to the date set forth in 196.199, the court should decline to find that the legislature intended to do so by inference. It comes as no surprise, then, that Petitioner grossly misreads the legislative history of section 196.199.

Section 196.199 was not intended to create an exemption from taxation for government property leased for private purposes prior to the date mentioned in section 196.199(4). To the contrary, the entire thrust of that act was to create a uniform system of exemptions and to put an end to the patch work system of exemptions whereby exemptions were granted ad hoc by special acts of the Legislature and by local governments for reasons other than actual exempt use. The

Preamble to Chapter 71-133 states that it is "repealing all exemptions granted by special or local acts or general acts of local application; ... providing for the exemption of certain property used exclusively for or predominately for literary, scientific, religious, educational and governmental purposes; excluding certain leasehold interests from exemption...". Nowhere in the Preamble is any mention made of the purpose that Petitioner reads into the act of exempting government property subject to leases prior to a certain date. See, Preamble to Chapter 71-133.

Indeed, Petitioner's premise that "the thrust of 71-133 [the act creating 196.199(3)] was to place the first tax on the private use of government property" (Id. at 18, n.5) is false. Prior to the passage of 71-133, Municipal property leased for private purposes was routinely placed on tax roles and taxes. See, e.g., "Municipal Casino Property - County Taxes -Assessment," Op'n Att'y Gen. 051-118 (May 17,1951) (approving of property appraiser's decision to place municipal property rented to casino on tax role). But the State, Counties and Municipalities would sometimes voluntarily agree not to place such properties on the tax roll, even though the government otherwise had the power to tax the property. See, generally, Lykes Brothers, 354 So.2d at 878 (in 1964 Plant City entered into contract agreeing not to tax property it was leasing to meat packing plant). Chapter 71-133 was intended to end this process of granting exemptions for nonexempt uses - not to perpetuate or ratify it.

Read in light of this actual legislative purpose, the language relied upon by Petitioner does not support its position. Petitioner pulls one sentence out of it context. The relevant sections of Chapter **71-133** are as follows:

> (c) Nothing herein or in **5192.010,** Florida Statutes, shall require a governmental unit or authority to impose taxes upon a leasehold estate created prior to the effective date of this act if the lease agreement creating such leasehold estate contains a covenant on the part of such governmental unit or authority as lessor to refrain from imposing taxes on the leasehold estate during the term of the leasehold estate, but any such covenant shall not prevent taxation of a leasehold estate by any taxing unit or authority other than the unit or authority making such covenant.
>
> (3) Property owned by the United States, by the State of Florida, or by any political subdivision, municipality, agency, authority or other public body corporate of the state which becomes subject to a leasehold interest of a nongovernmental lessee other than that described in subsection (2)(a) above on or after June **1, 1971,** and the leasehold interest of such a lessee, shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary, scientific, religious or charitable purposes.
>
> **(4)** No exemption granted before June **1, 1971** shall be revoked by this act if such revocation will impair any existing bond agreement.

When read in pari materia with the other sections, the original section (3) of section **196.199** as created in chapter **71-133** was intended to establish June **1, 1971** as a deadline after which no special agreements or acts of exemption could

be granted under any circumstances. This deadline was necessary because chapter 71-133 revoked most, but not all such exemptions. For example, section (4) stated that the general revocation of special agreements or acts of exemption did not apply to exemptions granted prior to June 1, 1971 when to do so would violate an existing bond agreement. Similarly, section (2)(c) gave the State and Counties the right not to require taxation of properties that they had agreed not to tax prior to December 31, 1971 (although government entities not a party to such agreements could tax such properties). Thus, this deadline was established to limit the ability of governmental entities to enter into agreements to exempt property from taxation. It was not intended to create a new exemption for all government properties that had private leases on it prior to June 1, 1971.

Accordingly when the legislature extended this deadline to April 15, 1976 in Chapter 76-283, the Legislature was merely extending the time for government entities to enter into agreements to grant special exemptions that would otherwise be revoked by Chapter 71-133.1' The Legislature was

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1/ Admittedly, Chapter 76-283 attempts to apply this extension of time only to "a municipality, agency, authority, or other public body", specifically excluding states and counties. But municipalities could not enter into agreements not to tax municipal property leased for private purposes, unless given specific legislative authority to do so. See, Lykes Brothers, 354 So.2d at 880 ("municipal contracts promising not to impose taxes, or granting tax exemptions, are ultra vires and void in the absence of specific legislative

(Footnote Continued)

not, as Petitioner contends, creating an entire new class of exempt property by inference.

III.

PURSUANT TO 196.199(2)(B) THE SUBJECT LEASEHOLD SHOULD BE TAXED AS REAL PROPERTY SINCE NO RENT IS PAYED EXCEPT FOR DE MINIMIS AND NOMINAL AMOUNT OF $1 ANNUALLY FOR 99 YEAR LEASE OF 192 ACRES WITHIN CITY LIMITS.

Petitioner's final argument centers on the fact that it paid without protest intangible property taxes on the leasehold allegedly pursuant to section 196.199(2)(b). Petitioner then argues that the value of the 99 year leasehold must be subtracted from the property subject to the real property taxes, leaving only the minimal value of residuary fee subject to the real property taxes. This argument is extremely clever from Petitioner's point of view since it allows the Petitioner to pay $791.78 in intangible taxes and thereby avoid paying $30,186.65 in real property taxes. But this argument fails because the leasehold is subject to an intangible tax only if rent is payed on the lease and no rent is payed on the lease in this case except for the nominal and de minimis amount of $1 annually, which is rent in name only and not in substance.

Section 196.199(2)(b), Fla.Stat. reads as follows:

> Such leasehold or other interest shall be taxes only as intangible personal property

(Footnote Continued)
authority."). Perhaps 76-283 was passed with a specific project in mind whose special tax status the Legislature had already approved by special act.

> pursuant to chapter 199 if rental payments are due in consideration of such leasehold or other interest. If no rental payments are due pursuant to the agreement creating such leasehold or other interest, the leasehold or other interest shall be taxed as real property.

This section was created by Chapter 80-368, Laws of Florida, which was one of several efforts to give relief to taxpayers leasing government property at high market rates and at the same time paying high ad valorem taxes. As a result of Chapter 71-133 and judicial interpretations to that law, "lessees [of certain governmental property] are now faced with large tax bills for taxes due and uncollected since January 1, 1972, while still having to pay rent to [the local government]." State of Florida House of Representatives, Committee on Finance & Taxation, attached as appendix D to Petitioner's Brief.

In the situations that the legislature was intending to address, the rent was not nominal: instead it was substantial. For example, the Finance Committee report specifically mentioned the circumstances of lessees of the Santa Rosa Island Authority: "lessees pay a fixed rental rate to the authority. Those lessees who operate businesses also provide approximately 5% of their annual gross income from their businesses to the Authority." Straughan v. Camp, 293 So.2d 689, 692 (Fla. 1974). See, Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571, 574 (Fla. 1958) (rent was $25,000 annually and $100,000 paid for option to purchase for $700,000).

In contrast, Petitioner admit in their statement of facts that their rent is only "nominal." Pet. Int. Brief at 2. Indeed, Petitioner has a 99 year lease on 192 acres of land within the limits of the City of Tampa -- and is paying for rent only $1 per year. The annual rent for the entire 192 acres would not pay the greens fees for one golfer for nine holes. "Nominal" means "existing in name only; ...not real or actual; merely named, stated, or given, without reference to actual conditions; often with the implication that the thing named is so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the name." Black's Law Dictionary 946 (5th Ed. 1979). A rent of $1 per year for 192 acres is truly "not real or actual" rent, but is only rent in name only. Such rent "in name only and not in substance" was not intended to qualify a leasehold for treatment as an intangible under section 196.199(2)(b).

The law of Florida has repeated recognized that such a nominal factor will not determine a legal outcome. For example, in Hialeah, Inc. v. Dade County, 490 So.2d 998, 1001(Fla. 3rd DCA 1986), the court held that Hialeah, Inc. was the equitable owner required to pay tax for certain property even though, at the end of the purported lease agreement, Hialeah would not receive title to the $11 million property until it payed consideration of $100. The court held this consideration was "nominal" and therefore did not change the fact that Hialeah Inc. controlled all meaningful aspects of ownership.

This authority is in accord a long line of Florida cases. "The legal maxim de minimis non curat lex simply means that the law does not care for small things." Loeffler v. Roe, 69 So.2d 331, 338 (Fla. 1954) (nominal encroachment on easement does not make title unmarketable). See, Dept. of Revenue v. Yacht Futura Corp., 510 So.2d 1047, 1049 (Fla. 1st DCA 1987) (de minimis use of yacht in state did not subject it to taxation); Smith v. Winn Dixie Stores, Inc., 448 So.2d 62, 64 (Fla. 3rd DCA 1984) (lease would not be defaulted due to breach that was de minimis); Metropolitan Dade County v. Shiver, 365 So.2d 210, 213 (Fla. 3rd DCA 1978) (refusing to stop election when difference between ballot language and authorizing statute was de minimis).

In light of this authority it would be strange indeed to assume that the legislature intended that nominal, de minimis rent, rent that was "in name only, but not in substance," would entitle a leaseholder to be taxed at the lower intangible rate. Moreover, such an interpretation would mean that section 196.199(2)(b) was violative of the equal protection provisions of the Florida and Federal Constitutions. The standard for testing the constitutionality of a classification for state tax purposes is whether the distinction serves a "rationale basis." "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." Just Valuation & Taxation League v. Simpson, 209 So.2d 229, 232

(Fla. 1968), quoting Allied Stores of Ohio v. Bowers, 358 U.S. 522 **(1959).**

If the classification is merely "nominal," that is, based on name alone and not substance, it clearly does not met this test. There is no rationale basis to treat things differently when they are identical in substance and differ only in name. If such were the case, there could never be an equal protection challenge to any statutory classlflcation, since even the most arbitrary statutory classification establishes a distinction in name. While the Legislature may well be able to distinguish for tax treatment leaseholders who pay actual rent and leaseholders who pay no rent, it cannot constitutionally distinguish between leaseholders who pay rent in name only and not in substance (like Petitioner), and those who pay no rent. Accordingly, Petitioner's interpretation should be rejected because it leads to an unconstitutional result. Instead, the statute should be interpreted to mean that leaseholders who pay only nominal rent are treated the same as leaseholders who pay no rent.

For the above stated reasons, the subject leasehold should be taxed **as** real property, and the issue of double-taxation is simply not a real issue in this case.

CONCLUSION

Having reserved ruling on the jurisdictional issue, this Court should decline jurisdiction because the only issue of great public importance, the constitutionality of section 196.199(2)(B), is properly avoided in this case by holding

that petitioner simply does not come within its provisions. In the alternative, this court should affirm the Appellate Court for the reasons stated in the Appellate Court opinion and because (1) section 196.199(4) did not create a new tax exemption by inference; and (2) the subject leasehold should be taxed as real property pursuant to section 196.199(2)(b) since no rent is payed except for nominal rent which is rent in name only and not in substance.

If, however, the court determines that the payment of nominal rent entitles leaseholders like Petitioner to such vastly disproportionate tax treatment as Petitioner requests, then this court should reach the issue of the constitutionality of 196.199(2)(b), and this court should hold that section 196.199(2)(b) violates the equal protection and just valuation provisions of the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 30 day of September, 1991, mailed to: JEAN R. WILSON, Assistant Attorney General, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32399; BENJAMIN K. PHIPPS, Post Office Box 1351, Tallahassee, Florida 32302; PETER GUARISCO, 2003 Apalachee Parkway, Suite 101, Tallahassee, Florida 32301; S.L. WILLIAMS, 150 South Palmetto Avenue, Box A, Daytona Beach, Florida 32114; WILLIAM C OWEN and F. TOWNSEND HAWKS, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 410 First Florida Bank Tower, Post Office Drawer 190, Tallahassee, Florida 32302; and B. NORRIS RICKEY, Sr. Assistant County Attorney, 315 Court Street, Clearwater, Florida 34616.

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