C47

FILED
SID J. WHITE
SEP 30 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v. CASE NO. 78,201

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.
_____/

RESPONDENT'S (BRAND) ANSWER BRIEF

BENJAMIN K. PHIPPS
Florida Bar No. 63151
FINE JACOBSON SCHWARTZ
NASH BLOCK & ENGLAND
Post Office Box 1351
Tallahassee, FL 32302
(904) 222-2717

attorney for Respondent
Property Appraiser

TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

CASES:

STATUTES AND OTHER AUTHORITIES:

PRELIMINARY STATEMENT

In this Brief, we will refer to the Petitioner as "CCCC". The Respondent, BRAND, shall be referred to as the "Property Appraiser"; Respondent, TUCKER, shall be referred to as "DOR".

STATEMENT OF THE CASE AND FACTS

Respondent, Property Appraiser, accepts and adopts the Statement of the Case and Facts set forth by CCCC in their Initial Brief, except CCCC, at the bottom of page 3 states:

> . . . . the Respondent Property Appraiser ignored the change [the 1980 amendment to 5196.199, Fla. Statsl and continued to assess the Club as the owner of the 192 acres in issue.

In fact, in all years prior to 1989, CCCC, or its predecessors, had annually paid the ad valorem tax on its 192 acre country club. Prior to 1989, it had never claimed an exemption from such tax, nor had it ever filed (and has yet to file) an application for exemption from ad valorem real property taxes, as is required under §196.199(5).

SUMMARY OF ARGUMENT

The tax status of governmentally owned properties is dealt with in the Florida Constitution at Art. VII, §3(a), which simply states, "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." In keeping with the concept of governmental immunity, the property of the United States, of the State of Florida, and of its political subdivisions are not mentioned. No grant of exemption under the charter law is necessary for property which is immune from the imposition of taxes at the state or local level. The concept of immunity is that the sovereign cannot be taxed. The United States and Florida are sovereign. Counties, school districts, and special taxing districts are political subdivisions or agencies of the sovereign state of Florida, and as such, are similiarly immune from taxation,

The key to understanding the distinction is to recognize that municipal properties have been granted an exemption by the people of this state by their adoption of the 1968 Constitution. But this exemption is limited to those instances where the property is used exclusively for municipal or public purposes. It is undisputed, and the trial court

determined that CCCC is not using the subject property, owned by the City of Tallahassee, for any municipal or public purpose. Since the property is being used for a proprietary purpose, it is subject to taxation.

The fact that CCCC has voluntarily filed an intangible tax return with the State of Florida, and paid intangible taxes, is incidental. CCCC has a leasehold interest in property owned by a municipality. Their paying a tax on that interest to the State has no bearing on the taxability on the real property. If the property is being used for municipal or public purposes, it is exempt from real property taxes. If not, Florida case law mandates that the unencumbered fee simple interest in the property is subject to ad valorem taxes. Those taxes are the responsibility of the owner *of* the property, the City of Tallahassee. The fact that the City has contractually passed along those taxes to CCCC is irrelevant.

Our Legislature has also specifically addressed the taxation of governmental leaseholds in $196.199, Fla. Stats. This Legislation, adopted as part of the 1971 reform of Florida's ad valorem tax exemption law, provided for the taxation of any leasehold interest in governmental property which was being used for nongovernmental, i.e., proprietary, purposes. This Court, in the landmark case of Williams v. Jones, 326 So.2d 425 (Fla. 1975), at 433, clearly stated that

any statutory scheme providing otherwise would be unconstitutional. When the 1980 Legislature, through its enactment of ch. 80-368, Laws of Florida, attempted to exempt from ad valorem real property taxes governmental leasehold property used for private, proprietary **purposes,** by subjecting those leaseholds to only the state intangible tax, they established a tax treatment which is not permitted under our constitution. Further, they failed to recognize that leasehold interests in municipal property cannot be treated the same as leasehold interest of those properties which are immune from taxation (the United States, the State, and **its** political subdivisions). See City of Orlando v. Hausmam, 534 So.2d 1183 (5th DCA 1988), rev. den., **544 So.2d** 199 (Fla. 1989). In failing to recognize this dichotomy, the Legislaive created the situation which exists with CCCC, here in Tallahassee. Under the 1980 amendment, had CCCC been leasing their private country club from Leon County, it would be exempt from ad valorem property taxes, and subject only to the intangible tax. The inequity, which CCCC claims it is suffering, was created by the adoption by **the** Florida Legislature of an unconstitutional exemption. The inequity can be cured **only** by striking the unconstitutional statute and providing that, in the words of Williams v. Jones, no "governmental-proprietary leasehold can be exempted from taxation."

ARGUMENT

POINT I

THE USE OF GOVERNMENTAL PROPERTY DETERMINES ITS TAXABILITY

As is often the case, understanding where we are is really only possible when we understand where we have been. We only have to go back to 1968, when our modern constitution was adopted. It provided:

> SECTION 3. Taxes; exemptions - -
> (a) All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation.

There is no other language in the Florida Constitution relating to the taxation of governmental property. Inherent in taxation is the concept of sovereignty. Only the sovereign, and those to whom it has delegated the authority, have the authority to impose taxes. Inherent in the sovereign's power to impose taxes, is the right to exclude itself from taxation. Correspondingly, lesser sovereigns and their delegates cannot impose taxes on the sovereigns above them. Thus, counties cannot impose taxes on the state, and the states cannot impose taxes on the United States.

In 1971, the Legislature rewrote chapter 196 of the Florida Statutes. Included was a new section dealing with the taxation of governmental leasehold, 5196.199. This

section codified the existing case law to provide that governmental properties, leased for nongovernmental purposes to private parties, were subject to taxation. Governmental leaseholds would be exempt only when the property was used for governmental purposes, or for other exempt purposes, e.g. literary, scientific, religious or charitable.

The next step in the history of the taxation of governmental leaseholds under the 1968 Constitution occured when this Court upheld the constitutionality of 5196.199 in the case of Williams v. Jones, 326 So.2d 425 (Fla. 1975), appeal dismissed, 429 U.S. 803 (1976). This case involved the taxation of property subject to long term leases owned by the Santa Rosa Island Authority. In upholding the requirement of the 1971 legislation that government leaseholds could be exempt only when used for governmental purposes, the court coined the terms "government-governmental" and "governmental-proprietary". The Court then went on to state that to not tax property which was competing with privately owned but similar residential or commercial properties would constitute a proscribed denial of equal protection.

> The exemptions contemplated under Sections 196.012 (5) and 196.199(2)(a), Florida Statutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. With the exemption being so interpreted all property used by the private persons and commercial enterprises is subject to taxation either directly or indirectly through taxation on the leasehold. Thus all privately used property bears a tax burden in some manner and this is what the Constitution mandates. 326 So.2d, at 433. (The emphasis is the Court's).

In 1980, our Legislature attempted to beat a major retreat from their 1971 reform legislation and to subvert the holding in Williams v. Jones, supra. They adopted legislation which attempted to tax the governmental leasehold as intangible property, under the state intangible tax imposed under ch. 199, Fla. Stats. Governmental leaseholds, which the Williams v. Jones Court had ruled could not escape local ad valorem taxation, were exempted from local ad valorem taxation. See §196.199(2)(b), Fla. Stats (1972 Supp.). The 1st District Court of Appeals in the case of Miller v. Higgs, 468 So.2d 371 (1st DCA 1985), addressed some of the questions relating to the constitutionality of this statute. By certifying the question to this Court, six years later, that Court apparently recognized the constitutional frailties of that statute. It should be noted that the First District is not the only Florida Court of Appeals to have done so. *See* City of Orlando v. Hausman, supra. Indeed, most commenta-

tors have expressed skeptisim that the 1980 legislation conforms with the strong statement of the Florida Supreme Court in Williams v. Jones, supra.* The willingness, indeed eagerness, of the Florida Legislation to enact unconstitutional tax laws is notorious. See Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989); McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 110 U.S. 2238 (1990); and Div. of Alcoholic Bev. v. McKesson Corp., 524 So.2d 1000 (Fla. 1988).

Regardless, whether property is owned by a political subdivision or by a municipality, the use of the property for proprietary purposes by a private lessee subjects at the leasehold to local ad valorem taxation. This is the mandate of Williams v. Jones.

---

* See Robert S. Goldman's excellent historical outline and analysis of this entire issue, beginning on page 206, Vo. 11, Florida State & Local Taxes (The Florida Bar). This is mandatory reading for anyone wishing to thoroughly understand the subject.

POINT II

TO THE EXTENT THAT §196.199 CONFORMS WITH THE THE FLORIDA CONSTITUTION, IT IS CONTROLLING

CCCC is a private country club operating within the city limits of the City of Tallahassee. The golf links are located on a 192 acre parcel leased from the City of Tallahassee for 99 years, beginning in 1956. All parties concede that the use of the property as a private country club constitutes a "governmental-proprietary" use. In fact, the trial court so determined. Prior to 1989, this property had been subjected to full ad valorem real property taxes. In 1989, the taxpayer filed an intangible tax return with the state, and sought a refund for the ad valorem taxes which it had paid on the property for the preceding four years. The application for refund was denied by the Leon County Property Appraiser under the authority of City of Orlando v. Hausman, supra. That case held that restaurants and other private commercial facilities operated on property leased at Herndon Airport from the Orlando Airport Authority, an agency of the City of Orlando, could not be exempted from ad valorem taxation. These properties were not being used "exclusively by [the municipality] for municipal or public purposes." This Court refused to review that decision of the 5th District Court of Appeals, 544 So.2d 199 (Fla. 1989).

That holding is also in compliance with §196.199(4):

> (4) Property owned by any municipality * * * * which becomes subject to a leasehold interest or other possessory interest of a nongovernmental lessee * * *, after April 14, 1976, shall be subject to ad valorem taxation * * * *.

It should be noted that this subsection deals not just with that portion of the property which may be leased to the nongovernmental entity, the leasehold estate; it deals with the entire property. Thus, it conforms to the holdings by this Court in Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989), and Schultz v. TM Florida-Ohio Realty Ltd. Partnership, 577 So.2d 573 (Fla. 1991). These cases simply recite the long held requirement that the Property Appraiser assess the unencumbered fee simple interest in the property, i.e. all interests in the property. Once the property ceases to be used exclusively, by the municipality, for municipal or public purposes, the entire unencumbered fee simple interest in the property becomes subject to ad valorem taxes. Not only is this the holding of the case law in Florida, this is the specific mandate of §196.199(4).

POINT III

THE NONGOVERNMENTAL LEASEHOLD INTEREST OF AN IMMUNE PROPERTY MAY BE SEPARATELY TAXED, BUT SUCH INTEREST IS NOT, AND CANNOT BE, SEPARATELY TAXED IN THE CASE OF A MUNICIPAL PROPERTY

In reviewing §196.199, it is helpful to note the way in which its draftors have broken down the law by subsection. Subsection (2) deals with property owned by governmental entities but leased out to nongovernmental lessees. It provides that such leasehold interest shall be exempt from taxation only when it is being used for a governmental or other exempt purpose. A close reading of the 1971 statute indicates that it was the intent of the Legislature that the entire property would be subject to taxation if it was not being used for a governmental or other exempt purpose. *See* §11, ch. 71-133, Laws of Florida, attached to this Brief as Appendix A. In 1976, it appears that the Legislature decided that only the governmental-proprietary leasehold would be subject to taxation. The implication is that the retained lessor's interest in properties of immune entities would continue to be immune from taxation. Correspondingly, what is now subsection (4), but was subsection (3) in the 1971 legislation, was modified so only the property of municipalities (and their agencies) would be subject to the rule calling for the entire unencumbered fee simple interest to be taxed. See ch. 76-283, Laws of Florida, which is attached as Appendix B.

The argument was made by the Petitioner before the 1st District Court of Appeals that it was within the authority of the Legislature to provide for the continued exemption of the governmental lessor's interest in governmental leaseholds, a point with which this Appellee-Respondent agreed. It can be argued that that is the present state of the statute with regards to governmental leaseholds from governmental entities who are immune from taxation. In other words, a private country club operating on a parcel of land leased from the Board of County Commissioners would be entirely exempt from local ad valorem taxation on real property, even if the private club's lease might be subject to the state's intangible tax, or the local ad valorem tax on this interest on real property (or both) depending on the constraints of the Florida Constitution.

However, it does not appear that the Legislature has done so with regard to municipal property. Subsection (4) of §196.199 provides that the entire property is taxable. Nor could the Legislature do so under the almost irrefutable interpretation of the municipal exemption provision of the Constitution set out in the City of Orlando v. Hausman case.

CONCLUSION

The attempt by the 1980 Legislature to exempt nongovernmental entities leasing governmental property for proprietary purposes is contrary to the Florida Constitution. Subjecting such interest in property to the state intangible tax does not permit an exempting it from the local ad valorem tax on real and tangible personal property, Governmental leaseholds which are being used by nongovernmental entities for private purposes are subject to real estate ad valorem taxation, regardless of the governmental entity who may be the lessor. In the case of municipal property (and property held by agencies of municipalities), the Florida Constitution requires that the entire property be subject to the local ad valorem tax on real and tangible personal property.

Respectfully submitted,

Benjamin K. Phipps
Florida Bar No. 63151
FINE JACOBSON SCHWARTZ
NASH BLOCK & ENGLAND
Post Office Box 1351
Tallahassee, FL 32302
(904) 222-2717

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to WILLIAM C. OWEN, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 410 First Florida Bank Tower, Post Office Drawer 190, Tallahassee, Florida 32302; JEAN R. WILSON and RALPH R. JAEGER, Assistant Attorney Generals, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, Florida 32399; PETER GUARISCO, 2003 Apalachee Parkway, Suite 101, Tallahassee, Florida 32301; S. LaRUE WILLIAMS, 150 South Palmetto Avenue, Box A, Daytona Beach, Florida 32114; LARRY E. LEVY, Post Office Box 10583, Tallahassee, Florida 32302; NORRIS B. RICKEY, Assistant County Attorney for Pinellas County, 315 Court Street, Clearwater, Florida 34616; and DANIEL A. WEISS, Assistant County Attorney for Dade County, Suite 2800, Metro-Dade Center, 111 N.W. First Street, Miami, Florida 33128, this 30th day of September 1991.

Attorney