IN THE SUPREME COURT OF FLORIDA

Case No. 85,434

PORT OF PALM BEACH DISTRICT,

Petitioner,

-vs-

DEPARTMENT OF REVENUE, et al.,

Respondents.

FILED
SID J. WHITE
OCT 18 1995
CLERK, SUPREME COURT
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Chief Deputy Clerk

APPEAL FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA
L.T. CASE NO. 93-03053

ANSWER BRIEF ON THE MERITS OF RESPONDENT, GARY NIKOLITS, AS PALM BEACH COUNTY PROPERTY APPRAISER

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STATEMENT OF THE CASE

Petitioner, Port of Palm Beach District, is a publicly owned business chartered by the Legislature. Respondents, Gary R. Nikolits and the State of Florida, Department of Revenue, are respectively the Palm Beach County Property Appraiser and the agency responsible for overall supervision of the assessment and collection of taxes.[1]

In 1992, the Palm Beach County Property Appraiser assessed those portions of land and buildings owned by the Port of Palm Beach District which were leased out to private, profit-making corporations. Some of the assessments were only against buildings owned by lessees of the Port.

Petitioner filed a declaratory judgment action in 1992 to contest those assessments. The year 1993 was added by amendment. Three tenants, the Florida Sugar Marketing and Terminal Association, Inc., Birdsall, Inc., and the Florida Molasses Exchange, Inc., intervened. They are the real parties in interest, since all of Petitioner's leases provide for a total pass-through of ad valorem taxes to the tenants. Through its leases, the incidence of the taxes falls squarely on the tenants.

Petitioner has no financial interest in this case whatsoever because of the tax pass-throughs. Its participation here and in the lower courts is solely for the benefit of its tenants. If it does not pay the taxes, no mechanism exists in Chapter 197, Florida

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[1] The Department of Revenue is only a proper party in a tax assessment challenge when it is alleged that the assessment is contrary to the Florida Constitution. Section 194.181, F.S.

Statutes, for its lands to be sold for nonpayment of taxes.

The Circuit Court, Hon. John J. Hoy, entered Summary Judgment in favor of Petitioner and the Intervenors, finding that the Port of Palm Beach District is a political subdivision of the State of Florida and immune from taxation, but that material issues of fact exist with respect to the claims regarding the leasehold interests of the lessees. The Court denied Summary Judgment with respect to the ad valorem taxability of the leasehold interests of the lessees of the Port.

Subsequent to the hearing on the Petitioner's and Respondent's Motion for Summary Judgment, Count II of the Intervenors' Amended Complaint was dismissed, since all parties stipulated that the Property Appraiser had made no effort to assess the leasehold interests of any of the tenants. The Property Appraiser deposed various Port officials and those depositions are in the Record on Appeal.

The District Court of Appeal, Fourth District, reversed the Order granting Summary Judgment. *State of Florida, Department of Revenue v. Port of Palm Beach District*, 650 So.2d 700 (Fla. 4th DCA 1995).

References in this Brief to the Record on Appeal are R-(page number), and to Petitioner's Initial Brief on the Merits are IB-(page number). References to the Brief of Amicus Curiae, St. Lucie County Port and Airport Authority ("SLCPAA" herein) are AB-(page number).

STATEMENT OF THE FACTS

The Port of Palm Beach District was created by the Legislature as "a body corporate". Its charter provides that it is proprietary in nature rather than governmental.[2] Ben Murphy, Executive Director of the Port, testified by deposition that the Port of Palm Beach is a "landlord port". This means it leases its facilities out to various businesses. The Port has made a profit, called "retained earnings", for the years during which Mr. Murphy has been at the helm. The 1992 annual report shows total revenues rising 7.4% from the previous year - from $6,100,801 to $6,549,892, and retained earnings increasing from $22,675,680 to $26,063,936. The Port has never declared a "dividend" to the people of Palm Beach County of these retained earnings, but on the other hand, it has not imposed property taxes, either. The Port has built cruise ship terminals and warehouses at its expense. The Port charges dockage charges. For example, a 500' ship pays $500 per day.[3] The Port charges "wharfage" for the privilege of moving cargo over the dock at the rate of $1.05 per ton. The Port does not require bids for prospective tenants. Recently, the Port commissioners set a policy to determine a lease payment based on 10% of the costs of the

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[2] See Chapter 74-570, Laws of Florida 1974, Art. XX: "It is hereby determined and declared that each and all powers conferred by this Act and the exercise thereof are proper public and proprietary purposes."

[3] There is no qualitative difference in the docking function between the port and a marina where smaller commercial vessels such as dive boats dock, such as the Riviera Beach municipal marina next door, except as to the size of the boats that can be accommodated. Leased out marinas are taxable, *Mikos v. City of Sarasota*, 636 So.2d 83 (Fla. 2d DCA 1994).

cruise line's terminal buildings.

Various products moving through the Port include sugar, molasses, containers, cement, fuel oil, fruit, sod, frozen goods, food, furniture, golf carts, linens, pillows, and the like.

The Port consists of approximately 187 acres, of which 65 acres are waterfront. There are no public facilities at the Port such as beaches or marinas, or even a picnic area. There are no public fishing piers, restaurants, nor public retail outlets.

The Port's annual report, which reads much like the annual report of a Fortune 500 company, has this to say at page 10:

> Sugar has experienced another outstanding year, surpassing last year's all time high in production. The Sugarcane Growers Cooperative broke three records during the 1992 growing season - harvesting and grinding the most sugarcane in a single season; producing the most sugar in a single crop; and producing the most sugar in a single day. These records were broken even though for the first time in the co-operative's 30 year history, 81% of the crop was mechanically harvested. Traffic at the Port of Palm Beach was brisk as truckloads of raw sugar were stored in the 20,000 ton warehouse prior to being loaded on barges. The Port continues to reap the benefits of an agricultural industry that remains an economic powerhouse in Palm Beach County.

The Deposition of Jean C. Rainbow, General Manager of the Florida Molasses Exchange, stated that the Exchange has seven employees on its payroll and ships molasses out of the Port on ocean or bulk tankers described as being tankers of about 23,000 metric tons in size. About 90% of the black strap molasses becomes cattle feed. Before the Molasses Exchange began using the Port of Palm Beach, it tried to utilize Port Everglades, but found the distance to transport the product from the Lake Okeechobee area was

"very inconvenient". The Florida Molasses Exchange represents all seven of the sugar mills, owned by six companies around Lake Okeechobee. The Exchange represents 100% of the sugar industry to dispose of and market the black strap molasses by product.

Fred Hill, general manager of the Florida Sugar Marketing and Terminal Association, Inc., stated that the last sale of sugar before his deposition was 5,600 tons to Supreme Sugar in Louisiana. The domestic market price for sugar, because of Congress' largesse, is 21 cents a pound, while the world price is currently about 11 cents a pound. The Federal government controls imports to keep the domestic price at a little above 20 cents a pound. Barges carrying 10,000 tons deliver sugar from the Port of Palm Beach to the refinery where it is processed. During 1992, about one million tons of sugar passed through the Port.

The Port's witnesses claimed that the Port serves a "governmental-governmental" purpose because the Port generates dollars in the community. This is the same beneficent effect of any major employer such as IBM, Motorola, or a business like the Palm Beach Mall.

THE 1992 ASSESSMENTS

No assessment was made of the channels, turning basin, jetties, breakwaters, public landings, wharves, docks, markets, parks, recreational facilities, or other "port facilities" as defined in Section 315.02(6), Florida Statutes, since those are not leased to the various tenants.

The challenged assessments are as follows:

Parcel I.D. No. (All 56-42-33-19-001)	Description	Assessed Value	Taxes
0000	Maritime Office Building	2,399,155	$62,962.56
0010	Bldg., Gulfstream, Inc.	3,429,721	89,645.96
0020	Eagle Cement Co. Buildings	1,842,774	48,166.38
0030	Eastern Cement Corp. bldgs.	330,190	8,839.81
0050	Bldgs - P. B. Steamship	227,830	5,953.44
0060	Fla. Sugar Marketing & Term.	1,812,556	47,376.54
0070	Birdsall, Inc.	206,446	5,396.08
0080	Bldg. leased Teeters Bros.	144,691	3,781.93
0090	Bldg. leased to Gulfstream	533,400	13,938.35
(All 56-42-33-22-001-)			
0010	Florida Molasses Exchange	944,715	24,692.93
0020	Birdsall, Inc.	4,005,484	104,695.24

The tax rate is approximately $26.13 per $1,000 of assessed valuation.

Petitioner implies that the taxes imposed by Palm Beach County, the Palm Beach County School Board, City of Riviera Beach, etc., somehow are the Port's responsibility to pay. Each of the leases contains a covenant for the Tenant to pay all taxes. For example, Paragraph 13 of the Eagle Cement lease dated June 24, 1983, provides:

> 13. Taxes and assessments on premises. It shall be the duty of Tenant to pay any and all lawful fees, licenses, dues, assessments and taxes which may be levied against Tenant and/or the Premises hereinabove described, and on additions and improvements thereto, and on equipment used as part of the property and in connection therewith or located thereon.

If the tenants do not pay the taxes as additional rent, there is no mechanism by which the Palm Beach County Tax Collector can force Petitioner to pay the taxes imposed. It is up to Petitioner as landlord and as a responsible public body to require the tenants to pay the taxes as additional rent, per their leases.

The leases provide that the improvements are the property of the tenants until termination of the lease. The assessments that were made in several cases are only on the buildings."

The Port of Palm Beach District is a business. It competes with port facilities located on privately owned property, such as Port Laudania in Broward County, the Belcher oil terminal on Fisher Island in Miami, most of the land on the Miami River where smaller ships ply the waters from Miami to Haiti and the Bahamas, and various locations in Tampa Bay such as the TECO facility.[5] If the Opinion of the District Court of Appeal, Fourth District is reversed, the Port's tenants will receive a subsidy from the other taxpayers in Palm Beach County in the form of a shift of ad valorem taxes onto the homeowners and other taxpayers of the county.

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[4] Section 196.199(2)(b), F.S., provides, in part, " Nothing in this paragraph shall be deemed to exempt personal property, buildings, or other real property improvements owned by the lessee from ad valorem taxation." ***See Parker v. Hertz Corporation, 544 So.2d*** 249 (Fla. 2d DCA 1989) holding such improvements properly taxable, even though the lease provides that they revert to the Hillsborough County Aviation Authority at the end of the lease.

[5] The District tried to buy the Port Executive Plaza, located across U. S. Highway 1 from the port facilities. "Now the port commission must submit a contract to the Resolution Trust Corporation, said port attorney Robert Cook. . ..Cook and the commission believe that the property will make money if tenants are persuaded to stay in the plaza." Port Offers $1.9 million for Plaza. Palm Beach ***Post,*** November 24, 1992, p. 4B.

SUMMARY OF ARGUMENT

Included in the Appendix hereto is a fold-out "decision matrix" which may be useful in harmonizing the various decisions which discuss taxation of governmental property. Each of the decisions of this court and the District Courts of Appeal fits somewhere onthatmatrix, except Sarasota-Manatee ***Airport Authority v. Mikos,*** 605 So.2d 132 (Fla. 2d DCA 1992), rev.den. 617 So.2d 320 (Fla. 1993).

Section 196.001, Florida Statutes, provides that all property in Florida is subject to ad valorem taxation unless specifically exempted. The Port of Palm Beach District is a "body corporate" having proprietary powers. Although created by the Legislature, it is not a political subdivision of the State having all the State's general powers. The business of the Port of Palm Beach is business - to provide a place for companies to conduct their businesses. Those companies compete with other businesses who pay their fair share of taxes.

This Court held that the Hillsborough County Aviation Authority's property is not "immune" from taxation. It has consistently approved decisions holding that publicly owned property such as the Capital City Country Club in Tallahassee, various shopping centers in Orlando, the Daytona Speedway, the Sebring International Raceway, etc., are not entitled to operate free of property tax because they do not serve a "governmental - governmental" purpose.

The Legislature provided in Section 196.199(4), Florida

Statutes, that public bodies which voluntarily enter into leases with profit-making businesses had best place a "tax stop" in the agreement, because that property is taxable. Should any "municipality, agency, authority or other body corporate" be found to be immune from taxation, that subsection is a waiver of that immunity.

The Charter of the Port of Palm Beach District itself in effect as of our taxing dates provides only for "exemption". When property is "exempt", failure to use it for public purposes results in a loss of that "exemption".

Sound public policy demands that if Florida is to have a uniform system of taxation, business owners cannot obtain an unconscionable advantage over their competitors by moving their businesses onto publicly-owned property.

This Court should affirm the Opinion of the District Court of Appeal, Fourth District.

INTRODUCTION

This case is about fairness. It should be intolerable to this Court that hundreds of restaurants in Broward and St. Lucie Counties pay their share of property taxes directly or through their rent, while Burt & Jack's Restaurant - located on choice waterfront land owned by the Port Everglades Authority - or Chuck's Seafood Restaurant, overlooking the Indian River on land owned by the St. Lucie County Port and Airport Authority - seek freedom from property taxes because a public body is their landlord.

Little Port Laudania and Alco Shipping pay huge property taxes on their facility on the Dania Cut Off Canal in Broward County, as do landowners along the Miami River, while giants Sea Land and Crowley Caribbean Transport seek to do exactly the same kind of business, moving containers from land to ship and vice versa, only on a larger scale, tax free.

Eagle Cement Company and Eastern Cement Company, located on land owned by Petitioner, would be granted a competitive advantage over a cement company operating on land it owns, were they freed from ad valorem taxation.[6]

First, by affirming the Fourth District Court of Appeal, this Court can ensure that all business competitors pay an aliquot share of property taxes. This ensures healthy competition among businesses.

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[6] As an interesting aside, Rinker Cement Company imports cement from its facility leased from Port Canaveral Authority. There is probably a cement company in Florida that carries out all its operations on taxpaying land,

Second, the other taxpayers of Palm Beach County should not be forced to provide corporate welfare to the port's tenants by paying their share of property taxes through higher millage rates, since the taxes of Palm Beach County homeowners are proportionately increased if the port tenants' $415,000 annual tax is reduced.

POINT I: THE PORT OF PALM BEACH DISTRICT IS A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND IS ADMINISTERING THE GENERAL POLICIES OF THE STATE OF FLORIDA IN THE LEASING OF ITS PROPERTIES TO NON-GOVERNMENTAL LESSEES.

Only a general unit of government possessing all of the powers of the Sovereign can enjoy sovereign immunity. The Port's charter demonstrates that it is limited in geographical area, taxing power, and function. This Court has long held that bodies such as the Hillsborough County Aviation Authority which operate one airport are not immune from taxation, for that very reason. *Hillsborough County Aviation* Authority *v. Walden,* 210 So.2d 193 (Fla. 1968). This Court recognized that because of its limited functions, an airport authority is not a political subdivision of the State. The case this Court cited there involved Port Everglades, Broward *County Port Authority v. Arundel Corp.,* 206 F.2d 220 (5th. Cir. 1953). That case correctly observed that the Broward County Port Authority is in effect a business corporation. Forty one years later, the Circuit Court of Broward County, after a lengthy trial, found that the Broward County Port Authority is still a business. *Port Everglades Authority v. Markham,* Case No. 91-007088/09, Final Judgment of August 4, 1994, copy included in the Appendix hereto at A-1-12, Replacement of the 1885 Constitution with the 1968 Constitution and decisions of this Court have only strengthened the holding of *Arundel.* The purpose of all Port Authorities is to help business do business. Any benefit the people receive is from being able to be customers of, say, the sugar companies at twenty two cents per pound while the world price is half that.

The Port of Palm Beach District espouses a "binary" - on or off - concept of immunity from taxation. It argues that while the Legislature can create and abolish a district, such a district has complete immunity from taxation during its existence. Petitioner argues that no mater what the Legislature says in the enabling act, e.g., that Petitioner's property is only "exempt" from taxation, the Legislature is powerless to modify this amorphous immunity unless it terminates the District's existence.' The Legislature arguably knew what it was doing when it so accurately described the Port of Palm Beach District as a "proprietary" organization.

Petitioner first argues that Chapter 311, Florida Statutes, identifies promotion and continued development of a viable "network" of deep water ports as an important governmental function, but in the same breath speaks of "competing" ports. The ports are either a network or they are not, and they probably are not. As is the case of cities bidding against one another to attract professional sports teams, a port giving an inducement to a company to locate at its facility will operate to the detriment of the port where that company is presently located. Chapter 311, Florida Statutes, only provides an orderly mechanism for spending funds derived from the State Transportation Trust Funds for the dredging or deepening of channels, construction of wharves, docks, etc., acquisition of cranes, environmental protection projects and

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[8] Indeed, the Legislature in §5 of Chapter 91-346, Laws of Florida 1991, abolished the Port Everglades District and Port Everglades Authority and transferred all its property to Broward County effective November 22, 1994.

the like, and appointment of a fifteen person committee from the ports of the state to divide the pie.

There is a huge difference between a 'public purpose' sufficient to authorize a sale of bonds, for example, and a "governmental-governmental" purpose, which is what a tenant must do in order for its property to be exempt.' The Second District Court of Appeal confused the two concepts in Sarasota-Manatee, supra.

As a "landlord port", the Port of Palm Bach District does little more than lease out land to businesses whose function it is to make profits for their stockholders. Business activities of tenants at the Port of Jacksonville do not serve a governmental-governmental purposes. See, e.g., *Mallard* v. *R. G. Hobelmann & Company, Inc.,* 363 So.2d 1176 (Fla. 1st DCA 1978) [the storage, warehousing and servicing of imported motor vehicles at the Port of Jacksonville does not serve a public purpose]; *St. John's Associates v.* Mallard, 366 So.2d 34 (Fla. 1st DCA 1978) [Even though Hobelmann's lessor is performing a function which the Jacksonville Port Authority is authorized to perform, it is a proprietary function competing with other private enterprises in Jacksonville. "St. John's and Hobelman's operations were no less proprietary and for profit than were those of Daytona Beach Racing and Recreation Facilities District or the commercial lessees on Santa Rosa Island". Id. @ 38.]

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[9] For example, in the Port Everglades case, Judge Korda found that the tugboats at Port Everglades served a governmental-governmental function since they fight fires and have the ability to contain pollution when requested. *(A-7).*

Because operating a place to dock ships is not unique to government, viz. privately-owned dock facilities at Port Laudania, the Miami River, the Belcher terminal on Fisher Island in Miami, etc., Petitioner's next argument that State statutes offering support to publicly owned port facilities turns them into governmental-governmental operations must fail. *See, Mikos* v. *City of* Sarasota, supra footnote 3, holding that a municipal marina leased to a non-governmental lessee serves or performs no governmental, municipal or public purpose or function.

Petitioner blurs the relevant dates, January 1, 1992 and 1993, with the present. It is not known why the Port cites 1994 and 1995 acts of the Legislature at IB-8, footnote 5, and 13-14, as such laws could have no possible effect on the taxable status of the Port's lands as of January 1, 1992 in the absence of retroactivity language which does not exist in those enactments. As of January 1, 1992, Port Everglades was not part of county government as mis-stated at IB-8. And, to be precise, the Port of Jacksonville is part of the consolidated City of Jacksonville, the lines between Duval County and the City of Jacksonville being indistinct.

Whatever vitality Sarasota-Manatee *Airport Authority, supra* may have had, has been vitiated by the same Court's later holding in *Sebring Airport* Authority *v. McIntyre,* 623 So.2d 541 (Fla. 2d DCA 1993), affirmed 642 So.2d 1072 (Fla. 1994). Neither the Second District Court of Appeal nor this Court could not have reached its governmental-proprietary conclusion without first finding that property of the Sebring Airport Authority was not "immune" but only

"exempt" from taxation. The Sebring Airport Authority has powers identical to that of the Port of Palm Beach District, see Chapter 67-2070, Laws of Florida 1967, as amended by Chapter 82-382, Laws of Florida 1982, Chapter 89-484, Laws of Florida 1989, and Chapter 91-415, Laws of Florida 1991. The Sebring Airport Authority vigorously argued to this Court at Page 14 of its Brief on the Merits in Case No. 82,489 that it was a political subdivision of the State, entitled to immunity from taxation, citing ***Sarasota-Manatee Airport Authority v. Mikos, supra.***

The people of Florida have authorized only sixty-seven political subdivisions in Art. VIII, Section 1, Const.Fla. 1968, providing that the State shall be divided by law into political subdivisions called counties. At IB-11, Petitioner argues that the Legislature included "districts" as "political subdivisions" in Section 1.08, Florida Statutes. Petitioner misquotes the statute.

Section 1.01(8), Florida Statutes, states that the words "public body," "body politic," or "political subdivision" include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state. Contrary to the Port's suggestion at IB-11 that this section defines "districts" as constituting "political subdivisions", reading that section and the Constitution together, it is clear that the Legislature must be referring to "counties" as political subdivisions and all other districts as "public bodies" or "bodies politic" for that section to be in harmony with the Constitution.

Section 189.402(6), Florida Statutes, does not create any immunity. That section simply defines "special districts" as *@local units of special purpose government". This is clearly what the Port of Palm Beach District is.

Government in Florida has often lent its credit, but not its taxing power, to help citizens borrow money at low rates. For example, Chapter 418, Part II, Florida Statutes, provides for the creation of "special recreation districts" which can employ revenue bond financing to help residents of mobile home parks and condominiums to buy out onerous recreation leases. The powers of such districts in Sections 418.22 and 418.34, Florida Statutes, mirror the powers the Legislature granted to Port of Palm Beach District in its charter. The Port suggests that once the residents of a condominium form such a district to buy out the recreation lease, binary immunity turns "on" and its lands become immune from taxation, since the Legislature is powerless to prescribe otherwise. A mobile home park recreation area should not be immune from taxation because the owners used a public revenue bond financing device to pay off the lease.

Andrews v. Pal-Mar Water Control District, 388 So.2d 4 (Fla. 4th DCA 1980), rev.den. 392 So.2d 1371 (Fla. 1980), does not control our case. That short decision reveals that none of the land sought to be taxed was leased out. This case fits into our "decision matrix" on the "not leased" branch, hence the Court need not have reached the question of whether the lands were immune or not. Even though the Fourth District Court of Appeal unartfully

used the word "immune", such land would still not have been taxable. City of Sarasota v. *Mikos,* 374 So.2d 458 (Fla. 1975) [Vacant land owned by a city but not leased is exempt, but taxable if used for a private city, citing Panama *City v. Pledger*, *140* Fla. 629, 192 So. 470 (Fla. 1939) and *City of Bartow v. Roden*, *286* So.2d 228 (Fla. 2d DCA 1973)].

The Port relies on *Eldred v. North Broward Hospital District,* 498 So.2d 911 (Fla. 1986), as holding that the 1968 Constitution somehow elevated a special tax district to the same immune status as a County, arguendo overruling *Walden, supra.* This Court held only that the North Broward Hospital District was an "independent establishment of the State", so the statutory waiver of immunity in Section 768.28, Florida Statutes, which also applies to municipalities, applies to it. No Court has ever held that a Port has a higher status than an "independent establishment of the State".

In *Hargrove v. Town of* Cocoa *Beach, 96* So.2d 130 (Fla. 1957), this Court held that the term "political subdivision" excludes bodies of limited purpose and authority such as the Port of Palm Beach District:

> The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it is nevertheless an incorporated organization which exercises those powers for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the view of injustice. *Id.* @ 133, e.s.

POINT II: THE CHARTER OF THE PORT OF PALM BEACH DISTRICT DEFINES IT AS A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA AND GRANTS IT IMMUNITY FROM AD VALOREM TAXATION.

Petitioner is very wrong at IB-11 when it argues that it "governs" an area of 971 square miles or approximately 1/2 of Palm Beach County. The actual area of the Port over which it has control is only 187 acres, much smaller than the Sawgrass Mall in Broward County. Petitioner has no "governing" ability over those 971 square miles. It has no zoning power, no police power, nor any other power over those lands except to tax them if necessary.[10]

Petitioner argues at IB-13 that the "clearest expression" of its status as a political subdivision is found in Chapter 74-570, Laws of Florida 1974. If this is so, why did the Legislature choose the strange words,

> The purpose of the changes in this act are to provide an integrated charter of the powers and safeguards necessary for the desired promotion and development of the facilities and services of the Port of Palm Beach, and the Port of Palm Beach District as proprietary in nature rather than governmental...

In Article XX of the charter, the Legislature declared that all of the powers bestowed on Petitioner are ".... proper public and proprietary purposes". Nothing in that act suggests that Petitioner's property is immune from taxation. To the contrary, in

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[10] The firestorm that brought about the abolition of the Port Everglades Authority was probably its levying a token ad valorem tax on Broward County's homeowners, while at the same time its executive director was buying gold super-bowl sized rings for the commissioners and hosting stone crab lunches for shippers in New York City - all of which are most reasonable activities for a business.

Article X, Section 12, the act provides only for "exemption" of the port's property from taxation.

At IB-12, Petitioner suggests that its power to establish a foreign trade zone is a sovereign power. Foreign trade zones can and have been established in Florida by private landowners. See, e.g., Miami ***Free Zone Corp. v. Robbins***, 542 So.2d 1007 (Fla. 3d DCA 1989), describing a free trade zone as simply a place like a bonded warehouse permitting importation of goods into the United States without paying duty. The Court observed that even though free trade zones were authorized and regulated by the Federal government, they are not a Federal instrumentality and are thus not immune from local taxation. The Court relied on United States Supreme Court decisions holding that the federal government's immunity from state taxation did not bar use taxes against government contractors. The Miami Free Zone was held subject to Dade County ad **valorem** taxes. Judge Korda also held that the Port Everglades free trade zone competes with the privately-owned Miami Free Trade Zone and that even though there are differences in the facilities, Port Everglades' Free Trade Zone is able to undercut the rates of the Miami zone.[11] This demonstrates the pernicious effect of allowing a public tenant to compete against those businesses who must operate on taxpaying land. It is just not fair that the public tenant enjoy that substantial advantage over its competitor.

Petitioner suggests that the Port of Palm Beach District has

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[11] See A-5 infra.

the power to undertake oceanographic research, development and commerce. This is not even arguably a governmental-governmental function. In St. Lucie County, the Harbor Branch Foundation owns property from which it conducts various scientific expeditions. Since these functions are carried out from privately-owned property, they are not sovereign activities.

Petitioner argues at IB-12 that it has sovereign characteristics because the enabling act authorizes it to act without obtaining approvals from other governmental bodies. Our record does not reflect whether the Port of Palm Beach lies within the jurisdiction of the City of Riviera Beach. It could present prickly issues of supremacy of local government if, for example, the land did lie within City limits and the City desired one thing while the Port wanted another. Petitioner must have overlooked the requirements of Article VIII, Section 2(6) of the charter, which requires it to obtain the permission of any municipality within which the project lies as a condition precedent to constructing, e.g., a bridge or tunnel to Peanut Island.

Even if Petitioner were a political subdivision, this does not mean that the Property Appraiser is precluded from assessing buildings and other improvements owned by the tenants, as is the case with several of the challenged assessments. See, e.g., Marathon Air ***Service,*** Inc. ***v. Higgs,*** 575 So.2d 1340 (Fla. 3d DCA 1991).

Even were this Court to find that the Port of Palm Beach District were somehow immune from taxation, the Legislature has it

within its power to waive immunity for all lands in Florida. In State *v. Alford, 107 So.2d* 27 *(Fla. 1958)*, this Court said:

> That, within constitutional limits, the Legislature may provide for the taxation of lands or other property of the State, is readily conceded. The question arises: however, whether the subject act actually does so provide. Id. @ 29.

Other than in the case of charters such as that of the Port of Palm Beach District and Section 196.199(4), Florida Statutes, it has specifically exercised that power in the case of school board lands. See , e.g., Section 235.34, Florida Statutes, waiving the sovereign immunity of school districts as to the payment of special assessments for municipal and county improvements. Congress has waived immunity of the United States for various agencies.[12] A specific waiver of immunity exists in Article X, Section 12, of the Port of Palm Beach District's charter.

Beyond that, Section 196.199(4), Florida Statutes, waives immunity for property of any municipality, agency, authority or other public body corporate of the state which becomes subject to a leasehold interest of a nongovernmental lessee other than one performing a governmental, municipal or public purpose or function. The Legislature cannot be deemed to have enacted meaningless language. This Court has the duty to give effect to the

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[12] See, e.g., 12 USC 1825(a) and (b)(1-3), waiving immunity for real estate taxes on real property owned by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, and Resolution Trust Corporation. Property of the Federal Home Loan Mortgage Corporation is taxable per 12 USC 1421(d) and Congress has waived immunity for taxation of certain property of the Veterans' Administration, 38 USC 1820(a)(6).

Legislature's clear language wherever possible. The plain reading of this subsection demonstrates that the Legislature intended property taxation of lands of all governmental bodies except the state and counties, the triggering event being within the control of the governing body of that district, i.e., the decision to lease the lands. "Legislatures may do things the courts think odd, but if their acts are within constitutional limitations, we may not change them." *Culbertson* v. Seacoast Towers, *East, Inc., 232 So.* 2d 753 (Fla. 3d DCA 1970). Unlike the general act in Dickinson v. City *of Tallahassee*, 325 So.2d 1 (Fla. 1975), and the special act in *Alford, supra*, the legislative waiver in Section 196.199(4), Florida Statutes, is clear.[13] In **Walden** v. *Hillsborough County Aviation Authority,* 375 So.2d 283 (Fla. 1979), this Court recognized that Section 196.001, Florida Statutes, waived any immunity which government property may have had.

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[13] In the Fourth District, the Intervenors argued that Section 196.199(4) cannot constitute a waiver due to a defect in the title of Chapter 71-133, Laws of Florida 1971. Whatever problems existed with the title have been cured by the nine legislative re-enactments in Section 11.2421, Florida Statutes: see *Brewer v. Gray,* 86 So.2d 799 (Fla. 1956) @ 804.

POINT III: THE REAL PROPERTY OF THE PORT OF PALM BEACH DISTRICT IS IMMUNE FROM AD VALOREM TAXATION UNDER THE PROVISIONS OF CHAPTER 95-467, LAWS OF FLORIDA 1995.

It is hornbook law that the Legislature acts prospectively only, unless its enactment is specifically retroactive. *State v.* Green, 101 So.2d 805 (Fla. 1958), cited approvingly in *Hausman* v. *V.T.S.I., Inc., 482* So.2d 428 (Fla. 5th DCA 1985) @ 431. Thus, the 1995 amendments to the Port of Palm Beach District's charter, made by the Legislature's attempt to give the Port's tenants a sweet subsidy from the pockets of the other taxpayers of Palm Beach County, has nothing whatsoever to do with assessments for the years 1992 and 1993.

If the Legislature does not designate a particular entity it has created as "a political subdivision of the State", then this should end the inquiry. Whether the Port of Palm Beach District indeed is anything different than a publicly owned business corporation after the 1995 amendment will of necessity await another case.

The 1995 enactment violates Article III, Section 11(a)(2), Const.Fla. 1968, which forbids any special law or general law of local application pertaining to assessment or collection of taxes for state or county purposes, including extension of time therefor. This Court has held that the Legislature, for example, lacks the power to exempt land on Santa Rosa Island from taxation. *Straughn* v. Camp, 293 So.2d 689 (Fla. 1974), holding that language in the special act creating the Santa Rosa Island Authority purporting to

exempt its property is a nullity. The only statute providing for non taxability of Petitioner's property is Section 196.199(4), and Petitioner holds the ability to decide whether its lands will be taxed or not by to whom it leases them and for what.

In a future year, a court will have to decide whether the 1995 Legislature's declaration that the Port is "...deemed to be a political subdivision of the State of Florida..." means any more than hanging a sign that reads "Beware of the bear!" over a cage containing a rabbit, as suggested by Port Canaveral Authority. The question will still be the use to which the tenants are putting the property.

POINT IV: CHAPTER 74-570, LAWS OF FLORIDA, EXEMPTS THE REAL PROPERTY OF THE PORT OF PALM BEACH DISTRICT FROM AD VALOREM TAXATION.

Petitioner and Intervenors have an extraordinary burden of proof. This Court held in ***Volusia County v.*** Daytona Beach **Racing *and* Recreational *Facilities District,*** 341 **So.2d** 498 (Fla. **1976),** that every presumption is indulged in favor of taxability of property and against a grant of exemption. The Fourth District Court of Appeal held in ***Gianolio v. Markham,*** 564 **So.2d** 1131 (Fla. 4th DCA **1981), rev.den.** 569 **So.2d** 1279 (Fla. **1982),** that the same burden of proof, to exclude every reasonable hypothesis of a lawful assessment, applies even in non-valuation cases. Petitioners fell far short of carrying this burden. They made an insufficient showing that their uses of the leased properties were for governmental-governmental, hence exempt uses.

Section **196.199(4),** Florida Statutes, provides for taxation of property owned by any municipality, agency, authority or other public body corporate (e.g., the Port of Palm Beach District) which becomes subject to a leasehold interest or other possessory interest of a non-governmental lessee. This section addresses use of property for literary, scientific, or religious purposes, but makes no mention of governmental or municipal use by a lessee.

Even if the exemption language in the Port's Charter is after the 1971 repealer of all special and local exemptions, the lands used for tenants' businesses are not entitled to exemption: ***Mallard v. Tele-Trip Co.,*** 398 **So.2d** 969 (Fla. 1st DCA **1981),** Mallard v. ***R.***

G. Hobalmann & Co., supra; St. John's Associates v. Mallard, **supra.**

In *Orlando Utilities Commission* **v.** Milligan, 229 **So.2d** 262 (Fla. 4th DCA 1970), Judge John H. Moore II, writing for the Court, well expressed the difference between **"exemption"** and **"immunity"** from taxation:

> Since Utility is a municipally owned and operated public utility, its real property is exempt from ad **valorem** taxation if the property is held and used exclusively for municipal purposes. This is an **"exemption"** only, not an **"immunity"** from taxation. Exemption presupposes the existence of a power to tax whereas immunity connotes the absence of that power. The state and its political subdivisions, like a county, are immune from taxation since there is no power to tax them. Park-N-Shop, Inc. v. Sparkman, Fla.1957, 99 **So.2d** 571. A municipality can be taxed but may be exempt if it meets the statutory criteria for exemption. *Id. @ 264.*

This Court specifically approved that opinion in *Dickinson v. City of Tallahassee,* 325 **So.2d** 1 (Fla. 1975), even though the Fourth District's decision arose under the 1885 Constitution. Petitioner has not explained exactly what functions its tenants are performing that would justify a grant of exemption under any statute. They are in business to make money, and this is not an exempt activity under Florida law. *See, Hillsborough County Aviation Authority v.* Walden, *supra,* where a service station, car rental companies, a motel, a construction company renting a hangar to store its aircraft, an aircraft repair and salvage company and a company engaged in repair of radio and communications equipment was held not to be anything other than predominantly private businesses.

POINT V. THE PORT OF PALM BEACH DISTRICT'S REAL PROPERTY LEASED TO NON-GOVERNMENTAL LESSEES IS EXEMPT FROM AD VALOREM TAXATION BY REASON OF THE EXEMPTION GRANTED IN F.S. 196.199(2)(A), FLORIDA STATUTES, AND CHAPTER 315, FLORIDA STATUTES.

Contrary to Petitioner's argument at IB-16, Section 196.199(1)(c), Florida Statutes, has a great deal to do with this case. That section provides for an exemption (not immunity) for property of "political subdivisions", municipalities, or "entities" created by general or special law. Petitioner argues that it is a "political subdivision", so it comes within the ambit of this subsection. Or, if it is even an "entity", its property is still only exempt from taxation. The law is clear - if its tenants use the land for exempt purposes, such as the Daily Bread Food Bank or Florida Marine Patrol at Port Everglades, the land will be exempt. If they use it for business purposes, it loses its exemption and will be taxable.

Petitioner is partially correct that the tax assessed is measured by the value of its property, except for those lessees where the assessment is only on their buildings. However, there is no mechanism to collect the tax if the Port does not collect it from its tenants and remit it to the Tax Collector. The Port's lands would not be sold if it did not pay the tax.

The author has handled ad valorem tax cases since 1968 and has never heard the term, "the four angels", as supposedly referring to exempt uses of property under Florida law.

Petitioner misses the point of the "public purpose" cases it cites at IB-37. Those cases do not have anything to do with

whether it is a fee interest or a leasehold estate that is taxed, the essential holding of those oases is that only a lessee performing a "governmental-governmental" as opposed to a "governmental proprietary" function qualifies an interest in land for tax exemption. Petitioner ignores the ***Sebring Airport Authority v. McIntyre*** case, ***supra,*** which applies the "governmental-governmental" test to property of an authority just like the Sarasota Manatee Airport Authority.

Williams v. ***Jones,*** 326 So.2d 425 (Fla. 1975) at 433, ended claims that most tenants were "serving a public purpose":

> The exemptions contemplated under Sections 196.012(5) and 196.199(2)(a), Floridastatutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. Pd. @ 433.[14]

That is still the law of this State.

It should be incidentally noted that docks built on State owned lands are indeed subject to taxation: see D.O.R. Opinion, October 19, 1992 (A-13). The added value of being adjacent to and able to use State lands is captured in the assessment of the adjoining land.

Section 315.11, Florida Statutes, does not exempt those portions of Petitioner's property that are leased out to for-profit lessees. ***See Port Everglades v. Markham*** at A-10.

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[14] This decision spawned the "Eastern Air Lines and Daytona Speedway But Not Santa Rosa Island Relief Act of 1980", Ch. 80-368, Laws of Florida 1980, which declared leaseholds in public property to be an "intangible", thus cutting the tax rate by 95%. The strange language in Section 196.199(2)(b) denying this "intangible" classification for leaseholds where no rent is payable pertains to Santa Rosa Island.

POINT VI. IF THIS COURT WERE TO FIND THAT AD VALOREM TAXES ARE DUE ON THE REAL PROPERTY OF THE PORT OF PALM BEACH DISTRICT LEASED TO A NON-GOVERNMENTAL LESSEE, IT WOULD BE MANIFESTLY UNFAIR TO THE PORT OF PALM BEACH DISTRICT TO BE LIABLE FOR THESE TAXES PRIOR TO THE FINAL DECISION OF THIS COURT.

Petitioner suggests that the decision to tax its property should be only prospective. Unlike *Interlachen Lakes* Estates, Inc. *v. Snyder,* 304 So.2d 433 (Fla. 1973), the Port was not relying on a statute when it failed to collect the taxes from its tenants in accordance with the Property Appraiser's notice sent in August of 1992. When the tax bills came out in November of that year, again, the Port did nothing, except to file a suit to avoid its tenants having to pay these taxes. Contrary to the Port's contention at IB-23, its tenants are not "small ship's agents and/or individual operators of warehouses". Its tenants which were taxed in this case are giants of industry: Maritime Office Building, Gulfstream, Inc., Eagle Cement Co., the Eastern Cement Corporation, the Palm Beach Steamship Company (whose assessment is only $227,830, less than a single family home in Wellington), Florida Sugar Marketing & Terminal Association, a consortium owned by Atlantic Sugar Association, Okeelanta Corporation, Osceola Farms Company, Sugarcane Grower's Co-operative and U. S. Sugar Corporation. Birdsall, Inc. has an assessment of only $206,446 - hardly enough to break the bank at a tax rate of $25 per $1,000 of assessed value. Teeters Brothers buildings are assessed at only $144,691. Gulfstream, Inc.'s buildings are assessed at $533,400. The Florida

Molasses Exchange, with an assessment of $944,715, is a co-operative representing 100% of the sugar industry: In addition to the members of the Florida Sugar Marketing and Terminal Association, it is joined by giant sugar producer, Talisman Sugar Corporation. We need cry no tears for the Port's tenants.

It was when this Court upheld taxability of property owned by the Greater Orlando Aviation Authority along Colonial Drive in Orlando used for shopping centers like Herndon Plaza, fast food restaurants such as Casa Gaillardo, etc., that the question of fairness arose. Why should leased municipal property be taxed and not port property? There is no good response to that question except to also ensure that business tenants of our port authorities pay their fair share of property taxes. This is the reason the port cases arose.

The rule of law this Court should announce is that **all** governmental property leased out to profit-making businesses not serving a **"governmental-governmental"** function should be taxable and the landlord be required to collect property taxes from the tenants. No basis exists for this Court to delay implementation of its decision, in view of Section 196.001, Florida Statutes, and its clear command that all property in Florida is taxable unless expressly exempted. A reading of Section **196.199(4),** Florida Statutes, would surely have suggested to the prudent chief financial officers that provision be made for payment of taxes according to the lease , particularly since tax clauses were placed in the leases.

RESPONSE TO BRIEF OF AMICUS CURIAE, ST. LUCIE PORT & AIRPORT AUTHORITY

The St. Lucie County Port and Airport Authority ("SLCPAA" herein) is a another business incorporated by the Legislature. Among the tenants of this landowner are such private, profit-making enterprises as Richard M. Money, Jack Frost, Inc., Robert M. Mulgrew, an excellent waterfront restaurant, Chuck's Seafood Restaurant, Automated Services, Inc., Platt's Grove, Inc., Howard C. Libersky, Edmond and Belinda Warren, a nongovernmental unit, and a non profit group, Experimental Aircraft Association, St. Lucie Chapter 908. Except for the EAA, these lessees are operating such businesses as restaurant, warehouse, aircraft leasing, commercial agriculture, aircraft and automotive repair shops, and a golf driving range. All of these businesses compete with businesses located on privately-owned, taxpaying real estate. At least three of SLCPAA's leases contain pass through language that obligates the tenants to pay the taxes, so the burden of taxation would in no wise fall on SLCPAA.

SLCPAA argues at AB-5 that Florida counties are immune from taxation. This is not true as to charter counties. This Court has held that when counties adopt charters they lose their status as political subdivisions and take on the same characteristics as municipalities for all purposes. *State ex rel. Volusia County v. Dickinson,* 269 So.2d 9 (Fla. 1972). This will become important in 1995 because the Legislature abolished the Port Everglades Authority effective November 1, 1994 and transferred its property to Broward County, a charter county. Since Port Everglades'

property, leased to such profit making businesses as Burt and Jack's Restaurant and a dry stack marina, was held to be taxable for the years 1990-1994 in *Port Everglades Authority v.* Markham, Case No. 91-007088/09, Final Judgment of August 8, 1994 (A-l), the Broward County Property Appraiser has found this property to be taxable for 1995.

SLCPAA argues inconsistently at IB-6 that property of municipal corporations is only exempt from taxation, but at AB-8 suggests that municipalities are immune from liability for suit in tort, making all municipal property enjoy sovereign immunity for all purposes. If this is true, then this Court incorrectly decided Capital *Cities* Country Club, Inc. v. Tucker, 580 So.2d 789 (Fla. 1st DCA 1991), affirmed 613 So.2d 448 (Fla. 1993), and should have reversed *City of* Orlando *v. Hausman,* 534 So.2d 1183 (Fla. 5th DCA 1988), rev.den. *544* So.2d 199 (Fla. 1989). This Court's decisions in both of those cases were correct and have resulted in these properties ' tenants paying their fair share of property taxes since that time.

SLCPAA argues that the "governmental-governmental / governmental-proprietary" test is "...superseded by constitutional amendment, statute and Supreme Court decisions." Nothing could be further from the truth. The latest decision - involving property of a special tax district - is Sebring Airport *Authority v. McIntyre,* 642 So.2d 1072 (Fla. 1994). The Sebring Airport

Authority was chartered by the Legislature.[15] It is most definitely not a dependent district of the City of Sebring. Its Charter refers to it as a "body politic and corporate":

> There is hereby created an authority to be known as the Sebring Airport Authority which shall be a body politic and corporate. The Sebring Airport Authority is hereby constituted a public instrumentality and the exercise of said Authority of the powers conferred by this Act shall be deemed and held to be the performance of essential government functions.

Section 22 of its Charter provides that all powers conferred by the Act constitute the performance of essential public functions, and as such, all facilities acquired or constructed under the provisions of the Act constitute public property used for public purposes. Section 332.03, Florida Statutes, provides the same public purpose language regarding airports as does Section 315.11, Florida Statutes for ports.

Sebring Airport Authority vigorously argued that it was immune from taxation both before the Second District Court of Appeal and to this Court. Page 10 of its Brief to the Second District and page 14 of its Brief to this Court argues:

> It should be noted, however, that the Authority is a "political subdivision of the state", entitled to immunity from taxation. see, e.g., *Sarasota-Manatee Airport Authority* v. *Mikos*, 17 FLW D2008 (Fla. 2d DCA 1992).

Although immunity was argued, the Second District predicated its decision on the use of the Sebring Airport for sports car

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[15] See Chapter 67-2070, Laws of Florida 1967, as amended by Chapter 82-382, Laws of Florida 1982, Chapter 89-484, Laws of Florida 1989, and Chapter 91-415, Laws of Florida 1991.

racing, manufacturing, etc. as a governmental/proprietary activity, and found the property taxable. In affirming, this Court specifically disapproved Page *v. Fernandina* Harbor *Joint Venture,* 608 So.2d 520 (Fla. 1st DCA 1992), rev.den. 620 So.2d 761 (Fla. 1993). It is indeed unfortunate that the Second District did not recede from Sarasota-Manatee, as it is difficult to reconcile that Opinion with *Sebring Airport Authority.*

SLCPAA argues at AB-13 that the governmental/proprietary distinction "has since been abandoned". This is just not true. This Court has held for years that 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. *Williams v.* Jones, 326 So.2d 425 (Fla. 1975) @ 433. In Daly *v. Stokell*, 63 So.2d 644 (Fla. 1953), this Court explained:

> We understand the test of a proprietary power to be determined by whether or not the agents of the city act and contract for the benefit and welfare of its people; any contract, in other words, that redounds to the public or individual advantage and welfare of the city or its people is proprietary, while a governmental function, as the term implies, has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty. Illinois Trust Savings Bank v. City of Arkansas City, 8 Cir., 76 F.2d 271, 34 L.R.A. 518; Tuttle Bros. & Bruce v. City of Cedar Rapids, Iowa, 8 Cir., 176 F. 86. Id. @ 645.

By no stretch of the imagination is providing a place for shipowners to load and unload their ships and restaurant patrons a view of the harbor a governmental function.

SLCPAA next argues that the Fifth District's test of what

constitutes a political subdivision is incorrect - that the district ". ..act as a branch of general administration of the policy of the State." Id. @ 1100.

There have not been meaningful changes either in the Constitution or court decisions that undermine this Court's holding in *Hillsborough County Aviation Authority v. Walden,* supra at 12, that property of the Hillsborough County Aviation Authority is not immune from taxation, but is only exempt. Even though it generally benefits the people of Florida to have airports to enable tourists to come here to spend their money, the business of the Hillsborough County Aviation Authority is to run one airport. This Court upheld the definition of "state agencies or subdivisions" in Section 768.28(2), Florida Statutes, which expressly included "independent establishments of the state" and even private corporations acting as instrumentalities or agencies of the state. *Eldred v. North Broward Hospital District,* supra at 18. The Legislature is free to determine which public agencies can be sued, and for what. This Court's decision in *Eldred* did not find, e.g., that municipal corporations are immune sovereign creatures because the Legislature included them in a statute limiting awards against various governmental and private bodies.

Respondent agrees with SLCPAA that today, counties carry on many proprietary functions. To the extent that those functions are carried on through a lease of publicly owned property to profit-making entities, a mechanism must exist to level the playing field between those players and businesses who pay property taxes either

directly or through their rent, and to prevent the homeowners of the county from shouldering those business' fair tax load.

SLCPAA's second point has been responded to supra, that Section 196.199(4), Florida Statutes, is meaningless if it is not a declaration that publicly of a "public body corporate" of the State of Florida such as the Port of Palm Beach District is not subject to taxation unless the lessee uses the property exclusively for literary, scientific, religious or charitable purposes.

SLCPAA argues at AB-18 that if there is any doubt about whether a law imposes a tax, the doubt is resolved in favor of the taxpayer. This has never been the law of ad valorem taxation. The Legislature has provided in Section 196.001, Florida Statutes, that unless expressly exempted from taxation, all real and personal property in this state is subject to taxation. This court held in Daytona ***Beach Racing and Recreational Facilities District v. County of Volusia,*** 372 So.2d 417 (Fla. 1978) that claims that property is not taxable are to be strictly construed in favor of taxability and against exemption. The taxpayer's burden of proof in an ad valorem tax case - even a case involving other than value - is to overcome the Property Appraiser's presumption of correctness "to the exclusion of every reasonable hypothesis of a lawful assessment". Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984).

As to SLCPAA's Point III, that each district should be entitled to demonstrate on a case by case basis whether it has sovereign immunity, it is respectfully suggested that the appropriate test to make this determination is to look at the

physical use that is being made of the land, rather than who is running the district. Amicus Curiae is challenged to provide this Court with one good reason why Chuck's Seafood Restaurant or Platt's Orange Grove should not be subject to ad valorem property taxes. The Experimental Aircraft Association may well be a "scientific" use of property, which would entitle that land to remain tax free. This Court should not look at the factors suggested by SLCPAA - the claim that the legislative act which created it appoints the County Commissioners to sit on its board, or that the Clerk of the Circuit Court sits as its Treasurer. The Legislature could as easily have provided for a totally independent board, as it did for the Port of Palm Beach or Port Canaveral.

CONCLUSION

The Port of Palm Beach is a legislatively-created body, placing it in the right hand column of the decision matrix. Its lands are subject to a lease, thereby staying on the right side of the matrix. The use is "governmental-proprietary", and the uses are not for exempt purposes. The conclusion is clear that the lands are taxable.

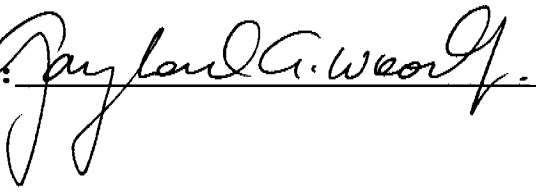
If the Port's lands were somehow immune from taxation, despite clear language to the contrary in its charter as it read in 1992, that immunity was waived both by its charter and by Section 196.199(4), Florida Statutes.

This Court should require the Port to promptly collect the taxes from its business tenants for two reasons - first, to equalize the financial structure of the Port's tenants with those competing businesses who pay taxes either directly or through their rent, and second, to shift the burden of taxes away from the homeowners of Palm Beach County and back onto the businesses at the Port where they belong.

The Opinion of the Fourth District Court of Appeal should be affirmed in all respects.

Respectfully submitted,

JAY JACKNIN, ERIC ASH and
GAYLORD A. WOOD, JR.

By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief and Appendix of Respondent, GARY R. NIKOLITS, as Palm Beach County Property Appraiser, was served by mail this 13th. day of October, 1995, on Robert B. Cook, P.A., 11911 U. S. Highway #1, Suite 308, North Palm Beach, FL 33408, Steven M. Katzman and Bridget A. Berry, Esqs., 777 S. Flagler Drive, Suite 310 East, West Palm Beach, FL 33401, Attorneys for Petitioner, David P. Ackerman and Jack J. Aiello, Esqs., Gunster, Yoakley & Stewart, P.A., Attorneys for Florida Sugar et al., 777 S. Flagler Drive, Suite 500 E, West Palm Beach Florida 33401, on Hon. Robert Butterworth, Attorney General, Lee Rohe, Assistant Attorney General, Room LL-04 The Capitol, Tallahassee, Florida 32399-1600, Attorney for Department of Revenue, on H. Michael Madsen and Kimberly L. King, P. 0. Box 1876, Tallahassee, FL 32302-1876, Attorneys for Amicus Curiae, St. Lucie Port & Airport Authority, and on Larry E. Levy and Loren E. Levy, Esqs., Post Office Box 10583, Tallahassee, Florida 32302.

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