IN THE SUPREME COURT OF FLORIDA

TIMOTHY "PETE" SMITH, Okaloosa County Property Appraiser; and State of Florida, **DEPARTMENT OF REVENUE,**

Appellants,

vs.

DONALD D. WELTON, and **ANN WELTON,** his wife,

Appellees.

CASE NO. 92,930

First District Court of Appeal Case No. 96-0377

First Judicial Circuit Case No. 95-3894

APPELLANTS' JOINT INITIAL BRIEF

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STATEMENT OF CASE AND FACTS

This is an ad valorem property assessment challenge case brought pursuant to Section 194.171, Florida Statutes against the Property Appraiser of Okaloosa County, Florida, (hereinafter "the Property Appraiser"), and pursuant to Section 194.181(5), Florida Statutes against the Department of Revenue (hereinafter "the Department").[1]/ (R-1-12).[2]/

The Complaint contains three (3) counts.

Count I challenges Section 193.155(8), Florida Statutes as being facially unconstitutional under Article VII, Section 4(c), Florida Constitution (hereinafter "the Amendment"). The relief requested is to have the statute declared facially unconstitutional. (R-4-6).

Count II challenges Section 193.155(8), Florida Statutes as being unconstitutional as applied. The relief requested is to have the statute declared unconstitutional as applied. (R-6-8).

Count III requests the Court to reinstate the prior assessed value of $50,682, as established by the prior property appraiser as of January, 1994, and declare that said value can not be increased by more than 3% pursuant to Article VII, Section 4(c),

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[1]/ Collectively, the Property Appraiser and the Department will be referred to as "the Appellants."

[2]/ References to the record on appeal will be prefixed with the letter R followed by the appropriate page number.

Florida Constitution.[3]/ (R-8-9).

The parties engaged in discovery and filed affidavits in support of their respective positions. (R-56-63; R-149-150). Appellants filed a Motion for Summary Judgment, (R-50-55), and Appellees filed a Motion for Summary Judgment as to Count I. (R-151-152).

The trial court, after a hearing, denied the Appellants' Motion for Summary Judgment on August 6, 1996 (R-260-261).

The trial court thereafter granted Appellees' Motion for Summary Judgment as to Count I, and on August 28, 1996, entered a Final Summary Judgment on Count I, which is the subject of this appeal (R-262-263). In that Final Order, the trial court ordered and adjudged that:

> 1. Section 193.155(8), Florida Statutes, was unconstitutional;
>
> 2. The property appraiser was to correct the assessment on Appellees' property for the tax year 1995 to be an increase of 3% or the CPI for that year, whichever is less; and,
>
> 3. The court retained jurisdiction as to costs and other relief necessary.
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> (R-263).[4]/

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[3]/ The Property Appraiser moved to dismiss Count III (R-13), and the trial court granted the motion on February 1, 1996, without prejudice. (R-46-47).

[4]/ In a virtually identical case, the trial court upheld the constitutionality of Section 193.155(8), Florida Statutes. See Boone v. Mastroanni, No. 95-6169 CA, (Fla. 4th Cir. Ct. June 20, 1996) (Final Summary Judgment), reversed, No. 97-639, (Fla. 1st DCA May 5, 1998), review granted, No. 92,973, Florida Supreme Court.

Counts I and II are separate and distinct causes of action and are not interdependent with other plead claims. Count I is a facial constitutional challenge to Section 193.155(8), Florida Statutes (R-4-6). The trial court's ruling under Count I that Section 193.155(8), Florida Statutes, was facially unconstitutional and that the Property Appraiser was to correct the assessment pursuant to Article VII, Section 4(c), Florida Constitution while in error, nevertheless ends the controversy except for costs. The Appellants timely filed a Notice of Appeal. (R-264-266).

After briefing and oral argument, in a divided decision, the First District Court of Appeal, (hereinafter "the First District"), affirmed the trial court's Final Summary Judgment, and held:

> The Florida Constitution, Article VII, Section (4)(c), provides that "assessment[s] shall change only as provided herein," thus prohibiting changes to just value that are not expressly stated in the constitution. Art. VII, § 4(c), Fla. Const. The purported exception to the three-percent rule in section 193.155(8)(a), Florida Statutes, is not one provided for in the constitution and is, therefore, facially unconstitutional..

Smith v. Welton, __ So. 2d __, 1998 WL 176668 (Fla. 1st DCA April 17, 1998) (footnote omitted).

However, in a well reasoned dissent, Judge Van Nortwick stated:

> Rather than violating a constitutional mandate, by section 193.155(8)(a) the legislature is attempting to ensure that all

> Florida homesteads will be assessed at just value as required by the constitution. On the other hand, the majority's interpretation of Article VII, section 4(c), creates a constitutional windfall for a property owner who, due to a material mistake of fact by the appraiser, receives an assessment in an amount lower than just value.

Subsequently, the Appellants, pursuant to Article V, Section 3(b)(1), Florida Constitution and Rule 9.030(a)(1)(ii), Florida Rules of Appellate Procedure, timely invoked the jurisdiction of this Court.

SUMMARY OF ARGUMENT

Section 193.155(8), Florida Statutes (1995) is not facially unconstitutional. Article VII, Section 4, Florida Constitution expressly provides that all property is to be assessed at just value. The Amendment also **contemplates** that all homestead property be assessed at just value in the "base year." Section 193.155(8), Florida Statutes (1995) does not authorize an increase in the just value of homestead property. Section 193.155(8), Florida Statutes (1995) does not conflict with Article VII, Section 4, Florida Constitution because it likewise requires that all property subject to an assessment be assessed at just value. The statute expressly permits assessments to be corrected where the property was not assessed at just value due to errors. Thus, the statute implements the express constitutional mandate of the Amendment.

Assessment at just value is required by the constitution and implemented by general law. General law has also always provided

for back assessment of property to achieve just value where mistakes of fact were made in the initial assessment of the property. The Amendment does not affect the legislature's power to provide for "back-assessment" of property. The Amendment merely limits increases in future years above the just value established for property assessed in the "base year."

The legislature has always had the authority to reach backward and collect taxes upon taxable property which has escaped taxation for a given year or years through the mistake or error of the Property Appraiser. The Property Appraiser can also correctly appraise in the current without regard to an error made in omitting property in a prior year. There is nothing in the Amendment which takes that ability away from the legislature. The sole purpose and effect of the Amendment is the limitation on any increase of the base year "just value" of homestead property.

The constitution expressly provides for "changes, additions and improvements" to be assessed as provided by general law. The statute also implements this express constitutional mandate. In situations involving changes, additions and improvements which for whatever reason are mistakenly not assessed in the year those additions and improvements are completed, the lower court's opinion would preclude a property appraiser from ever correcting "just value" to include these "changes, additions and improvements."

ARGUMENT

I. SECTION 193.155(8), FLORIDA STATUTES IS CONSTITUTIONAL.

The issue before this Court is whether the Property Appraiser may rely on the "material mistake of fact" provision of Section 193.155(8)(a), Florida Statutes to remedy an error in a homestead assessment so that the assessment will correctly reflect just value. This statute is constitutional because it does not authorize an increase in the just value assessment of a homestead. Subsection (8)(a) of the statute simply provides that a correction in the amount of the assessed value can be made to achieve "just value" if the prior assessment was erroneous as a result of a "material mistake of fact concerning an essential characteristic of the property."

The First District erred when it found that Section 193.155(8), Florida Statutes was unconstitutional and could not be relied upon to remedy an error in an incorrect assessment which was due to a material mistake of fact, as opposed to a change in judgment on the part of the Property Appraiser.

Appellants' position throughout this litigation has consistently been that the 1994 value never constituted "just value" because it was based upon incorrect data. As a result, a portion of Appellees' property escaped taxation for 1994 which, in turn, resulted in a "base year" assessment below "just value."

The constitutional provision upon which Appellees relied, Article VII, Section 4(c), Florida Constitution ("the

Amendment"), did nothing to limit existing law regarding the time within which the base just value (a homestead's just value as of January 1, 1994) must itself be established.

The Amendment instead speaks only to limitations on ad valorem tax increases above just value as of January 1, 1994. It is silent as to imposing new limits on when a determination of just value must be considered final. See Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992); In re Advisory Opinion to the Attorney General - Homestead Valuation Limitation, 581 So. 2d 586 (Fla. 1991).

Here, the constitutional mandate requires homestead property to be "assessed at just value as of January 1." Contrary to Appellees' position, this requires more than merely having a valuation number next to a parcel number on a property record card as of January 1, 1994. As this case illustrates, valuations completed in 1994, or any tax year, may be the result of material mistake.

In order to give meaning to the "just value" requirement, the legislature enacted Section 193.155(8)(a), Florida Statutes to remedy material mistakes. Section 193.155(8)(a), Florida Statutes, is merely a statutory means to remedy such mistakes and to fulfill the constitutional requirement of a "just" valuation as of January 1, 1994. Section 193.155(8)(a), Florida Statutes is not in conflict with the constitutional assessment limitation.

First, it is well-established and fundamental to

constitutional interpretation that all words in a constitution are presumed to have meaning and effect. Gaulden v. Kirk, 47 So. 2d 567, 574 (Fla. 1950).

There is no tension between the just value requirement of Article VII, Section 4, Florida Constitution and the limitations prescribed by Article VII, Section 4(c), Florida Constitution. The Amendment does not affect the establishment of just value. One must establish just value; then and only then does the Amendment come into play. The Amendment of Section 4(c) does not limit the Property Appraiser's duty to secure just valuation of the property for the base year.

The same section of the constitution that contains the limitation on increases in assessed value of property entitled to homestead exemptions also provides as follows:

> **Section 4. Taxation; Assessment -**
>
> By general law regulations shall be prescribed which shall secure a **just valuation** of all property for ad valorem taxation . . . (emphasis supplied).

One must attribute to the words "By general law regulations shall be prescribed which shall secure a just valuation" their plain meaning. Legislative authorization is required to trigger this provision. Therefore, it is not self-executing. Florida Department of Education v. Glasser, 622 So. 2d 944 (Fla. 1993).

The legislature provided the authority to secure a just valuation of all property by the enactment of Section 193.011, Florida Statutes. Walker v. Trump, 549 So. 2d 1098 (Fla. 4th DCA

1989); Keith Investments, Inc. v. James, 220 So. 2d 695 (Fla. 4th DCA 1969); Powell v. Kelly, 223 So. 2d 305 (Fla. 1969); Walter v. Schuler, 176 So. 2d 81 (Fla. 1965).

Questions regarding when an assessment on a certified tax roll may be changed are not new to Florida law. Corrected back assessments (similar to the one assessed against Appellees due to the discovery of real property having previously escaped taxation) have historically been part of Florida ad valorem tax law. Korash v. Mills, 263 So. 2d. 579 (Fla. 1972); City of Fort Myers v. Heitman, 5 So. 2d 410 (Fla. 1941); State ex rel. Ranger Realty Co. v. Lummus, 149 So. 650 (Fla. 1933); and, State v. Beardsley, 94 So. 660 (Fla. 1922). They bring the value of certain underassessed property on a prior year's tax roll up to just value as of January 1 of the present tax year. See §§ 197.122, 193.092, Fla. Stat.

Pursuant to the plain language of Sections 193.155(8), 193.092, Florida Statutes the Property Appraiser made a 1995 assessment, for the instant property, and a correction to the 1995 tax roll. The still-correctable mistake had resulted in Appellees' 1994 assessment being below just value. It is this correction as well as the statutes upon which said correction was based that the First District declared unconstitutional.

The position of the First District is that the Amendment does not allow for back assessment, even for property which escaped taxation in 1994, or any other base year. The Appellants

disagree. Back assessments have historically been allowed in Florida for taxable property that somehow escaped taxation. Korash, 263 So. 2d, at 581; Okeelanta Sugar Refinery, Inc. v. Maxwell, 183 So 2d. 567 (Fla. 4th DCA 1966). There is nothing in the Amendment which changes that aspect of Florida ad valorem tax law. There is nothing in the Amendment's language which mandates that homestead property is not subject to back assessment, as is all other taxable real property in Florida.

The Amendment states in pertinent part:

> (c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

This mandates that affected homesteads be assessed at just value as of a specific date (January 1, 1994), not that all 1994 homestead valuations must be inexorably set, regardless of error, by a specific date.

This case presents a question of great importance to taxing authorities throughout Florida; that is, what is a Property Appraiser's duty upon discovering in 1995 (or later) that a homestead value on the base year tax roll is below just value due to a material mistake of fact concerning an essential characteristic of the property.

By misreading the Amendment, the First District held that the Property Appraiser must leave an undervalued homestead

undervalued. The First District's opinion runs clearly afoul of the Amendment's unambiguous requirement that homesteads be valued at just value on the 1994 tax roll. Contrary to the First District's opinion, this language should be interpreted to mean that homesteads must be assessed at just value as of January 1, 1994, even if that requires an assessment to be increased in a subsequent tax year due to the discovery of property that had somehow escaped taxation earlier.[5]/ The constitutional requirement that homesteads be valued at just value "as of" January 1, 1994, would thereby be honored.

Surely there is no language in the Amendment which grants to any homeowner a tax windfall not otherwise available to all similarly situated homeowners, as would be the case for Appellees should the First District's position prevail. Conversely, if the Property Appraiser had included items in an assessment in the base year, such as a swimming pool, that would have the effect of incorrectly increasing the value and in the next year the Property Appraiser discovered that there was no swimming pool on the particular parcel, then the First District's opinion would not allow the Property Appraiser to remove the pool and its value from the assessment. Thus, the taxpayer would continue to pay taxes on a base year value that was too high and clearly

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[5]/ State Department of Revenue v. Markham, 426 So. 2d 555, 560 (Fla. 4th DCA 1982)(stating that the legislature could not enact a statute which would do away with just valuation or empower a court to do so).

incorrect.

The tax date for all real property subject to ad valorem taxation is, and historically has been, January 1 of the tax year in question. § 192.042, Fla. Stat. This was not changed by the Amendment. If anything, the January 1 tax date was constitutionally memorialized by the Amendment, as it establishes the base year for valuation of homestead property that is subject to the Amendment. The "base year" valuation is the just value of the homestead as it existed on January 1, 1994.

There is no date established in the Florida Constitution as to when an assessment, including a homestead assessment, may no longer be corrected for errors. Such matters are handled instead by statute. See e.g. §§ 193.023, 193.085, 193.092, 193.1142, 193.1145, 193.122, 197.323, Fla. Stat. Under current decisional and statutory law the Property Appraiser is under an affirmative duty to add to the current tax roll the value of taxable property, even property that escaped taxation in a prior tax year. § 193.092, Fla. Stat.; Korash, 263 So. 2d at 581. This duty exists for "a period of 3 years next preceding the year in which it is ascertained that such tax has not been assessed, levied, or collected. . . ." § 193.092(1), Fla. Stat.[6]/

In Korash, this Court held that back taxes may be assessed

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[6]/ It is interesting to note that Section 193.092, Florida Statutes, is referred to in Section 193.155(8), Florida Statutes wherein it is stated: "If back taxes are due pursuant to Sec. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes."

for escaped property, i.e., improvements and parcels of land that were overlooked in a previous tax year. This Court expressly stated that:

> It would be an extremely inequitable and unjust result for a court of equity to grant to a knowing taxpayer an outright 'windfall' of $25,000 which was the additional tax he admittedly escaped for the year in question. Justice may be 'blind' but it is not stupid. Impartial fairness and equality is what the blindfold represents.

Id. at 582.

Appellees own a parcel of property in Okaloosa County upon which they make their homestead. (R-3). This property was assessed in 1994 for $58,488.00, which included a parcel assessed at $7,806.00, that was transferred December 25, 1994. (R-11). This same property was assessed as of January 1, 1995, at $130,645.00. The difference between the 1994 and the 1995 assessments is approximately 15,000 square feet of building improvements that had not been assessed by the Property Appraiser and thus were not on the tax roll in 1994. (R-56-57). The basis of this assessment was the assessed valuation of the prior year after the correction of a material mistake of fact concerning an essential characteristic of the property. (R-56-61).

While Appellees acknowledge that the legislature, through the enactment of Section 193.155(8), Florida Statutes, provided for the correction of erroneous assessments, and that the Property Appraiser relied upon and utilized this statute to correct the assessment for the property that had escaped

valuation, (R-243-259), Appellees allege that the statute is in conflict with the Florida Constitution and therefore, the statute cannot be relied upon to correct errors or to correctly assess property in the current tax year. (R-244-256). According to the Appellees, and as a result of the First District's opinion, the Property Appraiser has **no** choice but to continue the incorrect valuation even though the 1994 value was not the property's just value and did **not** accurately include all of the improvements contained on the property.

In order for the Amendment to work, it must be uniformly applied to all similarly situated taxpayers. That means, at the least, that all persons entitled to the benefits of the Amendment must have their homesteads assessed in the base year at just value. Fuchs v. Wilkinson, 630 So. 2d 1044 (Fla. 1994). No taxpayer should receive favorable tax treatment that is not specifically authorized by law. The law should not be interpreted in such a way as to allow Appellees' homestead to be taxed at less than just value while property of all other similarly situated homeowners is taxed at full just value where property is assessed for the first time.

CONCLUSION

The Appellants request this Court to reverse the opinion of the First District, uphold the constitutionality of Section 193.155(8), Florida Statutes, reverse the summary judgment of the trial court and remand for further proceedings to determine whether the alleged erroneous assessment was due to "material mistake of fact concerning an essential characteristic of the property." § 193.155(8)(a), Fla. Stat. (1995).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail , this 9th day of June, 1998, to: **Gary E. Lundy, Esq.**, and to **Mark H. Welton, Esq.**, 1078 S. Ferdon Blvd., Ste. B, Crestview, FL 32536.

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