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 REPLY BRIEF

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PRELIMINARY STATEMENT

The Appellants hereby adopt the designations and abbreviations used in their Initial Brief.

STATEMENT OF THE CASE AND FACTS

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"). (R-4-6).

Count II challenges section 193.155(8), Florida Statutes, as being unconstitutional as applied. (R-6-8).

Count III requests the Court to reinstate the prior assessed value. (R-8-9).

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).

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 ruled only on Count I that section 193.155(8), Florida Statutes was facially unconstitutional. (R-263).

The Appellees incorrectly argue the merits of Count II, which is **not** an issue on appeal. The trial court never addressed the "as applied" challenge contained in Count II of the Complaint.

SUMMARY OF ARGUMENT

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 a past error in a homestead assessment so that the past assessment will correctly reflect "just value."

The Appellees make a dispositive concession in the Answer Brief, that if "the property had not been assessed at 'just value' based on 15,000 square feet of the building having escaped taxation, the Property Appraiser should not have even looked at section 193.155, Florida Statutes, but is required to back-assess according to section 193.092, Florida Statutes." Answer Brief at pp. 11-12; pp. 14-15; p. 29; and p. 30.

Section 193.155, Florida Statutes, which specifically concerns homestead property, allows the same correction to the valuation of property to achieve "just value" as in section 193.092, Florida Statutes. It has the same limitations as section 193.092, Florida Statutes. Backward changes are limited to "material mistakes of fact" and any back assessment of taxes is limited to three years.

Section 193.155(8)(a), Florida Statutes is constitutional

because it does not authorize an increase of more than three percent above a prior year's assessment that is correctly based on a just value assessment.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY HELD SECTION 193.155(8)(a), FLORIDA STATUTES UNCONSTITUTIONAL.

Appellants' position throughout this litigation has consistently been that the 1994 value never constituted "just value" because it was based upon a "material mistake of fact." 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 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."[1]/ 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

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[1]/ The issue of whether the change in the assessment was the result of a "material mistake of fact" or "change in judgment" **was not decided** by the trial court and **is not an issue** before this Court in this appeal. See, e.g., Oyster Pointe Resort Condominium Assoc. Inc. v Nolte, 524 So. 2d 415, 419 (Fla. 1988).

characteristic of the property."

Section 193.155(8), Florida Statutes, states:

> (8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:
>
> (a) If errors are made in arriving at any annual assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.
>
> (b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.
>
> 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.

The Appellees make a dispositive concession in the Answer Brief, that if "the property had not been assessed at 'just value' based on 15,000 square feet of the building having escaped taxation, the Property Appraiser should not have even looked at section 193.155, Florida Statutes, but is required to back-assess according to section 193.092, Florida Statutes." Answer Brief at pp. 11-12; pp. 14-15; p. 29; and p. 30.

Section 193.155, Florida Statutes, which specifically concerns homestead property, allows the same correction to the valuation of property to achieve "just value" as in section 193.092, Florida Statutes. In fact, section 193.155(8)(a), Florida Statutes incorporates section 193.092, Florida Statutes.

It has the same limitations as section 193.092, Florida Statutes. Backward changes are limited to "material mistakes of fact",[2]/ and any back assessment of taxes is limited to three years. See also section 197.122(1)(3), Florida Statutes (allowing the Property Appraiser to correct errors and material mistakes of fact in any assessment). Also, the Department is required to measure the rate of material mistakes of fact in evaluating tax rolls under the Department's roll review and approval responsibility provided in section 193.1142(2), Florida Statutes. The inability of property appraisers to correctly assess properties in the current year would impact the Department's remedies under this statute as well.

This being true, then Appellees are reduced to complaining about which statute should be used by a property appraiser when a material mistake of fact is discovered in the valuation of the property. It is the Appellees' position that the general statute concerning escaped property in section 193.092, Florida Statutes, is constitutional and must be used by the Property Appraiser on homestead property. However, the Appellees argue that the Legislature cannot enact a specific statute, such as section 193.155, Florida Statutes, to deal with homestead property, even if it includes similar provisions and the same limitations for

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[2]/ See 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); State v. Beardsley, 94 So. 660 (Fla. 1922).

collection of taxes as are contained in the general statute, section 193.092, Florida Statutes.

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." Therefore, section 193.155(8), Florida Statutes (1995), does not authorize an increase of more than three percent annually above the correct base year just value of homestead property. Section 193.155(8), Florida Statutes (1995), does not conflict with Article VII, section 4, Florida Constitution, because the Constitution likewise requires that all property subject to an assessment be assessed at just value. Rather, the statute expressly permits assessments to be corrected to just value where the property was not assessed at just value due to errors. See Smith v. Welton, 710 So. 2d 135, 138 (Fla. 1st DCA 1998) (Van Nortwick, J., dissenting). Thus, the statute implements the express constitutional mandate of the Amendment.

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 constitutional provision upon which Appellees relied, Article VII, section 4(c), Florida Constitution, 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 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 not reflect just value, as the result of a material mistake.

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. See sections 193.092, 197.122(1)(3), Florida Statutes (1997). 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 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. See sections 193.092, 197.122(1)(3), Florida Statutes. The Property Appraiser can also

correctly appraise the property in the current year 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 more than three percent annually above the base year "just value" of the homestead property.

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

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." Section 193.155(8)(a), Florida Statutes (1995). By Article VII, section 4(c), Florida Constitution the people of Florida did not intend to perpetuate mistakes in assessments of property, but only to cap the increase in justly assessed property at a reasonable maximum.

Respectfully submitted,

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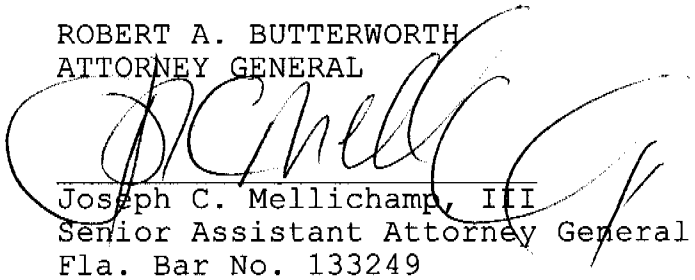
ATTORNEY GENERAL



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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 17th day of August, 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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