IN THE SUPREME COURT OF FLORIDA

CASE NO: SC01-663

ALVIN MAZOUREK, as
Hernando County Property Appraiser, et al.

Petitioner,

vs.

WAL-MART STORES, INC.

Respondents.

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL
DAYTONA BEACH, FLORIDA
Case Nos. 5D989-3165 and 5D99-3168

BRIEF OF AMICUS MIKE WELLS AS PASCO COUNTY PROPERTY APPRAISER

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STATEMENT OF THE CASE AND FACTS

Amicus, Mike Wells, as Property Appraiser of Pasco County, adopts the Statement of the Case and Facts as stated in the Initial Brief of Petitioners, Alvin Mazourek, as Hernando County Property Appraiser, and the State of Florida, Department of Revenue. Amicus addresses herein three points raised by Petitioners in the Initial Brief, all of which are matters of compelling interest to the Office of the Pasco County Property Appraiser.

SUMMARY OF THE ARGUMENT

Amicus would urge this Court to reverse the opinion issued by the Fifth District Court of Appeal in favor of the Respondents, Wal-Mart Stores, Inc., on the essential issues addressed herein and on those issues addressed in the Petitioners' Initial Brief.

The Fifth District Court of Appeal erred in ruling that sales taxes are external costs and should be excluded from "just value." Subsection (8) of Section 193.011, Florida Statutes, does not require a property appraiser to deduct sales tax from the purchase price paid by a taxpayer in order to arrive at "just value" for purposes of ad valorem taxation. The Property Appraiser used a valid replacement cost analysis under subsection (5) of the statute. The language in subsection (8) dealing with net proceeds to seller, after deduction of the costs of a sale, does not require the deduction of sales tax when using a replacement cost approach as performed by the Property Appraiser in this case.

The Property Appraiser in the case at bar appropriately considered all eight statutory factors set forth in Section 193.011, Florida Statutes, in arriving at the assessed value of Respondent's tangible personal property. He cannot be required to us one method of valuation over another, as the method of appraisal is left in the sound discretion of the Property Appraiser. The approach to value utilized by the Property Appraiser was correct and consistent with the sound principles of appraisal

theory for the property in question. No other method affords results indicative of the subject property's value "in place."

In ruling that the Property Appraiser should explain the steps taken in rejecting the use of market approach, the Fifth District Court of Appeal has also improperly shifted the burden to the Property Appraiser to justify its assessment. Such a holding is in derogation of the legislative mandate found in Section 194.301, Florida Statutes, which requires that the opinion of value be subject to a presumption of correctness. An assessment is entitled to retain the statutory presumption if the eight factors set forth in Section 193.011, Florida Statutes, are properly considered. *It is the taxpayer* who must show by clear and convincing evidence that a property appraiser's assessment is in excess of "just value."

I. THE PROPERTY APPRAISER PROPERLY INCLUDED SALES TAX IN THE ASSESSED VALUE OF WAL-MART'S PROPERTY.

The plain language of Section 193.011, Florida Statutes, does not mandate the specific manner in which the various property appraisers throughout the state perform appraisals. The pertinent portion of the statute as applied to the duties of a property appraiser provides as follows:

> In arriving at just valuation as required under s. 4, Art. VII of the State Constitution, the property appraiser **shall take into consideration** the following factors: ...(Emphasis Added).

The Second District Court of Appeal earlier addressed this very issue in the case of Turner v. Tokai Financial Services, Inc., 767 So.2d 494, 497 (Fla. 2nd DCA 2000) when the court overturned a trial court order requiring the Property Appraiser to deduct the "costs of sales" from an assessment of the taxpayer's personal property. In reaching the decision the court stated its reasoning as follows:

> From its title, it is clear that Section 193.011 requires only that the appraiser consider the listed factors–not that he necessarily apply them. See Parker v. State, 406 So.2d 1089, 1092 (Fla. 1981) (holding that a statute's title can assist in determining legislative intent). In addition, the language of the statute itself specifically requires only the consideration of the enumerated factors, not their application.

Respondent and the Fifth District Court of Appeal would urge upon this Court a policy which, if accepted, would mandate a property appraiser not just "consider" but actually implement those appraisal factors enumerated in subsections (1) and (8) of Section 193.011, apparently to the exclusion of other enumerated factors. While such a position fails to comport with the plain language of the statute, it would also require the application of value criteria which may well be inappropriate under the circumstances. See Hillsborough County v. Knight & Wall Co., 14 So.2d 703 (Fla. 1943); Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County, 219 So.2d 101 (Fla. 3rd DCA 1969). While each and every factor set forth in Section 193.011 is required to be considered, the ultimate application and implementation of any single factor, as well as the method of valuation used, is left to the sound

discretion of the property appraiser. District School Board of Lee County v. Askew, 278 So.2d 272 (Fla. 1973); Powell v. Kelly, 214 So.2d 347 (Fla. 1st DCA 1968).

One very significant subsection of Section 193.011, Florida Statutes, which has received little, if any, attention from Respondent is subsection (5). This factor addresses the "cost" of the property without any deduction for the costs of sales. In consideration of all the statutory factors set forth in the statute, it is clearly possible, as well as permissible, for the Property Appraiser to consider various approaches to value and conclude a certain approach is more appropriate than another approach advanced by the taxpayer. Florida East Coast Railway Company v. Department of Revenue, 620 So.2d 1051, 1059 (Fla. 1st DCA 1993). Thus, under the cost approach provided for in subsection (5) of the statute, the inclusion of sales tax in determining a replacement cost value appears appropriate based upon similar treatment of other taxes in valuation cases. Dade County v. Atlantic Liquor Co., 245 So.2d 229 (Fla. 1970).

In Atlantic Liquor Co., the Supreme Court of Florida was asked to determine whether Dade County's taxing authorities could include the value of state and federal beverage tax stamps in their assessment of the taxpayer's personal property. In finding the taxing authorities could include the excise tax in the value of the inventory, the Court acknowledged that the beverage tax was an excise tax imposed upon the

manufacturer and distributor. Id. at 231. The Court further found that payment of the beverage taxes added value to the stamped beverages and explained its reasoning as follows:

> These taxes are incidents of preparation essential to creation of a saleable product, and as such their value adheres to the value of the merchandise to which the excise stamps are affixed.
>
> The increased costs of the merchandise resulting from the stamps being affixed is naturally reflected in an increase in cost to the purchaser, but this is a secondary effect similar in nature to increases resulting from increased labor costs, increased material costs, or even increased social security costs. Id. at 232.

Like the beverage tax in Atlantic Liquor Co., the sales tax on Respondent's tangible personal property increases the value of the property on which it was paid. Generally, with few exceptions, the sales tax is paid once on tangible personal property by the purchaser . As with labor and material costs, the seller of the property recoups as much of the sales tax previously paid as it can in negotiating the purchase price of the item. As a result, payment of the sales tax affects the value of tangible personal property, and the tax should not be deducted from the Property Appraiser's calculation of original cost under the cost approach to value.

When dealing with the cost approach to value, an important analogy may be made between sales tax and the various impact fees levied by local governments for all types of governmental services. When dealing with replacement cost for

improvements to real property for which substantial impact fees had previously been paid, one would not argue that the impact fees are a "cost of sale" which adds nothing to the value of the property. Even though the fees are typically paid directly to the local government, they represent a "cost" associated with the property which would have to be considered in any replacement cost value analysis of the property. Certainly, any taxpayer whose property may be condemned would claim entitlement to prior impact fees paid for the property as part of just compensation.

The same rationale is equally applicable to sales tax. Sales tax is not a cost of sale, but a payment by the purchaser to the State of Florida, through the seller who acts as a collection agent. It is not a "cost of sale" which should be deducted from the net proceeds of the sale. The seller does not "pay" the sales tax, the seller merely collects and remits it to the state. The sales tax is not a cost of sale, the expense of which is traditionally included in the price of item of equipment as part of the seller's business operations. It is separately stated, separately identified and collected, and separately transferred to the state. But as for the buyer, it is an amount, not unlike impact fees and transportation expenses, which are ultimately included in the actual purchase price of the property and as a result, would be included in any replacement cost analysis.

Sales tax is not a cost of sale but part and parcel of the sale itself. It is certainly

not a cost of sale to the seller. There is a significant difference between sales tax and documentary stamp taxes paid on real estate. The seller of real property does not collect the documentary tax from the buyer and remit the tax to the state. Whereas the sales tax is truly a "cost" to the buyer. The legislature recognizes this fact through the State's "tax free sales" program designed to eliminate the burden of sales tax on the back-to-school buyers. Sales taxes must be paid by the purchaser, unlike documentary stamp taxes which may be paid by either party.

In reality, the factor set forth in subsection (8) of 193.011, Florida Statutes, is not just a cost approach to value alone. A thorough and plain reading of the language in subsection (8) reveals it to be a factor also closely related to a market approach to value. Subsection (8) contemplates an analysis of the "net proceeds" of a sale to a seller, not the total costs to the buyer. Subsection (8) appears to be somewhat of a mirror image of the market approach referenced in subsection (1) of the statute. Where subsection (1) deals with what a willing buyer would pay, less costs of purchase, subsection (8) deals with what a willing seller might receive, less costs of sale. As a result, the attempted application of either subsection to equipment owned by the Respondent is inconclusive at best due to the absence of a viable market in the trade equipment.

There would be two fatal flaws in proposing that one "sale", when property is

purchased, less any sales tax paid, less an allowance for depreciation, is the only acceptable method of valuing equipment. First, this approach does not consider, as required by the statute, the net proceeds of the sale "**as received by the seller**", but rather looks at a modified cost approach to the buyer which is not even authorized by the statute. Secondly, the application of subsections (1) and (8) presupposes a viable market in the re-sale of used equipment which is necessary to accurately depict value in a market approach. Hillsborough County v. Knight & Wall, supra; Aeronautical Communications v. Metropolitan Dade County, supra.

Respondent would seem to argue the eight (8) enumerated factors in Section 193.011, Florida Statutes, is in the nature of a taxpayer's menu, where one is free to select and choose amongst the various options, picking only those factors which, when combined, provide the lowest possible value for the taxpayer. This individual selection of some components, while disregarding others, is the antithesis to the mandate of the statute which requires a property appraiser to consider **all** the factors. It ignores the interactions which exist between the factors and the environment in which the property being appraised resides.

Whether such interpretations are a result of failing to recognize the true legislative craftsmanship of the statute or a purposeful attempt to alter its true intention by drawing unfounded parallels to introduce bias, it is clear the errant

application of the statute urged by Respondent will yield errant results. The eight factors are not isolated, independent components to be viewed and weighed separately, but together they form the statutory base cloth of Florida's valuation methodology in which sound appraisal logic and theory are interwoven. It is within the province and authority of the Property Appraiser to consider all the factors, comparing and contrasting each, and determine which are more accurately reflective of "just value" as required by the Florida Constitution.

As the courts have consistently pointed out, a property appraiser must consider all factors, but is not to blindly accept each and every factor, the appraiser must weigh the importance of each in the environment and consider ownership characteristics of the property being appraised. Bystrom v. Equitable Life Assurance Society, 416 So.2d 1133 (Fla. 3rd DCA 1982); Homer v. Connecticut General Life Insurance Company, 213 So.2d 490 (Fla. 3rd DCA 1968); Vero Beach Shores, Inc. v. Nolte, 467 So.2d 1041 (Fla. 4th DCA 1985). The statutory factors are not enumerated for the purpose of dispensing with existing appraisal practices and approaches to value, but to enhance these practices, to solidify their application and interaction.

The ultimate consideration given each statutory factor, the choice of method of valuation, and the weight afforded each factor are all decisions resting in the discretion of the Property Appraiser and absent a fraudulent or illegal exercise of such

discretion, the courts should not disturb the decision of the Property Appraiser. Spanish River Resort Corporation v. Walker, 497 So.2d 1299 (Fla. 4th DCA 1986); McArthur Jersey Farm Dairy, Inc. v. Dade County, 240 So.2d 844 (Fla. 3rd DCA 1970). The Property Appraiser in the case at bar identified the property to be appraised and evaluated the property in light of the eight statutory criteria. The Property Appraiser realized there was an absence of available market data for the sale of amalgamated equipment as owned by the Respondent. Absent this available market, the cost approach was selected as the appropriate method of valuation as authorized in subsection (5) of the statute. Such a decision clearly falls with the discretion of the Property Appraiser.

A thorough review of the statutory framework and prevailing case law governing the valuation of tangible personal property for purposes of ad valorem taxation makes it abundantly clear that the term "costs of sale", when evaluating the "net proceeds" of a "sale" to the seller, does not require a property appraiser using a cost approach to deduct the sales tax paid by a buyer from the total price of the tangible personal property. To do so would generate a result at less than "just value."

II. CONSIDERATION OF THE EIGHT STATUTORY CRITERIA SET FORTH IN SECTION 193.011, FLORIDA STATUTES, DOES NOT REQUIRE A PROPERTY APPRAISER CONSIDER AND EVALUATE ANY AND ALL POTENTIALLY RELEVANT MARKETS AND THEN PROVIDE A PLAUSIBLE EXPLANATION FOR NOT USING THE

MARKET APPROACH BASED UPON SUCH EVALUATION.

The Fifth District Court of Appeal specifically held in the case at bar that a property appraiser must consider both the "cost approach" and the "Market Data" approach in assessing personal property; and, if the "Market Data" approach is rejected, the property appraiser must provide a plausible explanation for its rejection. Wal-Mart v. Mazourek, 778 So.2d 346, 351 (Fla. 5th DCA 2001). Such a decision by the Court represents a significant departure from prevailing case law in the State of Florida which has consistently found that: (1) a property appraiser's decision as to value is entitled to a presumption of correctness, Valencia v. Bystrom, 543 So.2d 214 (Fla. 1989); Daniel v. Canterbury Towers, Inc., 462 So.2d 497 (Fla. 2nd DCA 1984); and, (2) the selection of methods used in the appraisal process is within the discretion of the property appraiser as long as the valuation takes into consideration the statutory factors. District School Board of Lee County v. Askew, 278 So.2d 272 (Fla. 1973); Powell v. Kelly, 214 So.2d 347 (Fla. 1st DCA 1968); Havill v. Lake Port Properties, Inc., 729 So.2d 467 (Fla. 5th DCA 1999).

The Fifth District Court of Appeal seeks support for its unique holding by suggesting that the "cost approach" method of valuation utilized by the Property Appraiser in the instant case did not take into consideration all eight statutory factors set forth in Section 193.011, Florida Statutes. However, an analysis of the various

approaches to value clearly demonstrates that each approach takes into consideration the relevant statutory factors, although admittedly the weight given to each factor may vary dependent upon the approach selected.

For example, in arriving at a value of new, or nearly new equipment, the cost approach may take into consideration the cost of that same or similar equipment sold new. The market approach, on the other hand, may consider resale markets for similar or comparable equipment. However, each approach evaluates "sales", or that amount which a willing buyer would pay a willing seller. In the end, both the factors set forth in subsections (1) and (8) of Section 193.011, Florida Statues, are taken into consideration. In fact, one might argue rather effectively that the value of new or nearly new equipment is better represented by its own purchase price than by reference to a secondary market dealing in much older equipment.

The requirement to consider the "Market Data" approach and offer a "plausible explanation" if it is rejected imposes significant additional obligations upon a property appraiser never intended by the Legislature. Taken to its logical conclusion, it would require an appraiser to consider and evaluate all three approaches to value, reconcile each, determine the best, and then provide explanations for rejection of the other approaches. Furthermore, these rejections would have to be sufficient in detail for subsequent judicial review. No longer would the method of valuation be subject to

the discretion of the appraiser and no longer would a taxpayer have to demonstrate some error on the part on the appraiser's assessment as a basis for challenging a decision. Apparently, it would be sufficient to argue that the appraiser's explanations for rejecting a certain method, or as in this case, selecting one method over another, were not "plausible."

At the center of this case is the manner of valuing the amalgamation of tangible personal property required to operate a Wal-Mart store and distribution center for the purpose of ad valorem taxation. This amalgamation of such tangible property would not exist if the owners could not produce, or at least anticipate production of, a positive income stream from the operations of the business, including the employment of personal property used in connection therewith. See F.S. §193.011(2), (3) and (7). In essence, it takes literally thousands of individual items of commercial personalty to operate a large retail store, each with its own intrinsic use functioning in relationship with other items yielding the economic overlay and justifying the capital expenditures required to put them to use.

The appropriate way to value such an assemblage of installed property at its highest and best use would be to find and adjust the market data to find the value of the assemblage as installed. Specifically, Section 193.011(2), Florida Statutes, provides that one of the statutory factors a property appraiser must consider is "[t]he

highest and best use to which the property can be expected to be put in the immediate future and the present use of the property." Unfortunately, therein lies the problem, the actual assemblage of such tangible property is so often unique in its use and so rarely marketed in place that it does not readily lend itself to a comparable sales analysis, or the " Market Data Approach" which is the terminology used by the Fifth District Court of Appeal.

In Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County, 219 So.2d 101 (Fla. 3rd DCA 1969), the Third District Court defined how an assemblage of property should be valued. In Aeronautical, the taxpayer assembled radios. At that time, inventory was assessed as any other tangible personal property in Florida. The tax assessor used the cost approach to assess the taxpayer's partially constructed radios. The taxpayer then filed suit on the theory that its depreciated cost of the property was not the "actual" value. It argued the property must be hypothetically broken into its individual parts for assessment purposes, and since these components have a market individually, they must be valued by the market approach.

But the Court recognized that since the components had a distinct value even as a partial assemblage, a market for individual parts would not render fair market valuation. There was no market for partially assembled radios. However, the Court explained, the assembled and installed value was reflected as the depreciated "costs"

of the items stated in the company's own books and ledgers and IRS tax forms. Id. at 101. It accordingly held that "the only reasonable hypothesis of assessment in the instant litigation is that of cost." Id. at 105. As the Aeronautical Communications case demonstrates, the cost method indicates the fair market value of an assemblage of property.

Four years later, in Dade County v. Miami Herald Publishing Company, Inc., 285 So.2d 671 (Fla. 3rd DCA 1973), the same Court reaffirmed the need to value property at its present, highest and best use. In that case, the county's appraiser "relied exclusively on the cost approach and based his appraisal on the Herald building as a newspaper plant." Id. at 672. The property consisted of "two interconnected structures, an office type structure and a warehouse type structure." The Court noted that no real market existed for a building devoted to newspaper use, but there was a market in Dade County for office facilities. In fact, all other newspaper plants in that county had been converted to office facilities. Thus, the taxpayer's appraisers valued the Herald buildings as office facilities, and argued the market approach should have been used for the assessment.

The Court recited the well-know definition of "fair market value" as "the amount that a purchaser willing, but not obliged to buy, would pay to one willing but not obliged to sell." However, the Court recognized this meant the Herald facility

must be valued at its present highest and best use, which was an assembled newspaper plant. The Court held that since there was no market with sales of assembled newspaper plants, the market approach would not render just value, but the cost approach would. Id. at 673. The Court applied the rule of law that a potential to use an integrated assemblage of property as something other than highest and best use, or to break it up and find separate markets for its components, is completely irrelevant to assessment at fair market value.

Valuing assembled property, at its highest and best use as an assemblage, is exactly what the Supreme Court addressed in Schleman v. Guaranty Title Company, 153 Fla. 379, 15 So.2d 754 (1943). There, a title abstract company argued that the taxable value of its "abstract plant" (the assemblage of books) was only the value of its component parts, which were the ink, paper, binders, and covers. The Court found that the key to the taxable fair market value was what the entire assembled tangible property plant would sell for in the market. In reaching its decision the Court stated "it is hard to believe that when the time has arrived, the owner would be willing to sell his plant" at the value of the sheets of paper as scrap. Id. at 760.

In other words, the Court would not allow the assemblage to be fractionalized and valued by adding up the sales prices of individual pieces of paper in the "used paper market." Similarly, in St. Joe Paper Company v. Adkinson, 400 So.2d 983 (Fla.

1st DCA 1981), the Court found that an appraisal method of valuing undeveloped land by subdividing it into small lots too speculative to be used for tax assessment purposes. Again, in a case where the real property was used for parking area and was an integral part of shopping center, the court found the tax assessor was justified in placing the same value on parking area as on improved land. Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1969).

In the case at bar, the Fifth District Court of Appeal states the Property Appraiser failed to comply with Department of Revenue guidelines which state "…the appraiser must search for this [market data] information and when successful in finding valid market values, he must use them in his appraisal." However, the Property Appraiser's admission that "he never sought out or considered any market data in assessing Wal-Mart's property" does not mean that: (1) a truly comparable market does exist; (2) an application of the cost approach is inherently wrong in determining the value of the properties in question; or, (3) the law requires an exhaustive search for a market which at worst may not exist and at best may not be comparable to the subject property.

There appears to be no record evidence offered by the Respondent which would tend to evidence any market for the amalgamated equipment which the Property Appraiser was required to assess under the factors set forth in Section 193.011,

Florida Statutes. While secondary resale markets for used equipment may exist, these markets offer equipment which has previously been fractionalized and are thus not necessarily probative of the value of the Respondent's equipment "in place". This fractionalization of the equipment is only one concern with this secondary market, more often than not the equipment may be older, and not truly indicative of value even on an item-by-item basis.

In fact given the testimony of the various experts and an understanding of the statutory requirements placed on a property appraiser, as well as an understanding of appraisal theory, the application of a valuation method other than the cost approach would be improper and would severely underestimate the value of the subject properties. Therefore, while not necessarily correct by design in specifically following the Department of Revenue guidelines as suggested by the Court below, the Property Appraiser was correct in his application. It is well settled that an appraiser may reach a correct result for the wrong reason. See City National Bank v. Blake, 257 So.2d 264 (Fla. 3rd DCA 1972).

It is common practice in the appraisal of property to estimate value by using the sale price of like or similar properties. This is most correctly termed "direct sales comparison approach", or in more common practice, the "market approach", or as written in Court's opinion below "the Market Data Approach." When the properties

sold are like the property being appraised and the terms of the sale are in cash or its equivalent, the value estimate for the subject property equates to the price of the sold property. In instances where the properties are comparable yet different, the application of this approach requires that adjustments be made to the sales price of the comparable property to compensate for differences between the sold properties and the subject property.

It would appear to be the Respondent's contention that value of store fixtures and equipment is best estimated by amassing the sale prices of single pieces of used store fixtures and equipment. This amassed information is then assembled, much as the personal property is assembled, to supposedly reflect the value of the subject properties. In applying its version of the "market data approach", Respondent would then suggest that the market has been considered and all eight of the statutory factors in Section 193.011, Florida Statutes, have been considered by default. This assertion, while persuasive, is fatally flawed for several reasons. First, "price" does not in all cases equal "just value", and second, the information used in this manner fails to meet the criteria of comparability found in appraisal theory.

Equating price to " just value" ignores the fact that not all transactions are at their "just value." Personal property can exist in several different market places (trade levels) without its physical characteristics changing. Given this trait, it is incumbent

that when price is used to estimate 'just value" price be extracted from that place which measures all components of value and considers the value of the property as a whole operating at its highest and best use in either its present use or that use to which it can be readily placed in the future. The Uniform Standards of Appraisal Practice, Rule 7-3, states:

> Personal property has several measurable market places, and the appraiser must identify, define and analyze the appropriate market consistent with the purpose of the appraisal;
>
> **Comment:** The appraiser must recognize that there are distinct levels of trade and each may have its own market value. For example a property may have distinct value at a wholesale level of trade, a retail level of trade, or a value under varying auction conditions. Therefore, the appraiser must consider the subject property within the correct market context. At page 51.

Despite numerous attempts of others to define what constitutes value, the decision of property appraisers in Florida is governed by Florida law. Article VII, Section 4, Constitution of the State of Florida, states that all property must be assessed at "just value." Rule 12D-1.002(2), Florida Administrative Code, defines "just value" as:

> Just valuation, actual value, and value - means the price at which a property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other.

Furthermore, the Legislature in Section 193.011, Florida Statutes, sets out eight separate factors that must be considered in determining "just value." In considering these factors, the appraiser must understand the interrelationship they have to each other as well as to the three traditional approaches to value. Equally important, the appraiser must understand while the eight factors are intertwined with the three approaches to value, the Legislature did not specify any particular approach or approaches. In fact, the eight factors are components of sound appraisal theory on which proper application of any of the three approaches would be built. Given the definition of "just value", that market place which maximizes the gains of the seller and buyer must be that market place which not only maximizes their gains but also provides the economic overlay of bringing the individual items of personalty together. Clearly, that is the only market that satisfies statutory factors Section 193.011 (2), (3), (4), (5), and (7), Florida Statutes.

Used store fixtures and equipment which are, in practice, sold at auction or liquidation sales may be in fact a cash representation of an "arms length transaction". However, as demonstrated by the example, this does not mean that all "arms length transactions" are a representation of "just value." The assessment standard text, Property Assessment Valuation 2nd edition, from the International Association of Assessing Officers recognizes this fact plainly stating, "[t]ypical sales of machinery

and equipment or other fixed assets might represent arm's length transactions yet not reflect market value." At page 362.

In ITT Community Development Corp. v. Seay, 347 So.2d 1024 (Fla. 1977), the Supreme Court of Florida recognized that the democratic philosophy mandates that every taxpayer be treated consistently and any sale at something other than the retail level of trade would violate constitutional requirements. See also Palm Beach Development and Sales Corp. v. Walker, 478 So.2d 1122 (Fla. 4th DCA 1985).

The remaining problem with the approach urged by the Respondent is that the information used fails to meet the criteria of comparability found in appraisal theory. The intrinsic value of each item cannot be fully recognized until it is in place and functions at its highest and best use. Clearly, the items found in the used market do not meet the level of comparability necessary for employment of the "direct sales comparison approach" nor does the used market provide an appropriate alternative, as required under the principle of substitution, for the properties being appraised. Indeed it seems logical to assume that the mere fact the item has found its way into a secondary sales market means it no longer functions at the same "highest and best use" as when it was new.

If the assessment cannot be based on sales of comparable properties and the courts have consistently ruled that the used prices of the fractionalized components

do not render market value of a property, a property appraiser's decision is reduced to utilization of one of the two remaining approaches to value: the income approach and/or the cost approach. Much like the limitations surrounding the use of sales of complete operating facilities, the income approach would contain elements of real and intangible personal property. See Metropolitan Dade County v. Tropical Park Inc., 231 So.2d 243 (Fla. 3rd DCA 1970). Thereby leaving the cost approach as the only viable option for determining "just value". And this cost approach, when properly applied, considers all eight statutory factors without resort to searching for a market of like kind tangible property .

Thus, the Property Appraiser correctly applied the eight statutory factors set forth in Section 193.011, Florida Statutes, in the utilization of the cost approach to valuing the Wal-Mart's tangible property, and having done so he was under no further obligation to either consider the market data requested by Respondent or provide an explanation as to why he did not do so.

III. THE FIFTH DISTRICT COURT OF APPEAL IMPROPERLY SHIFTED THE BURDEN TO THE PROPERTY APPRAISER TO JUSTIFY AN ASSESSMENT.

The presumption of correctness afforded the decision of a property appraiser under Section 194.301, Florida Statutes, is only lost if the taxpayer shows by a preponderance of the evidence, that either the appraiser: (1) failed to properly

consider the statutory factors set forth in Section 193.011, Florida Statutes or, (2) arbitrarily based the assessment on appraisal practices different than those practices generally applied to comparable property.

The plain language of the statute deals with the burden of proof in an assessment challenge and as this honorable Court has opined, where the language of a statute is clear and unambiguous, it must be given its plain and ordinary meaning. It is assumed the legislature knows the meaning of words and has expressed its intent by use of the words found in the statute. Aetna Casualty & Surety Company v. Huntingdon National Bank, 609 So.2d 1315 (Fla. 1992); Donato v. American Telephone and Telegraph, 767 So.2d 1146 (Fla. 2000).

In affirming the decision of the trial court and upholding the original assessment of the Property Appraiser, the Second District Court of Appeal in Wal-mart Stores, Inc. v. Todora, 791 So.2d 29, 26 F.L.W. D1035 (Fla. 2nd DCA 2001), made several findings regarding the application of Section 193.011, Florida Statutes, to the determination of the Property Appraiser. In addition to finding the assessment was supported by a reasonable hypothesis of a legal assessment, the court concluded the Property Appraiser properly considered all factors in Section 193.011, Florida Statutes, entitling the decision of the Property Appraiser to the presumption of correctness. This is the exact standard of initial review required by both Section

194.301, Florida Statutes, as well as the standard which has been required by prevailing case law. See Valencia v. Bystrom, 543 So.2d 214 (Fla. 1989). It is well established law in Florida that an assessment may not be overturned merely by a showing that a lower valuation might be more reasonable. Havill v. Lake Port Properties, 729 So.2d 467 (Fla. 5th DCA 1999).

Without question, Respondent failed to establish that the Property Appraiser's value exceeded the "just value" of the property owned. At most, Respondent's argument demonstrated another manner of appraising the property in question, one which was not necessarily better and in all probability less accurate than the method utilized by the Property Appraiser.

CONCLUSION

The valuation of Wal-Mart's tangible personal property performed by the Property Appraiser was consistent with both the requirements of the applicable statutes and prevailing case law, neither of which require the deduction of sales tax from the acquisition costs of tangible personal property as part of the appraisal process. The Respondent further failed to show by either clear and convincing evidence, or even a preponderance of the evidence, that the Property Appraiser's value

exceeded the just and fair value of the tangible property.

For all of the reasons referenced above, Amicus would urge this Court to reverse the opinion issued by the Fifth District Court of Appeal in favor of the Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: Stacy D. Blank, Esquire, Robert E. V. Kelley, Jr., Esquire, and Joseph J. Weisman, Esquire Holland & Knight, L.L.P., P.O. Box 1288, Tampa, Florida 33601-1288; Gene Auvil, Esquire, 15220 Brice Drive, Brooksville, Florida 34601; John E. Dent, Esquire, and Sherri L. Johnson, Esquire, Dent & Cook, P.A., 330 South Orange Avenue, Sarasota, Florida 34236; Thomas B. Drage, Jr., Esquire, and Kenneth P. Hazouri, Esquire, Drage, de Beabien, Knight, Simmons, Mantzaris &

Neal, L.L.P., P. O. Box 87, Orlando, Florida 32802-0087l; Mark Aliff, Esquire, Assistant Attorney General, Room LL-04, The Capitol, Tallahassee, Florida 32399-1600; and Gaylord A. Wood, Jr., Esquire and B. Jordan Stuart, Esquire, Wood & Stuart, P.A., 206 Flagler Avenue, New Smyrna Beach, Florida 32169-2637 on this 21st day of December, 2001.

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Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Amicus, Mike Wells, as Pasco County Property Appraiser, certifies that this Brief of Amicus is typed in 14 point (proportionately spaced) Times New Roman.

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Attorney