

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SCO01-663

ALVIN MAZOUREK, as Property Appraiser of Hernando County, Florida

Petitioner,

vs.

WAL-MART STORES, INC.,

Respondents.

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

**AMENDED BRIEF OF AMICI CURIAE, FLORIDA ASSOCIATION OF
PROPERTY APPRAISERS, INC., BILL DONEGAN, AS ORANGE
COUNTY PROPERTY APPRAISER, ORANGE COUNTY, FLORIDA,
FLORIDA ASSOCIATION OF COUNTIES, INC., AND FLORIDA
ASSOCIATION OF COUNTY ATTORNEYS, INC., IN SUPPORT OF
PETITIONER (Change in Location of Certificate of Compliance Only)**

THOMAS B. DRAGE, JR.
Florida Bar Number 173070
KENNETH P. HAZOURI
Florida Bar Number 0019800
Drage, de Beaubien, Knight,
Simmons, Mantzaris & Neal, LLP
Post Office Box 87
Orlando, Florida 32802-0087
Telephone: (407) 422-2454

TABLE OF CONTENTS

Table of Authorities iii

Preliminary Statement v

Summary of Arguments 1

Argument 2

I. THE FIFTH DISTRICT COURT OF APPEAL
INCORRECTLY RULED THAT PROPERTY
APPRAISERS MUST DEDUCT SALES TAX WHEN
UTILIZING A COST APPROACH TO VALUATION . . 2

A. The 5th DCA’s ruling that property appraisers must deduct sales tax when utilizing a cost approach to valuation is contrary to the unanimous weight of relevant authority stating that sales tax is an element of acquisition cost that

should be included when making a cost-approach assessment. 3

B. The 5th DCA improperly ruled that property appraisers must deduct sales tax when performing a cost-approach assessment of tangible personal property without any proof that the property appraisers’ failure to do so results in an assessment that exceeds just value 7

of the term acquisition.

cost, which includes sales tax, the 5th DCA erroneously substituted the statutory definition for the term “sales price” set forth in section 212.01(16), Florida Statutes (1997). 10

D. The 5th DCA erroneously interpreted the DOR Manual and the relevant case law, neither of which instructs property appraisers to deduct sales tax when using a cost approach to valuation. 11

Conclusion 13

Certificate of Compliance 14

Certificate of Service 14

TABLE OF AUTHORITIES

Cases

Bystrom v. S.F. Whitman, 488 So2d 520 (Fla. 1986) 8, 9

Dept. of Insurance v. S.E. Volusia Hospital Dist.

438 So.2d 815 (Fla. 1983) 6

Hausman v. VTSL, Inc., 482 So.2d 428 (Fla. 5th DCA 1986) 12

Public Employees Relations Commission v. Dade County Police

Benevolent Association, 467, So.2d 987 (Fla. 1985) 6

Southern Bell Telephone & Telegraph Co. v.

County of Dade, 275 So.2d 4, (Fla. 1973) 7

Spanish River Resort Corp. v. Walker,

497 So.2d 1299 (Fla. 4th DCA 1986)

12

Turner v. Tokai Financial Services, Inc.

767 So.2d 494 (Fla. 2^d DCA 2001) 11, 12

Wal-Mart Stores, Inc., V. Mazourek,

778 So.2d 346 (Fla. 5th DCA 2000) 2, 8, 10, 11, 12

Wal-Mart Stores, Inc. v. Todora,

2001 WL 387939 at *3 (Fla. 2^d DCA April 18, 2001) 4, 12

Walter v. Shuler, 176 So.2d 81 (Fla. 1965) 7

Constitution

Article VII, § 4, Fla. Const. (1968) 7, 8, 9

Florida Statutes

§ 193.011(1) & (8), Fla. Stat. (1997) 2, 4, 6, 7, 9

§ 195.027, Fla. Stat. (1997) 6

§ 195.032, Fla. Stat. (1997) 6

§ 195.062, Fla. Stat. (1997) 6

§ 212.02(16) Fla. Stat. (1997) 10

§ 212.05(1)(a)1.a., Fla. Stat. (1997) 11

Florida Laws

Chapter 212 Fla. Stat. 3, 10

Other Citations

International Association of Assessing Officers,

Property Assessment Valuation 360 (2d ed. 1996) 4

Research and Development Arrangements,

Statement of Financial Accounting Standards

No. 32.200 (Fin. Accounting Standards Bd. 1997) 4, 5

PRELIMINARY STATEMENT

In this Brief, the Petitioner, ALVIN MAZOUREK, as Property Appraiser of Hernando County, Florida, is referred to as “Mazourek,” and Respondent, WAL-MART STORES, INC., is referred to as “Wal-Mart.”

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal erred by ruling that property appraisers must exclude sales tax when valuing tangible personal property under a cost approach. This ruling is contrary to the unanimous weight of relevant authority stating that in a cost-approach assessment, sales tax is properly included as an element of acquisition cost. As such, there is no competent evidence establishing that the alternative method of valuation mandated by the court will result in assessments that equate to just value. Furthermore, one of the court's primary bases for its decision was its erroneous substitution of a statutory definition of the term "sales price" for the well-established definition of the term acquisition cost. Finally, the court misinterpreted the Department of Revenue's Manual of Instructions and related case law, which further establishes the fallacy of its opinion. Based on the foregoing, this Court should reverse the Fifth District Court of Appeal's ruling that property appraisers must exclude sales tax when valuing tangible personal property under a cost approach.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL INCORRECTLY RULED THAT PROPERTY APPRAISERS MUST DEDUCT SALES TAX WHEN UTILIZING A COST APPROACH TO VALUATION.

In this case, Wal-Mart challenged a 1997 assessment of tangible personal property claiming that Mazourek improperly included sales tax when valuing the property under a mass appraisal cost approach (the “cost approach”). Wal-Mart Stores, Inc. v. Mazourek, 778 So.2d 346 (Fla. 5th DCA 2000). Wal-Mart argued that the “cost of sale” and “cost of purchase” provisions of section 193.011(1) & (8), Florida Statutes (1997) (“§§ 193.011(1) & (8)”) required Mazourek to exclude the sales tax Wal-Mart paid when purchasing the property from the acquisition cost thereof. Id. at 530. Such a construction of § 193.011 results in a lower valuation of Wal-Mart’s property and thereby lowers Wal-Mart’s ad valorem tax liability.

Following a bench trial, the trial court rejected Wal-Mart’s argument and issued the following ruling:

(S)ales tax, shipping, installation and the like are proper costs which must be included in a properly conducted cost approach.

Id. at 349. The Fifth District Court of Appeal (“5th DCA”), however, reversed this ruling and held that the “cost of sale” and “cost of purchase” provisions of §§

193.011(1) & (8) require property appraisers to exclude sales tax from consideration in establishing just value under a cost approach. Id. at 350-351.

The salient issue in this appeal is the propriety of this holding. As explained below, the 5th DCA's ruling is incorrect because: a) the ruling is contrary to the unanimous weight of authority stating that sales tax is an element of acquisition cost that should be included when performing a cost-approach assessment; b) the 5th DCA has mandated an alteration to the valuation methods employed by property appraisers without any competent proof that the resulting assessments will equate to just value; c) the 5th DCA, instead of utilizing the well established term "acquisition cost" as the starting point of the cost approach assessment, incorrectly substituted the definition of the term "sales price" as set forth in Chapter 212, Florida Statutes, which governs the levy and collection of sales tax; and d) the 5th DCA erroneously interpreted the Department of Revenue's Manual of Instructions and relevant case law, neither of which directs property appraisers to deduct sales tax when utilizing a cost approach to valuation.

- A. The 5th DCA's ruling that property appraisers must deduct sales tax when utilizing a cost approach to valuation is contrary to the unanimous weight of relevant authority stating that sales tax is an element of acquisition cost that should be included when making a cost-approach assessment.**

The 5th DCA's determination that sales tax must be deducted from a cost-approach assessment of tangible personal property has no merit under well-recognized

principals of property valuation. In fact, the unanimous weight of relevant authority requires that sales tax be retained as a component of the historic or acquisition cost in order to correctly determine just value.

One such authority is the International Association of Assessing Officers (the “Association”). In Wal-Mart Stores, Inc. v. Todora, a companion case to the this appeal, the Second District Court of appeal explained the Association’s position on this issue as follows:

Acquisition costs, the starting point for assessments of property under a cost approach, are generally recognized to include freight, installation, taxes and fees.

2001 WL 387939 (Fla. 2d DCA 2001) at *3 (citing International Association of Assessing Officers, Property Assessment Valuation 360 (2d ed. 1996)). Thus, a worldwide association of individuals, whose work consists solely of determining the fair market value of property, has determined that the acquisition cost utilized in the cost approach to valuation must include the sales tax paid for the property.¹

¹ Wal-Mart has erroneously argued that the “cost of purchase” and “cost of sale” provisions of § 193.011(1) & (8) supercede the cost approach methodology followed in other jurisdictions. As explained below, Wal-Mart’s argument must fail in the absence of any showing that the inclusion of sales tax causes the assessment to exceed constitutionally mandated just value. See infra Section I.B.

A second authority that is contrary to the 5th DCA's ruling is Rule 32.200 of the Generally Accepted Accounting Principles ("GAAP"). This Rule sets forth the appropriate method determining a tangible asset's original acquisition cost as follows:

Tangible long-lived assets include property and equipment and other assets held for investment or used in a company's operations that have an estimated useful life of longer than one year. Under generally accepted accounting principals, an acquired long-lived asset should be treated at acquisition cost, including all costs necessary to bring the asset to its location in working condition. Thus, the cost of a long-lived asset should include the asset's purchase price, sales tax, freight, installation costs, and direct and indirect costs (including interest) incurred by an entity in constructing its own assets.

Research and Development Arrangements, Statement of Financial Accounting Standards No. 32.200 (Fin. Accounting Standards Bd. 1997)(emphasis supplied). Thus, GAAP further demonstrates that sales tax is properly included in the acquisition cost of property, and, therefore, property appraisers must follow this procedure in order to ensure that they have an accurate basis or "starting point" when valuing property under a cost approach.

Finally, as noted by the 5th DCA below, the Department of Revenue's ("DOR") tax-return form for tangible personal property also requires taxpayers to include sales tax, transportation, handling and installation charges as part of the purchase price reported to property appraisers. The form's content further establishes the DOR's

intention for sales tax to be included in the acquisition cost of property under a cost approach to valuation performed pursuant to § 193.011, and the DOR's interpretation of this statute is critical to the outcome of the appeal.

The DOR created the tax-return form pursuant to the authority vested in it by the Florida Legislature, which has directed the DOR to prescribe rules and regulations for the assessment and collection of ad valorem taxes including, but not limited to, those establishing proper measures of property valuation. See §§ 195.027, 195.032, 195.062, Fla. Stat. (1997). While not wholly dispositive of the issue of whether the “cost of purchase” and “cost of sale” provisions of §§ 193.011(1) & (8) require a deduction of sales taxes from acquisition cost when utilizing a cost approach, the DOR's position on the issue is highly authoritative. The construction of a statute by the agency charged with its administration is entitled to great weight and must not be overturned unless it is clearly erroneous. Dept. of Insurance v. S.E. Volusia Hospital Dist., 438 So. 2d 815, 820 (Fla. 1983); see also Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So. 2d 987, 989 (Fla. 1985)(stating that “a reviewing court must defer to an agency's interpretation of an operable statute so long as that interpretation is consistent with legislative intent and is supported by substantial competent evidence”).

In the instant case, there is no evidence or authority demonstrating that the DOR's interpretation of §§ 193.011 as it relates to the treatment of sales tax in a cost approach

to valuation is even incorrect, much less clearly erroneous. On the contrary, the DOR's position is consistent with the unanimous weight of authority stating that sales tax is properly included as a component of acquisition cost. Under the authority of Volusia Hospital and Public Employees, therefore, this Court should adopt the DOR's interpretation of the "cost of purchase" and "cost of sale" provisions of §§ 193.011(1) & (8).

In summary, all of the relevant authorities state that sales tax is properly included in the acquisition cost of property valued under a cost approach. In reaching a contrary conclusion, the 5th DCA improperly rejected a "tried-and-true" methodology employed by property appraisers for years. Accordingly, the Court should reverse the 5th DCA's ruling that property appraisers must exclude sales tax when valuing tangible personal property under a cost approach.

B. The 5th DCA improperly ruled that property appraisers must deduct sales tax when performing a cost-approach assessment of tangible personal property without any proof that the property appraisers' failure to do so results in an assessment that exceeds just value.

Article VII, Section 4, of the 1968 Florida Constitution ("Art. VII, § 4") requires the legislature to prescribe laws to ensure a just valuation of all property for the purposes of ad valorem taxation. The term "just value" is synonymous with fair market value, that is "the amount a purchaser willing but not obliged to buy would pay to a seller who is willing but not obliged to sell" the property. Southern Bell Telephone &

Telegraph Co. v. County of Dade, 275 So. 2d 4, 8 (Fla. 1973)(citing Walter v. Shuler, 176 So. 2d 81 (Fla. 1965). The purpose of § 193.011 and other statutes enacted under the authority of Art. VII, § 4, is to assist property appraisers in achieving a just valuation of all property as required by this constitutional provision. Any construction of § 193.011 that tends to result in a valuation of property below just value is necessarily unconstitutional.

As such, a taxpayer seeking to reduce its assessment must establish that the assessment actually exceeds just value. This Court has explained this rule of law as follows:

We begin our analysis by noting the general proposition that the core issue in any action challenging a tax assessment is the amount of the assessment, not the methodology utilized in arriving at the valuation. An appraiser may reach the correct result for the wrong reason. Indeed, a taxpayer must carry a heavy burden in order to successfully challenge a property tax assessment.

Bystrom v. S.F. Whitman, 488 So.2d 520, 521 (Fla. 1986)(citations omitted). Based on this rule, taxpayers cannot simply attack the property appraiser's methodology without making the requisite showing that the resulting assessment exceeds just value.

In the instant case, the fundamental defect in the 5th DCA's ruling is that it focuses solely on the methodology employed by Mazourek, as opposed to whether

Mazourek's assessment exceeded just value in contravention of Art. VII, § 4. This fact is confirmed by the very first sentence of the opinion, which reads as follows:

This case involves the issue of whether the Property Appraiser of Hernando County used correct methods to value tangible personal property owned and used by Wal-Mart in the operation of two retail stores and a distribution center.

Wal-Mart Stores, Inc. v. Mazourek, 778 So.2d 346, 348 (Fla. 5th DCA 2000)(emphasis supplied). In so doing, the 5th DCA has “put the cart before the horse” by ruling that property appraisers must alter their current methodology under the cost approach (by removing sales tax) in the absence of any competent proof that such an alteration will result in an assessment that equates to just value. As such, the 5th DCA's opinion is contrary to the authority of Bystrom and wholly disregards the trial court's factual conclusion that Mazourek's assessment did not exceed just value. (R. 2:539-549)

The result of the 5th DCA's flawed reasoning is an unconstitutional construction of § 193.011. As explained above, it is well established that in order to arrive at the fair market (or just) value of personal property when using a cost approach, one must include sales tax as an element of acquisition cost before adjusting this figure with the appropriate depreciation/appreciation tables. The necessary corollary to this fact is that if one removes sales tax as an element of acquisition cost, then one will tend to artificially lower the basis or “starting point” for the cost-approach analysis, which will tend to result in property being valued at a lesser amount -- regardless of whether the

lesser amount equates to just value, or a figure less than just value. Accordingly, the methodology mandated by the 5th DCA contravenes Art. VII, § 4, because it results in a construction of § 193.011 that is not consistent with securing a just valuation of property for ad valorem tax purposes.

Such an unconstitutional construction of §193.011 is clearly impermissible. Accordingly, this Court should reverse the 5th DCA's ruling and hold that property appraisers may (indeed should) properly include sales tax as an element of acquisition cost when utilizing a cost approach to value tangible personal property.

C. Instead of utilizing the well established definition of the term acquisition cost, which includes sales tax, the 5th DCA erroneously substituted the statutory definition for the term “sales price” set forth in section 212.01(16), Florida Statutes (1997).

In its opinion, 5th DCA incorrectly substituted the term “sales price” as defined in section 212.06(12), Florida Statutes (1997) (“§ 212.02(16)”) for the generally recognized definition of “acquisition cost” in determining the cost basis of property (or “starting point”) for the purpose of a cost-approach valuation. Mazourek, 778 So.2d at 350. Neither the Association's treatise, the DOR manual, GAAP nor any other salient authority even remotely suggests that the term acquisition cost is synonymous with the definition of “sales price” set forth in § 212.02(16). On the contrary, the terms are clearly not synonymous because acquisition cost is universally recognized to include more than just the sum charged by the vendor strictly for the

good or service being sold. The Mazourek court literally (and incorrectly) became the first authority to conclude otherwise.

Furthermore, the entire premise of using a definition from Chapter 212, Florida Statutes, -- the chapter governing the levy and collection of sales tax in this state -- to determine whether sales tax must be included in the cost of an item for purposes of a cost approach to valuation is fundamentally flawed. The purpose of defining “sales price” in § 212.02(16) is to describe the sums that will be subject to the tax levied on sales of tangible personal property in this state. See § 212.05(1)(a)1.a., Fla. Stat. (1997). As used in Chapter 212, Florida Statutes, therefore, “sales price” is necessarily separate and distinct from “sales tax” because the former describes the tax basis while the latter describes the tax itself. This truism is, however, wholly irrelevant to the issue of whether sales tax must be included in the acquisition cost of property to accurately assess tangible personal property under a cost approach to valuation. The Fifth DCA missed this point, and in so doing, rendered an erroneous opinion.

D. The 5th DCA erroneously interpreted the DOR Manual and the relevant case law, neither of which instructs property appraisers to deduct sales tax when using a cost approach to valuation.

In its opinion below, the 5th DCA incorrectly relied on Wal-Mart’s assertion that the Department of Revenue’s 1997 Manual of Instructions (the “DOR Manual”) “instructs property appraisers to exclude sales tax from the assessed value of property.” Mazourek, 778 So.2d at 350. In reality, the DOR Manual does not instruct

property appraisers to deduct sales from the acquisition cost of property when utilizing a cost approach to valuation but instead only requires such a deduction when utilizing a market approach.

Later in its opinion, the 5th DCA exacerbated its mistake by erroneously stating that in Turner v. Tokai Financial Services, Inc., 767 So.2d 494 (Fla. 2d DCA 2000), the property appraiser “admitted that in determining fair market value, sales tax should be deducted from the sales price.” Contrary to the 5th DCA’s understanding, the property appraiser in Turner admitted only that sales tax should be deducted when utilizing a market approach to valuation, and the court expressly stated that neither the property appraiser’s admission nor the court’s holding had any applicability to any other approach to valuation (including a cost approach).² Turner, 767 So. 2d at 499 n.2.

Finally, the 5th DCA also erroneously applied the “internal/external” analysis of costs to the instant case. Mazourek, 778 So.2d at 350. All of the cases cited by the 5th DCA in which courts have utilized this internal/external analysis have involved assessments of property performed under a market approach. See Hausman v. VTSL,

² In the subsequent decision of Wal-Mart v. Todora, 2001 WL 387939 (Fla. 2d DCA April 18, 2001), the court held that sales tax is not a “cost of purchase” or “cost of sale” that is excluded from consideration in establishing just value under a cost approach. This holding emphasizes the Second District Court of Appeal’s understanding that when considering whether sales tax should be deducted as a “cost of purchase” or “cost of sale” there are distinctions between the cost and market approaches.

Inc. 482 So.2d 428, 429 (Fla. 5th DCA 1986) (timeshare value derived from sales price); Spanish River Resort Corp. v. Walker 497 So.2d 1299, 1303 (Fla. 4th DCA 1986) (timeshare appraisal based upon purchase price of original sale); Turner v. Tokai Financial Services 767 So.2d 494, 496 (Fla. 2nd DCA 2000)(tangible personal property using market approach). These cases are materially distinguishable from the instant action, which involves a cost-approach assessment, and, therefore, the 5th DCA erred utilizing the internal/external analysis in its opinion.

The 5th DCA's erroneous interpretation of the DOR Manual and the Turner decision, as well as its misapplication of the internal/external analysis to the instant case, further demonstrate the fallacy of the 5th DCA's ruling on the issue of whether sales tax should be excluded in a cost-approach assessment. Accordingly, such ruling should be reversed.

CONCLUSION

Based on the foregoing, Amici Curiae, FLORIDA ASSOCIATION OF PROPERTY APPRAISERS, INC., BILL DONEGAN, AS ORANGE COUNTY PROPERTY APPRAISER, ORANGE COUNTY, FLORIDA, FLORIDA ASSOCIATION OF COUNTIES, INC., AND FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC., respectfully request the Court to reverse the 5th DCA's ruling below that the "cost of sale" and "cost of purchase" provisions of §§

193.011(1) & (8) require property appraisers to deduct sales tax from an assessment of tangible personal property utilizing a cost approach to valuation.

Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this ____ day of November 2001 to: B. Jordan Stuart and Gaylord A. Wood, Jr., Wood & Stuart, 206 Flagler Avenue, New Smyrna Beach, FL 32169, Robert E. Kelley and Stacy D. Blank, Holland & Knight LLP P.O. Box 1288, Tampa, FL 33601, John C. Dent, Dent & Cook, 330 S. Orange Avenue, Sarasota, FL 34236, Mark Aliff, Attorney General Office, 400 S. Monroe Street, #PL 01, Tallahassee, FL 32399 and Steven L. Brannock, 400 N. Ashley Drive, #2300, P.O. Box 1288, Tampa, FL 33601-1288.-

THOMAS B. DRAGE, JR.
Florida Bar Number 173070
KENNETH P. HAZOURI
Florida Bar Number 0019800
Drage, de Beaubien, Knight,
Simmons, Mantzaris & Neal, LLP
Post Office Box 87
Orlando, Florida 32802-0087
Telephone: (407) 422-2454

Certificate of Compliance with Florida Rule of Appellate Procedure 9.210

I hereby certify that the foregoing Brief is typed in Times New Roman, 14 point font in compliance with Florida Rule of Appellate Procedure 9.210.

Thomas B. Drage, Jr.