IN THE SUPREME COURT OF FLORIDA

Case No.: SC01-663

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

Petitioners,

vs.

WAL-MART STORES, INC.,

Respondent.

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL
CASE NOS. 5D99-3165 and 5D99-3168

ANSWER BRIEF OF RESPONDENT WAL-MART STORES, INC.

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INTRODUCTION

This appeal arises out of Hernando County's 1997 ad valorem tax assessments on tangible personal property owned by the respondent Wal-Mart Stores, Inc. ("Wal-Mart"). Once the chaff is separated from the Property Appraiser's initial brief, it appears that the Property Appraiser has presented three issues for this Court's resolution. First, the Property Appraiser contends that the Florida Fifth District erroneously concluded that sales tax is a cost of sale which must be excluded from the assessments of Wal-Mart's property.

Under Section 193.011(1), a property appraiser must consider "[t]he present cash value of the property, which is the amount a willing purchaser would pay a willing seller, exclusive of reasonable fees and costs of purchase… ." Similarly, under Section 193.011(8), a property appraiser must consider "[t]he net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale… ." These statutory provisions require the Property Appraiser to deduct any costs of sale or purchase from ad valorem assessments reached using Section 193.011(1) or (8). Wal-Mart contends that sales tax is a cost of sale or purchase and that the Property Appraiser's inclusion of sales tax in the assessments in violation of Sections 193.011(1) and (8) deprives the assessments of the presumption of correctness. In addition, the inclusion of sales tax results in assessments that exceed the fair market value of

Wal-Mart's property. In its opinion in this case, the Florida Fifth District Court of Appeal agreed that sales tax paid on the purchase of tangible personal property, like documentary stamp tax on real estate transactions, is an external cost of sale. As a result, the court held that sales tax must be excluded from the Property Appraiser's tangible personal property tax assessments. The court noted that sales tax is not part of the sales price charged by the vendor, but rather is a transaction cost levied by the state. Thus, because sales tax is a classic example of an external cost of sale or purchase, the Fifth District correctly ruled that sales tax must be excluded from the Property Appraiser's assessments of Wal-Mart's tangible personal property.

The Property Appraiser also challenges the portion of the Fifth District's decision requiring property appraisers to describe their consideration of the statutory factors and their reasons for rejecting the application of any factor. The Fifth District's decision is consistent with Florida law. It is well-established that property appraisers must consider each statutory factor in reaching an assessment of tangible personal property. The Fifth District's decision requires only that property appraisers be prepared to describe that process.

Finally, the Property Appraiser challenges the Fifth District's conclusion that the Property Appraiser failed to properly consider market data. As the Fifth District notes, the Property Appraiser admitted that he never sought out or

investigated the existence of any market data. Thus, the Fifth District could only conclude that the Property Appraiser failed to consider market data. The Property Appraiser spends a great deal of time contesting Wal-Mart's own evidence of market data and arguing about the proper method of using the market approach to value tangible personal property. The Fifth District never evaluated Wal-Mart's evidence of market data or analyzed the proper market approach. This Court should likewise decline to consider those issues in this appeal.

STATEMENT OF THE CASE AND FACTS

The Property Appraiser's twenty-page statement of the facts is rife with impermissible argument and detail pertinent to issues that are not before the Court.[1] In an effort to provide the Court with a succinct recitation of the facts necessary for the resolution of this appeal, Wal-Mart offers its own fact statement.

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[1] For example, the Property Appraiser includes in its statement of facts a discussion in which it speculates that Wal-Mart will challenge the Property Appraiser's failure to properly consider the condition of Wal-Mart's property. Initial Brief at 21-22. The Property Appraiser includes no further discussion on this point in the argument portion of its brief. The point was never briefed or argued by either party before the Fifth District and is simply not an issue in this appeal. The Property Appraiser's decision to address the point in its fact statement is mystifying.

Wal-Mart owns tangible personal property in Hernando County which it uses in the operation of two retail stores and a Distribution Center. The Hernando County Property Appraiser assessed Wal-Mart's property for ad valorem tax purposes in 1997 using a mass appraisal cost approach. Deputy tax assessor Mike King testified that he arrived at the assessments of Wal-Mart's property by first looking at the original, or historical, cost paid by Wal-Mart for its property. (T. 874).[2] The Hernando County property tax return requires taxpayers like Wal-Mart to report the original price paid for the property, including sales tax. (T. 874). When King's office received Wal-Mart's return, his staff compared that return to Wal-Mart's return for the previous year and made necessary changes on the computer to reflect the addition or deletion of property during the year. (T. 824-

[2] References to the record on appeal will be cited as "(R. __)". References to the trial transcript included in the record on appeal will be cited as "(T. __)." References to plaintiff's and defendants' trial exhibits will be cited as "(R. P. Ex. [or D. Ex.] at ____)."

825, 841). The Property Appraiser then trended the historical cost information provided by Wal-Mart for its property by applying a 1997 index factor to adjust Wal-Mart's historical cost to the replacement cost new as of January 1, 1997. (T. 913-914).

To complete its calculation of the assessments, the Property Appraiser used a computer program containing the Florida Department of Revenue's ("DOR") Present Worth Table and the DOR's recommended economic life guidelines for various types of property. (T. 820-21). The Present Worth Table sets forth depreciation percentages for personal property. (R. P. Ex. 4). The economic life of an item of property is the number of years over which it is depreciated from new to salvage value. (R. P. Ex. 21). King's staff assigned each class of property a particular code which corresponds to a predetermined economic life. (T. 821-22,

825-26). Once the property was input into the computer, the computer program applied the Present Worth Table and corresponding economic life to determine the fair market value of the property. (T. 842-43). For example, for all Wal-Mart's store fixtures, King's staff took Wal-Mart's original costs, including sales tax, and trended those costs to 1997 present values. The staff then assigned the fixtures a code which corresponded to the DOR's recommended 12-year life for fixtures. The computer then applied that 12-year economic life and the depreciation percentages set forth in the Present Worth Table to determine the value of the fixtures at their current age.

King testified that this method was used for the assessment of Wal-Mart's tangible personal property in 1997. (T. 848). King testified that he performed no other appraisal, calculation, or analysis, and he made no further adjustments to the

computer-generated values. (T. 913-14, 925-26, 928). The Property Appraiser's mass appraisal method resulted in assessments of the tangible personal property at Wal-Mart's retail stores of $1,141,561.00 and $2,449,109.00. (R. 561-62). In connection with the Distribution Center, the Property Appraiser assessed Wal-Mart's real property at $29,565,784.00 and tangible personal property at $18,609,917.00. (R. 11-12).

In December, 1997, Wal-Mart filed complaints challenging the ad valorem assessments for the two retail store locations and the Distribution Center. (R. 1-12; 558-62). Wal-Mart alleged, among other things, that the Property Appraiser failed to properly consider the statutory criteria in Sections 193.011(1) and (8), Florida

Statutes, and that the resulting assessments exceeded the just value of Wal-Mart's property. (R. 4-5, 559).[3]

The trial court tried Wal-Mart's challenges to the assessments of tangible personal property on August 9-18, 1999. (R. 248).[4]

During its case in chief, Wal-Mart called Hernando County's deputy tax assessor Mike King to testify regarding the process his office used in arriving at

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[3] Wal-Mart initially challenged the real property assessments as well, but the parties settled the issues relating to the Property Appraiser's assessment of Wal-Mart's real property before trial. (R. 189).

[4] The Property Appraiser has included numerous statements in the fact section of its initial brief implying that Wal-Mart failed to report items of personal property. Initial Brief at 5-7. The Property Appraiser asserted a counterclaim against Wal-Mart in which he alleged that during the process of discovery, he determined that Wal-Mart had failed to report certain tangible personal property. (R. 56-57). In the counterclaim, the Property Appraiser sought to impose additional tax on the alleged unreported property. (R. 59-60). Wal-Mart argued that the Property Appraiser was precluded by statute from pursuing its additional assessment by way of a counterclaim in the circuit court. (R. 218-20). Wal-Mart also argued that any allegedly unreported property was not in fact subject to taxation as tangible personal property. (R. 346-78). The Fifth District ruled in favor of Wal-Mart concluding that the Property Appraiser was precluded from using a counterclaim filed in the circuit court to assess Wal-Mart's property without first following the administrative procedures set forth in the Florida statutes for imposing additional assessments. *See Wal-Mart Stores, Inc. v. Mazourek*, 778 So. 2d 346, 352 (Fla. 5th DCA 2000). The Property Appraiser has not contested the Fifth District's decision on the counterclaim issue.

the assessments of Wal-Mart's property. King testified that he did not deduct from the assessed value the amount of sales tax paid by Wal-Mart on its property. (T. 915-16). Wal-Mart established that it paid sales or use tax on all of its reported tangible personal property. (R. 1163-66, 1173). King also admitted that he did not investigate the availability of, or consider any, market data in reaching the assessments. (T. 914-15, 925-26, 928). He did not consider any information from dealers of similar property, nor did he make any adjustments for additional depreciation or obsolescence. (T. 864, 914). King made no request to Wal-Mart for additional information in connection with the assessments.[5] (T. 917).

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[5] Although on page 4 of its initial brief the Property Appraiser claims that it requested a list of Wal-Mart's tangible personal property during the assessment process, the record evidence is clear that the Property Appraiser did not request any additional information. The Property Appraiser cites to the testimony of Willa Lovett as establishing that a request for a list of tangible personal property was made, however, the cited testimony does not support the Property Appraiser's contention that such a request was made. (T. 1058). In fact, Mike King admitted that he made no request to Wal-Mart for additional information in connection with the assessments. (T. 916-17).

King also testified during the Property Appraiser's case. During his testimony for the defense, King testified for the first time that he correlated the assessments achieved through the mass appraisal cost approach by measuring the assessments of certain unidentified taxpayers' property against other taxpayers' returns in subsequent years reporting purchases of tangible personal property acquired as part of entire businesses. (T. 2000-01). According to King, the unidentified assessments closely tracked the amounts reported by the unnamed taxpayers as the portion of the purchase prices of the entire businesses they attributed to tangible personal property. (T. 2000). King refused to disclose any information regarding his correlation, claiming that the tax returns upon which he relied contained confidential information. (T. 2088-2090). King did not have the data supporting his alleged correlation available at trial, nor would he produce that

information otherwise due to its alleged confidential nature. (T. 2088-2090). Wal-Mart moved to strike King's testimony based on unfair surprise and the fact that King refused to disclose any details of the comparisons allowing Wal-Mart to test his blanket conclusions. (T. 2002-2004, 2012-13, 2094). The trial court denied the motions to strike. (T. 2006, 2013, 2100).

At the conclusion of the trial, the trial court ruled that the Property Appraiser correctly included sales tax in the assessed value of Wal-Mart's property. (R. 546). In addition, the trial court ruled that the Property Appraiser satisfied his obligation to consider available market data by performing the purported comparison of the property tax assessments of unnamed taxpayers to the amounts subsequently reported by other taxpayers as the portion of the purchase prices of entire businesses attributable to tangible personal property. (R. 543-44, 547). The trial

court concluded that the Property Appraiser's comparison established that the mass appraisal method resulted in assessments equal to the fair market value of tangible personal property. (R. 547). As a result, the court entered judgment in favor of the Property Appraiser on its assessments. (R. 548).

Wal-Mart appealed the trial court's final judgment to the Fifth District Court of Appeal. (R. 539, 904). Wal-Mart again argued that the Property Appraiser failed to properly consider Sections 193.011(1) and (8) by including sales tax in the amount of the assessments and by failing to consider any market data. *See Wal-Mart Stores, Inc. v. Mazourek*, 778 So. 2d 346, 350 (Fla. 5th DCA 2000). The Fifth District issued its decision on December 29, 2000. *See id.* at 346. The court held that the Property Appraiser improperly included sales tax in its assessments of Wal-Mart's tangible personal property. *See id.* at 350-51. The court also held that the Property Appraiser, who admittedly never sought out or considered any market data when assessing Wal-Mart's property, failed to properly consider market data as required by Sections 193.011(1) and (8). *See id.* at 351-52. The court denied the Property Appraiser's motion for rehearing on February 28, 2001. (5th DCA Record, 83).

On April 18, 2001, the Second District Court of Appeal issued its decision in *Wal-Mart Stores, Inc. v. Todora*, 791 So. 2d 29 (Fla. 2d DCA 2001). The Second District determined in that case that a property appraiser may properly include sales tax in the assessed value of tangible personal property when the assessment is reached using the cost approach. *See Todora*, 791 So. 2d at 31. The Second District acknowledged the contrary ruling of the Fifth District in *Mazourek* and certified the conflict to this Court. *See id*. Judge Fulmer authored a dissent on the sales tax issue, agreeing with the Fifth District in *Mazourek* that sales tax should have been excluded from the assessed value of Wal-Mart's tangible personal property. *See id*. (J. Fulmer, dissenting).

Based on the Second District's certification of conflict, Wal-Mart filed its Notice to Invoke the Discretionary Jurisdiction of this Court on May 16, 2001. On October 17, 2001, the Court accepted jurisdiction in the present case. Thus, both sides of the conflict on the sales tax issue are currently pending before the Court.

On December 12, 2001, the Court stayed *Wal Mart Stores, Inc. v. Todora, et al.*, Case No. SC01-1130, pending the resolution of this case.

SUMMARY OF THE ARGUMENT

The Fifth District properly concluded that sales tax is a cost of sale or purchase which must be excluded from assessments of tangible personal property reached using Sections 193.011(1) and (8). Sales tax is a transaction tax imposed by the state on the privilege of selling tangible personal property at retail. Thus, sales tax is an extraneous cost of sale which adds no value to the item of personal property. This Court should affirm the Fifth District's decision requiring the exclusion of sales tax from assessments reached using Sections 193.011(1) and (8).

This Court should likewise uphold the Fifth District's decision requiring property appraisers to explain their consideration of the statutory factors in Section 193.011. Contrary to the arguments advanced by the Property Appraiser, the Fifth District's decision does nothing to infringe upon the discretion afforded property

appraisers, nor does it shift the burden of proof on challenges to the validity of the assessments from taxpayers to property appraisers. Florida law has long required property appraisers to consider each of the statutory factors. The Fifth District's decision states only that property appraisers should be prepared to explain that consideration. The Fifth District's decision is perfectly consistent with Florida law.

Finally, the Fifth District did not err in concluding that the Property Appraiser failed to properly consider market data as required by Sections 193.011(1) and (8). The Property Appraiser admitted at trial that he never sought out or investigated the existence of any market data. Thus, the Property Appraiser's challenge of the Fifth District's decision must fail based on its own

admission that it failed to consider any market data. This Court should affirm the Fifth District's decision.

ARGUMENT

The Property Appraiser's initial brief is, for the most part, much ado about nothing. The issue of whether sales tax is a cost of sale or purchase is simple and straightforward. Common sense and a basic knowledge of sales tax are enough to establish that sales tax, a transaction tax levied by the state, is a textbook example of a cost of sale or purchase. Indeed, it is hard to imagine a more obvious example of an extraneous or external cost of sale or purchase.

Likewise, there is nothing complicated or troubling about the Fifth District's conclusion that the Property Appraiser failed to consider any market data. He admitted as much. Finally, the Property Appraiser and amici curiae argue that the Fifth District has changed the law of Florida by requiring property appraisers to actually explain their consideration of the statutory factors and their reasons for choosing not to apply any of the factors. To the contrary, since long before the Fifth District's decision in this case, Florida law has required property appraisers to give meaningful consideration to each of the eight factors. All the Fifth District has done is ask property appraisers to explain that consideration. If a property appraiser has, in fact, considered the factors, asking the property appraiser to explain that process in no way changes Florida law, infringes on the property appraiser's discretion, or shifts the burden of proof on the validity of the assessment from the taxpayer to the property appraiser. The Fifth District's

decision in this case comports with Florida law, sound reasoning, and common sense. This Court should affirm that decision.

I. Sales Tax Is A Cost of Sale and Purchase Under Sections 193.011 (1) and (8) and Must Be Excluded From the Assessments.

Article VII, Section 4 of the Florida Constitution prescribes that all property must be assessed at "just value" for the purpose of ad valorem taxation. The terms "just value," "fair market value," and "full cash value" are legally synonymous. *See Walter v. Schuler*, 176 So. 2d 81, 83-84 (Fla. 1965); Florida Department of Revenue, Manual of Instructions*, Assessment of Tangible Personal Property* ("the *Manual*") (R. P. Ex. 6). "Just value" is defined in the Florida Administrative Code, Rule 12D-1.002(2) as follows:

> 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.

Pursuant to Section 193.011, Florida Statutes, property appraisers must take the following eight factors into account in arriving at "just value":

(1) The present cash value of the property, which is the amount a willing purchaser would pay a willing seller, exclusive of reasonable fees and costs of purchase, in cash or the immediate equivalent thereof in a transaction at arm's length;

(2) The 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, taking into consideration any applicable judicial limitation, local or state land use regulation, or historic preservation ordinance, and considering any moratorium imposed by executive order, law, ordinance, regulation, resolution, or proclamation adopted by any governmental body or agency or the Governor when the moratorium or judicial limitation prohibits or restricts the development or improvement of property as otherwise authorized by applicable law….

(3) The location of said property;

(4) The quantity or size of said property;

(5) The cost of said property and the present replacement value of any improvements thereon;

(6) The condition of said property;

(7) The income from said property; and

(8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements. When the net proceeds of the sale of any property are utilized, directly or indirectly, in the determination of just valuation of realty of the sold parcel or any other parcel under the provisions of this section the property appraiser, for the purpose of such determination, shall exclude any portion of such net proceeds

attributable to payments for household furnishings or other items of personal property.

§ 193.011, Fla. Stat. (1999); *see also Straughn v. Tuck*, 354 So. 2d 368, 371 (Fla. 1977) (in arriving at valuation, tax assessor shall take into consideration factors set forth in Section 193.011); *Bystrom v. Equitable Life Assur. Soc'y,* 416 So. 2d 1133, 1143-44 (Fla. 3d DCA 1982) ("Just valuation, as mandated by Article VII, Section 4 of the Florida Constitution, is to be arrived at by the application and consideration of all of the statutory factors delineated by Section 193.011…."), *rev. denied*, 429 So. 2d 5 (Fla. 1983).

An appraiser's assessment must carefully consider each of the eight criteria, in good faith, and give each criterion "such weight as the facts justify." *Daniel v. Canterbury Towers, Inc.,* 462 So. 2d 497, 502 (Fla. 2d DCA 1984). A property appraiser's failure to consider any one of the eight factors necessitates setting the

assessment aside. *See Straughn*, 354 So. 2d at 371. An incorrect application of a factor in the assessment process amounts to a failure to consider it. *See Straughn*, 354 So. 2d at 371. Furthermore, a property appraiser can fulfill the requirement to consider a factor properly only if he or she has the information necessary to do so. *See Scripps Howard Cable Company v. Havill*, 665 So. 2d 1071, 1076-77 (Fla. 5th DCA 1995), *approved*, 742 So. 2d 210 (Fla. 1998), *reh'g denied*, 24 Fla. L. Weekly S276 (Fla. June 10, 1999); *see also Wilkinson v. Kirby*, 654 So. 2d 194, 196 (Fla. 2d DCA 1995) (presumption of correctness was lost because assessment was based on misapplication of law).

Mere awareness of data does not rise to the level of the required consideration. Instead, an appraiser must engage in real analysis in considering the application of each factor. *See Schultz v. TM Florida-Ohio Realty, Ltd.*, 577 So. 2d

573, 575 (Fla. 1991) (appraiser's determination "will not be disturbed on review as long as each factor has been ***lawfully considered*** and the assessed value is within the range of reasonable appraisals."). (Emphasis added).

Although a property appraiser's assessment comes to the trial court clothed with a presumption of correctness, the presumption is lost if the taxpayer shows that the property appraiser failed to "consider properly" each of the eight criteria in Section 193.011. *See* § 194.301, Fla. Stat. (1999); *see also Schultz*, 577 So. 2d at 575. If the presumption of correctness is lost, the taxpayer need only show by a preponderance of the evidence that the appraiser's assessment exceeds just value. Even if the presumption of correctness is retained, the taxpayer may still prevail by presenting clear and convincing evidence that the assessment exceeds just value. If the property appraiser's assessment is found by a court to be erroneous, the court

may itself establish the appropriate amount of the assessment if there exists competent, substantial evidence in the record to satisfy the requirements of Section 193.011. *See* § 194.301, Fla. Stat. (1999).

Under Section 193.011(1), the Property Appraiser must consider "[t]he present cash value of the property, which is the amount a willing purchaser would pay a willing seller, ***exclusive of reasonable fees and costs of purchase***, in cash or the immediate equivalent thereof in a transaction at arm's length." (Emphasis added). Similarly, under Section 193.011(8), the Property Appraiser must consider "[t]he net proceeds of the sale of the property, as received by the seller, ***after deduction of all of the usual and reasonable fees and costs of the sale***, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements." (Emphasis added). These two factors require

that the costs of sale and reciprocal costs of purchase be excluded from the assessed value of property. *See Oyster Pointe Condominium Assoc., Inc. v. Nolte*, 524 So. 2d 415, 418 (Fla. 1988).[6]

In *Turner v. Tokai Financial Services, Inc.*, 767 So. 2d 494 (Fla. 2d DCA 2000), the Second District Court of Appeal recognized that, while the values derived under Sections 193.011(1) and (8) might differ, both sections require the deduction of certain transaction costs. Section 193.011(1) requires the deduction of fees and costs incurred by the buyer over the present cash value of the property.

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[6] Amici Todora, Crapo, Smith, and Higgs argue in their brief that it is questionable whether Sections 193.011(1) and (8) apply to tangible personal property at all or only to real property. To the contrary, it is beyond dispute that Sections 193.011(1) and (8) apply equally to tangible personal property. *See Southern Bell Tel. & Tel. Co. v. County of Dade*, 275 So. 2d 4, 7 (Fla. 1973) (personal property is entitled to the same "cost of sale" adjustment that real property receives in the assessment process); *Turner v. Tokai Financial Services, Inc.*, 767 So. 2d 494, 500 (Fla. 2d DCA 2000) (holding that costs of sale deduction not limited to real property); *Southern Bell Tel. & Tel. Co. v. Broward County*, 665 So. 2d 272, 275 (Fla. 4th DCA 1995) (approving property appraiser and Department of Revenue's 15% "cost of sale" adjustment under § 193.011(8) to assessment of personal property), *rev. denied*, 673 So. 2d 30 (Fla. 1996).

See Tokai, 767 So. 2d at 498. Section 193.011(8), on the other hand, requires the exclusion of the reasonable costs and fees the seller pays out of the proceeds received by the buyer. *See id.* Because sales tax is typically paid by the buyer to the seller, and then remitted by the seller to the state, sales tax should be excluded from assessments under both Sections 193.011(1) and (8). Simply stated, sales tax may be viewed either as a cost of sale *or* a cost of purchase.

Whether viewed as a cost of sale or purchase, it is clear that sales tax is an extraneous transaction cost which should be excluded from ad valorem assessments. This Court previously considered the types of transaction costs excluded under Sections 193.011(1) and (8) in the context of real property assessments. *See Oyster Pointe*, 524 So. 2d at 417-19; *see also Spanish River Resort Corp. v.* Walker, 497 So. 2d 1299, 1304 (Fla. 4th DCA 1986), *approved*, 526

So. 2d 677 (Fla. 1988). The Court's decision in *Oyster Pointe* is particularly helpful here. In *Oyster Pointe*, the Court concluded that property appraisers should exclude from assessments the reasonable fees and costs of sale typically associated with the closing of real estate transactions, such as reasonable attorneys' fees, brokers' commissions, appraisal fees, documentary stamp taxes, survey costs, and title insurance costs. *See id.* at 418. Sales tax, like documentary stamp tax, is an excise tax paid by the buyer at the time of sale and is ultimately remitted to the state. Sales tax is imposed on personal property while documentary stamp tax is imposed on real property. Otherwise, the taxes serve exactly the same function. As the Fifth District concluded "sales taxes are no different from documentary stamp taxes paid on real estate exchanges." *Mazourek*, 778 So. 2d at 350. As a

result, Sections 193.011(1) and (8) require the exclusion of sales taxes from tangible personal property tax assessments.

The Fifth District explained further that sales tax is a tax levied by the state on each taxable transaction by those engaged in the taxable privilege of selling tangible personal property at retail. *See Mazourek*, 778 So. 2d at 350. "The sales price of an item is that cost levied by the vendor, whereas sales tax is that cost levied by the state. The two are distinct and should not be added together in the assessment of tangible personal property." *Mazourek*, 778 So. 2d at 350.[7] Because sales tax is an extraneous cost of sale, the Fifth District properly concluded that it must be excluded from assessments of tangible personal property.

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[7] Several amici contend that the Fifth District erred in its use of the term "sales price." The amici contend that the cost approach starts with the original or historical cost figure and not the sales price of property. Even a cursory reading of the Fifth District's opinion, however, reveals that the Court simply uses that term to distinguish between the total cost or purchase price of property, which includes transaction costs, and the actual cost of the property itself, excluding transaction costs.

The Second District also recognized just that point in its *Tokai* decision. The property appraiser in *Tokai*, like the Property Appraiser here, used a cost approach to assess the taxpayer's tangible personal property. The taxpayer argued that its property must be assessed by using market data. The trial court agreed with the taxpayer and reduced the amount of the assessment to market value as calculated by the taxpayer's expert. The property appraiser did not challenge on appeal the trial court's reduction of the assessment to market value, but instead contested a further reduction in the assessment to account for certain alleged costs of sale. *See Tokai*, 767 So. 2d at 496.

On appeal, the Second District noted the property appraiser's admission that "amounts not properly included in the sales price, such as sales tax…" should be deducted from the assessment. *See Tokai*, 767 So. 2d at 499. Thus, the court

recognized that sales tax is an external cost of sale. On rehearing, the court added a footnote clarifying that the property appraiser's concession was made in the context of the market approach to value. *See id*. The court expressed no opinion on whether sales tax should be excluded under any other method of valuation.

The Department of Revenue's ("DOR") Manual for 1997 likewise instructs property appraisers that sales tax is an extraneous cost which should be excluded from the assessed value of property under the market approach.[8] Adopted by the DOR pursuant to Florida Administrative Code Rule 12D-51.002, the Manual directs property appraisers that "[s]ales tax is not to be included in the market data

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[8] Florida courts have historically accorded great weight to the Manual in resolving assessment issues. For example, in *Havill v. Scripps Howard Cable Company*, 742 So. 2d 210, 213-14 (Fla. 1998), this Court relied on the Manual in determining that a particular assessment approach was constitutionally infirm. Florida District Courts of Appeal have relied on the Manual (or its predecessor) for over thirty years. *See, e.g., Overstreet v. Dean,* 219 So. 2d 752, 753 (Fla. 3d DCA 1969) (assessment overturned where contrary to the "Comptroller's Instructions," forerunner to the Manual); *Mastroianni v. Barnett Banks, Inc*., 664 So. 2d 284, 288 (Fla. 1st DCA 1995) (relying on the Manual in approving assessment which rejected a variation of the income approach urged by the taxpayer).

approach." (R. P. Ex. 6 at 5).[9] Thus, both the DOR Manual and the *Tokai* decision confirm that sales tax is an extraneous cost of sale.

That conclusion makes perfect sense. As the Fifth District concluded here, sales tax is an external cost, not an internal one. In fact, under Florida law, it is unlawful for a vendor to include sales tax in the purchase price of property or to advertise a price that includes sales tax. *See* §§ 212.07(2) and (4). Sales tax must be separately added on to the price of the product at the time of the sale. Thus, sales tax is an extraneous cost of sale. Extraneous costs of sale or purchase are uniformly deducted because they add nothing to the value of the property. *See* *Hausman v. VTSI, Inc.*, 482 So. 2d 428, 431 (Fla. 5th DCA 1985) (noting that

[9] The Property Appraiser attempts to distance itself from the DOR's 1997 Manual by describing the Manual as ancient, outdated, and flawed. Moreover, the Property Appraiser continues to cite to this Court, just as it did in the Fifth District, a subsequently revised manual not applicable to the tax year at issue. In this case, the 1997 Manual cited by Wal-Mart was the Manual in force for the 1997 tax year.

"extraneous costs, which add nothing to just value" should be deducted under the eighth criterion), *rev. denied*, 492 So. 2d 1332 (Fla. 1986); *Overstreet v. Dean*, 219 So. 2d 752, 753 (Fla. 3d DCA 1969) (affirming challenge to tangible personal property tax assessment noting "there were improperly included in the original cost of Plaintiff's property, items such as services, labor and materials. . . which do not add to the value of the personal property itself… ."). It is hard to imagine a more obvious example of a cost of sale than sales tax – a cost levied by the state on sales transactions.

The arguments advanced by the Property Appraiser and amici to defeat the obvious proposition that sales tax is a cost of sale just defy common sense.[10] First,

[10] A total of nine parties have appeared as amicus curiae on behalf of the Property Appraiser in this appeal. Amici are other property appraisers, associations of property appraisers, and associations of taxing entities. The danger in permitting this sort of "piling on" by amici is described by Judge Posner in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997). Judge Posner explains as follows:

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the

the Property Appraiser contends that the Fifth District's decision must be reversed because the court cites no authority for its conclusion that sales tax is a cost of sale. *See* Point II. A., Initial Brief.[11] The Property Appraiser ignores the fact that the Fifth District's decision was the first in the state on exactly these facts. The

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> litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party.

The danger recognized by Judge Posner is readily apparent in this case. The amici have filed three additional briefs, either duplicating the arguments advanced by the Property Appraiser or adding additional arguments on the very same points – arguments which could have easily been advanced by the Property Appraiser himself. The effect of the amicus briefs has been to permit the filing of four briefs on behalf of the Property Appraiser rather than one. None of the amicus briefs offers any unique perspective to this Court. Instead, the amicus briefs are all simply regurgitation, refinements, or extensions of the Property Appraiser's own arguments.

[11] The Property Appraiser attempts to force this appeal into a challenge of fact issues. *See* Point I, Initial Brief. The question of whether sales tax is a cost of sale or purchase under Sections 193.011(1) and (8) does not present a fact issue, but rather a legal one. The facts underlying the legal question are undisputed. As instructed, Wal-Mart reported its original cost of the property, including sales tax. Wal-Mart established at trial that it actually paid sales tax on the reported property. The Property Appraiser did not exclude the sales tax from the assessed value of the property. The legal question for this Court is whether sales tax is an extraneous cost of sale or purchase excludable by statute from the assessments of Wal-Mart's property. That is an issue of statutory interpretation, the resolution of which is appropriate by the Fifth District and this Court. *See Tokai*, 767 So. 2d at 498-99; *Spanish River*, 497 So. 2d at 1303-04.

Property Appraiser also ignores the fact that the Fifth District properly relied on Sections 193.011(1) and (8), Florida Statutes, as well as the Florida sales tax statutes and the 1997 DOR Manual. In addition, the Fifth District relied on *Tokai*, *Hausman*, and *Spanish River* in crafting its analysis.

The Property Appraiser offers little substantive challenge to the Fifth District's well-reasoned analysis. Instead, the Property Appraiser argues only that sales tax is not a cost of sale because just value should include "all those elements of the cost which the seller must bargain for and ultimately incur in order to put the property to use for its commercial purposes." Initial Brief at 28-29. The Property Appraiser's contention is directly at odds with Sections 193.011(1) and (8). Florida law does not say that ***all*** costs necessary to put an item of property in use should be included in the assessed value of the property. In fact, Sections 193.011(1) and (8) say just the opposite. Section 193.011(1) provides that property appraisers must

consider the price a willing buyer will pay a willing seller exclusive of reasonable fees and costs of purchase. Similarly, Section 193.011(8) provides that property appraisers must consider the net proceeds received by the seller after the deduction of the usual and reasonable costs of sale. Thus, the language of Sections 193.011(1) and (8) on its face defeats the Property Appraiser's argument. The statute plainly contemplates that transaction costs, whether incurred by the buyer or seller, must be excluded from assessments.

In support of his argument, the Property Appraiser cites cases from 1969 and 1970, as well as a 1973 attorney general opinion. The Property Appraiser's cases, however, do not appear to stand for the cited proposition. None of the cases expressly state, or even imply, that all of the buyer's or seller's costs must be included in the assessed value of the property. Moreover, in *Overstreet v. Dean*, 219 So. 2d 752 (Fla. 3d DCA 1969), a case decided at about the same time, the

court did not require the inclusion of all costs. The appellate court in *Overstreet* affirmed the trial court's conclusion that the property appraiser improperly included in the taxpayer's original cost figure costs which did not add to the value of the personal property.

The Property Appraiser's argument does nothing to demonstrate that sales tax is not a cost of sale or purchase. Instead, the Property Appraiser asks this Court to rewrite Sections 193.011(1) and (8) to eliminate the language excluding costs of sale and purchase. The Property Appraiser seeks a ruling from this Court that all costs incurred by the buyer or seller may be included in the assessed value of the property. This Court should not accept the Property Appraiser's invitation to rewrite the statute.[12]

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[12] Amicus Wells contends that the Property Appraiser's assessments may not rely on Sections 193.011(1) and (8) at all, but rather on Section 193.011(5). The Property Appraiser, however, has never claimed that its cost approach relies solely on Section 193.011(5).

The Property Appraiser also contends that sales tax need not be excluded when the assessment is performed using the cost approach to value rather than the market approach. *See* Point II. B., Initial Brief. That contention is insupportable. First, the character of sales tax as an extraneous transaction cost rather than an embedded cost of the product does not change depending on the method of appraisal selected by the Property Appraiser. The Property Appraiser's contention rests on the illogical premise that sales tax is an extraneous cost when the Property Appraiser uses the market approach, but is somehow transformed into an internal cost when the Property Appraiser uses the cost approach. Sales tax is always an extraneous transaction cost and nothing about the Property Appraiser's selection of an appraisal method changes that fact.

Moreover, any purported distinction between the cost and market approaches on this point is artificial. The only difference between the two approaches is the way in which depreciation is taken. Under the market approach, a property appraiser determines what property is currently worth based on a comparison of current sales of similar property. Depreciation has already been factored into the value arrived at under the market approach as an inherent function of the marketplace. The just value of property under the market approach is the comparable sales price without the inclusion of sales tax. The cost approach approximates what property is currently worth by depreciating the original cost of the property to account for age and obsolescence. Thus, the market approach and the cost approach differ only in whether the market has automatically adjusted the price to account for depreciation or whether depreciation must be artificially

estimated by the property appraiser. If property is new, the market approach and the cost approach are identical. As the DOR Manual notes, when the starting point of the cost approach is the purchase of new property in an open, competitive market, as was the case for the property here, the determination of original cost is much like the market approach. (R. P. Ex. 6). There is no depreciation of new property and the value is based on the current sales price, whether viewed under the market or cost approach. Thus, it makes no sense to deduct sales tax from the current sales price under the market approach, but not from the historical sales price under the cost approach.

According to the Property Appraiser, Wal-Mart erroneously convinced the Fifth District that the original sale of the property at issue in this case is like a comparable sale of property used in the market approach. Contrary to the Property

Appraiser's accusation, it is not Wal-Mart, but the DOR that convinced the court on that point. Again, the DOR Manual explains that when the starting point of the cost approach is an actual sale, as it is in this case, the cost approach and the market approach are virtually identical. The only difference is the way a property appraiser must account for depreciation. There is no meaningful difference on the issue of whether sales tax paid on the taxpayer's purchase of the property should be excluded from the assessed value of the property. There is no logical basis for the Property Appraiser's contention that sales tax is an extraneous cost of sale for purposes of a market approach to value, but somehow becomes an embedded cost of the property under a cost approach.

The Property Appraiser's argument is also at odds with the *Tokai* decision. The court explained in *Tokai* that, although an actual sale is not required to trigger

the cost of sale reduction, when an assessment is based on an actual sale, as it is in this case, a property appraiser may well be required to apply Section 193.011(8) and not just consider it.[13] The Property Appraiser's assessments in this case are clearly based on actual sales – the original sales of the property to Wal-Mart. Nothing about the subsequent adjustments of sales prices for depreciation alters the conclusion that the assessments are based on actual sales and the Property Appraiser therefore was required to deduct from the amount of the assessments the sales tax paid by Wal-Mart.

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[13] Amici Todora, Crapo, Smith, Higgs, and Wells contend that property appraisers are not required to deduct the costs of sale and purchase because Section 193.011 does not mandate the application of any particular methodology for calculating assessments. The amici misunderstand the point of Wal-Mart's argument. The law is clear that property appraisers retain the discretion to reject the application of any factor so long as the property appraiser has first given the factor meaningful consideration. Wal-Mart's point is that in cases like the present one, in which a property appraiser elects to apply a particular factor, it must do so properly and in its entirety. The Property Appraiser cannot, as it has done here, apply Sections 193.011(1) and (8) piece-meal by refusing to apply the reduction for costs of sale and purchase included in those factors. To allow property appraisers to rewrite the factors at their whim would essentially dispense with any consideration of the statutory factors whatsoever.

The Property Appraiser also contends that sales tax should be included in the assessments because "external" and "extraneous" costs are not the same. According to the Property Appraiser, an external cost is an addition to the stated sales price, while an extraneous cost is a non-market addition to the negotiated sales price. It is not surprising that the Property Appraiser cites no authority for these definitions. The Property Appraiser argues that only extraneous costs can be excludable costs of sale or purchase. The Property Appraiser's definitions draw a distinction without a difference. Sales tax is both an external and extraneous cost, even under the Property Appraiser's definitions. Under Florida law, sales tax must be stated separately from the price of the property and cannot be included in any advertised price. Moreover, the seller of property has no ability to negotiate the application or rate of sales tax on the sale of personal property. Thus, while a seller is always free to lower its own price to make the payment of sales tax more palatable to the buyer, the same is true of any extraneous cost. Thus, the purported

distinction drawn by the Property Appraiser between external and extraneous costs proves nothing.[14]

In yet another argument that defies common sense, amici Todora, Crapo, Smith, and Higgs contend that the imposition of sales tax on the retail sale transaction actually increases the value of the tangible personal property sold. To suggest that an item of property becomes more valuable immediately after its sale simply because sales tax was imposed on the sales transaction defies logic and common sense. A quick example demonstrates the fallacy in amici's argument. If amici are correct, two identical items of tangible personal property purchased on the same date for the same sales price and with identical depreciation will have a different fair market value depending upon whether the property was purchased in

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[14] Moreover, courts have used the terms interchangeably. *See Tokai*, 767 So. 2d at 499 (using term "external" to describe deductible costs); *Hausman*, 482 So. 2d at 431 (stating that "extraneous" costs should be deducted from assessments under Section 193.011(8)).

a county with a 6% or 7% sales tax, and whether the property was sold to a tax exempt purchaser. Amici's argument means that property originally sold to a tax exempt purchaser will always have a lower fair market value because no sales tax was included in the original cost. Amici's argument ignores the economic reality of the marketplace. No purchaser of used tangible personal property will pay more for the property simply because the seller paid higher sales tax on its purchase of the property.

Amici also suggest that sales tax is really an embedded cost of production of tangible personal property and not an external cost of sale or purchase. Amici rely on this Court's decision in *Dade County v. Atlantic Liquor Company*, 245 So. 2d 229, 231 (Fla. 1970) to support their argument. That reliance is misplaced. In *Atlantic Liquor*, this Court determined that the federal beverage stamp tax at issue

in that case was imposed upon the distillation of alcoholic beverages, *and not on their sale*. Thus, the stamp tax was a production tax and not a sales tax and "being a production tax, the tax is viewed as a cost of manufacturing, payment of which increases the value of the product so taxed…." *Atlantic Liquor*, 245 So. 2d at 231. The manufacturer in *Atlantic Liquor* argued that the stamp tax was really imposed on the sale of the beverages and thus was not includable in the ad valorem assessment. This Court rejected the manufacturer's characterization of the stamp tax as a sales tax. In doing so, the Court concluded that the tax was levied during production, not on the ultimate sale, and therefore was a component cost of production, not a cost of sale. As a result, the cost of the stamp tax could be included in the ad valorem assessment. Unlike *Atlantic Liquor*, there is no dispute in this case that the tax at issue is a true sales tax imposed by the state on the sale

of the final product. *Atlantic Liquor* permitted inclusion of the tax in the property assessment precisely because it was not a sales tax like the tax at issue in this case. Thus, the *Atlantic Liquor* case on which the amici rely actually supports Wal-Mart's argument in this case.

The Property Appraiser further claims that even if sales tax is a cost of sale it may still be included in the assessed value of Wal-Mart's property because sales tax is included in the bargained-for value of property, is passed on to subsequent purchasers, and is not an extraneous cost of doing business. The Property Appraiser's contention is absolutely contrary to Florida law. First, sales tax is not part of the bargained-for value of property. Sales tax cannot be advertised in the price of property, nor included in the price. The seller cannot, as part of a negotiated price, agree to relieve a buyer of the obligation of paying sales tax or

agree to a reduced rate. As the Fifth District recognized, sales tax is a transaction tax levied by the state. It is not a term negotiable by the buyer or seller. Moreover, even if sales tax were negotiable, it is still an extraneous cost of sale. A quick look at the treatment of documentary stamp tax on real property demonstrates the flaw in the Property Appraiser's argument. Unlike sellers of tangible personal property, sellers of real property are permitted to include documentary stamp tax, brokers' fees, and other transaction costs in the advertised price of real property. *See Southern Bell*, 665 So. 2d at 275 (recognizing that selling price of real property includes costs of sale). Buyers of real estate may negotiate the total purchase price to account for those costs of sale. Notwithstanding the inclusion of those costs in the advertised price, there is no dispute that documentary stamp tax and other real estate transaction costs are extraneous costs of sale which must be excluded from

the assessed value of the property. Thus, the Property Appraiser's contention that sales tax should be included in the assessment because sales tax is part of the total purchase price misses the point.

The Property Appraiser also misses the mark when it contends that sales tax is not an extraneous cost of doing business. Florida's sales tax statute provides that sales tax is levied on the taxable privilege of selling tangible personal property at retail. *See* § 212.05(1), Fla. Stat. Thus, contrary to the Property Appraiser's argument, sales tax is an extraneous transaction cost imposed on the business of selling at retail. Finally, sales tax is imposed anew on every subsequent retail sale of the same item of property. Sales tax is not an embedded cost of the property which is ultimately passed on to subsequent purchasers. Instead, sales tax is

imposed on every subsequent retail sale of the property at the current rate in the sale location.

Ignoring Sections 193.011(1) and (8), as well as the *Oyster Pointe* and *Tokai* decisions, the Property Appraiser relies on decisions of the Alachua County circuit court in *Wal-Mart Stores, Inc. v. Crapo, et al*, Case No. 97-4728 (Fla. 8th Judicial Cir. June 3, 1999) (appeal pending in First District Court of Appeal, Case No. 1D01-1203), and the Second District in *Wal-Mart Stores, Inc. v. Todora*, 791 So. 2d 29 (Fla. 2d DCA 2001) as support, along with various general appraisal treatises. This Court should reject those opinions and the statements in the general appraisal treatises because they are contrary to the provisions of Sections 193.011(1) and (8).

For example, the Second District cites a general appraisal treatise entitled "Property Assessment Valuation" published by the International Association of Assessing Officers for the proposition that "[a]cquisition costs, the starting point for assessments of property under a cost approach, are generally recognized to include freight, installation, taxes, and fees." *See Todora*, 791 So. 2d at 31. The court's reliance on the general appraisal treatise is misplaced. The appraisal treatise makes no mention of Florida law and includes no discussion of the interplay between general appraisal theory and the specific statutory requirements of Sections 193.011(1) and (8). Property appraisers in Florida are bound by Sections 193.011(1) and (8), which are undoubtedly more restrictive than an appraisal text produced by an association of property appraisers. It should come as no surprise that materials produced by an association of property appraisers would recommend

the inclusion of all elements possible to increase ad valorem assessments. That, however, is not the law in Florida.

In fact, a review of the treatise upon which the Second District relied reveals that it is contrary to established Florida law on the treatment of sales tax. The treatise specifically states that sales tax is to be included not only in assessments reached using the cost approach, but also ***in assessments based on comparable sales***. *See* International Association of Assessing Officers, *Property Assessment Valuation* 360-62 (2d ed. 1996) (A. 1) (emphasis added).[15] The Second District in *Tokai* and the DOR Manual, however, have recognized that sales tax must be excluded from assessments reached using the market approach to value. The treatise makes no distinction between the cost approach and the market approach,

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[15] For the Court's convenience, the treatise excerpts are included in an appendix to this brief and are cited as "(A. __)."

recommending the inclusion of sales tax in assessments reached under both methods. The court clearly overlooked the pertinent portions of the treatise which would have revealed the inconsistencies between the treatise and Florida law. Moreover, because it recommends the inclusion of sales tax under both methods, the treatise offers no support for the court's decision to exclude sales tax under the market approach but not the cost approach.

Similarly, the inconsistencies between Florida law and the Property Appraiser's general appraisal treatises is apparent in the quotation set forth on page 21 of the Property Appraiser's initial brief. The Property Appraiser quotes what it calls the "standard real estate appraisal text," entitled Property Appraisal and Assessment Administration, published by the International Association of Assessing Officers (1990), for the proposition that the cost components in a real

estate appraisal may include architectural and engineering fees, building permits, title and legal fees, insurance, interest and fees on constructions loans, taxes incurred during construction, advertising and sale expenses, and reasonable overhead and profit. Contrary to the appraisal treatise, however, this Court has held that legal fees, title insurance fees, survey costs, and appraisal fees, as well as documentary stamp taxes associated with real estate transactions are all excludable from assessments under Section 193.011. *See, e.g., Oyster Pointe*, 524 So. 2d at 418. Thus, the general appraisal treatises upon which the Property Appraiser relies are neither dispositive nor persuasive on the interpretation of the Florida statute. In fact, the appraisal treatises are for the most part inconsistent on the treatment of costs of sale and purchase.[16]

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[16] The Property Appraiser continues to compare its cost approach in this case to the cost approach used to value real property. The real property cost approach, however, is very different. The most important distinction is that the cost approach for real property is a summation approach which values the property as the sum of

The trial court in *Crapo* likewise acknowledges that the rationale for its decision rests on "authoritative appraisal texts." *Todora*, 791 So. 2d at 31(quoting *Wal-Mart Stores, Inc. v. Crapo*, Case No. 97-CA-4728 (Fla. 8th Cir. Ct. Feb. 26, 2001)). Again, there is no basis for the conclusion of the circuit court, or the Second District, that general appraisal texts not specific to any particular jurisdiction can trump the statutory language in Sections 193.011(1) and (8).[17]

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all of its component costs. *See* P. Ex. 6 at 2. The real estate cost approach does not start with the sales price of the property as the Property Appraiser's cost approach does here.

[17] In fact, Florida courts have not hesitated to reject other general appraisal propositions when they conflict with Florida law. For example, the *Property Appraiser Valuation* treatise cited by the Second District in *Todora* instructs property appraisers in the use of the discounted cash flow method under the income approach. *Property Assessment Valuation*, 278-283 (A. 2). Florida courts, however, have rejected use of the discounted cash flow method. *See, e.g.*, *Spanish River*, 497 So. 2d at 1303; *Muckenfuss v. Miller*, 421 So. 2d 170, 172-73 (Fla. 5th DCA 1982); *St. Joe Paper Co. v. Adkinson*, 400 So. 2d 983, 986-87 (Fla. 1st DCA 1981). Similarly, *The Appraisal of Real Estate* published by the Appraisal Institute instructs that appraisers' highest and best use recommendations may rely on probable zoning changes. Appraisal Institute, *The Appraisal of Real Estate* 227-28 (11th ed. 1996) (A. 3). In *Straughn*, however, this Court set aside an appraisal based on the speculative assumption that a zoning change would occur. *See Straughn*, 354 So. 2d at 371-72.

Moreover, the court's analysis in *Crapo* confirms that the court misunderstood the statutory requirements in Sections 193.011(1) and (8). The circuit court concluded that sales tax should be included in ad valorem assessments because a taxpayer's decision on how long to keep an item of property in use and when to replace that property will turn on a consideration of the total replacement cost of the item, including sales tax.[18] That rationale, however, can be applied equally to any sales cost, whether imposed on sales of real or tangible personal property, and without regard to whether the property is appraised under the market or cost approaches. For example, a taxpayer considering the purchase of a new home will no doubt consider the amount of documentary stamp tax and other fees which must be paid on the purchase. That consideration, however, in no way

[18] Amici Todora, Crapo, Smith, and Higgs repeat this argument in their brief.

changes this Court's conclusion that documentary stamp tax and other real estate transaction costs are external costs of sale which must be excluded from the ad valorem assessment of the property.

Similarly, a taxpayer considering the replacement of tangible personal property may examine comparable sales of similar property (the market approach) to determine its likely replacement cost. The taxpayer will clearly have to pay sales tax to replace the property, and thus, under the circuit court's analysis, sales tax should be included in assessments under the market approach as well as the cost approach. Both the Second District and the DOR Manual, however, have determined that sales tax should be excluded under the market approach. The circuit court's analysis in *Crapo* simply misses the point. The determinative factor is not whether the taxpayer would have to pay sales tax to replace the property, but

rather whether the sales tax is an external cost of sale or purchase. Because sales tax is an obvious example of an external transaction cost, it must be excluded from the assessment under Sections 193.011(1) and (8).

Finally, the Property Appraiser contends that DOR must have intended to include sales tax in tangible personal property assessments because the tax return form it designed instructs taxpayers to include the sales tax paid as part of the original reported cost of the property. According to the Property Appraiser, this Court should accord deference to that construction by DOR. As the Fifth District noted, there is nothing about DOR's instructions on the return form that indicates its intent to include sales tax in tangible personal property assessments. For example, the same tax return form is used without regard to whether the Property Appraiser elects to apply a market approach or a cost approach in assessing the

reported property. DOR's Manual, however, requires the exclusion of sales tax from assessments reached using a market approach. Taken to its logical conclusion, the Property Appraiser's argument puts the DOR's return form at odds with its own Manual. The Property Appraiser's argument cannot be correct.

This Court should also affirm the Fifth District's decision because the inclusion of sales tax in the assessed value of the property results in improper taxation of intangible property. Sales tax charged on the purchase price of an item of tangible personal property is an excise on the right to sell at retail in the state. *See* § 212.05, Fla. Stat. (1999); *see also Gaulden v. Kirk*, 47 So. 2d 567, 572 (Fla. 1950). More specifically, sales tax is akin to a debt owed by the consumer to the state. *See* § 212.07(8), Fla. Stat. (1999); *Zero Food Storage Division of American Consumer Industries, Inc. v. Department of Revenue*, 330 So. 2d 765, 767-68 (Fla. 1st DCA

1976). The nature of sales tax as a debt renders it intangible personal property as a matter of law. *See* § 192.001(11)(b), Fla. Stat. (1999). It is unlawful to include the value of intangible property in an ad valorem assessment of tangible personal property. *See Scripps,* 665 So. 2d at 1074-76 (assessment which included value of cable company franchise, defined statutorily as intangible property, was unlawful). Thus, the Property Appraiser erred in including sales tax in the assessments of Wal-Mart's property.

II. The Fifth District Did Not Err By Requiring Property Appraisers to Describe Their Consideration of the Statutory Factors.

The Property Appraiser also contends that by requiring property appraisers to describe their consideration of the statutory factors, the Fifth District has improperly infringed on the discretion afforded property appraisers and shifted the burden of proof on the validity of assessments from taxpayers to property appraisers. The Property Appraiser's argument misses the point. The Fifth District's decision does nothing to change prior Florida law. As the Property Appraiser concedes, it has long been the law of Florida that property appraisers are required to give meaningful consideration to each of the statutory factors. All the

Fifth District has done is ask property appraisers to describe that process. If, in fact, the Property Appraiser has properly considered each of the factors, it is little enough to ask him to explain what he did. Nothing about the Fifth District's decision infringes upon the discretion afforded property appraisers to reject inappropriate factors or to weight factors as the property appraisers deem appropriate. In fact, the Fifth District again recognized the discretion afforded property appraisers to weight or completely reject any of the statutory factors -- so long as a property appraiser first properly considers each of the factors. The court, however, noted that consideration of a factor really means a proper and meaningful consideration. Mere awareness of data is not sufficient consideration, nor is the incorrect application of a factor proper consideration. Nothing in the Fifth District's decision represents any departure from prior Florida law. The Fifth District simply stated the common sense conclusion that if a property appraiser has considered the statutory factors he or she should be able to describe that process.

The angst demonstrated by the Property Appraiser and various amici over the Fifth District's decision is particularly telling. The Property Appraiser and the amici recognize that the Fifth District's decision is carefully designed to prevent property appraisers from doing exactly what the Property Appraiser did in this case. Here, the Property Appraiser performed his computer generated desktop appraisal of Wal-Mart's property giving no consideration to market data as required by the statutory factors. In fact, the Property Appraiser admitted as much. And yet, when pressed, the Property Appraiser attempted to insulate his assessment by repeating the oft-cited mantra of property appraisers, "I considered every factor." The Fifth District no doubt recognized that a property appraiser's glib recitation

that it has considered every factor, without any ability to describe to the court or affected taxpayers exactly what that consideration encompassed, renders the statute meaningless. As a result, the Fifth District stated only that if a property appraiser considers and rejects a factor, the property appraiser should be able to explain to a court just what he or she did. That decision by the Fifth District is reasonable and recognizes that, without the ability to test the consideration employed by property appraisers, taxpayers will be stymied in every case by the conclusory and unsubstantiated testimony of property appraisers that they considered every factor.

III. The Property Appraiser Admitted He Considered No Market Data.

The Fifth District did not err in concluding that the Property Appraiser failed to consider market data. He admitted as much.

Property appraisers typically value property using one of three well-recognized methods: the market approach, the cost approach, or the income approach. *See Havill*, 742 So. 2d at 212. The market approach relies on recent comparable sales of similar property to arrive at the current market value. If there are no available comparable sales, an appraiser may employ the cost or income approach. *See id.* at 212-13. The cost approach arrives at the current value of property by considering its original, replacement, or reproduction cost, less depreciation. *See id*. at 213. The income approach values property as a function of future expected income streams generated from the use of the property. The cost approach and income approach are substitute methods in which the actions of the market are artificially re-created by the appraiser in an attempt to estimate market value. In contrast, market data inherently reflects the actions of the marketplace.

See Bystrom v. Valencia Center, Inc., 432 So. 2d 108 (Fla. 3d DCA 1983) (market approach necessarily considers all factors affecting value), *rev. denied*, 444 So. 2d 418 (Fla. 1984). For this reason, the market approach is regarded as "the best method of valuation" for personal property. *See Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County* , 219 So. 2d 101, 104-05 (Fla. 3d DCA 1969). A cost approach "cannot prevail over a true market place assessment." *Ozier v. Seminole County Property Appraiser*, 585 So. 2d 357, 359 n. 2 (Fla. 5th DCA 1991).

Reflecting this preference for market data, the DOR Manual states that the "comparable sales approach is generally considered the most reliable method of evaluation." (R. P. Ex. 6 at 2). Despite the fact that "market data relating to personal property may be difficult to obtain …, ***the appraiser must search for this information*** and when successful in finding valid market data values, he ***must use them in his appraisal***." *Id*. at 5 (emphasis added).

Despite this directive, deputy tax assessor Mike King admitted at trial that the Property Appraiser in this case ***never investigated the possible existence of a market*** for any of Wal-Mart's tangible personal property. (T. 913-14, 925-26, 928, 864). King admitted at trial that he relied solely on the mass appraisal cost approach in assessing Wal-Mart's property without making any effort to identify or consider market information. The Property Appraiser's computer program contains the DOR's Present Worth Table, the DOR's recommended lives for various types of property, and a trending table designed to estimate a taxpayer's original cost as of 1997. King assessed the tangible personal property in the county by inputting into the computer the items of personal property reported by the taxpayer, their original

cost (including sales tax), and the date of their purchase. King assigned each category of property an identifying code. This code, in turn, corresponds to the DOR's recommended economic life for that type of property. As the property was input into the computer, the computer automatically calculated its value.

King admitted that no further study, investigation, or effort was undertaken to secure any actual market data. King made no attempt to determine the availability of any comparable sales data for any item of property reported by Wal-Mart. He did not attempt to secure any information from any dealers of similar new or used property, and he made no adjustments for any additional depreciation. In fact, he made no effort whatsoever to even consider the information necessary for a market data approach. In *McArthur Jersey Farm Dairy, Inc. v. Dade County*, 240 So. 2d 844, 846-47 (Fla. 3d DCA 1970), the Third District Court of Appeals affirmed a trial court judgment setting aside portions of a tangible personal property tax assessment because the tax appraiser had assessed the property based solely on a cost approach, despite uncontradicted testimony by expert witnesses that the dairy equipment and machinery at issue were commonly bought and sold in an established marketplace.

Wal-Mart was ambushed late in the trial by surprise testimony from King during the Property Appraiser's case. King testified for the first time that he performed a previously undisclosed market calibration to validate the assessments based on the Present Worth Table.[19] King explained that he compared the tangible

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[19] King no doubt changed his position as a result of the court's opinion in *Wal-Mart Stores, Inc. v. Turner*, Case No. 98-2679 (Fla. 13th Judicial Cir. July 13, 1999). In a virtually identical case, the court there held that a mass appraisal cost approach, like the one employed by the Property Appraiser in this case, is lawful

personal property assessments of unidentified taxpayers with the subsequent returns of other taxpayers reporting the portion of the purchase prices of entire businesses attributable to tangible personal property. According to King, the fact that previous years' tangible personal property assessments for unidentified taxpayers tracked closely the amounts other taxpayers later paid for tangible personal property bought as part of entire businesses indicated to him that the Present Worth Table resulted in assessments of tangible personal property at fair market value. The Fifth District recognized that King's testimony did not establish that he considered market data as required by Sections 193.011(1) and (8). In fact, the Property Appraiser now appears to concede that point. *See* Initial Brief at 16.

Instead, the Property Appraiser now contends that Mr. King adequately considered market data by virtue of the body of data available to him and his accumulated knowledge and experience as a property appraiser. At the same time, the Property Appraiser appears to contend that he was never actually required to consider market data at all. The Property Appraiser's contention conflicts with the DOR Manual which specifically instructs Property Appraisers to search for a market data and, if it is available, utilize that data in reaching its assessments.

This Court need go no further than the Property Appraiser's own admission that he failed to seek out or consider any market data to affirm the Fifth District's decision. The Court need not address most of the Property Appraiser's arguments on the market data issue. The Property Appraiser spends a great deal of time

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only if calibrated to "reflect real life market values." Opinion at 8. The decision in *Turner* was released on July 13, 1999, less than a month before trial in this case.

attacking the market data offered by Wal-Mart.[20] The Fifth District never even considered the propriety of Wal-Mart's market data. It did not need to. The Property Appraiser and amici also use the market data section as a platform from which to air a number of issues currently of particular interest to property appraisers, but beyond the scope of this appeal. For example, in arguing that no market data exists in this case, the Property Appraiser contends that property must be valued "in use." Thus, according to the Property Appraiser market data gleaned from inventory offered for sale by dealers or classified advertisements is not adequate evidence of the value in use. Instead, the Property Appraiser contends that the only relevant market data is current sales of similarly situated property being put to the same use by the same type of taxpayer. Of course, contrary to its own assertion, nothing about the Property Appraiser's cost approach in this case determines value in use. The Property Appraiser has no idea whether the store fixtures reported by Wal-Mart are currently in use on the retail floor or abandoned in a storage room. Wandering even farther afield, amicus Mike Wells contends that the market approach is inappropriate for the assessment of tangible personal property because the property must be valued as an assemblage at its highest and best use. Thus, according to Wells, the only valid market data is comparable sales of an assembled pool of identical property at its highest and best use. Because it is impossible to ever discover a comparable sale under this standard, Wells argues the cost approach should always be used to value tangible personal property.

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[20] It is interesting to note that the type of market data so criticized by the Property Appraiser is the very data recommended for consideration in the *revised* DOR guidelines upon which the Property Appraiser relies so heavily. *See* R. P. Ex. 17 at 40.

The attempts by the Property Appraiser and Wells to use this case to craft advantageous changes in the law governing market data are misplaced. There is no support in the Florida law for their contention that market data must measure the property's value in use. *See Bystrom*, 432 So. 2d at 108 (shopping center must be valued on the basis of market value as established through comparable sales and not on "use" value dictated by lease on property); *Gulf Coast Recycling, Inc. v. Turner*, 753 So. 2d 712 (Fla. 2d DCA 2000) ("use" value of apartment complex could not prevail over market valuation which considered contaminated condition of property). Most important, however, their arguments are completely beyond the issues before this Court. The only point decided by the Fifth District in this case is that the Property Appraiser admitted that he never even attempted to seek out or investigate the existence of any market data. It is elementary that unless the Property Appraiser attempts to determine the existence of market data he cannot consider market data in compliance with Sections 193.011(1) and (8). Any decisions about the existence or comparability of any market data that may or may not exist are inappropriate for this appeal. The Fifth District never reached those issues and this Court should decline to decide them as well. *See Provident Management Corp. v. City of Treasure Island*, 718 So. 2d 738, 740 (Fla. 1998) (declining to address issues not reached by district court, explaining "we eschew those claims not first subjected to the crucible of the appellate process"). The Property Appraiser's and amici's attempt to secure an advantageous change in the law governing market data must wait for another day and another case.

IV. Standard of Review

The issues in this appeal present questions of law and are therefore subject to *de novo* review. *See, e.g., Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for respondent, Wal-Mart Stores, Inc., certifies that this Answer Brief is typed in 14 point (proportionately spaced) Times New Roman.

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Attorney

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