IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-663

On Review from the District Court for the Fifth District of Florida,

Case Nos. 5D99-3165 and Case No. 5D99-3168

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

-vs-

WAL-MART STORES, INC.
Respondents.

INITIAL BRIEF OF PETITIONERS

ALVIN MAZOUREK
as Hernando County Property Appraiser,
and
STATE OF FLORIDA, DEPARTMENT OF REVENUE

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STATEMENT OF THE CASE

Plaintiff in the trial Court in Case No. 97-3121-CA was Wal-Mart Stores, Inc. Defendants were Alvin Mazourek, as Hernando County Property Appraiser, Leona Bechtelheimer, as Tax Collector and Larry Fuchs, as Executive Director of the State of Florida, Department of Revenue ("DOR" herein). The Complaint challenged the assessments of Wal-Mart's tangible personal property in its two retail stores as of January 1, 1997. It alleged that Mr. Mazourek failed to consider properly the criteria in §193.011, F.S., that the appraisal was arbitrarily based on appraisal practices which are different from those which Mr. Mazourek generally applied to comparable property within the same class as Wal-Mart's property, and that the Property Appraiser arbitrarily and discriminatorily assessed Wal-Mart's property at a higher relative and comparable value than all or substantially all other property in Hernando County.

The Complaint in Case No. 97-2994-CA was in four counts. Two of the counts related to Wal-Mart's real property used as its regional distribution center, located at 5100 Kettering Road near I-75. Count III alleged that in assessing the tangible personal property within the distribution center, Mr. Mazourek failed to consider every one of the factors contained in §§193.001 [sic] and

193.073, [sic] F.S. and the Rules and Regulations of the DOR.[1] Count IV alleged that the assessment of the tangible personal property in the distribution center was excessive when compared with the assessment of other similar tangible personal property in Hernando County, depriving Wal-Mart of equal protection under the law. Wal-Mart dismissed the real estate counts and the two cases were consolidated for trial.

The final hearing was held before the Hon. Jack Springstead, Circuit Judge, sitting as the trier of fact, from August 9, 1999 through August 18, 1999. The Transcript consists of 14 volumes with 2,460 pages of testimony and each side presented numerous exhibits. Judge Springstead personally viewed the Distribution Center, but no transcript exists to document his visit.

Wal-Mart presented no evidence in support of its claims that Mr. Mazourek arbitrarily applied different appraisal practices to Wal-Mart's property than any other tangible personal property in Hernando County, or that it was deprived of equal protection.

Judge Springstead entered a detailed Final Judgment on October 15, 1999 upholding the assessments. (A-12-20) Wal-Mart appealed the Final Judgment to the District Court of Appeal, Fifth District, which reversed. *Wal-Mart Stores, Inc. v. Mazourek*, 778 So.2d 346

[1]There is no §193.001, F.S. and §193.073, F.S., provides for how the Property Appraiser should proceed if a taxpayer files an erroneous or incomplete statement of personal property or that all the property of a taxpayer has not been returned for taxation.

(Fla. 5th DCA 2000) (A-1-11).

References in this Brief will be R-(page number) for the Record on Appeal; Tr.-(page number) to the Transcript of Testimony; PE-(exhibit number) for Wal-Mart's exhibits and DE-(exhibit number) for Defendants' exhibits, and to the Appendix to this Brief, A-(page number).

STATEMENT OF THE FACTS

Wal-Mart owns 2,056 stores in all 50 states. (Tr.-1092) Forty of those states assess tangible personal property. Wal-Mart returns its property for taxation in each jurisdiction in those states by an attachment to its Return with the same general information. (Tr.-1087) All 40 states and every Florida Property Appraiser values Wal-Mart's personal property by applying factors from a present worth table to Wal-Mart's reported costs. (Tr.-1081, 1088, but see Tr.-1091)

This case differs from *Wal-Mart Stores, Inc. v. Todora*, ___ So.2d ____, 26 F.L.W. D1035 (Fla.2nd DCA 2001)(A-33), also on review before this Court, in that in addition to its assessments of fixtures in two stores, Wal-Mart also challenged the assessment of the tangible personal property within its 1,000,000+ square foot regional distribution center. (DE-21) The major feature within this building is an immense, sophisticated computer-controlled conveyor system called a Rapistan which scans and moves merchandise

from pallets in racks to the loading area where it is loaded onto trailers to be transported to retail stores. The Rapistan is elevated in some parts of the building by a mezzanine to allow fork lifts to pass beneath the conveyors.

Store #1213 is a "Superstore" located at 13186 Cortez Boulevard in Brooksville. The store opened with all brand new fixtures and equipment in September, 1996, ninety days before the January 1, 1997 valuation date. Willa Lovett filed Wal-Mart's 1997 tangible personal property tax return with Mr. Mazourek's office stating that it purchased the tangible personal property located in that store for a total of $2,626,309, including sales tax, transportation, handling and installation charges as required by the DOR's instructions. (DE-3, Tr.-1067-8, 1098)

She filed the returns "in bulk" by category of asset; no cost was stated for any particular asset or for any component of cost such as sales tax paid. Ms Lovett did not have a fixed asset listing of any of Wal-Mart's tangible personal property, so she was unable to supply such a list to Mr. Mazourek's office even though it was requested. (Tr.-1058) Wal-Mart's return for the Superstore contained a column entitled "Depreciated Amount" with Wal-Mart's estimate of its depreciated value, $2,399,911. (Tr.-1070) In other Florida counties, Wal-Mart placed the "Depreciated Amount" column on the front of the return in the column marked "Taxpayer's estimate of fair market value". (Tr.-1141) Thus, the difference

between Wal-Mart's estimate of market value on its return and Mr. Mazourek's assessment was only $99,198.[2]

The instructions with the return require the taxpayer to report expensed tangible personal property, i.e., property the cost of which is below the $200 amount which Wal-Mart's accounting policies require to be capitalized and depreciated. (Tr.-1100) Even though Ms Lovett acknowledged familiarity with those instructions, her returns included only 1/52nd of the expensed property.(Tr.-1101) Section 195.027(4)(a), Florida Statutes, provides that the tangible personal property return form must include six categories, none of which relate to sales tax. There is no provision for reporting "usual fees and costs of sale" as in the case of the Form DR-219 which is presented for recording with deeds of real estate as required by Section 201.022, Florida Statutes.

Wal-Mart's returned costs for each category of equipment and Mr. Mazourek's assessments of that property in the Superstore are as follows:

Item	Cost	% good	Assessed Value
Store Fixtures . . .	1,629,598	94	1,531,822
Store Fixtures/Other .	305,893	94	287,539
Computer Equipment . .	$109,349	83	90,760
Telephone System . .	37,296	87	32,448
Personal Computers (1995)	3,606	67	2,416

[2]At a millage rate of 25 dollars of tax per $1,000 of assessed value, this would indicate a tax difference between Wal-Mart's return and Mr. Mazourek's assessment of about $2,500.

Personal Computers (1996)	39,177	83	32,517
Refrigeration Equipment .	496,390	94	466,607
Supplies	5,000	100	5,000
	$2,626,309		$2,449,109

Store #967 is a conventional Wal-Mart located in Spring Hill. Wal-Mart returned $1,661,889 as its cost for the equipment in the store as having been purchased between 1993 and 1995. The return for this store contained its own depreciation estimates ranging from 70% for fixtures purchased in 1989 to 8% for fixtures purchased in 1996. The attachment to the return contained Wal-Mart's "Depreciated Amount" of $1,005,736.66. The Property Appraiser corrected the errors in Wal-Mart's return to a cost of $1,662,491, and applied various amounts of depreciation depending on the age of the equipment according to the DOR's Present Worth Table as in the case of the Superstore. The maximum depreciation of 80% was applied to Wal-Mart's computer equipment purchased in 1992 and earlier. Mr. Mazourek's Director of Tangible Personal Property, Myron "Mike" King, thus established Mr. Mazourek's assessment at $1,141,561. The difference between Wal-Mart's claimed value and Mr. Mazourek's assessment for this store was only $135,824.

Wal-Mart's returns for the Distribution Center indicated costs of $28,402,144 for its equipment plus an additional $91,146 for the equipment in the trucking facility. Ms Lovett did not return its unlicensed tractors ("Yard Dogs") used to move trailers around the

Distribution Center which had a book cost of $244,416.85. (Tr.-1109-10) There are at least 85,000 positions for pallets in Wal-Mart's pallet racks. Wal-Mart returned only $24,000 for all of is supplies in the distribution center, including pallets. At even $10 a pallet, the pallets should have been returned at a minimum of $850,000. (Tr.-1116) Wal-Mart's appraiser, Les Miles, failed to value the pallets in his appraisal of the distribution center property. (Tr.-204, PE-1)

Ms Lovett could not explain how she arrived at a figure of $24,753 for supplies. Mr. King stated that a rule of thumb is that supplies for a business should approximate 1% of the cost of the remaining tangible personal property, which means that Wal-Mart should have reported supplies for the distribution center of $390,000, Store 1213, $26,263, and store 967, $16,618. (Tr.- 2082-3)

Ms Lovett also did not return as tangible personal property, the raised floor in the computer room, the expensed property not contained in Wal-Mart's capital accounts, the conveyor walkway system, tiered sprinklers in the aerosol room, cabling throughout the building, and the backup pumps and generators for the sprinkler system, so they escaped taxation for the year 1997. (Tr.-1148, 1152, 1115, 2043-53, 2056-78)

Mr King valued the tangible personal property at the distribution center for $18,609,917 as of January 1, 1997, applying

the DOR's useful lives and Present Worth Tables to Wal-Mart's reported costs. Wal-Mart has contended that the assessments were actually made by the data-entry clerks who took the numbers from Wal-Mart's returns and entered those numbers into the computer. This is incorrect; the assessments were made by Mr. King through his design of the appraisal system, his direction that his staff use the useful lives and present worth factors provided by the DOR, and his supervision of the valuation process.

Wal-Mart's primary valuation witness was Les Miles, an appraiser from Dallas. Although the valuation date was January 1, 1997, he began his assignment in November of 1998. (Tr.-319) Thus, he had no personal knowledge whatsoever as to the quantity, size or condition of Wal-Mart's property[3] as of the valuation date almost two years earlier. He could not answer the question as to whether there was a sufficient supply of used equipment available on the salvage market to supply the Wal-Marts he appraised. (Tr.-321-2) Mr. Miles' associate, Neil Smith, actually inspected the stores and Mr. Miles claimed that Smith determined the quantity or size of the property. Smith did not testify, and Mr. Miles did not personally verify the quantity or size or condition of the property as of January 1, 1997.

Mr. Miles used the cost approach to value the tangible personal property in the distribution center, but was absolutely

[3] Two of the criteria in Section 193.011, F.S.

unable to articulate the basis for his estimate of physical and functional depreciation and economic obsolescence. (Tr. 248, 281) He listed some equipment as a "lot" but could not tell the Court either what was in it or how it was appraised. (Tr.-285) Mr. Miles could not tell the Court the basis of his values for any other equipment. (See, e.g., Tr.-287, 313, 316) Other people who Mr. Miles could not identify actually made the value conclusions for the property in the distribution center. (Tr.-244, 250)

The dealers to whom he spoke had no information on sale prices of three month old store fixtures. (Tr.-314) Wal-Mart will be absolutely unable to point to evidence in our Record to demonstrate either that there was a viable market in Hernando County for store fixtures or distribution center equipment. Neither can it show that there is no substantial, competent evidence to support the Trial Court's finding on page 7 that the Property Appraiser more than adequately considered the market in performing his cost approach.

THE D.O.R.'S PRESENT WORTH TABLES

Wal-Mart's case was a frontal assault on the present worth tables prescribed by the DOR for use by all property appraisers throughout the State. Its primary goal was a judicial ruling invalidating use of the tables. Although Wal-Mart called witnesses from as far away as California to testify concerning the development and validity of the tables, it came up short in that endeavor. Mr. Mazourek presented substantial expert testimony as

to their validity, and Wal-Mart apparently now concedes that their use represents an appropriate measure of market value through the replacement cost approach to value.

The appraiser first applies a trending table to the reported cost of assets by year of acquisition to adjust that cost to present reproduction cost to take inflation into account. The DOR then prescribes a useful life for various categories of assets — shorter in the case of assets such as computers, and longer in the case of assets such as store fixtures. The tables then prescribe depreciation related to those lives.

James Pence, a member of the American Society of Appraisers as is Mr. Miles, testified as an expert for the Defendants. (Tr. - 418, 439) Mr. Pence noted that from Wal-Mart's tangible personal property returns, an appraiser could not determine the nature of the property being returned. (Tr. - 447) He testified that use of the Department's present worth tables fully account for all forms of depreciation — physical, functional and economic or external. He stated that Property Appraisers allow for all forms of depreciation by adjusting the useful lives of the various types of property. (Tr. - 477, 484) He testified that most of the county Property Appraisers in Florida use the present worth tables supplied by the DOR. (Tr. - 479)

The Court accepted Stephen Barreca as an expert in the cost approach, depreciation, present worth tables, economic lives, and

review of appraisals. (Tr.-1595) He testified extensively supporting the DOR's present worth and useful life tables and addressed Mr. Miles' opinions of value. (Tr.-1565) Mr. Barreca could not determine a logical progression in Mr. Miles' opinions from data to calculations to conclusion; there were a bunch of price figures but they were not used at all. (Tr.-1757-8) The District Court made no note of Mr. Barreca's testimony in its reversal of the Trial Court.

ALLEGED FAILURE TO CONSIDER THE STATUTORY CRITERIA

The Trial Court's Final Judgment describes in detail the Property Appraiser's consideration of the eight criteria in Section 193.011, F.S. Mike King is a professional appraiser with extensive qualifications and was so qualified by the Trial Court. (Tr.-1992) Mr. King discussed at length how he considered each of the criteria in §193.011, Florida Statutes in assessing tangible personal property. (Tr. - 1993-2025) The Fifth District Court of Appeal overlooked this testimony when it found (A-7-9) that he did not in fact consider those statutory criteria. Mr. Pence also reviewed the eight criteria in §193.011, Florida Statutes, and discussed how use of the DOR-prescribed tables complies with each of the eight criteria. The Fifth District Court likewise did not mention Mr. Pence's testimony.

The District Court held at that "mere awareness of data does not rise to the level of required consideration." (A-5) Les Miles'

sole consideration of the seventh criterion in §193.011(7), F.S., "the income from said property", was to think about using it, then reject it. (Tr.-112) The Record lacks any testimony or evidence that sound appraisal practice requires an appraiser to actually go through the calculations of an approach to value in order to have a basis to reject that approach.

SELECTION OF THE COST APPROACH

There are three traditional approaches to value; the "cost approach", the "market" or "direct sales comparison" approach, and the "income approach" to value.[4]

No substantial, competent evidence in the record demonstrates that there was a viable market in Hernando County in either three month old store fixtures, as in the Superstore), in specialized distribution equipment such as the Rapistan in the distribution center, or four year old equipment such as in the conventional Wal-Mart.

After the 1997 appraisals were made, but before the Value Adjustment Board hearings, Mr. King asked Wal-Mart's tax agent, Jack West, for a list of its tangible personal property, but no such list was ever furnished. (Tr. - 2027)

Mr. King stated that in his opinion, an assessment is not

[4] This Court has specifically disapproved of use of the income and market approaches to assess the tangible personal property of a cable television company, *Havill v. Scripps Howard Cable Company*, 742 So.2d 210 (Fla. 1999)

completed until after the tax roll is certified. Contrary to the District Court's finding that Mr. King neither sought out nor considered market data in used equipment (A-8), he testified that he in fact contacted the market sources used by Wal-Mart's appraiser, Les Miles. (Tr. - 2030-34) All of the sources said that they had bought equipment from Wal-Mart at one time or another, but none had ever sold to Wal-Mart except one company who sold them a forklift. (Tr. - 2035) Mr. King said that these persons reported to him that it would be cost-prohibitive to expend the time to locate sufficient used equipment to outfit a new Wal-Mart store: "It would be more efficient and less expensive to buy new equipment than to utilize used equipment that had no manufacturer's warranty and was mismatched." (Tr. - 2036)

Although repeatedly pressed to identify actual market transactions from a willing seller to a willing buyer which were supposedly the basis of his opinions of market value, Les Miles was utterly unable to do so. (Tr.-238, 253, 342) He could not identify particular market transactions which were supposedly the basis for values of heavy equipment or of computer equipment.(Tr.-237, 242, 384)

The Fifth District overlooked Mike King's testimony when it found that the Property Appraiser failed to consider the market data approach. Mr. King testified:

> Q: Well, you've never done a market approach in any way, shape or form before, have you?

A: A market approach?

Q: Yes, as you've described it this afternoon.

A: It's my opinion that every time I look at these returns and I see a sale that, yes, I am doing a market survey. (Tr.-2112)

What personal property appraisers call the "market approach" results in an estimate of the market value of an item of tangible personal property sitting on a dealer's shelf. The term, "market value in continued use" which the American Society of Appraisers uses refers to the appraisal of equipment in use and in place, rather than in a dealer's warehouse, and describes it as follows:

> To use the market approach to appraise machinery and equipment under the premise of continued use, those elements which add value-in-use must be identified and included in the appraisal. In effect, the appraiser converts the market price of the base unit to fair market value-in place. For machinery and equipment, these elements include such things as freight, installation, connections, foundations, rebuilding costs, and any indirect costs such as engineering or design fees required to place an asset in service (the same costs considered in the cost approach.)[5]

Mr. Barreca testified that the concept of highest and best use necessarily involves valuing the property where it is located, rather than in some dealer's inventory as Mr. Miles did. (Tr.-1765-7) He stated that one could get an extremely distorted opinion of value by trying to value a large, complex piece of machinery such as the Rapistan by looking at sales of small pieces

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[5] *Appraising Machinery and Equipment*, P. 114. American Society of Appraisers, ISBN 0-07-001475-1 (New York, 1989)

of equipment which are in turn assembled into the larger machine. (Tr.-1766)

Mr. Pence disagreed with Wal-Mart that the only way to determine the value of tangible personal property is to talk with dealers. He stated that only qualified sales transactions can form market evidence. As he put it:

> "When you're talking about the comparable sales approach, you're talking about the approach that utilizes sales, and it doesn't utilize what someone wants to sell something for, even if they are experts and want to sell something for... the true market is when the sale occurs." (Tr.-468)

Mr. Barreca testified that Mr. Miles' so-called market information was from the wrong market — the salvage market from dealers in used equipment, because those sales are marked up salvage value, not market value. (Tr.-1767) Mr. Barreca testified that there are three markets for equipment: the new market, the salvage market where discarded equipment is bought and sold, and the junk or scrap market where store equipment would be sold for its metal content. (Tr.-1611) He stated that in the new market (where Wal-Mart buys its equipment) there would not be many significant adjustments between selling price and just value. However, in the salvage market, that approved by Mr. Miles, the volume of adjustments for design costs, installation, conformity and acquisition would have to be made to the extent that it would no longer be a comparable sales market. (Tr.-1611-12) The junk or scrap market is even less comparable and one would have to make

even more subjective adjustments. (Tr.-1614) Mr. Barreca gave the example of someone who might spread all of the components of a house on the ground and sell them to a used window or stove dealer; the sum of those values would not be representative of the value of the assembled house. (Tr.-1769) The reason is that the comparable sales market for houses is different from the used building materials market. (Tr.-1770-1)

Les Miles, Wal-Mart's expert, admitted that it was not improper to value the subject property by the cost approach:

> Q. Do you agree that a properly performed cost approach is an acceptable way to determine the market value of tangible personal property?
>
> A. Yes. (Tr.-2419)

Mr. King testified that one of the things he does to verify the validity of his department's assessments is that when a business changes ownership, he compares the seller's last assessment with the purchaser's first return where the purchaser states the cost of the property purchased. He testified that there is a good correlation between these two numbers, indicating that the DOR's present worth tables are valid. (Tr. - 2009-2012) The District Court of Appeal erroneously thought that Mr. King's review of other taxpayers' returns was to consider market data (A-8); that was not the reason for the process at all. Instead, it was used to validate the present worth tables prescribed by the DOR.

THE SALES TAX ISSUE

Wal-Mart will be unable to point to either evidence or testimony from the Record in our case to support its claim that sales and use taxes are not proper, indeed essential, components of the *cost* approach to value. Wal-Mart's contention is thus completely abstract.

Wal-Mart will doubtless argue that the DOR's outdated 1976 Manual of Instructions states, "Sales tax is not to be included in the market data approach." The 1997 Manual contains no such language, even in the section on the market approach. The *Guidelines* which became effective December 31, 1997, state in the section discussing the Cost Approach:

> A determination of costs must be made after review of the accounting records. This cost basis should reflect the total cash outlay necessary for the acquisition of the property, including the invoice cost, freight and installation cost, *sales and/or use tax*, extra foundations necessary to support the equipment, and any other costs incurred for the use of the property. (Tr-2140), Plaintiff's Exhibit 17 @ p. 38; (e.s.), Rule 12D-51.002, Florida Administrative Code.

The cost approach section of the new *Guidelines* is totally consistent with the previous Manual of Instructions. The new *Guidelines* eliminated the statement from the section on the market data approach in the 1976 Manual about not including sales taxes in that approach to value. (See PE-17, pp. 39-40) That statement is flawed and out-dated, and was been corrected in the new *Guidelines*. Regardless, the language in the old Manual is inapplicable to Mr.

Mazourek's appraisal because he did not perform a the market approach to value.

Mr. King testified that there were things about the DOR's 1976 guidelines which were just plain wrong, which is why they were replaced in December of 1997. (Tr. - 2084) One particularly incorrect statement was the statement about not including sales tax in the market data approach. (Tr. - 2085) This evidence supports the Property Appraiser's contention that the previous manual was "flawed" and "out-dated"; the Fifth District's contrary finding (A-6)totally lacks Record support.

The Record contains very little evidence concerning the sales tax issue; every witness — even Wal-Mart's appraisal expert Mr. Miles (Tr.-363-364) — conceded that sales tax is an essential element of the costs which must be included in a properly conducted cost approach to value, which is the approach recommended by the DOR and by this Court in the assessment of tangible personal property.

Ms Lovett's records indicated that Wal-Mart was paying sales tax on some of its purchases at a rate of 1.5%, not the 6% claimed by Wal-Mart. (Tr.-1126)

Mr. King testified concerning the sales tax issue that whenever a buyer goes to purchase an item of personal property, he is conscious of the bottom line, including sales tax. He described the process of buying a car and negotiating with the dealer the

bottom line that he would be willing to pay, including sales tax. (Tr.- 2023-2024) He noted that the Beall's Outlet store was packed with customers when the State had a sales-tax free weekend for school clothes. (Tr. - 2024)

Les Miles testified on direct examination:

> Q. And in your cost approach, did you have sales tax in your cost approach? Did you add that to the prices quoted by Rapistan, for example, and so forth?
>
> A. No. The invoices and everything that we have that we used - I'll have to go to this. It does not indicate — it says, "Taxes estimated, no estimate made, tax structure unknown at this time." (Tr.-220)

Mr. Miles explained on cross-examination that his "market value installed" included all costs incurred in bringing the property to its location, such as transportation, and engineering expense, crating, handling, installation, wiring and piping, modification, millwrights, sales commissions, fees licenses and permits and debugging. (Tr.-310-311) When asked whether his number included sales and use taxes, his response was, "In their 275[6] *could have been* state sales and use tax, but I don't believe that when we got that quote that they were considering what the tax might be." (Tr.-311)

Mr. Miles' own writings in a respected appraisal journal confirm that to value installed personal property, sales tax must be included as part of the original cost. (See *Valuation*, Vol. 40,

[6] $275 per lineal foot of Rapistan conveyor, see Tr.-385

No. 1, June 1996, pp. 59, 62: Leslie Miles, "Fair Market Values and the Cost Approach".)

Mr. Miles contributed two chapters to textbook prepared by the American Society of Appraisers, *Appraising Machinery and Equipment,* referred to as the "Black Book." At Tr-364, Mr. Miles agreed with the statement in that text by Merritt Agabian[7] that in a cost approach, the appraiser should include "indirect costs and fees for machine evaluation for purchase, selection plant layout, necessary licensing fees *and taxes*", and that the "taxes" to which Mr. Agabian referred are state sales taxes. *Mr. Miles agreed that all of costs -- including sales tax -- were proper components in the cost approach.* (Tr.363-364)

The other three textual authorities referred to throughout the Final Hearing -- the "Red Book" and the "Green Book" published by the International Association of Assessing Officers and the standard text, *The Appraisal of Real Estate*, Eleventh Edition, make it abundantly clear that taxes are an indispensable element of the cost approach to value for both real and tangible personal property.

The "Green Book" is *Property Assessment Valuation*, Second Edition, published by the International Association of Assessing Officers. Wal-Mart closely cross-examined Mike King concerning

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[7] Mr. Agabian testified for Wal-Mart in the trial Court in this case.

statements in both the "Green" and the "Red" books. The "Green Book" states at page 360:

> The cost approach can be applied to almost all types of personal property. Its application is especially well suited to the valuation of machinery and equipment, for which it is possible to identify make and model (model number) of the item, year acquired, and total acquisition costs including freight, installation, *taxes* and fees. (e.s.)

The Appraisal of Real Estate, Eleventh Edition, published by The Appraisal Institute, has been found to be authoritative in property tax cases.[8] At pages 346 and 347, that text describes the components of a properly conducted cost approach of real estate. These components necessarily include any tax paid on the items comprising the costs, including sales taxes.

The standard real estate appraisal text, *Property Appraisal and Assessment Administration*, (International Association of Assessing Officers, 1990) states at page 207:

> In appraisal, costs consist of all expenditures necessary to complete construction of an improvement and place it in the hands of the buyer. Costs are either direct or indirect. Direct costs include materials, labor, supervision, equipment rentals and utilities. Indirect costs include architectural and engineering fees, building permits, title and legal fees, insurance, interest and fees on construction loans, *taxes incurred during construction*, advertising and sales expenses, and reasonable overhead and profit. (e.s.)

CONDITION OF THE PROPERTY

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[8]See, e.g., *Robbins v. Adlee Developers*, 556 So.2d 503 (Fla. 3d DCA 1990), *Florida East Coast Railway Co. v. Department of Revenue*, 620 So.2d 1051 (Fla. 1st DCA 1993).

Wal-Mart will doubtless contend that Mr. Mazourek's assessments failed to consider subsection (6) of Section 193.011, "Condition of said property." Not only did Wal-Mart fail to report condition, but it denied access to the Property Appraiser to inspect the property. Although the returns provide a box for the owner to report its opinion of the condition of its property, Wal-Mart did not check any of the applicable boxes. Wal-Mart presented no evidence to show that its tangible personal property was in other than good condition.

Mr. Nikkenen of Mr. Mazourek's office had requested permission to inspect the distribution center but Wal-Mart denied permission to do so until after suit was filed. (Tr.- 2247, 2252, 2306)

Mr. King inspected both of the stores once he had permission from Wal-Mart's home office. (Tr. - 2038) This refutes Wal-Mart's contention that the Property Appraiser failed to consider the condition of the property.[9] Both Mr. Pence (Tr.-456) and Mr. King testified that it would not be possible or financially feasible for the Property Appraiser's office to perform an item-by-item appraisal of Wal-Mart's property (Tr.-2081-2), nor is there any requirement that he do so.

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[9] In its appeal presently pending in the District Court of Appeal, First District, Wal-Mart claims that the Alachua County Property Appraiser's assessment is invalid because the Property Appraiser did not inspect the store fixtures prior to the filing of its petition in the Value Adjustment Board. See Wal-Mart's initial brief in *Wal-Mart Stores, Inc. v. Crapo*, Case No. 1D01-1203, p.2.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal misinterpreted the facts and failed to accord the Trial Court's findings, which were based on substantial competent evidence, a presumption of correctness. In holding that sales tax should be excluded from a cost approach assessment, the Fifth District Court failed to recognize that the evidence presented in the Trial Court showed that (1)sales tax is properly included in the cost of an item in performing a cost approach to value, (2) sales tax is not a cost of sale which is required by §193.011, F.S. to be removed from valuation, and (3) that sales tax included in the cost basis of a cost approach valuation is not analogous to an extraneous cost which adds no market value and which must be excluded in a sales comparison approach to value. Sales tax is one of numerous "costs" properly included in a cost approach, and such inclusion is in accord with all other legal authority and proper appraisal practice.

The evidence further showed that the Property Appraiser more than adequately considered the market in comparable property in performing his cost approach. His choice to reject non-comparable data was within his sound discretion.

The Appellate Court further erred in holding that a Property Appraiser must explain his consideration of or rejection of any of the criteria he is required by law to consider. In so doing, it

improperly placed the burden on the appraiser to justify the assessment and deprived the assessment of its presumption of correctness, rather than requiring the taxpayer to show that the Property Appraiser committed an error which resulted in an incorrect valuation.

ARGUMENT

POINT I. THE FIFTH DISTRICT COURT OF APPEAL FAILED TO FOLLOW THE "SUBSTANTIAL COMPETENT EVIDENCE RULE" IN OVERTURNING THE TRIAL COURT'S FINDINGS OF FACT, WHICH WERE BASED ON SUBSTANTIAL COMPETENT EVIDENCE.

In a nine-page Final Judgment, including six pages of findings of fact, the Trial Court elaborated upon the substantial, competent evidence presented to support the assessment as made by the Property Appraiser. The Trial Judge stated findings related to the consideration of each of the eight factors in §193.011, F.S. He indicated his basis for his determination that the Property Appraiser correlated his assessment to the appropriate market in sales of comparable property and discussed the Property Appraiser's expert's explanation of how the economic life tables used in the cost approach assessment account for all forms of market depreciation. He stated his understanding and approval of the testimony concerning the Property Appraiser's consideration of and rejection of the use of data from the salvage market as not comparable to the subject property. He stated his understanding of

the testimony of the Property Appraiser's experts, and even Wal-Mart's expert witness, Mr. Miles, that sales tax is typically included in a cost approach valuation, and that it is not improper to include sales tax as an element of value rather than to exclude it as a costs of sale which is extraneous to value.[10]

The Trial Court thoroughly addressed the weaknesses and contradictions in Wal-Mart's expert's testimony, all of which established that the market in which Wal-Mart valued the property was inappropriate to its highest and best use, its age, its condition and its comparability to its own property. The Court's findings of fact were specific, detailed and related to the conclusions drawn from them. Each was made in accord with the law.

The Fifth District Court took issue with each of those findings of fact. It held that the evidence showed that the Property Appraiser failed to consider at least two of the criteria, that the market in salvage property was not considered sufficiently by the Property Appraiser's rejection of it, that (regardless of proof as to whether it was included) sales tax should have been deducted from the assessment. It determined, absent any support in the record (other than argument of counsel)that any external cost

[10]It is particularly significant that Wal-Mart presented no evidence whatsoever concerning the amount of sales tax, if any included in its reported costs, and offered no expert testimony, but only argument of counsel for its claim that sales tax is of a nature such that it should be excluded from the valuation as a cost of sale which is extraneous to value.

of sale must be deducted from a cost approach valuation. It held that the Property Appraiser failed to establish his consideration of the income approach to value, in spite of the fact that both parties and all experts agreed that the income approach was inapplicable as an assessment method in this case.

In so doing, the Appellate Court failed to follow the proper standard of review. The Trial Court's findings were based on substantial competent evidence, well-elaborated in its Judgment. It was not the province of the Appellate Court to engage in alternative fact-finding. *Siegel v. Career Service Commission*, 413 So.2d 796 (Fla. 1st DCA 1982). This Court has made clear innumerable times that a judgment or ruling of a trial court comes to the appellate court with a presumption of correctness. It has not hesitated where necessary to find error where that rule is violated. *Markham v. Fogg*, 458 So.2d 1122 (Fla. 1984) Particularly in cases concerning tax assessment, which primarily concern factual matters, as long as there is competent, substantial evidence to support the findings, an appeals court should not substitute its judgment for that of the trier of fact. *Walden v. Borden Co.*, 235 So.2d 300 (Fla. 1970); *Markham, supra.; Greenwood v. Oates*, 251 So.2d 665 (Fla. 1971)

Particularly applicable to this case is the holding on the same issue in another ad valorem tax case, *Firstamerica Development Corp. v. Volusia County*, 298 So.2d 191 (Fla. 1st DCA 1974) at 192:

> The trial judge entered a lengthy and well reasoned final judgment reciting his findings and conclusions. Among other things, he specifically found and recited that the testimony of some of appellant's crucial witnesses was successfully impeached. When a judge sits as trier of the facts and has an opportunity to observe the witnesses, their demeanor, candor or lack of it, he is entitled to, indeed he must, determine whether the testimony of such witnesses is worthy of belief. Such a determination, in the absence of bias or prejudice (which has not even been suggested in the case sub judice) will not be disturbed on appeal.

Petitioner respectfully suggests that the principle as elaborated in Firstamerica is equally applicable to each issue herein.

POINT II. SALES TAX IS PROPERLY INCLUDED IN THE COST OF AN ITEM IN PERFORMING A COST APPROACH TO VALUE.

The Fifth District Court holds, without record evidence or authority, that as an external cost of sale, sales tax should be deducted from historical cost in a cost approach to value. (A-6-7)

The issue, put concisely, is whether or not the Property Appraiser failed to properly consider certain criteria in §193.011, F.S. by his refusal to deduct any sales tax from historical purchase prices of personalty as reported by Wal-Mart. There are at least two elements that go into the making of that decision: First, the Court must determine whether sales tax is one of the "reasonable fees and costs of purchase" or "reasonable fees and costs of sale" as contemplated respectively by §193.011(1) and (8). Second, it must review the holding in the light of whether the inclusion of sales tax as an element of a cost approach valuation

is or is not the same as addition of an extraneous cost of sale in a sales comparison approach to value.

A. Sales tax is not one of the "reasonable fees and costs of purchase" or "reasonable fees and costs of sale to be removed from valuation as contemplated respectively by §193.011(1) and (8).

The baldly stated assertion by the Fifth District Court has a fatal logical error: although it is a given that the Property Appraiser, in order to follow the law, must consider subsections 1 and 8 of §193.011, F.S., that does not warrant the unsupported assumption that sales tax is a cost of sale applicable to those provisions. Nowhere is any authority cited for the insistence that sales tax is a cost of sale such that the presumption of correctness is lost because it was not deducted. The sole statement in the holding is by way of analogy to a number of cases which require the deduction of *extraneous* costs made in the transfer of real estate, followed by the statement that "it is clear that sales taxes are an *external* cost of sale and that "[s]ales taxes are no different from documentary stamp taxes paid on real estate exchanges...." There was no such testimony in our Record (other than that made in argument by Wal-Mart's attorney); in fact, there was not a scintilla of evidence or testimony in the Record on which that opinion could have been based. Conversely, even Wal-Mart's expert witness testified that it was appropriate to include sales tax as an element of original cost in a cost approach. Other than the assertion of counsel in argument, there

was complete accord by all expert witnesses that sales tax is properly included as an element of value in a cost approach.

The "just value" standard is paramount in assessment valuation. Hence, barring a change in our Constitution, all of those elements which make up the bargained-for price arrived at between the parties should be included in any sale used to arrive at an estimate of just value. The value of an item of commercial personalty as assessed for ad valorem taxation includes 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 purpose. *Dade County v. Atlantic Liquor*, 245 So.2d 229 (Fla. 1970) See also, *Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County*, 219 So.2d 101 (Fla 3rd DCA 1969) and AGO 73-76 (March 22, 1973).

Not one other authority has addressed the matter. *Turner v. Tokai,* 767 So.2d 494 (Fla. 2nd DCA 2000) briefly refers to the deduction of sales tax from comparable sales of personalty used in a market, or sales comparison approach to value. The other cases cited by the Fifth District Court and those cited for the proposition by Respondent refer not at all to sales taxes, personal property, nor cost-approach valuation and speak with regard to costs of sale only with respect to a specific circumstance, applicable only to some form of real property. The Department of Revenue Standard Measures of Value pertaining to Assessment of

Tangible Personal Property and Inventory (referred to by the Fifth District Court as the "Manual of Instructions" which was in use prior to 1998, takes no position whatsoever on the deduction of sales tax in a cost approach to value.

B. Inclusion of sales tax in the historical cost of property which is the starting point of a cost approach valuation is not the same as inclusion of an extraneous cost (which adds no market value) to a sales transaction used as a comparable sale in a sales comparison approach to value.

The Fifth District Court correctly but misleadingly states that the Second District Court of Appeal in *Turner v. Tokai*, *supra.*, notes (as dicta) the "admission" of Mr. Turner, the Hillsborough County Property Appraiser, that "sales taxes should be deducted from sales price".(A-7) However, it apparently misunderstood the fact that the admission related only to sales taxes deducted from comparables sales used in a market approach valuation, and not to the data used in a cost approach. Nowhere is it mentioned that sales taxes should be deducted in a cost approach".[11]. Further, the case, by its own language, specifically rejects any requirement that an assessor be required to apply a "blanket" deduction for costs to any assessment. *Id.* at 499.

The Trial Court in this case as well as the Second District

[11]Since the issue did not arise in the case, the Court's passing comment concerning sales tax as a cost of sale is dicta. Other than acknowledging the Property Appraiser's "concession", it did not express an opinion that sales tax must be excluded from assessments using either the cost or the market approach to value.

Court of Appeal in *Tokai, supra.*, held that the cost approach was a proper method of valuation. The discussion in Tokai concerning the inclusion of sales tax relates to the finding in that Trial Court that a sales comparison approach should have been used to value that rental property[12], and speaks to the consideration and use of costs of sale in the context of an assessment which involves use of market sales. That is not in any way the case herein, and it needs to be made clear that, under the standard in Tokai, the absence of a measurable market (as in this case) would preclude any blanket deduction for sales tax or any other transactional cost. See also, *Wal-Mart Stores, Inc. v. Todora*, ___ So.2d ____, 26 F.L.W. D1035 (Fla.2nd DCA 2001)

This case stands alone in its holding that sales tax should be deducted in a cost approach valuation. The Trial Court in this case as well as the Trial Court in *Wal-Mart v. Crapo*, Case No. 97-4728, Eighth Circuit, June 3,1999 (A-21-32), presently on appeal to the District Court for the First Appellate District (Case No. 1DO1-1203), and the Trial Court as well as the Second District Court in *Todora*[13],*supra,* agreed that sales tax is a proper component of a cost approach to value. As stated by the Trial Judge in *Crapo* and cited approvingly by the *Todora* Court:

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[12]That finding was not appealed.

[13]*Todora* is presently before this Court, having been certified as conflicting with the Second District Court's Opinion in this case on the identical sales tax issue.

> it is obvious that in determining how long to keep a fixture in use (which is what depreciation is all about) the owner must consider all of the business costs involved in acquiring and installing the fixture. Part of the owner's decision to replace an item has be [*sic*] based on the total investment (including sales tax) he has in that item. This reasoning is supported by all of the authoritative appraisal texts recognized by the experts. (A-30, A-36)

The Opinion of the Fifth District Court makes reference to and Wal-Mart relies upon a statement in "the Department of Revenue's 1997 Manual of Instructions" as directing property appraisers to "exclude sales tax from the assessed value of property." (A-6) It is significant that the reference is not to the Manual adopted in 1997 pursuant to Rule 12D-51.001, F.A.C., but to its ancient predecessor, the Department of Revenue's Standard Measures of Value, last revised in 1971. This reliance on the Manual to the exclusion of any other authority is misguided. Section 195.032, F. S., and Rule 12D-51.002, F. A. C., state the will of both the Legislature and the Department of Revenue that the guidelines shall not have the force and effect of administrative rules and are to be used only to assist Property Appraisers in the assessment of tangible personal property.

In addition to the age and datedness of the document, it makes reference to deduction of sales tax only in the market data approach.[14] Since the Manual describes the cost approach beginning

[14]Neither does the old Manual instruct property appraisers that sales tax is an extraneous or even an external cost of sale. In fact, it merely states, "sales tax is not to be included in the

with the historical cost of the property, as the assessment was performed herein, but does not suggest that sales tax be deducted from the historical reported cost, the logical assumption is that the Manual does not recommend such a deduction.

The reasoning behind this is evident. Without basis in the evidence, testimony or the law, Wal-Mart apparently convinced the Court that the reported historical cost by the taxpayer used in a cost-approach assessment is the same data as a "sale" of property used in the sales comparison or "market" approach for the purpose of making cost-of-sale deductions. Such an analogy is incorrect, both in fact and as a theory of appraisal. As indicated in the texts referenced at trial, a properly performed sales comparison approach identifies bargained-for transactions similar to the subject property. Adjustments are made to those sales to account for dissimilarities from the subject, to remove any non-market items within the transaction and to adjust as necessary and feasible to include any additional market costs necessary to represent the market value of the property in use. A sales comparison, by definition, cannot properly be based on one sale of property. Only comparison of a range of sales of like property will permit the estimation of market value which is not a specific number, but a point within a range of values which approximate the

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market data approach," without further information or clarification.

market.

On the other hand, the cost approach to value typically begins with the bargained-for *price* actually paid by the *user* — a price which should include all of those market adjustments other than those required to account for physical age and condition and any adjustments in the value of the dollar and the utility of the property from the time that the property was purchased until the assessment date. While the sales used in the sales comparison approach must be adjusted to account for the value-in-use by the user, that concept is implicit in correctly-reported historical costs,[15] and once they are adjusted for time, economic and physical factors, they correctly represent the market value of the property.

The old "Manual" does not represent the present position of the Florida Department of Revenue on the inclusion of sales tax in the cost approach. The Revised Standard Measures of Value placed in use as Guidelines for Property Appraisers and adopted under Rule 12D-51.002, F.A.C. in December, 1997 were available in draft form to the Property Appraisers for as much as two years prior to their formal presentation. Unlike the old Manual, they do address the

[15]Unlike in real property assessment, as clarified by Mr. Barreca, one of the difficulties in using the sales comparison approach in the valuation of many types of personalty is the difficulty in identifying sales of property which are used in businesses sufficiently similar to the property being assessed. Not only must the same type of property be found, but its value-in-use must be comparable. As it was in the case of Wal-Mart's assessments, this is often an impossible task.

need to *include* sales tax in the cost approach valuation:

> A determination of costs must be made after review of the accounting records. This cost basis should reflect the total cash outlay necessary for the acquisition of the property, including invoice cost, freight and installation cost, *sales and/or use tax,* extra foundations necessary to support the equipment, and any other costs incurred for the use of the property. [e.s.]

12D-51.002, F.A.C. (1997), p.58.

The Fifth District Court appears to have misunderstood the distinction between an "external cost" and "extraneous cost" of sale. The terms are not identical. An "external cost" is one which is an addition to a stated sales price. An "extraneous cost" is a non-market item imposed in addition to the negotiated sales price of the property. While the District Court uses the term *external cost*, its reference to *Hausman v. VTSI, Inc*, 482 So.2d 428 (Fla 5th DCA 1985)is to an *extraneous cost* of sale. Indeed, as stated in *Hausman*, an extraneous cost adds nothing to the value, an external cost may or may not do so, depending on the nature of the cost and whether it is normally part of the consideration going into establishment of the price to be paid for the property. As indicated in the Guidelines and in the testimony herein, many costs may be "external" to the price listed on the purchase order, but yet are necessarily a part of the bargained-for price of the property, in place and in use, which is the basis of its market value. Sales tax, delivery, installation costs, site preparation costs, and many other costs are part of the total value which the

purchaser considers in buying property designed to produce income. A cost may be *external* to the net price paid to a seller for a piece of equipment, but it is not *extraneous* if it is incurred specifically with respect to the use of the item of personalty. *Dade County v. Atlantic Liquor*, supra; *Aeronautical Communications Equipment, Inc. v. Metropolitan Dade County, supra.* Hence, the fact that sales tax is external — not part of the list price of an item of personalty — does not mean that it is extraneous to value.

In fact, as was accepted by each expert witness at trial, even if sales tax is a cost of sale, it is one which is included in the bargained-for price of the property and passed on to subsequent purchasers, and not an extraneous cost of doing business. The requirements of Florida law are consistent with, not in conflict with standard accepted appraisal practice. There is no requirement in Florida law that sales taxes must be deducted a cost of sale, as, in the context of this assessment they are not costs contemplated in §193.011, F.S.

C. Inclusion of sales tax as part of valuation using a cost approach is in accord with all other authority and appraisal practice.

Other than the Fifth DCA opinion in this case, which cites no appraisal authority nor competent testimony in the trial court for its determination, there is no authority which would require a Florida Property Appraiser to make a blanket deduction for sales tax from all historical costs reported by a taxpayer in a cost

approach valuation and substantial reasoning as to why he must not do so, particularly that, as a matter of sound appraisal theory, removal of value elements from the assessment would result at a valuation at less than the mandated "just value". The criteria in §193.011. F.S. were designed to serve and support that mandate, and an attempt to misuse any criterion to erode the "just value" standard in the interest of a lower tax for a taxpayer, should not meet with success.

The Fifth District Court notes that the requirement that sales tax be included on the taxpayer's return does not mean that it is part of the sales price. That does not explain why the Department of Revenue would require taxpayers to return sales tax as an integral part of the original cost of their property if the Property Appraiser was not permitted to use that information in arriving at the assessment. Sales tax is an important component to be considered if the Property Appraiser is to give full consideration to the statutory criterion, "The cost of said property", in §193.011(5), F.S. The DOR's revised 1997 Guidelines define "Historical Cost" as "the initial capitalized cost of an asset at the time it was first put into service."(R-Vol. XXI, #17, p.38.), including sales and/or use tax. This Guideline is entirely consistent with and derived from the statutory factors in §193.011, Florida Statutes.

The cost approach is a lawful method to value property. *Havill*

v. Lake Port Properties, Inc., 729 So.2d 467 (Fla. 5th DCA 1999) Sales taxes are payable on building materials. Rule 12A-1.051(4), Florida Administrative Code.[16] Were sales tax not an element of value, an appraiser performing a cost approach on real property would necessarily exclude any cost expended by the contractor which was in the nature of a tax. This is contrary to sound appraisal practice.

The Courts should accord the greatest deference to the Department of Revenue, the administrative agency charged by the Legislature with oversight over the assessment and collection of taxes. See, *Odham v. Foremost Dairies, Inc.*, 128 So.2d 586 (Fla. 1961).[17] The DOR-prescribed return form requires taxpayers to include sales tax as one of their costs. The 1997 Guidelines require taxpayers to report sales tax as part of their costs. I.R.S. requires taxpayers to capitalize sales tax. No appraisal text directs appraisers to exclude sales taxes in the cost approach to value. The theory that sales taxes should be deducted, either as

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[16]"Contractors are the ultimate consumers of materials and supplies they use to perform real property contracts and must pay tax on their costs of those materials and supplies..."

[17]"The courts have been extremely reluctant to interfere with the actions of such bodies in the proper performance of their duties and responsibilities in the absence of a clear and unmistakably flagrant violation of a constitutional or statutory right of the affected party. Promiscuous intervention by the courts in the affairs of these administrative agencies except for most urgent reasons would inevitably result in the dethronement of the commissions and the substitution of the courts in their place and stead." *Id.* @ 592-3.

costs of sale or as intangible property has no support either in the law or sound appraisal practice.

POINT III. IN STATING THAT A PROPERTY APPRAISER MUST EXPLAIN WHY HE CHOSE TO REJECT A STATUTORY FACTOR, THE COURT IMPROPERLY PLACES THE BURDEN ON THE APPRAISER TO JUSTIFY THE ASSESSMENT.

In assessing property, a Property Appraiser is required to consider each of the criteria in §193.011, F.S. This requirement has long been a part of the law. Effective for the year that this case was tried on the merits[18], §194.301. F.S. requires that, in order for the presumption of correctness accorded an assessment to be lost, *the taxpayer* must show by a preponderance of the evidence that the property appraiser failed to *consider properly* the criteria.

It has long been the law that the taxpayer has the burden to show that the assessment is in excess of just value. As this Court said in *Bystrom v. Whitman*, 488 So.2d 520 (Fla. 1986), "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. [citation omitted] An appraiser may reach a correct result for the wrong reason. *City National Bank of Miami v. Blake*, 257 So.2d 264 (Fla. 3rd DCA 1972)"

Hence, it follows that the choice of methodology is within the

[18]See, 1997 Laws of Florida, Ch. 97-85, §2.

sound discretion of the Appraiser. In *Blake v. Xerox Corporation*, 447 So.2d 1348 (Fla. 1984), a case, as is the present one, involving the assessment of personal property, the Court held:

> Regardless of which method was theoretically superior, the trial court was bound to uphold the appraiser's determination if it was lawfully arrived at.... Like the trial court, the district court addressed the merits of the question of which method was theoretically superior, and simply disagreed with the trial court's determination. Although the trial court's determination was based in part on a finding that the property appraiser's method was a better one, the judgement should have been affirmed simply on the ground that the property appraiser's determination, having been lawfully arrived at and being supported by a reasonable hypothesis of correctness was properly upheld.

Id. at 1350-51. (See also *Bystrom v. Whitman*, 488 So.2d 520 (Fla. 1986); *Bystrom v. Equitable Life Assurance Society*, 416 So.2d 1133 (Fla. 3rd DCA 1982) and *Florida East Coast Railway v. DOR*, 620 So.2d 1050 (Fla. 1st DCA 1993)

The Fifth District Court has held in this case that:

> [i]n cases in which the appraiser considers a factor but rejects it, consideration and the reasons why it was rejected should be stated so a court can evaluate whether rejection was legally proper.

The effect of this holding is to remove from the Appraiser his discretion in assessment and the presumption that the assessment is correct. It places the Property Appraiser and his assessment on trial, rather than requiring the challenging taxpayer to show that the assessment is incorrect or that the Appraiser failed to follow the law such that the assessment is necessarily at other than just value. This would require the Property Appraiser to justify every

step of his assessment, rather than requiring the taxpayer to show that the appraiser erred.

The uncontroverted testimony in this case was that the Property Appraiser was more than just "aware" of each statutory factor, but carefully considered each one, and rejected a factor for use only when it was shown that the data, or lack thereof made that factor inapplicable to the assessment.

POINT IV. THE PROPERTY APPRAISER MORE THAN ADEQUATELY CONSIDERED THE EXTANT MARKET IN PERFORMING HIS COST APPROACH.

The Florida Constitution requires that appraisals be made at "just valuation". For years, there was great controversy in Florida concerning the meaning of the term, "just valuation". In the landmark case of *Walter v. Schuler*, 176 So.2d 81 (Fla. 1965), this Court determined that the term meant the classic "willing buyer/willing seller" amount. It has re-affirmed this definition in four cases since that time: *Southern Bell Telephone and Telegraph Company v. County of Dade*, 275 So.2d 4 (Fla. 1975), *District School Board of Lee County v. Askew*, 278 So.2d 272 (Fla. 1973), *Deltona Corporation v. Bailey*, 336 So.2d 1163 (Fla. 1976), and *Department of Revenue v. Johnston*, 442 So.2d 950 (Fla. 1983)

Every District Court of Appeal that has addressed the term has done so in the same manner: *State Department of Revenue v. Adkinson*, 400 So.2d 53 (Fla. 1st DCA 1982), *Bystrom v. Valencia*

Center, Inc., 432 So.2d 108 (Fla. 3rd DCA 1983), *State Department of Revenue v. Markham*, 426 So.2d 555 (Fla. 4th DCA 1983).

It is inescapable that, no matter which valuation methods are used, appraisal is an art, not a science, which requires the application of the judgment and discretion of the appraiser. *Powell v. Kelly*, 23 So.2d 305 (Fla. 1969), *accord, Schleman v. Connecticut General Life Insurance Co.*, 151 Fla. 96, 9. So. 2d. 197 (1942); *Bystrom v. Bloom*, 472 So.2d 819 (Fla. 3rd DCA 1985) In order for them to be the best indicator of value, sales used to value property must be *comparable* to that property, and where no such comparable market is evident the criteria in §193.011, F.S. constitute a guide for assessment such that each must be considered, but only sound appraisal judgment can determine which should and should not be used. Whether consideration or even total rejection of a criterion is satisfactory is always a matter of fact and appraisal judgment and opinion, not a matter of law.

The courts have consistently held forth on what does *not* constitute market value. As shown above, one cannot arrive at market value using non-arm's length sales or worse, as proposed by Wal-Mart, mere opinions or estimates of sale price which are not, as a matter of established fact, derived from actual comparable sales and which can neither create the highest value nor represent the highest and best use of the subject property. If the use of sales for valuation is to represent consideration of each of the

eight criteria in §193.011, F.S., each of the sales must be representative of the criteria. Particularly, the sale must be comparable in time, location, highest and best use, amount and condition. See, for example, *Palm Beach Development and Sales Corporation v Walker*, 478 So.2d 1122 (Fla. 4th DCA 1985).

In this case, the evidence showed and the Trial Court found that the taxpayer's expert appraiser used only sales of used equipment, much older than the subject property, and refurbished. Wal-Mart does not buy its equipment in the same market used by Wal-Mart's appraiser. Pursuant to §193.011, F.S., the property must be valued at its highest and best use, at the location where it is used for the purpose of the user. What Wal-Mart could sell its property for to another user who did not purchase new property held for a use comparable to Wal-Mart's is not the value the law requires the Property Appraiser to find. All of the criteria that the Property Appraiser must consider — the highest and best use, the location, the quantity as an aggregate of property, the cost, the condition, and the income from the property — require that the valuation be based on the value of the property *in use*, *to the taxpayer*. The Property Appraiser's expert witnesses testified, and the Trial Court agreed, that the proper method for assessing a taxpayer's personalty is based on valuation at its highest and best use as "being used as part of an ongoing concern, contributing to the stream of income" (A-15) A valuation of the individual

"pieces", without consideration of their use constitutes a failure to consider condition, location, quantity and highest and best use — four of the criteria in §193.011, F.S. Valuation of personalty "in continued use" as an aggregation has long been the standard. *Hillsborough County v. Knight & Wall Co.,* 14 So.2d 703 (Fla. 1943) at 705 and *Warren Co. v. Howell*, 3 So.2d 167 (Fla. 1941) [e.s.]

Just as the Florida courts have discussed the three traditional appraisal methods, or approaches to value: the cost, market and income methods, they have consistently held that, for the purpose of following the law as outlined in §193.011, F.S., it is for the Property Appraiser to determine which of these methods is superior. See, *Blake v. Xerox Corporation*, *supra*, *Bystrom v. Whitman*, *supra, Bystrom v. Equitable Life Assurance Society*, *supra* and *Florida East Coast Railway v. DOR*, *supra.*

In this case, the evidence was unequivocal that the Property Appraiser acted pursuant to law in assessing the property using the normal and usual information available to him, specifically the report to him by the taxpayer; he considered all of the criteria which the law requires, used those which were applicable, and performed the assessment to arrive at a valuation of the property in the same manner as he did for all or substantially all other like property in the County.

Wal-Mart contended, and the Appellate Court, (albeit based on the wrong facts) agreed, that the Property Appraiser violated the

law by failing to document a market in comparable property. Even were this holding supported by the evidence, it inaccurately substitutes the requirement that the Property Appraiser *consider* the criteria in §193.011, F.S. with a mythical "requirement" that he specifically identify any data concerning the sales or expected sale prices of similar equipment and explain why that data was not used to employ a market approach to valuation. In fact, there is no case nor rule which makes the use of comparable sales a requirement of §193.011, F.S. Even were there such a requirement, it is unjustified to assume that a proper determination of the existence of a market can only be made by a formal, documented analysis.

The Property Appraiser does not perform his annual tasks in a vacuum. In each year, he has the benefit of ongoing annual investigation of all of the appraisal facts in his county, acquired over many years of doing the same job. It is evident from the testimony that the assessment was not merely a review of the taxpayer's return and application of certain routines to arrive at a value, but was based on knowledge gained from constant and continuous investigation and review of all available information over the subject year and many prior years. In fact, the Property Appraiser in this case had at his disposal a plethora of data. Each of thousands of taxpayers reports the original purchase price of its tangible personal property to the office each year. This is

the best possible body of sales from the market. This market data serves as the basis of the market-based cost approach to value which was used in this case, as well as virtually all others in the County (and the State). It represents the property's cost when purchased at the price actually paid, for the use intended by the taxpayer. That price is then trended to adjust for changes over time in sale prices, and adjusted for physical depreciation and functional and economic obsolescence through the use of a huge body of data derived from research performed by the Internal Revenue Service and arranged in tabular form by the Florida Department of Revenue for that purpose.

From all of that data, as well as knowledge of the commercial activities taking place in the County, the Property Appraiser had determined and continued to reinforce by further investigation that no market in personalty similar to that reported by Wal-Mart was bought or sold in Hernando County. A formal, documented investigation of sales data which was not comparable to the subject was not only unnecessary, but contrary to logical thought. What he must do, and did in this case, is determine the best possible evidence of market, and verify that information. This the Trial Court found that he did, and having done so, his determination concerning the market should have been accorded a presumption of correctness.

Therefore, substantial, competent evidence showed that the

market in comparable personalty was considered in many ways, and the Property Appraiser determined that the data was not sufficient to perform a market valuation. The cost approach having been chosen as the most reasonable approach to value, the only question remaining as to whether the assessment is in accord with the law is whether or not it is within a reasonable range of values which approximate "just" or "fair market" value. In order to overcome the presumption, Wal-Mart was required to show, by clear and convincing evidence, that (1) the Property Appraiser used the data available to him which addresses the factors in §193.011, F.S. in such a way that he made an error which resulted in an assessment which was too high, *and* (2) that the taxpayer's use of data resulted in a correct appraisal. *Oyster Pointe Resort Condominium Association v. Nolte*, 524 So.2d 415 (Fla. 1988), *Blake v. Xerox, supra*. The Trial Court found that evidence propounded by the taxpayer herein established neither of these requirements:

> Plaintiff has not met its burden of proof. The Court finds it incredible that property having a cost of $2,626,309 in October of 1996 when placed in service in the Cortez Boulevard superstore would have a market value of $935,000 three months later, or that a conveyor system having a cost of $13,571,679 in 1992 would have a market value five years later of only $4 million. While Wal-Mart disavowed its own returns at the final hearing, the numbers which could only be its opinion of value support the Property Appraiser's assessments.

(A-18)

CONCLUSION

The Fifth District Court of Appeal failed to follow the substantial, competent evidence rule in reversing the sound rulings of the Trial Court on all issues. Misreading the evidence and testimony, it determined that sales tax must be deducted from a cost approach valuation of personal property, that a Property Appraiser must explain to the Court the basis of his use or rejection in the assessment process of any criterion in §193.011, F.S., and that, although he was not bound to employ a market valuation, the Property Appraiser failed to properly consider market data, and failed to sufficiently explain his rejection of the market approach to value. It further found that, in so doing, he failed to sufficiently and properly consider certain of the criteria in §193.011. F.S.

The record reflects, and the Trial Court found in a detailed and thorough Final Judgment that there was substantial, competent evidence to support the Property Appraiser's position on all issues. The Fifth District Court's failure to accord the trier-of-fact's determinations a presumption of correctness constitutes reversible error.

For all of the above reasons, Petitioners respectfully request that this Court reverse the determination of the Fifth District Court of Appeal on the essential issues addressed herein.

Respectfully submitted,

_____

for Mark Aliff, Gaylord A. Wood, Jr.
and B. Jordan Stuart

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and Appendix thereto has been forwarded by mail this 13th day of November, 2001 to Robert E.V. Kelley, Jr., Stacy Blank and Joseph J. Weissman, Holland & Knight LLP, P.O. Box 1288, Tampa, FL 33601, Attorneys for Appellant; Gene H. Auvil, 15220 Brice Dr. Brooksville, FL 34601, Attorney for Juanita Sikes, as Hernando County Tax Collector; John C. Dent, Jr. and Sherri L. Johnson, Dent & Cook, P.A., 330 S. Orange Avenue, P.O. Box 3269, Sarasota, FL 34230 and Thomas B. Drage and Kenneth P. Hazouri, P.O. Box 87, Orlando, FL 32902-0087, Attorneys for Amici.

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I CERTIFY that this document was prepared using 12-point Courier New type font.

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B. Jordan Stuart

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-663

On Review from the District Court for the Fifth District of Florida,

Case Nos. 5D99-3165 and Case No. 5D99-3168

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

-vs-

WAL-MART STORES, INC.
Respondents.

APPENDIX TO INITIAL BRIEF OF PETITIONERS

ALVIN MAZOUREK
as Hernando County Property Appraiser,
and
STATE OF FLORIDA, DEPARTMENT OF REVENUE

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