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.

REPLY BRIEF OF PETITIONERS

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

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STATEMENT OF THE FACTS

Respondent's Statement of the Case and Facts is inaccurate and misleading. It contains statements which amount to argument in the guise of facts. The following are examples of specific statements made by Respondent which are inaccurate or misleading, with references to the location of the statement in the Answer Brief.[1]

Mr. King arrived at the assessment only *in part* based on the reported historical cost of the property. [AB-3] The Respondent's simplistic description of the process ignores the mountains of testimony by Mr. King which establish the work that he did in 1997 and prior years to investigate, research and validate the mass appraisal process.

The claimed "Hernando County Tax Return" [AB-3] is a form propounded to and *mandated* for use by *all 67* Florida Property Appraisers pursuant to §195.027, F.S.

The Property Appraiser did not adjust for additions to or deletions of property as stated at AB-3. Wal-Mart's tax returns reflected no additions or deletions. [T-835] Respondent also fails to note that errors made by Wal-Mart on the return were discovered and corrected by Mr. King. [T-837-839]

Prior to the computer calculations noted by Respondent at AB-4, the Property Appraiser's office assigned codes, hand-selected by

[1]References to the Transcript of Trial will be to "T-[page no.]; references to the Answer Brief will be to "A-[page no.]

Mr. King and established by the office, to the various property, each representing an economic life. [T-821-822, 848]

The computer program did not merely apply a Present Worth Table to the reported figures. [AB-4] The *appropriate* Present Worth Table, *as selected by the Property Appraiser*, was applied.

It was never established that Wal-Mart's return included sales tax. [AB-4] The return did not reflect any sales tax. Sales tax, if any, which was included in Wal-Mart's "bulk" reported figures, was unidentified and unverified.

One of Wal-Mart's allegations in its complaint was that the Property Appraiser failed to consider the condition of the property. Respondent now objects to the Property Appraiser's response to that allegation. [AB-3, n.1]

It is disingenuous for Respondent to claim as fact that Wal-Mart established the payment of sales tax on its property. [AB-6] Although Willa Lovett testified at length regarding that matter, she was unable to show that the bulk reporting by Wal-Mart included sales tax, or if it did, what percentages were paid. [T-1122-26, 1163-66, 1173]

The record references cited for the claim that Mr. King admitted that he did not investigate the market or market data [AB-6] simply do not establish that fact. At T-914-915, Mr. King states that he made no adjustment to the assessment for economic obsolescence; at T-925-926, he states that he did not perform a

market data *valuation*. At no time does Mr. King indicate that he did not investigate the availability of market data. In fact, Mr. Miles, Wal-Mart's expert appraiser, stated that no comparable market data could be found [T-238, 253, 342] and Mr. King testified that he contacted market sources [T-2030-34] and performed market surveys. [T-2112]

The reference to T-917 at AB-6 does not establish that Mr. King "made no request for additional information" from Wal-Mart, but concerns only the Distribution Center, which was not contested in administrative hearing. As to the retail stores, Mr. King testified that he made specific requests for information, for a list of property and for inspection. [T-2027]

The assessments used by Mr. King in his validation process were not "unidentifed" [AB-7]; they were held as confidential by the Court. [T-2013] Nowhere in the record is it stated that Mr. King "refused to disclose any details of the comparisons", nor that those comparisons were "blanket" conclusions. [T-2002-04, 2012-13]

Although the Trial Court recognized the details as stated in the Record, the Fifth District Court was apparently misled concerning the Property Appraiser's consideration of the market. [AB-8] Mr. King's testimony on the procedure he followed to consider available market data consumes *eight pages* of testimony, not including Wal-Mart's lengthy objections. (See T-2000-2012.)

ARGUMENT

The bulk of the Argument in the Answer Brief has been addressed in full in Petitioner's Initial Brief. However, Wal-Mart persists in semantic obfuscation wherein it incorrectly defines an appraisal term, then applies that improper definition to the Property Appraiser's actions in an attempt to show that his assessment was erroneous. Much of what follows addresses those misdefinitions.

Petitioner's Point I was not addressed in the Answer Brief, and hence, will not be elaborated upon herein.

POINT II (as originally stated by Petitioner): SALES TAX IS PROPERLY INCLUDED IN THE COST OF AN ITEM IN PERFORMING A COST APPROACH TO VALUE.(Respondent's Point I)

Once again, as in *Wal-Mart Stores, Inc. v. Todora*, 791 So.2d 29 (Fla. 2nd DCA 2000), Respondent states without basis, discussion or explanation that "sales tax is an extraneous cost of sale...." It then uses that assumption as the basis for its entire argument. To accept Wal-Mart's contentions regarding the inclusion of sales tax, one must accept the concept that sales tax is an "extraneous cost", and not an element of a properly-conducted cost approach to value. This is circular reasoning. As fully discussed in the Initial Brief, it is agreed that sales tax is an "*external* cost of sale". There is no basis for deeming it to be an *extraneous* cost. In using these two distinct terms interchangeably, Wal-Mart fails

to distinguish between that externality (a cost which is part of the value, but may not be part of the stated purchase price) and an "extraneous" cost (one which is paid, but which adds nothing to value). Wal-Mart's blithe, unsupported analogizing of the two terms is without reason or rationale.

Respondent is however, correct in stating that Petitioner, like Wal-Mart and the Fifth District Court, did not "cite authority" for the definitions of "external" and "extraneous". However, the crucial distinction between the terms exists both as a matter of language definition and in the law: *Websters Dictionary*[2] defines "external" as "relating to, existing on, or connected to with the outside or an exterior part", and "acting or coming from the outside". "Extraneous", on the other hand, is defined, not only as "coming from the outside", but further as "not vital or essential", and "irrelevant". Hence, something "external" to a matter is not within in it, but affects it, as in "external influence". Something 'extraneous" to a matter has no impact upon it.

Florida case law bears out this distinction, particularly as refers to evidence. While "external evidence" is admissible and relevant to proof of a matter, "extraneous evidence" is irrelevant and inadmissible. (See, for example, *Canion v. State*, 783 So.2d 80

[2]Riverside Publishing Co. *Websters II New Riverside University Dictionary*. Boston: Houghton-Mifflin Co., 1984.

(Fla. 4th DCA 2001); *Arguelles v. State*, 791 So.2d 500 (Fla. 4th DCA 2001) and *Hewett-Kier Construction Co., Inc. v. Lemuel Ramos and Associates, Inc.* 775 So.2d 373 (Fla. 4th DCA 2000); *Stuyvesant Insurance Co. V. Butler*, 314 So.2d 567 (Fla. 1975); *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000) among many others.) Therefore, if definition of the terms is necessary, it exists in abundance, and unequivocally supports the position that an external cost is part of value, while an extraneous cost is irrelevant to value.

Wal-Mart's sole "authorities" for its position concerning sales tax are the holdings in *Turner v. Tokai*, 767 So.2d 494 (Fla. 2nd DCA 2000), the holding of the Court in the decision under review herein and what it calls the " Department of Revenue's ("DOR") Manual for 1997". [R-18-19] As stated in the Initial Brief at IB-29-30, the holding in *Tokai* includes no position on first and eighth criterion deductions nor on sales tax as an element of value or as a necessary deduction from any assessed value. As indicated previously, use by Wal-Mart of the opinion under review as authority for its position begs the question. As to the "Manual", Respondent once again misleads the Court by its reference. As previously indicated at IB-31-32, the "Manual to which Wal-Mart refers is not a 1997 document, but the unrevised publication of a document last revised in 1975. Wal-Mart's heavy reliance on this antiquated document, both for its position that sales tax should be

excluded from value and concerning the relationship between the cost and market approaches to value [R-24] is desperately tenuous.[3]

In 1997, the Manual was revised and updated, including the DOR's specific direction to the 67 Property Appraisers to include sales tax as an element of value in their cost approach assessments. Wal-Mart's contention at AB-19, n.9, that since the 1997 Manual had not yet become effective for use as of January 1, 1997, hence its existence should be ignored is irrational. It would be beyond logic to close our eyes to the fact that the Department of Revenue and the Property Appraisers knew and understood that it was necessary to include sales tax as an element of value well prior to the revision of the Manual.[4]

The Answer Brief contains no other reference which might be construed as authority for its position.

In attacking the reliance of the Petitioners and the Amici on recognized appraisal texts and treatises, Respondent engages in *post hoc* and circular reasoning. Respondent fails to recognize the importance of engaging in sound appraisal practice, under the requirements of Florida law. First and foremost, our Constitution

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[3]Once again, the distinction in application between the cost and sales comparison ("market") approaches to value is fully briefed at IB-29-35, and need not be reiterated herein.

[4]If the circumstances are not obvious in themselves, the fact that the instructions to the Department of Revenue's mandated Return filed by all taxpayers in all 67 counties, had long required the reporting of the historical cost of property *including sales tax,* is compelling.

requires that all property be assessed at 100% of "just" (market) value. The term is meaningful as an appraisal concept. Where a statutory requirement can be interpreted to comport with the just value requirement or to comply with it, it should be interpreted in such a way as to achieve compliance.

Every appraisal text or treatise which addresses the matter, all of the expert witnesses for both sides in this case and the others which have been tried in Florida, the DOR and all 67 Florida Property Appraisers agree that sales tax is an essential component of just value as calculated by the cost approach. Sections 1 and 8 of §193.011, F.S. require that "fees and costs of sale" be deducted from the sale price of property when determining its value. This clearly should be construed to mean that those fees and costs which, as a matter of sound appraisal practice, are not components of the just value of the property should be the only fees and costs that are deducted. Hence, even if sales tax is among those items defined as "fees and costs", to include it within those subject to deduction under the statute would be to improperly misconstrue the statute into unconstitutionality, when there is no reason for doing so.

POINT III (as originally stated by Petitioner): 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. (Respondent's Point II)

The legal requirement that a Property Appraiser must properly "consider" the eight criteria is defined by Wal-Mart (as well as by the Fifth District Court of Appeal) as "consider and defend". It is correct that Property Appraisers have been routinely asked to explain their consideration of the statutory factors to a court. As was Mr. Mazourek in this case, they are fully prepared to do so. That, however, does not overcome the fact that, before a Property Appraiser's explanation or lack thereof can be held to invalidate an assessment, the complaining taxpayer must, as its unavoidable burden, show that the assessment is incorrect. Absent that rule, the statutory presumption of correctness becomes meaningless.

The Fifth District Court in this case did not merely "ask the property appraiser to explain his consideration" [AB-11, *et passim*], but held that any option by the Property Appraiser, using his appraisal judgment, to reject a criterion must be clarified to the satisfaction of the court, and that an incorrect application of a factor, whether relevant to the ultimate value or not, amounts to a failure to consider it, causing a loss of the presumption of correctness accorded the valuation.[5]

An assessment is a matter of studied opinion, not a fact. *Daniel v. Canterbury Towers, Inc.*, 462 So.2d 497 (Fla. 2d DCA 1985) The purpose of the presumption of correctness is to give the

[5]It is of note that in this case, all parties rejected the use of the income approach to value without reviewing income data or going through computations before doing so.

property appraiser the benefit of any difference in opinion as to proper appraisal practice. Without that leeway, the benefit of expertise shifts to the complaining taxpayer, to the detriment of the public official charged with the expertise to perform the task and ultimately to the taxing bodies of the county.

That having been said, it is evident that regarding consideration of the criteria in this case, the Fifth District Court overlooked, and Respondent ignores the abundance of specific testimony in the record concerning Mike King's consideration of the eight criteria. From T-1993 through T-2025, Mr. King discusses in detail his consideration of each one of the statutory criteria — if it was used, how so; if it was rejected, why. A more thorough recitation of the Property Appraiser's compliance with the law could not be had.

POINT IV (as originally stated by petitioner): THE PROPERTY APPRAISER MORE THAN ADEQUATELY CONSIDERED THE EXTANT MARKET IN PERFORMING HIS COST APPROACH. (Respondent's Point III)

Wal-Mart's inaccurate statement that the Property Appraiser admitted that he considered no market data is based on an intentional misinterpretation of one statement, taken out of the context of the entire body of testimony. It is simply untrue, and has been previously dealt with in the Initial Brief. [See, IB-12, 41-46; AR-7] Further discussion is unwarranted and unworthy.

Wal-Mart would have this Court accept that the Property Appraiser merely performed a mindless arithmetical calculation — not an assessment, and failed to do any investigation or analysis in his determination of value. As indicated at length in the Initial Brief, such a conclusion is repeatedly belied by the Record. One of the most blatant misdefinitions employed in the service of its argument is Wal-Mart's characterization of the "assessment process". According to Wal-Mart, that term means only what is done between the time that the return is received and when the preliminary valuation is arrived at. It does not include the plethora of prior and concomitant research, or any requests for information after the preliminary valuation but before the value is certified for collection. That limits the "assessment" to a one-hour clerical process — not at all what actually happened.

A corollary misdefinition is Wal-Mart's use of the terms "market" and "market data". As indicated in the Initial Brief, Mr. King testified for the Property Appraiser concerning the specifics of his extensive, detailed review of dealers in equipment like that of Wal-Mart. [T-2030-2036] As stated in the Initial Brief, he concluded from that review, and from following up on the sources provided to him by Wal-Mart, that no property comparable in age, condition and level of trade to Wal-Mart's property was being bought and sold in the market. However, Wal-Mart's sole question to him (and sole basis for its claim of failure to consider the

market) was as to whether he actually used the data from a market which he properly considered to be inapplicable in his assessment. He was clear that he did not do so. From that, in spite of all of his testimony showing his work, Wal-Mart extrapolates that he "*admitted* that he did not consider the market." Clearly, nowhere in the law is the definition of "consider" or the definition of "the market" so delimited.

Respondent further confuses "market data" with the sales comparison (market) approach to value. While the case law indicates that, where market data exists, it should be considered in the assessment process, the choice of methodology, or approach to value, is reserved to the Property Appraiser in his discretion. Hence, even had market data been available, the Property Appraiser's decision to use a cost approach valuation would not invalidate the assessment, nor would it be a basis for a loss of its presumption of correctness. *Blake v. Xerox Corporation*, 447 So.2d 1348 (Fla. 1984); *Bystrom v. Equitable Life Assurance Society*, 416 So.2d 1133 (Fla. 3rd DCA 1982); *Bystrom v. Whitman*, 488 So.2d 520 (Fla. 1986).

CONCLUSION

Respondent's effort misstates both the facts and the law on each point addressed. This Court should not be misled. For all of the reasons previously stated and all of those above, Petitioners

respectfully request that this Court reverse the determination of the Fifth District Court of Appeal.

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 has been forwarded by mail this 24th day of January, 2002 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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CERTIFICATE OF STYLE AND TYPE SIZE

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

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