IN THE SUPREME COURT
STATE OF FLORIDA

P. DEWITT CASON, CLERK OF
THE CIRCUIT COURT, ET. AL.

Petitioners,

vs.

Sup. Ct. Case No: SC05-1484
D.C.A. Case No: 1D04-4836
Cir. Ct. Case No: 00-293-CA

STATE, DEPARTMENT
OF MANAGEMENT SERVICES,

Respondent.
_____/

PETITIONERS - P DEWITT CASON'S AND OTTINGERS' INITIAL BRIEF ON THE MERITS

On Appeal from the District Court of Appeal, First District.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGES

FLORIDA AUTHORITIES:

FEDERAL AUTHORITIES:

FLORIDA CONSTITUTION:

FLORIDA STATUTES:

LAWS OF FLORIDA:

RULES OF PROCEDURE:

FLORIDA ADMINISTRATIVE CODE:

OTHER AUTHORITIES:

INTRODUCTORY NOTES

The Petitioners, CHARLIE W. OTTINGER, a/k/a CHARLES W. OTTINGER, BETTY OTTINGER, GINA OTTINGER a/k/a GINA O. WILLIAMSON and VALERIE OTTINGER, will be referred to in this brief collectively as the "OTTINGERS". The Petitioner, P. DEWITT CASON, as Clerk of the Circuit Court of Columbia County, Florida, will be referred to in this brief as "P. DEWITT CASON". The Petitioner, THE SCHOOL BOARD OF COLUMBIA COUNTY, will be referred to in this brief as the "SCHOOL BOARD". P. DEWITT CASON, the OTTINGERS and the SCHOOL BOARD, will be referred to in this brief collectively as the "Petitioners". The Respondent, STATE, DEPARTMENT OF MANAGEMENT SERVICES, will be referred to in this brief as the "STATE." Citations to the record herein shall be made to the appropriate volume and page number as follows: (R, V- __, ____). Citations to the appendix of this brief shall be made as follows: (Appendix at ___)

STATEMENT OF THE CASE AND FACTS

This action concerns certain real property (hereinafter the "Property") in Columbia County, Florida which has been designated parcel number 34-3S-18-10339-002 by the Columbia County, Property Appraiser (hereinafter the "Property Appraiser.") (R, V-I, 1-2), (R, V-I, 58) The record title to the Property is held in the name of Florida Correctional Finance Corporation, (hereinafter the "Corporation") a private corporation. (R, V-I, 1-2), (R, V-I, 58-59) The STATE leases the Property from the Corporation and operates a penal facility for youthful offenders on the Property. (R, V-I, 1-3)

The Property Appraiser determined that the Property was assessable for ad valorem taxation purposes and placed it on the tax rolls for the 1996 tax year and all subsequent tax years. (R, V-I, 59)

No application for ad valorem tax exemption for the Property was filed with the Property Appraiser for the 1996 tax year. (R, V-I, 59) However, for the 1997 tax year, the Corporation filed with the Property Appraiser a request for an exemption from ad valorem taxation, asserting that by virtue of the STATE's lease of the Property, the Property was equitably owned by the STATE and thus entitled to be exempt. (R, V-I, 59)

The Property Appraiser considered the request but, in his professional

judgment, determined that the Property was subject to ad valorem taxation. He therefore denied the request and the Property was placed on the tax roll for the 1997 tax year. (R, V-I, 59-60)

The Columbia County tax roll for the tax year 1996 was certified for collection under section 193.122(2), Florida Statutes, on October 4, 1996. (R, V-I, 60) The Columbia County tax roll for the tax year 1997 was certified for collection under section 193.122(2), Florida Statutes, on October 3, 1997. (R, V-I, 60) No petition contesting the assessment of the Property was filed with the Columbia County Value Adjustment Board for the 1996 or the 1997 tax years. (R, V-I, 60)

On May 28, 1997, the Columbia County Tax Collector (hereinafter the "Tax Collector") sold tax certificate No. 1997/ 1828.000 with a face amount of $235.30 (hereinafter the "1997 Tax Certificate") for the taxes due on the Property for the 1996 tax year. (R, V-I, 46) On May 28, 1998, the Tax Collector sold tax certificate No. 1998/ 1831.000 with a face amount of $132,313.84 (hereinafter the "1998 Tax Certificate") for the taxes due on the Property for the 1997 tax year. (R, V-I, 46-47) The 1998 Tax Certificate was sold to the OTTINGERS. (R, V-I, 47)

On April 26, 2000, the OTTINGERS made application for tax deed to the

Tax Collector based on the 1998 Tax Certificate. At that time the OTTINGERS redeemed the 1997 Tax Certificate. The application was certified by the Tax Collector to the Columbia County Clerk of the Court on May 5, 2000. (R, V-I, 47)

On July 17, 2000, this action was commenced by the STATE (R, V-I, 1) which, although not the legal title holder to the Property, asserted that it was the equitable owner of the Property by reason of its lease of the Property from the Corporation. (R, V-I, 1-3) On July 28, 2000, the trial court issued a temporary injunction which prohibited the tax deed sale. (R, V-I, 7-8)

On July 16, 2004, the OTTINGERS filed a motion for summary judgment on the grounds that the court lacked jurisdiction pursuant to section 194.171(2), Florida Statutes, the statutory provision which governs the timing of challenges to contest tax assessments, and section 194.171(6), Florida Statutes, which provides that the requirements of section 194.171(2), Florida Statutes, must be met in order for a court to have jurisdiction over a tax assessment case. (R, V-I, 48-57) After hearing, the trial court granted the OTTINGER's motion for summary judgment and on September 13, 2004, entered Final Summary Judgment against the STATE for lack of jurisdiction. (R, V-I, 104-110) The STATE timely served a motion for rehearing which asked the trial court to reconsider its Final Summary Judgment. (R, V-I, 140-142) The trial court denied the STATE's motion for rehearing by

written order filed on October 13, 2004. (R, V-I, 160)

The STATE timely filed a notice of appeal to the District Court of Appeal of the State of Florida, First District on October 22, 2004. (R, V-I, 172-181) The District Court considered this case and issued its opinion on August 4, 2005, reversing the Final Summary Judgment, but certifying the following question of great public importance to this Court.

> DO THE JURISDICTIONAL NON-CLAIM PROVISIONS OF SECTION 194.171, FLORIDA STATUES, APPLY TO BAR A CLAIM OF THE STATE THAT ASSERTS AN ASSESSMENT IS VOID BECAUSE IT WAS MADE ON PROPERTY IMMUNE FROM AD VALOREM TAXATION?

(Appendix at 1-9) The District Court's opinion is reported at *State, Department of Management Services v. Cason ex rel. Columbia County,* 909 So.2d 378 (Fla. 1st DCA 2005)

The Petitioners timely filed a notice to invoke the discretionary jurisdiction of this Court on August 17, 2005, and this appeal ensued.

SUMMARY OF ARGUMENT

It must be presumed that when the Legislature enacted chapter 83-204, Laws of Florida, (codified at section 194.171(6), Florida Statutes) which made the provisions of section 194.171(2), Florida Statutes, jurisdictional, it intended to make section 194.171(2), Florida Statutes, apply to untimely actions which might be brought by the STATE. Prior to the enactment of chapter 83-204, Laws of Florida, the Legislature had enacted section 95.011, Florida Statutes, which provides that the STATE will be subject to the same statutory time limits for bringing civil actions as any other litigant. The Legislature is presumed to be aware of all existing statutes concerning a subject upon which it chooses to legislate. Therefore the Legislature must be presumed to have been aware of section 95.011, Florida Statutes, when it enacted chapter 83-204, Laws of Florida, and presumed to realize that by not specifically excepting the STATE from the operation of the non-claim statute that the STATE would be subject to its time limitations.

Furthermore, prior to the enactment of chapter 83-204, Laws of Florida, this court had decided *Lake Worth Towers v. Gerstung*, 262 So.2d 1 (Fla. 1972), which made challenges to tax assessments based on the STATE's sovereign immunity subject to general statutes of limitations. The Legislature is presumed to be

familiar with all opinions of this court which deal with judicial decisions concerning the subject upon which it chooses to legislate. Therefore the Legislature must be presumed to have been aware that this court had already determined that general statutes of limitations would bar tax challenges based upon sovereign immunity and presumed to realize that by not specifically excepting the STATE from the operation of section 194.171(2), Florida Statutes, that the STATE would be subject to its time limitations.

Additionally, the use of the term "taxpayer" in the statute governing challenges to tax assessments is not an indication of legislative intent to exclude the STATE from the operation of the statute. The term "taxpayer" is statutorily defined to mean the person or other legal entity in whose name property is assessed. Further, the Legislature has mandated that all property is to be assessed regardless of whether such property is taxable. Therefore, the STATE is necessarily a "taxpayer" in every county in Florida where it owns property. The use of the term "taxpayer" in the statutes governing challenges to tax assessments cannot be viewed as evidence of legislative intent regarding the applicability of these statutes to the STATE.

Moreover, this Court's opinions in *Markham v. Neptune*, 527 So.2d 814 (Fla. 1988) and *Ward v. Brown*, 894 So.2d 811 (Fla. 2004) must be read to make

section 194.171(2), Florida Statutes, applicable to untimely actions challenging tax assessments which might be brought by the STATE. In *Markam,* this Court specifically considered and rejected the void-voidable analysis which was employed in *Lake Worth*, and ruled that even challenges to allegedly void assessments will be barred unless brought within the 60 day time limit set out in the non-claim statute. The Court in *Lake Worth,* specifically included within the term "void assessment" assessments which were improper because of sovereign immunity. As this Court does not overrule itself *sub silentio,* and *Lake Worth,* has never explicitly been overruled, *Markam,* must be read to apply to challenges to assessments which are void due to the STATE's sovereign immunity. As *Ward,* was based upon *Markam,* it must also be deemed to be applicable to sovereign immunity challenges.

This lack of special treatment for the STATE in challenging tax assessments which are allegedly void based upon the STATE's sovereign immunity is consistent with this court's long standing treatment of the STATE as set out in *Trustees of Internal Improvement Trust Fund v. Bass,* 67 So.2d 433 (Fla. 1953). In *Bass,* this court held that the STATE was equitably estopped from bringing an action to invalidate an erroneously issued tax deed because the STATE had waited to long to bring its action. As a result, the STATE was divested of its interest in

real property under common law equitable defenses and without the need of any affirmative act by the Legislature whatsoever.

Also, Florida courts have generally interpreted statutory non-claim periods in other areas of the law, such as probate, to apply to the STATE just as any other litigant.

Finally, the effect of the non-claim statute on Federal property is not an issue because the Federal courts have already determined that the United States is not subject to this non-claim statute in challenging assessments based on the sovereign immunity of the United States.

ARGUMENT

Jurisdiction.

This Court has discretionary jurisdiction to review the decision of the District Court herein because such decision passes upon a question certified by the District Court to be of great public importance. Art. V, § (3)(b)(3), Fla.Const., Fla.R.App.P. 9.030(a)(2)(A)(v).

Standard of Review.

The Final Summary Judgment of the trial court is to be reviewed under the *de novo* standard. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000)

I.

THE JURISDICTIONAL NON-CLAIM PROVISIONS OF SECTION 194.171, FLORIDA STATUES, APPLY TO THE STATE AND WILL BAR AN UNTIMELY CLAIM BY THE STATE TO INVALIDATE A TAX ASSESSMENT ON STATE PROPERTY.

The District Court has certified the following question to this Court:

> DO THE JURISDICTIONAL NON-CLAIM PROVISIONS OF SECTION 194.171, FLORIDA STATUES, APPLY TO BAR A CLAIM OF THE STATE THAT ASSERTS AN ASSESSMENT IS VOID BECAUSE IT WAS MADE ON PROPERTY IMMUNE FROM AD VALOREM TAXATION?

Section 194.171(2), Florida Statutes, provides as follows:

> No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the value adjustment board if a petition contesting the assessment had not received final action by the value adjustment board prior to extension of the roll under s. 197.323

§ 194.171(2), Fla. Stat. This statute is commonly referred to as a "non-claim" statute.

The time limits set forth in Section 194.171(2), Florida Statutes, are jurisdictional:

> The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

§ 194.171(6), Fla. Stat. (emphasis supplied)

Neither the District Court below nor the STATE has asserted that the language of the above statutes is ambiguous, unclear or otherwise in need of statutory construction by the Court. This concession would ordinarily resolve the issue.

> In construing a statute we are to give effect to the Legislature's intent. *See State v. J.M.*, 824 So.2d 105, 109 (Fla.2002). In attempting to discern legislative intent, we first look to the actual language used in the statute. *Joshua v. City of Gainesville,* 768 So.2d 432, 435 (Fla.2000); *accord BellSouth Telecomms., Inc. v. Meeks,* 863 So.2d 287, 289 (Fla.2003). When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative

> intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs,* 820 So.2d 297, 303 (Fla.2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. *See State v. Burris,* 875 So.2d 408, 410 (Fla.2004). When the statutory language is clear, "courts have no occasion to resort to rules of construction--they must read the statute as written, **for to do otherwise would constitute an abrogation of legislative power**." *Nicoll v. Baker,* 668 So.2d 989, 990-91 (Fla.1996).

Daniels v. Florida Dep't of Health, 898 So.2d 61, 64-65 (Fla. 2005) (emphasis supplied)

Under this Court's ruling in *Daniels,* courts are bound to follow the plain language of the statute unless such plain language leads to an "unreasonable" result or a result "clearly contrary to legislative intent." *Daniels,* 898 So.2d at 64. Therefore the District Court's failure to enforce the statute as written can only be upheld if the plain and ordinary meaning of the statute would lead to an "unreasonable" result or a result "clearly contrary to legislative intent."

In the instant case the District Court chose not to follow the plain language of the statute for the following reasons:

1. It did not believe that the Legislature intended to include actions based upon the STATE's sovereign immunity within those actions barred by the non-claim statute if untimely. (Appendix at 7-8)

2. It did not believe that this court intended to include the STATE within those person covered under *Markham* and *Ward*. (Appendix at 6)

Respectfully, the OTTINGERS assert that the District Court was in error and that allowing the STATE to be bound by section 194.171(2), Florida Statutes, is neither "unreasonable" nor "clearly contrary to legislative intent" for the reasons set forth below.

A. When The Legislature Enacted Chapter 83-204, Laws Of Florida, Which Made The Provisions Of Section 194.171(2), Florida Statutes, Jurisdictional, It Must Be Presumed To Have Intended To Deprive The Courts Of Jurisdiction To Consider Untimely Actions Which Might Be Brought By The STATE.

The District Court held that it did not "find any provision in section 194.171, or elsewhere, reasonably implying that the nonclaim bar should be applied to actions brought by the sovereign on an assertion of immunity." (Appendix at 7) The District Court further stated:

> Other than section 194.171, a statute, which, like one of limitation, is procedural in nature, not substantive, in that it affects the procedure whereby one may assert a right of action, *cf. Hoagland v. Railway Express Agency*, 75 So.2d 822, 827 (Fla.1954), we have been cited to no statute, substantive or procedural, nor have we found any that subjects property of the state used for a governmental purpose to ad valorem taxation. In the absence of a clear expression of the legislature to such effect, we are of the opinion that section 194.171 was not designed to bar a claim by the state contesting an assessment because of the property's immunity from taxation.

Appendix at 8. (emphasis supplied)

§ 95.011, Fla. Stat.

In order to properly address the concerns of the District Court we must first look to the common law. At the common law, statutory time limits for commencing civil actions did not run against the STATE.

> The common law has long accepted the principle '*nullum tempus occurrit regi*'-neither laches nor statutes of limitations will bar the

sovereign.

State of Kansas v. State of Colorado, 514 U.S. 673, 687 (1995)

Previously, the common law rule of *nullum tempus occurrit regi* was codified by the Legislature, with some modifications, as follows:

> This chapter shall not apply to any action by this state, or by any officer or persons in behalf of this state, or to any action by or on behalf of the board of trustees of the internal improvement trust fund, or the seminary or school fund, or the state board of education, or any county or municipal corporation, or school district within this state, or with respect to any moneys or property held or collected by any officer or trustee or his sureties.

§ 95.02, Fla. Stat. (1973)

> The provisions of existing law, whether provided for in this chapter or any other chapter, whereby an action is barred if not commenced within twenty years, shall apply to any action by the state, or any of its agencies, or by any officer or persons on behalf of the state or any of its agencies, or by any county or municipal corporation of the state.

§ 95.021, Fla. Stat. (1973)

However, this codified common law rule was abandoned by the Legislature when it enacted chapter 74-382, Laws of Florida. In this act, the Legislature repealed sections 95.02, and 95.021, Florida Statutes. Ch. 74-382, § 26, at 1219, Laws of Fla. In this same act, the Legislature created section 95.011, Florida Statutes (Supp. 1974). Ch. 74-382, § 1, at 1208, Laws of Fla.

Section 95.011, Florida Statutes, provides as follows:

> A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or[1] any other governmental authority, shall be barred unless begun within the time prescribed in this chapter **or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere**.

§ 95.011, Fla. Stat. (emphasis supplied)

The intended effect of chapter 74-382, Laws of Florida, was to remove the special treatment of the STATE with respect to statutes of limitation and place the STATE on an "equal footing" with other litigants in this regard. Legislative staff summarized this feature of chapter 74-382, Laws of Florida, as follows:

> All special limitation periods for state and local government are eliminated, thereby putting government on an equal footing with everyone else.

Memorandum from C. McFerrin Smith to Senator Tom Johnson dated April 30, 1974. (Appendix at 10)[2] (emphasis supplied)

> The legislature has made the statute of limitations applicable to the state. s 95.011, Fla. Stat. (1977)

Askew v. Sonson, 409 So.2d 7, 13 (Fla. 1982)

Under the plain wording of section 95.011, Florida Statutes, the Legislature

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[1]This "or" was changed from "and", by Chapter 77-174, Laws of Florida Otherwise this statute has not been changed since its creation in 1974.

[2]"Florida appellate courts may consider legislative staff summaries in construing statutes." *Ellsworth v. Insurance Company of North America*, 508 So.2d

made chapter 95, Florida Statutes, and all other statutory time limitations for the bringing of civil actions applicable to the STATE. "A civil action ... including one brought by the state, ... shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere." § 95.011, Fla. Stat. (emphasis added). Therefore, by repealing sections 95.02, and 95.021, Florida Statutes, and enacting section 95.011, Florida Statutes, the Legislature has expressly consented to section 194.171(2), Florida Statutes, applying to the STATE and placing the STATE on an "equal footing" with other litigants.

When the Legislature made the non-claim statute jurisdictional by enacting chapter 83-204, Laws of Florida, in 1983, section 95.011, Florida Statutes, already existed. Of course, the Legislature must be deemed to be aware of all existing statutes at the time it enacts a new statute:

> [C]ourts must presume that the Legislature passes statutes with the knowledge of prior existing statutes and ... [t]here must be a hopeless inconsistency before rules of construction are applied to defeat the plain language of one of the statutes.

Knowles v. Beverly Enterprises, 898 So.2d 1, 9 (Fla. 2004)

As the Legislature was aware that it had made the STATE subject to all general statutory time limits for bringing civil actions, and the Legislature did not

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395, 398 (Fla. 1st DCA 1987)

provide any exception for the STATE within section 194.171, Florida Statutes, it must be presumed that the Legislature intended to include the STATE within the purview of the time limits set out in section 194.171(2), Florida Statutes

The District Court's concerns that it did not "find any provision in section 194.171, or elsewhere, reasonably implying that the nonclaim bar should be applied to actions brought by the sovereign ..." (Appendix at 7), were unfounded because section 95.011, Florida Statutes, does more than "imply" that section 194.171, Florida Statutes, will apply to the sovereign; it explicitly requires that section 194.171, Florida Statutes, apply to the sovereign.

Lake Worth Towers v. Gerstung.

Prior to the Legislature making the non-claim statute jurisdictional by enacting chapter 83-204, Laws of Florida, this Court had already decided *Lake Worth Towers v. Gerstung,* 262 So.2d 1 (Fla. 1972). *Lake Worth,* provided that tax assessments made in violation of the STATE's sovereign immunity fall within the definition of "void assessment" and challenges to void assessments would be barred unless brought within the time provided in certain general statutes of limitations. In *Lake Worth,* this Court held:

> [W]e deem it important to reflect in this opinion 'deadlines' we find in the law which limit the institution of suits to vacate an illegal or absolutely void tax assessment against property that is not taxable

> either because of **sovereign immunity** or its exempt status. Definitions of these types of properties appear in Chapter 196, Florida Statutes. Such properties are in a different category from properties that are subject to taxation. Tax assessments against the latter will not be held invalid, either in whole or in part, unless suit is instituted within sixty days from the time the assessment roll is certified as provided by law. F.S. Section 194.151, F.S.A. But **even as to property not subject to taxation at all because of its immunity** or exempt status it is our view that if the tax assessed is paid, suit must be brought by the taxpayer against the county within one year after such payment to recover the amount paid pursuant to F.S. Section 95.08, F.S.A.; **or if tax certificates or tax deeds for such taxes are issued thereon, suit to cancel the same must be brought within the time allowed by F.S. Chapter 197, F.S.A. for such purpose**. The policy involved in such limitations and laches is that there must be a time when tax processes and procedures that have been completed should not be judicially disturbed; for examples, where tax funds received have been allocated or expended or intervening rights have accrued from tax delinquency enforcement proceedings prior to any authorized claim or suit being filed or instituted by the taxpayer.

Lake Worth, 262 So.2d at 4-5. (emphasis supplied)

It should be noted that the statutes of limitations which *Lake Worth,* ruled were applicable to the STATE, were general in nature and made no special mention of the STATE. These statutes provided:

> Every claim against any county shall be presented to the board of county commissioners within one year from the time said claim shall become due, and shall be barred if not so presented.

§ 95.08, Fla. Stat. (1971)

> When the holder of a tax deed goes into actual possession, occupancy and use of the land embraced in such tax deed, and so continues for a

> period of four years, no suit for the recovery of the possession thereof shall be brought by a former owner or other adverse claimant, unless such suit be commenced within, or prior to, the said period of four years after the holder under such tax deed has entered into the actual possession, occupancy and use of the land embraced in said tax deed; and the holder of such tax deed, where the said real estate is in adverse actual possession, occupancy and use of any person, shall not be entitled to recover possession of such real estate under such tax deed, unless suit for such recovery shall be brought within four years from the date of such tax deed; provided, however, that infants, persons of unsound mind or under guardianship or imprisonment may commence suit or proceedings under this section within three years after the recovery or discontinuance of such disability.

§ 197.725, Fla. Stat. (1971)

Yet, this Court found that these general statutes would bar actions by the STATE to recover money paid or land taken by virtue of an assessment which is void due to the STATE's sovereign immunity from taxation. *Lake Worth*, 262 So.2d at 4-5. Thus, at the time the Legislature made the non-claim statute jurisdictional by enacting chapter 83-204, Laws of Florida, this court had already determined that claims by the STATE to invalidate assessments or tax deeds could and would be barred by statutes of limitations which were general in nature and did not specifically reference the STATE.

The Legislature must be presumed to be familiar with all rulings of this Court on a subject upon which it chooses to legislate.

It is an accepted rule of statutory construction that the legislature is

> presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute.

Ford v. Wainright, 451 So.2d 471, 475 (1984)

As the Legislature was aware that this Court had ruled that the STATE was subject to general statutory time limits for bringing civil actions concerning tax assessments, the Legislature must have realized that the STATE would be subject to the time limits it created in section 194.171(2), Florida Statutes. Since the Legislature did not provide an exception for the STATE, it must be presumed that the Legislature intended to include the STATE within the purview of section 194.171(2), Florida Statutes

The term "taxpayer" includes the STATE.

In its opinion, the District Court cites as one of the reasons that it believes the Legislature did not intend to include the STATE within the entities subject to the statutory scheme for challenging tax assessments because the statutes refer to challenges by as "taxpayer."

> Nor do we find any provision in section 194.171, or elsewhere, reasonably implying that the nonclaim bar should be applied to actions brought by the sovereign on an assertion of immunity. For example, in subsection (3) of the statute, the taxpayer, as a precondition to filing an action, is required to pay an amount which he or she admits to owing. In section 194.181(1)(a), the taxpayer is in part identified as the party contesting the assessment of the tax. Because the legislature is presumed to be aware of prior existing laws

> and the constructions placed upon them, it is inconceivable to us that the legislature, at the time it enacted the jurisdictional nonclaim provision of section 194.171(6), by chapter 83-204, Laws of Florida, intended to include within **the classification of taxpayer** the state of Florida as a party contesting as void the assessment of lands by reason of the property's immune status.

Appendix at 7. (emphasis supplied)

In fact, the Legislature has specifically included the STATE within the definition of the term "taxpayer." At the time the Legislature made the non-claim statute jurisdictional by enacting chapter 83-204, Laws of Florida, the term "taxpayer" had a statutory definition.

> "Taxpayer" means the person or other legal entity in whose name property is assessed, including an agent of a timeshare period titleholder.

§ 192.001(13), Fla. Stat. (Supp. 1982)[3]

Thus, to be included within the term "taxpayer", an entity merely needs to have property assessed in its name. There is no requirement that a "taxpayer" actually pay taxes. Furthermore, at the time of the enactment of chapter 83-204, Laws of Florida, the STATE was required to be a "taxpayer" because the Legislature had statutorily mandated that property appraisers assess all properties, regardless of whether such property was taxable:

> The property appraiser shall assess all property located within his

[3]This definition remains unchanged to the present.

> county, except inventory, whether such property is taxable, wholly or partially exempt, or subject to classification reflecting a value less than its just value at its present highest and best use. Extension on the tax rolls shall be made according to regulation promulgated by the department in order properly to reflect the general law. Streets, roads, and highways which have been dedicated to or otherwise acquired by a municipality, a county, or a state agency may be assessed, but need not be.

§ 192.011, Fla. Stat. (1981)[4] (emphasis supplied)

See also, Fla.Admin.Code R. 12D-8.001 (this rule of the Florida Department of Revenue states that all real property is to be assessed regardless of taxable status and gives a list of all the exceptions to this rule. STATE owned property is not listed as an exception).

All governmental and other immune and exempt entities which own real property in a county are "taxpayers," because the property appraiser is required to assess the real property in their names. Therefore, the term "taxpayer" is required by statute to include the STATE and other immune or exempt entities.

Even if an entity were required to pay taxes to be a "taxpayer" the STATE would not automatically be excluded from the definition of "taxpayer." The District Court recognized that the properties of the STATE may be subject to taxation upon the consent of the Legislature. (Appendix at 8); *Dickinson v. State,* 325 So.2d 1, 3 (Fla. 1975).

Moreover, at the time of the enactment of chapter 83-204, Laws of Florida, the Legislature had recognized that the properties of the STATE may be subject to taxation, and shown such recognition by providing a statutory scheme for giving notice to the STATE when STATE properties were subject to taxation.

> Whenever lands or other property of the state or of any agency thereof are situated within any district, subdistrict or governmental unit for the purpose of taxation, which said lands or any of them or other property, are or shall be subject to special assessments or taxes, the tax collector or other tax collecting agency having authority to collect such taxes or special assessments shall, upon such taxes or special assessments becoming legally due and payable, mail to the state agency or department holding such land or other property, or if held by the state, then to the Board of Trustees of the Internal Improvement Trust Fund at Tallahassee, a notice and make notation under the same date of such notice on the tax roll, which said notice shall contain a description of the lands or other property owned by the state or its agency upon which taxes or special assessments have been levied and are collectible, and the amount of such special assessments or taxes, and unless such notation of notice on the tax roll shall have been made, any nonpayment by the said state or its agency of taxes or special assessments shall not constitute a delinquency or be the basis on which the said lands or other property may be sold for the nonpayment of such taxes or special assessments.

§ 196.31, Fla. Stat. (1981)[5]

Both this Court and the Legislature have recognized that under certain circumstances the STATE may be required to pay ad valorem taxes. Therefore, the use of the term "taxpayer" cannot exclude the STATE.

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[4]This statute remains unchanged to the present.

B. This Court's Opinions In *Markham v. Neptune,* and *Ward v. Brown,* Must Be Read To Deprive The Courts Of Jurisdiction To Consider Untimely Actions Which Might Be Brought By The STATE.

In its opinion below the District Court held:

> [W]e cannot believe that the court intended for the rule it embraced in *Ward* and *Markham* to pertain to property of the federal or state government, which has long been recognized as immune from taxation.

Appendix at 6.

The District Court further held:

> The statute, characterized in *Markham* as "a jurisdictional statute of nonclaim," was held to exclude even a challenge to a tax assessment as void if the challenge was filed over 60 days following the assessment. In reaching its decision, the *Markham* court abandoned the void/voidable analysis previously employed by it in *Lake Worth Towers v. Gerstung,* 262 So.2d 1 (Fla.1972), and fashioned a broad rule of preclusion without explicitly acknowledging any exception.

Appendix at 5.

> [W]e cannot believe that the court, in abandoning the void/voidable dichotomy previously employed, intended for its interpretation of section 194.171 to apply to property owned by the state or its subdivisions and used by them for a governmental purpose.

Appendix at 6-7.

Respectfully, this court's opinions in *Markham v. Neptune,* 527 So.2d 814 (Fla. 1988) and *Ward v. Brown,* 894 So.2d 811 (Fla. 2004) must be read as

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[5]This statute remains unchanged to the present.

encompassing actions brought by the STATE because this Court had previously found general statutes of limitations to be applicable to actions of the STATE contesting tax assessments due to sovereign immunity.

Lake Worth Towers v. Gerstung.

In *Markam,* this Court recognized that the Legislature had chosen to abandon the void/voidable analysis this Court had employed in *Lake Worth Towers v. Gerstung*, 262 So.2d 1 (Fla. 1972), thereby making both challenges to both void and voidable assessments as set out in *Lake Worth*, subject to the 60 day time limit mandated by section 194.171(2), Florida Statutes. *Markam*, 527 So.2d at 815-816. In *Lake Worth,* this Court explicitly held that the term "void assessment" included assessments made in violation of the STATE's sovereign immunity. *Lake Worth*, 262 So.2d at 4-5.

Thus, at the time *Markam,* was issued, this Court had already determined that tax assessments on STATE property, in violation of the STATE's sovereign immunity would be included in the term "void assessments". Of course, the Florida Supreme Court does not recede from its prior holdings *sub silentio*. *Puryear v. State,* 810 So.2d 901, 905-906 (Fla. 2002) As this Court in *Markam,* did not recede from this position, *Markam,* should be read to apply with equal force to the STATE and private litigants.

Trustees of Internal Improvement Trust Fund v. Bass

As early as 1953 this Court ruled in *Trustees of Internal Improvement Trust Fund v. Bass,* 67 So.2d 433 (Fla. 1953) that the STATE could be divested of its real property due to an improper ad valorem tax assessment.

In *Bass,* swamp and overflow lands were erroneously placed on the tax rolls. The lands were sold for delinquent taxes in 1908. The Trustees of the Internal Improvement Fund brought an ejectment proceeding against the grantee of the tax deed holder. The trial court dismissed the action and this Court affirmed holding:

> In its inception the tax assessment was not authorized by law and had it been moved against promptly might have been set aside, but the present owner has been in possession more than eleven years under a deed issued by the State. Under such a state of facts, even if his title is not good by adverse possession, the State is estopped to question it.

Bass, 67 So.2d at 433-434.

Thus any claim by the STATE that the sovereign may not be divested of its real property through the ad valorem tax process must fail because this has not been the law for over 52 years. Furthermore, as the ruling in *Bass,* is not based on a statute of limitations or other act of the Legislature, it must be viewed as implicitly recognizing that there is no general rule that the STATE may only be divested of its property with its consent.

Non-claim statutes in other fields of law are generally construed by Florida courts as applying to actions brought by the STATE.

In areas of the law other than taxation Florida court have generally applied non-claim statutes as applying to the STATE.

In probate proceedings Florida courts have long recognized that non-claim statutes bar actions by the STATE just as they do any other litigant.

> The question here presented for our decision was squarely presented to the Second District Court of Appeal in Smith's Estate.[6] In an able opinion by Judge Shannon the foregoing decisions were carefully analyzed and in conclusion it was held that the statute of non-claim does apply to claims held by the State of Florida in its sovereign capacity, and that if such claims are not filed in the estate within the time limited by the statute they are barred.

In Re: Moore's Estate, 145 So.2d 293, 295 (Fla. 1st DCA 1962) *cert. den.*, 153 So.2d 819 (Fla.1963)

> [T]he Statute of Non-claim bars those liens held by the State in its sovereign capacity, *In Re: Moore's Estate,* 145 So.2d 293 (Fla. 1st DCA 1962), *cert. denied,* 153 So.2d 819 (Fla.1963); as well as against state agencies, *In Re: Smith's Estate,* 132 So.2d 426 (Fla. 2nd DCA 1961).

AHCA v. Estate of Johnson, 743 So.2d 83, 89 (Fla. 3d DCA 1999); (Nesbitt, J., dissenting and concurring)

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[6] *In Re: Smith's Estate,* 132 So.2d 426 (Fla. 2d DCA 1961)

C. The Court's Decision Herein Will Not Affect Any Property Or Property Right Of The Untied States Because The Federal Courts Have Ruled That The United States Is Not Bound By This Non-Claim Statute.

The District Court expressed concern about the possibility that the rights of the United States might be affected depending upon the outcome of this action. In commenting on this Court's opinion in *Markham* and *Ward* the lower court said:

> If the above statements are required to be literally applied, then the government of the United States would be barred from contesting a patently illegal and void assessment on property owned by it and situated in this state by reason of its failure to challenge an assessment within the required 60 days. Given the far-reaching implications of the language used, we cannot believe that the court intended for the rule it embraced in *Ward* and *Markham* to pertain to property of the federal or state government, which has long been recognized as immune from taxation.

Appendix at 6.

However, the United States Court of Appeals for the Eleventh Circuit has ruled that the 60 day limitations period does not bar actions based upon Federal immunity from taxation because the cause of action to set aside such assessment is not a state cause of action.

> Finally, the defendants contend that while the general rule is that the United States is not subject to statutes of limitations which would otherwise bar actions at the common law, the rule is not applicable when the statute which creates the cause of action also creates time limitations on enforcing the cause of action; citing *United States v. California* 655 F.2d 914 (9th Cir.1980); *Denver &*

> *Rio Grand R. Co. v. United States*, 241 F. 614 (8th Cir.1917); *United States v. Magnolia Motor and Logging Co.*, 208 F.Supp. 63 (N.D.Cal.1962). The defendants point out that the Florida Statute which creates the right to contest a tax assessment, also contains a jurisdictional statute of nonclaim providing that no such actions may be considered by a court more than 60 days following certification of that year's tax rolls for collection. *See Coe v. I.T.T. Community Development Corp.*, 362 So.2d 8 (Fla.1978). Here the complaint on its face shows that it could not possibly have been filed within sixty days of certification of the 1979 through 1980 tax rolls for collections and thus its nonclaim statute bars this action.
>
> This argument presupposes that the United States must look to the state law for the creation of its cause of action. But the cause of action asserted by the government is not a state law judicial remedy or cause of action but is a federal common law cause of action in quasi-contract for money had and received. In these circumstances the state statute has no application to this action.

U.S. v. Broward County, 901 F.2d 1005, 1008-1009 (11th Cir. 1990), *overruled on other grounds, U.S. v. California*, 507 U.S. 746 (1993)

Under *Broward County*, the United States will not be affected by the outcome of this case and therefore the concerns of the District Court in this regard are unfounded.

CONCLUSION

The certified question should be answered in the affirmative, the decision of the District Court of Appeal should be quashed and the trial court's Final Summary Judgment should be reinstated in all respects.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2).

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