

IN THE SUPREME COURT OF FLORIDA

Case No. SC01-663
Lower Tribunal No. 5D99-3165 and 5D99-3168

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

Petitioners,

v.

WAL-MART STORES, INC.,

Respondent.

—
BRIEF OF AMICUS CURIAE
FLORIDA CHAMBER OF COMMERCE, INC.,
IN SUPPORT OF THE RESPONDENT

—
On Discretionary Review
From the District Court of Appeal, Fifth District

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STATEMENT OF INTEREST

Amicus Curiae Florida Chamber of Commerce, Inc. (Chamber), is a corporation organized and existing under the laws of the State of Florida. The Chamber has approximately 6,000 members, including corporations, partnerships, sole proprietorships and other business entities that are regulated by and pay taxes to state, regional and local governments.

The Chamber's mission is "to be the leader in the formulation and advocacy of sound public policy for Florida business." Among the Chamber's specific concerns in carrying out its mission is to make sure that state and local governments appropriately and consistently apply the tax laws of this State. Because household goods and personal effects are exempt from the tangible personal property tax, this tax in Florida is paid by the business sector, including Chamber members. Thus, the issue of whether sales tax is considered in determining the "just value" of tangible personal property for property tax purposes is vitally important to the Chamber and its members.

Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, the Chamber has secured the consent of all parties to appear as amicus curiae in this proceeding on behalf of the Respondent, Wal-Mart Stores, Inc., in order to urge

the Court to affirm the decision of the Fifth District Court of Appeal. In this brief, the Chamber will address Point II of the Appellants' initial brief.

STATEMENT OF THE CASE AND OF THE FACTS

The Chamber adopts the Statement of the Case and of the Facts set forth in the Answer Brief of the Respondent Wal-Mart Stores, Inc.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly ruled that, pursuant to Section 193.011(1) and (8), Florida Statutes, sales tax is a usual and reasonable cost of sale that must be excluded when considering the just value of tangible personal property.

Sales tax monies are funds of the State of Florida at the moment of collection and are thus never “received” by the seller as “net proceeds” of the sale of property. Further, the imposition of sales tax cannot be “bargained-for” or negotiated by the buyer or seller, but is mandated by statute. Sales tax is an extraneous cost that adds nothing to the value of the property and thus, cannot be considered in establishing just value, pursuant to Section 193.011.

Not only does the statute exclude sales tax by its terms, there is a sound policy basis for doing so. Specifically, because of differing rates, statutory exemptions and exclusions from the tax, the inclusion of sales tax when determining the just value of an item of tangible personal property would lead to disparate treatment of similarly situated taxpayers, contrary to the constitutional and statutory mandates on the valuation of property for ad valorem purposes.

ARGUMENT

II. SALES TAX IS AN EXTRANEIOUS COST OF SALE THAT MUST BE EXCLUDED WHEN DETERMINING JUST VALUE OF TANGIBLE PERSONAL PROPERTY UNDER SECTION 193.011, FLORIDA STATUTES.

A. SALES TAX IS NOT RECEIVED BY THE SELLER

The provisions of Section 193.011, Florida Statutes, by their plain reading, compel the conclusion that sales tax is not to be included in the price or cost of the property to be valued. Subsection (1), requires the property appraiser to consider, when determining just value:

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

Subsection (8), requires the property appraiser also to consider:

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

furnishings or other items of personal property.
(Emphasis added.)

Both provisions focus on the amount paid to or received by a seller of tangible personal property.¹

The law also is clear that sales tax is not paid to or received by the seller, except to be held in trust as an agent for the State of Florida. Section 212.15(1), Florida Statutes, states:

The taxes imposed by this chapter shall, except as provided in s.212.06(5)(a)2.e., [for taxes collected for other states] become state funds at the moment of collection and shall for each month be due to the department on the first day of the succeeding month and be delinquent on the 21st day of such month. All returns postmarked after the 20th day of such month are delinquent. (Emphasis added.)

Because sales tax money belongs to the State of Florida at the moment it is paid, it never becomes the property of, and thus is not “received” by, the seller, as contemplated by section 193.011. Sales tax is not a “net proceed” of the sale belonging to the seller, but rather money credited to the account of the State, immediately upon payment. Any attempt by the seller to claim, as its own, sales tax

¹ The Chamber agrees also with Respondent’s argument that sales tax constitutes a “reasonable fee” or “cost of purchase” or “cost of sale” pursuant to §193.011(1) and (8), but it has not re-argued that point in this brief.

collected from the buyer, is also a criminal offense. Section 212.15(2), Florida Statutes, states, in part:

Any person who, with intent to unlawfully deprive or defraud the state of its moneys or the use or benefit thereof, fails to remit taxes collected under this chapter is guilty of theft of state funds, punishable as follows. . . .

Additionally, for some transactions, the seller is relieved of the statutory responsibility to collect and receive sales tax as the agent for the State of Florida, thus the seller never touches these tax monies. For example, any business that buys more than ten million dollars of tangible personal property in a county in one year for use by the business is allowed to present the seller with a direct pay permit in lieu of paying sales tax. The purchaser then accrues tax on the purchase and remits it directly to the State of Florida, with no sales tax ever paid to or received by the seller. See, § 212.183, Fla. Stat. (2001); Fla. Admin. Code R. 12A-1.0911.

B. SALES TAX IS NOT “BARGAINED-FOR” BY THE PARTIES

Further, sales tax is not “bargained-for” by the parties. On page 28 of their Initial Brief, Appellants state:

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. (Emphasis added)

The Chamber agrees with that statement. However, contrary to Appellants' later assertion, sales tax is not part of the "bargained-for" price of any tangible personal property. Rather than being negotiated, sales tax on the sale of tangible personal property is mandatory, imposed by statute, and outside of the control of either the buyer or seller. Section 212.05(1)(a)1.a., Florida Statutes, imposes the tax on each retail sale of tangible personal property in Florida. Further, Section 212.06(3), Florida Statutes, requires sellers to collect the tax. Neither the seller nor the purchaser has any discretion to decide whether sales tax is charged or at what rate it is charged.

Section 212.07(4), Florida Statutes, states:

A dealer engaged in any business taxable under this chapter may not advertise or hold out to the public, in any manner, directly or indirectly, that he or she will absorb all or any part of the tax, or that he or she will relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property or services sold or released or, when added, that it or any part thereof will be refunded either directly or indirectly by any method whatsoever. A person who violates this provision with respect to advertising or refund is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A second or subsequent offense constitutes a misdemeanor of the first degree, punishable as provided in s. 775.08 or s. 775.083.

Any attempt to negotiate and remit sales tax at less than the required rate, would be a violation of the law. Similarly, should the seller “absorb” the tax by including it in the price, as Appellants’ logic suggests is possible, the seller would have committed a criminal offense. Because the imposition and rate of sales tax applied to the purchase of tangible personal property is outside of the control of either the buyer or seller, it cannot be negotiated by them and is therefore not an element of the “bargained-for” price used to arrive at an “estimate of just value.”

**C. SALES TAX IS BOTH EXTRANEOUS AND
EXTERNAL TO THE PURCHASE OF PROPERTY**

The Court in Hausman v. VTSI, 482 So. 2d 428 (5th DCA 1985), rev. denied, 492 So. 2d 1332 (Fla. 1986), recognized that “extraneous costs, which add nothing to just value” must be excluded from a property appraiser’s valuation. Florida sales tax meets the classic definition of an item “extraneous” to the sale of tangible personal property.

Appellants assert, beginning at page 29 of their Initial Brief that: “[i]nclusion 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 Appellants’ argument in support of its assertion is unpersuasive. It can be summarized as follows: Sales tax is excluded

in a market approach to value but not in a cost approach to value because (1) the case of Turner v. Tokai, 767 So. 2d 494 (Fla 2nd DCA 2000), involved a market approach to value; (2) the courts in Wal-mart Stores, Inc. v. Crapo, Case No. 97-CA-4728 (Fla. 8th Cir. Ct., February 26, 2001) and Wal-mart Stores, Inc. v. Todora, 26 F.L.W. D1035 (Fla. 2nd DCA 2001), held, based upon appraisal texts and not Florida law, that sales tax should be included; (3) the Department of Revenue’s instructions to the contrary are not binding; and (4) the Fifth District Court of Appeal was confused about the distinction between “external costs” and “extraneous costs.”²

Admittedly, Tokai involved a market approach to valuation; but Appellants have offered no insight into why (or how) sales tax is excluded from the sales side of the transaction in a market approach, but not from the purchase side of the transaction in a cost approach. While there may be multiple ways to view a single transaction, there remains one transaction. It is illogical to admit that sales tax is extraneous and excluded when using one approach to value that starts from the sales side of the transaction, but argue that sales tax is not extraneous and excluded when using a second approach to value that starts from the purchase side of this same transaction.

²The Chamber has not responded to the Appellants’ second and third arguments, which the Respondent has fully addressed.

The Court also considered the nature of extraneous costs in Oyster Pointe Resort Condominium Assoc. v. Nolte, 524 So. 2d 415 (Fla. 1988), another case involving the market approach to value. In Oyster Pointe, the Court held:

...the legislature intended the phrase “reasonable fees and costs of sale” to include only those fees and costs typically associated with the closing of the sale of real property such as reasonable attorney’s fees, broker’s commissions, appraisal fees, documentary stamp costs, survey costs and title insurance costs. (Emphasis added.)

Appellants have offered no logical explanation for why sales tax on the sale of tangible personal property should not be treated like documentary stamp tax on the sale of real property. Both taxes meet the definition of an extraneous cost imposed by a third party--the State of Florida--and so are required to be excluded from consideration by the property appraiser.

Appellants also suggest that the Fifth District was confused about the distinction between an “external cost” and an “extraneous cost.” Appellants cite no authority for their assertion for any meaningful distinction between these two terms. The Chamber suggests that there is none.

Neither term is defined in the Florida Statutes. Therefore, the Court may refer to a dictionary to ascertain the plain and ordinary meaning of the terms. L.B. v. State, 700 So.2d 370, 372 (Fla. 1997). “Extraneous” has been defined as: “of

external origin; introduced or added from without.” The Oxford English Dictionary, Second Edition, 1989, Clarendon Press, Oxford. “External” meanwhile, has been defined as “situated or lying outside; pertaining to, or connected with the outside or outer portion of anything.” Id. Webster’s defines “extraneous” as “existing on or coming from the outside; not forming an essential or vital part.” Merriam Webster’s Collegiate Dictionary, Tenth Edition, 1999. And, it defines “external” as “capable of being perceived outwardly; having merely the outward appearance of something; superficial; not intrinsic or essential.” Id. Likewise, Roget’s Thesaurus cites “external” as a synonym for “extraneous” and “extraneous” as a synonym for “external.” The New American Roget’s Thesaurus, 1978. The State of Florida’s action to either tax or exempt a transaction, which action neither the buyer nor the seller has any control over, is “of external origin” and therefore not “essential” to the bargained-for price that is the basis for just valuation.

D. THERE IS A SOUND POLICY BASIS UNDERLYING THE STATUTE’S EXCLUSION OF SALES TAX

In addition to the plain language in the statute, there is a sound policy basis for exclusion of sales tax from the cost price leading to an estimate of the just value of tangible personal property. Inclusion of an item of external cost, such as sales tax, in determining the “just value” of property would lead to inequitable results

because, depending on the type of transaction, its location, and the nature of the purchaser, the statutes may not apply the sales tax equally to all potential taxpayers. For example, assume two buyers purchase an identical item of tangible personal property in Florida, on the same date, at the same price (\$5,000), but from different locations of the same retailer in two different counties. County A has only the 6% statewide sales tax, but County B has an additional 1% county surtax, as allowed by Section 212.055, Florida Statutes. Accepting Appellants' argument, the just value of the property in County A would be based upon a \$5,300 historical cost, and the just value of the identical property in County B would be based upon a \$5,350 historical cost. The legislature could not have intended such a result.

Similarly, assume that two hospitals, one for-profit and one not-for-profit, purchase the same \$10,000 computer, in the same county, from the same retailer, on the same date. Assuming it had a consumer certificate of exemption pursuant to Rule 12A-1.038, Florida Administrative Code, the not-for-profit hospital could purchase the computer without paying sales tax. Section 212.08(7), Florida Statutes. Per the Appellants' argument, regardless of the rate in that county, the value of the for-profit hospital's computer would necessarily be at least \$600 higher than the value of the non-profit hospital's computer, solely as a result of the sales tax it paid--unless, of course, the property appraiser in the for-profit hospital's

county elected to use a market approach to value, in which case the sales tax impact could be ignored.

Chapter 212, Florida Statutes, is replete with sales tax exemptions for taxpayers who meet certain criteria. Surely the legislature did not intend that the property purchased by a non-exempt taxpayer has a higher value than that purchased by an exempt taxpayer. For instance, assume that two industrial concerns, in the same business, in the same county, each purchase an identical piece of manufacturing equipment for \$2 million, from the same manufacturer, on the same day. If one of the manufacturers qualifies for the new and expanding business exemption set forth in Section 212.08(5)(b), Florida Statutes, the base upon which its property is valued would be at least \$120,000 less than its competitor, who did not qualify for the exemption. Section 193.011 should not be read to lead to such an inequitable result.

As this Court reasoned in ITT Community Development Corp. v. Seay, 347 So. 2d 1024 (Fla. 1977):

Democratic philosophy mandates that every taxpayer be treated consistently, and that everyone contribute his fair share, no more and no less, to the tax revenues...

The democratic ideology contemplates consistency of treatment. Article VII, Section 4, Florida Constitution, reflects that contemplation...
347 So. 2d at 1028, 1029.

To accept the Appellants' argument that sales tax is properly included when determining the just value of tangible personal property would result in inconsistent treatment of similarly situated taxpayers and violate the stated philosophy and intent of our Constitution.

CONCLUSION

The Fifth District Court of Appeal correctly ruled that sales tax is an extraneous cost that must be excluded when determining the "just value" of tangible personal property. Sales tax is not bargained for in the transaction, is never paid to or received by the seller, other than as an agent of the State, and does not add to the value of the property sold. To include sales tax in the just value determination would lead to inequitable results depending upon the type of tangible personal property purchased or the location or status of the taxpayer purchasing the property.

This Court should affirm the decision of the Fifth District Court of Appeal in this matter.

Respectfully submitted this ___ day of December, 2001.

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CERTIFICATE OF SERVICE

I certify that a copy of this “Brief of Amicus Curiae Florida Chamber of Commerce, Inc., in Support of Respondent” was furnished by United States Mail, postage prepaid, on this ____ day of December, 2001, to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure as the type style utilized is 14-point New Times Roman.

Certified by: _____

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