IN THE SUPREME COURT OF FLORIDA

Alvin Mazourek, as Property Appraiser
of Hernando County,

Petitioner, CASE NO. SC01-663

v.

Wal-Mart Stores, Inc.,

Respondent.

_____/

ON DISCRETIONARY REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT OF FLORIDA

INITIAL BRIEF
OF AMICUS CURIAE JAMES TODORA, AS PROPERTY APPRAISER OF SARASOTA COUNTY, ED CRAPO, AS PROPERTY APPRAISER OF ALACHUA COUNTY, TIMOTHY "PETE" SMITH, AS PROPERTY APPRAISER OF OKALOOSA COUNTY, AND ERVIN HIGGS, AS PROPERTY APPRAISER OF MONROE COUNTY

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopt the Statement of the Case and Facts, as set forth in the Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

Amicus Curiae are four Florida elected Property Appraisers who, like the Petitioner, have historically included sales tax in their calculations of the value of tangible personal property by the cost approach. Two of these Property Appraisers, Jim Todora and Ed Crapo, have litigated this issue in court and had their methodology expressly approved by their respective circuit courts. The current court case involving Jim Todora, the Property Appraiser of Sarasota County, was affirmed by the Second District Court of Appeal. That case, *Wal-Mart Stores, Inc. v. Todora*, Case No. SC01-1130, is currently pending before this Court.

Amicus respectfully request that this Court reverse the decision of the Fifth District Court of Appeal in the instant case. The Fifth District Court of Appeal's decision contradicts generally-accepted appraisal principles that are uniformly applied by the Property Appraisers of this State in determining the just value of tangible personal property. The decision also contradicts the decisions of this Court regarding the treatment of excise taxes in the assessment of tangible personal property.

By law, Florida property appraisers are required to assess all property at its just value. This determination involves the exercise of judgment and the application of appraisal principles. To assist the Property Appraisers, the Florida Legislature

enacted §193.011, Fla. Stat., which lists a number of factors for the Property Appraisers to consider in each assessment. However, because the hallmark of property taxation in Florida is just value, the Property Appraisers are not required to apply all of the factors of §193.011 if their application would result in an assessment at other than just value. Thus, by requiring the Property Appraiser to exclude sales tax from his just value determination, the 5th DCA interfered with the Property Appraiser's obligation to assess all property at its just value.

The trial court in the instant case weighed the evidence before it and concluded that "the evidence clearly shows that sales tax, shipping, installation and the like are proper costs which must be included in a properly conducted cost approach." Likewise, the Second District Court of Appeal has also held that sales tax is an acquisition cost which must be considered in performing a proper cost approach. If a cost approach is properly performed and a determination of just value is made, there is no authority for requiring the Property Appraiser to make an extra deduction for sales tax. Thus, this Court should reverse the decision of the Fifth District Court of Appeal and affirm the final judgment of the trial court in all respects.

ARGUMENT

I. THE PROPERTY APPRAISER PROPERLY INCLUDED THE TOTAL COST PAID BY WAL-MART, INCLUDING SALES TAX, SHIPPING AND INSTALLATION, IN ITS CALCULATION OF THE ORIGINAL COST OF WAL-MART'S PROPERTY UNDER THE COST APPROACH TO VALUE.

A. The Property Appraiser is not required to deduct costs of sale or purchase from original cost when calculating the just value of tangible personal property by the cost approach to value.

Article VII, Section 4 of the Florida Constitution requires that all property be assessed at its just value for ad valorem taxation. This Court has previously held that just value is synonymous with fair market value and that just value may be established by the classic formula that is "the amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell." *See Walter v. Schuler,* 176 So. 2d 81, 85-86 (Fla. 1965). Because there are various methods of determining the fair market value of property, the Property Appraiser must exercise judgment in applying the different methods to different property. *See Powell v. Kelley,* 223 So. 2d 305, 309 (Fla. 1969) (stating that "the appraisal of real estate is an art, not a science").

By law, in arriving at a calculation of the just value of property, the Property Appraiser is required to properly consider each of the factors of §193.011, Fla. Stat. in order to retain the strong presumption of correctness set forth in §194.301, Fla. Stat. However, the Property Appraiser, after giving appropriate consideration to each of the eight factors, may assign to each factor such weight as he deems proper and may in fact reject some of the factors if they are inappropriate under the circumstances. *See Daniel v. Canterbury Towers, Inc.,* 462 So. 2d 497, 501-02 (Fla. 2d DCA

1985). This is because, in order to arrive at just valuation, the Property Appraiser must exercise his or her judgment and apply proper appraisal principals in the assessment of the property. *See Havill v. Lake Port Properties Etc., Inc.,* 729 So. 2d 467, 471 (Fla. 5th DCA 1999).

In order to arrive at the just value of an item of tangible personal property by the cost approach, the Property Appraiser should include sales tax as part of the original cost of the tangible personal property, just as he would include any other component of original cost, such as raw materials or labor costs. *See Wal-Mart Stores, Inc. v. Todora,* 791 So. 2d 28, 31 (Fla. 2d DCA 2001). This is because, when a taxpayer determines whether to acquire an item of tangible personal property and the cost to acquire it, the taxpayer will take into consideration everything it has to invest in the property, including any sales tax and installation cost, that it must pay to acquire the property. *See Wal-Mart Stores, Inc. v. Crapo*, Case Number 97-CA-4728 (Final Judgment 8th Jud. Cir. Ct. February 26, 2001). Thus, the payment of sales tax to acquire an item of tangible personal property affects the market value of the property.

The Second District Court of Appeal has held that the Property Appraiser is not *required* to make any deductions for costs of sale pursuant to §193.011(8), Fla. Stat. *See Turner v. Tokai Financial Services, Inc.,* 767 So. 2d 494, 497 (Fla. 2d DCA 2000). In *Tokai*, the taxpayer's expert testified that the assessment of Tokai's equipment should have been reduced to reflect certain costs of sale. *See id.* at 496. She did not claim that Tokai had actually incurred those costs, but merely testified that those were the expected costs of sale in the market. *See id.* The Second DCA held that §193.011(8) does not require the Property Appraiser to make a deduction for costs of sale. *See id.* at 497. Rather, the court held that the Property Appraiser is only required to deduct those costs of sale which are appropriately deducted in order to arrive at the fair market value of the property using the

market approach. *See id.* at 498. In so holding, the court reasoned that the purpose of §193.011, Fla. Stat. is to assist Property Appraisers in discharging their constitutional obligation to assess property based on its just value, not to mandate a particular methodology. *See id.*

Thus, Property Appraisers are not required to make a deduction for costs of sale in order to satisfy their obligations under §193.011, Fla. Stat. Rather, because the hallmark of property taxation is just value, Property Appraisers are only required to consider the factors of §193.011, Fla. Stat. and determine, based on their best judgment and generally accepted appraisal principles, the weight to give those factors in order to arrive at a just valuation of the subject property. In the instant case, because the Property Appraiser correctly chose to use the cost approach to value the subject tangible personal property, a deduction for costs of sale would have been improper, as it would have resulted in a value that was less than the just value of the property.

In fact, this Court has previously held that the payment of excise taxes on an item of property increases the value of that property. *See Dade Cty. v. Atlantic Liquor Co.,* 245 So. 2d 229, 231 (Fla. 1970). In the *Atlantic Liquor* case, the Supreme Court of Florida was asked to consider whether Dade County taxing authorities could properly include the value of state and federal beverage tax stamps in their assessment of the taxpayer's personal property. *See id.* at 230. In finding that the taxing authorities acted properly, the Court first noted that the beverage tax was an excise tax imposed upon the manufacturer and distributor. *See id.* at 231. The Court then concluded that payment of the beverage taxes added value to the stamped beverages. *See id.* at 232. The Court further explained:

> These taxes are incidents of preparation essential to creation of a saleable product, and as such their value adheres to the value of the merchandise to which the excise stamps are affixed.

> The increased costs of the merchandise resulting from the stamps being affixed is naturally reflected in an increase in cost to the purchaser, but this is a secondary
>
> effect similar in nature to increases resulting from increased labor costs, increased material costs or even increased social security costs.

Id.

Like the beverage tax in *Atlantic Liquor*, the sales tax on Wal-Mart's tangible personal property necessarily increases the value of the property on which it was paid. As with labor and material costs, the cost of sales tax may not be separated from the purchase price of the item in determining the item's value. Also, as with labor and material costs, the seller of the property recoups as much of the sales tax as it can in negotiating the purchase price of the item. Therefore, because payment of sales tax affects the value of tangible personal property, it should be included in the Property Appraiser's calculation of original cost under the cost approach to value, and the Property Appraiser properly exercised his judgment in considering, but deciding not to apply, §193.011(1) and (8) in the instant case.

Other jurisdictions that have considered this issue have generally agreed that sales tax should be included in the cost of an item of tangible personal property, at least where the taxing authority was required to assess the property at its full cash

value.[1] *See State Dep't of Assessments and Taxation v. Metrovision of Prince George's County, Inc.,* 607 A.2d 110, 118 (Md. Ct. Spec. App. 1992); *Xerox Corp. v. County of Orange,* 136 Cal. Rptr. 583, 591 (Cal. Ct. App. 1977). In *Metrovision,* the Maryland appellate court held that, in applying the cost approach to tangible personal property, the taxing authority must include all costs necessary to get an asset operational, including freight, sales tax and installation. *See Metrovision,* 607 A.2d at 118. Likewise, in *Xerox,* the California appellate court rejected Xerox's contention that sales tax and freight are not a part of the cost of tangible personal property under the cost method of valuation. *See Xerox,* 136 Cal. Rptr. at 591. Instead, the court held that "sales tax is an element of value." *See id.* at 590. The court reasoned that:

> The addition of taxes and freight charges to the list price of such equipment is consistent with an appraisal approach that gives consideration

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[1] The one case that the Amici are aware of in which sales tax was excluded from the cost of commercial and industry machinery and equipment is *Board of County Commissioners v. McGraw Fertilizer Service, Inc.,* 933 P.2d 698 (Ka. 1997). However, in this case, the Kansas Constitution required all personal property to be assessed at its "retail cost when new." *See id.* at 703. The court acknowledged that the term "retail cost when new" dictated a different result from jurisdictions that used the term "fair market value." *See id.* at 709. In addition, Kansas law differed from Florida law in that, in Kansas, sales tax is considered a debt of the consumer, rather than a debt of the seller. *See id.* at 705-06; *see also* §212.06, Fla. Stat. (2000). Thus, the *McGraw Fertilizer* case is distinguishable from the instant case. *See generally* Marion R. Johnson, CAE, *Should Sales Tax, Freight and Installation Charges be Assessable for Ad Valorem Tax Purposes?*, ASSESSMENT JOURNAL, March/April 1998, at 42.

> to consumer's costs in arriving at market value. It is in accord with general accounting principals. The cost of an asset includes purchase price, brokerage commission, duties, transportation and all costs placing the asset in a condition for use.

Id. at 591.

In the instant case, the district court of appeal erroneously focused on the term "sales price," and found that sales tax must be excluded from the cost approach because it is not a part of the "sales price." However, a properly performed cost approach does not begin with the "sales price." Rather, a properly performed cost approach begins with the original cost of the property. The Fifth District Court of Appeal's use of the term "sales price" indicates that it did not fully understand how the cost approach is used to arrive at fair market value. Regardless of whether sales tax is part of the "sales price" of an item, as defined by §212.02(16), Fla. Stat., sales tax should legally be included in the *original cost* when the cost approach is used.

In any event, it is questionable whether subsection (8) of §193.011 even applies to an assessment based on a cost approach. At least one appellate court has indicated that subsection (8) only applies when the Property Appraiser is performing a market or comparable sales approach to value. *See Bystrom v. Equitable Life Assur. Soc.,* 416 So. 2d 1133, 1144 (Fla. 3d DCA 1982). In

Equitable Life, the Third District Court of Appeal held that a cost of sale deduction under §193.011(8) was not appropriate when the value had been determined by the income approach to value. *See id.* The court then stated that §193.011(8) may only properly be applied when there has been an actual sale. *See id.* Therefore, §193.011(8) only applies when a market approach is used, and should not be applied to the cost approach to value.

There is also some debate as to whether subsections (1) and (8) of §193.011 were ever intended to apply to tangible personal property. It may be possible to find, under some circumstances, that the original cost of tangible personal property may include some costs of sale. However, at this time, no Florida courts, other than the Fifth District Court of Appeal in the instant case, have found and applied any costs of sale, as provided in §193.011(1) and (8), to tangible personal property. This is because §§193.011(1) and (8), unlike the other factors in §193.011, are generally inapplicable to tangible personal property, as sales of tangible personal property do not usually involve the additional costs traditionally associated with sales of real property.

In enacting §193.011(8), the legislature expressly stated that it was "providing an additional factor for the just valuation of *real property*." *See* Ch. 67-167, Laws of Fla. (title) (emphasis added). Likewise, in amending §193.011(1) to exclude costs of sale, the legislature indicated that the amendment was necessary because

"increased demand for real property have [sic] resulted in speculative purchasing and the payment of gross sales prices in excess of actual cash value." *See* Ch. 77-363, Laws of Fl. (preamble). Thus, it appears that the Legislature did not intend for §§193.011(1) and (8) to apply to tangible personal property.

While recognizing that the legislative history tends to support this argument, the *Tokai* court found that subsections (1) and (8) applied to tangible personal property, based on the lack of limiting language in the statute. *See Tokai*, 767 at 500. However, regardless of the actual language of the statute, the legislative history indicates that subsections (1) and (8) were intended to apply only to real property and this Court may take the legislative history into consideration in forming its decision.

For the foregoing reasons, the Property Appraiser properly considered subsections (1) and (8) of §193.011, Fla. Stat., even though the Property Appraiser ultimately chose not to make a deduction for sales tax.

B. Sales tax is not a "cost of sale" or "cost of purchase."

In any event, sales tax is not a "cost of purchase" or "cost of sale." Rather, unlike documentary stamp taxes and other "costs of sale," the sales tax, like other excise taxes, is an embedded cost of production and distribution that is part of the original cost of the property. *See Rutledge v. Chandler,* 445 So. 2d 1007, 1009

(Fla. 1983). The tax is not levied against the consumer, but upon the businessman who is engaged in the business or occupation. *See Ryder Truck Rental, Inc. v. Bryant,* 170 So. 2d 822, 825 (Fla. 1964). The seller then passes the cost of the sales tax on to the purchaser by adjusting the selling price accordingly. *See id.; see also Szabo Food Services, Inc. v. Dickinson,* 286 So. 2d 529, 532 (Fla. 1973). Thus, the sales tax ultimately affects the purchase price of an item of tangible personal property.

The Supreme Court of Florida has classified taxes as follows:

> All taxes, other than polls, are either direct or indirect property taxes. A direct tax is one that is imposed directly upon property, according to its value. It is generally spoken of as a property tax or an ad valorem tax. An indirect tax is a tax upon some right or privilege, or corporate franchise, and is most often called an excise or occupational tax.

Rutledge, 445 So. 2d at 1008. As the sales tax is a tax upon the privilege of engaging in a particular business in the State of Florida, it is properly classified as an excise tax. *See id.* For legal purposes, the levying of an excise tax occurs somewhere in the claim of manufacture and distribution. *See id.* at 1009. Therefore, the sales tax is a cost of distribution, payment of which increases the value of the product so taxed. *See Dade County v. Atlantic Liquor Co.*, 245 So. 2d 229, 231 (Fla. 1970). This Court held in *Atlantic Liquor* that costs of

production and distribution, such as beverage tax stamps, are properly included in the cost of the property for ad valorem tax purposes. *See id.* at 232.

Contrary to the lower court's finding, sales tax is not equivalent to the documentary stamp tax imposed on the transfer of real estate. Whereas a documentary stamp tax is levied every time there is a transfer of real estate, and can therefore be considered a "cost of sale," the sales tax is levied only once in the chain of manufacture and distribution (on the retail sale), even though there may be multiple transactions in order to get the property to the ultimate retail consumer. Likewise, while the documentary stamp tax is a tax on the transaction, sales tax is a tax on the privilege of doing business within the state, and is thus more akin to an embedded cost of production and distribution. *See Ryder,* 170 So. 2d at 825.

In the instant case, the Fifth District Court of Appeal based its decision that sales tax is a "cost of sale" on its finding that sales tax is an external cost that does not affect the value of property. However, in the *Atlantic Liquor* case, this Court correctly compared the increase in the value of property due to the payment of excise taxes to the increase in value that would be caused by increased labor or material costs. *See Atlantic Liquor,* 245 So. 2d at 232. Likewise, as the Second District Court of Appeal recognized in the *Todora* case, all of the authoritative appraisal texts recognized by property appraisers direct the appraisers to include freight, installation, taxes and fees in performing a cost approach. *See Todora,* 791

So. 2d at 31 (quoting *Wal-Mart Stores, Inc. v. Crapo,* Case No. 97-CA-4728 (Fla. 8th Jud. Cir. Feb. 26, 2001)). Thus, since payment of sales tax does have an effect on the value of property, particularly when value is determined by the cost approach, the Fifth District Court of Appeal's holding that sales tax is an external "cost of sale" is erroneous and should be reversed by this Court.

CONCLUSION

WHEREFORE, Amicus Curiae, Jim Todora, Ed Crapo, Timothy "Pete" Smith and Ervin Higgs, respectfully request that this Court reverse the decision of the Fifth District Court of Appeal and uphold the trial court's final judgment in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail this _____ day of November, 2001, on **Robert E.V. Kelley, Jr., Esq., Joseph J. Weissman, Esq.,** and **Stacy D. Blank, Esq.,** Holland & Knight, LLP, P.O. Box 1288, Tampa, Florida 33601-1288; **Joseph A. Mellichamp, III,** Senior Assistant Attorney General, Room LL-04, The Capitol, Tallahassee, Florida 32301; **Thomas B. Drage, Jr., Esq.,** and **Kenneth P. Hazouri, Esq.,** Drage, de Beabien, Knight, Simmons, Mantzaris & Neal, LLP, P.O. Box 87, Orlando, Florida 32802-0087; and **Gaylord A. Wood, Jr., Esq.,** and

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Counsel for Amicus Curiae certify that this Answer Brief is typed in 14 point (proportionately spaced) Times New Roman.

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