FINANCE & TAXATION

Finance & Taxation: Ad Valorem

***Nikolits v. Verizon Wireless Personal Communications L.P.*,**
9 So. 3d 690 (Fla. 4th Dist. App. 2009)

Computer software as defined by the Florida Statutes, and not subject to the embedded software exception, is intangible personal property and therefore cannot be assessed as tangible personal property by a county property appraiser.

FACTS AND PROCEDURAL HISTORY

Verizon Wireless Personal Communications, L.P. (Verizon) operates a mobile switching center containing a computer system known as the Autoplex 1000 (Autoplex). The Autoplex is a network of computers with three types of software—booting software, operating system software, and Wireless Services Software (Software). The Software is comprised of approximately 1,000 separate programs that, among other things, allow customers to make calls and browse the Internet. These programs all reside on the Autoplex, which is the hardware necessary to run them. In the absence of the Software, the Autoplex would still operate as a computer, allowing typical system performance. Nikolits, the Palm Beach County Property Appraiser, assessed the Software as tangible personal property for the purposes of *ad valorem* taxation. Verizon paid the tax under protest and brought suit.

The trial court found the Software was "computer software" as defined by Section 192.001(19) and did not fit within the exception provided for "embedded software." Fla. Stat. § 192.001(19) (2008). Based on this finding, the trial court ruled that the Software was not taxable as tangible personal property. Nikolits appealed, arguing that the trial court erred in finding the Autoplex system was a computer, and therefore erred in finding the Software was computer software.

ANALYSIS

The Fourth District Court of Appeal rejected Nikolits' argument, finding that competent, substantial evidence supported the

trial court's factual finding that the Autoplex was in fact a computer. The court also found the Software was "computer software" and that the "embedded software" exception did not apply.

Turning to the question of law, the court noted that the ability of local governments to collect taxes is limited. As delineated by the Florida Constitution, local governments and counties have the power to collect taxes on real property and tangible personal property, but not intangible personal property. Thus, the question before the court was whether computer software is tangible or intangible property.

The court first looked to the definitions of intangible personal property and tangible personal property under Florida Statutes Sections 192.001(11)(b) and (d). Intangible personal property is "property where value is based upon that which the property represents rather than its own intrinsic value," whereas, tangible personal property is "capable of manual possession and [its] chief value is intrinsic to the article itself." Fla. Stat. § 192.001(11)(b), (d).

The court reasoned that computer software cannot be tangible personal property because it is not capable of manual possession; only the medium where it is stored can be possessed. While the value of the software does lie in the software itself, its essence is not in the medium on which it is stored, "[r]ather, the tangible medium on which it is transported and transmitted is the means by which the property is manually possessed." *Nikolits*, 9 So. 3d at 694.

For further guidance, the court looked to the Fifth District's decision in *Gilreath v. General Electric Co.*, 751 So. 2d 705, 709 (Fla. 5th Dist. App. 2000), where that court resolved the same issue by making a distinction between a program itself and the medium on which a program resides. The medium itself is tangible personal property, but the program is not. This distinction applies regardless of the requirement that a physical medium may be needed to store or transmit the program; the nature of the program remains intellectual property. The program is not subject to local taxation because it does not increase the value of the physical medium on which the program is stored.

Agreeing with the Fifth District, the Fourth District Court of Appeal held that computer software is not taxable as tangible personal property and affirmed the trial court.

SIGNIFICANCE

The *Nikolits* court joins the Fifth District in holding that computer software, unlike the tangible medium on which it is stored, is intangible personal property and, therefore, not subject to property tax.

RESEARCH REFERENCE

- 50 Fla. Jur. 2d *Taxation* § 81 (2009).

Justin P. Miller

Finance & Taxation: Ad Valorem

***Shank v. Havill*,**
6 So. 3d 631 (Fla. 5th Dist. App. 2009)

Filing a tax collector's receipt for payment of an amount a taxpayer admits owing in good faith is not an absolute statutory prerequisite for establishing a trial court's jurisdiction to hear an assessment challenge when the taxpayer has made a good-faith payment but is not issued a receipt.

FACTS AND PROCEDURAL HISTORY

Taxpayers Brian S. and Alane Rae Shank received a Notice of Ad Valorem Taxes from the Lake County Property Appraiser. The notice denied an exemption previously granted. The Shanks petitioned the Value Adjustment Board, which denied relief. The Shanks then submitted a check for $849.49 representing the amount they admitted in good faith owing. The tax collector returned the check, stating that Florida Statutes did not authorize collection of partial payments. The tax collector did not issue a receipt to the Shanks.

The Shanks filed a complaint in circuit court against the property appraiser challenging the assessment at issue. The property appraiser moved to dismiss, alleging that by failing to file a receipt with the complaint, the Shanks had not complied with the statutory preconditions for establishing the court's jurisdiction to hear the assessment challenge. The trial court granted the motion, and the Shanks appealed.

ANALYSIS

Florida law requires a taxpayer challenging a property assessment to pay the amount the taxpayer admits owing in good faith before bringing a complaint. Fla. Stat. § 194.171(3), (6) (2007). The tax collector is required to issue a receipt for the payment, a copy of which "shall be filed" with the taxpayer's complaint. *Id.* at § 194.171(3). The statute also requires an assessment challenge be filed within sixty days of the Value Adjustment Board's decision. *Id.* at § 194.171(2).

The Shanks' complaint alleged that they remitted the amount they believed to be due, but that the tax collector failed to issue a receipt. The property appraiser did not dispute that the Shanks submitted the $849.49 payment, that they did not receive a receipt in return, or that they filed their complaint before the sixty day deadline expired. Still, the property appraiser argued that the complaint was jurisdictionally barred because the Shanks did not attach a receipt to the complaint.

The Fifth Circuit rejected this reasoning and reversed dismissal of the Shanks' complaint, citing with approval the Second District's view that "the filing of the tax collector's receipt with the court within the applicable [sixty-day] time period is not a jurisdictional prerequisite." *Shank*, 6 So. 3d at 633 (citing *Mikos v. Parker*, 571 So. 2d 8 (Fla. 2d Dist. App. 1990)). Moreover, the Fifth Circuit stated that it would be "absurd" to believe that the legislature intended for taxpayers to lose their right to challenge an assessment because of the tax collector's failure or refusal to issue a receipt after taxpayers attempt to submit the required good-faith payment.

The court also rejected the property appraiser's alternative argument that the Shanks failed to notify the tax collector that the $849.49 check represented a good-faith payment in full rather than simply a partial payment. "Although we agree that the better practice would be for a taxpayer to provide a cover letter to the tax collector expressly reciting that the payment being made is a [good-faith] payment required by [S]ection 194.171(3), we cannot find that doing so is statutorily required." *Shank*, 6 So. 3d at 633. Therefore, the court reversed the order dismissing the Shanks' complaint and remanded the case for proceedings on the merits.

SIGNIFICANCE

The decision in *Shank* indicates that property appraisers should not seek to deny taxpayers their day in court by relying on an overly technical interpretation of the statute requiring a good-faith payment of taxes as a condition precedent to an assessment challenge.

RESEARCH REFERENCES

- 51 Fla. Jur. 2d *Taxation* §§ 543, 545, 546 (2006).
- 16D C.J.S. *Constitutional Law* § 2068 (2005).

Mark R. Johnson

Finance & Taxation: Ad Valorem—Exemptions

***Haddock v. Carmody*,**
1 So. 3d 1133 (Fla. 1st Dist. App. 2009)

Florida Statutes Section 196.061, which denies the homestead exemption to a property owner who rents out the "entire dwelling," is constitutional. Further, when an owner prevents a renter from accessing a *de minimis* amount of space in the dwelling, the owner has still rented out the "entire dwelling" under Florida Statutes Section 196.061.

FACTS AND PROCEDURAL HISTORY

Since 1995, Thomas W. Carmody (Carmody) has owned a condominium at Amelia Island Plantation. After establishing his permanent residence there in 2002, Carmody received Florida's homestead exemption between 2003 and 2005. Carmody rented his condominium for 113 nights in 2003, 104 nights in 2004, and 66 nights in 2005, and during these periods, he stored his personal property in two locked closets. Pursuant to Florida Statutes Section 196.061, which denies rental property homestead status for property tax purposes, Greg Haddock, the Nassau County Property Appraiser (Appraiser), sent a notice to Carmody revoking his homestead exemption and accompanying "Save Our Homes" cap for the years 2003, 2004, and 2005.

In response, Carmody brought an action against the Appraiser, asserting that the revocation violated his right to the

homestead exemption under the Florida Constitution. The trial court agreed with Carmody, finding that Florida Statutes Section 196.061 conflicted with his constitutional right to the homestead exemption and was thus unconstitutional as applied. The court then ordered the Appraiser to grant Carmody the homestead exemption for the years 2003, 2004, and 2005. Thereafter, the Appraiser appealed, and the First District Court of Appeal reversed the trial court's order.

ANALYSIS

The First District addressed whether the Appraiser's revocation of Carmody's homestead status pursuant to Florida Statutes Section 196.061 was constitutional in light of Article VII, Section 6(a), of the Florida Constitution, which provides the right to the homestead exemption, and Article VII, Section 4, which provides the right to the to the "Save Our Homes" tax cap. The court focused on the plain language of Article VII, Section 6(a), which states that a tax payer shall have the right to claim the homestead exemption "upon establishment of right thereto in the manner prescribed by law." Fla. Const. art. VII § 6(a). With respect to this clause, the court relied on precedent construing Article VII, Section 6(a), and Article VII, Section 4, *in pari materia*, and recognized that taxpayers must claim the homestead exemption and "Save Our Homes" tax cap in accordance with procedures that the Florida Legislature establishes. The court then found that the Florida Legislature established how rental property is treated for homestead exemption purposes when it enacted Florida Statutes Section 196.061. This section provides that the rental of an entire dwelling that was previously claimed as homestead property constitutes abandonment of the exemption until the owner resumes occupancy of the dwelling. Based on this provision, the court reasoned that Florida Statutes Section 196.061 did not conflict with Article VII, Section 6(a), and therefore the trial court erred in ruling that the statute was unconstitutional as applied to Carmody.

Because the Fourth District held that Florida Statutes Section 196.061 was constitutional as applied, the court then resolved how the statute should be construed. The court noted that tax exemption statutes are strictly construed against the tax payer and that the application of Florida Statutes Section 196.061 in this case depended on the interpretation of "entire dwelling."

Carmody argued that he did not rent out his "entire" condominium because he prevented access to the two locked closets where he stored his personal property. However, the court rejected Carmody's emphasis on the word "entire," explaining that his interpretation would allow owners to avoid the statue by merely preventing access to a *de minimis* amount of space in the dwelling. Therefore, the court held that "under [S]ection 196.061, Florida Statutes, [Carmody] rented [his] entire dwelling, notwithstanding the fact that [he] reserved two locked closets for personal storage." *Haddock*, 1 So. 3d at 1137. Accordingly, the court reversed the trial court's order.

SIGNIFICANCE

Haddock holds that Florida Statutes Section 196.061 is an established procedure for claiming the homestead exemption under Article VII, Section 6(a) and is therefore constitutional as applied.

Moreover, *Haddock* holds that when a property owner prevents a renter from accessing *de minimis* space in a dwelling, the owner has still rented out the "entire dwelling" under Florida Statutes Section 196.061. Practitioners should be aware that *Haddock* does not announce a test to determine what amount of space constitutes a *de minimis* amount under Florida Statutes Section 196.061.

RESEARCH REFERENCES

- 10 Fla. Jur. 2d *Constitutional Law* § 118 (2009).
- 51A Fla. Jur. 2d *Taxation* §§ 1299, 1301 (2009).

Matthew E. Kahn

Finance & Taxation: Homestead Exemption

***Karayiannakis v. Nikolits*,**
23 So. 3d 844 (Fla. 4th Dist. App. 2009)

Where the landowner of an apartment building occupies a portion of the building and leases the remaining units, a property appraiser may classify and assess for tax purposes the adjoining land into homestead and commercial portions based upon the percentage of the building occupied by the owner as her homestead.

FACTS AND PROCEDURAL HISTORY

Appellant, Anna Karayiannakis, owned a two-story apartment building consisting of five residential units in Palm Beach County. Appellant lived in one of the units and leased the remaining four units. Hoping to get the greatest benefit of the homestead exemption on her taxes for years 2006 and 2007, Appellant claimed as her homestead the entire building, including leased units and all the property surrounding the building. Gary Nikolits, Property Appraiser for Palm Beach County (Appraiser), subsequently measured the dimensions of Appellant's building and found that Appellant occupied as her residence only thirty-seven percent of the building. Based on that finding, the Appraiser concluded that the Appellant could receive favorable homestead tax treatment only as to thirty-seven percent of the building. As a consequence, the Appraiser concluded, only thirty-seven percent of the property surrounding Appellant's building could be claimed under the homestead exemption.

The Appellant appealed to the Value Adjustment Board (Board), arguing that, while the building could be divided into separate residences for purposes of the homestead exemption, the land surrounding the building could not be divided. The Board found in favor of the Appraiser. The Appellant then sought relief in the courts, naming as defendants the Appraiser, Palm Beach County Tax Collector Ann Gannon, and Executive Director of the Department of Revenue for the State of Florida Jim Zingale (collectively, Appellees). The trial court granted summary judgment in favor of the Appellees, and the Appellant appealed to the Fourth District Court of Appeal.

ANALYSIS

The Fourth District Court of Appeal held that the property surrounding the Appellant's building was properly divided for purposes of the homestead tax exemption. First, the Fourth District rejected Appellant's argument on definitional grounds. Under the Florida Statutes, real estate qualifying for the homestead exemption is defined as "real property . . . less any portion thereof used for commercial purposes . . . ." § 196.012(13) (2007). Real property is then defined as "land, buildings, fixtures, and all other improvements to land." Fla. Stat. § 192.001(12). So by definition, any portion of a person's building *or* land used for commercial

purposes does not qualify as real property under the homestead exemption. Thus, the Fourth District reasoned, there is no basis for distinguishing between the building and the surrounding property where both were being used for commercial purposes.

Second, the Fourth District rejected the Appellant's argument as contrary to the explicit language of Section 196.031(5). That section specifically provides that the homestead tax exemption "applies only to those parcels classified and assessed as owner-occupied . . . or only to the *portion*[*s*] of property so classified and assessed." *Karayiannakis*, 23 So. 3d at 846 (quoting Fla. Stat. § 196.031(5) (2007) (emphasis in original)). Portions of the Appellant's property that she leases are not owner-occupied and, consequently, such portions do not qualify for the homestead tax exemption. Thus, in order for the Appellant to receive the benefit of the tax exemption for portions of her property that do qualify for the exemption, those portions must be divisible from portions that fail to qualify for the exemption.

Last, the Fourth District concluded that it was proper for the Appraiser to use the uncontested dimensions of the Appellant's occupation of the building in determining the Appellant's occupation of the surrounding property. For these three reasons, the Fourth District held that the property surrounding the Appellant's building was properly divided for purposes of the homestead exemption.

SIGNIFICANCE

This case clarifies that where a landowner leases a portion of her homestead property, whether building or land, the landowner loses the benefit of the homestead tax exemption on those leased portions of property. Additionally, this case demonstrates that when a property appraiser is confronted with a landowner who leases to tenants a portion of her building that would otherwise qualify for the homestead exemption, the property appraiser may use the dimensions of the landowner's occupation of the building to determine the extent of the homestead tax exemption for the surrounding land.

RESEARCH REFERENCES

- 51A Fla. Jur. 2d *Taxation* § 1257 (2006 & Supp. 2009).

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 16, § 44.74 (3 ed., West 2003).

Charles E. Simpson

Finance & Taxation: Tax-Deed Sale

Village of Doral Place Association, Inc. v. RU4Real, Inc., 22 So. 3d 627 (Fla. 3d Dist. App. 2009)

The statute prohibiting the separate sale of "common elements" of condominium properties must prevail over the statute allowing tax deed sales and quiet title actions in the event property tax bills for portions of condominium properties are not paid in a timely manner.

FACTS AND PROCEDURAL HISTORY

The Miami-Dade County Property Appraiser (Appraiser) placed a value of $83,464 on the portion of a large condominium property that contained a condominium association's swimming pool. The tax collector sent a tax bill for $2,593.85 to the property manager for the 331-unit Village of Doral Place Condominium Association, Inc. (Association). No one paid the tax bill. As a result, a tax certificate was sold to a local bank, which in due course conveyed it to RU4Real and For Sale by Owner (Buyers).

After two years, the Buyers applied for a tax deed pursuant to Florida Statutes Section 197.502(1) (2003). They then purchased the swimming pool, known as "Tract F," at a public sale, and immediately came to the property and installed fences barring access to the pool.

The Association filed suit in circuit court seeking an injunction, declaratory relief, and an order setting aside the tax deed. The trial court issued a temporary injunction, but declined to set aside the tax deed. In doing so, the court accepted the Appraiser's argument that this relief was barred by the sixty-day non-claim statute. The court then granted a declaratory judgment, holding that when the Buyers bought Tract F they took the property subject to the existing condominium declaration that granted the Association and its unit owners exclusive use of the swimming pool. All parties appealed.

ANALYSIS

Rejecting arguments by the Appraiser and the Buyers, the Third District reversed the trial court's refusal to set aside the tax deed. The gist of the Third District's opinion is that the tax deed sale of the swimming pool was illegal because Florida law prohibits the separate sale of a "common element" of a condominium. The Appraiser argued that the swimming pool was a "common area"—not a "common element"—and that Florida law does not prohibit the separate sale of a condominium's common "areas." But, the court held that Chapter 718's definitions make it clear that "common elements" are those "portions of the condominium property not included in the units," Fla. Stat. § 718.103(8) (2003), and that the swimming pool obviously was not part of any individual unit. The court reasoned that the condominium declaration's reference to the pool as a "common area" makes no difference in substance.

Next, the court rejected the Buyers' argument that they were entitled to prevail under a separate statute authorizing a grantee under a tax deed to maintain a quiet title action. Florida Statutes Section 65.081(3) (2003) provides in part: "No defense to the action [to quiet title] or attack upon the tax deed shall be made except the defense that the taxes assessed against the property had been paid by the former owner before issuance of the tax deed." Since the Association had not paid the $2,593.85 tax bill, the Buyers argued that the challenge to their tax deed must fail. The court disagreed.

"Our responsibility is to read the Florida Statutes *in pari materia* and to harmonize the statutes with each other wherever possible." *Village of Doral Place Assn.*, 22 So. 3d at 631. The court concluded that Section 65.081(3) does not overcome Section 718.107's prohibition against selling condominium common elements separately from the units. The court also applied the maxim of statutory construction that says statutes will not be construed in a manner that leads to an "absurd result." In the present case, the Buyers entered and fenced off a portion of the condominium property from the unit owners, which not only interfered with their use and enjoyment of the pool but also created troublesome issues regarding responsibility for maintenance and liability insurance. The court concluded that this was an absurd

result and that Section 718.107 prohibits separate sale of the common elements of a condominium, even for a tax deed.

The court directed the Association to repay the purchase price of Tract F, with interest, to the Buyers.

SIGNIFICANCE

Village of Doral Place Association clarifies that Florida law prohibits a local government from recovering delinquent taxes on condominium common elements through public sale of a tax deed.

RESEARCH REFERENCES

- 10 Fla. Jur. 2d *Condominiums and Cooperative Apartments: Common Elements* § 59 (2009).
- 50 Fla. Jur. 2d *Tax: Condominiums and Cooperatives* § 76 (2009).

Mark R. Johnson