Filing # 98423421 E-Filed 11/05/2019 04:34:53 PM

IN THE SUPREME COURT OF FLORIDA

BILL FURST, as Property Appraiser of
Sarasota County, Florida,

Petitioner,

v.

Case No. SC19-701
Dist. Ct. Case No. 2D17-3973

SUSAN K. DEFRANCES,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF OF
RESPONDENT SUSAN K. DEFRANCES

RECEIVED, 11/05/2019 04:35:29 PM, Clerk, Supreme Court

SHERRI L. JOHNSON
Florida Bar No. 0134775
JOHNSON LEGAL OF FLORIDA, P.L.
P.O. Box 20998
Sarasota, FL 34276
(941) 926-1155
sjohnson@johnsonlegalfl.com
Attorney for Respondent Susan K. DeFrances

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

ADMINISTRATIVE RULES

STATEMENT OF THE CASE AND FACTS

Respondent Susan K. DeFrances is the holder of a life estate in real property located at 7326 Captain Kidd Ave. in Sarasota County [hereinafter "the Property"]. In 2014, Petitioner Bill Furst, as Property Appraiser of Sarasota County, Florida, assessed the Property at $302,400.00. [R.124]. Upon receiving her 2014 tax bill, Ms. DeFrances paid the 2014 taxes in full. [R.124]. In 2015, the Property Appraiser discovered that, due to clerical errors regarding the size of the property and the extent of the property that qualified for the homestead exemption,[1] the 2014 assessed value was incorrect. [R.124]. The Property Appraiser corrected the tax roll to reflect a 2014 assessed value of $4,920,600, and back assessed Ms. DeFrances for an additional $26,254.30 in taxes for the 2014 tax year. [R.125].

Ms. DeFrances filed an action to challenge the Property Appraiser's 2014 back assessment. [R.125]. In Count I of the Complaint, which is the subject of this petition, she contended that the 2014 back assessment was unlawful because the Property did not escape taxation in 2014. [R.125]. The evidence indicated that the Property Appraiser had made clerical errors regarding the size of the land and the extent to which it was considered homestead property in 2014. [R.9]. However,

[1] Notably, in his Initial Brief to this Court, the Property Appraiser indicates that he also made a clerical error regarding the location of the property on the waterfront. This fact is not supported by the record. However, if true, it lends further support to the Petitioner's position that the Property Appraiser's errors related to the value of the property, and not to whether the property was taxed.

the Property Appraiser acknowledged in his Answers to Interrogatories that "there is no specific, defined area of land that escaped taxation since the land was valued as a whole." [R.126]. The trial court granted summary judgment in favor of the Property Appraiser, and Ms. DeFrances filed an appeal to the Second District Court of Appeal. [R.8].

The Second District reversed and remanded with directions to enter summary judgment in favor of Ms. DeFrances on Count 1 of the Complaint. [R.131]. The court held that the Property Appraiser's back assessment was not authorized by section 193.092, Florida Statutes because no portion of the Property had escaped taxation. [R.131]. The court noted that:

> Ms. DeFrances's property was not missed, overlooked or forgotten – the entire parcel as well as the improvements were assessed and included on the tax roll. . . . Rather, the property was undervalued as the result of an error.

[R.126-27]. Thus, the court held that, while the Property Appraiser could correct the clerical error in his records, he could not back assess Ms. DeFrances's property, as it had already been assessed. [R.127].

In so holding, the court distinguished the instant case from the case of *Korash v. Mills*, 263 So. 2d 579, 580 (Fla. 1972), in which an entire motel was accidentally omitted from the tax roll. [R.127-28]. The court also noted that this Court's decision in *Korash* expressly differentiates between situations where property is under-valued, and situations where an improvement is completely

omitted, quoting the following language from *Korash*, wherein this Court explained the flaw in the lower court's reasoning:

> If it Were only for the purpose of an increase in the valuation of the total property then we would agree with the chancellor, for it has been consistently so held. It will be seen however that in these prior cases the increase has been an attempted increase in Amount only (after an assessment of the improvement for a total lesser Amount) and not instances where the entire improvement was skipped and failed to be noted at all for taxation because of error or oversight as in the present case.

[R.128]. The Second District also quoted the following language from *Korash*, noting that "the [Supreme Court of Florida] takes pains to distinguish between property that has not been assessed at all and property that has been assessed but undervalued due to an error:

> We must keep in mind the distinction between changes and "miscalculations" by the assessor which "up" the amount previously assessed after tax roll certification, and the situation here where there has been no billing at all on the improvement (or it could be a separate, "overlooked" parcel of land) which has been completely excluded from the tax roll."

[R.129]. The Second District thus concluded that Ms. DeFrances's Property, which had already been assessed, albeit at a reduced valuation, did not "escape taxation," within the meaning of section 193.092, Florida Statutes, and thus there was no legal authority for the Property Appraiser's back assessment. [R.131].

SUMMARY OF ARGUMENT

Under section 193.092(1), Florida Statutes, Florida property appraisers are only authorized to issue back assessments when they discover that property has escaped taxation in one of the three preceding tax years. In the instant case, Ms. DeFrances's Property was assessed in 2014. However, in 2015, the Property Appraiser discovered that he had made multiple clerical errors in the 2014 assessment. Specifically, he discovered errors regarding the size of the Property, the location of the Property, and the homestead character of the Property, which had resulted in an under-valuation of the Property. The Second District correctly held that, under these circumstances, where the Property had been assessed, but under-valued in the prior tax year, the Property Appraiser was not authorized to issue a back assessment.

There is no statutory basis for the Property Appraiser's contention that he has the right to issue a back assessment whenever he discovers that a clerical error was made in a prior tax year. While the property appraisers have broad authority to correct clerical errors in the assessment process, the plain language of section 193.092(1) only authorizes *back assessments* when property was omitted from the tax roll, not when it was merely under-valued. This distinction was explained at length by this Court in *Korash v. Mills*, 263 So. 3d 579 (Fla. 1972). In *Korash*, the Court upheld the back assessment of a motel that was omitted from the prior year's

tax roll, but indicated that it would not uphold a back assessment based solely on the under-valuation of property that had already been assessed.

The Second District's decision is consistent with the plain language of section 193.092(1), Florida Statutes and this Court's decision in *Korash,* and should thus be affirmed. To the extent that other appellate courts have authorized back assessments for property that has not escaped taxation under section 193.092(1), those decisions should be disapproved.

ARGUMENT

THE SECOND DISTRICT CORRECTLY HELD THAT THE PROPERTY APPRAISER DID NOT HAVE AUTHORITY TO BACK ASSESS PROPERTY THAT HAD NOT ESCAPED TAXATION, BUT HAD MERELY BEEN UNDER-VALUED IN THE PRIOR TAX YEAR.

Section 193.092(1), Florida Statutes does not authorize the Property Appraiser to impose a back assessment on property that was assessed, but mistakenly under-valued, in a prior tax year. This is so, regardless of the reason for the under-valuation. Thus, in the instance case, where the Property was mistakenly under-valued in the prior tax year due to clerical errors regarding the size, location and homestead character of the Property, the Second District correctly held that the Property Appraiser's back assessment was invalid.

A. Regardless of the reason for the error, section 193.092(1) only permits back assessments for property that has "escaped taxation" in one of the three immediately preceding tax years.

While the Property Appraiser is authorized to correct clerical errors in his records at any time, Florida law only authorizes the Property Appraiser to assess back taxes against property if the property "escaped taxation" during one of the three preceding tax years. Specifically, section 193.092(1), Florida Statutes provides, in pertinent part:

> When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been

> collected for any year within a period of 3 years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately *for such property as may have escaped taxation* . . .

Id. [emphasis added]. Rule 12D-8.006(1) provides that "escape taxation" means "to get free of tax, to avoid taxation, to be missed from being taxed, or to be forgotten for tax purposes." *See also Okeelanta Sugar Refinery, Inc. v. Maxwell*, 183 So. 2d 567, 568 (Fla. 4th DCA 1966). Rule 12D-8.006(1) goes on to state that:

> Improvements, changes, or additions which were not taxed because of a clerical or some other error and are a part of and encompassed by a real property parcel which has been duly assessed and certified, should be included in this definition if back taxes are due under section 193.073, 193.092, or 193.155(8), F.S. Property under-assessed due to an error in judgment should be excluded from this definition. Korash v. Mills, 263 So. 2d 579 (Fla. 1972).

Thus, the Rule clarifies that, in dealing with a parcel that has already been assessed, the property appraisers may issue back taxes for improvements, changes or additions which were not taxed, but not for property that was merely under-assessed.

Contrary to the Property Appraiser's assertions, Rule 12D-8.006 does not authorize him to back assess any proper that was under-valued in a prior tax year due to a clerical error. In fact, the Rule goes on to instruct property appraisers issuing back assessments to:

(a) Make a separate assessment for each year (not to exceed three) that the property has been *entirely omitted* from the assessment roll.

Rule 12D-8.006(2)(a). Notably, the Rule contains no instructions for back assessing property that has merely been under-valued in a prior tax year.

This Court previously addressed the scope of property appraisers' authority to correct errors under section 197.122 and its predecessors. *See Smith v. Krosschell*, 937 So. 2d 658, 661 (Fla. 2006); *Allen v. Dickinson*, 223 So. 2d 310, 310 (Fla. 1969). In those cases, the Court found that the property appraisers have the authority to make corrections that arise from clerical errors, but not changes in judgment. However, neither of those cases addressed the property appraiser's authority to issue a back assessment under section 193.092, Florida Statutes.

The only case in which this Court has addressed the scope of the property appraisers' authority to issue back assessments under section 193.092 was *Korash v. Mills*, 263 So. 2d 579, 581 (Fla. 1972), wherein the Court upheld a back assessment of a motel that was accidentally omitted from the tax roll in the prior tax year. However, in that case, the Court noted that it would have held otherwise if the case had involved a mere increase in the valuation of property that had already been assessed. *See id.* at 580. Thus, in the instant case, the Second District properly followed *Korash* in holding that, where the Property was assessed and included on the prior year's tax roll, but was undervalued due to errors in the size and homestead character of the Property, the Property Appraiser did not have

authority to back assess the Property. *DeFrances v. Furst*, 267 So. 3d 525, 530 (Fla. 2d DCA 2019).

Unfortunately, the First and Third District Courts of Appeal have issued opinions in which they appear to ignore the requirements of section 193.092, and approve back assessments whenever a clerical error has occurred, regardless of whether the requirements of section 193.092 have been satisfied. *See Robbins v. First Nat'l Bank*, 651 So. 2d 184, 185 (Fla. 3d DCA 1995) (approving a back assessment to correct a clerical error, without addressing whether the property had escaped taxation); *see also Straughn v. Thompson*, 354 So. 2d 948, 949 (Fla. 1st DCA 1978).[2] However, to the extent that other appellate courts have approved back assessments without a determination that the property had escaped taxation, those decisions should be disapproved. If back assessments were to be permitted whenever the property appraiser corrected an error of omission or commission, then section 193.092 would be rendered meaningless. Just as the Property Appraiser is also not authorized to issue a back assessment for more than the three preceding tax years, the Property Appraiser is not authorized to issue a back assessment unless the property escaped taxation. While back assessments are

[2] The Property Appraiser also claims that the Second District's decision conflicts with its prior decision in *McNeil Barcelona Assocs., Ltd. v. Daniel*, 486 So. 2d 628 (Fla. 2d DCA 1986). However, as these opinion were issued by the same appellate court, the instant case effectively overruled *McNeil Barcelona* to the extent any conflict existed.

authorized for property or portions thereof that were completely omitted from the tax roll, they are not authorized solely for the purpose of increasing the value of property, like the subject Property, that has already been assessed.

B. The Property Appraiser is not authorized to back assess property whenever he discovers a clerical error in a prior year's tax roll.

Section 193.092 does not authorize the Property Appraiser to back assess property that has been mistakenly under-valued in a prior tax year, regardless of the reason for the under-valuation. In describing the procedures for back assessing property, Rule 12D-8.006(2)(a) requires the property appraisers to "make a separate assessment for each year (not to exceed three) that the property has been entirely omitted from the assessment roll," but notably does not provide instructions for back assessing property that was merely under-valued. The Second District was thus correct in holding that, under Florida statutes and regulations, the Property Appraiser did not have authority to back assess property that was mistakenly under-valued in the prior tax year.

In so holding, the Second District was mindful of this Court's language in *Korash*, where the Court expressly distinguished between back assessments for the purpose of increasing valuation, as opposed to back assessments for an omitted improvement:

> If it Were only for the purpose of an Increase in the valuation of the total property then we would agree with the chancellor, for it has been

> consistently so held. It will be seen however that in these prior cases the increase has been an attempted increase in Amount only (after an assessment of the improvement for a total lesser Amount) and not instances where the entire improvement was skipped and failed to be noted at all for taxation because of error or oversight as in the present case.

Korash, 263 So. 2d at 580-81. This Court went on to state that:

> We must keep in mind the distinction between changes and 'miscalculations' by the assessor which 'up' the amount previously assessed after tax roll certification, and the situation here were there has been no billing at all on the improvement (or it could be a separate, 'overlooked' parcel of land) which has been completely excluded from the tax roll.

Id. at 581.

The Property Appraiser relies on one sentence in the *Korash* case, where, characterizing the facts of the case, the Court said "thus we have here an instance where the principal value of the property has indeed 'escaped' taxation which is fairly within the contemplation of Fla. Stat. §193.092." *Id.* However, the Second District correctly reasoned that this statement, in the context of the entire opinion, was clearly not intended to condone back assessments for property that has been assessed, but under-valued. *See DeFrances*, 267 So. 3d at 529.

While the Court has drawn a distinction between clerical errors and changes in judgment in the context of section 197.122(1), which provides for the correction of clerical errors in the assessment process, there is no statutory or regulatory authority for back assessing property that was mistakenly under-valued in a prior

tax year. Section 197.122(1) does not authorize back assessments. Rather, the sole statutory authority for back assessments is section 193.092, and this Court has only applied section 193.092 to situations where property was entirely omitted from the tax roll, so as to "escape taxation."

C. In the instant case, the Property did not escape taxation.

Ms. DeFrances' Property did not escape taxation in the 2014 tax year. In 2014, Ms. DeFrances received a tax bill for the Property, which she paid in full. [R.124]. There was no evidence that the subsequently-issued back assessment was for property that had been excluded from that original 2014 tax bill. To the contrary, the Property Appraiser answered as follows in his sworn Answers to Interrogatories:

> 3. Identify the specific portions of the Property that escaped taxation in 2014 (or which would have escaped taxation if the Property had been assessed at $302,400.00 in 2014.
>
> ANSWER: There is no specific, defined area of land that escaped taxation since the land was valued as a whole.

[R.126]. Rather, the evidence indicated that, in the prior tax year, the Property Appraiser had made clerical errors regarding the size of the land, the location of the land on the water,[3] and the extent to which the Property should be treated as homestead property, which had resulted in an under-valuation of the Property.

[3] Again, this fact (that an error was made in the location of the property) is not in the record, but was asserted by the Property Appraiser in his Initial Brief.

[R.9]. The Second District thus correctly held that the Property Appraiser's errors did not result in any portion of Ms. DeFrances's property escaping taxation. *DeFrances,* 267 So. 3d at 530.

D. The Second District's Opinion does not prevent property appraisers from correcting clerical errors; it only limits the circumstances under which a taxpayer may be required to pay a back assessment.

The Second District's decision does not affect the Property Appraiser's authority to correct clerical errors in his records pursuant to section 197.122. The decision merely clarifies the limited circumstances under which those corrections can also result in a back assessment. The Property Appraiser has great leeway under section 197.122(1) , Florida Statutes to correct errors of omission or commission. However, the legislature has strictly limited the circumstances under which property appraisers may back assess property for mistakes that occurred in prior tax years. *See Homer v. Connecticut General Life Ins. Co.*, 211 So. 2d 250, 254 (Fla. 3d DCA 1968) (holding that the back assessment statute is "a delegation of limited authority which is to be exercised only upon the happening of certain events clearly delineated in that section").

Regardless of whether clerical errors were made by the Property Appraiser in his 2014 assessment, section 193.092, Florida Statutes only authorizes a back assessment if the property "escaped taxation," and, even then, the Property Appraiser may only back assess for up to three years. In *Korash,* this Court

explained the public policy behind the property appraisers' limited authority to back assess, stating:

> We adhere to the decisions in those situations because of the inherent evils which would allow belated adjustments upward and downward, creating instability and causing inequitable future variances between buyers and sellers regarding tax prorations and obligations.

Korash, 263 So. 2d at 582. The current statutory scheme thus balances the need for accurate tax rolls against the dangers inherent in requiring taxpayers to pay unexpected tax bills as a result of the property appraisers' mistakes.

The Property Appraiser opines that by denying him the ability to issue back taxes whenever he discovers a clerical error in a prior year's tax roll, the Second District is somehow sanctioning the disparate treatment of similarly-situated taxpayers. However, if anything, the deck is stacked against the taxpayers, who have no recourse if they discover that their property was mistakenly over-valued in a prior tax year. *See* §194.171, Fla. Stat. (requiring challenges to property tax assessments to be brought within a strict 60-day window). If Ms. DeFrances were to discover that, due to a clerical error in the size, location or homestead character of the Property, the Property Appraiser had erroneously *over-assessed* her property in a prior tax year, she would have no recourse. Yet the courts have recognized that, while seemingly harsh, such limitations are necessary in order to ensure the integrity of the tax collection process.

The same policy considerations that justify restricting taxpayers' ability to correct over-assessments in prior tax years likewise supports the legislature's reasoning for restricting the property appraisers' authority to issue back assessments. The legislature's balancing of the desire for accurate tax rolls with the taxpayers' need for certainty can be seen in section 197.122(3). In determining under what circumstances the property appraisers have authority to correct material mistakes of fact, the legislature decided to only allow such corrections if they were made within one year of the approval of the tax roll, and only if the correction would result in a *reduction* of the taxes owed. *See* §197.122(3), Fla. Stat. Likewise, under section 193.092(1), where property is omitted from a prior year's tax roll, the legislature has only permitted the property appraisers to back assess the property for the last three tax years. The legislature presumably imposed these limitations, even though the limitations might arguably result in some taxpayers paying more or less than their fair share, because the legislature perceived these limitations as offering an acceptable balance between the competing interests of the property appraiser and the taxpayers. The expansive back taxing authority sought by the Property Appraiser in this case is simply not permitted by the plain language of the statute, nor is it supported by public policy.

CONCLUSION

WHEREFORE, Respondent Susan K. DeFrances respectfully requests that this Court affirm the Opinion of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to J. Geoffrey Pflugner at jpflugner@icardmerrill.com and dmartin@icardmerrill.com, Jason A. Lessinger at jlessinger@icardmerrill.com, thashem@icardmerrill.com, and lkarpova@icardmerrill.com, and Anthony Manganiello at amanganiello@icardmerrill.com, thashem@icardmerrill.com, and lkarpova@icardmerrill.com, Bora S. Kayan at bkayan@scgov.net and lcroft@scgov.net, and Robert P. Elson at robert.elson@myfloridalegal.com, jon.annette@myfloridalegal.com, and lisa.ryder@myfloridalegal.com on this 5th day of November 2019.

JOHNSON LEGAL OF FLORIDA, P.L.
2937 Bee Ridge Rd. Suite 1
P.O. Box 20998
Sarasota, FL 34276
Phone: (941) 926-1155
Fax: (941) 926-1160
sjohnson@johnsonlegalfl.com
Attorney for Respondent Susan K. DeFrances

/s/ Sherri L. Johnson
SHERRI L. JOHNSON
Florida Bar No. 0134775

CERTIFICATE OF COMPLIANCE

Counsel for Respondent Susan K. DeFrances certifies that Respondent's Answer Brief is typed in 14 point (proportionately spaced) Times New Roman font.

JOHNSON LEGAL OF FLORIDA, P.L.
2937 Bee Ridge Rd. Suite 1
P.O. Box 20998
Sarasota, FL 34276
Phone: (941) 926-1155
Fax: (941) 926-1160
sjohnson@johnsonlegalfl.com
Attorney for Respondent Susan K. DeFrances

/s/ Sherri L. Johnson
SHERRI L. JOHNSON
Florida Bar No. 0134775