IN THE SUPREME COURT OF THE STATE OF FLORIDA

BILL FURST, as Property Appraiser of Sarasota County, et. al.,

Appellant,

vs.

Case No.: SC19-701
Dist. Ct. Case No.: 2D17-3973
L/T Case No.: 2015 CA 006511 NC

SUSAN K. DEFRANCES,

Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING

Appellant Bill Furst seeks rehearing and respectfully directs this Court to language in Florida Statute Section 197.122 (2015) which this Court has overlooked. When this Court overlooked the statutory language, it resulted in a misapprehension of the interrelationship between Section 197.122 and Florida Statute Section 193.092 (2015), as well as the interrelationship between this Court's prior holdings in *Smith v. Krosschell*, 937 So.2d 658 (Fla. 2006) and *Korash v. Mills*, 263 So.2d 579 (Fla. 1972). This Court overlooked the statutory language and misapprehended the relationship between the two statutes and *Korash* and *Krosschell* in its Opinion at pages 12-13:

The Property Appraiser criticizes the Second District's interpretation of section 193.092(1)—and by extension our interpretation here—as artificially constraining the text. He asks us to draw a distinction between underassessments caused by "clerical errors" and those caused by errors in judgment. He concedes that errors in judgment are not correctable through back assessments under section 193.092(1). But he urges us to hold that the statute requires property appraisers to impose back assessments when clerical errors result in "taxable value" being lost.

The problem with the Property Appraiser's arguments is that they are disconnected from anything the text says or fairly implies. The text does not speak of "taxable value" escaping taxation. Nor does the text mention—much less draw a distinction between—clerical errors and errors in judgment. (Footnote 4) In fact, if we were to read the statutory phrase "escaped taxation" as encompassing the under-taxation of property, the text would give us no basis to categorically prohibit the use of back-assessments to correct errors in judgment.

Footnote 4: The Property Appraiser's argument that we should decide this case based on a distinction between clerical errors and errors in judgment appears to borrow from case law interpreting a different statute, section 197.122, Florida Statutes (2015). *See Smith v. Krosschell*, 937 So.2d 658, 661 (Fla. 2006) (explaining that this statue addresses "the correction of mathematical, administrative, or clerical error[s]" in the assessment roll but not errors in judgment). **Section 197.122 relates to corrections to the assessment roll, not to the imposition of back taxes**. And section 197.122 does not include the phrase "escaped taxation." The Property Appraiser does not rely on Section 197.122 for the authority to impose the back assessment at issue in this case.

(Emphasis added).

The statutory language this Court overlooked is highlighted

below:

197.122. **Lien of taxes**; application

(1) **All taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens**, on any property against which the taxes have been assessed and shall continue in full force from January 1 of the year the taxes were levied until discharged by payment or until barred under chapter 95. If the property to which the lien applies cannot be located in the county or the sale of the property is insufficient to pay all delinquent taxes, interest, fees, and costs due, a personal property tax lien applies against all other personal property of the taxpayer in the county. However, a lien against other personal property does not apply against property that has been sold and is subordinate to any valid prior or subsequent liens against such other property. **An act of omission or commission on the part of a property appraiser**, tax collector, board of county commissioners, clerk of the circuit court, or county comptroller, or their deputies or assistants, or newspaper in which an advertisement of sale may be published **does not defeat the payment of taxes**, interest, fees, and costs due and **may be corrected at any time** by the party responsible in the same manner as provided by law for performing acts in the first place. **Amounts so corrected shall be deemed to be valid ab initio** and do not affect the collection of the tax. All owners of property are held to know that taxes are due and payable annually and are responsible for ascertaining the amount of current and delinquent taxes and paying them before April 1 of the year following the year in which taxes are assessed.

(Emphasis added).

Section 197.122 relates to the payment of back taxes because it is the statute which creates and defines the lien of taxes. Section 193.092 is not implemented until after a lawful correction of an act of omission or commission occurs under Section 197.122. Property appraisers are charged with lawfully assessing all property. When a property appraiser makes any mistake which results in a decrease of the amount of property taxes owed, ad valorem taxes which may have been lawfully assessed do not get levied. Section 197.122 determines whether the mistake made can be retroactively corrected, and only allows correction of acts of omission or commission, but not errors of judgment, as confirmed by both *Krosschell* and *Korash*.

This Court noted "the Property Appraiser does not rely on Section 197.122 for the authority to impose the back assessment at issue in this case." This is a misapprehension of the relationship between Section 197.122 and Section 193.092 and the facts of this case. The Property Appraiser necessarily relied on Section 197.122 to make the correction, which is the only path to Section 193.092. The Property Appraiser then relied on Section 193.092 for the back assessment.

Section 197.122 irrefutably confirms that corrections based on acts of omission or commission do not affect the collection of the tax and any amounts so corrected are to be included in the lien of taxes. Only after the act of omission or commission is corrected may those taxes be collected via back assessment because the taxes only become due after the correction is made, whereby the taxes become "valid ab initio." Once the taxes become valid ab initio under Section 197.122, Section 193.092 then allows the taxes to be collected because only at that point has it been determined that "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 . . . ."

This Court also overlooked facts in the record which confirmed Section 197.122 was at issue and contested before the trial court in this case. Mrs. DeFrances attached as Exhibit B to her complaint the "Notice of Proposed Increase in Assessed value and taxes- §12D-8.021(7) Florida Administrative Code." (R. 16, Appendix, Exhibit 1). This document notified Mrs. DeFrances of the correction of the Property Appraiser's clerical error. Rule 12D-8.021 implements the unequivocal language in Section 197.122 and provides definitions

differentiating between errors of judgment and acts of omission or commission so that property appraisers and other government officials have guidance in determining which errors are correctable under Section 197.122 and then subject to back assessment under Section 193.092. Attached as Exhibit C to the Complaint was the Tax Collector's bill for the increased taxes. (R. 17, Appendix, Exhibit 2). This is the document by which the Tax Collector initiated collection of the tax lawfully due under Section 193.092, but only after the correction made pursuant to Section 197.122.

The Property Appraiser relied on Section 197.122 in its affirmative defenses before the trial court, stating:

> Furst erroneously assessed the property at $302,400.00 for the 2014 tax year, due to an error of commission or omission, when the property appraiser's office was in the process of converting to a new computer system, which caused certain valuation figures to be removed from the prior year's calculation. For the 2013 tax year, the property was assessed at a just value of $2,449,400.00, such that the assessment at $302,400.00 was known by Plaintiff to be a mistake, **subject to correction in order to assess taxes on property that would otherwise escape taxation pursuant to Florida Statute Sections 197.122 and 193.092.**
>
> (Emphasis added).
>
> (R. 32-33, Appendix, Exhibit 3)

Mrs. DeFrances, in her written opposition to the Property Appraiser's summary judgment motion, (R. 89-92, Appendix, Exhibit 4), contested the application of Section 197.122 and argued to the trial court that Section 197.122 did not authorize the correction of an act of omission or commission affecting homestead property. Mrs. DeFrances' arguments before the trial court were in direct contravention to this Court's opinion in *Smith v. Krosschell*, which confirms Section 197.122 allows corrections for acts of omission or commission affecting homestead property. She further argued facts remained in dispute which would preclude summary judgment. (R.89-92, Appendix, Exhibit 4).

This Court also misapprehended the significance of the undisputed fact reflected in the trial court's ruling at summary judgment, confirming the error was clerical and not a judgment error. (R. 96-99, Appendix, Exhibit 5). This factual determination by the trial court confirmed the applicability of Section 197.122 as implemented by Rule 12D-8.021.[1]

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[1] Regrettably, the trial court's ruling failed to include a citation to Section 197.122.

This Court also misapprehended the import of Mrs. DeFrances' concession on appeal that the error at issue was in fact a clerical error. On appeal to the Second District Court of Appeal, Mrs. DeFrances waived all arguments she raised before the trial court other than her claim that her property did not escape taxation under Section 193.092, including her legal argument in opposition to Section 197.122 and any factual dispute over the nature of the error. When she did, she conceded the trial court's finding that the error was a clerical error subject to correction under Section 197.122. She therefore conceded the validity, applicability, and impact of Section 197.122 in this case. When she did, she conceded the error was able to be corrected as an act of omission or commission, and therefore became a lien on her property under Section 197.122. Once she conceded these points, the additional tax owed was subject to back assessment under Section 193.092.

This Court overlooked or misapprehended the point of law that confirms retroactive corrections to errors in judgment are statutorily prohibited. As noted above, Section 197.122 only allows for correction of acts of omission or commission, not errors in judgment, as this Court confirmed in both *Korash* and *Krosschell*. Since an

error in judgment cannot lawfully be retroactively corrected under Section 197.122, such a correction can never be included in the lien of taxes and can never be the basis for a back assessment under Section 193.092.

Based on the questions posed by this Court during oral argument, coupled with the Opinion of this Court, this misapprehension of the connection between the two statutes, and resulting perceived lack of a statute prohibiting retroactive correction to errors in judgment, led this Court to erroneously conclude that allowing back assessment under Section 193.092 in this case would allow property appraisers to back assess based on retroactive corrections to errors in judgment. This fear is explicitly stated in this Court's opinion at page 13, as quoted above and re-stated here for ease of reference:

> In fact, if we were to read the statutory phrase "escaped taxation" as encompassing the under-taxation of property, the text would give us no basis to categorically prohibit the use of back-assessments to correct errors in judgment.

Section 193.092 confirms back assessment is only proper when tax could have been lawfully assessed or collected. Since an error in judgment cannot be retroactively corrected under Section 197.122,

any back assessment based on such a correction is always improper under Section 193.092, because an unlawful retroactive correction based on a change in judgment never results in "ad valorem tax that might have been lawfully assessed or collected."

This Court also overlooked the portion of *Korash v. Mills* confirming that the statutory predecessor to Section 197.122 was at issue and addressed. The *Korash* Court first confirmed the error was correctable as a clerical error and not an error in judgment, thereby further confirming that only then could the retroactive correction be the basis for back assessment, noting at page 581:

> The back assessment *sub judice* is not viewed merely as "clerical" under Fla.Stat. s 192.21 (now s 197.011), F.S.A., for it is more serious than that. The types of clerical corrections under this statute are rather limited. Neither is it a *total* escape of taxation but it is a partial one under s 193.23 (now s 193.092), F.S.A. and is within that statute's purview for 're-capture.'

The critical language of Florida Statute Section 192.21 (a copy of which is included as Appendix, Exhibit 6) is virtually identical to Section 197.122. A close examination of the *Korash* opinion therefore confirms the *Korash* Court considered the nature of the correction under the operative statute at the time, confirmed it was not a

statutorily prohibited correction to an error in judgment, and therefore allowed back assessment.

CONCLUSION

Mrs. DeFrances' property escaped taxation when 4 of her 5 lots were not assessed due to a clerical error. Section 197.122 authorizes the correction of clerical errors. Any tax due as a result is valid ab initio and included in the lien of taxes. Once the amount due based on the correction is included in the lien of taxes, then and only then is it subject to back assessment under Section 193.092. The overlooked statutory language and facts, and resulting misapprehensions, have allowed Mrs. DeFrances to use the facts of *Korash* to define the law in this case when it is the law of *Korash* and *Krosschell* that must be applied to the facts of this case.

The Property Appraiser respectfully requests rehearing to address the overlooked and misapprehended statutory language and facts. This Court will then be able to interpret the phrase "escape taxation" in a manner consistent with the opening language of Section 193.092, as limited by the restrictions imposed by Section 197.122, which will alleviate this Court's concern over interpreting "escaping

taxation" in a way that would unlawfully allow back assessments based upon retroactive corrections to errors in judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 17th day of September, 2021 by Electronic Mail to Sheri L. Johnson, Esq. at sjohnson@johnsonlegalfl.com; Bora Kayan Esq. at bkayan@scgov.net; and Robert P. Elson, Esq. at Robert.Elson@myfloridalegal.com, Jon.Annette@myfloridalegal.com and Lisa.Ryder@myfloridalegal.com.

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