Florida TaxWatch

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Volume III, Issue 10*

April 1996

The Property Tax Burden of Proof: A Call for Change

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Introduction

There is today no meaningful remedy for taxpayers experiencing excessive property tax assessments. Administrative and judicial remedies are established, but they are illusory because the taxpayer's burden of proof is virtually insurmountable. There is no Taxpayer Bill of Rights for property taxes, and taxpayers are denied the one right which is most fundamental: the right to a meaningful remedy for overassessment. The result is that small taxpayers are almost completely shut out of the process, and large taxpayers who can afford to challenge the property appraiser are rarely successful, even when they have strong positions.

HB 557 and SB 740 have been introduced to correct this situation. These bills would: (1) retain the presumption of correctness which property appraisers currently enjoy, provided they comply with recognized professional standards of appraisal practice; and (2) allow taxpayers to rebut that presumption by a preponderance of evidence. With this change, Florida ad valorem taxpayers will be treated the same way as taxpayers challenging other Florida taxes, and the same way as ad valorem taxpayers generally throughout the country. This legislation is not about tax cuts or reductions, but about basic fairness to the taxpayer. This change is within the legislative prerogative.

The Current Burden of Proof

A Florida property appraiser enjoys a presumption of correctness if he has "considered" the eight factors in section 193.011, Florida Statutes (attached). The presumption can only be rebutted by proof that "the appraisal made was not supported by any reasonable hypothesis of legality." *Blake v. Xerox Corporation*, 447 So. 2d 1348 (Fla. 1984).[1] The meaning of this formulation is not well defined. However, the results of its operation are clear: the property appraiser almost always wins. Some of the features of its operation are set forth below:

"Consideration" of eight criteria triggers the presumption.

To enjoy the presumption of correctness a property appraiser need only have "considered" the eight factors. The cases do not impose requirements as to the quality of such "consideration." To the contrary, property appraisers have discretion as to the weight to be accorded each factor. *Vero Beach Shores v. Nolte*, 467 So. 2d 1041 (Fla 4th DCA 1985). Therefore, property appraisers routinely get past this part of the test easily, with conclusory assertions that all factors were considered. This entitles the property appraiser to the presumption of correctness, which is rarely overcome because the taxpayer must exclude "every reasonable hypothesis" of a proper assessment to overcome it. The irony is that the eight factors were adopted to constrain the property appraisers' discretion, *Walter v. Schuler*, 176 So. 2d 81, 85 (Fla. 1965). Their purpose was to protect taxpayers from overvaluations by property appraisers; instead they protect property appraisers from taxpayer claims of overvaluation.

It should also be emphasized that the eight factors are not "methods" or "approaches to value, as the opponents contend; they are factors (i.e., information) to which valuation methods may be applied. There is currently no statutory requirement that the property appraiser employ professionally accepted appraisal methods.

Several Florida courts have explicitly or implicitly held that the presumption of correctness remains effective even on appeal. In other words, unlike other Florida trial court judgments, a judgment in favor of an ad valorem taxpayer does not come clothed with the presumption of correctness; the opposite is true. *See Walker v. Trump*, 549 So. 2d 1098 (Fla. 4th DCA *1989)*; *Bystrom v. Bal Harbour 101 Condo. Assn., Inc., 502 So. 2d 1312* (Fla. 3rd DCA 1987); *Mastroianni v. Barnett Banks, Inc.*, 20 Fla. L.W. D2536 (Fla. 1st DCA 1995). Thus, a taxpayer who

[1] The "every reasonable hypothesis" test was articulated at least as early as 1927. *Roberts v. American Nat. Bank*, 115 So. 251 (Fla. 1927).

is able to meet the heavy burden in a circuit court proceeding will face it anew on appeal. The circuit court's evaluation of the evidence will be second-guessed on appeal in ways that have no counterpart in other civil litigation.

"Every reasonable hypothesis" and "beyond a reasonable doubt."

It is unclear what "every reasonable hypothesis" means. To say that a taxpayer must "exclude every reasonable hypothesis of a lawful assessment" resembles the "every reasonable doubt" burden of proof facing the State in criminal cases. Indeed, practitioners in this field have observed that it is easier for the State to convict a criminal defendant than for a Florida taxpayer to win a property tax case. The comparison is also instructive because of the locus of the burden in each context: in the criminal context, it operates in favor of the individual and against the Government; in the property tax environment it operates against the individual and in favor of the Government. No other analog for this situation has been discovered.

The heavy burden the Government must carry to convict a criminal defendant is grounded in the importance of liberty and the individual in our society. There is no comparable policy which calls for imposing a similar burden on ad valorem taxpayers. To the contrary, the desire for protections against abusive taxation is also deeply rooted in the history of this nation and in its institutions. Many, many taxpayers, large and small, are now convinced that the current Florida property tax system is abusive because they have no realistic remedy for overassessment. Instead of protecting the individual, the system protects the Government.

"Range of reasonable appraisals."

In *Blake v. Xerox Corporation*, the Florida Supreme Court seemed to equate the "every reasonable hypothesis" test with whether the assessment, if "lawfully arrived at" (meaning, if the eight criteria were "considered") is "within the range of reasonable appraisals." However, it does not appear that this yardstick was actually applied. The assessment was $28 million, the taxpayer's value $15 million. One of these values was obviously outside the "reasonable range." However, the opinion does not discuss the application of the "reasonable range" concept to the facts presented. Similarly, in *Mastroianni v. Barnett Banks, Inc.*, the trial court found that the assessments were outside the range of reasonable appraisals, but the court of appeal reversed, stating that an assessment "cannot be overturned by a showing that a lower valuation is more reasonable." In other words, even though the taxpayer's value is a better representation of fair market value, he loses. A taxpayer thus cannot prevail with evidence that an assessment is outside the range of "reasonable appraisals."

Some cases say that the "core issue" in a tax suit is the amount of the assessment, not the methodology used in arriving at the valuation, *See, e.g., Bystrom v. Whitman*, 488 So. 2d 520 (Fla. 1988). However, as described above, proof of overvaluation does not entitle the taxpayer to relief. Indeed, the precedents and confusion that have evolved often prevent the valuation issue from receiving serious consideration. Instead the focus is on the "hypothesis" of the assessment.

"Hypothesis" and the role of appraisal method.

Although the term "hypothesis" has not been defined in this context, the "exclusion of every reasonable hypothesis of a lawful assessment" standard suggests that an inquiry into the derivation of the assessment is necessary. Again, however, *Blake v. Xerox Corporation* teaches otherwise. The court there specifically rejected as irrelevant whether the taxpayer's method was a better method for valuing the property at issue. Thus, the taxpayer cannot prevail by showing that his method is superior to that employed by the property appraiser. Indeed, even if the property appraiser changes his method, the taxpayer's burden is unchanged. *See, e.g., Bystrom v. Whitman*, 488 So. 2d at 522 ("Because a taxpayer must prove no legal hypothesis could support the assessment, a property appraiser should have the right to defend the assessment by re-examining any potentially erroneous element in the valuation formula").

It is difficult to imagine why the superiority of one appraisal method over another would not be relevant in a system which bases taxation on the value of property. The essential issue is (or should be) the fair market value of the property, namely, the price the property would bring in an open market transaction between a willing buyer and a willing seller. If one method produces a better determination of value, it should be adopted. The Constitution requires assessments at just or fair market value and it is inconsistent with that mandate to reject admittedly superior methodologies. It is also impossible to discuss intelligently a determination of fair market value without regard for the method used to derive it. The credibility of a value determination depends upon how it was derived; there is no other yardstick by which to measure it.

Proving a negative proposition.

To win, the taxpayer must prove a negative proposition. He cannot simply establish the fair market value of the property or that the property appraiser's method is faulty; he must negate every reasonable "hypothesis" which might support the assessment. In other words, he must negate the validity of methods not even used in deriving the assessment. *See, e.g., Bystrom v. Whitman.* The focus is not on the fair market value of the property, but on the search for alternative "hypotheses." The problem is that there may be no limit to the number of "hypotheses" which could be employed, especially in the absence of a requirement to adhere to professional standards. But the taxpayer is required to identify every one of them and to prove that it is not reasonable.

The current law is thus a complex web of conflicting standards and restrictions which tie the taxpayer in knots. The "core issue" is said to be value, but the taxpayer cannot prevail by showing that a lower value is more reasonable. The "reasonable hypothesis" test is said to mean that the assessment must be within the range of reasonable appraisals, but the taxpayer cannot prevail by showing that the assessment is outside that range. "Hypothesis" implies method, but method is said to be irrelevant. And even if the taxpayer gets lucky and persuades a trial court that there is no "reasonable hypothesis" to support an assessment, an appeals court is likely to re-weigh the evidence and reverse, *See, e.g., Bystrom v. Bal Harbour 101 Condo. Assn., Inc., Walker v. Trump; Mastroianni v. Barnett Banks, Inc.*

This is not to suggest that no taxpayer can ever win a property tax case. However, with the law in its current condition, taxpayer victories are rare and generally involve extraordinary circumstances, such as an intentional inclusion of intangible asset value in an assessment, *Scripps Howard Cable Company v. Havill*, 20 Fla. L.W. D2624 (Fla. 5th DCA 1995), or a disregard of land use restrictions, *Walker v. Hoffman*, 464 So. 2d 10 (Fla. 4th DCA 1985). But for most taxpayers there is only the illusion of a remedy. However one attempts to prove his case, there is almost always a judicial decision which states or implies that it cannot be done that way. The presumption under existing law is all but conclusive.

The Solution: HB557 and SB 740

This legislation would retain the presumption of correctness in favor of the property appraiser, provided he has complied with the requirements of law and followed recognized professional standards of appraisal practice. The presumption will no longer be triggered with mere conclusory assertions about what has been "considered." A taxpayer will be able to rebut the presumption with a preponderance of evidence. This will bring Florida into conformity with the majority of states, and bring the Florida property tax system into conformity with the system applicable to other Florida taxes. The focus will be on value, not a search for "hypotheses" to negate.

Opponents of the bill have suggested during the legislative debate that the burden of proof is a judicially-created procedural standard, so it is not subject to change by the Legislature. The only authority cited for this proposition is *Avila South Condominium Association v. Kappa Corp.*, 347 So.2d 599, 607-08 (Fla. 1977). There, the Florida Supreme Court invalidated a statute allowing condominium associations to bring class actions on behalf of members, finding that the statute conflicted with an existing Rule of Civil Procedure and was also an attempt to prescribe how a judicial proceeding should be conducted.

This has no applicability to a statute which prescribes the burden of proof. The Legislature has prescribed standards for burdens of proof in many other contexts. Florida courts have approved and applied such legislation, and it has not been treated as "procedural" in nature so as to offend the judicial power over court processes. *See, e.g., Herrer v. State*, 594 So.2d 275 (Fla. 1992) (statute placing burden on criminal defendant to prove defense of entrapment by preponderance of the evidence did not violate due process); *In re Estate of Combee*, 583 So. 2d 708 (Fla. 2d DCA 1991) (statutory presumption that contract establishing joint bank account with right of survivorship expresses true intent of signatories, can be overcome only by specified showing), *approved*, 601 So.2d 1165 (Fla. 1992). The principle that a legislature has the power to prescribe burdens of proof and presumptions is a general principle in the United States. *See generally* 16 C.J.S. *Constitutional Law* § 129, at 416 ("The legislature may also regulate the burden of proof, and the extent thereof required") (citations omitted).

Indeed, the Florida Supreme Court has upheld a statutory property tax presumption, *Straughn v. K & K Land Management, Inc.*, 326 So. 2d 421, 424 (Fla. 1976). There, section 193.464(4)(c) provided that the sale of land for a purchase price of three or more times the agricultural assessment created a presumption that the land was not used primarily for bona fide agricultural purposes. The statute further prescribed the showing required to rebut the presumption. Note also that the existing statute governing circuit court review of property tax assessments provides that "the burden of proof shall be upon the party initiating the action." Fla. Stat. § 194.036(3)(1993). See also sections 90.301- 90.304, Florida Statutes (defining and classifying presumptions). There is simply no legal basis for the opponents' claim that this legislation would infringe on the judicial rulemaking power.

The legislative power to address this issue is clear, and the question becomes whether the Legislature should do so. The taxpayer's burden of proof is one of the few facets of the property tax system that is not currently regulated by statute. *See* Article VII, Section 4, Florida Constitution ("By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation"). This burden of proof was judicially developed in another era, in cases based upon discriminatory tax treatment, *see, e.g., Roberts v. American National Bank of Pensacola*, 115 So. 261 (Fla. 1927); *Folsom v. Bank of Greenwood*, 120 So. 317 (Fla. 1929). The taxpayer burden of proof described in those decisions, which predate the adoption of fair market value as the valuation standard, was carried forward into the modern jurisprudence without apparent consideration of its continued suitability.

In recent years, conditions have steadily worsened. There is a snowball effect, with more and more decisions rendered which contain snippets of text that are used to squeeze taxpayers out of the Value Adjustment Board or court. Homeowners and small business taxpayers are shut out of the process, and large taxpayers must invest small fortunes to anticipate and refute all the potential "hypotheses" of an assessment. No public policy can justify continuation of this state of affairs. The situation is out of control, and legislative action is needed.

The status quo cannot be defended on the ground that appraisal is a matter of judgment and that this legislation would tie property appraisers up in litigation over differences in judgment. Taxpayers in a majority of American jurisdictions have the right to prove the value of their property by a preponderance of the evidence. This is as it should be. It not only provides basic fairness to the taxpayer, it also helps promote the fair market value standard as the ultimate objective in property tax valuation. The ultimate objective is not to make life easy for assessing officials by covering their mistakes.

The property appraiser's decisions are rendered without the benefit of any hearing, yet they are almost conclusively presumed correct. This is unique; research has disclosed no other government official in this state (constitutional or otherwise) whose actions are similarly favored. No tax system should be so heavily based upon the judgment of a single person whose actions are insulated from meaningful review. Affording citizens due process is often inconvenient for executive officials, but this is a necessary price for a free society. This general proposition is no less true in the tax field. A tax system which is based upon the value of property must accommodate the rights of taxpayers to be heard on the issue of value.

Article I, Section 25, Florida Constitution requires the Legislature to adopt a taxpayers' bill of rights, which among other things, sets forth "government's responsibilities to deal fairly with taxpayers under the laws of this state." Fair dealing is not defined in the Constitution, but at a minimum it should mean that the taxpayer has a meaningful opportunity to obtain relief from illegal taxation. Fair dealing does not mean that the taxpayer should have the same burden of proof as is required to convict a criminal. The property appraiser should be treated the same as other governmental officials: if he follows the statutes his action is presumed correct, but a taxpayer should be able to rebut that presumption by a preponderance of the evidence.

The property appraisers' desire to continue the status quo is understandable. But they cannot justify the unique favored position that they now enjoy. The status quo is grossly unfair to taxpayers. In an era of taxpayers' bills of rights, the right to a fair opportunity to establish the value of one's property should be basic. Taxpayers in other states have this right, and government there has survived. Florida too can afford a fair property tax system. ■

** A companion to this article entitled, "Presumption of Correctness: The Reality and the Necessity," by Attorney John C. Dent, Jr., is being published concurrently.*

About the Author

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Mr. Goldman's practice includes all dimensions of state and local taxation, including tax protests, litigation in the courts and before administrative agencies, appeals, counseling tax clients and tax planning. Since 1983, Mr. Goldman has served on the Executive Council of the Florida Bar Tax Section and has chaired the Section committees on ad valorem taxation, sales taxation and administrative procedure. He also is a contributing author to the Florida Bar's two-volume treatise Florida State and Local Taxes, and has served as an instructor for Tax Section Continuing Legal Education.

Mr. Goldman is a member of the Taxpayer Advisory Group appointed by the Executive Director of the Florida Department of Revenue, and a member of the Steering Committee of the Federation of Tax Administrators national Task Force on Electronic Data Interchange Audit and Legal Issues for Tax Administration.

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