CORRECTION OF ERRORS IN THE ASSESSMENT OF HOMESTEAD PROPERTY AFTER *SMITH v. WELTON*

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I. INTRODUCTION

The Weltons challenged Oklaloosa County Property Appraiser Timothy "Pete" Smith's assessment of their homestead property because the increase in the assessment from the 1994 tax year to the 1995 tax year exceeded the limits set forth in Article VII, Section 4 of the Florida Constitution, also known as the Save Our Homes Amendment.[1] The property appraiser included 15,000 square feet of improvements on the 1995 tax roll that had mistakenly been left off the tax roll since the Weltons acquired the property in 1972.[2] In so doing, Smith relied on Florida Statutes Section 193.155(8), which provides that

> [e]rroneous assessments of homestead property assessed under this section may be corrected in the following manner:

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1. *Smith v. Welton*, 729 S.2d 371, 371–372 (Fla. 1999). Article VII, Section 4(c) of the Florida Constitution provides,

> All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.
>
> 1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:
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> (A) three percent (3%) of the assessment for the prior year.
>
> (B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. *Welton*, 729 S.2d at 371–372.

> (a) If errors are made in arriving at any annual assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.
>
> . . .
>
> If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.[3]

The trial court granted summary judgment in favor of the Weltons, because it found that Section 193.155(8) was facially unconstitutional.[4] The First District Court of Appeal affirmed, holding that the statute would "defeat the purpose of the Save Our Homes Amendment by allowing constant reassessments of homesteads based on 'new information.'"[5] The property appraiser appealed to the Florida Supreme Court,[6] which held that the statute was constitutional, but that it did not give property appraisers authority to retroactively correct the base year assessment of homestead property.[7] Thus, the questions that now plague Florida property appraisers are whether and how corrections can be made to assessments of homestead property under Section 193.155(8).

The issue is further confused by the fact that the court did not distinguish between corrections resulting from changes in appraisal judgment and corrections of material mistakes of fact — a distinc-

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3. Fla. Stat. § 193.155(8) (2000). "Essential condition of the subject property" is defined in Section 197.122(3)(a) as

> a characteristic of the subject parcel, including only:
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> 1. Environmental restrictions, zoning restrictions, or restrictions on permissible use;
> 2. Acreage;
> 3. Wetlands or other environmental lands that are or have been restricted in use because of such environmental features;
> 4. Access to usable land;
> 5. Any characteristic of the subject parcel which characteristic, in the property appraiser's opinion, caused the appraisal to be clearly erroneous; or
> 6. Depreciation of the property that was based on a latent defect of the property which existed but was not readily discernible by inspection on January 1, but not depreciation resulting from any other cause.

Fla. Stat. § 197.122(3)(a) (2000).

4. *Welton*, 729 S.2d at 372.

5. *Smith v. Welton*, 710 S.2d 135, 138 (Fla. Dist. App. 1st 1998), *aff'd on other grounds*, 729 S.2d 371.

6. *Welton*, 729 S.2d at 371.

7. *Id.* at 373.

tion that the court, statutes, and property appraisers have recognized for decades.[8]

II. HISTORICAL BASIS FOR CORRECTING MISTAKES IN ASSESSMENTS

The Florida Constitution requires that all property be assessed at its just value.[9] In *Walter v. Schuler*,[10] the Florida Supreme Court found that just value is legally synonymous with "fair market value."[11] More importantly, the court clarified the rule that assessments at more *or less* than one hundred percent of fair market value "would not accomplish 'just' valuation."[12] This requirement seemingly obligates property appraisers to correct erroneous assessments.

Property appraisers in Florida have always been able to correct mistakes of *fact* in property assessments.[13] Section 197.122(1) provides for the correction of any "act of omission or commission on the part of any property appraiser."[14] Pursuant to Section 195.027, the Florida Department of Revenue enacted Rule 12D-8.021,[15] which provides the procedure for the correction of errors by property appraisers.[16] Property appraisers are also permitted to back assess[17] property that has escaped taxation for up to three years prior to the year in which the mistake is discovered.[18] The language of Section

8. Fla. Stat. § 197.122(3) (providing for correction of assessments due to material mistakes of fact); *see e.g. Korash v. Mills*, 263 S.2d 579, 581 (Fla. 1972) (explaining the distinction between changes in judgment and correction of factual mistakes).

9. Fla. Const. art. VII, § 4.

10. 176 S.2d 81 (Fla. 1965).

11. *Id.* at 85–86.

12. *Id.*; *but see Welton*, 710 S.2d at 137 (finding that "[t]he constitution also provides that '[n]o assessment shall exceed just value[,]' but does not state that assessments shall not be below just value" (second and third alterations in original)).

13. Fla. Stat. § 197.122(3).

14. *Id.* § 197.122(1); *see City of Ft. Myers v. Heitman*, 5 S.2d 410, 412 (Fla. 1941) (holding that the correction of errors and omissions is always appropriate); *Dickinson v. Allen*, 215 S.2d 747, 749 (Fla. Dist. App. 2d 1968) (finding that errors in mathematical computation on a tax bill could be considered errors of omission or commission).

15. Fla. Stat. § 195.027 (2000).

16. Fla. Admin. Code Ann. r. 12D-8.021 (1999).

17. *Id.* The terms "back assess" and "back assessment" refer to the retroactive taxation of property that occurs to correct mistakes on tax rolls that were certified in prior years. The terms are used by the courts in property tax cases. *E.g. Korash*, 263 S.2d at 581.

18. Fla. Stat. § 193.092 (2000).

193.155(8), the statute at issue in *Welton*, suggests that the back assessment statute also applies to homestead property.[19]

Historically, the only mistakes that the courts have not allowed property appraisers to correct are mistakes of judgment made in prior tax years.[20] In *Markham v. Friedland*,[21] the previous tax assessor had determined that the improvements to plaintiff's property were not "substantially complete" as defined in Florida Statutes Section 193.11(4), and he assessed the property as unimproved land.[22] In the following tax year, his successor determined that the building had been "substantially complete" in the prior year, and he attempted to back assess the property for the value of the improvements.[23] The issue before the court was whether the improvements had escaped taxation and were therefore subject to back assessment.[24]

The *Friedland* court held that the property had not escaped taxation.[25] The court noted that "the law in Florida clearly established is that once the tax roll has been certified only clerical errors may be corrected and not mistakes of judgment."[26] The court thus distinguished between back assessing property that has escaped taxation due to a mistake of fact and revaluing property because of a change in judgment.[27]

The difference between a mistake of fact and a change in judgment was further defined by the Supreme Court of Florida in *Korash v. Mills*.[28] In *Korash*, the property appraiser attempted to back assess a motel.[29] In the prior year, the property record card for the land accidentally had been separated from the property record card for the improvements, causing only the value of the land to be entered on the tax roll.[30] Thus, when the error was discovered in the

19. Fla. Stat. § 193.155(8). "If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes." *Id.*

20. *Markham v. Friedland*, 245 S.2d 645, 652 (Fla. Dist. App. 4th 1971).

21. 245 S.2d 645 (Fla. Dist. App. 4th 1971).

22. *Id.* at 647 (referring to a statute that was later recodified in Florida Statutes Section 192.042 (2000)).

23. *Id.* at 648.

24. *Id.* at 652.

25. *Id.*

26. *Id.*

27. *Id.*; *see Underhill v. Edwards*, 400 S.2d 129, 132 (Fla. Dist. App. 5th 1981) (holding that the determination that a parcel of property should not have been exempt from taxation involved a change of judgment).

28. 263 S.2d 579, 581 (Fla. 1972).

29. *Id.* at 580.

30. *Id.*

following year, the property appraiser attempted to back assess the value of the improvements.[31] The Florida Supreme Court held that the motel had partially escaped taxation and was subject to back assessment.[32] The court distinguished between changes that increase the assessment of property that has previously been assessed and situations in which there have been no billing at all on the improvement.[33] Specifically, it found that a previously overlooked improvement or parcel of land may fall into the category of property that has escaped taxation due to a mistake of fact.[34] The court explained that

> [i]t would be an extremely inequitable and unjust result for a court of equity to grant to a knowing taxpayer an outright "windfall" of $25,000 which was the additional tax he admittedly escaped for the year in question.
>
> Justice may be "blind" but it is not stupid. Impartial fairness and equality is what the blindfold represents.[35]

III. THE WELTON COURT MISCONSTRUED THE FACTS

In *Welton*, the Florida Supreme Court upheld the constitutionality of Section 193.155(8)(a), thereby suggesting that property appraisers may correct assessments of homestead property and assess back taxes if necessary.[36] However, the court did not explain how property appraisers should make these corrections. The court simply stated that the statute did not give property appraisers "authority to reach back and correct an erroneous calculation of the

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31. *Id.*

32. *Id.* at 581.

33. *Id.*; *see Randall v. Wilkinson*, 563 S.2d 771, 772 (Fla. Dist. App. 2d 1990) (holding that "there was no change in judgment because no judgment had been exercised in the first instance").

34. 263 S.2d at 581. The *Korash* court stated,

> 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. This is obviously a mistake, error, oversight, which cannot be prejudicial to the taxpayer as in those cases where a *change in judgment* by the tax assessor was involved, belatedly increasing the valuation which had in fact earlier been assigned and entered on the tax roll.

Id. (emphasis in original).

35. *Id.* at 582.

36. 729 S.2d at 373.

base year 'just value' assessment and then apply that corrected value to subsequent years."[37]

Unfortunately, no trial was held in the *Welton* case. The final summary judgment granted by the trial court was based solely on its decision that Section 193.155(8)(a) was facially unconstitutional.[38] It did not contain any findings of fact.[39] Thus, at the time the case went before the Florida Supreme Court, the facts continued to be in dispute, with Welton claiming that the property appraiser had exercised a change of judgment and the property appraiser claiming that the property had escaped taxation due to a material mistake of fact.[40]

Nevertheless, without any factual findings before it, the Florida Supreme Court based its holding on the property appraiser's application of Section 193.155(8)(a).[41] The court stated that Smith had "mistakenly under-assessed" the property[42] and had "increased the assessed value of the Welton property" from 1994 to 1995.[43] By doing so, the court suggested that this case involved an impermissible change in judgment, although no such finding had been made by the trial court. If the supreme court intended to consider whether the property appraiser applied the statute correctly, it should have remanded the case to the trial court to determine exactly how the property appraiser applied the statute and whether the increase in assessment resulted from a material mistake of fact or a change in judgment.[44]

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37. *Id.*

38. *Id.* at 372.

39. Final S.J. at 1–2, *Welton v. Smith*, Case No. 95-3894 (Fla. Cir. 12th Aug. 28, 1996).

40. *Welton*, 710 S.2d at 138 (Van Nortwick, J., dissenting). Note that the *Welton* case was consolidated with the case of *Boone v. Mastroianni*, 709 S.2d 192 (Fla. Dist. App. 1st 1998), in which the trial court found that the property appraiser had corrected a material mistake of fact concerning an essential characteristic of the property. *Welton*, 729 S.2d at 372. Nevertheless, the supreme court's opinion stated that Mastroianni "mistakenly undervalued" the property, suggesting that the property had not escaped taxation. *Id.*

41. *Welton*, 729 S.2d at 373.

42. *Id.* at 371.

43. *Id.* at 372.

44. First District Court of Appeal Judge William Alva Van Nortwick, Jr. recommended that the appellate case be remanded "for further proceedings to determine whether the alleged erroneous assessment was due to a 'material mistake of fact concerning an essential characteristic of the property.'" *Welton*, 710 S.2d at 138 (Van Nortwick, J., dissenting) (quoting Florida Statute Section 193.155(8)(a)).

IV. APPLICATION OF SECTION 193.155(8)(a)

Perhaps the most confusing aspect of the *Welton* opinion is the court's use of the term "base year assessment."[45] Presumably, the court used this term to describe the year in which homestead property is initially assessed at its just value after a change in ownership occurs.[46] Even though "base year" is not a term that is either used or defined in the Florida Constitution or statutes, in practice, many appraisers use the term "base year" to refer to the tax year in which homestead property is assessed at its actual just value before the Save Our Homes Amendment limitations become applicable.[47]

However, the court went too far in distinguishing between the base year assessment and subsequent annual assessments.[48] Section 193.155(8)(a) authorizes property appraisers to correct errors made in arriving at any annual assessment of homestead property if they are "due to a material mistake of fact concerning an essential characteristic of the property."[49] The court defined "annual assessment" as "the value that is ascribed to a homestead each year after the 'just value' has been determined in the base year."[50] The court found that because the statute did not expressly allow corrections to be made to *base year* assessments, the property appraisers could not recalculate an erroneous "base year" just value assessment retroactively.[51] Unfortunately, the court failed to recognize that the term "base year" is not mentioned anywhere — not even in the Florida Constitution — because it is simply another way of referring

45. 729 S.2d at 373.

46. Fla. Const. art. VII, § 4(c)(3) (requiring homestead property to be assessed at just value on January 1 following a change of ownership).

47. During 1994 and 1995, the Florida Department of Revenue (DOR) conducted workshops to assist county property appraisers responsible for implementing the Save Our Homes Amendment. DOR guidelines and instructional material often referred to the "base year," and "base value." *E.g.* Memo. from John R. Everton, Dir., Div. of Ad Valorem Tax, Fla. Dept. of Revenue, to Prop. Appraiser or Computer Serv. Bureau as Addressed, *Revised Amendment 10 Questions and Answers* 4–6 (Jan. 25, 1995) (copy on file with the *Stetson Law Review*).

48. *Welton*, 729 S.2d at 373.

49. Fla. Stat. § 193.155(8)(a).

50. *Welton*, 729 S.2d at 373.

51. *Id.*

to the first in a series of annual assessments of homestead property.[52]

Fundamentally, the base year assessment *is* an annual assessment. All ad valorem tax assessments are annual assessments.[53] The only difference is that, unlike the "base year," subsequent annual assessments are limited by the Florida Constitution to an amount that necessarily may not reflect the actual fair market value of the property.[54] Thus, it is unlikely that the legislature intended to exclude base year assessments from the operation of Section 193.155(8)(a) merely by using the term "annual assessment." To do so would not make sense, especially considering the fact that an error regarding an essential characteristic of the property is most likely to be made in the base year when the property is initially assessed at its just value.

By treating the initial annual assessment differently than subsequent annual assessments and defining "annual assessment" to exclude the "base year," the court caused confusion among Florida property appraisers who now must determine whether they can make corrections to assessments from any prior year. Two phrases in Section 193.155(8) suggest that the property appraiser may make such corrections.[55] First, the statute provides that if an error is made, "the assessment must be recalculated for every such year," suggesting that a correction may result in an alteration to more than one year.[56] Second, the statute states that "[i]f back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes."[57] If property appraisers were not permitted to make changes to previous assessments, there would be no need for this reference to back taxes.[58] Thus, it would appear that property appraisers are autho-

52. The court stated that "[n]owhere in section 193.155(8)(a) is the base year 'just value' assessment even mentioned." *Id.* However, the term "base year" is also not mentioned in the Florida Constitution, where it is treated like any other annual assessment. Fla. Const. art. VII, § 4(c).

53. Fla. Stat. § 192.001 (2000) (stating that "'[a]ssessed value of property' means an annual determination of the just or fair market value"); Fla. Stat. § 192.042 (2000) (requiring property to be assessed on January 1 of each year).

54. *Welton*, 710 S.2d at 137–138 (quoting *Fla. League of Cities v. Smith*, 607 S.2d 397 (Fla. 1992)).

55. Fla. Stat. § 193.155(8).

56. *Id.* § 193.155(8)(a).

57. *Id.* § 193.155(8).

58. *Id.* § 193.092 (permitting collection of back taxes for only the prior three years).

rized to reach back and correct prior assessments of homestead property.

If, as the court held, the property appraiser cannot correct the base year assessment, then it stands to reason that, according to the court's interpretation of Section 193.155(8)(a), property appraisers can make corrections to any annual assessment *except* the base year. Under this interpretation, property appraisers theoretically would be able to correct the just value of the property for the tax year immediately following the base year and recalculate the value accordingly for all subsequent tax years. Although this interpretation seems to make a rather arbitrary distinction between the base year and other annual assessments, it is the only reasonable interpretation of Section 193.155(8)(a) that is available in light of the court's opinion.

V. EFFECT OF WELTON DECISION

The Save Our Homes Amendment grants some homeowners a windfall, because their capped assessments do not necessarily reflect the actual just value of their homestead property. However, public policy favors assessments that bear *some* relationship to fair market value.[59] Assessments that have no relationship to the amount or type of property being assessed do not serve the public interest. While the individual homeowner may benefit, other taxpayers will shoulder the burden of higher millage rates when local governments begin losing revenue due to erroneous underassessments.

It is for just this reason that the back assessment statute was created. As the Florida Supreme Court said in *Korash*, "The [back assessment] statute was provided as a means to insure that the tax roll speaks the truth and truly reflects tax assessments on an equal basis."[60] By allowing owners of homestead property to benefit from mistakes — presumably even clerical mistakes — the court will force owners of nonhomestead property to bear the burden of property appraisers' mistakes.[61]

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59. *See Korash*, 263 S.2d at 582–583 (discussing the purpose of taxation and the principle of sharing tax burdens on the basis of property value).

60. *Id.* at 581.

61. *Id.* at 582.

> There is no inequity — except to petitioners' taxpaying fellow "sufferers" if allowed to prevail.
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> . . .

While homeowners should not be subjected to surprise increases in their assessments, they are already protected from unexpected increases by court decisions that prohibit back assessments due to changes in judgment.[62] Furthermore, under appropriate circumstances, homeowners may be able to assert the doctrine of equitable estoppel when a property appraiser unexpectedly increases the value of their homestead property.[63] The *Welton* case, by failing to explain to property appraisers the appropriate and legal way to make corrections to the assessment of homestead property, undermines the ability of property appraisers to follow the constitutional mandate that all property be assessed at its just value.

> Our holding is consistent with the basic purpose of taxation: that all taxpayers share in proportion to their assessments, the support of their government and the protection and services afforded to their property and to themselves, and that none bears an added or unfair burden by reason of other taxpayers not paying their just share.

Id.

62. *Id.* at 581; *Friedland*, 245 S.2d at 652.

63. *Korash*, 263 S.2d at 583 (holding that "[e]quitable estoppel would protect the taxpayer where there may be inequitable circumstances").