State and Local Taxation

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This article surveys recent developments in the field of state and local taxation. Particular emphasis is placed on the recent decision by the Supreme Court of Florida in the area of corporate taxation. The author also reports and analyzes developments in property taxes, and sales and use taxes.

I. REAL PROPERTY TAXES

A. Valuation

The Florida Constitution requires property appraisers to assess property within their jurisdictions at "just valuation." This constitutional provision has been implemented by the legislature through a statute prescribing eight factors to be considered in computing just valuation. These factors are: (1) the present cash value of the property; (2) the present use of the property, and the highest and

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1. FLA. CONST. art. VI, § 4 states that "[b]y general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation...."
2. The term "just valuation" is synonymous for tax purposes with "full cash value." McNayr v. Claughton, 198 So. 2d 366, 368 (Fla. 3d Dist. 1967).
4. In 1977, the legislature amended § 193.011 to define the present cash value of the property as: "the amount a willing purchaser would pay a willing seller exclusive of reasonable fees and costs of purchase, in cash or the immediate equivalent thereof in a transaction at arm's length." 1977 Fla. Laws, ch. 77-363 (codified at FLA. STAT. § 193.011(1) (1977)).
best use to which the property could be expected to be put in the immediate future; (3) the location of the property; (4) the quantity or size of the property; (5) the cost of the property and the present replacement value of any improvements thereon; (6) the condition of the property; (7) the income from the property; and (8) the net proceeds from the sale of the property.

The question concerning the proper valuation of real property probably arises more frequently than any other in the state and local tax area. The statute itself provides one reason for this mass of litigation. Although it requires the appraiser to consider each factor, the statute does not assign a relative weight to any of them. Furthermore, in specific cases it is arguable that the assessor overvalued, undervalued or completely ignored a particular factor.

Section 194.042 of the Florida Statutes (1975) provided an option for the taxpayer to contest an assessment which he believed was inaccurate. This provision was commonly referred to as Pope's Law. The constitutionality of Pope's Law was challenged in *ITT Community Development Corp. v. Seay* on the ground that it violated the just valuation requirement of the constitution.

Pope's Law provided a procedure by which the taxpayer could offer his property for sale at public auction to determine proper valuation for tax purposes. As the Supreme Court of Florida noted, "[t]he property owner who contests the assessment though Pope's Law is required to make a commitment to his difference of opinion [with the property appraiser] by testing that opinion at the marketplace." The property in question went through an auction procedure. The owner filed a certificate stating the amount he ascertained to be the just valuation of his property. It was accompanied by a surety bond for ten percent of the value of the property stated in the certificate. The amount stated in the certificate constituted the minimum bid that the property appraiser could accept at the auction. If no bid was made exceeding the amount set forth in the certificate, such amount would constitute the just valuation of the property and would be entered on the tax rolls of the county. If a bid was accepted at auction, however, the valuation of the property would be that which was originally assigned by the property appraiser.

In *ITT Community Development Corp. v. Seay* the taxpayer attempted to utilize Pope's Law, contending that the 1975 tax no-

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5. 347 So. 2d 1024 (Fla. 1977).
6. Id. at 1026.
8. ITT Development Corp. v. Seay, 347 So. 2d at 1028.
The owner petitioned for a writ of mandamus to require the appraiser to divide the taxpayer’s holdings into parcels having a value of $200,000 or less because, according to the taxpayer’s interpretation of Pope’s Law, no certificate could contain property in excess of $200,000 in assessed value. The appraiser denied having the duty to divide land into $200,000 blocks. Additionally, the appraiser contended that the certificates were not subject to the $200,000 limitation unless they were composed of more than one parcel of land.

The trial court found that Pope’s Law was unconstitutional (although this was not challenged by the appraiser), that the taxpayer was time-barred from using Pope’s Law, and that the $200,000 limitation applied only when two or more parcels were included in a single certificate. The Supreme Court of Florida affirmed the trial court’s finding that Pope’s Law was unconstitutional, obviating the need to address the taxpayer’s last two points.

The supreme court found Pope’s Law to be unconstitutional because it failed to satisfy the just valuation requirement of the Florida Constitution. Since Pope’s Law measured just valuation in terms of fair market value, it could only be upheld if it always yielded valid fair market values. The court noted that fair market value traditionally has been defined as that amount which a purchaser, willing but not obligated to buy, would pay to one willing but not obligated to sell. Although the parties could not initially be compelled to buy and sell, the implication behind the traditional definition is that once the parties enter into a contract of sale they are bound. In contrast to the traditional situation, the court found that under Pope’s Law there never would be a willing buyer and a willing seller because the taxpayer is not compelled to relinquish his property to the highest bidder, and prospective buyers would tend to be somewhat apathetic since the sale would remain contingent upon the owner’s willingness to sell, which might remain in question for at least thirty days after the auction. Since Pope’s Law did not produce the necessary willing buyer and willing seller, it could not yield a valid fair market value. The court, therefore, found that Pope’s Law did not provide just valuation.

Justice Adkins, however, stated in his dissent that an owner,
following the procedure of Pope's Law, would become a willing seller because the decision to follow the law was purely voluntary. Furthermore, since no one was forced to buy, Adkins would find that the buyer was a willing buyer. Adkins' contention does not respond to the majority opinion's concern that purchasers would be discouraged from pursuing property because the seller need not accept the buyer's offer. Adkins argued that the eight factors prescribed in section 193.011 of the Florida Statutes (1975) for use in determining just value were "artificial means" which the legislature designed to measure the amount a willing buyer would pay a willing seller for the property.\(^\text{13}\)

The supreme court in *ITT* found other infirmities with the statute. First, the court found that the statute interfered with the establishment of just valuation in a second way. The statute does not provide for the use on the tax roll of any cash offer greater than the amount enumerated in the certificate, even if an actual sale takes place at that price. Only when there is no cash offer above the certificate amount is a value established which varies from that originally assigned by the property appraiser. Second, the court found that as a result of the auction procedure, the statute attempted to value property at least ten months after the legal assessment valuation date\(^\text{14}\) of the tax year.\(^\text{15}\) The court found this result constitutionally impermissible since it meant that all taxpayers would not be treated consistently.

Finally, the court found that the $200,000 statutory limitation would yield an unreasonable result regardless of how it was construed. The court stated that if the limitation applied only when there were two or more parcels of property included in a single assessment, a problem would still arise when a single parcel carried a high value. In such a situation, the taxpayer would be motivated to set an arbitrary value on his parcel which was less than its true value. Since few persons would possess the financial resources necessary to enable them to bid on such expensive property, the taxpayer would be virtually assured of having his own valuation accepted. Conversely, if the $200,000 limitation were construed to mean that all property must be divided into parcels valued at less than $200,000, then any single improvement of a parcel valued in excess of $200,000 would bar its owner from utilizing Pope's Law.\(^\text{16}\)

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13. *Id.* at 1030.
14. The legal assessment valuation date is January 1.
15. The court cited Culbertson v. State Road Dept., 165 So. 2d 255 (Fla. 1st Dist. 1964), for the proposition that appraisals quickly become too remote in time to serve as a competent basis for determining value.
16. For example, any high rise office or residential building constructed on one parcel
B. Agricultural Exemptions

1. APPLICATION PROCEDURE

In examining statutorily defined procedures and deadlines, it is clear that the Florida courts strictly construe the statutes to the benefit of the taxing authority. Given the previous case law regarding due process and notice requirements, it is not surprising that the district courts of appeal in several recent cases found that the taxpayers could not sustain their burden of showing strict compliance with the agricultural classification statute.

In *Blake v. R.M.S. Holding Corp.*, the taxpayer bought property in January 1974, from an owner who had an agricultural exemption for the property in question. A few days after the closing, the previous owner received a short form renewal card for his use in applying for an agricultural assessment, but having sold the property, the previous owner forwarded the application form to the attorney for the new owner. On January 31, 1974, the plaintiff's attorney sent a letter with the short renewal form made out as an application on behalf of the new owner for an agricultural assessment of the property for the 1974 tax year. Because of a clerical error, the letter was addressed to the assessor at the Dade County Court House instead of the assessor's office at the Justice Building. Consequently, the letter was not delivered to the assessor's office. The property was assessed and taxed for 1974 as nonagricultural. A letter mailed by the taxpayer's attorney on December 27, 1974, was received by the tax assessor's office which responded on January 3, 1975, that no application had been filed for 1974.

In *R.M.S. Holding Corp.*, the court construed section 193.461 of the Florida Statutes (1973) to require the taxpayer to apply for an agricultural classification prior to April 1. When such an application is not filed, the land must be assessed under the provisions of section 193.011 of the Florida Statutes (1975). The court held that since no application had been filed with the assessor by April

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17. 341 So. 2d 795 (Fla. 3d Dist. 1977).
18. FLA. STAT. § 193.461(3)(a) (1973) provided that "[n]o lands shall be classified as agricultural lands unless a return is filed on or before April 1 of each year. . . . Failure to make timely application by April 1 shall constitute a waiver for one year of the . . . agricultural assessment."
19. The legislature has amended the statute to require the filing of an application by March 1. In addition, the "Board of Tax Adjustment" is now referred to as the "Property Appraisal Adjustment Board." 1974 Fla. Laws, ch. 74-234 (current version at FLA. STAT. § 193.461(3) (1977)).
20. 341 So. 2d at 799 (citing FLA. STAT. § 193.461(6)(b) (1973)).
1, in the sense that the document was delivered to or received at the office of the assessor, no proper return had been made. The court also found that the mailing of an application which was addressed incorrectly and not received by the assessor's office, did not fulfill the statutory requirement for the filing of a return or application with the assessor. Furthermore, the court decided that a short form renewal application was not a proper application by a new owner since only a prior owner could use a renewal application.

Section 193.461 again was strictly construed in Doyle v. Askew. The question presented was whether applications for agricultural assessment could be filed after April 1, if the taxpayer's failure was due to illness or other such cause. The court held that such a cause was not a proper excuse since the statute was mandatory. The court concluded that the failure to make a timely application constituted a waiver of any application for agricultural assessment.

2. GOOD FAITH COMMERCIAL AGRICULTURAL USE

The key to the entire agricultural exemption framework lies in its use by property owners to shield property being held for future development from the property taxes which would be a reflection of the land's true value. In fact, where land is being used for its highest and best possible use and that use is agriculture, the agricultural exemption statute does not provide any benefits to the land owner, since the statute only provides that such land be assessed on the basis of its value for agricultural use.

In several cases this year, the District Courts of Appeal for the Second and Fourth Districts have disagreed on what constitutes a

21. The court pointed out that the assessor did not have to notify the taxpayer that its agricultural exemption had been denied because no application had been received. Furthermore, the court stated that even when a properly filed application is not granted the assessor is not statutorily required to inform the applicant. 341 So. 2d at 800.

The only requirement for notification is that the assessor must maintain public records in his office showing valuation and whether an agricultural assessment has been granted. Id. (citing FLA. STAT. § 193.461(2) (1973)).

22. 341 So. 2d 845 (Fla. 1st Dist. 1977).


24. FLA. STAT. § 193.461 (1977). Subsection (3) of the statute lists the factors the tax assessor may consider when deciding if the property qualifies for an agricultural tax exemption. These factors are: (1) the length of time the land has been used agriculturally; (2) the continuity of the use; (3) the purchase price paid; (4) size as it relates to agricultural use; (5) extent of commercial agricultural practices; (6) existence of a lease and the nature of it; and (7) other factors that may become applicable. The supreme court upheld the constitutionality of the statute in Straughn v. K & K Land Management, Inc., 326 So. 2d 421 (Fla. 1976). See Brill & Hayes, State and Local Taxation, 1976 Developments in Florida Law, 31 U. MIAMI L. REV. 1231, 1242-43 (1977).
good faith commercial agricultural use. The Second District has held that a good faith use exists when the agricultural use yields sufficient income to allow the use to stand on its own feet. The agricultural use need not provide a profit on the total investment. Conversely, the Fourth District has decided that there must be a reasonable expectation of meeting the investment cost and realizing a reasonable profit in order for an agricultural use to be considered a good faith commercial agricultural use.

In Straughn v. K & K Land Management, Inc. the Second District found that profit motive was an appropriate criterion to help determine whether there is good faith commercial agricultural use. The court stated that the profit motive criterion does not require that the profit be sought immediately on the total investment. Regardless of whether the purchase price contemplated speculative or other nonagricultural uses, the statute is satisfied if the land presently has a bona fide commercial agricultural use. Furthermore, the court indicated that an agricultural exemption may be granted despite the absence of a reasonable return on the total investment via agricultural use.

The Second District found that the purpose of the agricultural exemption statute was to encourage agricultural use by assisting the farmer to make a reasonable profit from its use. Accordingly, the court found that although the agricultural use was a temporary use for the purpose of sustaining the investment until the full speculative profit could be realized, it was not any less a legislatively encouraged use.

In Walden v. Tuten, the Second District noted that a profit motive was an important element in showing good faith commercial agricultural use. The court stated that, absent a profit motive from the agricultural use, the presumption of a non-bona fide agricultural use, arising from a sale for three times the assessed agricultural value, would tend to be "fortified." The court found that the property owners received an annual return of only one-ninth of one percent on their investment. The court remanded the case, holding that the critical question in determining if the good faith commercial agricultural standard was satisfied was whether the lessees, who were the actual agricultural users, were materially profiting from their agricultural use. The court noted that if there were a profit

25. 347 So. 2d 724 (Fla. 2d Dist. 1977).
26. 347 So. 2d 129 (Fla. 2d Dist. 1977).
27. Id. at 131.
28. The return on the investment was $1,300 on the $1,000,250 purchase.
29. Tuten relied on the Supreme Court of Florida's decision in Straughn v. K & K Land
from the property, the land trust’s status as a passive land trust would be jeopardized for federal tax purposes. The court, therefore, should have considered this factor as mitigating the importance of finding a profit motive since making a profit actually could be very expensive for the beneficiaries of the trust.

The Fourth District strictly construed the agricultural exemption statute against the taxpayer in First National Bank of Hollywood v. Markham and Markham v. Nationwide Development Co. First National presented a situation where there had been no income from agriculture for the year in question, although there was testimony that the expected income from agriculture for the subsequent year would be approximately $87,000. Other evidence showed that for the tax year in question, the expenses of the property exceeded $250,000 of which approximately eighty percent was for interest. Furthermore, for the following tax year, interest alone would total $600,000, approximately seven times the expected income from agriculture. The taxpayer relied in large part on the fact that the land prior to his acquisition had been used as a dairy farm and that the land still was being used for agricultural purposes. The court concluded that in view of the purchase price of the land, the difference between the income derived from the agricultural use and the cost of owning the land, and the announced purpose of the beneficial owner to hold the land for resale as an investment, the possibility of a good faith commercial agricultural use could be ruled out.

Nationwide was similar in that the previous owners of the property maintained the right, for no additional rent, to remain in possession of the property, which they did for the first four months of the tax year in question. The court held that although the previous owners continued their dairy operation, this did not enable the taxpayer to satisfy the good faith use standard. The court reasoned that there could not be a good faith commercial agricultural operation because Nationwide had no reasonable expectation of meeting investment costs and realizing a reasonable profit through the agricultural use of the land. It would seem, however, that if the motive of the statute is to be served an exemption should have been granted here. Since all the cases involve situations where the land is not being put to its highest and best use, a use which has re-

Management, Inc., 326 So. 2d 421 (Fla. 1976). There, the supreme court stated that “[t]he agricultural assessed value is the amount that could be invested with a reasonable expectation of an annual return to the owner similar to what he would gain from other [similar] commercial enterprises . . . .”

30. 342 So. 2d 1016 (Fla. 4th Dist. 1977).
31. 349 So. 2d 220 (Fla. 4th Dist. 1977).
mained the same in scope and extent should be sufficient to satisfy the good faith commercial agricultural use standard.

3. VALUATION

Cassady v. McKinney dealt with the information a trial court must have in order to make its own valuation of the property after an improper assessment. Apparently, this was the second time the same case had been reversed for the appraiser's failure to consider two of the seven use factors mandated by the legislature in section 193.461(6) of the Florida Statutes (1971). The evidence before the trial court clearly established that the consideration of the two omitted factors would result in reducing the assessed value of the land. The District Court of Appeal, Second District, found that the trial court, lacking competent substantial evidence of the depreciated value of improvements on the property and of the lower level of income produced by the property, had insufficient information to make a proper adjustment. The court held that a trial court was free to accept competent evidence revealing the manner and extent to which the omitted factors bore upon the valuation. In the absence of such evidence, however, a trial court could not substitute its own judgment as to the extent of the adjustment.

Judge McNulty, concurring specially, argued that even if there were sufficient evidence to which the trial judge could point in making an assessment, he did not have the authority to do so. The judge stated that a court might determine a given assessment to be legally excessive and set a cap on it, but it should then remand the matter to the assessor to make the assessment. Apparently, the judge believed that without such a prohibition aggrieved taxpayers would have nothing to lose by trying to persuade a circuit judge to adopt the taxpayer's own valuation.

C. Leaseholds

1. SUBSURFACE RIGHTS

The pressing question of whether a lease giving the lessee the right to explore and extract minerals, oil, and gas from the property

32. 343 So. 2d 955 (Fla. 2d Dist. 1977).
33. The factors that were not considered were the present depreciated value of improvements on the property and the income produced by the property. Id. at 956. The present depreciated value of improvements factor was eliminated by the legislature in 1972. 1972 Fla. Laws, ch. 72-181, § 1 (current version at Fla. Stat. § 193.461 (1977)).
34. 343 So. 2d at 956.
35. Id. at 958.
is taxable interest was resolved in *Straughn v. Sun Oil Co.* The supreme court held that such subsurface rights were taxable interests in real property.

The question of the taxability of subsurface interests was not one involving the constitutional power of the state to tax. Rather, the issue was "whether under the statute the leasehold interests are interests in real property which the legislature intended should be subject to taxation." The District Courts of Appeal for the First and Second Districts had considered the subsurface rights issue in *Fisher v. Sun Oil Co.* and *Straughn v. Amoco Production Co.*, respectively, and the courts reached opposite conclusions on the issue.

The First District in *Fisher* found that the legislative intent to tax the taxpayer's leasehold interest could not be discerned from the statute, and that under previous case law the interest possessed by the taxpayer was no more than a contractual license to explore and produce, rather than an interest in real property, hence, not one subject to real property taxes.

The Supreme Court of Florida noted that at the time of *Miller v. Carr*, section 193.481(1) of the Florida Statutes (1975) had not been enacted. The supreme court followed the Second District's distinction in noting that in *Miller v. Carr* the supreme court was concerned "only with the alienability by the lessor of a reserved interest in the unsevered oil," while the cases under the statute in question were concerned with "the taxability of the total interest in the lessee . . . ."

36. 345 So. 2d 1062 (Fla. 1977).
37. The oil companies suing in *Straughn v. Sun Oil Co.* conceded that the legislature has the inherent power to define real property for tax purposes.
38. 345 So. 2d at 1065. Section 193.481(1) of the Florida Statutes (1977) provides that: Whenever the mineral, oil, gas, and other subsurface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property . . . , such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee.
41. These cases were discussed extensively in Brill & Hayes, *supra* note 24, at 1252-56.
42. *Miller v. Carr*, 141 Fla. 318, 193 So. 45 (1940).

Rather than distinguishing *Miller*, it is submitted that the supreme court should have discredited the language used by that court. In the *Miller* case the lessee contended that the lease constituted a "constructive severance of oil 'in place' and that title to the oil passed to the lessee . . . ." 141 Fla. at 324, 193 So. at 47. The *Miller* court construed the lease to be a
The Supreme Court of Florida conceded that the statute was unclear on its face as to its purpose. Nevertheless, the court found that the purpose the legislature intended the statute to have was clear. The court reasoned that there was little difference whether the rights to subsurface minerals are transferred by deed or lease, since in either case the taxpayer can extract the minerals and become the true owner of the separate minerals. The court concluded, accordingly, that it was "only just that the tax burden generated by subsurface mineral rights fall on those who benefit from possession of those rights." The court believed this consideration was the motivating force behind the legislature's enactment.

Justice Drew argued in his dissent that the legislature did not intend to tax the mineral leases. He reasoned that the words "otherwise transferred" indicated "an intention to tax only an interest in real estate that would be susceptible to intelligent and uniform appraisal, levy and enforcement . . . ." Section 211.13 of the Florida Statutes (1977) states that it is impossible under known valuation methods to ascertain accurately the value of subsurface rights. Justice Drew, therefore, argued that the legislature, when it enacted section 211.13, could not have intended to tax such interests. Justice Drew would find the leases to be no more than contractual licenses to explore and to produce.

2. VALUATION

In 1975, the Supreme Court of Florida in Williams v. Jones upheld the constitutionality of section 196.199 of the Florida Statutes (Supp. 1976) which provides for the exemption of certain

"contract for the use of the realty for the purposes therein specified. It passed the right to produce oil from the land and nothing more." Id. Both the Second District in Amoco Production Co., and the supreme court, in Straughn v. Sun Oil Co., correctly observed that Miller was concerned with the alienability of a leasehold interest and not its taxability. Both courts, however, ignored Miller's limitation of a leasehold interest in subsurface rights to a mere "right to produce." In order for the tax to be levied on the leasehold interest, the leasehold interest must be found to be an interest in realty. See Brill & Hayes, supra note 24, at 1253 n.142.

In Straughn v. Sun Oil Co. the supreme court took pains to point out that a leasehold interest is an interest in realty. The court cited its earlier decision in Williams v. Jones, 326 So. 2d 425 (Fla. 1975), appeal dismissed, 428 U.S. 803 (1976), in support of that proposition. It also could have cited its decisions in Dade County v. Pan American World Airways, Inc., 275 So. 2d 505, 509 n.2 (Fla. 1973), and Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571 (Fla. 1957). Though each of these decisions contradict the effect of the Miller language, none of the decisions discussed Miller.

44. 345 So. 2d at 1065.
45. Id.
46. 1945 Fla. Laws, ch. 22-784, § 13 (current version at Fla. Stat. § 221.13 (1977)).
47. 326 So. 2d 425 (Fla. 1975).
governmental-owned property and for methods of valuing such leases. Section 196.199(6) stated that property "originally leased for 99 years or more . . . shall be deemed to be owned . . . ." Williams v. Jones found that this subsection dealing with the ninety-nine year leases was intended by the legislature to provide a standard for valuation.48

In Department of Revenue v. Gibbs,49 the county tax collector attempted to collect delinquent taxes on leasehold interests in government-owned property by issuing tax sales certificates on the property. The State Department of Revenue sued to enjoin the issuance of such certificates, contending that the exclusive procedure for the collection of unpaid taxes on leasehold interests in government property is provided by sections 196.199(7) and 197.116(7) of the Florida Statutes (1975). Section 196.116(7) states that no certificate should be sold nor a lien created in property owned by any governmental entity whose property became subject to taxation due to its lease to a non-governmental party. The statute added that such delinquent taxes should be enforced and collected pursuant to section 196.199(7). The tax collector had contended that since the ninety-nine year leases were to be valued and treated as fee ownership, the taxes thereon could be collected under section 197.116 by the sale of tax certificates on the leasehold interests just as tax certificates are sold for unpaid taxes on fee interests. The court disagreed with the tax collector's contention that section 196.199(7)(1) only applied to leasehold interests of less than ninety-nine years duration.

II. Intangible Personal Property Taxes

A. Procedure

Section 199.232(4) of the Florida Statutes (1971) provided that no intangible tax "assessment shall be made, except pursuant to an investigation, after the expiration of three years from the date of filing, whichever is later." In Grunwald v. Department of Revenue,50 the taxpayer filed his return on March 20, 1970. The due date of the return was April 1, 1970. On November 30, 1970, the taxpayer paid the intangible taxes which were due. Prior to November 30, 1973, the Department of Revenue notified the taxpayer that it was investigating his liability for the 1970 tax year. Sections 199.252 and 215.26 of the Florida Statutes (1973) state that the right of refund

48. For further discussion of Williams v. Jones, see Brill & Hayes, supra note 24, at 1256.
49. 342 So. 2d 562 (Fla. 1st Dist. 1977).
50. 343 So. 2d 973 (Fla. 1st Dist. 1977).
for intangible taxes is available for three years from the date of payment. Section 199.232(7) provides that an investigation of intangible tax liability may be made against any person for any year for which his right to refund is available. Accordingly, the disposition of the case hinged on an interpretation of section 199.232(4), which provided that no assessment could be made "except pursuant to an investigation" after the three year period expires. The court held that the investigation provision was not a limitation on the power of the assessor to make an assessment against the taxpayer. The court enlarged the three year provision so that any assessment would be proper so long as the investigation had begun within the three year limitation for refund.

B. Scope

Since the passage of the documentary stamp tax, there has been considerable litigation concerning what suffices as a transfer having a taxable incident. In 1976, the Supreme Court of Florida attempted to provide some certainty in this area when it decided Florida Department of Revenue v. DeMaria, which held that a taxable incident occurs where the economic burden (in this case mortgage payments) is shifted from the corporate transferor to the sole shareholder-transferee. Two recent cases distinguished DeMaria by finding the absence of a shift of the economic burden.

In Abramson v. Straughn, the taxpayer had participated in a joint venture with an individual who subsequently fell into bankruptcy proceedings. In order to extricate the taxpayer's fifty percent interest in the venture from the bankruptcy proceedings and the claims of the bankrupt's creditors, the two venturers reached an agreement, approved by the court, whereby each received parcels of property consistent with his fifty percent interest and assumed the mortgage thereon. Quitclaim deeds were executed by the venturer in bankruptcy for nominal consideration. The court found that the transaction only changed the form of the taxpayer's liability and that this change did not constitute consideration for documentary stamp tax purposes. The court pointed out that DeMaria and an earlier case, Kendall House Apartments v. Department of Revenue, dealt with the shift of an economic burden from a grantor, solely responsible for mortgage payments, to a grantee who previously did not have a financial obligation. The court concluded

51. 338 So. 2d 838 (Fla. 1976).
52. 348 So. 2d 1172 (Fla. 4th Dist. 1977).
53. 245 So. 2d 221 (Fla. 1971).
54. For a discussion of these cases, see Brill & Hayes, supra note 24, at 1274-77.
that since the extent of the taxpayer's liability remained unchanged, he did not purchase the fifty percent interest for consideration within the meaning of section 201.02 of the Florida Statutes (1975), and thus there was no taxable incident.\(^5\)

In *American Foam Industries, Inc. v. Department of Revenue*,\(^5\) a corporation entered into a contract for the purchase of certain property for which it advanced funds although title was placed in the name of its sole stockholder. Although payments on the mortgage were made by the corporation, a subsequent construction loan was backed by a note signed by the sole stockholder in his personal capacity. The stockholder later executed a quitclaim deed to the corporation without consideration, but subject to the outstanding mortgage securing the sole stockholder's personal note. The District Court of Appeal, Third District, found that the responsibility and economic burden for making the mortgage payments always had remained with the corporation. It reasoned that since the corporation had made all the payments on the purchase money order and no payments had been made by the individual, it was clear that there had been no consideration and this was merely a transfer from agent to principal; therefore, the case was an exempt transaction under the Department of Revenue's own rules.\(^7\)

A last case concerning the scope of the documentary stamp tax dealt with the question of what the actual purchase price of a property is for tax purposes. In *Department of Revenue v. Mesmer*,\(^5\) the taxpayers had entered into a contract for the purchase of real property at an agreed price of $1,300,000. Prior to closing, the taxpayers sold their rights in the property to a third party for $1,850,000. Subsequently, the third party closed the sale by paying the seller the $1,300,000 contract price. Documentary stamp taxes were paid only on the transaction, reflecting the $1,300,000 paid to the purchaser for the legal title under the contract, while the department contended that tax was due on the entire $3,150,000, which the purchaser paid the taxpayers and the seller.

The trial court found that the doctrine of equitable conversion was not applicable here and therefore did not make the transaction between the taxpayers and the third party a taxable one.\(^9\) This finding was reversed on appeal, the District Court of Appeal, First

55. 348 So. 2d at 1174.
56. 345 So. 2d 343 (Fla. 3d Dist. 1977).
58. 345 So. 2d 384 (Fla. 1st Dist. 1977).
59. For a discussion of the doctrine of equitable conversion in Florida, see *Hull v. Maryland Cas. Co.*, 79 So. 2d 517 (Fla. 1954).
District, finding that the assignment of the contract immediately vested equitable title in the third party, although legal title remained in the seller until conveyance. The court concluded that documentary stamp taxes reflecting the price of the assignment by the taxpayers to the third party should have been paid because there had been a transfer of an interest in land within the contemplation of section 201.02 of the Florida Statutes (1975).

C. Interest

In Lewis v. Creative Developers Ltd., the District Court of Appeal, First District, considered the effective date of section 201.17(2)(c) of the Florida Statutes (1976) providing for the payment of interest on unpaid documentary stamps at the rate of one percent per month from the date of recording. Although the statute became effective on June 28, 1976, the supreme court did not address the issue of whether the statute was applicable to certain transactions under consideration in Florida Department of Revenue v. DeMaria. The District Court of Appeal, First District, had stayed the action in Creative Developers until the Supreme Court of Florida decided the DeMaria case. The court found that since there was no language in the statute stating that it was to be applied retroactively as to the payment of interest, it should not apply to taxes which were delinquent at the time of the statute's enactment.

III. SALES AND USE TAXES

A. Extent of Power

Chapter 212 of the Florida Statutes (1977) prescribes sales and use taxes. Section 212.06(5), as does the Constitution of the United States, excepts all imports and exports from the application of these taxes. Section 212.06(5) was construed very broadly in Fred McGilvray, Inc. v. Askew. McGilvray held constitutional the statutory presumption that goods cannot be considered exports unless they are delivered to a licensed exporter for exporting, delivered to a common carrier for shipment out of state or mailed through United States mails out of the state.
A question concerning the phrase property delivered "to a licensed exporter for exporting"\(^6\) arose in *Graybar Electric Co. v. Department of Revenue*.\(^6\) The problem arose when the taxpayer sold electrical equipment to two foreign customers through their subsidiaries formed in Florida for exporting purposes. The state had issued export sales tax numbers to the subsidiaries. No other procedures existed by which the subsidiaries could become licensed exporters.\(^5\) The state assessed a sales tax on the taxpayer's sales because the taxpayer could not qualify under any of the three exceptions, including the licensed exporter provision.

The District Court of Appeal, Third District, found that in the absence of formal state export licensing procedures, the sales tax was unauthorized because the goods were delivered to a "licensed exporter" within the meaning of that exception. The court reasoned that since the state had issued export sales tax numbers to the subsidiaries and there was no other procedure by which the companies could have become licensed exporters as contemplated by the statute, the property in question should not be subject to sales taxes.\(^7\)

*Klosters Rederi A/S v. Department of Revenue*\(^7\) presented to the District Court of Appeal, Third District, another question involving the scope of chapter 212 of the Florida Statutes (1977).\(^7\) A Norwegian corporation was assessed on purchases of supplies to be used on cruises it conducted outside the state's territorial waters. The state contended that the placement of the items on board the cruise vessel for use during the voyage was a sufficient exercise of power over personal property to make the items amenable to the assessment of use taxes.

Section 212.08(8) of the Florida Statutes (1975) provides for a partial exemption for vessels engaged in intrastate or foreign commerce. The tax exemption is applicable to the vessels and parts thereof and is apportioned by the ratio of the vessel's intrastate mileage as compared to its total mileage.\(^7\) The court found that the taxed items such as toiletries and party supplies were expendable

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68. 347 So. 2d 718 (Fla. 3d Dist. 1977).
69. *Id.* at 719.
70. *Id.* at 720.
71. 348 So. 2d 656 (Fla. 3d Dist. 1977).
72. *Fla. Stat.* § 213.05(2) (1977) sets the use tax rate at four percent when an item "is not sold but is used, consumed, distributed or stored for use or consumption in [Florida]."
73. The state conceded that if there were a finding that the items were parts, the formula would result in only a negligible tax, since there were few miles traveled within the State of Florida. 348 So. 2d 656, 659 n.1.
and did not qualify as parts. The court found, however, that the expendable items in question could be taxed only on a pro rata basis as to the intrastate use.74

B. Estoppel

In 1968 the District Court of Appeal, First District, held that the admissions tax laws did not apply to operations basically identical to those of the taxpayer in the case at hand. The state "made it plain" that it would not "attempt to enforce collection of any admissions tax . . . ."75 The taxpayer then ceased collection of the tax. Subsequent case law resulted in the upholding of the admissions tax and the taxpayer thereafter began paying taxes. George W. Davis & Sons, Inc. v. Askew76 arose from the attempt of the state to tax the taxpayer on its admissions sales which had accrued during the time the admissions tax seemingly was inapplicable.

The First District, although noting that a state is not estopped from assessing back taxes due to an error by its officials, found a different case here. The court found it unfair to force the taxpayer, who was really a collection agency for the state, to pay back taxes after it had followed the existing case law with the Department of Revenue’s approval.

IV. CORPORATE INCOME TAXES

Probably the most significant case in state and local taxation during 1977 in terms of legal reasoning and potential economic impact was Department of Revenue v. Leadership Housing, Inc.77 In November 1971, the Florida Constitution was amended to permit the imposition of a corporate income tax.78 The taxpayers brought an action for declaratory and injunctive relief for capital gains which they had as a result of the appreciation of their real estate prior to November 1971, the date constitutional protection from taxation was ended. The taxpayers’ argument apparently was premised on the concept that the appreciation in the value of their

74. The court found that this holding was necessary under Fla. Admin. Code § 12A-1.64(5)(c) (1977).
75. George W. Davis & Sons, Inc. v. Askew, 343 So. 2d 1329, 1330 (Fla. 1st Dist. 1977) (quoting the trial court’s opinion).
76. 343 So. 2d 1329 (Fla. 1st Dist. 1977).
77. 343 So. 2d 611 (Fla. 1977).
78. 1971 Fla. Laws, ch. 71-984, § 1. By referendum the voters of Florida repealed the constitutional bar on income taxes for other than natural persons. This provision was not self-executing but the legislature took the necessary implementing action. The corporate income tax now is specified in Fla. Stat. §§ 220.01-.69 (1977).
property was income. The trial court agreed, holding that "[a]ppreciation in the value of property which occurred prior [to 1971] continues to be constitutionally protected from taxation as income."\textsuperscript{79}

The Supreme Court of Florida held that appreciation does not become income until the property is sold, exchanged, or otherwise disposed, relying on the decision of the Supreme Court of the United States in \textit{Eisner v. Macomber}.\textsuperscript{80} \textit{Eisner} held that income is neither a gain accruing to capital nor a growth in the value of an investment; rather income is something of value severed from the capital.\textsuperscript{81} The Supreme Court of Florida acknowledged that \textit{Eisner} had been developed to include several items as realized income.\textsuperscript{82} The court distinguished these taxable incidents because economic gain was enjoyed at the time of the taxable event.

The thrust of the taxpayers’ argument in \textit{Leadership Housing} really seemed to be that the appreciation of their capital assets was immune from taxation because of the existing Florida constitutional provision prohibiting the taxation of income. The supreme court did not respond to this argument, apparently feeling it was indistinguishable from the question of whether appreciation is income.

The majority opinion of the supreme court found without merit the taxpayers’ second point, that the tax would be harsh and arbitrary. Justice Roberts in his dissent, however, analyzed the question in terms of its historical perspective. Roberts pointed out that the constitutional prohibition was adopted during the boom period in Florida to create a favorable investment climate. Roberts concluded, accordingly, that the taxation of the pre-1971 appreciation was impermissible in view of the 1924 income tax prohibition. The Justice argued that "Florida taxpayers were entitled to rely upon a constitutional immunization of capital gains from a state income tax which was adopted for the very purpose of encouraging them to invest their capital in this state."\textsuperscript{83} Robert’s argument could be made any time the status of an item was changed from nontaxable to taxable. What makes his contention compelling, however, is that a taxpayer owning real property in or after 1971, which appreciated during the prior thirty-seven years, finds himself in the untenable

\textsuperscript{79} 343 So. 2d at 613.
\textsuperscript{80} 252 U.S. 189 (1920).
\textsuperscript{81} \textit{Id.} at 207.
\textsuperscript{82} 343 So. 2d at 614. These items include the value of lessee-erected improvements in realty upon reversion to the owner, detached interest coupons of bonds upon a gift, and property transferred by a husband to his wife in a property settlement connected with divorce.
\textsuperscript{83} 343 So. 2d at 620.
position of owning property with a potentially huge and unexpected tax bill. The majority opinion's interpretation is troublesome because it really seems like a retroactive tax in that the state is attempting to make a killing all at once on revenue it was barred from taking.