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The Un-taxability of Computer Software as Tangible Personal Property by Florida County Governments

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THE *UN*-TAXABILITY OF COMPUTER SOFTWARE AS TANGIBLE PERSONAL PROPERTY BY FLORIDA COUNTY GOVERNMENTS

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I. INTRODUCTION

Florida’s Fourth District Court of Appeal, in its recent decision in *Nikolits v. Verizon Wireless Personal Communications L.P.*,¹ construed Florida’s Tax Code to not permit counties to tax “computer software” as tangible property.² The decision has a profound financial impact on the taxing powers of Florida county governments given the ever increasing reliance on computers and their software by people and businesses. This impact cuts even deeper due to the global recession and the State of Florida’s ever increasing revenue woes. The decision, however, was in accordance with the intent of the Florida Legislature. In Part II of this article, I examine the Fourth District’s decision in *Nikolits*. In Part III of this article, I will show why the decision is in accordance with the legislature’s intent by examining the applicable tax statute. In my analysis, I will use as guidance the Fourth

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1. 9 So. 3d 690 (Fla. 4th Dist. Ct. App. 2009).

2. *Id.* at 694.

District's decision in *Nikolits* and a decision by the Fifth District on a similar issue in *Gilreath v. General Electric Co.*³ I will also invoke the canons of statutory interpretation. Then, in Part IV of this article, I will briefly examine the definition of a "computer" and the presumption of correctness allocated to county tax appraisers, and then provide why, given that definition and the limitations on a county tax appraiser's taxing power, the Fourth District's decision was correct. Lastly, I conclude with my recommendation as to how the Florida Legislature may re-construe the applicable tax section to permit the State of Florida to benefit from taxation of computer software as intangible personal property.

II. THE FOURTH DISTRICT'S DECISION IN *NIKOLITS*

On April 15, 2009, Florida's Fourth District Court of Appeal rendered its decision in *Nikolits*.⁴ This case arose from Palm Beach County, in 2005, having subjected the "Wireless Services Software" of Verizon Wireless Personal Communications (Verizon) to ad valorem taxation⁵ as tangible personal property.⁶ Verizon paid the tax under protest, but contested the validity of the tax by bringing suit against Palm Beach County's Property Appraiser, Gary R. Nikolits (Nikolits).⁷ After the trial court ruled in favor of Verizon, Nikolits appealed the decision,⁸ leading to the Fourth District's decision.⁹

The Wireless Services Software is run on the computer system in Verizon's mobile switching center in Jupiter, Florida.¹⁰ The computer system is called the *Autoplex 1000*.¹¹ "The *Autoplex* consists of a network of computers. Run on the computers are three types of software: boot software, operating system software, and the Wireless Services Software."¹² The Wireless Services Software enables Verizon to provide its customers with the ability to use their cell phones to make phone calls, "send text messages, operate a [mobile] GPS navigator, and browse the Internet."¹³ While the *Autoplex* is

3. 751 So. 2d 705 (Fla. 5th Dist. Ct. App. 2000).

4. *Nikolits*, 9 So. 3d at 691.

5. BLACK'S LAW DICTIONARY 57 (8th ed. 2004). Ad valorem taxation is taxation that is "proportional to the value of the thing taxed." *Id.*

6. *Nikolits*, 9 So. 3d at 691.

7. *See id.*

8. *Id.*

9. *Id.* at 694.

10. *Id.* at 692.

11. *Nikolits*, 9 So. 3d at 692.

12. *Id.* Only the taxability of the Wireless Service Software was at issue in *Nikolits*. *See id.*

13. *Id.*

the hardware that executes the software, the Wireless Services Software gives the *Autoplex* and Verizon the ability to provide the aforementioned services.¹⁴

In *Nikolits*, the trial court, in interpreting Florida's Tax Code, held that the Wireless Service Software fit section 192.001(19), *Florida Statutes*, definition of computer software, exempting it from taxation.¹⁵ The trial court also found that the Wireless Services Software did not fall within section 192.001(19)'s "embedded software" exception.¹⁶ If it had, the Wireless Service Software would have been subject to taxation.¹⁷ Section 192.001(19) states:

(19) "Computer software" means any information, program, or routine, or any set of one or more programs, routines, or collections of information used or intended for use to convey information or to cause one or more computers or pieces of computer-related peripheral equipment, or any combination thereof, to perform a task or set of tasks. Without limiting the generality of the definition provided in this subsection, the term includes operating and applications programs and all related documentation. *Computer software does not include embedded software that resides permanently in the internal memory of a computer or computer-related peripheral equipment and that is not removable without terminating the operation of the computer or equipment. Computer software constitutes personal property only to the extent of the value of the unmounted or uninstalled medium on or in which the information, program, or routine is stored or transmitted, and, after installation or mounting by any person, computer software does not increase the value of the computer or computer-related peripheral equipment, or any combination thereof.*¹⁸

14. *Id.* In *Nikolits*, the Fourth District described in greater detail the nature of the Wireless Service Software, stating that:

The Wireless Service Software itself consists of approximately 1000 separate programs. Ten percent of these programs are needed for basic call processing. The other programs are used for various diagnostic tools, various report generators, and as tools to verify that the software has been installed properly. This means the Autoplex system will still process voice calls even if up to ninety percent of the Wireless Services Software is uninstalled. If all of the Wireless Services Software is uninstalled, the Autoplex processing system would still be up and running, and one could still read e-mail and do those kinds of things on those computers using the tools that come with the operating system.

Nikolits, 9 So. 3d at 692.

15. *Id.* (interpreting FLA. STAT. § 192.001(19) (2009)).

16. *Id.*

17. *Id.*

18. FLA. STAT. § 192.001(19) (emphasis added).

On appeal, the Fourth District, in spite of a strong argument to the contrary, affirmed the trial court.¹⁹ It also held that the Wireless Services Software “is intangible personal property and is therefore outside of the taxing power of Palm Beach County.”²⁰ In so holding, it cited to the Florida Constitution, as well as to the Fifth District’s decision in *Gilreath*, stating that:

Under the Florida Constitution, local governments and counties have the power “to levy and collect ad valorem taxes on real property and tangible personal property. The power to tax intangible personal property, however, is reserved only to the State.” As such, “if the [computer] software is intangible personal property, the County was without authority to assess or collect taxes on it.”²¹

III. AS INTENDED BY THE FLORIDA LEGISLATURE, “COMPUTER SOFTWARE” IS INTANGIBLE PERSONAL PROPERTY AND NOT TAXABLE BY FLORIDA COUNTY GOVERNMENTS

Section 196.001 states that “[a]ll real and personal property” is property subject to taxation, unless expressly exempted.²² The Florida Constitution provides that local governments and counties may assess ad valorem taxation on tangible personal property, but not on intangible personal property, as taxation on intangible property is reserved to the State.²³ The Fourth District Court of Appeal found that Palm Beach County could not tax the Wireless Services Software because, as “computer software,” it is intangible personal property and “not taxable by Palm Beach County.”²⁴ I agree with this holding, as the Florida Legislature intended that courts treat “computer software” not as tangible personal property, but rather, as intangible personal property.²⁵

This issue involves a matter of statutory interpretation, namely whether the legislature, through section 192.001, intended to treat “computer software” as tangible or intangible personal property.²⁶ As such, the *de novo*

19. *Nikolits*, 9 So. 3d at 694.

20. *Id.* at 693.

21. *Id.* (quoting *Gilreath v. Gen. Elec. Co.*, 751 So. 2d 705, 707–08 (Fla. 5th Dist. Ct. App. 2000)) (citations omitted) (alteration in original); *see also* FLA. CONST. art. VII, §§ 1(a), 9(a).

22. FLA. STAT. § 196.001(1) (2009).

23. FLA. CONST. art. VII, §§ 1(a), 9(a).

24. *Nikolits*, 9 So. 3d at 694.

25. *See id.*; *see also* FLA. STAT. § 192.001(19) (2009).

26. *See* FLA. STAT. § 192.001(19).

standard of review is applied by an appellate court,²⁷ which “simply means the appellate court is free to decide the question of law, without deference to the trial judge, as if the appellate court had been deciding the question in the first instance.”²⁸

“[L]egislative intent is the polestar” of statutory interpretation.²⁹ To determine such intent, an appellate court must first look to a statute’s plain language.³⁰ If “the statute is clear and unambiguous, ‘there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.’”³¹ However, “[i]f the meaning of a statutory provision is deemed ambiguous, it must be subject to judicial construction.”³² The purpose of the rules of statutory construction “is to discover the true intention of the law. But such rules are useful only in case of doubt and should never be used to create doubt, only to remove it.”³³

Amongst the rules of construction used by courts to rectify an ambiguity is that remedial statutes are “liberally construed to advance the intended remedy.”³⁴ A remedial statute is broadly defined as a statute “intended to fix an existing problem.”³⁵ Another principle of statutory construction is that “tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer.”³⁶ In construing statutes, appellate courts will also read “all parts of a statute . . . together in order to achieve a consistent whole.”³⁷ “Further, in construing a statute that is susceptible to more than one interpre-

27. See *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004) (“Although we take into consideration the district court’s analysis on the issue, constitutional interpretation, like statutory interpretation, is performed de novo.”).

28. 2 PHILIP J. PADOVANO, *FLORIDA APPELLATE PRACTICE* § 18:4, at 339–40 (West 2009).

29. *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1082 (Fla. 2009) (per curiam) (quoting *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 5 (Fla. 2004) (per curiam)).

30. *Id.* (citing *McKenzie Check Advance of Fla., L.L.C. v. Betts*, 928 So. 2d 1204, 1208 (Fla. 2006)).

31. *Id.* (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

32. *Gulfstream Park Racing Ass’n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006).

33. *State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973).

34. *Educ. Dev. Ctr., Inc. v. Palm Beach County*, 751 So. 2d 621, 623 (Fla. 4th Dist. Ct. App. 1999).

35. RONALD BENTON BROWN & SHARON JACOBS BROWN, *STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT* 60 (2002).

36. *Leadership Hous., Inc. v. Dep’t of Revenue*, 336 So. 2d 1239, 1242 (Fla. 4th Dist. Ct. App. 1976) (quoting *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967)).

37. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

tation, it is often helpful to refer to legislative history in order to ascertain the Legislature's intent."³⁸

As the *Laws of Florida* may impact an appellate court's analysis of a statute, a discussion of its purpose and make-up is warranted. The Florida Senate, in its Glossary of Terms, defines the *Laws of Florida* as:

A verbatim publication of the general and special laws enacted by the Florida Legislature in a given year and published each year following the regular session of the legislature. It presents the laws in the order in which they are numbered by the Secretary of State, as well as resolutions and memorials passed by the legislature.³⁹

The Florida Constitution also requires that every law has an "enacting clause" that reads: "Be It Enacted by the Legislature of the State of Florida."⁴⁰ Furthermore, although the *Laws of Florida* contain the provisions of a bill, the legislature provided before the enacting clauses—i.e., the preamble or prefatory language—of the *Florida Statutes*, as "official statute law of the state immediately upon publication,"⁴¹ do not. This is because "[a] preamble to a statute is an introductory or prefatory clause, preceding the enacting clause, supplying the reasons and explanations for legislative enactments. It is not part of a statute itself and has no substantive legal force and so cannot, by itself, prescribe rights or establish duties."⁴² As such, prefatory matters stated before the enacting clause in the *Laws of Florida* are not included in the *Florida Statutes* because they are not part of the official statutory law of the state.⁴³ Rather, this language may offer guidance for a court when a statute's plain meaning is ambiguous, as "preambles and findings and purposes clauses can help resolve ambiguity" because they are relevant to a statute's meaning.⁴⁴

As stated in *Nicolits*, the *Florida Statutes*, via subsection 192.001(19), provides a definition of "computer software."⁴⁵ In that definition, "computer

38. *State v. Jefferson*, 758 So. 2d 661, 665 (Fla. 2000).

39. The Florida Senate: Glossary of Terms, http://www.flsenate.gov/Info_Center/index.cfm?Mode=Glossary&Submenu=3&Tab=info_center&CFID=86199434&CFTOKEN=34982315 (last visited Nov. 7, 2009).

40. FLA. CONST. art. III, § 6.

41. *See* FLA. STAT. § 11.2421 (2009).

42. 48A FLA. JUR. 2D *Statutes* § 57 (2007).

43. *See id.*

44. LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 125 (2008).

45. *Nicolits v. Verizon Wireless Pers. Commc'ns, L.P.*, 9 So. 3d 690, 692 (Fla. 4th Dist. Ct. App. 2009).

software” is defined as “personal property,” but not as either tangible or intangible personal property.⁴⁶ In the same statutory section, the *Florida Statutes* define tangible and intangible personal property, whose definitions fail to include “computer software.”⁴⁷ The statute’s wording is, accordingly, ambiguous as to whether “computer software” is tangible or intangible personal property, and the canons of construction may be invoked.

It is feasible that because the legislature included a definition of “computer software” and tangible or intangible personal property, neither of which expressly defines “computer software” as intangible personal property, the legislature did not intend for “computer software” to be categorized as intangible personal property. “Computer software,” however, is intangible personal property because a close examination of legislative intent affords this result.⁴⁸

In first turning to the plain language of section 192.001, one may determine that the Florida Legislature intended that “computer software” is not tangible personal property.⁴⁹ As articulated by the Fourth District Court of Appeal in *Nikolits*:

A close examination of the definition of tangible personal property contained in section 192.001 compels the same result [as the Fifth District reached in *Gilreath*]. In particular, that definition states that tangible personal property is “all goods, chattels, and

46. FLA. STAT. § 192.001(19) (2009).

47. FLA. STAT. § 192.001(11)(b), (d). For purposes of taxation, the Florida Legislature has provided the following definitions of tangible personal property and intangible personal property:

(b) “Intangible personal property” means money, all evidences of debt owed to the taxpayer, all evidences of ownership in a corporation or other business organization having multiple owners, and all other forms of property where value is based upon that which the property represents rather than its own intrinsic value.

. . . .

(d) “Tangible personal property” means all goods, chattels, and other articles of value (but does not include the vehicular items enumerated in s. 1(b), Art. VII of the State Constitution and elsewhere defined) capable of manual possession and whose chief value is intrinsic to the article itself. “Construction work in progress” consists of those items of tangible personal property commonly known as fixtures, machinery, and equipment when in the process of being installed in new or expanded improvements to real property and whose value is materially enhanced upon connection or use with a preexisting, taxable, operational system or facility. Construction work in progress shall be deemed substantially completed when connected with the preexisting, taxable, operational system or facility. Inventory and household goods are expressly excluded from this definition.

Id.

48. See FLA. H.R. COMM. ON CMTY. AFFAIRS, HB 1723 (1997) BILL ANALYSIS & ECONOMIC IMPACT STATEMENT 1 (Apr. 15, 1997) [hereinafter HB 1723 BILL ANALYSIS & ECONOMIC IMPACT STATEMENT].

49. See FLA. STAT. § 192.001(11)(d).

other articles of value . . . capable of manual possession and whose chief value is intrinsic to the article itself.” § 192.001(11)(d). Although computer software’s value is intrinsic in and of itself, as the “essence of the property is the software itself, and not the tangible medium on which the software might be stored,” *Gilreath*, 751 So. 2d at 708, it is property incapable of manual possession. This is because, software, itself, is “not capable of being ‘seen, weighed, measured, felt or otherwise perceived by the senses.’” *Id.* (quoting *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 122 (Tex. App. 1996)). Rather, the tangible medium on which it is transported and transmitted is the means by which the property is manually possessed.

Therefore, we . . . hold that “computer software” is intangible personal property. As such, we affirm the trial court’s decision that the Wireless Services Software is not taxable by Palm Beach County, as it is intangible personal property, which is property outside a county’s taxing authority.⁵⁰

Furthermore, in examining the prefatory language of the 1997 *Laws of Florida*, one can discern the legislative intent to treat “computer software” as intangible personal property.⁵¹ Specifically, although this provision was not included in the subsequent *Florida Statutes* because it appeared before the enacting clause, the 1997 *Laws of Florida* state that it is “the intent of the Legislature to clarify that computer software, as defined in this act, is not tangible personal property under the ad valorem tax laws of this state.”⁵² In using this language as guidance, one can logically conclude that because the legislature stated that “computer software” is not tangible, it intended it to be categorized as intangible. This is because “[f]or purposes of ad valorem taxation, personal property is divided into” intangible personal property or tangible personal property.⁵³ As such, if computer software is not tangible it must logically be intangible.

The prefatory language in the *Laws of Florida* also states that it is the “intent of the Legislature that the provisions of this act are remedial.”⁵⁴ An interpretation of “computer software” as intangible personal property adheres to the rule of construction for remedial statutes because, to do so, is to liberally construe the statute to achieve its perceived remedial purpose of tax re-

50. *Nkolits*, 9 So. 3d at 694.

51. See Act effective June 1, 1997, ch. 97-294, 1997 Fla. Laws 5333, 5333 (codified at FLA. STAT. §§ 192.001, 196.012, .195–.196 (2009)).

52. Ch. 97-294, 1997 Fla. Laws at 5333.

53. 50 FLA. JUR. 2D *Taxation* § 80 (2006).

54. Ch. 97-294 1997 Fla. Laws at 5333.

lief.⁵⁵ The legislature's intent to provide tax relief by way of section 192.001(19) is embodied in a 1997 Florida House of Representative's Committee Report for House Bill 1723, which states that section 192.001(19)'s definition of "computer software" was designed to "effectively remove[] the value of software, except for the value of the diskette or other medium on which the information is stored, from ad valorem taxation."⁵⁶ Moreover, an interpretation of "computer software" as intangible personal property is in accordance with the rule of construction that tax statutes are interpreted in favor of the taxpayer, as such an interpretation grants the taxpayer relief.⁵⁷

Additionally, this interpretation is in accord with the Fifth District Court of Appeal's decision in *Gilreath v. General Electric Co.*⁵⁸ In *Gilreath*, the Fifth District rendered a decision on the same question discussed in this issue, i.e., whether computer software under section 192.001(19) is tangible or intangible personal property.⁵⁹ In that case, the court examined section 192.001(19), noting that the definition

made a sharp distinction between the information, program or routine (the "imperceptible binary impulses"), and the medium on which the information, program or routine is carried. That is to say, as the court interprets this amendment, the Legislature determined that the disk or tape itself was tangible personal property, but the information, program or routine was not. The remainder of the statute clearly indicates that the information, program or routine is not subject to local taxation, because it "does not increase the value of the computer or computer-related peripheral equipment, or any combination thereof."⁶⁰

More importantly, the court also held that "the fact that tangible property is used to store or transmit the software's binary instructions does not change the character of what is fundamentally a classic form of intellectual property" that is, in fact, "intangible property."⁶¹ As such, "computer software" is, itself, intangible property, regardless of its present status under the *Florida Statutes* and, therefore, is subject to taxation as intangible personal

55. See BROWN & BROWN, *supra* note 35, at 59.

56. HB 1723 BILL ANALYSIS & ECONOMIC STATEMENT, *supra* note 48, at 1 (emphasis added).

57. See BROWN & BROWN, *supra* note 35, at 59-60.

58. See *Gilreath v. Gen. Elec. Co.*, 751 So. 2d 705, 706 (Fla. 5th Dist. Ct. App. 2000).

59. *Id.* at 707.

60. *Id.* at 708-09.

61. *Id.* at 709 (quoting *Ne. Datacom, Inc. v. City of Wallingford*, 563 A.2d 688, 691 (Conn. 1989)).

property by the State of Florida—not Florida county governments—if the legislature so provides.⁶²

Thus, in accordance with the intent of the Florida Legislature, the Fourth District’s holding in *Nikolits* was correct in its finding that “computer software” was not taxable by Palm Beach County because it was not tangible personal property, but rather intangible personal property.⁶³

IV. THE FOURTH DISTRICT’S DECISION WAS CORRECT GIVEN THE DEFINITION OF A COMPUTER AND THE FACT THAT A PRESUMPTION OF CORRECTNESS WAS NOT APPLICABLE TO THE PROPERTY APPRAISER’S FINDINGS

Another compelling question is whether the Fourth District Court of Appeal acted improperly by not interpreting the word “computer” in favor of the taxing authority and not giving a presumption of correctness to the Property Appraiser’s findings.⁶⁴ As in Issue III, whether the trial court properly interpreted the word computer in section 192.001(19) is a matter of statutory interpretation that an appellate court reviews *de novo*.⁶⁵

A rule of statutory construction is that “[w]hile doubtful language in taxing statutes should be resolved in favor of the taxpayer, *the reverse is applicable in the construction of exceptions and exemptions from taxation.*”⁶⁶ This, however, is a rule of construction, which is not applicable if a term is unambiguous.⁶⁷ As such, it “is inapplicable to construe language of a statute that is not doubtful.”⁶⁸ This is in accordance with the principle that, absent an ambiguity or a statutory definition, the wording of a statute is given its plain and ordinary meaning.⁶⁹ It is also assumed that a legislative body knows the plain and ordinary meanings of the words it uses.⁷⁰ A word’s plain meaning is “ascertained by reference to a dictionary.”⁷¹

62. *Id.*

63. See *Nikolits v. Verizon Wireless Pers. Commc’ns L.P.*, 9 So. 3d 690, 693 (Fla. 4th Dist. Ct. App. 2009).

64. See *id.*

65. *Am. Honda Motor Co. v. Cerasani*, 955 So. 2d 543, 545 (Fla. 2007) (emphasis added).

66. *Markham v. PPI, Inc.*, 843 So. 2d 922, 925 (Fla. 4th Dist. Ct. App. 2003) (quoting *Robbins v. Yusem*, 559 So. 2d 1185, 1187 (Fla. 3d Dist. Ct. App. 1990)).

67. *Id.*

68. *Id.*

69. *Sieniarecki v. State*, 756 So. 2d 68, 75 (Fla. 2000).

70. *Hankey v. Yarian*, 755 So. 2d 93, 96 (Fla. 2000).

71. *Sieniarecki*, 756 So. 2d at 75 (quoting *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992)).

It is feasible to argue that the meaning of the word “computer” used in the definition of “computer software” is ambiguous, and because section 192.001(19) is a tax exemption, it should have been translated in favor of the taxing authority.⁷² However, the Florida Legislature provided a definition of the term “computer software”—not “computer.”⁷³ The meaning of the term computer, itself, is accordingly unambiguous because it is a word with a plain and ordinary meaning ascertainable by reference to a dictionary, i.e., “a high-speed electronic device that processes, retrieves, and stores programmed information.”⁷⁴ Hence, there is no doubt or ambiguity as to the plain meaning of the term “computer,” making the rules of construction inapplicable.

If an appellate court, however, did find an ambiguity regarding the definition of the term “computer,” it should still interpret it in favor of the taxpayer. This is because the rule of construction requiring a court to strictly construe a tax statute as against the taxpayer is “applicable in the construction of exceptions and exemptions from taxation,”⁷⁵ but not tax exclusions, with section 192.001(19) being a tax exclusion and not a tax exemption.⁷⁶ An examination of the Second District’s decision in *Department of Revenue v. GTE Mobilnet of Tampa Inc.*,⁷⁷ shows why section 192.001(19) is a tax exclusion.⁷⁸

In that case, at issue was whether certain language in the definition of “telecommunication service” was a tax exemption or tax exclusion.⁷⁹ The Second District held that because the wording was “part of the statutory definitions that determine what comes within the tax imposition language,” it operates not as an exemption, but as an exclusion.⁸⁰ The court held that this was because the tax definition operated to exclude “telecommunication service” from taxation by placing it outside the tax statute.⁸¹

72. See FLA. STAT. § 192.001(19) (2009).

73. See *id.*

74. WEBSTER’S NEW COLLEGE DICTIONARY 231 (1995).

75. *PPI, Inc.*, 843 So. 2d at 925 (quoting *Robbins v. Yusem*, 559 So. 2d 1185, 1187 (Fla. 3d Dist. Ct. App. 1990) (emphasis omitted)).

76. See *Dep’t of Revenue v. GTE Mobilnet of Tampa Inc.*, 727 So. 2d 1125, 1128 (Fla. 2d Dist. Ct. App. 1999). “A tax exemption, [generally] is a statute that carves out a statutory exception for something that otherwise would be within the scope of the taxing statute.” *Id.* By contrast, a tax exclusion is property that is not taxable because it is excluded from the tax statute. See *id.*

77. *Id.* at 1125.

78. See *id.* at 1128.

79. *GTE Mobilnet of Tampa Inc.*, 727 So. 2d at 1127–28.

80. *Id.* at 1128.

81. *Id.*

Comparatively, the definition of “computer software” is a tax exclusion because, like the definition of “telecommunication services” in *GTE Mobilnet of Tampa Inc.*, the definition of computer software is part of statutory definitions that determine what comes within a tax statute.⁸² Also, like the definition of “telecommunication service” in *GTE Mobilnet of Tampa Inc.*, the definition of “computer software” excludes it from taxation by placing it outside the taxing statute.⁸³ In particular, section 192.001(19) states that if software meets the definition of “computer software,” and does not fit into the “embedded software” exception, it is “personal property only to the extent of the value of the unmounted or uninstalled medium.”⁸⁴ This places computer software outside the tax statute because, as provided by the legislature, only “real and personal property” is subject to taxation,⁸⁵ and “computer software” is not personal property for the purposes of taxation.⁸⁶

Therefore, even if a court finds that the term “computer” raises an ambiguity, it is still correct in interpreting the statute in favor of the taxpayer because section 192.001(19) is a tax exclusion—not a tax exemption.⁸⁷

One may further argue that the Fourth District erred in its decision by not cloaking with a presumption of correctness the Property Appraiser’s findings that the Wireless Services Software was taxable as tangible personal property.⁸⁸ I disagree, because Palm Beach County’s Tax Appraiser misapplied the law by taxing intangible personal property as tangible personal property.

It is a well-established rule that “[t]ax assessors are constitutional officers and as such their actions are clothed with the presumption of correctness. One asserting error on the part of the tax assessor must show by ‘proof’ that every reasonable hypothesis has been excluded which would support the tax assessor.”⁸⁹ If “the presumption of correctness should have been but was not applied by the trial court,” an appellate court may reverse the trial court’s findings.⁹⁰ This presumption, however, does not apply if “the Property Appraiser’s assessment . . . was based on a misapplication of the law.”⁹¹

82. *Id.* at 1126–27.

83. *See id.* at 1126–28.

84. FLA. STAT. § 192.001(19) (2009).

85. FLA. STAT. § 196.001(1) (2009).

86. *See* FLA. STAT. § 192.001(19).

87. *See id.*; *see also GTE Mobilnet of Tampa Inc.*, 727 So. 2d at 1128.

88. *See Nikolits v. Verizon Wireless Pers. Commc’ns L.P.*, 9 So. 3d 690, 693 (Fla. 4th Dist. Ct. App. 2009).

89. *Straughn v. Tuck*, 354 So. 2d 368, 371 (Fla. 1977) (citing *Powell v. Kelly*, 223 So. 2d 305, 308 (Fla. 1969)).

90. *See Markham v. June Rose*, 495 So. 2d 865, 866 (Fla. 4th Dist. Ct. App. 1986).

91. *See Wilkinson v. Kirby*, 654 So. 2d 194, 196 (Fla. 2d Dist. Ct. App. 1995).

In *Nikolits*, the presumption of correctness was not applicable.⁹² This is because the Property Appraiser, by taxing intangible personal property as tangible personal property, misapplied the tax statute.⁹³ Accordingly, the trial court did not err by not giving a presumption of correctness to the Property Appraiser's findings. Therefore, because the trial court acted properly in not construing section 192.001 against Verizon, and not cloaking the Property Appraiser's findings with a presumption of correctness, the Fourth District was correct in its holding.⁹⁴

V. CONCLUSION

Although a Florida county government would profit from taxing "computer software" as tangible property—as exemplified in the one million dollar loss to Palm Beach County due to the *Nikolits* decision⁹⁵—the Florida Legislature has intended otherwise.⁹⁶ Given Florida's strict separation of powers scheme,⁹⁷ the Fourth District's decision correctly discerned and interpreted the intent of the legislature. If it ruled to the contrary, it would have encroached into the providence of the legislature by misconstruing and misapplying the law in a way that the legislature did not intend.⁹⁸

I do, however, recognize the importance and necessity of taxation to an orderly form of government. Although "computer software" is not taxable as tangible property, it may be taxable by the State as intangible personal property. To do so, I recommend that the legislature expressly provide for this in the definition of "computer software" by stating that "computer software" is taxable as intangible personal property if it fits within the embedded software exception. This will also definitively label section 192.001(19) a tax exemption by showing that computer software is in fact subject to taxation as personal property, but is otherwise exempt from taxation under section 192.001(19) unless it falls within that exemption's embedded software ex-

92. See *Nikolits*, 9 So. 3d at 693.

93. *Id.*

94. See *id.*

95. Billy Shields, *Verizon Avoids \$1 Million Palm Beach County Bill*, BROWARD DAILY BUS. REV., Apr. 16, 2009, at A3.

96. See *id.*

97. *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000) ("This Court, on the other hand, in construing the Florida Constitution, has traditionally applied a strict separation of powers doctrine.").

98. See FLA. CONST. art. II, § 3 (enumerating Florida's strict separation of powers scheme by stating: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

ception.⁹⁹ Furthermore, it will bring within the State's taxing power the delineated ability to tax a form of intangible property that now lingers outside Florida's Tax Code, helping generate revenue for the State from a viable tax source.

99. *See* FLA. STAT. § 192.001(19) (2009).