SUPREME COURT OF FLORIDA

MUBEN LAMAR, L.P., a New
Jersey Limited Partnership,

Petitioner,

vs. CASE NO. SC 00-1111

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Respondent.

______________________________/

ON CERTIORARI REVIEW TO RESOLVE EXPRESS AND DIRECT CONFLICT BETWEEN DECISIONS OF THE DISTRICT COURTS OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

RESPECTFULLY,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Jeffrey M. Dikman
Fla. Bar #274224
Assistant Attorney General
Department of Legal Affairs
The Capitol-Tax Section
Tallahassee, FL 32399-1050
(850) 414-3300
Counsel for Respondent

TABLE OF CONTENTS

1. TABLE OF CONTENTS....................i.

2. TABLE OF CITATIONS AND AUTHORITIES....................ii.

3. STATEMENT OF TYPE SIZE AND STYLE....................1.

4. PRELIMINARY STATEMENT....................2.

5. PREFACE TO STATEMENT OF THE CASE AND FACTS....................3.

6. STATEMENT OF THE CASE....................3.

7. STATEMENT OF THE FACTS....................6.

8. SUMMARY OF ARGUMENT....................13.

9. ARGUMENT

BOTH THE TRIAL COURT AND THE FIRST DISTRICT COURT CORRECTLY DECLARED THAT DOCUMENTARY STAMP TAX IS DUE. PETITIONER BOUGHT LAND IN "CONSIDERATION" FOR VALUABLE PARTNERSHIP SHARES.

A. THE TRANSFERS IN THE CASE AT BAR AND IN KURO WERE NOT GIFTS. ....18.

B. AFFIRMING THE TRIAL AND APPELLATE COURTS DOES NOT REQUIRE A FINDING THAT THE 1990 AMENDMENT SUPERCEDED PRIOR LAW....................42.

C. PETITIONER'S RULE CHALLENGE ARGUMENT SHOULD BE REJECTED BECAUSE NO RULE CHALLENGE WAS BROUGHT BELOW....................46.

10. CONCLUSION....................48.

11. CERTIFICATE OF SERVICE....................49.

12. INDEX TO APPENDIX....................50.

TABLE OF AUTHORITIES

FEDERAL CASES

Carpenter v. White,
80 F.2d 145 (1st Cir. 1935) 24

Moline Properties, Inc. v. Commissioner of IRS,
319 U.S. 436 (1943) 26, 27

STATE CASES

Abramson v. Straughn,
348 So. 2d 1172 (Fla. 4th DCA 1977) 35

Andean Investment Co. v. Department of Revenue,
370 So. 2d 377 (Fla. 4th DCA 1979) 35

Bankers Insurance Co. v. Florida Residential
Property & Casualty Joint Underwriting Ass'n,
689 So. 2d 1127 (Fla. 1st DCA 1997) 47

Choctoawatchee Electric Cooperative, Inc. v. Green,
132 So. 2d 556 (Fla. 1961) 24

Communities Finance Corp. v. Department
of Environmental Regulation,
416 So. 2d 813 (Fla. 1st DCA 1982) 47

Culbreath v. Reid,
65 So. 2d 556 (Fla. 1953) 33

Dean v. Pinder,
538 A.2d 1184 (Md. 1988) 23

Department of Revenue v. Dix,
362 So. 2d 420 (Fla. 1st DCA 1978),
cert denied, 370 So. 2d 458 (Fla. 1979) 35

Department of Revenue v. Florida Municipal Power Agency,
473 So. 2d 1348 (Fla. 1st DCA 1985) 35

Department of Revenue v. McCoy Motel, Inc.,
302 So. 2d 440 (Fla. 1st DCA 1974),
appeal dismissed, 307 So. 2d 448 (Fla.1974) 41

Department of Revenue v. Race,
743 So. 2d 169 (Fla. 5th DCA 1999) 32

Department of Revenue v. Ray Const. Of Okaloosa County,
667 So. 2d 859 (Fla. 1st DCA 1996) 33

Florida Department Of Revenue v. De Maria,
338 So. 2d 838 (Fla. 1976) . . . . passim

Fort Pierce Utility Authority v. Florida
Public Service Comm'n,
388 So. 2d 1031 (Fla.1980) 23, 43

Friends of the Everglades v. State,
Department of Environmental Regulation,
387 So. 2d 511 (Fla. 1st DCA 1980) 47

Key Haven Associated Enterprises v. Board
of Trustees of the Internal Improvement Trust Fund,
427 So. 2d 153 (Fla. 1982), superseded on other
grounds as noted in Bowen v. Florida Department
of Environmental Regulation, 448 So. 2d 566
(Fla. 2d DCA 1984), approved and adopted,
472 So. 2d 460 (Fla. 1985) 46

Kuro, Inc. v. Department Of Revenue,
713 So. 2d 1021 (Fla. 2nd DCA 1998) . . . . passim

Marks v. Green,
122 So. 2d 491 (Fla. 1st DCA 1960) 26, 27, 41

Morales v. Sperry-Rand Corporation,
601 So. 2d 538 (Fla. 1992) 48

Muben-Lamar, L.P. v. Dept. of Revenue,
25 Fla. L. Weekly D994 (Fla. 1st DCA 2000)...............passim

Murphy v City of Port St. Lucie,
666 So. 2d 879 (Fla. 1995) 48

Oyster Pointe Resort Condominium Associate Inc.v Nolte,
524 So. 2d 415 (Fla. 1988) 48

Pan America World Airways, Inc. v. Florida
Public Service Comm'n,
427 So. 2d 716 (Fla.1983) 23, 43

Regal Kitchens, Inc. v. Department of Revenue,
641 So. 2d 158 (Fla. 1st DCA 1994) 28, 29

River Park Joint Venture v. Dickinson,
303 So. 2d 654 (Fla. 1st DCA 1974) 35

School Board of Flagler County v. Hauser,
293 So. 2d 681 (Fla. 1974) 47

School Board of Leon County v. Mitchell,
346 So. 2d 562 (Fla. 1st DCA 1977) 47

Smith v. Ryan,
39 So. 2d 281 (Fla.1949) 43

St. Petersburg Bank & Trust Co. v. Hamm,
414 So. 2d 1071 (Fla.1982) 42

State, Department of Revenue v. Brock,
576 So. 2d 848 (Fla. 1st DCA 1991) 47

State ex rel. Biscayne Kennel Club v. Board of
Business Regulation, 276 So. 2d 823 (Fla.1973) 23, 43

State ex rel. Department of General Services v. Willis,
344 So. 2d 580 (Fla. 1st DCA 1977) 47

State ex.rel. Palmer-Florida Corp. v. Green,
88 So. 2d 493 (Fla. 1956) 31,32

State ex.rel. Rogers v. Sweat,
152 So.432 (1934) 35

State, Marine Fisheries Com'n v. Organized
Fishermen of Florida, 675 So. 2d 933 (Fla.1st DCA 1996) . 46

State v. Webb,
398 So. 2d 820 (Fla.1981) 44

STATE STATUTES

Section 201.02, Fla. Stat. (Supp. 1990)...................passim

Section 201.02(5), Fla. Stat. (1987)..........................44

Section 201.15, Florida Statutes (2000).......................41

Section 620.145, Fla. Stat. (2000)............................31

Section 620.149, Fla. Stat. (2000)....31

Section 620.8201, Fla. Stat. (2000)....31

Section 620.8203, Fla. Stat. (2000)....31

Section 620.8502, Fla. Stat. (2000)....19

Laws of Florida Ch. 90-132, Section 7....21

Chapter 42, Chapter 2A,
New Jersey Statutes Annotated (1990)....19,31

New Jersey Statutes 42:2A-11 (1990)....31

New Jersey Statutes 42:2A-12 (1990)....31

New Jersey Statutes 42:2A-27 (1990)....31

New Jersey Statutes 42:2A-43 (1990)....31

New Jersey Statutes 42:2A-44 (1990)....31

New Jersey Statutes 42:2A-48 (1990)....31

ADMINISTRATIVE RULES

Fla. Admin. Code Rule 12B-4.012 (1989) 44

Fla. Admin. Code Rule 12B-4.012 (2000)....22,46

Fla. Admin. Code Rule 12B-4.013 (2000)....22,46

MISCELLANEOUS

Revenue Ruling M.T.4, 1942-37-11194 24

STATEMENT OF TYPE SIZE AND STYLE

The undersigned counsel for Respondent certifies that the type size and style used in Respondent’s Answer Brief is 12 point Courier New.

PRELIMINARY STATEMENT

Petitioner, Muben-Lamar, L.P., will be referred to herein as "Petitioner." Respondent, the Florida Department of Revenue, will be referred to herein as the "Department." There are three volumes in the record on appeal. References to the record on appeal will be cited as R:__;___, so as to indicate first the volume and then the page number of the record.

Additionally, this brief refers to some legal authorities which were time consuming to locate but which were filed below pursuant to requests for judicial notice. Those materials include the 1990 version of New Jersey Partnership Statutes, the 1989 version of the Department's administrative rule, and an IRS Revenue Ruling. *Each of these materials can be found most readily as attachments to the Department's requests for judicial notice, which were filed at RI:17-88 and R:III;288-292.*

PREFACE TO STATEMENT OF THE CASE AND FACTS

Although this case was heard below on cross-motions for summary judgment, there is nevertheless significant conflict in the briefs concerning the undisputed facts. The explanation for this conflict is as follows:

(a) Both the Department and the Trial Court relied upon the undisputed facts as set forth within the *corporate deposition* testimony of Petitioner's own client representative, William E. Weiss, and in the various *exhibits* attached thereto. Compare, RII;89-269; RII;272-287; RIII;448-458.

(b) In contrast, the Petitioner's Statement of the Facts relies upon a mixture of facts, conclusions and legal arguments, all of which are contained within the *affidavit* of William E. Weiss. Compare, Petitioner's Recitation of Fact to R:III;328-333;

(c) The Trial Court chose to focus upon the facts as presented in the *corporate deposition* of Mr. Weiss, rather than upon the mixture of facts, conclusions and argument contained within Mr. Weiss' *affidavit*. Compare, RII;89-269; RII;272-287; R:III;334-341; RIII;448-458.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is mostly correct, but contains one factual error and is incomplete.

A. ERRONEOUS ASSERTIONS

The Department did not "assess" the amount of tax to be paid by the Petitioner. Rather, Petitioner, "under protest," *self-declared* the taxable amount of "consideration" on its documentary stamp tax returns. R:II; 233, 239 and 244. The controversy before this Court arose from a tax *refund denial* and not from an "assessment" of liability by the Department. R:II:247.

B. INCOMPLETE CASE HISTORY

Prior to the hearing on the cross-motions for summary judgment, the Department filed a Motion to Strike or to Disregard Portions of the Affidavit of William E. Weiss (hereinafter, "motion to disregard"). R:III;334-341. That motion, which included a memorandum of law, argued:

(1) that portions of Mr. Weiss' affidavit directly contradicted his corporate deposition testimony; and

(2) that Mr. Weiss' affidavit was riddled with extensive factual *conclusions* and *legal argument*. R:III;373-377.

The cross-motions for summary judgment and the Department's motion to disregard were duly scheduled to be heard together, on March 25, 1999. The hearing on March 25, 1999 began with a stipulation that the cross-motions for summary judgment and the related motion to disregard should be heard *together*, rather than separately. R:III;386. The Court then heard the arguments of counsel in that agreed upon format.

The underlying *facts*, as set forth in Mr. Weiss' corporate deposition and accompanying exhibits, were never in dispute. These facts were fairly summarized in the Department's motion for summary judgment, as well as in the Final Judgment. R:II;89-269; 272-287 and R:III;448-458. However, at the conclusion of the summary judgment hearing, the Trial Court inquired, in an abundance of caution:

> THE COURT: Well, if there's nothing else, then I think that summary judgment--there's no issue of fact here that needs to be presented at trial.
>
> MR. LEVY (COUNSEL FOR PETITIONER): No, sir.

R:III;445.

Having obtained this final assurance from Petitioner's counsel that there were no facts in dispute, the Court orally announced that it would enter summary final judgment in favor of the Department. R:III;446.

The material facts, as set forth in the Final Judgment, accept the facts as set forth in the Department's motion for summary judgment. Compare, R:II;272-276 with R:III;449-451. The material facts, as set forth in the Final Judgment, do not incorporate any of Mr. Weiss' sworn legal arguments and conclusions, which the Department had moved to disregard. Accordingly, the Department's motion to disregard the affidavit testimony of William E. Weiss was effectively granted, even though no separate order was entered on that motion.

STATEMENT OF THE FACTS

Petitioner's Statement of the Facts lacks factual precision and relies heavily for record support upon "legal argument" and other *conclusory* statements set forth in Mr. Weiss' *affidavit*. As the Department maintained below, the material and undisputed facts are all set forth in Mr. Weiss' corporate *deposition*, and in *documents* attached thereto.[1]

A second problem with Petitioner's statement of the facts is that it complicates a simple real estate transaction in which land was exchanged for partnership interests. The discussion of the means by which Petitioner originally acquired the land in question (through a mortgage foreclosure) is completely immaterial to any issue before the Court.

For these reasons, the Department substitutes its own Statement of the Facts, followed by a critique of certain "facts" presented by Petitioner.

A. GRAPHIC PRESENTATION OF FACTS

Before reading further, the Court may wish to review the one page graphic illustration of the facts, which forms part of the record on appeal. See, Appendix "C" hereto or R:III:381. The

[1]The exhibits attached to the deposition are: (1) the partnership agreement, certificates of partnership, and capital contribution schedules at R:II;131-227; (2) the deeds and accompanying documentary stamp tax returns at R:II;228-248; and (3) the federal income tax return treatment of the capital contributions at R:II;249-269.

facts of this case are greatly simplified, when presented visually.

B. TEXTUAL PRESENTATION OF THE FACTS

Three Florida deeds were each executed by the grantor, Mutual Benefit Life Insurance Company ("MBLIC") effective December 31, 1990, as a "contribution" to the "capital" of Petitioner, Muben-Lamar, L.P. ("the Limited Partnership"). R:II;273. The Limited Partnership was a separate legal entity which had been created that same day, in accordance with the laws of the State of New Jersey.[2] R:II;273 and R:II;131-227.

Under the terms of the Limited Partnership Agreement, there were two "General Partners" and one "Limited Partner." The two General Partners were Lamar-Eastern, L.P. (hereinafter, "Lamar-Eastern") and Muben Realty Company (hereinafter, "Muben Realty"). The sole Limited Partner was MBLIC. R:II;273.

It is undisputed that MBLIC *received something in exchange* for its contribution to capital. Specifically, it is undisputed that MBLIC received a 98% interest in the partnership "*in consideration*" for the contribution to partnership capital of various parcels of improved real estate, which were located in Florida and Mississippi. In deposition, Mr. Weiss testified, on

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[2]The Limited Partnership Agreement and the related Certificate of Limited Partnership, filed with New Jersey's Secretary of State, were attached to Petitioner's deposition, as composite Exhibit "A." R:II;131-227.

behalf of Petitioner:

> Q: And under the partnership agreement, what was--**was Mutual Benefit Life entitled to receive any partnership interest <u>in consideration</u> for its transfer of the real estate into the partnership?**
>
> **A. Yes, it got a 98 percent limited partnership interest.**

Petitioner's deposition at R:II;108, lines 18-25 and at R:II;109, lines 1-9 (Emphasis Supplied).

Under the terms of the Limited Partnership Agreement, the "Agreed Contribution Value" of these properties was shown on a schedule, which read as follows:

PROPERTY	LOCATION	AGREED CONTRIBUTION VALUE
Quarter	Jackson, MS	$ 1,631,395
Village Mall	Port Orange, FL	$ 4,743,233
Pinetree Village	Laurel, MS	$ 3,214,098
Kendall Value	Kendall, FL	$12,110,006
Sunset Strip	Miami, FL	$ 6,037,152
	Total	$27,735,884[3]

R:II;189.

In addition to its own 98% interest in the partnership, MBLIC received additional "consideration" for the deeds.

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[3]The Agreed Contribution Value of the three Florida properties was only $22,890,391, since two of the properties described above were in Mississippi. The Department solely received payment of tax on that portion of total contributions which represented Florida real estate, as opposed to Mississippi real estate. R:II;276.

Specifically, MBLIC arranged for its second tier subsidiary, Muben Realty, to receive a separate 1% interest, as "General Partner." R:II;274-275. This was done by "allocating" a portion of MBLIC's real estate contribution as if it had been contributed by Muben Realty. R:II;105-106. In actuality, Muben Realty had contributed nothing of its own to the partnership capital. Title to the land had been vested solely in the grantor, MBLIC. R:II;105-106.

Lamar-Eastern, the other "General Partner," was also given a 1% interest in the partnership. Lamar-Eastern's 1% interest was issued in "consideration" and exchange for the execution of a promissory note, payable to the Limited Partnership, in the sum of $280,000. R:II;104-105.

The partnership interests given to MBLIC, and to its second tier subsidiary, in "consideration" and exchange for the Florida deeds, had substantial monetary value. R:II;189. This value existed because the partnership, as a result of the exchange, owned shopping centers, free and clear, in both Mississippi and Florida, as well as a $280,000 promissory note, which had been contributed by Lamar-Eastern. R:II;108. Moreover, at no pertinent time did the partnership have any liabilities. R:II:108.

The increase in the value of each partner's individual capital account, resulting from their individual capital

contributions, are reflected on Schedules K-1 attached to the Petitioner's 1991 federal 1065.[4]

Petitioner's account contribution values, as reported to the Department and to the Internal Revenue Service, and as reflected within the Limited Partnership Agreement, were based upon MBLIC's historical "cost" of acquisition at a foreclosure sale, rather than on a current appraisal of the fair market values of the Florida real estate on December 31, 1990. R:II;117-121.

No other information was provided to the Department concerning the fair market values of the real estate on December 31, 1990, so the Department accepted *Petitioner's* valuation figures, as reported on: (1) Petitioner's documentary stamp tax returns; (2) Petitioner's partnership agreement; and (3) Petitioner's federal income tax returns.[5]

C. ERRORS IN PETITIONER'S STATEMENT OF FACTS

Petitioner states on page 3 of its Brief on the Merits, as a "fact," that the purpose of forming the partnership was to hold legal title to the properties "with the same economic and beneficial interest remaining in Mutual Benefit with the exception that the properties were now treated as partnership

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[4] A copy of the 1991 1065 and attached Schedules K-1 were attached to the deposition, as composite Exhibit "C." R:II;249-269.

[5] Petitioner does not maintain that the fair market value is less than what Petitioner paid for the properties. R:II;120.

assets on the books of Mutual Benefit." This assertion is solely based upon a lawyer's affidavit (Mr. Weiss is a New Jersey Lawyer) and constitutes legal argument, not "fact." R:III;334-341.

Moreover, the underlying facts reveal that MBLIC's ownership interests changed as a result of the transaction. Before the transaction, MBLIC owned 100% fee simple interest in land. R:II;106. After the transaction, MBLIC instead owned intangible personal property consisting of partnership shares. R:II;131-227. The underlying economic value of these shares was a 98% ownership interest in both land and a promissory note. R:II;131-227. Prior to the transaction, MBLIC had no interest, directly or indirectly, in that promissory note, which had issued from Lamar-Eastern, an unrelated third party.

Petitioner also states as a "fact," on page 6 of its Brief on the Merits, that the grantor *already* held its equity interest in the partnership at the time of transfer. This is factually incorrect for two reasons.

First, the Trial Court expressly found, based upon the undisputed facts presented below, that "there was a *simultaneous* issuance of partnership interests in consideration for land and a promissory note." (emphasis supplied). R:III;457-458. It is undisputed that the creation of the partnership and the issuance of the deeds all took place *on the same day:* December 31, 1990.

Page 7 of Petitioner's Brief on the Merits.

Second, it is *undisputed* that the partnership interests issued in *exchange* for the land, as part of a *single transaction*. Mr. Weiss's corporate deposition at R:II;108, lines 18-25 and at R:II;109, lines 1-9; See also, R:II;148 & 189.

Finally, Petitioner asserts as a "fact," on pages 7-8 of its Brief on the Merits, that the Department "assumes" that the value of the land is an amount bid by Petitioner at a foreclosure sale. The Department never made such a contention below. R:III:384-447. Instead, the Department argued that it was entitled to rely upon *Petitioner's own valuation figures*, as reported by Petitioner on its documentary stamp tax returns (as well as in the partnership agreement and in federal income tax returns). R:II:272-287.

Petitioner never produced an appraisal or other evidence to the Court suggesting that its own valuation figures were in error. R:III;384-447. Therefore, the Trial Court made a specific finding that "[t]he Department was entitled to rely upon Plaintiff's reported valuations, and the Department does not challenge these valuations. There is no genuine valuation issue in dispute." R:III;451.

SUMMARY OF ARGUMENT

The Trial Court correctly ruled, based upon the *undisputed facts*, that Petitioner exchanged valuable "shares" in a limited partnership in "consideration" for real estate which it received.[6] Stated conversely, MBLIC received personalty (consisting of partnership shares) in "consideration" for realty.

As a matter of law, Petitioner is deemed a "purchaser" of the real estate because it gave good and valuable "consideration." This Court, in DeMaria, has stated that there is a "purchaser" whenever property is given which has **"exchangeable value."**

It is undisputed that the limited partnership shares received by the grantor, MBLIC, had *enormous value*. Those shares represented a 98% interest in a limited partnership. The limited partnership had no liabilities and owned three free and clear shopping centers, together with a third party promissory note. **It was because these shares were so valuable that MBLIC gave up $22 million in free and clear real estate in exchange for them.**

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[6]Q: And under the partnership agreement, what was--was Mutual Benefit Life entitled to receive any partnership interest in consideration for its transfer of the real estate into the partnership?

A. Yes, it got a 98 percent limited partnership interest.

Petitioner's deposition at R:II;108, lines 18-25 and at R:II;109, lines 1-9.

Although the grantor's net wealth neither increased nor decreased as a result of the transactions, this does not prove that the transactions were mere "paper transactions." After all, when $1 million in land is sold for $1 million in cash, the effect on the grantor's total wealth is also neutral, but there is nevertheless "consideration." In contrast, when a pure "gift" of land is made, the grantor's net wealth is reduced by the amount of the gift.

The only issues are whether the transactions in the case at bar, and in Kuro, constituted a gift or an exchange. In the case at bar, the Trial Court correctly found that there was no genuine valuation issue in dispute, because the Department had accepted Petitioner's own valuation figures. Petitioner's valuation figures are set forth consistently in the partnership agreement, in Petitioner's documentary stamp tax returns and in its federal income tax returns.

The Trial Court correctly based its decision not only upon the plain language of Florida statutes, but also, upon numerous court decisions, and the Department's rules. These court decisions included a case which is closely on point, from another state, as well as a federal documentary stamp tax decision. The federal decision is particularly material; Florida's documentary stamp tax is patterned upon a repealed federal documentary stamp

tax act.

The Trial Court was confronted with the decision whether to extend and expand upon the erroneous appellate decision in Kuro, or whether to distinguish the same. The Trial Court correctly chose to distinguish Kuro, noting that the case at bar, unlike Kuro, involves capital contributions by a completely unrelated third party, as well as the simultaneous *exchange* of land for shares.

Similarly, the Trial Court correctly distinguished this Court's decision in Palmer-Florida, which did not involve either the exchange of valuable shares for land or the capital contribution of land to an artificial entity.

All three judges on the First District's panel *unanimously* agreed that the Trial Court's ruling was correct and that the ruling should be affirmed. However, a majority of the panel members went further, and correctly observed that the Second District's decision in Kuro is flawed.

In Kuro, the Second District erroneously held that a family owned corporation solely acquired naked legal title to land and that beneficial ownership of the corporate land ultimately remained unchanged, with the shareholders. Yet, in reversing an administrative law judge's findings, the Second District articulated no facts to support its *de novo finding of fact* that

a trust had been created. The only factual basis for the Second District's holding was that the corporation in question was closely held, by a father and son.

Kuro strongly invites lower courts to begin treating *all closely held* corporations like trusts. But whereas trusts are expressly created for the purpose of *severing* legal and beneficial ownership, corporations and limited partnerships are separate and distinct artificial entities, which can, and often do, own land *in their own right*.

The United States Supreme Court and the First District Court of Appeal, have long held that corporations should not be permitted to "pierce their own corporate veil," so as to enjoy all of the numerous benefits of separate entity status with none of the tax disadvantages. This longstanding doctrine, which is known as the "separate entities doctrine," is now threatened by the aberrational decision in Kuro.

Under Kuro, virtually any transaction between a *closely held* entity and its shareholders is now at risk of being mislabeled a "mere paper transaction." Unless the Kuro decision is expressly overturned by this Court, it will eventually decimate Florida's documentary stamp tax base, which the State desperately needs and relies upon to acquire and protect coastal lands, preserve water quality, assure that the housing needs of its citizens are met, and to provide general revenue. This is because Kuro *judicially*

legislates a huge tax exemption.

The Second District probably did not realize how *large* a tax exception it had *judicially created*. Under Kuro, the tax can be routinely avoided, in a three step process:

(1) Real property is contributed tax-free to a newly formed corporation, pursuant to Kuro;

(2) The stock is then sold tax-free for the value of the real property (the tax does not apply to the sale of stock); and

(3) The real property can then be distributed tax-free to the new stock-holder, pursuant to Palmer-Florida.

It is the role of the Legislature and not of the judiciary to create tax exemptions. If the Legislature someday chooses to create a tax exemption for Kuro situations, it can do so.

Petitioner attacks a straw man when it argues that the 1990 amendment failed to overturn prior case law. The Department has never argued in this case that the 1990 amendment overturned prior case law. Rather, the Department has argued that its position would be sustainable under **either** the 1990 or the pre-1990 statute, rules and case law.

Finally, the Race decision, upon which Petitioner heavily relies, is easily distinguishable, because it involved the *opposite* situation from the case at bar. In Race, the Department failed to follow its own rules. In the case at bar, it is the

Petitioner who disregards existing administrative rules.

ARGUMENT

BOTH THE TRIAL COURT AND THE FIRST DISTRICT COURT CORRECTLY DECLARED THAT DOCUMENTARY STAMP TAX IS DUE. PETITIONER BOUGHT LAND IN "CONSIDERATION" FOR VALUABLE PARTNERSHIP SHARES.

A. THE TRANSFERS IN THE CASE AT BAR AND IN KURO WERE NOT GIFTS.

The Petitioner's brief misstates the Department's position and, in so doing, confuses the issue before the Court. The Department's position can be simply stated as follows:

Petitioner purchased land from MBLIC in exchange for partnership shares. The transactions at issue would have been taxable under either 1990 or pre-1990 statutes, rules and case law. At all times throughout the statute's history, transfers for "consideration" have been taxable but purely gifting transactions have not been taxable. The transactions at issues were sales, not gifts.

The requirement that there be a "purchaser" and the requirement that there be "consideration" are one and the same. This Court has previously declared that there is a "purchaser" whenever there is "consideration" and vice-versa. Florida Dept. Of Revenue v. De Maria, 338 So.2d 838, 840 (Fla. 1976).

In determining whether there is a "purchaser," or "consideration," this Court has, on a previous occasion, relied

upon the Webster's Dictionary definition of "purchaser" as "one who obtains or acquires property by paying an equivalent in money **or other exchangeable value.**" (emphasis supplied). Id., at page 840. Since there is no genuine dispute that the shares in question had "exchangeable value," there can be no genuine dispute that Petitioner was a "purchaser" of the land, for "consideration."

MBLIC was not engaged in a charitable transaction or gift. It received good and valuable "consideration." The Trial Court correctly found, based upon the undisputed facts of this case, that:

> MBLIC *received something in exchange* for its contribution to capital. Specifically, MBLIC received a 98% interest in the partnership in exchange for the contribution to partnership capital of various parcels of improved real estate, which were located in Florida and Mississippi.

R:III;450 (emphasis per original).

The Trial Court could not have concluded that the properties were *given away* as gifts, based upon the *undisputed* facts of this case. At bottom, this case involved a straightforward *exchange* of land for personalty (i.e., limited partnership interests).[7] These intangible personal property interests, consisting of

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[7]Limited partnership interests are classified as personalty, under the laws of New Jersey, where the partnership was formed. 42:2A-12 New Jersey Statutes Annotated (1990). They are also personalty under Florida law. Section 620.8502, Florida Statutes. (2000).

limited partnership “shares,” were in no way identical to the land for which the interests were exchanged.

Before the transaction, MBLIC owned 100% interest in the land, in fee simple. After the transaction, MBLIC did not own the land at all but instead owned limited partnership interests. Moreover, the economic values *underlying* the partnership interests included the value of a promissory note, which had been contributed by an *unrelated* third party. Prior to the transaction, MBLIC owned no arguable interest in the promissory note, *directly or indirectly*.

The Trial Court’s decision is supported by the plain language of the pertinent tax statute. The tax at issue was imposed pursuant to Section 201.02, Florida Statutes (Supp. 1990), which provides, in pertinent part:

> **201.02. Tax on deeds and other instruments relating to real property or interests in real property**
>
> (1) On deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by his or her direction, on each $100 of the <u>consideration</u> therefor the tax shall be 70 cents. When the full amount of the consideration for the execution, assignment, transfer, or conveyance is not shown in the face of such deed, instrument, document, or writing, the tax shall be at the rate of 70 cents for each $100 or fractional part thereof of the consideration therefor. *For purposes of this section, <u>consideration includes, but is not limited to</u>, the money paid or agreed to be paid; the discharge of an obligation; and the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness*

> *is assumed. If the consideration paid or given in exchange for real property or any interest therein includes <u>property other than money</u>, it is presumed that the consideration is equal to the fair market value of the real property or interest therein.*

(Emphasis Supplied).

The above-quoted statute was the version in effect when the pertinent transaction took place.[8] The statute takes the perfectly logical position that consideration need not be money or debt instruments but can be virtually any property. This proposition is not "new" law, as Petitioner suggests. Even prior to the enactment of the 1990 amendment, the Department had defined consideration, in its <u>1989</u> rules, to include:

> **12B-4.012 Rate, Consideration.**
>
> (1). . .
> (2) Consideration-Documentary Stamps: The term "consideration" under 201.02, F.S., includes:
> (a) Cash
> (b) Purchase money mortgage
> (c) Corporation stock
> (d) . . .
> (g) <u>Value of any</u> real or <u>personal property given in exchange for realty</u>
> (h) <u>Any other</u> monetary consideration <u>or consideration which has a reasonable determinable pecuniary value</u>

(Emphasis Supplied).

Petitioner misstates the issue as whether the 1990 amendment "codified" prior case law. But whether the amendment "codified"

[8]This version reflects an amendment by Laws of Florida Ch. 90-132, Section 7, effective July 1, 1990.

the law, as Petitioner asserts, or "clarified" the law, as the Department asserts, makes no difference under the facts of this particular case. Regardless of whether the statute constitutes a "codification" or a "clarification" of prior law, the plain language of the 1990 amended statute must still be followed for periods of time which are subsequent to its enactment.

Moreover, Florida Administrative Code Rule 12B-4.012 and 12B-4.013, which implements the aforementioned legislation, provides:

> **12B-4.012 Rate, Consideration**
>
> (1). . .
> (2) Definitions:
>
> (a) . . .Where property other than money is exchanged for interests in real property, there is the presumption that the consideration is equal to the fair market value of the real property interest being transferred.
>
> (b) "Property other than money" includes, but shall not be limited to, property that is corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.
>
> (3). . .
>
> **12B-4.013 Conveyances Subject to Tax.**
>
> (1) Exchange of Property. . .
>
> (10) Partnerships: A conveyance of real property by a partner in exchange for an interest in a partnership, or where the value of the partner's interest in the partnership

> is increased by the conveyance, is taxable. There is the presumption that the consideration is equal to the fair market value of the real property being transferred. . .

(Emphasis Supplied).

In its rules, the Department has consistently interpreted the 1990 statute, as amended, as well as the predecessor version of the statute, to impose tax liability upon contributions to the capital of a limited partnership entity. The underlying theory of the rule is that a contributor to the capital of a closely held artificial entity (in contrast to the donor of a gift) receives something for that which it gives up.

It is well-established that the "administrative construction of a statute by the agency or body charged with its administration is entitled to great weight and *will not be overturned unless clearly erroneous.*" (Emphasis Supplied). Fort Pierce Util. Auth. v. Florida Public Service Comm'n, 388 So.2d 1031, 1035 (Fla.1980); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 828 (Fla.1973); Pan Am. World Airways, Inc. v. Florida Public Serv. Comm'n, 427 So.2d 716, 719 (Fla.1983).

As applied to the instant case, the Department's rule interpretation means that the MBLIC transaction was taxable, since MBLIC received in "consideration" for its real estate, a valuable interest in personal property: partnership interests.

The Trial Court, the First District Court, the Legislature, and the Department are not alone in concluding that such transactions are taxable. Another state court has reached identical results in construing substantially similar documentary stamp tax provisions. In Dean v. Pinder, 538 A.2d 1184 (Md. 1988), the Court held that the term "actual consideration" included the increase in the value of the sole shareholder's interest, upon contributing land to the capital of a corporate entity.

More importantly, two federal forums have reached the same result as the Trial Court, when construing similar provisions of the repealed *Federal* Documentary Stamp Tax Act. Florida's courts have historically looked to federal documentary stamp tax law for guidance in interpreting Florida's documentary stamp tax statutes. Choctoawatchee Electric Cooperative, Inc. v. Green, 132 So. 2d 556 (Fla. 1961) [Florida's documentary stamp tax statutes are based upon repealed federal documentary stamp tax laws, and Florida courts will look to federal documentary stamp tax decisions for guidance].

In Revenue Ruling M.T.4, 1942-37-11194, the Internal Revenue Service, in applying the now repealed federal documentary stamp tax act, held: "a conveyance of realty to a partnership by a partner as a contribution to the partnership assets is subject to stamp tax."

A similar result was reached in Carpenter v. White, 80 F.2d 145 (1st Cir. 1935). The facts of that case involved a business trust and a corporation which had each deeded separate properties to one newly formed business trust. The court noted that "no money consideration was paid for these conveyances" but found the transaction taxable anyway, because "[t]he trustees of the new trust issued transferable shares in agreed amount to the two grantors." Id. at 146.

In Carpenter, as in the case at bar, the Taxpayer argued that the grantor had transferred "bare legal title" to the properties, for purposes of management convenience. Id. at 146. In rejecting that argument, the Court held:

> The entire interest, legal and equitable, in the property of the Amoskeag Company was conveyed to the trustees of the new trust, and new equitable interests, not of identical character with the old ones, were created, evidenced by the shares in the new trust, issued to the grantors in return for the conveyance. There was therefore a complete change in both the legal title and the beneficial ownership of the property, not a continuance of the same beneficial ownership in the hands of new trustees. Nor were the equitable interests of the new shares in the same property as those of the old shares; the latter represented interests only in the property of the Amoskeag Company; the former, interests in all the property conveyed to the new trust.

Id. at 146 (emphasis supplied).

In the case at bar, the grantor gave up 100% equitable ownership in land, in consideration for receiving 100% equitable ownership of those partnership shares which it received. That

is, the grantor gave up his equitable ownership of land in consideration for receiving equitable ownership of personalty.

Moreover, in the case at bar, the 98% limited partnership interests which MBLIC received in exchange for the land, represented the value not only of land, but of a promissory note, which had been contributed by a third party. But for the transaction, MBLIC had no interest, directly or indirectly, in that promissory note.

KURO IS WRONGLY DECIDED

The only decision which conflicts with the pertinent portions of the Department's rule, or with the decision of the District Court below, is an aberrational decision from the Second District in Kuro, Inc. v. Dept. Of Revenue, 713 So. 2d 1021 (Fla. 2nd DCA 1998), which was wrongly decided.

Kuro is contrary to more than a half century of precedent. The decision has created new uncertainties in the law, because it questions the long-settled doctrine that artificial entities, even when *closely held*, are nevertheless legally separate entities from their shareholders. To this extent, the case at bar *should* be a vehicle for rejecting Kuro or limiting it to its precise facts.

Historically, transactions between individuals and artificial entities have been treated as real, for both tax and nontax purposes, without regard to whether the artificial entity

was closely or widely held, or whether the transaction involved a shareholder, as opposed to an unrelated party. Moline Properties, Inc. v. Commissioner of IRS, 319 U.S. 436 (1943); Marks v. Green, 122 So. 2d 491 (Fla. 1st DCA 1960); Regal Kitchens, Inc. v. Department of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994). Kuro has called this long-standing doctrine into question for the sake of a policy, expressed in the concurring opinion below, which is not supportable.

The Kuro Court's analysis is contrary to a great body of law issued by the United States Supreme Court and by the First District Court of Appeal. In Moline Properties, Inc. v. Commissioner of IRS, 319 U.S. 436 (1943), the Court held that a taxpayer who creates a separate taxable entity[9] must accept all tax benefits and the burdens of forming a separate taxable entity and rejected an effort to treat a corporation as a taxpayer's alter ego. In that case, the United States Supreme Court noted:

> The *doctrine of corporate entity* fills a useful purpose in business life. Whether the purpose be to gain an advantage under the laws of the state of incorporation or to avoid or to comply with the demands of creditors, or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity. . .*the choice of the advantages of incorporation to*

[9]Limited partnerships and corporations are both separate entities for tax purposes and for limited liability purposes.

> *do business, it was held, required the acceptance of the tax disadvantages.*

Moline, 63 S.Ct. at 1134 (emphasis supplied).

Similarly, in Marks v. Green, 122 So. 2d 491 (Fla. 1st DCA 1960), the taxpayer, an individual, unsuccessfully argued that it owed no intangible personal property tax on the stock of its wholly owned corporation. The taxpayer argued that this would constitute double taxation, since the corporation had already paid intangible tax on its stock interests. In rejecting this argument, the Court held:

> Petitioner has seen fit to organize a domestic corporation and own all of its outstanding capital stock. He has elected to do business through this corporate entity. The benefits of conducting one's business in such manner are obvious and too numerous to mention in this opinion. Having so elected, Petitioner is in no position to claim all benefits accruing to him by virtue of doing business as a corporation, and at the same time seek to disregard the existence of the corporate entity in order to avoid payment of a tax otherwise chargeable to him.

Marks, at page 493.

More recently, in Regal Kitchens, Inc. v. Department of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994), the Court rejected an effort to avoid taxation of leases entered between separate entities, *just because they were owned and controlled by the same persons.* The Court noted:

> Those who seek the protection afforded by incorporation [or limited partnership] must also accept the burdens. Individuals may

> incorporate [or form a limited partnership] to shield themselves from personal liability or for many other reasons, but they may not then disavow the existence of the corporation [or limited partnership] for the purpose of obtaining a tax advantage. This is not a case in which nominal parties to a business venture are "paying rent to themselves" as Regal argues[10]. On the contrary, this is a case in which a corporation is paying rent to a partnership.

Regal Kitchens, at 163.

The Trial Court lacked the power to repudiate the erroneous decision in Kuro, but correctly distinguished this flawed decision, based upon its facts. The facts in Kuro are contrasted with the facts of this case in a graphic, which is attached as Appendix "C" hereto. See, R:III;381. As can be seen from the attached graphic, Appendix "C," the Trial Court correctly distinguished Kuro, when it held:

> Plaintiff's reliance upon the distinguishable decision in Kuro, Inc. v. Dept. Of Revenue, 1198 WL 241486 (Fla. 2nd DCA 1998) is misplaced. That decision held, in the context of a contribution to the capital of a corporation, that no "consideration" existed. However, the Kuro decision is *distinguishable* for two reasons:
>
> First, Kuro is distinguishable because, in this case, there

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[10]The Court further noted in Regal Kitchens that the taxpayer's argument "puts Regal Kitchens in the unusual position of a corporation attempting to pierce its own corporate veil." Id. at 163. Yet the Second District, in Kuro, clearly relied upon the closely held nature of a corporation, in finding that no consideration existed. Under the rubric of "paper transactions" and "equitable ownership," it effectively permitted the shareholders of the Kuro corporation to pierce their own corporate veil.

> has been a fundamental change in the nature of Plaintiff's property interests. Unlike Kuro, it cannot be argued that this case involved a mere "paper transaction."
>
> In Kuro, the only asset owned by the grantee corporation was real estate. The grantors, a father and son, owned the real estate 50/50 before the transfer and [according to Kuro] had equitable ownership of the real estate, 50/50, after the transfer. According to Kuro's analysis, there was no meaningful change under these facts.
>
> In the case at bar, there was real change. The partnership interests received by MBLIC included the underlying value of a $280,000 promissory note contributed by a third party, Lamar-Eastern. But for this exchange transaction, MBLIC had no interests, directly or indirectly, in the promissory note of Lamar-Eastern. Moreover, the addition of new owners, one of which was completely unrelated to Plaintiff, fundamentally altered the nature of the transaction.
>
> A second distinction between the facts of this case and Kuro is that Kuro did not involve a simultaneous *exchange* of real estate for personalty. In Kuro, the Court specifically noted, in footnote 1 that "we need not address the applicability of the presumption of consideration if the stock had, in fact, been issued in exchange for real estate." In the case at bar, there was a simultaneous issuance of partnership interests in consideration for land and a promissory note. Thus, there was consideration for the contribution of land to the Limited Partnership, consisting of intangible personal property (i.e., limited partnership interests).

R:III;457-458.

The Trial Court was powerless to do anything more than to distinguish Kuro. The First District Court was powerless to do anything more than to disagree with Kuro. This Court has the power to actually *overturn* the erroneous decision in Kuro, and should do so.

If this Court were to instead expand Kuro, by applying its analysis to the case at bar, then, that would be confusing partnership property with property of the partners. This would not just be contrary to case law, but it would also run contrary to uniform limited partnership acts.

Petitioner is a Limited Partnership, formed under the laws of the State of New Jersey. It is clear from New Jersey's Limited Partnership Act[11] that a Limited Partnership is a separate entity distinct from its partners, and that property of the partnership is not to be confused with property of the partners.[12] Florida's Uniform Limited Partnership Act contains similar provisions.[13] The District Court correctly based its decision, in part, upon the provisions of the Uniform Limited Partnership Act.

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[11]Title 42, Chapter 2A, New Jersey Statutes Annotated (1990).

[12]See, New Jersey Statutes 42:2A-11 [partner may deal with partnership entity in the same way as an unrelated party]; 42:2A-12 [partnership interest is personal property]; 42:2A-27 [limited liability is conditioned on limited control]; 42:2A-43 [generally, no right to distribution in kind]; 42:2A-44 [relationship between partner and partnership is that of a debtor to a creditor]; and 42:2A-48 [creditor of a limited partner may only attach partner's interest, and not the underlying partnership property].

[13]Section 620.149, Fla. Stat. [partnership interest is personalty]; 620.8201, Fla. Stat. [partnership is an entity]; Section 620.8203, Fla. Stat. [property acquired by a partnership is property of the partnership and not of the partners individually]; and Section 620.145, Fla. Stat. [generally no right to distribution in kind]

PALMER-FLORIDA IS DISTINGUISHABLE

Petitioner argues that this Court's decision in State ex.rel. Palmer-Florida Corp. v. Green, 88 So. 2d 493 (Fla. 1956), supports a reversal in this case. But the facts in the Palmer-Florida decision are readily distinguishable from the facts of this case. Palmer-Florida merely held that when a grantee received land from a corporation, and the grantor corporation received no "consideration" in exchange, that no tax was due. In this case, unlike Palmer-Florida, the Petitioner stipulated that the grantor did receive something in "exchange" for the land: partnership interests.

Moreover, in Palmer-Florida, the Court was concerned with a corporate *distribution* of land to shareholders, rather than with a *contribution* of land to the capital of an artificial entity. Whereas a grantor, like MBLIC, can receive partnership or corporate shares "in consideration" for the contribution of land to an artificial entity, the same is often not true in a corporate distribution.

For example, if the recipient of land distributed from an artificial entity is an individual, it cannot be said that the grantor received stock or shares in the individual, in "consideration" for the land. Stated differently, whereas an individual can acquire a proprietary interest in a corporation, the converse is not true.

PETITIONER'S OTHER CASES ARE ALL DISTINGUISHABLE

Another distinguishable case upon which Petitioner heavily relies is Department of Revenue v. Race, 743 So.2d 169 (Fla. 5th DCA 1999), which involves the complete *opposite* situation from the case at bar. In that case, which involved a "corrective deed," the Fifth District held that the Department was failing to follow its own administrative rules,[14] which declared that corrective deeds were not taxable. But in the case at bar (which does not involve a corrective deed) it is undisputed that the Petitioner (and not the Department) is failing to follow the pertinent administrative rules.

Petitioner also discusses in detail the distinguishable case of Culbreath v. Reid, 65 So. 2d 556 (Fla. 1953), involving a "love and affection" deed between parents and their daughter. The Court noted that a parent's "love and affection" for their daughter was not "monetary consideration." Petitioner argues from these facts, that "consideration" is therefore limited to cash money or debt instruments. This case does not even remotely suggest that stock and other forms of valuable property, such as limited partnership "shares" are not "consideration." Moreover, it could not be more clear from the statute's plain language, as

[14] In Race, the Court held that ". . .the Department's Rule 12A-4.014(3), pertaining to conveyances which are not subject to the documentary stamp tax, indicates that no tax is due in this case. . .It is well established that an agency may not ignore its own rules." Id., at page 71.

well as the Department's implementing rules, that "consideration" is not limited to money or debt instruments.

Petitioner also relies upon the distinguishable decision in Department of Revenue v. Ray Const. Of Okaloosa County, 667 So.2d 859, (Fla. 1st DCA 1996), for the proposition that "consideration" is limited to money or debt instruments. That case does not support the proposition that consideration is limited to money or debt instruments.

Ray Const. involved a valuation dispute. It primarily supports the proposition that the valuation presumption in the 1990 amendment does not apply to sales for cash. The case at bar involves neither a sale for cash nor a bona fide valuation issue.

The Ray Const. case is distinguishable from the case at bar. In the Ray Const. case, "consideration" was stipulated to exist and the "amount" of consideration was at issue. In the case at bar, almost the opposite holds true. The valuation of the land, which was exchanged for shares, is not in dispute. Rather, a legal issue arises whether the shares constitute "consideration."

Petitioner has spent an enormous amount of time discussing a series of cases which are not remotely material to the case at bar. These cases address such diverse and immaterial topics as whether assignments of mortgages are taxable, whether leases are taxable, whether deeds executed in settlement of condemnation proceedings are taxable, and whether circumstances may arise when

a mortgage does not constitute consideration.[15]

Petitioner also spends a great deal of time discussing cases which only provide general propositions. For example, on page 36 of its Brief on the Merits, Petitioner cites River Park Joint Venture v. Dickinson, 303 So. 2d 654 (Fla. 1st DCA 1974) for the general proposition that substance should govern the tax treatment of documentary stamp transactions, and not "form."

The general proposition that substance should rule over form does not help Petitioner in the case at bar. The transaction at issue in the case at bar, both in form and in substance, involved an "exchange" of land for personalty. Moreover, the personalty which was received in the case at bar included both the underlying value of land and a promissory note from a third party. MBLIC had no interest in that promissory note, directly or indirectly, prior to the transaction at issue.

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[15] The Department cannot explain why Petitioner has even cited the following cases. State ex.rel. Rogers v. Sweat, 152 So.432 (1934), upon which Petitioner relies, held that *assignments of mortgages* are not taxable instruments under Chapter 201 (unlike *deeds* which are at issue in the case at bar). Department of Revenue v. Dix, 362 So.2d 420 (Fla. 1st DCA 1978), cert denied, 370 So. 2nd 458 (Fla. 1979) held that *leases* are not taxable instruments under Chapter 201 (as are deeds or mortgages). Department of Revenue v. Florida Municipal Power Agency, 473 So.2d 1348 (Fla. 1st DCA 1985), involved public policy issues arising in the unique context of *condemnation proceedings*. Abramson v. Straughn, 348 So.2d 1172 (Fla. 4th DCA 1977), held that a *mortgage* might not constitute "consideration" when the economic burden of the mortgage had not shifted. Andean Inv. Co. v. Department of Revenue, 370 So.2d 377 (Fla. 4th DCA 1979), involved the issue of when mortgages are consideration.

PETITIONER MISSTATES FACTS

In addition to relying upon distinguishable cases, Petitioner has misstated critical facts. For example, on page 33 of its Brief on the Merits, Petitioner erroneously argues that "the transferee did not give any 'property' to Mutual benefit" and that the transferee "paid nothing to Mutual Benefit." This statement could only be true if, contrary to the Trial Court's findings, shares in a limited partnership [which owned $22 million in free and clear real estate, as well as notes] were of no value.

The logic and result would be the same, however, even where a grantee partnership fails to issue <u>new</u> partnership interests in exchange for the contribution of real property to capital. For example, assume that a newly formed partnership having no assets or debts receives a deed of unencumbered property worth $1 million, as an initial contribution to capital. Assume further that all partnership interests have been issued several days before, in anticipation of future contributions to capital. As a result of the deed, the <u>existing</u> partnership interests can now be sold for approximately $1 million more after the deed than before. It would not be realistic to assert that no "value" was received in exchange, even though no new partnership "interests" are issued at that time. <u>See</u>, <u>Dean v. Pinder</u>, supra.

PETITIONER'S FALL-BACK VALUATION ARGUMENT

Perhaps sensing the weakness in its position that "no" consideration exists, Petitioner raises interesting fall back arguments, regarding valuation. First, on page 19 of its Brief on the Merits, Petitioner suggests that only 1 percent of the transaction should be taxed, because the grantor retained a 99% limited partnership interest, and retained some degree of indirect control over the partnership.

However, even if, *arguendo*, the 99% limited partner (as opposed to the general partner) legally controlled Petitioner's affairs,[16] this argument ignores both the language of the statute and the substance of the transaction. The statute clearly provides that where property other than money is given in exchange for realty, "consideration" is presumed to be equal to the value of the land. The statute does not provide that consideration is presumed to be equal to 1% of the value of the land. Moreover, the grantor did not sell a 1% interest in land; it sold a 100% interest in land in exchange for partnership shares.

Petitioner's second fall-back valuation argument appears on page 23 of its Brief on the Merits. There, Petitioner suggests that the $22,890,391 "consideration" amount, consistently given

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[16]In a limited partnership, control is exercised by the general partner(s) and not by the limited partner(s). This is why limited partners are protected from liability.

on Petitioner's own documentary stamp tax returns, in the partnership agreement, and in federal income tax return filings, may have been inflated. According to Petitioner, the three shopping centers might have been worth as little as $100.

Petitioner's valuation argument is unsupported by competent substantial evidence. These are the facts:

(1) the Department had accepted Petitioner's <u>own</u> documentary stamp tax return valuation, at $22,890,391; R:III;451.

(2) these valuations also appeared on federal income tax returns and in the partnership agreement capital account contribution schedule; R:III;451.

(3) Petitioner produced no appraisals indicating that its own return figures were incorrect, and; R:III;384-447.

(4) Petitioner's <u>own witness</u> expressly stated that he was <u>not</u> advancing this position. R:II;120.

Given these facts, the Trial Court correctly found, in its Final Judgment, that the "Department was entitled to rely upon Plaintiff's reported valuations, and the Department does not challenge these valuations. There is no genuine valuation issue in dispute." R:III:451.

Petitioner's arguments and hypotheticals on pages 24-26 of its Brief, concerning the *alleged* way in which the Department approaches valuation controversies, misses the point: there simply was no valuation controversy <u>in this case</u>. The Department

accepted Petitioner's own valuation figures, in the absence of better information.

Petitioner erroneously argues, on page 24 of its Brief on the Merits, that the "department's position focuses on the value of the property transferred, instead of the value of that given for the transfer. It assumes the value of that received to be equal to that given" (Emphasis per original).

But the only issue in this case was whether there was consideration, not how much. As the Trial Court correctly determined, there was no genuine valuation issue in this case. The Department just relied upon Petitioner's own valuation figures.

The Department further takes issue with the statement, on page 24 of Petitioner's Brief, that the statute's valuation presumption is the "department's position." To begin with, the Department took no "position" on valuation other than to accept Petitioner's own valuation figures. Additionally, by referring to the valuation presumptions in the statute as the "department's" position, Petitioner is refusing to acknowledge the Legislature's role in creating the *statutory* presumption in question:

> If the consideration paid or given in exchange for real property or any interest therein includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest therein.

Section 201.02(1), Fla. Stat.

It is important to point out that the Department does not consider all transactions between artificial entities to be taxable. *For example, if a corporation were to deed unencumbered land to a recognized charitable organization, for no benefit other than the resulting federal income tax deduction, the Department's rules in no way suggest that such a transaction would be taxable.*

Similarly, in the cases when an individual transfers unencumbered real estate to a son or daughter, for "love and affection," the Department's rules create no presumption that consideration exists. But where, as in the case at bar, consideration does exist, the Department cannot waive the statute's imposition of tax merely because the transaction involved consideration other than money.

The Department's rule position recognizes that consideration need not be in the form of money or debt instruments. This is consistent with the plain language of Section 201.02(1), Florida Statutes (1991), which acknowledges that "consideration" need not be cash.

PETITIONER'S OTHER FALL-BACK ARGUMENTS

Petitioner also argues that the transaction is somehow *exempt* from taxation solely because it was *motivated* by a legitimate business purpose: providing for management of the

property. The problem with this argument is that the Legislature has not passed an exemption whereby tax can be avoided merely because it achieves some reasonable objective of corporate management. It must be remembered that the purpose of tax laws is to raise revenue for governmental operations, and that the creation of such an exemption would be a legislative function, and not a judicial function.[17]

The last fall-back argument raised by the Petitioner in the first part of its brief is that the tax could have been avoided through the usage of a trust, rather than a limited partnership. This argument must fail. The choice of business entity almost always involves tax consequences. Moreover, taxpayers have historically been taxed based upon the way in which their transactions were structured, rather than based upon how things might have been structured differently. Department of Revenue v. McCoy Motel, Inc., 302 So.2d 440, 442 (Fla. 1st DCA 1974), appeal dismissed, 307 So.2d 448 (Fla.1974); Marks v. Green, 122 So. 2d 491 (Fla. 1st DCA 1960).

Moreover, whereas a trust is intended, as a matter of law,

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[17]A majority of the documentary stamp tax is used to fund the Land Acquisition Trust Fund, purchase coastal lands and pay debt service to acquire coastal land, and to fund the Water Management Lands Trust Fund, State Housing Trust Fund, Local Government Housing Trust Fund, Florida Housing Finance Agency and the General Revenue Fund. Section 201.15, Florida Statutes. The loss in revenue could greatly impact the trust funds mentioned above and also cause the surtax for Dade County to be reduced.

to sever legal title from equitable ownership, partnerships and corporations are separate business entities, which can, and often do, hold title to land in their own right. See, Section 620.8203, Fla. Stat. [property acquired by a partnership is property of the partnership and not of the partners individually] and Section 620.149, Fla. Stat. [partnership interest is personalty]. There is no competent evidence to support a finding of fact that trust was ever created.

B. AFFIRMING THE TRIAL AND APPELLATE COURTS DOES NOT REQUIRE A FINDING THAT THE 1990 AMENDMENT SUPERCEDED PRIOR LAW.

In arguing that consideration is limited to "money paid or agreed to be paid; the discharge of an obligation, and the amount of any mortgage, purchase money mortgage lien, or other encumbrance," Petitioner fails to satisfactorily address the **plain language** of the 1990 amendment. The statute clearly and unambiguously provides that consideration "includes, but is not limited to" these narrow categories of property.

The first rule of statutory construction is to follow the plain language of the statute. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla.1982). Where the language employed by the Legislature is plain and unambiguous, there is no need to resort to rules of construction.

In the 1990 amendment, the Legislature clearly and unambiguously provided that consideration is not limited to money

or debt instruments. The 1990 amendment <u>**clarified**</u> that any property which is determined to have pecuniary value (e.g., money, debt instruments, equity securities, etc.) can constitute "consideration."

But even if, *arguendo*, the Court were to find that the language of the amended statute remained ambiguous, then, the holding below would still be correct, under any of several well-established rules of statutory construction.

It is well-established that the "administrative construction of a statute by the agency or body charged with its administration is entitled to great weight and *will not be overturned unless clearly erroneous*." (Emphasis Supplied). <u>Fort Pierce Util. Auth. v. Florida Public Service Comm'n</u>, 388 So.2d 1031, 1035 (Fla.1980); <u>State ex rel. Biscayne Kennel Club v. Board of Business Regulation</u>, 276 So.2d 823, 828 (Fla.1973); <u>Pan Am. World Airways, Inc. v. Florida Public Serv. Comm'n</u>, 427 So.2d 716, 719 (Fla.1983).

The Department has never interpreted consideration to be limited to money or debt securities. Even <u>before</u> the 1990 amendment, the Department's rules provided that consideration was <u>not</u> limited to money or debt securities. For example, in its <u>1989</u> rules, the Department had already defined consideration to include the "value of <u>any</u> real or personal property given in exchange for realty" or "<u>any</u> other monetary consideration or

consideration which has a reasonable determinable pecuniary value." Fla. Admin. Code Rule 12B-4.012 (1989) (emphasis supplied).

Another applicable rule of statutory construction is that Courts should avoid any interpretation of the statutes which would lead to an absurd or unreasonable result. State v. Webb, 398 So.2d 820 (Fla.1981); Smith v. Ryan, 39 So.2d 281 (Fla.1949). Petitioner's argument would lead to an absurd result because, under Petitioner's analysis, a "boat, car or guitar" would constitute "consideration" whereas $22 million in stock or in limited partnership shares would not constitute consideration. Petitioner's Brief, at page 42.

There is no factual basis to support Petitioner's underlying contention: that the Legislature intended to exclude equity securities from the statutory definition of "consideration." The word "consideration" has long been a linchpin of contract law, where it has never been limited to a particular class or category of property.

Petitioner's definition of "property" also runs contrary to this Court's statement in DeMaria that *any* "exchangeable value" can be used by a "purchaser" as "consideration." It runs contrary to the federal documentary stamp tax authorities discussed previously. And, it runs contrary to the ordinary dictionary definition of "consideration," which is contained

within Webster's Ninth New Collegiate Dictionary (1983). That dictionary defines "consideration" to mean any "payment or recompense."

There is no need for this Court to determine that the 1990 Amendment "superseded" prior case law, in order to affirm the holdings below. Petitioner's view that the term "consideration" is synonymous with "money or debt instruments" was never the law, and if any doubt existed that this was never the law, the Legislature eliminated that doubt, in 1990, by specifically amending Section 201.02(1), Florida Statutes (1991).

The 1990 amendment not only "codifies" prior case law, as Petitioner asserts, but has also **clarified** the statute. The statute is now more clear than before that "consideration" includes "but is not limited to" various types of property and that consideration can be property "other than money."

Finally, Petitioner's reliance upon Section 201.02(5), Florida Statutes (1987) ("the 1987 amendment") is misplaced. Petitioner erroneously argues, based upon this statute, that the 1987 Legislature intended to tax partnership *distributions*, but not partnership *contributions*.

But the **1987** Legislature was not thinking about the **1998** Kuro issue, *one way or the other*. No one back in 1987 could have foreseen the 1998 decision in Kuro, or what it would do to Florida's tax base.

Instead, the 1987 Legislature solely intended to create an exception to the 1956 holding, in Palmer-Florida, that partnership *distributions* were not taxable. The exchange of land for shares or other personalty was *already* taxable, and did not require an amendment.

C. PETITIONER'S RULE CHALLENGE ARGUMENT SHOULD BE REJECTED BECAUSE NO RULE CHALLENGE WAS BROUGHT BELOW.

On page 48 of its Brief on the Merits, Petitioner argues that Florida Administrative Code Rules 12B-4.012 and 12B-4.013, which implement Section 201.02, Florida Statutes (1991), are "over broad and unauthorized." However, the Trial Court solely found that the Department's rule position was not "clearly erroneous" as applied to the particular facts of this case. It never reached the broader question of whether the Department's rules are "over broad and unauthorized" as applied to different facts than those which had been presented.

It must be remembered that Petitioner never exhausted the administrative remedy of instituting a rule challenge proceeding below, pursuant to Section 120.56, Florida Statutes (1997). The doctrine of exhaustion of administrative remedies precludes judicial intervention in executive branch decision making where administrative procedures can afford the relief a litigant seeks. See, State, Marine Fisheries Com'n v. Organized Fishermen of Florida, 675 So. 2d 933 (Fla.1st DCA 1996) See Key Haven

Associated Enters. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153, 157 (Fla. 1982) (limiting litigants wishing to contest the validity of agency action to administrative remedies and direct appeal), superseded on other grounds as noted in Bowen v. Florida Dep't of Envtl. Regulation, 448 So. 2d 566, 568-69 (Fla. 2d DCA 1984), approved and adopted, 472 So. 2d 460 (Fla. 1985); State ex rel. Dep't of Gen. Servs. v. Willis, 344 So. 2d 580, 589 (Fla. 1st DCA 1977); see also Art. V, §§ 5(b) and 20(c)(3), Fla. Const.

It is improper, if administrative remedies are adequate, "to seek relief in the circuit court before those remedies are exhausted." Communities Fin. Corp. v. Department of Envtl. Regulation, 416 So. 2d 813, 816 (Fla. 1st DCA 1982); see School Bd. of Flagler County v. Hauser, 293 So. 2d 681 (Fla. 1974); Bankers Ins. Co. v. Florida Residential Property & Cas. Joint Underwriting Ass'n, 689 So. 2d 1127 (Fla. 1st DCA 1997); State, Dep't of Revenue v. Brock, 576 So. 2d 848 (Fla. 1st DCA 1991); Friends of the Everglades v. State, Dep't of Envtl. Regulation, 387 So. 2d 511 (Fla. 1st DCA 1980); School Bd. of Leon County v. Mitchell, 346 So. 2d 562 (Fla. 1st DCA 1977).

Not only did Petitioner fail to institute a rule challenge proceeding in the Division of Administrative Hearings, but it failed to do so in its Circuit Court Complaint. In its prayer for relief, Petitioner solely sought a declaration that it was

entitled to a *tax refund*, and not a more *general declaration* that the Department's rules are invalid and "over broad." R:I;1-4.

The law is clear that issues not raised in the pleadings cannot be presented for the first time on appeal Murphy v City of Port St. Lucie, 666 So. 2d 879 (Fla. 1995). Morales v. Sperry-Rand Corporation, 601 So. 2d 538, 540 (Fla. 1992). The Florida Supreme Court in a case involving taxation explicitly refused to consider a new issue raised for the first time on appeal in Oyster Pointe Resort Condominium Assoc. Inc.v Nolte, 524 So. 2d 415, 418 (Fla. 1988).

The sole issue presented below was whether consideration existed, as applied to the facts of this particular case. The Trial Court and the District Court properly concluded, based upon the facts of this particular case, that Petitioner had issued shares in consideration for land. The sole issues now presented are whether those rulings were correct, and additionally, whether the Kuro decision was incorrect.

Accordingly, the Department does not address whether the 1990 statutory amendment superseded the Supreme Court's decision in Palmer-Florida. As discussed previously, the facts of this case are nothing like the facts in the Palmer-Florida decision. The Department solely maintains that the rulings below were correct and that the Kuro decision was incorrect.

CONCLUSION

WHEREFORE, the Department prays that the Court affirm the Trial Court and the First District Court. Additionally, the Department prays that this Court either overturn the Second District's decision in Kuro, or limit that decision to its precise facts.

RESPECTFULLY,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Jeffrey M. Dikman
Fla. Bar #274224
Assistant Attorney General
Department of Legal Affairs
The Capitol-Tax Section
Tallahassee, FL 32399-1050
(850) 414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to Larry Levy, 1828 Riggins Road, Tallahassee, FL 32308 and to William J. Deas, P.A., 2215 River Blvd., Jacksonville, FL 32204 this _____ day of December, 2000.

____
Jeffrey M. Dikman
Assistant Attorney General

INDEX TO APPENDIX

1. FINAL SUMMARY JUDGMENT (R:III;448-458)................."A"

2. DECISION OF THE FIRST DISTRICT COURT BELOW IN MUBEN-LAMAR, L.P. V. DEPT. OF REVENUE, 25 Fla. L. Weekly D994 (FLA. 1ST DCA 2000)............."B"

3. GRAPHIC COMPARISON OF THE CASE AT BAR WITH KURO (R:III;381).."C"