SUPREME COURT OF FLORIDA

Case No: **SC 00-1111**

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

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.

_________________________________/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF TYPE SIZE AND STYLE

The undersigned counsel for petitioner certifies that the type size and style used in petitioner's brief on the merits is 14 Times New Roman.

PRELIMINARY STATEMENT

Petitioner, Muben-Lamar, L.P., will be referred to herein as "Muben-Lamar." Respondent, Department of Revenue, will be referred to herein as the "department." References to the record on appeal will be delineated as (R-volume # - page #).

STATEMENT OF THE CASE

This case involves a challenge to a documentary stamp tax assessment. (R-I-01-13) Muben-Lamar is a New Jersey limited partnership, and the department is a state agency responsible for the administration of chapter 201, Florida Statutes (2000). (R-I-01) Muben-Lamar filed a complaint seeking refund of documentary stamp tax paid in the total amount of $207,561.15, involving transfers of three separate parcels of improved real property located in Florida. (R-I-01)

Prior to filing suit, Muben-Lamar had filed an application for refund of such amount with the department and, by letter, the department notified Muben-Lamar that its application was being denied. (R-I-02; I-05-06) Muben-Lamar then filed a written protest with the department as authorized and, by letter dated November 22, 1995, the department issued its official “Notice of Decision of Refund Denial” denying the request. (R-I-02; I-07-13) Thereafter, suit was timely filed. (Id.) Thereafter the department filed its answer to the complaint, admitting that the court had jurisdiction but denying that Muben-Lamar was entitled to a refund. (R-I-14-16)

After discovery, which included the deposition of a representative of Muben-Lamar, William E. Weiss, both parties filed motions for summary judgment. (R-II-272-287; III-293-327; III-342-372) After hearing the trial court granted the department's motion for summary judgment and entered the final summary judgment prepared by the department. (R-III-448-458; A-1) Notice of appeal to the First District Court of Appeal was timely filed. (R-III-459-460)

After oral argument, the district court rendered its decision upholding the department's assessment, but acknowledging that its decision was in conflict with Kuro, Inc. v. Department of Revenue, 713 So.2d 1021 (Fla. 2d DCA 1998). Muben-Lamar, L.P. v. Department of Revenue, 25 Fla. L. Weekly D994 (Fla. 1st DCA Apr. 20, 2000). Thereafter, Muben-Lamar filed its notice to invoke the discretionary jurisdiction of this Court together with its jurisdictional brief. On November 9, 2000, this Court issued its order accepting jurisdiction, setting a brief schedule, and scheduling oral argument.

STATEMENT OF THE FACTS

Muben-Lamar is a New Jersey limited partnership created under the laws of the State of New Jersey for the sole purpose of holding title to and managing the three properties located in Florida, the transfers of which gave rise to the documentary stamp tax for which refund is sought. William E. Weiss, who was the deponent at the instance of the department, is the Second Vice President of the MBL Life Assurance Corporation, Inc. (MBL Life) and MBL Life is the assignee of the assets and certain prescribed liabilities of the Mutual Benefit Life Insurance Company (Mutual Benefit), which was a life insurance company incorporated under the laws of the State of New Jersey. (R-II-92-94; R-III-328-333)

Mutual Benefit was experiencing financial difficulties as a result of the depressed real estate market. The three parcels of improved commercial property, which gave rise to the documentary stamp tax liability for which refund is sought, were owned by Mutual Benefit, having been acquired by Mutual Benefit as a result of foreclosures or deeds in lieu of foreclosure. (R-III-328-333) At the time of foreclosure or deeds in lieu of foreclosure, Mutual Benefit paid all applicable documentary stamp tax on the certificates of title or deeds based on the book value (principal unpaid indebtedness) of said properties. (R-III-331)

The purpose of forming Muben-Lamar was to hold legal title to the properties acquired by the foreclosure with the same economic and beneficial interest remaining in Mutual Benefit with the exception that the properties were now treated as partnership assets on the books of Mutual Benefit. (R-III-331) Mutal Benefit believed that it could improve the performance of the properties by bringing in a professional property management company given an equity interest in the properties who, by the very nature of being a partner, would have more incentive to devote the time, resources, and energy to the management of the properties of Mutual Benefit. (R-III-331-332) Accordingly, Muben-Lamar was created for the purpose of holding legal title to the property and managing same until such time as a sale could be made. The three partners of Muben-Lamar were:

Partner	**Interest**
Mutual Benefit Life Insurance Company (limited partner)	98%
Muben Realty Company (general partner)	1%
Lamar Eastern, L.P. (general partner)	1%

(R-II-99-100; R-III-330) Muben Realty was 100 percent owned by a holding company, Mutual Benefit Life Insurance Co. Holding Corporation, held by Mutual Benefit.

The involved three properties were shopping centers and commercial office buildings and Mutual Benefit, which was a life insurance company, felt that professional management of such properties after foreclosure was necessary in order to attempt to realize a profit from the properties and manage same soundly until such time as the real estate market rebounded and the properties could be sold, and that Lamar Eastern could supply such management.

Muben-Lamar is a limited partnership formed by an agreement dated December 31, 1990, described as follows:

> Organization: Muben-Lamar, L.P., a New Jersey limited partnership (the "Partnership"), was formed on December 31, 1990, and owns five rental properties. The general partners are Muben Realty Company ("Muben"), a New Jersey corporation, and Lamar-Eastern, L.P. ("Lamar"), a Delaware limited partnership. The limited partner is the Mutual Benefit Life Insurance Company in Rehabilitation ("Mutual Benefit"), a New Jersey corporation. Muben is an indirect, wholly-owned subsidiary of Mutual Benefit.

Notes to Financial Statement dated December 31, 1991. (R-II-89-269, exhibit to deposition of William Weiss and Brian Loreti) When formed, the initial capitalization was as follows:

> The initial capital contribution of Mutual Benefit and Muben are the real properties described in Note 1. The initial capital contribution of Lamar is equal to 1% of the initial capital contribution, as defined, of Mutual Benefit and Muben. In accordance with contribution options under the Agreement, Lamar has elected to contribute a $280,160, ten year, non-interest bearing promissory note in lieu of a cash contribution.

Notes to Financial Statement dated December 31, 1991. (Id.)

Immediately after formation of the limited partnership, title to the three parcels of properties was transferred from Mutual Benefit to the partnership created, and a management agreement executed. The creation of the limited partnership and the transfer of title was to provide for the operation and management of the shopping center and office buildings, and the ultimate sale of said properties pursuant to the management agreement.

The documentary stamp taxes paid for which refund is sought were paid on the transfers of the shopping centers and office buildings, two of which are located in Dade County, Florida, and the third of which is located in Volusia County, Florida. At the time of the transfer, there were no mortgages on any of the properties and the transferee (limited partnership - Muben-Lamar, L.P.) paid nothing for said properties, either by way of money, assumption of any mortgages, or any other consideration. (The department contends that the interests in the partnership constitutes consideration but the transferor already held its equity interest at the time of the transfer and through the partnership interest held or controlled a 99 percent equity interest afterward.) The department assessed documentary stamp taxes based on the amount bid by Mutual Benefit at a foreclosure sale as the basis for the value of the properties, which was the book value, plus costs. This "value" is used for the documentary stamp tax assessment. The partnership agreement was executed on December 31, 1990, and all the deeds transferring the properties were executed on December 31, 1990. (R-II-102-103)

Mutual Benefit acquired the subject properties by assignment from MBL Life pursuant to state insurance rehabilitation proceedings under New Jersey law. MBL Life had had sizeable investments in a real estate portfolio by making loans secured by mortgages, and the loans on each of the involved properties were part of these investments. Each of these mortgage loans went into default in the real estate recession which began during the middle to late 1980's, and as a result of the defaults, Mutual Benefit ultimately foreclosed each mortgage. (R-II-96)

In the process of foreclosure, Mutual Benefit bid the properties in at the respective foreclosure sales for the unpaid principal balance of each mortgage loan plus expenses and costs and, at the same time, paid the applicable documentary stamp tax on each certificate of title. (R-II-117-118) This was Mutual Benefit’s standard procedure on Florida commercial mortgage foreclosures. Upon acquisition of the properties by Mutual Benefit, the mortgages ceased to exist. The department contends that documentary stamp tax is due based on the value of the properties which it assumes to be the value as bid by Mutual Benefit at foreclosure. In deposition, Mr. William E. Weiss testified that he could just as easily have bid in the properties for $100.00 but that the company practice was to bid the unpaid principal balance. (R-II-119)

Mutual Benefit, generally feeling that it lacked the requisite special expertise to manage and rehabilitate certain types of foreclosure properties and ready them for sale at the best possible prices, formed different partnerships to hold legal title to the properties and manage same. (R-II-111) It brought into the partnerships professional property management companies as partners, giving such companies an equity interest in the partnerships to create a real economic incentive to upgrade the foreclosed property so as to obtain the maximum re-sale price for each and to manage them profitably until sold. The purpose of the transfers to the partnership was to benefit Mutual Benefit by enhancing the value of its indirect ownership of the properties utilizing the partnership entity as a vehicle to do so.

At the time, the properties were transferred from Mutual Benefit to the partnership were unencumbered, free and clear of any mortgages, liens, or other encumbrances, and the original Mutual Benefit mortgage had been extinguished as an incident to the foreclosures. (R-II-106-107) Documentary stamp taxes in amounts equal to the then applicable book value (unpaid principal balance) of the properties were paid on the deeds with the added notation that such were being paid under protest. (R-II-123)

<u>SUMMARY OF ARGUMENT</u>

Muben-Lamar contends that no documentary stamp tax is due on the transfers of the three commercial properties located in Florida. No legal consideration flowed from Muben-Lamar to the transferor. It is undisputed that no cash was paid, there was no mortgage or other encumbrance on the property, and that the sole purpose of the transfer of the property was to provide for the management of the three parcels of property after the properties were acquired through foreclosure until such time as the real estate market recovered and the properties could be profitably sold. No economic benefit flowed to the transferor and no economic burden was assumed by the transferee.

The effect of the transfer was to place legal title in the partnership to profitably manage same for the transferor. The partnership was "just an empty papershell, a paper entity but for the assets being contributed." (R-II-107) On the date of its creation it had no assets and no liabilities. Id.

Muben-Lamar's contentions may be divided into two parts as follows:

A. Section 201.02(1), as amended in 1990, does not authorize the documentary stamp tax on the transfer of the three involved properties; and

B. Florida Administrative Code Rules 12B-4.012(2)(a) and 12B-4.013(1)(10), implementing chapter 90-132, Laws of Florida, are invalid and over broad in that by said rules the department attempts to change the concept of "purchaser" and "consideration," and impose a new tax not mentioned in the title or authorized in the body of said law based on the value of that being transferred instead of that given or paid as consideration for the transfer.

The department contends that real property contributions-in-aid-of-capital (CIAC) where no mortgage exists are now, for the first time, rendered taxable by the 1990 amendment and its rules. CIAC is <u>not mentioned</u> in the title or body of the 1990 law, and appears only in the department's rules.

Prior to the 1990 amendment, "consideration" paid by the purchaser was measured by what the purchaser paid to the seller or what financial burden of the seller was shifted. For the <u>first</u> time, the department is now contending that <u>that which is transferred by the transferor is the basis for consideration</u>, even if the transferee/purchaser gave nothing and assumed no debt or burden. <u>This is a new tax.</u>

Muben-Lamar's position is that the situation in the case at bar is controlled by the principles originally applied in <u>Department of Revenue v. DeMaria</u>, 338 So.2d 838 (Fla. 1976), and <u>State ex rel. Palmer-Florida Corp. v. Green</u>, 88 So.2d 493 (Fla. 1956), recognized in <u>Department of Revenue v. Race</u>, 743 So.2d 169 (Fla. 5th DCA 1999), and <u>Kuro</u>, and since 1953 followed many times in cases involving documentary stamp taxes. Muben-Lamar further contends that the pivotal language in section 201.02 has remained unchanged since 1931, and was unchanged in the 1990 amendment.

The department's position is that Kuro was improperly decided and that a 1990 amendment to section 201.02(1), and the department's rule implementing same, provide the legal basis for concluding that the equity interest in the limited partnership which was created for the sole purpose of holding title to this property and providing for the management of same, constitutes consideration, supporting the imposition of documentary stamp tax based on the "fair market value" of the property. The department admits, however, that it never made any attempt to determine what was the fair market value of the properties and simply assumed that the amount of documentary stamp tax paid under protest at the time of recordation, which was based on the amount bid at foreclosure, supports the basis for the determination of the amount of tax due.

The testimony was undisputed that when the properties were acquired by foreclosure and certificates of title issued pursuant to the foreclosure actions, that Mr. William E. Weiss, who bid the properties for the lender at foreclosure, merely bid in the outstanding principal balance of the loans. His testimony was that he could probably have acquired the property just as easily by bidding $100.00 because there was no one else to bid. (R-II-119) The point is, a price bid at foreclosure certainly does not necessarily reflect the fair market value of the property being foreclosed and is totally unrelated to that given by a transferee.

To support documentary stamp tax imposition, the statute requires that there be a "purchaser." Here, there was no purchaser as such term is used in the statute. The evidence is undisputed that Muben-Lamar was a limited partnership created under the laws of the State of New Jersey after the properties were acquired by Mutual Benefit through foreclosure for the sole purpose of holding legal title of the subject properties thereafter. The partnership document, deed transfers, and management agreement were all executed on December 31, 1990. The partnership agreement provided that the three partners, consisting of the two general partners, and the one limited partner which was Mutual Benefit, had the respective interests in the partnership of Muben Realty Company - 1 percent, and Lamar Eastern, L.P. - 1 percent, and the limited partner which had owned the property outright prior to the transfer, Mutual Benefit - 98 percent.

The testimony also was undisputed that the partnership was created so that Lamar Eastern, the general partner who would be managing and operating the property, would have additional incentive to exert every effort to manage the property profitably and, at the time of the sale, to try to realize the best possible price. The others were not in the real estate management business. This is not a situation where the transferee is giving anything new to the transferor.

Neither the statute as it existed prior to 1990, nor as it exists after the 1990 amendment, altered or changed the requirement that there must be consideration flowing from a transferee (purchaser) to a transferor to support imposition of documentary stamp tax. The statutory amendment simply does not support the rule or the department's interpretation of it and this was specifically noted in Kuro and Race.

ARGUMENT

NO DOCUMENTARY STAMP TAX IS DUE ON THE TRANSFERS OF THE THREE PARCELS OF PROPERTY INVOLVED BECAUSE THERE EXISTS NO "PURCHASER" OR "CONSIDERATION" AS REQUIRED BY SECTION 201.02, FLORIDA STATUTES (1997).

A. Section 201.02(1), Florida Statutes (1997), neither before nor after 1990 authorized the documentary stamp tax on the transfers of the three properties involved.

The department contends that the 1990 amendment to section 201.02(1) through chapter 90-132, and its rules adopted implementing same support the imposition of documentary stamp tax on contributions-in-aid-of-capital. (CIAC). There have been four cases where the department's new rules were before the courts which are: Race, Kuro, In Re: The Petition of Helen Gladman, 693 So.2d 34 (Fla. 1st DCA 1997), which was a per curiam decision affirming a declaratory statement issued by the department, and Department of Revenue v. Ray Constr. of Okaloosa County, 667 So.2d 859 (Fla. 1st DCA 1996). As the Court well knows, a per curiam decision with no written opinion has no precedential value. See Department of Legal Affairs v. District Court of Appeal, 434 So.2d 310 (Fla. 1983); State Comm'n on Ethics v. Sullivan, 430 So.2d 298 (Fla. 1st DCA 1983); ACME Speciality Corp. v. City of Miami, 292 So.2d 379

(Fla. 3d DCA 1974). Both Race and Kuro disagreed with the department's interpretation of the statute after the 1990 amendment, and in both instances held that the involved transfers were not taxable notwithstanding that a transfer of real property or interest therein had occurred. Ray Constr. involved dissimilar facts but the court also rejected the department's statutory interpretation and assessment.

In Race, the court set forth the position of the department as follows:

> The Department argues that the assessment is proper under section 201.02(1), which provides for the imposition of documentary stamp taxes on deeds and other instruments at the time they are recorded. Prior to the statute's 1990 amendment, the definition of "consideration" was a creature of case law. However, the 1990 amendment added language listing certain instruments as consideration for which documentary stamp taxes are due. It provides:
>
>> For purposes of this section, consideration includes, but is not limited to, 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. . . . .
>
> The Department argues that prior case law is no longer applicable to define the term "consideration." The statute clearly includes the amount of a purchase money mortgage lien, assumed or not. However, the statute also specifies that consideration "is not limited to" the listed

instruments. We therefore conclude that case law has not been completely abrogated in this area.

Race, 743 So.2d at 170 (emphasis added.) Thereafter, the court stated:

> We do not believe the Legislature intended that documentary stamp taxes be imposed under the circumstances of this case. Section 201.02(1) clearly provides that the amount of an encumbrance which survives a conveyance, is subject to documentary stamp taxes. *Chapparel Partners v. Dept. of Revenue*, 662 So.2d 727 (Fla. 1st DCA 1995). But we are of the opinion that taxes are due only once on the same encumbrance regarding the same person. *See American Foam Industries v. Dept. of Revenue*, 345 So.2d 343 (Fla. 3d DCA 1977); *Straughn v. Story*, 334 So.2d 337 (Fla. 1st DCA 1976). Taxes are not due under section 201.02(1) where a deed merely corrects an error and now new purchaser or new or additional consideration is involved. *See American* (quitclaim deed from sole stockholder to corporation without consideration); *Straughn* (no consideration on recording quitclaim deed where taxpayer already liable for payment of mortgage and debt, and no assumption of new liability).

Race, 743 So.2d at 170-171 (emphasis added). The contention of the department in Race as to the application of the statute was addressed as follows:

> The application of the statute as suggested by the Department would result in the imposition of taxes for recording documents which do *not* involve consideration, *i.e.*, the imposition of new, additional or previously nonexistent encumbrances on the grantee, as where a mistake is made in the original deed. Tax laws are to be construed strongly in favor of taxpayers and against the government, and all ambiguities or doubts are

> <u>to be resolved in favor of taxpayers.</u> *Dept. of Revenue v. Ray Construction of Okaloosa County*, 667 So.2d 859 (Fla. 1st DCA 1996); *Dept. of Revenue v. Bonard Enterprises, Inc.*, 515 So.2d 358 (Fla. 2d DCA 1987).

<u>Race</u>, 743 So.2d at 171 (emphasis added.) Continuing the court stated:

> While the language of section 201.02(1) provides for the imposition of documentary stamp taxes where any deed is filed and the property is encumbered, we are not required to interpret it in a technical, pedantic, or unreasonable manner. A plain meaning analysis that leads to an unreasonable or ridiculous result, obviously not intended by the legislature, must be rejected. *See Weber v. Dobbins*, 616 So.2d 956, 958 (Fla. 1993); *Drury v. Harding*, 461 So.2d 104 (Fla. 1984); *Holly v. Auld*, 450 So.2d 1277 (Fla. 1983); *City of Boca Raton v. Gidman*, 440 So.2d 1277 (Fla.1983) *United Auto. Ins. Co. v. Viles*, 726 So.2d 320 (Fla. 3d DCA 1998); *Sullivan v. Fulton County Administrator*, 662 So.2d 706 (Fla. 4th DCA 1995), *approved*, 675 So.2d 927 (Fla. 1996).

<u>Race</u>, 743 So.2d at 171. Notably, the Fifth District Court in <u>Race</u> did not consider the department's position to be reasonable at all or consistent with the statute.

There, as here, the department contended that the language in the 1990 amendment supports the assessment. Here, the department contends that the statutory language specifying that consideration "includes, but is not limited to" the instruments specifically listed, gives the authority to the department to determine by rule what it decides was intended by the legislature and that its rule is simply implementing the amendment. In other words, the department contends that the legislature intended to give the department cart blanc, unlimited, discretionary authority to decide what transfers of deeds are going to be taxable and somehow altered the concept of "purchaser." Here, as in Race, the department has taken a position which never before existed, which is that even though there is no actual consideration passing hands, no economic burden shifted, and even though no sale to a "purchaser" occurs, if property is transferred it is taxable. The Fifth District Court noted this when it addressed the application of the statute as suggested by the department and pointed out that the department's contention "would result in the imposition of taxes for recording instruments which do *not* involve consideration." Race, 743 So.2d at 171 (emphasis added). The district court then gave as an example "the imposition of new, additional or previously nonexistent encumbrances on the grantee, as where a mistake is made in the original deed." Id.

In Race, the department under its rules contended that consideration equivalent to the value of the mortgage debt existed because a transfer of real property had taken place. Here, the department is contending that the value of the property transferred should be used as a basis for imposition of tax even though admittedly the transferee gave no specific consideration in return for the transfer.

All that transpired was the creation of a partnership and a transfer of title to property for the sole purpose of operating same and attempting to sell same at a profit at some time in the future and the transferor owned 100 percent of the property before the transfer and owned or controlled 99 percent afterward and remained the true beneficial owner. The department contends that Kuro and Green are distinguishable because the transferor continued to hold the same total ownership after the transfer. Muben-Lamar submits that this is not a valid distinction. If it was, then why should tax not be based on only the 1 percent not owned or controlled by the transferor, since it still has or controls 99 percent of what it transferred? In other words, transferred into itself.

Similarly, in Kuro, the Second District Court of Appeal rejected the department's interpretation, and also rejected the department's market value contention. The department contends that Kuro was "wrongfully decided." Muben-Lamar submits that DeMaria, Green, Culbreath v. Reid, 65 So.2d 556 (Fla. 1953), Race, and Kuro are correct.

The facts involved in Kuro are stated as follows:

> The final order concluded that stock issued by Kuro in exchange for the condominiums constituted consideration therefor, and that, pursuant to the applicable statutes and rules, such consideration was equal to the fair market value of the condominiums,

> which was $618,000. The documentary stamp tax was thus based on that amount. We conclude that the assessment of the additional tax was error and reverse.

713 So.2d at 1021-1022 (emphasis added). In further explaining the situation, the court stated:

> The condominiums involved herein were acquired by Kurt and Ronald Rabau, father and son, in 1991. In 1994, the Rabaus incorporated Kuro for the purposes of taking title to the condominium units, so as to avoid exposure to potential personal liability arising from the management of the eight rental units. After forming Kuro, the Rabaus transferred each of the condominiums to Kuro by warranty deed. Each deed recited nominal consideration of $10. Kuro thus paid the minimum documentary stamp tax on each transaction. Thereafter, DOR conducted an audit and determined that additional documentary stamp taxes were due.

Kuro, 713 So.2d at 1022 (emphasis added). After citing section 201.02(1), Florida Statutes (1997), which is the same statute involved in the instant case, and referencing the department's rules 12B-4.012(2)(b) and 12B-4.013(7), Florida Administrative Code, the district court rejected the department's position that consideration flowed in the transaction stating:

> Based on the evidence the parties stipulated to during the administration proceeding, we conclude that Kuro was not a purchaser within the meaning of section 201.02(1) and, thus, no additional taxes were due. Section 201.02(1) applies to transfers of real estate for consideration to a "purchaser." In *Florida Department*

> *of Revenue v. DeMaria*, 338 So.2d 838 (Fla.1976), the supreme court defined "purchaser" under the statute as "one who obtains or acquires property by paying an equivalent in money or other exchange in value." *Id.* at 840. In this instance, Kuro paid nothing for the transfer of the condominiums. The DOR argues that, under the statute, and the rules, the stock issued by Kuro constituted consideration of property other than money, which was presumed to be equal to the fair market value of the condominiums. The presumption enunciated in the statute and the DOR rules, however, is a rebuttable presumption, which Kuro did in fact rebut in this instance.
>
> The record shows that the conveyances here were for the benefit of the Rabaus, who were merely availing themselves of the advantages of incorporation. Though the transactions effected a change in the legal ownership of the property, the beneficial ownership of the land remained unchanged. These were thus mere book transactions and, otherwise, were not sales to a purchaser, as contemplated by section 201.02(1). *See State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493 (Fla.1956).

Kuro, 713 So.2d at 1022 (emphasis added).

As in Kuro, here only a book transfer took place and no sale or transfer occurred whereby the transferee was a "purchaser." The owner, an insurance company, sought to protect its investment by placing same in an entity it caused to be created for management purposes only which ceased to exist after the sale. A transfer of legal title for such purpose, with retention of a 99 percent beneficial ownership interest through the partnership, is not a transfer for consideration.

The form of the transaction could have been different and no tax would have been due. For instance, instead of using the vehicle of a limited partnership, Mutual Benefit could have created a trust, transferred legal title of the properties to the trustee, and named itself, Lamar Eastern, and Muben Realty, beneficiaries in the same by percentages, and included in the trust document the duties of the trustee pertaining to management and operation of the trust for the benefit of the three named beneficiaries, including directions that the property be sold and proceeds be divided among the named beneficiaries in the percentages stated. The trustee would hold total legal title of the property, no "consideration" would have flowed and the trustee would not have been a "purchaser," with the duty to operate and sell same as directed by the trust terms and division of the sale proceeds would be personalty. The sale by the trustee would be taxable but the conveyance to the trustee would not. In fact, the transfers would not even have to be recorded. The form of the arrangement should not dictate taxability when the substances remains the same. Similarly, Muben-Lamar could have transferred the property to itself as trustee with the trust document containing the management agreement's duties and directions as to management, sale, and proceeds distributions, and achieved the same result and the transfer would have be taxable. It is noted that in the 2000 legislative session, the legislature even repealed the requirement of deed recordation in merger situations involving partnerships or limited partnerships. See Ch. 2000-298, Laws of Fla.

The department's position that the tax should be based on the property value fixed at foreclosure, is not sound as the following example demonstrates. Assume the properties had been bid in for $100.00, instead of the unpaid principal balance, then presumably the department would contend that tax was due based on the $100.00 value. Similarly, assume the bid in price was $100,000.00 instead of the unpaid principal balance, so that the transfer reflected the $100,000.00 value, would the department still contend that tax was due based on the market value? Neither Muben-Lamar, the department, nor the circuit court clerk had the properties appraised so the fair market value is unknown.

Here, the department attempts to avoid this scenario by stating that it merely accepted the value used by Muben-Lamar which was the foreclosure bid, and the foreclosure bid, as everyone knows, may be above or below the actual property value. This demonstrates that the construction of the statute as suggested by the department is incorrect because documentary stamp tax on deed transfers is collected by the clerks of court and there is nothing in the statute to even remotely suggest that the clerk or transferor should obtain an appraisal before recording deeds, or that a foreclosure sale creates fair market value.

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.

The following example also demonstrates the fallacy of the department's position. Assume that "A" sells to "B" a lot worth \$20,000.00, but "B" actually pays \$2,000.00 for the lot. The statute clearly imposes tax on only the \$2,000.00 paid for the lot. Next, assume "A" sells "B" a lot actually worth \$20,000.00 for \$30,000.00. Would the department suggest that tax is due on \$20,000.00 or \$30,000.00? Obviously, tax is due on the \$30,000.00 paid for the lot because that is the consideration flowing from "B" to "A." Now, assume "B" purchases the \$20,000.00 lot for \$100.00, even though admittedly it is worth more. Would the department contend that tax must be based on \$100.00, the actual price paid, or on the lot value. Finally, assume "B" purchases the \$20,000.00 lot by trading a boat worth \$500.00. Here, the last sentence of the statutes operates to "fix" consideration at \$500.00 (the book value) not the market value of the lot. The point is, in all instances, the tax is due based on that given by the purchaser, not that received by the purchaser, and the statute gives no authority to the department to substitute market value of property transferred for consideration actually paid by the purchaser. Documentary stamp tax is imposed based on consideration given by a purchaser. See Department of Revenue v. Dix, 362 So.2d 420 (Fla. 1st DCA 1978), cert. denied, 370 So.2d 458 (Fla. 1979); DeVore v. Gay, 39 So.2d 796 (Fla. 1949).

In the instant case, had the papers been drawn so that Muben-Lamar actually paid $1,000.00 for each of the three properties, the tax could only be based on said amount, since no financial burden (mortgage, etc.) existed to be shifted. Another example demonstrating the fallacy of the department's interpretation is as follows. Assume that three men desire to engage in the business of raising produce and other farm products and selling them from a roadside stand. Assume "A" owns a half-acre parcel which sits beside a country road on which is located a cement block structure formerly used as a roadside gas station and general store, but unoccupied for the last 20 years. Assume "B" owns a tractor which could be used in the farming operation, and that "C" has $10,000.00. Assume the three decide to form a partnership in which each will have a one-third interest, and "A's" contribution to capital in the partnership is the half-acre parcel which has an assessed value of $1,000.00; "B" contributes the tractor worth $5,000.00; and "C" supplies the $10,000.00 to be used as operating capital for the purchase of seeds and leasing of land for the farming operation. Under this scenario, “A,” “B,” and “C” would each have the same one-third interest in the partnership and the department, under its rules and interpretation of same, would levy documentary stamp tax on the assessed value of $1,000.00, even though “A” would receive the same one-third interest in the partnership as the “B” and “C.” The point is that the value of the land is totally unrelated to the respective interests in the partnership, or the contributions-in-aid-of-capital (CIAC) made to the partnership.

The examples mentioned are examples of what constitutes a contribution-in-aid-of-capital and point out that, when a contribution to capital is made by a transfer of real property, the value of the real property transferred has no direct relationship to the value of the transferor’s equity in the partnership and the partnership gives nothing for the transfer. The same would be true if “C” contributed no money to the partnership but, instead, agreed to perform the manual labor of operating the tractor and furnishing the seeds and fertilizer used in planting the crops. Under Florida law, contributions-in-aid-of-capital in the form of real property have not previously been subject to documentary stamp tax unless subject to mortgage debt which is assumed by the partnership, and nothing in either the title, or the body of the present statute suggest that the legislature intended to change this in 1990. See Andean Inv. Co. v. Department of Revenue, 370 So.2d 377 (Fla. 4th DCA 1979).

Cited in Kuro was the early case of Green, which early on rejected an attempt by the department to tax a real property transfer from a corporation to its shareholders, based on the market value of the property. In Green, the supreme court held that grantees who were all stockholders of the grantor corporation, who took an interest in the land conveyed by the corporation in proportion to their stock holdings and paid no money for it and transferred nothing of value to the corporation in exchange for the land conveyed, were not "purchasers" and did not pay a "reasonably determinable" consideration for the conveyance as contemplated by section 201.02 and, accordingly, no documentary stamp tax was due. In so doing, the court rejected the identical contention made in the instant case by the department that the tax should be measured by the market value of the land transferred stating:

> It is accordingly our view that * * * the deed in question did not require documentary stamps because the grantees were not "purchasers," and did not pay a "reasonably determinable," "consideration" for the conveyance as contemplated by Sec. 201.02, Florida Statutes, F.S.A. We find no legal support for the theory that the documentary stamp tax should be measured by the market value of the land transferred. It was a mere book transaction and was in no sense a sale to a

> “purchaser” as contemplated by Sec. 201.02, Florida Statutes, F.S.A.

Green, 88 So.2d at 495.

Previously in Culbreath, this Court had recognized that:

> We cannot substitute in the statute the words “monetary value” or “value” or “market value” for the word “consideration.”

65 So.2d at 558. The same is true in the case at bar. Nothing found in the 1990 amendment to section 201.02 even remotely suggests that the legislature intends to change the entire concept of documentary stamp tax imposition so as to depart from the requirement that “consideration” exist, and tax real property transferred as a contribution-in-aid-of-capital and to measure the amount of the tax by the fair market value of the real property transferred.

The situation at bar and in Kuro are extremely similar in material facts and identical in principle application of section 201.02, and both Green and Culbreath recognize that the courts cannot substitute “monetary value,” “value,” or “market value” for consideration. That part of section 201.02(1) is virtually unchanged since creation in 1931.

In Kuro, stock was issued by a corporation to two co-owners of several condominiums, and the co-owners transferred title to the corporation.

There, as here, the department argued that the stock value (equity interest) was the same as the value of the condominiums, and that this was "consideration" for documentary stamp tax purposes. The resolution stated the value of the properties on the corporate books.

The substance of the involved transaction and purpose of same is not in dispute. Mutual Benefit owned 100 percent of the property before and it still held a 99 percent interest after, either directly or through the wholly owned subsidiary, and totally controlled all major decisions through the partnership and management agreements. Here, as in Kuro, and Green, the department argues that the equity interests are equal to the property value and that this makes the partnership a "purchaser" paying consideration, the exact argument rejected in Green and Kuro.

Contrary to the contention made by the department that Kuro somehow stands "alone," Kuro is entirely in accord with numerous cases involving documentary stamp tax and the requirement that there be a consideration made by a "purchaser," and that the statute must be strictly construed within its confines. In the early case of State ex rel. Rogers v. Sweat, 152 So. 432 (Fla. 1934), documentary stamp tax was sought for an assignment of a real estate mortgage. After referencing the involved compiled general laws at the time found in chapter 15787, C. G. L., the supreme court stated:

> Paragraph 5, above quoted, includes deeds, instruments, or writings whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser, or purchasers, or any other person or persons, by his, her, or its direction. <u>We cannot conceive that this language is sufficiently broad and inclusive to embrace therein assignments of mortgages.</u> If it could be held to embrace assignments of mortgages, it would likewise embrace assignments of all statutory liens which are assignable. Certainly it is elementary that there is a difference between an assignment of an interest in real estate and the assignment of a lien on real estate. One is the assignment of real property, while the other is an assignment of a chose in action, or personal property.

<u>Sweat</u>, 152 So. at 434 (emphasis added). In finding that the documents were not subject to documentary stamp tax, the court held:

> It, therefore, follows that applying the rule hereinbefore enunciated there is at least such an ambiguity found in the phraseology of the statute as to preclude its application to assignments of mortgages, unless the mortgage assigned is one which incorporates the certificate of indebtedness not otherwise shown in a separate instrument.

<u>Sweat</u>, 152 So. at 434.

In Culbreath, the supreme court held that the donee of an absolute gift of realty from the parents was not a "purchaser" within the meaning of the statute imposing documentary stamp taxes. Therein the court stated:

> The consideration, and only consideration, show is "love and affection." The "love and affection" which natural parents have for their daughter cannot be given any monetary measure of value. The statute in question applies only to a monetary consideration. In De Vore v. Gay, Fla., 39 So.2d 796, in addition to discussing consideration and monetary consideration, this Court held "that laws imposing taxes should be liberally construed for the taxpayers."

Culbreath, 65 So.2d at 557 (emphasis added). Thereafter the court stated:

> The words "conveyed to or vested in the purchaser," appearing in section 201.02, F.S., F.S.A., have a particular significance insofar as the taxing power is concerned. In this case, it is admitted that the daughter was not the purchaser of the property and under the terms of the statute, unless she was the purchaser, the provision imposing the tax "on each one hundred dollars of the consideration therefore the tax shall be ten cents" does not apply.

Culbreath, 65 So.2d at 558 (emphasis added). In Race, the department attempted to tax a situation which, like Culbreath, did not involve consideration contending it was authorized under the law as amended in 1990 because it specifically stated that consideration included a mortgage. Furthermore, the last sentence of section

201.02(1), which deals with a presumption by its own terms is inapplicable. It provides:

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

(Emphasis added.) By its language, it says the consideration paid or given, which is referring to that which was paid by a transferee, and states that if such includes "property other than money" it is presumed that the fair market value of the property would be equal to the consideration paid. Here, the transferee did not give any "property" to Mutual Benefit. The transferee is the limited partnership and it paid nothing to Mutual Benefit so the presumption in the last sentence of the statute does not apply by its own terms or is based on the evidence. The department is contending that the partnership interest was "property" and consideration for the transfer. The facts do not support this and there certainly is no "sale" agreement suggesting same.

In <u>Abramson v. Straughn</u>, 348 So.2d 1172 (Fla. 4th DCA 1977), the department attempted to impose documentary stamp tax on the conveyance of certain joint venture property by a quit-claim deed. In finding that the transaction was not taxable, the court set forth the facts as follows:

> In 1969, Petitioner entered into a joint venture agreement with Kassuba Realty Corporation to acquire real property for rental investment purposes. Under the terms of the agreement acquisition and financing of the properties were handled thru Kassuba Realty. Its president, Walter Kassuba, personally guaranteed all obligations of Kassuba Realty. Petitioner was primarily responsible for the development and management of the properties.
>
> Under the terms of the joint venture agreement, each venturer was liable on all notes and other evidences of indebtedness of the joint venture in proportion to his respective interest in the venture, that is, fifty percent each. This meant that while only Kassuba Realty's president was personally liable to a lender, under the terms of the agreement he could seek indemnification from Petitioner.
>
> As each parcel was acquired, full documentary stamps were affixed to the deed and record title was retained by Kassuba Realty Corporation. Equitable ownership of the property was conveyed to the joint venturers, each taking fifty percent.

Abramson, 348 So.2d at 1173. Continuing the court stated:

> In 1973 Walter Kassuba began experiencing financial difficulties and filed for bankruptcy. Petitioner, wishing to extricate his fifty percent interest in the venture from the bankruptcy proceedings and the claims of Kassuba's creditors, entered into an agreement with Kassuba which was approved by the bankruptcy court. Each venturer received whole parcels of property to satisfy his fifty percent interest and assumed the mortgages thereon.

> Pursuant to this agreement, Kassuba Realty, Walter Kassuba, and his wife executed four quit-claim deeds, conveying certain whole parcels to Petitioner. The consideration stated on the face of each deed was $ 10.00. Minimum documentary stamps were affixed to each deed.

Abramson, 348 So.2d at 1173 (emphasis added). The department assessed documentary stamp tax against these four quit-claim deeds. The petitioner contended that no consideration was given and that the transaction was solely a partition of the joint venture property.

In rejecting the department's contention, the court stated:

> We find that the transaction resulted only in a change in the form of Petitioner's liability and hold that such a change does not constitute consideration for documentary stamp tax purposes.

Abramson, 348 So.2d at 1173 (emphasis added). The court also rejected the department's contention that tax was due because a mortgage had been assumed referencing Kendall House Apartments, Inc. v. Department of Revenue, 245 So.2d at 221 (Fla. 1971), cert. denied, 404 U.S. 832 (1971), and DeMaria. In explaining its rationale in rejecting the department's contention, the court stated:

> The rationale of both the cited cases is that where the burden of making the mortgage payments has shifted from the grantor to the grantee, consideration is given by the grantee. The Supreme Court in Florida Department of Revenue v. De Maria, supra, referred to this change in

> financial responsibility as a "... shifting of the economic burden and benefit which supplies the consideration required by Section 201.02, Florida Statutes" at 840.
>
> It might appear that the Petitioner, in assuming the mortgages on the parcels conveyed to him, gave consideration as defined in Florida Department of Revenue v. De Maria, supra, and Kendall House Apartments, Inc., supra. However, we believe that these cases are distinguishable. We find that implicit in the holdings in both De Maria and Kendall House Apartments, Inc. is an absence of any liability or obligation in the grantee with respect to the mortgage prior to the conveyance. With the transfer in each case came a genuine "shifting of the economic burden" from a grantor who was solely responsible for mortgage payments to a grantee who, prior to the transfer, had no share in the financial obligation represented by the mortgage.
>
> We conclude that the quit-claim deeds at issue here represent nothing more than a change in the form of Petitioner's liability.

Abramson, 348 So.2d 1174 (emphasis added). The court concluded by finding that the petitioner "was not a purchaser for consideration within the meaning of section 201.02." Id.

Similarly, in River Park Joint Venture v. Dickinson, 303 So.2d 654 (Fla. 1st DCA 1974), the court firmly established that the duty was on the court to look through the form of a transaction to the substance of same to determine documentary stamp tax liability. In the case at bar, the substance and purpose of the arrangement are not in dispute. Muben-Lamar was created to manage the property for Mutual Benefit.

In Dix, the court held that although a lease was a conveyance of an interest in land, conveyances of such were not ordinarily subject to documentary stamp taxes citing DeVore. In finding the transaction not taxable the court stated:

> A lease is a conveyance of an interest in land within the purview of Section 201.02(1), however, leases are not ordinarily subject to documentary stamp taxes because the consideration is executory.

Dix, 362 So.2d at 422. It also rejected the department's contention that it was merely attempting to impose tax on the amount of the mortgages.

Kendall House, relied on by the department is clearly distinguishable. In Kendall House the supreme court held that the concept of "consideration" was satisfied because a mortgage existed and a transfer of the burden of making the mortgage payment took place.

The significance and importance of a shifting of economic burden or the creation of an economic burden in the transferee is also recognized in Andean, which involved a transfer of real property from partners to a partnership, which partnership acquired the property subject to a mortgage. It is undisputed in the case at bar that no economic burden was shifted and no mortgage existed.

Ray Constr. is significant for two reasons which are (1) it involved section 201.02(1) after the 1990 amendment, and (2) it also rejected the department's broad interpretation of the amended statute. The facts are set forth as follows:

> The trial judge made extensive findings of fact in his ruling on the merits of the case, which we will recite here to the extent we feel necessary. As determined by the trial judge, Ray Construction is a limited partnership owned by Timothy Ray and Thomas Ray. Both Rays are also the general and limited partners of R & R Land, Ltd., which purchases acreage and develops it into subdivision lots which are then sold to Ray Construction for the sum of $ 6,000 per lot. Ray Construction is in the residential house construction business. The method of operation followed by Ray Construction and R & R Land, Ltd., so far as the transactions in controversy are concerned, is that R & R Land, Ltd. holds legal title to the residential lot during construction of a home thereon by Ray Construction. After the home is built, Ray Construction sells the home to a third party purchaser, conveying title to the real property and improvements by warranty deed. Documentary tax stamps for the full amount of the purchase price paid by the third party purchaser are placed on the deed by Ray Construction at the time of recording the purchaser's warranty deed. Simultaneously with execution and delivery of the warranty deed to the third party purchaser, R & R Land, Ltd. executes and delivers to Ray Construction a quitclaim deed conveying title to Ray Construction. Ray Construction, in accordance with the established agreement between the parties, pays to R & R Land, Ltd. the sum of $ 6,000, and documentary stamps based upon that consideration are affixed to the quitclaim deed upon

> recording by Ray Construction. The purpose of having land acquisition and subdivision development done by a separate partnership, R & R Land, Ltd., with the arrangement whereby the lots would be sold to Ray Construction for a fixed price, was to establish a value of the lots for financing purposes and for the purpose of ascertaining the actual cost of developing the subdivision lots.

Ray Constr., 667 So.2d at 863-864 (emphasis added). The department's position was that tax should have been assessed based on the total price paid which included the improvement. The court rejected the department's contention. The court agreed with the trial court's determination ". . . that the sole consideration paid by Ray Construction to R & R Land, Ltd., for each lot was the sum of $6,000. Under the controlling statute, section 201.02(1), consideration includes, but is not limited to the money paid or agreed to be paid; the discharge of an obligation; and the amount of any mortgage, purchase money lien, or other encumbrance, whether or not the underlying indebtedness is assumed." Id. There, as here, the department had attempted to rely on the last sentence in section 201.02(1) relating to the presumption and the court rejected the department's contention.

There, the department had contended that the brothers and R & R Land, Ltd., had an ownership interest in the houses constructed, and provided security for Ray Construction's line of credit, and these "interests" were part of that transferred and that this activated the last sentence of the statute to use "fair market value" of the property valued which would include the property as improved. The court rejected this emphasizing that the only consideration was the $6,000 per lot and the so-called other "interests" were not additional "property" given as additional consideration for the transfer.

B. The 1990 amendment did not modify or change the first eleven lines of section 201.02(1), which has remained virtually unchanged except for changes in amount of tax since 1931, and the new language added merely codified existing case law determining what constitutes "consideration."

The following examination of the statute as amended in 1990 demonstrates the correctness of Race and Kuro and the fallacy in the department's position. Section 201.02, Florida Statutes (1953), states:

> On deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or any other person by his direction, on each one hundred dollars of the consideration therefor the tax shall be ten cents; provided, that 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, then in such event the tax shall be at the rate of ten cents for each one hundred dollars or fractional part thereof, of the consideration therefor.

(Emphasis added.) Section 201.02(1), Florida Statutes (1989), is identical to the 1953 law except for the amount of the tax and provided:

> (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 <u>purchaser</u> or any other person by his direction, on each $100 of the consideration therefor the tax shall be 55 cents. When the full amount of the <u>consideration</u> 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 55 cents for each $100 or fractional part thereof of the consideration therefor.

(Emphasis added.) Section 201.02(1), Florida Statutes (1990) provided:

> (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 <u>purchaser</u> or any other person by his direction, on each $100 of the consideration therefor the tax shall be 55 cents. When the full amount of the <u>consideration</u> 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 55 cents for each $100 or fractional part thereof of the consideration therefor. <u>For purposes of this section, consideration includes, but is not limited to, 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 property other than money, it is</u>

> <u>presumed that the consideration is equal to the fair market value of the real property or interest therein.</u>

(Emphasis added.) The first eleven lines of the statute are identical to the 1953 statute except for the tax amount. <u>See</u> copies of the statute from 1953, 1963, 1989, 1990 attached in the Appendix. The 1990 amendment specified that which <u>is</u> to be <u>included</u> in consideration which is: (1) Money paid or agreed to be paid; (2) the discharge of any obligation; and (3) the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the indebtedness is assumed, but each of these had already been held to be "consideration," so it adds nothing new.

The first part of the statute remained unchanged and it required, both before and after the 1990 amendment, a transfer to a "purchaser" for "consideration." In fact, it was identical in 1953 except for the tax amount.

The last sentence in the 1990 statute which was added only applies <u>after</u> it is established that a <u>purchase</u> for consideration occurred and all or part of the consideration was "property." This deals with the situation where a person purchases real property and instead of cash, gives a boat, car, guitar, or some other property. If "A" sells "B" a lot worth $5,000.00 for an outboard boat and motor worth $3,000.00, the statute creates a <u>rebuttable</u> presumption that the boat and motor are worth the same as the land which can be rebutted by demonstrating the real value of the boat. Had "B" purchased the $5,000.00 lot for $3,000.00 cash, the last sentence has no application, and tax would be due based on the $3,000.00 consideration. Muben-Lamar submits that the department's interpretation of the statute is incorrect for the following reasons:

1. Since its inception in 1931, the statute requires a "purchaser" for "consideration" and this part of the statute has not been changed.

2. The legislature cannot grant an agency unbridled discretion, and the 1990 language "includes, but is not limited to," if construed as contended by the department that it can by rule declare all property transfers, including CIAC transfers, to be taxable, notwithstanding lack of real consideration, would be an unconstitutional delegation of legislative authority.

3. The title to the 1990 amendment gives no indication that the legislature intends to impose taxes on transactions not previously assessed or to change the statutory requirements of "purchaser" and "consideration," except in the limited situation where a partnership transferred property to a partner, and then only if certain conditions exist. The <u>title</u> and the <u>amendment</u> in section 201.02(5) specifically recognize that tax may be due on conveyances of real property from a partnership to a partner under certain conditions but <u>neither</u> mention the converse

situation which is that involved here, which is like Kuro and Green, except that those cases involved corporations and stockholders and not partnerships.

4. By including the specific matters it deems to be "consideration" the amendment is merely codifying existing judicial decisions which had held such debts, mortgages, etc., to be "consideration."

Muben-Lamar submits that the purpose of the 1990 amendment was to codify in law judicial decisions defining "consideration," not to create a new concept of "consideration." The legislature is presumed to be cognizant of the judicial construction of statutes. Bridges v. Williamson, 449 So.2d 401 (Fla. 2d DCA 1984); Davies v. Bossert, 449 So.2d 418 (Fla. 3d DCA 1984). The legislature also is presumed to adopt that construction except where the new statute differs from such construction. Pennisular Supply Co. v. C.B. Day Realty, 423 So.2d 500 (Fla. 3d DCA 1982).

By declaring consideration to include (1) money paid or agreed to be paid, (2) the discharge of an obligation, and (3) the amount of any mortgage, purchase money mortgage lien, or other encumbrance whether accrued or not, the legislature is merely codifying in the statutes that which the court's had already held to be consideration. The 1990 amendment adopts and recognizes the difference in Florida and federal law already noted previously in Raspberry v.

Dickinson, 243 So.2d 236 (Fla. 1st DCA 1971), that Florida law does not exclude encumbrances as does federal law. See Kendall House (property transferred subject to a mortgage where the purchaser assumed the burden of making mortgage payments after the closing date); Raspberry (land transferred for cash and a mortgage which was assumed by the purchaser); DeMaria; Dix; Andean; Abramson; River Park. There is nothing new in this. These matters were already "consideration." Nothing suggests that the legislature intended to embark on a wholly brand new excursion into attempting to tax transactions where no "purchaser" exists and which had never before been subject to tax, as the department attempted to do in Kuro and Race, and attempts here, or that the concept of "consideration" is being changed.

The title to chapter 90-132 gives no indication that new taxes are imposed on deed transfers except from a partnership to a partner under certain conditions. The title states in part:

> amending s. 201.02, F.S., which imposes the documentary excise tax on deeds and other instruments relating to real property; defining "consideration"; providing conditions under which conveyances of real property to a partner from a partnership are taxable;

Ch. 90-132, Laws of Fla., General Acts, Vol. 1 at 447 (emphasis added). The "considerations" listed in the statute were already taxable by both administrative fiat and judicial decisions, and the title does not advise that transfers from an individual to a partnership as a contribution to capital are taxable, but only addresses conveyances from a partnership to a partner. See § 201.02(5), Fla. Stat. (2000). If the legislature has intended to tax CIAC property transfers from a partner to a partnership, it could have done so. See for comparison Department of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979)(legislature levied a new tax and the department attempted to impose it retroactively). The title certainly does not indicate a new tax is being imposed. See State ex rel. Szabo Food Serv., Inc. of N.C. v. Dickinson, 286 So.2d 529 (Fla. 1973), which recognized that "[v]ending machines are not listed under either the elimination of exemptions or the extension of taxation to new subjects. A new tax not mentioned in the title is unconstitutional and invalid. *Mayo v. National Truck Brookers, Inc.*, 220 So.2d 11, 12 (Fla.1969). To adopt Szabo's contention would be to imply the use of an unconstitutional procedure by the Legislature." 286 So.2d at 531 (emphasis added).

To contend that real property transferred as a contribution to capital creates a taxable event based on the value of the property would assume the legislature is imposing a new tax which the title does not mention, and especially when both the title and amendment addresses transfers from a partner to a partnership but makes no mention of the converse situation.

Furthermore, the department's interpretation of the statute results in it being constitutionally infirm. There are no standards or guidelines clarifying the language "includes, but is not limited to," and construing same as contended by the department that it can by rule determine what it deems "consideration" results in an improper delegation of legislative authority in violation of article III, section 1, and article II, section 3, Florida Constitution, and is wholly inconsistent with the title of the act. See Chiles v. Children A, B, C, D, E, 589 So.2d 260 (Fla. 1991); Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979); Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1976); Dickinson v. State ex rel. Bryant, 227 So.2d 36 (Fla. 1969); Connor v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968); D.P. v. State, 597 So.2d 952 (Fla. 1st DCA 1992).

Any doubt as to the imposition of taxes in this situation should be resolved in favor of the taxpayer based on the rulings of numerous courts including the First District Court of Appeal in D.P. The rule involving interpretation of statutes so as to avoid a conclusion or suggestion that it is unconstitutional has been stated on numerous occasions by the courts. In Brown v. Griffin, 229 So.2d 225 (Fla. 1969), the court stated the rule as follows:

> It is a well recognized rule of statutory construction that "A statute must be so construed, if fairly possible, as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score." Burr v. Florida East Coast Ry. Co., 77 Fla. 259, 81 So. 464. Many other cases announce this principle.

229 So.2d at 227. See also State ex rel. Ervin v. Cotney, 104 So.2d 346 (Fla. 1958); Brown v. State, 358 So.2d 16 (Fla. 1978).

C. Florida Administrative Code Rules 12B-4.012 and 12B-4.013, implementing the 1990 amendment to section 201.02, Florida Statutes (1989), are invalid and over broad.

For the reasons articulated previously addressing the legislative history, judicial construction of said statute, and the language found in the title and body of said amendment, the department's interpretation of section 201.02 is incorrect and its implementing rules are over broad and unauthorized.

CONCLUSION

Based on the foregoing arguments and authorities, this Court respectfully is requested to reverse the district court's decision affirming the trial court's decision.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to **JEFFREY M. DIKMAN, ESQUIRE**, Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050 on this the **4th** day of December 2000.

____
Larry E. Levy