

ORIGINAL

SUPREME COURT
STATE OF FLORIDA

Case No: SCOO-1111

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

Appellant/petitioner,

vs.

DEPARTMENT OF REVENUE,

Appellee/respondent.

**PETITIONER'S
BRIEF ON JURISDICTION**

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STATEMENT OF TYPE SIZE AND STYLE

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

PRELIMINARY STATEMENT

Appellant, Muben-Lamar, L.P., will be referred to herein as "Muben-Lamar. " Appellee, 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 imposed by the department on transfers of real property as part of a contribution in aid of capital (C.I.A.C.). (R-I--O 1- 13) The petitioner, Muben-Lamar, L.P., is a New Jersey limited partnership. The respondent, Department of Revenue, is a state agency responsible for the administration of chapter 201, Florida Statutes (1999). (R-I-O 1) Muben-Lamar tiled a complaint seeking refund of documentary stamp tax paid by it in the total amount of \$207,56 1.15, involving transfers of three separate parcels of improved real property located in Florida was a contribution in aid of capital (C.I.A.C.) (R-I-O 1)

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 denied. (R-1-02; I-05-06) 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. After hearing the trial court granted the department's motion for summary judgment. Notice of appeal to the district court was timely filed. (R-111-459-460)

The First District Court of Appeal rendered its opinion affirming the trial court's order on April 20, 2000. Muben-Lamar, L.P. v. Department of Revenue, 25 Fla. L. Weekly D994 (Fla. 1st DCA Apr. 20, 2000). The district court also acknowledged that its opinion conflicted with Kuro, Inc. v. Department of Revenue, 713 So.2d 1021 (Fla. 2d DCA 1991), stating:

We acknowledge that our decision conflicts with the decision in Kuro, Inc. v. Department of Revenue, 713 So. 2d 1021 (Fla. 2d DCA 1998).

Muben-Lamar, 25 Fla. L. Weekly at D994. Muben-Lamar timely filed its Notice to Invoke Discretionary Jurisdiction in this Court.

STATEMENT OF THE FACTS

The district court set forth the factual situation as follows:

Muben-Lamar has three partners. Muben Realty Company and Lamar Eastern, L.P., each hold a 1% interest in the partnership. Mutual Benefit Life Insurance Company (Mutual Benefit) holds a 98% interest in the partnership. Muben-Lamar's partnership agreement provided that the initial capital contribution of Muben and Mutual Benefit "shall consist of the real property interests identified on Exhibit A attached hereto. Within 30 days of execution of this agreement, Mutual Benefit, on behalf of itself and Muben, shall contribute to the partnership the initial properties The partners agree that the fair market value of each of the initial properties and related property contributed by Mutual Benefit is as stated on exhibit A." Exhibit A of

the partnership agreement indicated the property had a value of \$22,890,391. Lamar Eastern, L.P. contributed a \$280,160, ten-year, non-interest bearing promissory note in lieu of cash contribution. Mutual Benefit transferred the properties, and Muben-Lamar paid documentary stamp tax in the amount of \$207,561.15.

Muben-Lamar later sought a refund of the taxes paid. The Department denied a refund, asserting the 1990 amendment to section 201.02, Florida Statutes, indicated a legislative intent that transfers of property to corporations, partnerships, or other business entities were to be subject to tax on their fair market values. Muben-Lamar then filed an action for declaratory judgment. Muben-Lamar asserted it was not a purchaser within the purview of section 201.02 and no consideration flowed from Muben-Lamar to Mutual Benefit.

Muben-Lamar, 25 Fla. L. Weekly at D994.

SUMMARY OF ARGUMENT

The decision of the First District Court in the instant case expressly and directly conflicts with the decision of the Second District Court in Kuro, Inc. v. Department of Revenue, 713 So.2d 1021 (Fla. 2d DCA 1998), on the same question of law involving the interpretation of the 1990 amendment to section 201.02(1), Florida Statutes. Thus, this Court should exercise its discretionary jurisdiction to resolve the conflict.

ARGUMENT

THE FIRST DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT COURT'S DECISION IN KURO, INC. v. DEPARTMENT OF REVENUE, 713 So.2d 1021 (Fla. 2d DCA 1998), ON THE SAME QUESTION OF LAW.

Both the First District Court and the Second District Court were called upon to construe the provisions of section 20 **1.02**, Florida Statutes (1999), as amended in 1990. The First District Court held that the 1990 amendment indicated a legislative intent to reflect that all transfers of property to corporations, partnerships, or other business entities were to be subject to tax based on the fair market value of the real property transferred. The Second District Court in Kuro, Inc., held that such was not the legislative intent in the enactment of the 1990 amendment to section 20 1.02. It held that transfers of real property to a corporation by the owners of said real property who were sole stockholders in the corporation were not taxable transactions because there was no "purchaser," and no consideration flowing from the transferee, and rejected the department's position that tax should be imposed based on the market value of the property transferred; which was based on the department's rules and interpretation that the stock was incorporeal personal property which would be presumed to be worth the

market value of the real property. The two decisions are in direct conflict as the First District Court acknowledged.

Under Florida law, imposition of documentary stamp tax under section 201.02, has previously always been based on the consideration flowing from the transferee/purchaser to the transferor/seller; in other words, the amount paid for the property, in either cash or cash equivalent such as debt assumption, not the value of the real property transferred. See State ex rel. Palmer-Florida Corp. v. Green, 88 So.2d 493 (Fla, 1956). If a mortgage or other debt of the transferor was assumed by the transferee, that such constituted part of the consideration paid by the “purchaser.” In situations where a contribution in aid of capital was made in the form of real property, no taxable transaction would have occurred because there would be no “purchaser,” and the value of the property transferred could not be imputed to the stock, or partnership interest after the transfer to presume the existence of “consideration” paid by a “purchaser.” A contribution in aid of capital can occur where an entity is created, which might be corporate or a partnership, as is in the instant case, and persons or entities agreeing to create a third entity for purposes of doing business and capitalize the new entity

by paying agreed to amounts which may be in cash, property, or any form agreed to.

In the instant case, the third entity, Muben-Lamar, was created for the sole purpose of managing the subject properties which had been acquired through foreclosure by Mutual Benefit Life Insurance Company (Mutual Benefit). There was no debt or mortgage assumed by Muben-Lamar, which was the partnership created, and the department's assessment was based on the value of the property as agreed to in the partnership agreement which was the amount previously bid at foreclosure by Mutual Benefit. The department's position as stated in the district court's opinion was that, under the law as amended in 1990, any such transfers would be subject to documentary stamp tax whether or not any actual money was paid by the entity created to the contributor of the real property as a contribution in aid of capital. In other words, the department contended that tax would be assessed based on the value of the real property transferred and not on any specific consideration being paid by the transferee.

In Kuro. Inc., the department took the same position as in the instant case. There, as here, the department relied upon its rules promulgated by Florida

Administrative Code Rules 12B-4.0 12(2)(b) and 12B-4.0 13(7) pursuant to section 201.02 as amended. Kuro, Inc. stated:

According to DOR rules promulgated pursuant to section 201.02(1), "[p]roperty 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." Fla. Admin. Code R. 12B-40 12(2)(b). "A conveyance of realty to a corporation in exchange for shares of its capital stock, or as a contribution to the capital of a corporation, is subject to tax." Fla. Admin. Code R. 12B-40 13. Both of the foregoing rules reference the presumption set forth in section 20 1.02(1), that consideration for property other than money "is equal to the fair market value of the real property." Fla. Admin. Code R. 12B-4012(2)(a); 12B-4.013(7).

713 So.2d at 1022. Thereafter, the court stated:

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.

Kuro, Inc., 7 13 So.2d at 1022. Continuing the court stated:

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, 7 13 So.2d at 1022. In the instant case, the First District Court reached the opposite conclusion and held that the partnership interests were “consideration” for the land and that an exchange of land for personalty had occurred.

There are three reported cases addressing the department’s position under the 1990 amendment in which the department took the same position in all three cases as to the intent in the 1990 amendment. In Department of Revenue v. Race, 743 So.2d 169 (Fla. 5th DCA 1999), the court stated:

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 to be resolved in favor of taxpayers. *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).

Race, 743 So.2d at 171.

Race addressed the department's contentions as to the interpretation of the 1990 amendment stating:

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.

Because the department's interpretation of the 1990 amendment to section 201.02 affects transfers of all real property in Florida, and because the department's position was rejected in Kuro, Inc. and Race, and accepted in the First District Court's decision and its interpretation is in direct conflict with Kuro, Inc., the petitioner suggests that resolution of the conflict is of great importance to

all involved in property transactions in Florida and that this Court should exercise its discretionary jurisdiction and resolve the conflict.

CONCLUSION

Based on the foregoing arguments and authorities, this Court respectfully is requested to accept jurisdiction of this case.

Respectfully submitted,



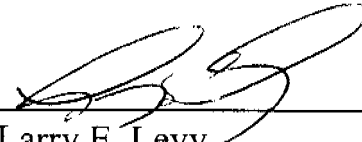
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CERTIFICATE OF SERVICE

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 **26th** day of May 2000.



Larry E. Levy