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 REPLY BRIEF

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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 #). References to Muben-Lamar's initial brief will be delineated as (IB-page #). References to the department's answer brief will be delineated as (AB-page #).

It should be noted that page 23 of Muben-Lamar's initial brief contained an error. The fourth sentence on said page should read: "Similarly, Mutual Benefit 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 be exempt."

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 (2000).

Notwithstanding the department's attempts to obfuscate the issue, the question presented to this court for resolution is the proper interpretation of the 1990 amendment to section 201.02, Florida Statutes (2000), and specifically the last sentence in section 201.02(1), Florida Statutes (2000), which states:

> 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.

(Emphasis added.) The department contends that the amendment should be interpreted as authorizing imposition of documentary stamp tax on transfers of real property as a contribution-in-aid-of-capital (CIAC) to newly created entities where no real consideration exists. Muben-Lamar submits that it does not.

This case is before this Court on decisional conflict jurisdiction involving differing interpretations of the statute as amended in 1990. This certainly indicates some amount of ambiguity in the 1990 amendment. Both the

Second District Court of Appeal and the Fifth District Court of Appeal disagreed with the department's interpretation. Although the first district upheld the tax at bar, it could well have been influenced by the fact that, by a per curiam decision, it upheld a declaratory statement issued by the department involving the same amendment.

The department construes the last sentence as authorizing the tax even though (1) no money was paid or agreed to be paid, (2) no obligation was discharged, and (3) no mortgage, purchase money mortgage lien, or other encumbrance existed which are the three matters defined as consideration in the 1990 amendment. The department interprets the last sentence as allowing it to presume the fact of a purchaser and consideration. Mutual Benefit and both the second district and fifth district courts do not agree.

If the court finds that the sentence clearly and unambiguously provides to tax imposition, then the department prevails and Kuro, Inc. v. Department of Revenue, 713 So.2d 1021(Fla. 2d DCA 1998), is wrong. Furthermore, Department of Revenue v. Race, 743 So.2d 169 (Fla. 5th DCA 1999), is wrong because there, as here, the department presumed consideration, even though now the department admits Race was correct.

The department's position is aptly recognized at page 43 of its brief where it acknowledges the possibility of this Court finding ambiguity stating:

> 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.

(AB-43) The department asserts that it has made an administrative interpretation and this should suffice to breathe life into the "ambiguous" statute and render CIAC transfers taxable.

The law is clearly to the contrary, however, ambiguity in tax imposition statutes renders doubtful transactions not taxable. As this Court stated in State ex rel. Drum Service Co. of Florida v. Kirk, 234 So.2d 358 (Fla. 1970):

> We think that respondents' arguments are beside the point * * * This is not an exemption section to be strictly construed against the taxpayer but rather a section which defines what is to be taxed and as such is to be strictly construed against the taxing authority.

234 So.2d at 359 (emphasis added). See also State ex rel. Rogers v. Sweat, 152 So. 432 (Fla. 1934)(involving documentary stamp tax law). Any ambiguity in the last sentence which the department relies on to support tax imposition, must be resolved in favor of the taxpayer. Hence, the First District Court of Appeal's

decision should be reversed and Race and Kuro upheld as the correct expression of the law.

The only place any reference is made to CIAC is in the department's rules addressing conveyance of realty to a corporation. See Fla. Admin. Code R. 12B-4.013(7). Where the department has been unsuccessful in having the legislature pass a law taxing what the department wants, it has simply done so by rule. The department's rule implementing the 1990 amendment as to partnerships is 12B-4.013(10), F. A. C., and it does not mention CIAC, or require that there be a "purchaser." See Fla. Admin. Code R. 12B-4013.(10). In this CIAC situation, an entity was being created and capitalized and, thus, there was no "purchaser." Documentary stamp tax imposition has always required a "purchaser" for "consideration." The statute still requires a "purchaser" but the department's rule and interpretation ignores this language and purposes to tax notwithstanding the fact that no "purchaser" exists in a CIAC transfer where no mortgage or other indebtedness exists. The department is attempting to expand the statute–taxation by expansion or taxation by implication, and tax transfers where no "purchaser" exists.

In its initial brief, Muben-Lamar pointed out that the 1990 amendment was codifying judicial decisions which had addressed what constitutes

consideration, and not changing the requirement of a "purchaser," and traced the history from 1953 to the present. See Appendix to Initial Brief. The department at page 42 of its answer brief chooses to characterize the amendment as having "clarified," but then states at page 45 that: "[t]he 1990 amendment not only "codifies" prior case law, as Petitioner asserts, but has also **clarified** the statute." (AB-45) If the clarification was so crystal clear as the department suggests, why wasn't it clear to the second and fifth district courts?

One thing the 1990 amendment did not do, as the department implicitly admits, was to impose a tax on transactions not previously taxed, or eliminate the necessity of a "purchaser," and the department points to no language in the title or body of the law indicating to the contrary. The title specifically only advises that the body of the law is "providing conditions under which conveyances of real property to a partner from a partnership are taxable." The converse, transfers as CIAC from a partner to a partnership, is not mentioned in the title or body of the amendment. The title states that "consideration" is defined but certainly does not mention or suggest that the requirement of a "purchaser" is being changed.

Since neither the title nor the body of the amendment provide a basis for the department's tax, the department falls back on its administrative

interpretation. This legally is insufficient. Codifying existing judicial holdings as part of the statutory law is not imposing a new tax. Furthermore, notwithstanding the department's suggestion in its brief that the CIAC transfers were taxable before 1990, this is not so. The department's position in such CIAC situations is exemplified in Andean Inv. Co. v. Department of Revenue, 370 So.2d 377 (Fla. 4th DCA 1978).

In Andean Inv., the property transferred was subject to a mortgage, and the tax was imposed by the department based on the mortgage indebtedness because a shifting of economic burden had occurred which constituted consideration for the transfer and hence a purchase had occurred. The court stated the facts as follows:

> Petitioner is a general partnership the members of which are various individuals who owned and operated warehouses. In order to provide more convenient and economical management of their various separate holdings it was agreed they would each transfer their properties to the partnership and this single entity would handle the management. The only assets of the partnership are these properties.
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> * * * * *
>
> When the properties were transferred to the partnership they were taken subject to various mortgages encumbering each of them. No money or other

> consideration actually passed from the partnership to the transferor partners.

Andean Inv., 370 So.2d at 378 (emphasis added). The department imposed tax based on the mortgage and the court upheld same although disagreeing with the department's calculation of the amount.

At bar, no mortgage existed, no shifting of economic burden occurred, and there was no "purchaser." The statute as amended still requires a transfer whereby title is vested in a "purchaser." Andean, Inv. represents the department's position on CIAC real property transfers to a partnership from a partner, and the department did not try to tax based on the market value of the property transferred there.

The department contends that Kuro was wrongly decided (AB-26), but admits that Race was correctly decided (AB-26), because the department did not follow its own rules. If Race were correctly decided, then why did the department bother to litigate the matter to the appellate court? In Race, the department took the literal language of the statute as amended in 1990 and made two decisions which resulted in the assessment. These two decisions were: (1) that there was a deed showing a transfer of real property from one person to two persons, and (2) that there was a mortgage on the property at the time of the

transfer. Because of these two facts, the department contended that the 1990 amendment caused the transaction to be taxed, and that no further inquiry into consideration was necessary, even through there clearly was no "purchaser." It presumed a "purchaser" and "consideration" in Race exactly as it has done in the instant case.

It is nice that the department now admits that it was wrong in Race from the beginning and should never have assessed it, but the fact that it did demonstrates the department's interpretation and analysis of the 1990 amendment to impose tax notwithstanding the various surrounding facts and circumstances which gave rise to the transaction and the total lack of a "purchaser" or any actual "consideration." Although the deed did not so specify in Race, it could have specified that the consideration was love and affection and the department's rationale still would have assessed it in the same manner because (1) there was a transfer by deed, and (2) there existed a mortgage.

The department's approach in Kuro was identical to its approach in Race; that is to look no further than to find that there was a deed transferring property from the two owners to a corporation owned by the same two owners and then presume that therefore there must be a "purchaser" for consideration and that the stock was presumed equal to the market value of the property and this supplied

the consideration. Had a mortgage been on the subject property at bar, what would the department have done? Ignore the mortgage and tax based on the fair market value of the property or tax as it did in Andean Inv.? Muben-Lamar submits it would have taxed as it did in Andean Inv.

The department makes no attempt to address Muben-Lamar's contention that the language added in 1990 to the effect that "consideration, includes, but is not limited to," could not have been intended to vest in the department the unrestricted discretion to establish what is consideration or to eliminate the necessity of a "purchaser." In fact, both Race and Kuro recognize that the department has interpreted the statute to presume a "purchaser" and the existence of consideration where neither exist.

Nor does the department address the fact that the title to the 1990 amendment contains no indication that a contribution-in-aid-of-capital situation is to be rendered taxable where no actual purchaser exists. In Muben-Lamar's initial brief the title to the amendment is quoted beginning at page 45, and the only mention made in the title of imposition of a new tax is the language referencing conditions under which conveyances of real property to a partner from a partnership are taxable. Nothing in the title suggests that a CIAC transfer from a partner into a partnership, where no mortgage exists and the partnership had

nothing to give prior to the transfer, would be considered a taxable transaction. The department cannot address this point because the title is crystal clear. That is no doubt why the department falls back on its so-called administrative interpretation and its rules to support the tax.

Although no mention is made in the title of the 1990 amendment relating to conveyances of property by a partner to a partnership, the department has promulgated a rule which makes such taxable notwithstanding the absence of a "purchaser" or any actual consideration flowing. See Fla. Admin. Code R. 12B-4.013(10). No doubt that is the basis for the department's contention that its administrative interpretation evidenced in the rule should sustain its assessment even assuming the statute is ambiguous and does not. The rule is unauthorized because the statute requires a "purchaser" for consideration. As interpreted by the department, the rule would impart on a totally new concept of documentary stamp tax law, and change the requirement of a "purchaser" and what constitutes consideration, which is not mentioned in either the title or body of the 1990 amendment. That is, it would change the concept of tax assessment from an assessment based on the actual consideration paid by a "purchaser," to the concept of assessing the tax based on the value of the real property transferred notwithstanding that there may be no purchaser, as it attempted in Race and Kuro.

At no time under Florida law, has the assessment of documentary stamp tax ever been based on the market value of the property transferred and that is what the department's new position is based on. Historically, by statute a "purchaser" for "consideration" has always been required.

The department's position simply cannot be reconciled with the language of the statute as amended as the following examples demonstrate.

(1) What if Mutual Benefit had transferred the property for $100,000.00, and the partnership issued a promissory note to Mutual Benefit for said amount. Under the statute quite clearly the consideration could only be based on the $100,000.00 note. Assume, instead of a note, that the partnership paid $100,000.00 in cash, then the result could be no different. Notwithstanding that the property may have a value of $20 or $30 million dollars, the consideration actually paid by the purchaser would be the $100,000.00, and the requirements of section 201.02(1) that there be a "purchaser" for consideration apply and tax would be based on said amount. Assume instead of a payment of $100,000.00, the transferee agreed to pay $1,000.00, $100.00, or even $10.00. If that was the actual consideration flowing then the partnership clearly would be a purchaser and tax could only be based on that which the purchaser paid. Proof of actual consideration rebuts the presumption.

(2) What if, prior to transfer, Mutual Benefit had mortgaged the property for $500,000.00, transferred the property to the partnership, and the partnership assumed the mortgage. Under the statute the tax would be based on the amount of the economic benefit received by the transferor which would be the $500,000.00, and not the value of the property of $20-$30 million dollars. Assume Mutual Benefit had borrowed $50,000.00, and there was a $50,000.00 outstanding mortgage on the property and the partnership had assumed the $50,000.00 mortgage, then the tax would have to be based on the $50,000.00 assumed debt. That would be the payment for the property and a "purchaser" would exist. In fact, this is virtually the same situation which was before the Fourth District Court of Appeal in Andean Inv. There, property was transferred subject to a mortgage, and the department assessed the tax based on the amount of the mortgage not the property value.

These examples demonstrate the impropriety in the department's positions. If Mutual Benefit transferred the property worth $30 million dollars to the partnership without a mortgage, the department says tax is due based on $30 million dollars of fair market value using the last sentence of the amendment which says that if the consideration includes property other than money, it is presumed that such property is equal to the fair market value of the land.

But, if the property is transferred to the newly-created partnership subject to a $50,000.00 or $500,000.00 mortgage which is assumed or paid with a $100,000.00 note, then the department would have to tax based on the mortgage debt on the note. The statute does not provide for taxing both based on the fair market value of the property and the consideration actually paid. It is an "either or" situation.

(3) What if Mutual Benefit transferred the property to itself in trust for the benefit of itself, Muben-Lamar, and Muben Realty with the trust drawn so that Muben-Lamar had the authority and duty to provide for proper management and was hired under the same management agreement identical to that presently existing for the same proportionate distribution of proceeds at the time of the sale of the property. The transfer to itself in trust could not have generated documentary stamp tax liability because no consideration flowed. See Fla. Admin. Code R. 12B-4.013(32).

(4) Next, assume that Mutual Benefit transferred the involved property to Muben-Lamar as trustee, who paid nothing for same but which had the duty pursuant to the trust instrument of managing such property until such time as an acceptable sale could be found and, after the sale, distributed the proceeds in the same distribution percentages of 98 percent, 1 percent, and 1 percent. Id.

The point is, the substance of the arrangement in the transaction at bar was to provide for the proper management and operation of the subject commercial properties, shopping centers, etc., until such time as the properties could be sold with the incentive that the manager be paid a percentage at the time of distribution equal to 1 percent. While the department appears to contend that this is not the substance of the transaction, it later states that it would not make any difference because it would still be taxable. (AB-43) As clearly noted, the department's position here is totally inconsistent with its position in Andean Inv., which was decided under the law prior to the amendment. Notwithstanding the department's contention, its present position is based on the 1990 amendment and the pivotal issue before this court is the proper interpretation of the 1990 amendment and specifically the last sentence of section 201.02(1).

CONCLUSION

Here, there was no "purchaser," no "economic benefit" flowed because there was no mortgage or other encumbrance, and the creation of an entity and capitalizing same in part through a transfer of real property is not a transfer to a "purchaser" and a transfer or sale to a "purchaser" for consideration is required to support documentary stamp tax imposition under section 201.02(1). The ambiguity in the statute evidenced by the differing judicial interpretations which

the department reluctantly admits should be resolved in favor of the taxpayer. The 1990 amendment does not clearly and unambiguously impose a tax on the transfer at bar. Race and Kuro are correct and should be approved and the First District Court should be reversed.

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 **9th** day of January 2001.

Larry E. Levy

STATEMENT OF TYPE SIZE AND STYLE

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