


ORIGINAL

SUPREME COURT
STATE OF FLORIDA

FILED
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JUN 06 2000
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BY 

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

Appellant/Petitioner,

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,
Appellee/Respondent.

CASE NO. SC00-1111

RESPONDENT'S BRIEF ON JURISDICTION

RESPECTFULLY,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Jeffrey M. Dikman
Fla. Bar #274224
Assistant Attorney General
Department of Legal Affairs
The Capitol-Tax Section
PL 01
Tallahassee, FL 32399-1050
(850) 414-3300
Counsel for Appellee/Respondent

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THE DEPARTMENT AGREES THAT THE FIRST DISTRICT COURT'S
DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND
DISTRICT COURT'S DECISION IN KURO, INC. V. DEPARTMENT OF
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Fla. Admin. Code Rule 12B-4.012 (1989)6

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STATEMENT OF TYPE SIZE AND STYLE

The undersigned counsel for Appellee certifies that the type size and style used in Appellee's Brief on jurisdiction is 12 point (or greater) Courier New.

PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE

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

STATEMENT OF THE FACTS

Petitioner has failed to include the following portion of the District Court's opinion in its statement of the facts:

. . .the partnership bought the real property by issuing valuable partnership interests in consideration for land. This case involved a straightforward exchange of land for personalty.

Muben-Lamar, L.P. v. Department of Revenue,
25 Fla. L. Weekly D994 (Fla, 1st DCA Apr. 20, 2000).

SUMMARY OF ARGUMENT

The Department agrees that 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. The Department further agrees that this Court should exercise its discretionary jurisdiction to resolve the conflict.

ARGUMENT

The Department agrees that the decision of the First District conflicts with the decision of the Second District in Kuro, Inc., v. Department of Revenue, 713 So.2d 1021 (Fla. 2d DCA 1998). The Department agrees that this Court should accept jurisdiction to resolve this conflict.

However, the Department disagrees with the way in which Petitioner has framed the issues and discussed applicable precedent. The First District Court did not "hold" 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. See, Petitioner's argument, at page 4 of its Jurisdictional Brief.

The First District did not hold, for example, that a gift to a nonprofit charitable corporation would be taxable.¹ Rather, the "holding" of the District Court was as follows:

The trial judge correctly determined that the partnership bought the real property by issuing valuable partnership interests in consideration for land. This case involved a straightforward exchange of land for personalty. By statute, a partnership is an entity separate and distinct from its partners. § 620.8201, Fla. Stat. (1997).

¹In its briefs, the Department has consistently maintained that such a transaction would not be taxable.

Muben-Lamar, L.P. v. Department of Revenue,
25 Fla. L. Weekly D994 (Fla. 1st DCA Apr. 20, 2000).

The Department further disagrees with Petitioner's repeated assertion that the sole issue in this case is the interpretation of a '1990 amendment," Although the First District indeed applied the plain language of the statute to the facts of this case, it did not "interpret" anything.

Moreover, contrary to the impression given by Petitioner's brief, the Department's position is not solely based upon the language of the statutory amendment. Indeed, the Department formally took the same position even before the 1990 amendment.'

Rather, the Department maintains that the Kuro decision threatens the stability of the tax laws. Unless this decision is surgically removed from the body of controlling precedent, it

² The Department defined consideration, in its 1989 rules, to include:

12B-4.012 Rate, Consideration.

(1). . .

(2) Consideration-Documentary Stamps: The term 'consideration" under 201.02, F.S., includes:

(a) Cash

(b) Purchase money mortgage

(c) Corporation stock

(d) . . .

(g) Value of any real or personal property given in exchange for realty

(h) Any other monetary consideration or consideration which has a reasonable determinable pecuniary value

(Emphasis Supplied).

will, over time, invade other areas of the state's corporate and tax laws. The Department's concerns are not overstated. Kuro has already created the following problems:

1. Kuro implicitly rejects the separate entities doctrine articulated in Moline Properties, Inc. v. Commissioner of IRS, 319 U.S. 436 (1943) [holding that a taxpayer who forms a corporation must take the good with the bad and be treated as separate from its shareholders for tax purposes, not just for liability purposes]. The separate entities doctrine is a cornerstone of federal and state tax law and a linchpin of corporate law;
2. Kuro, contrary to clear precedent from this court³, ignores all federal authorities, even those authorities which are on point;⁴
3. Kuro ignores the well-settled doctrine that the "administrative construction of a statute by the agency or body charged with its administration is entitled to

³The Florida documentary stamp tax act is patterned upon a repealed federal act and this Court has historically looked to the federal law for guidance. Choctoawatchee Electric Cooperative, Inc. v. Green, 132 So. 2d 556 (Fla. 1961).

⁴Federal authorities are virtually on point. See, Carpenter v. White, 80 F.2d 145 (1st Cir. 1935) [The court noted that "no money consideration was paid for these conveyances" but found the transaction taxable anyway, because "[t]he trustees of the new trust issued transferable shares in agreed amount to the two grantors." Id. at 146.1 Accord, Revenue Ruling M.T.4, 1942-37-11194.

great weight and *will not be overturned unless clearly erroneous.*" (Emphasis Supplied). Fort Pierce Util. Auth. v. Florida Public Service Comm'n, 388 So. 2d 1031, 1035 (Fla.1980); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So. 2d 823, 828 (Fla.1973); Pan Am. World Airways, Inc. v. Florida Public Serv. Comm'n, 427 So. 2d 716, 719 (Fla.1983).

The Department also disagrees with the mischaracterization of its position, appearing on page 6 of the Petitioner's jurisdictional brief, The Department does not contend that the "value of the real property transferred" is more important than determining whether there is "consideration." Rather, the Department contends that stock or partnership shares constitute consideration when they are *exchanged* for land. The value of the land is merely used to determine the value of the stock or shares which are received *in exchange*.

The Department also disagrees with the statement, on page 8 of Petitioner's jurisdictional brief, that it took the same position in Department of Revenue v. Race, 743 So.2d 169 (Fla. 5th DCA 1999). In Race, the Department took the position that a corrective deed was taxable. The Court held that this position was contrary to the Department's own rules. This case does not involve a corrective deed situation. Also, in this case, the Department's rules support the position which the Department has

taken.⁵

⁵12B-4.012 Rate, Consideration

(2) Definitions:

(a) . . . Where property other than money is exchanged for interests in real property, there is the presumption that the consideration is equal to the fair market value of the real property interest being transferred.

(b) "Property other than money" includes, but shall not be limited to, property that is corporeal or incorporeal, tangible or intangible, visible or invisible, real or Personal; everythings that has an exchangeable value or which goes to make up wealth or estate.

(3). . .

12B-4.013 Conveyances Subject to Tax.

(1) Exchange of Property. . .

(10) Partnerships: A conveyance of real property by a partner in exchange for an interest in a partnership, or where the value of the Partner's interest in the partnership is increased by the conveyance, is taxable. There is the presumption that the consideration is equal to the fair market value of the real property being transferred. . .

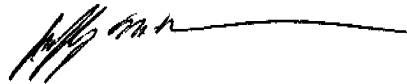
(Emphasis Supplied),

CONCLUSION

WHEREFORE, the Department prays that the Court accept jurisdiction to resolve the interdistrict conflict between the First and Second Districts.

RESPECTFULLY,


ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



Jeffrey M. Dikman
Fla. Bar #274224
Assistant Attorney General
Department of Legal Affairs
The Capitol-Tax Section
PL 01
Tallahassee, FL 32399-1050
(850) 414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to Larry Levy, 1828 Riggins Road, Tallahassee, FL 32308 and to William J. Deas, P.A., 2215 River Blvd., Jacksonville, FL 32204 this 5th day of June, 2000.



Jeffrey M. Dikman
Assistant Attorney General