SUPREME COURT OF FLORIDA

CRESCENT MIAMI CENTER, LLC.,

Petitioner

v.

Case no. SC03-2063
Lower Tribunal no. 3D02-3002

FLORIDA DEPARTMENT OF REVENUE,

Respondent.
_________________________________/

RESPONDENT,
FLORIDA DEPARTMENT OF REVENUE'S,
ANSWER BRIEF

Charles J. Crist, Jr.
Attorney General

Charles Catanzaro
Assistant Attorney General
Fla. Bar No. 979732
Office of the Attorney General
The Capitol - PL-01
Tallahassee, FL 32399-1050

(850) 414-3300
(850) 488-5865 (fax)

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ISSUE ON APPEAL

Whether the deed whereby a limited partnership conveys real property to a limited liability company is subject to the documentary stamp tax at section 201.02(1), Florida Statutes, (2000), when the tax is imposed on deeds to real property, the deed at issue transfers complete title to the real property and the limited liability company is, under section 608.701, Florida Statutes, (2000), an entity separate from the limited partnership from which it received the property?

STATEMENT OF THE CASE AND FACTS

The Court accepted this case upon the exercise of its discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). The decision reached by the Florida Third District Court of Appeal in the case at bar (Record on Appeal (ROA), pp. 174-186) expressly and directly conflicts with the decision reached by the Florida Second District Court of Appeal in *Kuro, Inc. v. Florida Department of Revenue*, 713 So. 2d 1021 (Fla. 2nd DCA 1998).

The Third District Court of Appeal affirmed, ROA, p. 175, the trial court's order granting summary judgment in favor of Respondent, Florida Department of Revenue (DOR), ROA, p. 173.

DOR rejects Petitioner's statement of facts - they contain legal conclusions. The Third District disposed of the case on the following facts. Reference to the diagram, ROA p.

176,

assists understanding of the complicated transfers involving the real property.

1. On February 24, 2000:

a. Crescent Real Estate Equities, Limited Partnership (Crescent) owned the real property at issue. (ROA, p. 175.)

b. Crescent owned CRE Management IX, LLC (CRE). (ROA, p. 175, n.2)

c. Crescent formed and owned Petitioner, Crescent Miami Center, LLC (Miami Center). (ROA, p. 175.)

d. Crescent transferred 99.9 percent of its interest in Miami Center to Crescent Real Estate Funding, IX, LP (Crescent Funding). (ROA, p. 175.)

e. Crescent transferred 0.1 percent of its interest in Miami Center to CRE. (ROA, p. 175.)

f. CRE transferred its 0.1 percent interest in Miami Center to Crescent Funding. (ROA, p. 175.)

g. Crescent Funding and Crescent were, respectively, the general and limited partners in CRE. (ROA, p. 175, n.1.)

2. Crescent transferred the real property to Miami Center on February 25, 2000. (ROA, p. 175.)

3. The deed whereby Crescent conveyed the property to

Miami Center recites Miami Center paid $10.00 “and other good and valuable consideration” for the property. (ROA, p. 175.)

4. The property was transferred to separate the property from Miami Center’s other assets to facilitate unsecured financing. (ROA, p. 175.)

5. Miami Center paid $1,212,750 in documentary stamp tax upon its recording of the deed: $693,000 state stamp tax pursuant to section 201.02(1), Florida Statutes, and $519,750 Dade County surtax pursuant to section 201.031(1), Florida Statutes. (ROA pp. 175-176.)

6. Miami Center applied for a refund of the documentary stamp tax and surtax. (ROA p. 176.)

7. DOR denied Miami Center’s applications for refund. (ROA p. 176.)

8. Petitioner filed suit in the Eleventh Circuit for Dade County, Florida, to challenge the refund denial. (ROA p. 176)

9. The parties moved for summary judgment. (ROA p. 176.)

10. The trial court granted final summary judgment in Respondent’s favor. (ROA p. 173.)

11. Petitioner appealed to the Third District Court of Appeal, (ROA p. 173). The Third District affirmed the trial

court’s order, (ROA p. 186).

12. The Florida Supreme Court accepted the case by exercising its discretionary jurisdiction on March 25, 2004.

SUMMARY OF ARGUMENT

Deeds that convey real property are subject to a documentary stamp tax. §201.02(1), Fla. Stat., (2000). The tax is calculated against the consideration paid for the real property. Purchaser and consideration form an indivisible unit - there is not one without the other.

Miami Center purchased the real property at issue. Miami Center paid consideration in the form of increasing Crescent Funding's equity interest and by accepting the risk inherent in property ownership.

Section 201.02(1), Florida Statutes, (1989), was amended to expand the definition of "consideration." The expanded definition prevented avoidance of the tax engendered by the perspective from which the value of consideration would be determined. Former section 201.02(1), Florida Statutes, and the case law thereunder, focused on the value of consideration with respect to the money or property the purchaser transferred to the seller. When that value was not reasonably determinable, the value of the consideration was not reasonably determinable, hence the tax could not be computed.

The amendment to section 201.02(1), Florida Statutes, allows the amount of the consideration the purchaser pays to be measured with respect to the fair market value of the

property deeded when the consideration is not money. Locating the consideration locates the purchaser. The law respects the separate identities of legal entities; a limited partnership's ownership of a limited liability company does not insulate their transactions from tax consequences.

Exemptions from tax are construed strictly against the taxpayer. Chapter 201, Florida Statutes, (2000), sets forth four exemptions. None of the exemptions pertains to the deeds between related parties.

Crescent did not make a gift of the property to Miami Center. The property conveyed was sufficiently valuable to engender gift tax consequences had a gift been made. A gift under these circumstances is a legal impossibility.

The Third District Court of Appeal correctly concluded that "the transfer of real property from a parent company to a newly created subsidiary limited liability company owned by the general limited partner of the parent company, is subject to Florida's documentary stamp tax statute, Section 210.02(1), Florida Statutes (2000)." ROA, p. 175. The decision below is consistent with that reached in *Muben-Lamar, L. P. v. Department of Revenue*, 763 So. 2d 1209 (Fla. 1st DCA 2000).

The decision in *Kuro, Inc. v. Department of Revenue*, 713 So. 2d 1021 (Fla. 2nd DCA 1998), overturning the application of

documentary stamp tax, is wrong. The court wrongly minimized the legal import of the conveyance and misapplied concepts that pertain to exclusively to trusts - there is no division of legal and equitable interests outside of a trust. The court in *Kuro* created a tax exemption. The decision in *Kuro* warrants reversal.

STANDARD OF REVIEW ON APPEAL

This case devolves upon the interpretation of section 201.02(1), Florida Statutes, (2000). "[J]udicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review." *Racetrac Petroleum, Inc. v. Delco Oil, Inc.,* 721 So. 2d 376, 378 (Fla. 5th DCA 1998), citing *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 670 (Fla. 1993), aff'd in part, rev'd in part on other grounds, 512 U.S. 753 (1994). The standard of review in this matter is de novo.

ARGUMENT

THE DEED WHEREBY A LIMITED PARTNERSHIP CONVEYS REAL PROPERTY TO A LIMITED LIABILITY COMPANY, A SEPARATE LEGAL ENTITY, IS SUBJECT TO THE DOCUMENTARY STAMP TAX

A. Deeds Transferring Interests in Real Property Are Subject to Florida Documentary Stamp Tax

Florida taxes deeds transferring interests in real property. §201.02(1), Fla. Stat. (2000). The tax is imposed

on the document itself; liability for the tax "is to be solely determined by the form and face of the instrument and not by proof of extrinsic facts." *State Department of Revenue v. McCoy Motel, Inc.*, 302 So. 2d 440, 442 (Fla. 1st DCA 1974). The Third District, straightforwardly "applying the plain language of Section 201.02(1) to the undisputed facts and the face of the deed," correctly concluded that the deed whereby the grantor, Crescent, transferred real property to the grantee, Miami Center, was subject to Florida documentary stamp tax. (ROA, p. 186.)

Petitioner and Amicus seek to avoid the tax because, according to Petitioner, the tax "would cause an unconscionable burden upon the business community," Initial Brief, p. 15, and, according to Amicus, subject the real estate development industry to a "significant" tax burden, Amicus Brief, p. 2. In short, neither wants to pay the tax - much like most people who, given the choice, would rather not pay sales or federal income tax.

But "taxes," observed Justice Holmes, "are what we pay for civilized society." *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100, 48 S. Ct. 100, 105 (1927) (Holmes, J., dissenting). Petitioner and Amicus no doubt demand as their right the

benefits of civilized society - but they refuse the legally imposed responsibility for its maintenance.

Neither Petitioner nor Amicus are constrained to create tiered organizations to which property must be transferred. But if they do, they are responsible for the legal consequences inuring: Florida taxes deeds transferring interests in real property.

The Third District reached the correct conclusion. The means Petitioner and Amicus use to challenge that conclusion, separating purchaser from consideration, misusing the adjective "mere" and contriving a "book transaction," are refuted below.

B. "Consideration" and "Purchaser" Comprise a Legal Unity

In *Florida Department of Revenue v. De Maria,* 338 So. 2d 838 (Fla. 1976), the Florida Supreme Court observed the term "purchaser" was not defined in Chapter 201, Florida Statutes. Accordingly, the Court adopted the definition in Webster's New Twentieth Century Dictionary: "'purchaser:' one who obtains or acquires property by paying an equivalent in money or other exchange in value." *De Maria,* 338 So. 2d at 840. The Court concluded: "Since ... there was 'reasonably determinable consideration' flowing from the taxpayer to the corporation

for the conveyance of the real property ... it is inescapable that the taxpayer is 'one who obtains or acquires property by paying an *equivalent* in money or other exchange of value." *Id*. (Emphasis in original.) Accordingly, one who pays is a purchaser; that which is paid, in money or money's equivalent, is consideration. The consideration-purchaser dichotomy is an illusion: the one begets the other.

The validity of the point is proved by the absurdity of the converse: A purchaser pays consideration for nothing. That which is paid for something is not consideration. The absurdity of these propositions nullifies Petitioner's and Amicus's suggested statutory ambiguity. Initial Brief, p. 13, and Amicus Brief, p. 11, n.4.

"'Ambiguity suggests that reasonable persons can find different meanings in the same language.'" *State v. Huggins*, 802 So. 2d 276, 277 (Fla. 2001). A reasonable person is not likely to suggest that he or she would pay consideration for nothing in return. A reasonable person is not likely to suggest that what he or she paid for something is not consideration should consideration be subject to controversy.

The suggestion of ambiguity is nothing more than the want of redundancy: "Congress is 'not required to define each and every word in a piece of legislation in order to express

clearly its will'[;] a statute is not ambiguous merely because it contains a term without a statutory definition." *United States v. Sepulveda*, 115 F.3d 882, 886, n.9 (11th Cir. 1997).

The definition of consideration obviates a definition of purchaser. Consideration and purchaser are joined necessarily in a commercial transaction. The consideration-purchaser unity is reflected in the 1990 amendment to section 201.02(1), Florida Statutes.

C. The Amendment to Section 201.02(1), Florida Statutes, (1989), Authorized Valuing Consideration with Reference to the Property Deeded Rather than the Property Paid Therefor - the Historical Referent that Engendered Unintended Tax Avoidance

Section 201.02(1), Florida Statutes, changed significantly in 1990. The change pertained to the consideration that comprised the tax base. The 1989 statute did not define consideration. The want of a definition of consideration had been outstanding since the inception of the documentary stamp tax in 1931. See Ch. 15787, Laws of Fla. (1931). The statute has always included a purchaser as the person who pays consideration. The want of a definition of consideration supported the decision in *DeVore v. Gay*, 39 So. 2d 796 (Fla. 1949) where the Court observed: "When taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to the actual monetary considerations or to considerations which have a *reasonably determinable pecuniary value*." *Id.* at 797 (emphasis added).

Similarly, in *Palmer-Florida Corporation v. Green*, 88 So. 2d 493 (Fla. 1956), the Court observed: "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." *Id.* at 496 (emphasis added).

Under the statutory scheme prevailing in 1989, Florida Administrative Code Rule 12B-4.014(17) stated: "Where unencumbered real property is conveyed to a corporation by a shareholder as a contribution to capital, and is not in exchange for valuable consideration, the conveyance is not taxable. (Citations omitted.)"

The rule reflected the legislation and the outstanding case law - the documentary stamp tax had to be calculated on a reasonably determinable consideration. The reasonable determination was necessarily based on money or a measurable quid pro quo - a manifestation of intent to bargain. When the value of the consideration was not reasonably determinable, the amount of tax could be computed.

The legislation and case law had not kept current with sophisticated tax planning techniques whereby separate but related legal entities were created to hide consideration. Hidden consideration hid the purchaser who, traditionally, was a third party with whom the seller bargained. These techniques not only successfully removed documents from the statute's reach but created the illusion of dual requirements - consideration and purchaser.

Chapter 90-132, section 7, at 451, Laws of Florida, amended section 201.02(1), Florida Statutes, (1989), to address the problem engendered by consideration that was not reasonably determinable, thus: "If the consideration paid or given in exchange for real property ... includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property." The tax base, consideration, is now reasonably determined by reference to the property deeded, not the property paid.

The presumption addresses the value of the consideration - not whether consideration was paid nor whether the party receiving the property purchased that property. Further, valuing consideration by reference to the property deeded rather than the property exchanged therefor contradicts Petitioner's unspoken argument that all taxable deeds emanate from the bargaining process and reflect deliberative intent.

Taxpayers cannot assert nothing was given in exchange for real property when a demonstrable gift was not given and the value of an interest in a separate legal entity increased as a result of a transfer of property - the latter is exchangeable value. One would pay more money for a membership interest in Miami Center as a result of Miami Center's ownership of the real property than one would pay were Miami Center not to own

the real property. Similarly, one would pay more money for an interest in Crescent Funding as a result of Crescent Funding's owning Miami Center than one would pay were Miami Center not to own the property. Thus, in accordance with Florida Administrative Code Rule 12B-4.012(2)(b), "property other than money" includes "everything that has an exchangeable value or which goes to make up wealth or estate."

The statute's amendment prevented facile tax avoidance by imposing a presumption that not only valued consideration but shifted the perspective from which that value would be determined. Accordingly, DOR, pursuant to section 201.11(1), Florida Statutes, (1989), amended[1] Florida Administrative Code Rule 12B-4.013(7), (1991):

> Corporation: 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. There is a presumption that the consideration is equal to the fair market value of the real property interest transferred.

The presumption specified in section 201.02(1), Florida Statutes, (2000), addresses the consideration's value, not its existence in a quid pro quo transaction. Here, the value of the consideration is the deeded property's fair market value

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[1]See O'Connell, *Documentary Stamp Taxes - Impact of Statutory and Florida Administrative Code Amendments*, The Florida Bar Journal, vol. LXV, No. 6, 98 (June, 1991).

because, without rebuttal, it is by that amount that Crescent's equity interest in Crescent Funding increased and Crescent Funding's equity interest in Miami Center increased. These increases are attributable to Crescent's deeding the property to Miami Center. And, as Petitioner notes, that deed was a contribution to capital. See Initial Brief pp. 7 and 12. See, also, Amicus Brief, p. 1.

D. The Consideration Exchanged in the Transaction Is Revealed in the Change in the Parties' Respective Property Rights and in the Shift of Risk with Respect to the Real Property Transferred

1. The Mere Change in Property Rights

Petitioner describes the conveyance as a "mere change in ownership [that] did not result in any other party acquiring an interest in the [p]roperty." Initial Brief p. 8.

DOR agrees the transaction at bar was a mere change in ownership. DOR's agreement, however, is premised on the correct use of the adjective "mere" and a rejection of Petitioner's and Amicus's assumption that "mere" means insignificant or trivial.

The adjective "mere," has a number of definitions. "Mere," used accurately, does not trivialize the noun it modifies.[2] On the contrary - "mere" means pure and absolute -

[2]See, further, the Oxford English Dictionary, concerning the adjective "mere:" "now often misunderstood as a term of

nothing less than. Merriam-Webster's Collegiate Dictionary, 10th ed. 1998, p. 727.

Petitioner's assertion that there was no substantive change in ownership defies the deed. The deed conveyed the real property "in fee simple forever." ROA p. 54. "A title in fee simple is the highest quality of estate in land known to law." *State v. Jacksonville Expressway Authority*, 139 So. 2d 135, 138 (Fla. 1962). Fee simple title "implies absolute dominion over the land." 22 Fla. Jur. 2d Estates, Powers and Restraints on Alienation §8 (1998). There could be no greater substantive change in ownership - on February 24, 2000, Crescent owned the real property. On February 25, 2000, Miami Center owned the real property; a subsequent deed of the property would be executed by Miami Center, not Crescent nor Crescent Funding. On February 25, 2000, Crescent had no interest in the property to convey. The gravity of these facts and legal consequences obtaining were not lost on the Third District. ROA pp. 182 - 183.

There was indeed a mere change in the form of ownership -

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disparagement, the adj. being apprehended as in sense 5;" to wit: "Having no greater, extent, range, value, power or importance than the designation implies; that is barely or only what it is said to be."

ownership changed absolutely. If the Court is to conclude there was no substantive change in the ownership of the real property the Court must ignore both the law of estate transfer and the separate nature of the legal entities involved.

Consideration need not be money; it exists where there is a benefit to the promisor or detriment to the promisee. *Dorman v. Publix-Saenger-Sparks Theatres, Inc.*, 184 So. 886, 889 (Fla. 1938); *Mangus v. Present*, 135 So. 2d 417, 419 (Fla. 1961).

The consideration supporting the change in ownership of the real property is reflected in the change in property interests that followed from the transfer. On February 24, 2000, Crescent owned three things: (1) real property; (2) its interest in
Crescent Funding valued at $X and (3) its interest in Miami Center valued at $Y.

On February, 25, 2000, following Crescent's transfers of its interest in Miami Center and its deeding the real property to Miami Center, Crescent owned one thing: its interest in Crescent Funding which interest was valued at [($X +$Y) + the fair market value of the real property)]. This follows necessarily as a result of the property's transfer being a contribution to the Miami Center's capital, Initial Brief, p.

7, Amicus Brief p. 1, and Crescent's ownership of Crescent Funding which, in turn, owned Miami Center. See, above, facts 1.a through 1.g.

Since the transfer of the real property was a contribution to capital, the value of the real property was reflected as owner's equity in Miami Center's books. The owner's equity account in Crescent Funding, owned by Crescent, was increased by an equal amount.

Crescent had a claim to the assets owned by Crescent Funding on liquidation. Crescent Funding, in turn, had a claim to the assets owned by Miami Center on liquidation. Crescent no longer owned the asset itself. This increased value in owner's equity is the "other good and valuable consideration" that was paid for the property - and that consideration provides the base for the calculation of the tax.

Crescent's conveyance to Miami Center was not a something for nothing transaction. Were Crescent to sell its interest in Crescent Funding or were Crescent Funding to sell Miami Center the selling price of either interest would be higher as a result of Miami Center's owning the property than it would be had Crescent not conveyed the property.

2. The Shift of Risk Between Separate Legal Entities

The consideration that Miami Center paid for that property is further reflected in the shifting of risk with respect to the liability that might arise with respect to the real property. Miami Center paid for the property by accepting the property in return for its interposing itself between its owner, Crescent Funding, its owner's owner, Crescent, and the world.

Insofar as closely held corporations are legal entities distinct from their stockholders, *Miner v. Bay Bank & Trust Company*, 185 Bankr. 362, 366 (N.D. Fla. 1995), Crescent and Miami Center entered into the transaction for a business purpose - the facilitation of "future unsecured financing." Initial Brief, p. 21.

Miami Center presented to lenders a financial profile more attractive than that presented by Crescent. The more attractive financial profile that Miami Center presented with respect to the property has an economic value. Exploitation of the value

necessitated transferring the property. The cost of that transfer is the documentary stamp tax.

Further, the transfer of the property shielded the

balance of Crescent's assets from risk with respect to the property by virtue of Miami Center's owning the property. The raising of the corporate shield is also good and valuable consideration.

"The law in Florida is that corporations are legal entities separate and distinct from the persons comprising them. Absent fraud, the corporate veil is not pierced." *111 Properties, Inc. v. Lassiter*, 605 So. 2d 123, 125 (Fla. 4th DCA 1992). A limited liability company is an entity separate from its members. §§608.404 and 608.4227, Fla. Stat. (2000). The law that pertains to piercing the corporate veil applies to limited liability companies. §608.701, Fla. Stat. (2000). The fact that one individual owns and controls a corporation "does not lead inevitably to the conclusion that the corporate entity is a fraud or necessarily the alter ego of its stockholder[]." *Hilton Oil Transport v. Oil Transport Co., S.A.*, 659 So. 2d 1141, 1152 (Fla. 3rd DCA 1995). "[E]ven if a corporation is merely an alter ego of its dominant shareholder or shareholders, the corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained." *Lipsig v. Ramlawi*, 760 So. 2d 170, 187 (Fla. 3rd DCA 2000).

Unless Miami Center was organized to mislead or perpetrate fraud against its creditors, it insulates its owner, Crescent Funding, from liability. Similarly, unless Crescent Funding was organized to mislead or perpetrate fraud against its creditors, it insulates its owner, Crescent, from liability. See *Kanov v. Bitz*, 660 So. 2d 1165, 1166 (Fla. 3rd DCA 1995) and *Seminole Boatyard, Inc. v. Christoph*, 715 So. 2d 987, 990 (Fla. 4th DCA 1998).

In *Dean v. Pinder*, 538 A.2d 1184 (Md. 1988), the Maryland Supreme Court recognized the corporate shield as valuable consideration for documentary stamp purposes: "[A] corporation is a distinct legal entity, separate and apart from its stockholders." *Id.* at 1189. "Significantly, the Deans obtained the benefit of limited liability for corporate obligations with respect to the properties." *Id.* at 1190.[3]

E. A Limited Partnership's Ownership of a Second Limited Partnership which Owns a Limited

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[3]The *Pinder* decision is discussed in greater detail below at H.7, pp. 43 -44. See, further, *EWH 1979 Development Company, L.P. v. State Department of Treasury, Division of Taxation*, 10 N.J. Tax 321, 325 (1989): "Taxpayers' argument that the transfers are exempt from realty transfer fees is misplaced because there has been a transfer of ownership to the BCA partnership, a separate legal entity."

Liability Company Does Not Insulate from Tax Consequences the Commercial Intercourse between the First Limited Partnership and the Limited Liability Company

The law's recognizing the separateness of artificial entities results in the law's imposing on related corporations the onus of dealing at arm's length for tax purposes. Accordingly, a corporation's controlling another artificial entity does not dissolve their separate business identities for purposes of determining their respective responsibilities under the revenue laws.

Transactions between individuals and artificial entities are deemed purposeful and are respected as such. In *Moline Properties, Inc. v. Comissioner of Internal Revenue*, 319 U.S. 436, 63 S. Ct. 1132 (1943), an individual created a corporation to hold real estate which, when sold, generated taxable gain. The individual argued that he, not the corporation, realized the gain and that he, not the corporation, should report the gain on his income tax return.

The Court rejected the individual's argument: The individual created the corporation for his "advantage and had a special function from its inception." *Moline Properties*, 319 U.S. at 439, 63 S. Ct. at 1134.

> The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to

gain an advantage under the laws of the state of incorporation or to avoid or to comply with the demands of creditors, or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity ... the choice of the

> advantages of incorporation to do business, it was held, required the acceptance of the tax disadvantages.

Moline Properties, 319 U.S. at 439, 63 S. Ct. at 1134.

Similarly, in *Marks v. Green*, 122 So. 2d 491(Fla. 1st DCA 1960), an individual was the sole shareholder of a corporation which owned intangible personal property. The corporation paid intangible personal property tax on the value of the intangible personal property it held. Mr. Marks, in turn, was required to pay intangible personal property tax on the value of his stock in his corporation - the value of which equaled the value of the intangible personal property held by the corporation. *Id.* at 492.

The court refused to disregard the entities' separate identities: "for purposes of taxation, the identity of the corporate entity must be kept separate and distinct from the identity of its stockholders, unless otherwise provided by statute." *Id.* at 493.

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

Id. at 493-494.

In *Regal Kitchens, Inc. v. Florida Department of Revenue*, 641 So. 2d 158 (Fla. 1st DCA 1994), four individuals owned a corporation and a partnership. The corporation deeded real property to the partnership; the partnership leased the property back to the corporation. The corporation sought to avoid sales tax on its lease payments because the corporation was the partnership's alter ego. *Regal Kitchens*, 641 So. 2d at 163. The court observed the taxpayer's argument put the taxpayer "in the unusual position of a corporation attempting to pierce its own corporate veil." *Id.* The court rejected the taxpayer's argument:

> Those who seek the protection afforded by incorporation must also accept the burdens. Individuals may incorporate to shield themselves from personal liability or for many other reasons, but they may not then disavow the existence of the corporation for the purpose of obtaining a tax advantage. This is not a case in which nominal parties to a business venture are "paying rent to themselves" as Regal argues. On the contrary, this is a case in which a corporation is paying rent to a partnership.

Id. at 163.

Lastly, section 482, title 26 United States Code, authorizes the Secretary of the Treasury to apportion income among related businesses to prevent tax evasion and to clearly

reflect income.

See *Northwestern National Bank of Minneapolis v. United States*, 556 F.2d 889, 891-892 (8th Cir. 1977):

> The purpose behind the dividend distribution was to obtain a tax advantage not available in an arm's length transaction. The transaction was made possible only on the basis of [the intercorporate relationship and control] and the end result was a distortion of the respective net incomes of both parent and subsidiary corporations.

The arm's length standard reviews transactions to determine whether the economics of transactions between controlled entities are similar to those between unrelated, independent parties.

United States Steel Corporation v. Commissioner of Internal Revenue, 617 F. 2d 942, 947 (2nd Cir. 1980). The benefit of separate legal identities carries the attendant cost of separate tax responsibility.

F. Crescent Did Not Make a Gift of the Real Property It Deeded to Miami Center

Petitioner and Amicus assert that Miami Center gave nothing in return for the property. See Petitioner Brief p. 12 and Amicus Brief p. 7. Since Petitioner and Amicus deny the existence of a purchaser they necessarily deny an exchange and therefore tacitly assert a gift.

A gift proceeds from a "'detached and disinterested

generosity' ... 'out of affection, respect, admiration, charity or like impulses,'" (citations omitted), *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 285, 80 S. Ct. 1190, 1197
(1960). See also *Cook v. United States*, 897 F. Supp. 1403, 1407 (M.D. Fla. 1995).

"If the payment proceeds primarily from ... the incentive of anticipated benefit of an economic nature, it is not a gift." *Duberstein*, 363 U.S. at 285, 80 S. Ct. at 1196-1197.

There are no facts indicating that Miami Center received the property as a result of Crescent's affection, respect and admiration. The transaction was commercial, executed for economic benefit: "The purpose for the transaction was to separate the property from the rest of Crescent assets in order to facilitate future unsecured financing. Initial Brief, p. 21.

"[Florida Home Builders Association] members routinely transfer unencumbered real property as a capital contribution of capital to subsidiaries." Amicus, p. 1.

When one gives a gift one's net worth is diminished because one unilaterally parts with property. See *Wheeler v. United States*, 116 F. 3d 749, 761-762 (5th Cir. 1997). Crescent's net worth did not change as a result of the transfer because Crescent transferred the property as a contribution to capital. Different property interests were exchanged quid pro quo.

The United States imposes a tax on the transfer of property by gift. 26 U.S.C. §2501(a)(1) (2000). Real property may be transferred by gift. 26 U.S.C. §2511(a)

(2000). The tax is imposed on the value of the property on the date of the gift. 26 U.S.C. §2512(a) (2000). The first $10,000 of a gift is excluded from tax. 26 U.S.C. §2503(b)(1) (2000).

The deeded property had a value of approximately $115,500,000.[4] The $10,000 exclusion would not exhaust the tax base; Crescent, accordingly, conveyed property theoretically subject to federal gift tax. However, and most importantly, there could be no gift tax consequences in this case because the gift tax applies only to human beings - it does not apply to transfers between artificial entities, thus:

> The following are examples of transactions resulting in taxable gifts and in each case it is assumed that the transfers were not made for an adequate and full consideration in money or money's worth:
>
> (A) ... A transfer of property by B to a corporation generally represents gifts by B to the other individual shareholders of the corporation to the extent of their proportionate interests in the corporation. However, there may be an exception to this rule, such as a transfer made by an individual to a charitable, public, political or similar organization as a single entity, depending on the facts and circumstances in the particular case.

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[4]The sum is calculated by working backwards from the amount of tax. $693,000 (state tax) x 100 = $69,300,000; $69,300,000 ÷ $.60 = $115,500,000. See §201.0205, Fla. Stat., (2000), for the special $.006 state tax rate applicable in Dade County, as opposed to the typical .007 state tax rate, §201.02(1), Fla. Stat., (2000).

26 C.F.R. §25.2511(h)(1).[5]

In *Tilton v. Commissioner of Internal Revenue*, 88 T.C. 590 (1987), the owners of a corporation transferred all the stock in the corporation to their sons. The former owners then transferred 3599 acres in Putnam County, Florida, to the corporation. The corporation returned no money nor property for the real property. The Tax Court held the sons responsible for gift tax on the value of the real property transferred to the corporation. *Tilton*, 88 T.C. at 599.

Here, Crescent owns Crescent Funding which owns Miami Center. If Petitioner's and Amicus's theory of the case is accepted, then Crescent gave itself a gift of its own property - Petitioner says as much: "CMC [Miami Center] did not give any money or other property in exchange for the real property." Initial Brief, p. 7. The logic supporting the proposition is circular.

The facts are clear: Miami Center neither paid money nor transferred real or tangible property for the real property it received from Crescent. Both the Petitioner and Amicus

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[5]None of the exceptions in this case can apply. There are no facts to support the contention that Miami Center is a charitable, public, political or similar organization. (A public corporation functions like a political subdivision or state agency. §§11.45(1)(i) and (j), and 22.03(5), Fla. Stat., (2000).)

insist, however, that consideration be money, stock or debt relief.

Section 201.02(1), Florida Statutes, (2000), does not limit consideration to money, stock or debt relief; consideration includes other properties; it includes intangible property with exchangeable value - the "other good and valuable consideration" recited on the deeds.

Despite Miami Center's having paid no cash for the real property Miami Center paid for the realty with property other than money, section 201.02(1), which property is the equivalent of money, *De Maria*, 338 So. 2d at 840 - to wit: the value of limited liability and the increase in its value. To contend otherwise necessitates concluding that Miami Center received the property as a gift - a proposition that has no legal support.

The points discussed above, the purchaser-consideration unity and the separate tax responsibilities inuring to separate entities converge, for documentary stamp tax purposes, in *Muben-Lamar,* 763 So. 2d 1209. The points discussed above diverge in *Kuro,* 713 So. 2d 1021.

The Third District found the Petitioner's argument "superficially convincing," ROA, p. 181, but, penetrating the

hyperbole, fathoming the law, determined that *Muben-Lamar* was decided correctly and *Kuro* was decided incorrectly.

G. The First District in *Muben-Lamar* Correctly Determined that Tax Was Due in a Transaction Similar to the Case at Bar

The First District in *Muben-Lamar, L.P. v. Department of Revenue*, 763 So. 2d 1209, confronted a transaction similar to that at Bar. A limited partnership and an insurance company transferred their interests in real property to Muben-Lamar, LP. The taxpayer, Muben-Lamar, LP, asserted it was not a purchaser within section 201.02, Florida Statutes, and that it paid no consideration for the real property. *Id.* at 1210.

The court rejected the taxpayer's argument recognizing that a partnership is "an entity separate and distinct from its partners." *Muben-Lamar,* 763 So. 2d at 1210, citation to partnership statute omitted. The court held: "[Muben-Lamar, LP] bought the real property by issuing valuable partnership interests in consideration for land. This case involved a straightforward exchange of land for personalty." *Id.*

Here land was exchanged for personalty that became more valuable as a direct result of the exchange. The exchange was not additional personalty - it was value added to the existing personalty - an addition that would not have been made had

there

been no transfer. The consideration follows as the natural consequence of a commercial transaction; it need not reflect intent or deliberative bargaining.

That Miami Center issued no new membership interests does not extinguish the economic benefit the transfer engendered. Whether the ownership interest is reflected by 10 units or 1000 units is irrelevant when one person owns all the units. What is relevant is the value of those shares before and after the transfer.

Before the transfer Miami Center was probably worth $0 since it was formed simply to hold the property for unsecured financing. Following the transfer Miami Center was worth at least the fair market value of the property it received in the course of the transfer. The fair market value presumption in section 201.02(1), Florida Statutes, (2000), applies, therefore, absent some other showing of consideration.

The increase in the value of membership interests in Miami Center is an exchangeable value. A person is unlikely to pay $1 for assets worth $0. A person is presumed to be willing to pay the fair market value of assets worth a sum greater than $0.

Both Petitioner and Amicus attempt to distinguish *Muben-*

Lamar because *Muben-Lamar* involved a third party and a promissory note. Initial Brief, p. 19; Amicus Brief, p. 7, n. 2.

Lamar-Eastern, L.P., one of the limited partners in Muben-Lamar, L.P., contributed a ten-year promissory note valued at $280,160. *Muben-Lamar*, 763 So. 2d at 1210. The real property contributed to the enterprise was valued at $22,890,391. *Id.*

The tax at issue was $207,561.15. The tax was assessed against the real property's fair market value - not the value of the note.[6] If the note were the legally significant fact then the tax would be zero since the note was provided for an interest in a partnership rather than an interest in real property. This result further supports the conclusion that the interest in the artificial entity is separate and distinct from the interest the
real property - despite both Petitioner and Amicus asserting they
are one and the same. Petitioner Brief, p. 8; Amicus Brief, p. 7.

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[6]This fact is not readily apparent from the court's decision at 763 So. 2d 1209. However, no calculation supports documentary stamp tax of $207,561.15 against the promissory note of $280,160.

H. The Error in *Kuro* Rests on Two Mistakes: the Court Minimized the Magnitude of the Transfer and Applied Principles that Pertain to Trusts and Securities

1. Overview of the *Kuro* Decision

Petitioner and Amicus assert the matter is disposed of by *Kuro,* 713 So. 2d 1021. A father and son purchased condominium units, formed a corporation, and then transferred title to the condominium units to the corporation "to avoid exposure to potential liability arising from the management of the eight rental units." *Id.* at 1022.

The court held that the corporation was not a purchaser; it paid no consideration for the property; "[t]hough the transactions effected a change in the legal ownership of the property, the beneficial ownership of the land remained unchanged. These were ... mere book transactions and ... were not sales to a purchaser, as contemplated by section 201.02(1)." *Id.* at 1021.

2. The Court in *Kuro* Wrongly Concluded the Transfer Was Immaterial

The term "book transaction," evaluated objectively, describes nothing. The "books" are where a business records its economic activity. Economic activity that is not recorded in the business' books is one of two things: fraud or immaterial. The conveyance under review and its status as a

contribution to Miami Center's capital was neither fraudulent nor immaterial.

Immateriality is the operative principle when the adjective "mere" is wrongly appended to "book transaction" to minimize the effect of a transaction or event. The magnitude of the deed at issue precludes its being immaterial.

"Materiality judgments are primarily quantitative in nature. They pose the question: Is this item large enough for users of the information to be influenced by it?" Financial Accounting Standards Board Original Pronouncements, as of June 1, 2000, vol. III, Concept 2, para. 123, p. 1046. "[T]he relative rather than the absolute size of a judgment item determines whether it should be considered material in a given situation." *Id.* at paragraph 129, p. 1047.

As Petitioner asserts - the entire point of the transfer was to "facilitate unsecured financing." Initial Brief, p. 21. If a legal entity is created to hold one asset in order that that asset may be used to obtain financing, then the economic event pertaining to that asset, its original transfer to the entity, cannot be immaterial and its importance cannot be minimized. The court in *Kuro* believed a false premise - the court in *Kuro* tacitly believed the transfer of the property to a corporation was nothing more

than a ministerial function

performed to satisfy accounting requirements otherwise without legal consequence.

There was nothing minimal or ministerial about the transfer and its effects on the books of the interested parties: Crescent, Crescent Funding and Miami Center. The Third DCA correctly concluded that the transfer of the property transformed a shell into a viable entity. ROA, p. 184, n.6.

3. To Describe a Transfer of Real Property as a "Book Transaction" Is to Misapply Principles of the "Book-Entry System" - Principles that Pertain to Securities

The term "book transaction," used to describe a legally inconsequential accounting entry, misapplies the term "book-entry" which is used in the "book-entry system." The misapplication functions on two levels: (1) the book entry system applies to securities rather than real property, and (2) the book entry system is legally consequential - it operates within Article 8 of the Uniform Commercial Code, Chapter 678, Florida Statutes, "Investment Securities," and throughout the federal regulations pertaining to the sale and

issue of marketable federal securities.[7]

"[O]ne of the reasons for the evolution of book-entry systems is to eliminate the risk of loss or destruction of physical certificates." §678.5041, Fla. Stat. Ann., (2003), Comment 4. How the court in *Kuro* misapplied the book entry system is clear when the parameters of the system are identified.

> This section[8] expresses one of the core elements of the relationships[9] for which the Part 5 rules were designed, to wit, that a securities intermediary[10] undertakes to

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[7]See, for example, Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds (Department of the Treasury Circular, Public Debt Series No. 1-93), 31 C.F.R. Chapter II, Part 356, and Regulations Governing Book-Entry Treasury Bonds, Notes and Bills (Department of the Treasury Circular, Public Debt Series No. 2-86), 31 C.F.R. Chapter II, Part 357.

[8]§678.5041, Fla. Stat., (2003), "Duty of securities intermediary to maintain financial asset."

[9]The possible "chain of custodial relationships" including the Federal Reserve, depository institutions, dealers, brokers, institutional investors and individuals; "there frequently are multiple levels between an issuer of the security and the ultimate holder of the beneficial interest in that security." Proposed Rules, Department of the Treasury, Fiscal Service, Regulations Governing Book-Entry Treasury Bonds, Notes and Bills, 61 Fed. Reg. 8420, 8421 (March 4, 1996).

[10]For example, a "clearing corporation," §678.1021(1)(n), Fla. Stat., (2003), which includes a "clearing agency" under federal securities law, §678.1021(1)(e)1, Fla. Stat., (2003). A clearing agency is, generally, "a person who acts as an

> hold financial assets corresponding to the security entitlements[11] of its entitlement holders[12]. ... This section recognizes the reality that as the securities business is conducted today, it is not possible to identify particular securities as belonging to customers as distinguished from other particular securities that are the firm's own property. Securities firms typically keep all securities in fungible form, and may maintain their inventory of a particular security in various locations and forms, including physical securities held in vaults or in transit to transfer agents, and book entry positions at one or more clearing corporations.

§678.5041, Fla. Stat. Ann., (2003), Comment 1.

The court in *Kuro* used the term "book transaction" as a short hand description of the situation where one person holds property for another. This is the fundamental premise on which both Petitioner and Amicus rely.

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intermediary in making payments or deliveries ... in connection with transactions in securities." 15 U.S.C. §78c(a)(23)(A).

[11]"[T]he rights and property interest of an entitlement holder with respect to a financial asset specified in part V [Security Entitlements]." §678.1021(1)(q), Fla. Stat., (2003).

[12]"[A] person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary." §678.1021(1)(h), Fla. Stat., (2003).

Neither Kuro, Inc. nor Crescent Miami Center, LLC, held real property for someone else. Each owned their respective properties in their respective right. Moreover, a paper deed was recorded in each instance. ROA pp. 8-16. "Book transaction," a misnomer for "book-entry" is an example or metaphor that has no place in transactions involving the transfer of real property.

4. Legal and Beneficial Ownership Interests Are Not Separated in the Corporate Environment - Each Refers to Stock Ownership

The distinction the court in *Kuro*, draws between legal and beneficial interests derives from trust law; its application in the corporate setting derives from the misapplication of technical trust terminology.

According to the basic accounting equation: Assets = Liabilities + Owner's Equity.[13] A simple, hypothetical balance sheet looks like this:

Assets		Liabilities and Owners' Equity	
Cash	$ 5000	Liabilities	$2000
Building	$10,000	Owners' equity	$13,000
Total Assets	$15,000	Total Liabilities and Owner's Equity	$15,000

The balance sheet shows two views of the same business. The left side, assets, shows what the business owns. The right side, liabilities and owners's equity, shows who supplied the resources and how much each group supplied. R. Meigs, Accounting, p. 46.

"A stockholder as such has no title, legal or equitable, to the corporation's property. His interest is a pro rata part of the residuum on liquidation." *Howell Turpentine Co. v. Commissioner of Internal Revenue*, 162 F. 2d 319, 322 (5th Cir. 1947).[14] "[E]quity is not an asset to the corporation, but indeed its opposite: a *claim* on assets." *Strougo v. Bassini*, 282 F. 3d 162, 175, n. 10 (2nd Cir. 2002) (emphasis in

[13]See R. Meigs, J. Williams, S. Haka and M. Bettner, Accounting - The Basis for Business Decisions,(11th ed. 1999), p. 46.

[14]Owner's equity is "the residual interest in the assets of an entity after deducting its liabilities." Financial Accounting Standards Board Original Pronouncements, as of June 1, 2000, vol. III, Concept 6, para. 49, p. 1123.

original).

"Owners' equity" is simply a compound noun, synonymous with "equitable ownership" and "equitable interest." The noun "equity" has changed to an adjective, "equitable." Changing a noun to an adjective does not change property rights.

If one has an interest in a corporation one is either a creditor or an owner. Form of ownership addresses type of title. Type of title is a trust issue - it does not arise outside the trust setting.

"[A] corporate parent has no legal or equitable interest in the property of its subsidiary. It simply owns the stock of the sub." *In re W. T. Mayfield Sons Trucking Co.*, 225 Bankr. 818, 826 (N.D. Ga. 1998). "[O]nwership of all the outstanding stock of a corporation is not the equivalent of ownership of the subsidiary's property or assets. *In re Petition of Brierly*, 145 Bankr. 151, 169 (S.D. NY 1992).

"Under Florida law, the stockholders do not hold title to property owned by the corporation. Rather, the corporation, as a legal entity, holds the title." *Miner*, 185 Bankr. at 366. A corporate shareholder retains the beneficial ownership of stock after the stock is placed in escrow. *World Time Corporation of America v. Mizrachi*, 702 So. 2d 284 (Fla. 4th DCA 1997).

In *Chanrai Investments, Inc. v. Clement*, 566 So. 2d 838 (Fla. 5th DCA 1990), the court refused to reform a deed where the real property owned by a corporation was conveyed by the corporation's sole shareholder to a second corporation when the first corporation, the owner of the real property, was not a party to the deed or agreement the action sought to be reformed. *Chanrai Investments,* 566 So. 2d at 839. The first corporation "is a legal entity and the only owner of the property sought to be reached by this reformation. The individual stockholder has neither legal nor equitable title to the property. This is not altered by the fact that a single stockholder may own all the stock of a corporation." *Id*.

In *Marks v. Green*, 122 So. 2d at 494, the Court noted that the only time a stockholder may be described as having a beneficial interest in a corporation is when the corporation may be described as a trust holding the stock for the benefit of the stockholder. Accordingly, the value of the stock a sole shareholder held in his corporation was subject to intangible personal property tax. There is no distinction between legal and beneficial ownership interests in the ownership of stock - the two are combined. A distinction between legal and equitable ownership interests contemplates

separate titles - and titles are separated only in the trust environment.

5. Legal and Beneficial Ownership Interests Are Separate in the Trust Environment

"Trust law provides that upon establishment of a trust, the legal title is held by the trustee whereas the equitable title rests with the beneficiary. ... The law is firmly established in Florida that a trust cannot exist where the legal and equitable title are vested in one individual." *In re Wells*, 259 Bankr. 776, 779 (M.D. Fla. 2001). "A trust by definition gives the beneficiary equitable title to the trust assets and allows legal title to remain with the trustee." *In re Grieves*, 250 Bankr. 405, 406 (M.D. Fla. 2000).

The trust beneficiary's equitable interest is a beneficial interest:

> [the term] [']beneficiary of a trust['] signif[ies] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary.

55A Fla. Jur. 2d <u>Trusts</u> §1 (2000).

A business trust is an unincorporated business organization where trustees manage property for persons holding "transferable certificates evidencing interests in the

trust estate." 8B Fla. Jur. 2d Business Relationships §464 (2000). Section 609.07,
Florida Statutes, (2000), characterizes the ownership interests in a business trust as "beneficial ownership."

In *Kuro* the court wrongly imposed on a corporation a concept that applied to trusts. The adjectives "equitable" and "beneficial" are interchangeable when describing a stock holder's interest which is always "equity" and is always "legal." The adjectives "equitable" and "beneficial" obtain discrete legal significance when they describe the title to the property one holds.

An equitable or beneficial title is held only by a cestue que trust. Unless a trust is involved, title to property in the corporate setting is not divided - one is either a creditor or a shareholder.

> When a legal estate and a trust estate are coextensive and both become vested in the same person, a merger of the trust estate in the legal estate takes place; but in order for the merger to take place the legal and **equitable** estates must not only be coextensive but commensurate, that is, there must be the same estate in law as in equity. The merger of an equitable with a legal estate is largely a matter of intention.

22 Fla. Jur. 2d Estates, Powers and Restraints on Alienation

§52 (1998) (emphasis added).

The equitable estate relates to a trust. Here, there was no trust nor attempt to create a trust - intent is not at issue. The *Kuro* decision gave a corporation the legal status and treatment of a non-business trust. See, for example, Florida Administrative Code Rule 12B-4.013(32).

6. The Court in *Kuro* Created an Exemption from Tax

"[E]xemptions from taxation are special favors and statutes granting such exemptions must be strictly construed." *Coppock v. Blount*, 145 So. 2d 279, 281 (Fla. 3rd DCA 1962). Tax exemptions are strictly construed against the party claiming the exemption. *Regal Kitchens,* 641 So. 2d at, citing *State Department of Revenue v. Anderson*, 403 So. 2d 397, 399 (Fla. 1981).

The Florida Legislature has not bestowed the favor Petitioner and Amicus seek. The "book transaction" exemption the court found in *Kuro* has no statutory basis.

Chapter 201, Florida Statutes, (2000), grants four exemptions: property transferred to tax exempt entities, section 201.02(6), property transferred in the course of a dissolution of marriage, section 201.02(7), obligations to pay money issued by a Florida political subdivision, section

201.24(1)and transactions involving educational facilities and sites, section 201.24(2).[15] Chapter 201, Florida Statutes, (2000) does not grant a "book transaction" exemption.

Amicus would avoid the strict construction of exemptions by shifting the focus to the statute's silence regarding transfers between related entities. Amicus Brief, p. 16. Amicus tacitly asserts that the statute must identify each transaction the statute is intended to reach. The assertion ignores the fact that Chapter 201, Florida Statutes, affirmatively imposes tax; it does not prohibit tax.

In accordance with the doctrine *inclusio unius est exclusio alterius*, "when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by the specific reference was intended to be omitted or excluded." *Gay v. Singletary*, 700 So. 2d 1220, 1221 (Fla. 1997). Where a statute notes exceptions "the inclusion of one implies exclusion of others." *United States v. Macia*, 157 F.Supp. 2d 1369, 1371 (S.D. Fla. 2001).

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[15]See, further, section 201.02(5), Florida Statutes, (2000); a partnership's conveyance of real property back to the partner who originally conveyed the property to the partnership is excluded from the tax so long as the partner does not assume any debt for which that partner was not originally liable.

The meaning of a statute derives from the language the legislature employed. *Florida Department of Revenue v. Florida Municipal Power Agency*, 789 So. 2d 320, 323 (Fla. 2001).

Section 201.02(1), Florida Statutes, (2000), taxes deeds that convey an interest in real property. Only a few particular types of deeds are exempt from tax; commercial deeds between related parties are not among them.

The "book transaction" exemption the court found in *Kuro* derives from the Florida Supreme Court's decision in *Palmer-Florida*, 88 So. 2d 493. In *Palmer-Florida*, the taxpayer corporation deeded its property to its shareholders in proportion to their share of common stock. The court held "[T]he grantees were not 'purchasers;'" the transfer "was a mere book transaction." *Id*. at 495. The Court's term, "mere book transaction" in *Palmer-Florida*, is based on the general accounting equation.

The property held by the corporation was an asset and appeared as such on the left side of the balance sheet. The value of that property was held as owner's equity on the right side of the balance sheet - it was not a sum reserved to satisfy creditors' claims. The stockholders, as such, owned the equitable interests in the corporation. The stockholders

could not meaningfully be characterized as the beneficial owners of the property because the property was not held in trust - title to the property was not divided. The Court in *Palmer-Florida* did not, therefore, characterize the stockholders as beneficial owners. The Court did not confuse equity in the trust context with owner's equity in the corporate context. Moreover, the corporation did not have a reciprocal economic interest in its shareholders, that is, the corporation had no property interest that increased in value as a result of the distribution. The shareholders' claim to residual assets on liquidation was reduced by the fair market value of the property distributed. The corporation's obligation to its shareholders was reduced as a result of the liquidation.

Lastly, the distribution was not tax-free as Petitioner and Amicus imply. Since the distribution took place in a commercial environment it was not a gift. The distribution, however, generated income tax consequences to the shareholders.[16] In business, there is "no free lunch" when it

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[16]The transfer was income to the shareholders to the extent the transfer could be characterized as a dividend. 26 U.S.C. §301(a), (b)(1) and (c)(1) and §61(a)(7). The transfer was capital gain to the shareholders to the extent the transfer could be characterized as distribution on liquidation and the property had appreciated. 26 U.S.C. §301(a), (c)(3) and §61(a)(3).

comes to tax unless the legislature, federal or state, specifically authorizes a tax free menu in the form of exemptions.

The transaction in *Kuro* was the exact opposite of the transaction in *Palmer-Florida*. The court in *Kuro* interpreted *Palmer-Florida* to stand for the proposition that transactions between a corporation and its shareholders "washed." Section 201.02(1) taxes deeds that transfer interests in real property. There is no wash. The decision in *Kuro* is wrong.

7. The Result Reached in *Kuro* Is Inconsistent with the Result Reached by Other Jurisdictions

The decision *Dean v. Pinder*, 538 A.2d 1184,(cited with approval by the Third District, ROA, p. 183), addressed facts similar to those in *Kuro*: a husband and wife purchased two parcels in their own name, formed a corporation and then deeded the property to the corporation. The corporation paid no money nor issued any additional shares of stock in exchange for the property. *Pinder*, 538 A.2d at 1186.

Moreover, whether the transfer was a dividend or a distribution on liquidation is a technical matter of federal income tax. "Normally, a corporate distribution is either a dividend or a return of capital or both. ... [D]ividends received by a corporate stockholder are taxable to him as ordinary income, whereas a return of capital has no tax consequence unless it results in a gain or loss." *United States v. Florida*, 252 F. Supp. 806, 817 (E.D. Ark. 1965). The distinction is irrelevant here.

The issue in the case devolved upon the Court's construing the term "actual consideration" - a term that was not defined by statute. The Court found "actual consideration" with respect to the "'economic facts' of the conveyance." *Pinder*, 538 A.2d at 1189 (internal citation omitted). "The 'actual consideration' flowing from the grantee to the grantor is what the parties themselves considered the bargain to be, regardless of the amount of money or other tangible property that the grantor may have received or that may have been stated on the deed." *Id.*

The Court identified the substantive consequence of these transactions: "Before the transfer of [the] properties the Deans owned stock in a 'paper' corporation without assets. The
transfer of the properties undeniably increased the assets of the corporation and, hence, the value of the Deans' stock." *Id*. at 1190.

Amicus attempts to distinguish *Pinder* by stating that "[U]nlike Florida's statute, the Maryland statute imposed a blanket tax on all conveyances." Amicus Brief, p. 8, n. 3. This statement is incorrect. Maryland Tax-Property Code Annotated article 12-108 identifies a number of "instrument[s] of writing ... not subject to the recordation tax." Amicus

correctly notes that the Maryland statute did not use the term "purchaser." The Maryland statute did, however, use the term "actual consideration." *Pinder* 538 A.2d at 1187. Amicus's observation is valid only if the Court accepts that consideration can be paid by a person who is not a purchaser.

The Maryland Court's observation respecting consideration and the parties' bargain is consistent with the separation of entities doctrine - the individuals deeding the property were separate from the business entity they created and owned. Moreover, the Court's observation refutes both Petitioner's and Amicus's insistence that bargaining requires tire kicking negotiation between men in straw hats and suspenders. One's bargain includes the "natural consequence[s] of the commercial transaction." See Third District opinion, ROA, p. 183.

Section 201.02(1) simply levies tax on deeds transferring interests in real property. The notion is not esoteric.

In *Carpenter v. White,* 80 F.2d 145 (1st Cir. 1935)[17] (cited with approval by the Third District, ROA, p. 183), a business trust and a corporation each conveyed real property to a

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[17]Chapter 201, Florida Statutes, the documentary stamp tax law, was taken from the federal documentary stamp tax act; consequently, Florida courts follow federal decisions. *Choctawhatchee Electric Cooperative, Inc. v. Green*, 132 So. 2d 556, 558 (Fla. 1961). The federal documentary stamp tax act was repealed in 1966. Pub. L. No. 89-44, §701(c)(1).

second business trust which, therefor, paid no money or tangible personal property to either grantor. The court in *Carpenter* rejected the proposition there was no sale of the beneficial interest in the property, there having been conveyed only bare legal title which has no substantial value. *Carpenter,* 80 F.2d at 146. The court observed:

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

Carpenter, 80 F.2d at 146.

Here, Crescent surrendered 100 percent of its ownership in land in consideration for an increased value in its interest in Miami Center through Crescent Funding. In short, Crescent exchanged its fee title in land, which title combined legal and equitable ownership interests, for the equitable ownership of Crescent Funding and Miami Center, which equitable ownership increased in value as a result of the

conveyance.

For Miami Center to deny consideration it must prove a gift - which entails its further denying that the transaction was motivated to obtain economic benefit. Such a denial would reveal the transaction as a sham and contradict the purpose of Crescent's formation of Miami Center: creation of a separate entity for a business purpose. See fact 5, above.

Amicus's reliance on *Mandell v. Gavin*, 816 A.2d 619, 625 (Conn. 2003), Amicus Brief, pp. 11-12, is misplaced. *Mandell* cannot apply in this case. First, the Connecticut Court specifically rejected the plain meaning doctrine of statutory construction. *Mandell*, 816 A.2d at 624. Florida follows plain
meaning interpretation. *Florida Convalescent Centers v. Somberg*, 840 So. 2d 998, 1000 (Fla. 2003).

Further, the Connecticut statute was amended opposite the Florida amendment. Connecticut General Statute 12-494, at issue in *Mandell*, see 816 A.2d at 625, b. 8, did not define consideration. The statute's predecessor, Connecticut General Statute 12-494(a) (Supp. 1969), imposed tax on the property's fair market value when there was no otherwise discernible consideration. *Mandell*, 816 A.2d at 625, n.8, and 625-626.

Florida jurisprudence precludes a result similar to that

in *Mandell*. So long as Crescent "got something," that is, consideration, then, without more, the value of that consideration is valued with respect to the property transferred. Crescent's interest in Crescent Funding and Crescent Funding's value increased as a direct result of the transfer.

I. The Incidence of Tax Falls on the Economic Substance of the Subject Transaction

"In analyzing whether tax liability exists [Florida courts] are authorized to look through form to fact and substance." *Hialeah, Inc. v. Dade Co.*, 490 So. 2d 998, 1001, n. 6 (Fla. 3rd DCA 1986). The substance over form analysis applies to the gift tax. *Sather v. Commissioner of Internal Revenue*, 215 F.3d 1168, 1174 (8th Cir. 2001).

Whereas a taxpayer may structure a transaction to minimize tax liability the transaction must have economic substance. *Kirchman v. Commissioner of Internal Revenue*, 862 F. 2d 1486, 1491 (11th Cir. 1989).

According to *McCoy Motel*, 302 So. 2d 440, the documentary stamp tax is an excise tax and that tax liability arises solely with reference to the document; extrinsic facts are irrelevant. *Id.* at 442. If the substance of the

transaction is irrelevant then the relationship of the parties comprising that substance is irrelevant.

DOR does not challenge the validity of Crescent's business with Miami Center. DOR simply applies the tax that follows from the transactions taking place between those entities doing business in the State of Florida. Or, if DOR has no business looking at the transaction for documentary stamp tax purposes, DOR simply applies the tax to the face of the deed - the deed whereby Crescent transferred real property to Miami Center, the deed whereby one legal entity transferred real property to a second legal entity.

CONCLUSION

The deed whereby Crescent conveyed Florida real estate to Miami Center is subject to Florida documentary stamp tax. Crescent's ownership of Crescent Funding and Crescent Funding's ownership of Miami Center does not insulate their business from tax. Crescent did not make a gift of the property and Chapter 201, Florida Statutes, (2000), does not exempt transfers between artificial legal entities, ownership notwithstanding.

WHEREFORE DOR requests the Court affirm decision of the Florida Third District Court of Appeal.

Respectfully submitted,

____

Charles Catanzaro
Fla. Bar No. 979732
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing, Respondent, Florida Department of Revenue's Answer Brief, has been furnished by U.S. Mail to Fred O. Goldberg, Esq., Berger Singerman, 200 S. Biscayne Blvd., Ste. 1000, Miami, FL 33131-5308 and, for Amicus, Guy V. Perko, Esq., Hopping Green & Sams, P.O. Box 6526, Tallahassee, FL 32314, this 10th day of June, 2004.

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Charles Catanzaro
Assistant Attorney General

CERTIFICATE OF TYPE STYLE AND SIZE

I certify that Courier New, 12 point, is the type style and size used in the Respondent's answer brief.

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Charles Catanzaro
Assistant Attorney General