

SUPREME COURT OF FLORIDA

Supreme Court Case No. SC03-2063  
THIRD DCA CASE NO. 02-3002  
LT Case No. 00-21824

CRESCENT MIAMI CENTER, LLC,

Petitioner,

v.

DEPARTMENT OF REVENUE,  
STATE OF FLORIDA,

Respondent.

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ON APPEAL FROM THE DISTRICT COURT OF APPEAL,  
THIRD DISTRICT

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**PETITIONER'S INITIAL BRIEF**

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FRED O. GOLDBERG, ESQUIRE  
Berger Singerman  
Attorneys for Petitioner  
200 South Biscayne Boulevard  
Suite 1000  
Miami, Florida 33131  
Telephone: (305) 755-9500  
Fax: (305) 714-4340

**CERTIFICATE OF INTERESTED PERSONS, ETC.**

Counsel for Petitioner CRESCENT MIAMI CENTER certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Crescent Miami Center, LLC.  
(Petitioner)
2. Fred O. Goldberg, Esquire  
(Counsel for Petitioner)
3. Berger Singerman  
(Counsel for Petitioner)
4. Department of Revenue, State of Florida  
(Respondent)
5. Charles Catanzaro, Esquire  
(Counsel for Respondent)
6. Assistant Attorney General  
Department of Legal Affairs  
(Counsel for Defendant)

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## I. STATEMENT OF JURISDICTION

This matter is before this Court based upon direct and express conflict between the Third District's Opinion in the instant action (Appendix, Tab 11)<sup>1</sup> and the decision of the Second District in *Kuro, Inc. v. State, Department of Revenue*, 713 So.2d 1021 (Fla. 2d DCA 1998), *Review Denied*, 713 So.2d 201 (Fla. 1998). Thus, this appeal is within the Court's discretionary jurisdiction pursuant to Article V, §3(b), Florida Constitution, and Rule 9.030(a)(2)(A)(iv), Fla.R.App.R. See Order accepting jurisdiction, App. Tab 13.

## II. STATEMENT OF FACTS

Prior to February 25, 2000, Crescent Real Estate Equities Limited Partnership (hereinafter referred to as "Crescent") was the owner of certain real property and all improvements thereupon located in Miami, Miami-Dade County, Florida (hereinafter referred to as the "Property"). App. Tab 4, Ex. A, ¶ 11. On February 24, 2000, Crescent formed and organized Crescent Miami Center, L.L.C. (hereinafter referred to as "CMC" or "Petitioner") as a limited liability company under the laws of Delaware. App. Tab 4, Ex. A, ¶ 4. CMC maintains its principal place of business and principal commercial domicile in Miami-Dade County, Florida,

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<sup>1</sup>A formal paginated Record has not yet been issued in connection with this proceeding. Accordingly, Record references herein cite to the Appendix to this Brief by tab number and page or paragraph number.

and is authorized to conduct business in the State of Florida. App. Tab 4, Ex. A, ¶ 4.

Immediately after CMC was formed on February 24, 2000, Crescent transferred 99.9% of its ownership interest in CMC to Crescent Real Estate Funding IX, L.P. (hereinafter referred to as "Crescent Funding"), a Delaware limited partnership. App. Tab 4, Ex. A, ¶ 5. At the same time, Crescent transferred the remaining 0.1% of its ownership interest in CMC to CRE Management IX, LLC (hereinafter referred to as "CRE Management"), a Delaware limited liability company. App. Tab 4, Ex. A, ¶ 5. Immediately thereafter, CRE Management, again on February 24, 2000, transferred its 0.1% interest in CMC to Crescent Funding rendering CMC wholly owned by Crescent Funding. App. Tab 4, Ex. A, ¶ 6. At all times applicable hereto, CRE Management was wholly owned by Crescent. App. Tab 4, Ex. A, ¶ 6. At all times applicable hereto, Crescent was the sole limited partner in Crescent Funding and Crescent Funding's sole general partner was CRE Management. App. Tab 4, Ex. A, ¶ 8. Thus, at all times applicable hereto, Crescent, through its ownership of Crescent Funding and CRE Management, owned and controlled 100% of CMC.

Because Crescent owned 100% of CRE Management, Crescent Funding's sole general partner, and Crescent was Crescent Funding's sole limited partner, Crescent owned 100% of the beneficial interest in Crescent Funding, which, in turn, owned

100% of the beneficial interest in CMC. App. Tab 4, Ex. A, ¶¶ 8, 9, 10. In addition, because Crescent Funding was the sole member of CMC, it possessed all rights to the fullest extent of Delaware law to control, manage and operate CMC. App. Tab 4, Ex. A, ¶ 10. Similarly, Crescent, as the sole member and owner of CRE Management, Crescent Funding's general partner, possessed all rights to the fullest extent of Delaware law to control, operate and manage Crescent Funding. App. Tab 4, Ex. A, ¶ 10. Thus, Crescent, through Crescent Funding, also possessed the right and power to control, operate and manage CMC. App. Tab 4, Ex. A, ¶ 10.

On February 25, 2000, Crescent, as grantor, transferred the Property to CMC. App. Tab 4, Ex. A, ¶ 11. CMC filed the deed with the Clerk of Courts, Miami-Dade County, Florida on February 25, 2000 and paid documentary stamp tax in the sum of \$693,000 and surtax in the sum of \$519,750, a total sum of \$1,212,750 to the Clerk of Courts in connection with the filing of the deed. App. Tab 4, Ex. A, ¶ 12. The Property which Crescent transferred to CMC was not encumbered by any mortgage and no mortgage was satisfied in connection with the closing which took place on February 25, 2000. App. Tab 4, Ex. A, ¶ 13. Crescent did not owe any account payable in favor of CMC and no account payable was satisfied in connection with the transfer of the Property by Crescent to CMC. App. Tab 4, Ex. A, ¶ 14.



Crescent received no real, personal or intangible property or anything of value in exchange for the property transferred by it to CMC, and no shares or interest in CMC were conveyed in exchange for the Property. App. Tab 4, Ex. A, ¶¶ 16, 17. Crescent created CMC, and CMC's ownership was established prior to the real estate conveyance and no shares of interest in CMC were conveyed in exchange for the Property. App. Tab 4, Ex. A, ¶ 16.

Crescent possessed no tax reason for executing the deed and neither realized a favorable tax consequence nor sustained any tax liability as a result of the transfer of the Property to CMC. App. Tab 4, Ex. A, ¶ 19. The transfer of the Property to CMC by Crescent did not result in any favorable or unfavorable change in Crescent's financial statements. App. Tab 4, Ex. A, ¶ 15. The sole purpose for the transfer effectuated by the deed was to separate the Property from the rest of Crescent's assets in order to facilitate future unsecured financing. App. Tab 4, Ex. A, ¶ 18.

The real beneficial ownership of the real estate did not change and the transfer of the Property from Crescent to CMC was a mere book transaction. App. Tab 4, Ex. A, ¶ 18. Prior to the transaction, Crescent managed and maintained the Property and controlled the right to transfer, encumber or hypothecate the Property. App. Tab 4, Ex. A, ¶ 21. Similarly, immediately

after the transaction, Crescent, through its ownership and control of CMC, possessed precisely the same rights. App. Tab 4, Ex. A, ¶ 21. In addition, as part of the transaction, Crescent executed an assignment of rents in favor of CMC; however, all revenues from such rents were passed on to Crescent as 100% owner of Crescent Funding, and such revenue was reported on Crescent's financial statements. App. Tab 4, Ex. A, ¶ 20. Thus, prior to the transaction, Crescent possessed the right to receive all rents and income from the Property, and after the transaction, Crescent continued to receive such income. App. Tab 4, Ex. A, ¶ 20.

On March 8, 2000, CMC applied for a refund of the surtaxes and documentary stamp taxes of \$1,212,750 paid in connection with the filing of the deed. App. Tab 1, ¶ 14, and Ex. 2. Respondent, Department of Revenue (hereinafter referred to as "DOR") denied CMC's application for a refund via a Notice of Proposed Refund Denial dated May 5, 2000. App. Tab 1, ¶15, and Ex. 3. CMC elected not to pursue an informal protest of the Notice of Denial and, pursuant to DOR rules, the Notice of Proposed Refund Denial became final on July 4, 2000, sixty (60) days after the Notice of Proposed Refund Denial was issued. The instant action was filed within sixty (60) days of July 4, 2000 and all jurisdictional requirements for and conditions precedent to the filing of the case *sub judice* were satisfied.

### III. STATEMENT OF THE CASE

The case *sub judice* was filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida on September 1, 2000. App. Tab 1. DOR filed its Answer to the Complaint on October 3, 2000. App. Tab 2.

On June 28, 2002, DOR filed its Motion for Summary Judgment and supporting memorandum of law. App. Tab 3. Thereafter, on September 6, 2002, CMC filed its Motion for Summary Judgment as well as the Affidavit of Daniel E. Smith, Esquire. App. Tab 4. In addition to its own Motion for Summary Judgment, CMC also filed a Memorandum of Law in opposition to DOR's Motion for Summary Judgment on September 25, 2002. App. Tab 5. A hearing was held on DOR's Motion for Summary Judgment on September 26, 2002, and on October 8, 2002, the Circuit Court entered its Final Order granting Defendant's Motion for Summary Judgment and denying CMC's Motion for Summary Judgment. App. Tab 6, 7. CMC filed its Notice of Appeal in a timely fashion on November 5, 2002.

After full briefing by the parties (App. Tabs 8, 9, 10) and oral argument, the Third District Court of Appeal affirmed the trial court's ruling in its decision entered September 10, 2003. App. Tab 11. After a timely Motion to Certify Conflict or, in the Alternative, For Certification of a Matter of Great Public Importance was denied by the Third District on September 25,

2003, CMC filed a timely Notice of Appeal on November 13, 2003. App. Tab 12. CMC served its Brief on Jurisdiction on December 18, 2003.<sup>2</sup> This Honorable Court accepted jurisdiction over the instant proceeding by Order dated March 30, 2004. App. Tab 13.

#### V. SUMMARY OF THE ARGUMENT

§ 201.02 of the Florida Statutes does not impose a documentary stamp tax on a deed unless there is a "purchaser" that pays consideration "in exchange" for the real property. In the instant action, a wholly owned subsidiary, Petitioner CMC, received a deed to unencumbered real property as a voluntary contribution of capital from its parent company, Crescent. CMC did not give any money or other property in exchange for the real property. Under these circumstances, CMC, the grantee, is not a "purchaser" and paid no consideration for the real property. *Kuro v. Department of Revenue*, 713 So.2d 1021 (Fla. 2d DCA 1998), *appeal dismissed*, 728 So.2d 201 (Fla. 1998).

The scope of any statute assessing a tax in Florida is to be strictly construed against the taxing authority. This rule of strict construction requires any ambiguity or doubt to be resolved in favor of the taxpayer.

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<sup>2</sup>Due to the submission of unnecessary materials in its Appendix, Crescent was ordered to file an Amended Brief on Jurisdiction. The Amended Brief was filed on December 31, 2003.

The conveyance at issue was a mere change in the form of ownership and did not result in any other party acquiring an interest in the Property. The real equitable and beneficial and interest in the Property was unaffected by the transfer. Under these circumstances, the transaction was not taxable pursuant to Fla.Stat. § 201.02(1). *State Ex Rel Palmer-Florida Corp. v. Green*, 88 So.2d 498 (Fla. 1956); *Department of Revenue v. De Maria*, 338 So.2d 838 (Fla. 1976); *Kuro v. Department of Revenue*, 713 So.2d 1021 (Fla. 2d DCA 1998).

In an attempt to bring the situation reflected in the instant action outside of the ambit of the above-cited decisions, DOR advances three theories upon which it suggests that the presence of consideration in the instant transaction may be found. These are: (1) that there was a purpose for the transaction; (2) that the transaction shifted potential future liability which might arise from ownership of the property from the parent to CMC, the wholly owned subsidiary; and (3) that the parent received valuable partnership interests in exchange for the transfer of property. These novel theories of how a subsidiary "pays consideration" are inconsistent with the requirement of "strict construction" of the taxing statute and fly in the face of numerous decisions of the Florida Supreme Court and the district courts. As a result, DOR's theories should properly be rejected and the Third District's decision

affirming the trial court's Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment should properly be reversed.

#### V. ARGUMENT

The question to be resolved by this Honorable Court in the instant appeal may be stated as follows: Was documentary stamp tax and surtax pursuant to Fla.Stat. § 201.02 due from Petitioner CMC when Crescent transferred the unencumbered Property to CMC, an entity wholly owned, controlled and operated by Crescent, where CMC did not pay to Crescent any consideration, whether monetary or otherwise? As has been held repeatedly by the courts of this State, the answer to this question should properly be "no." Under these circumstances, CMC is not a "purchaser" under the purview of Fla.Stat. § 201.02(1).

However, the Third District ruled to the contrary in its Opinion rendered September 10, 2003. App. Tab 11. In its decision, the Third District determined that the deed conveying the Real Property to CMC was subject to the documentary stamp tax. App. Tab 11, pp. 8-9. The Court found consideration in this transaction "as a natural consequence of the commercial transaction transferring intangible property" in exchange for the Real Property, App. Tab 11, pp. 9-10. This Third Circuit reasoned that after the transaction "Crescent had no interest in the property to convey." App. Tab 11, p. 9. The Third District

agreed with DOR's position that "Crescent exchanged equitable ownership of land in consideration for a more valuable equitable ownership of an interest in another limited partnership." App. Tab 11, p. 11. The Third District also characterized CMC's legal arguments as seeking a non-statutory "exemption" from the documentary stamp tax. App. Tab 11, p. 12. For the reasons set forth more fully herein, CMC submits that the Third District erred and its decision should properly be reversed.

Fla.Stat. § 201.02(1) provides that:

On deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by his or his direction, on each \$100 of the consideration therefore the tax shall be 70 cents. When the full amount of the consideration for the execution, assignment, transfer, or conveyance is not shown in the face of such deed, instrument, document, or writing, the tax shall be at the rate of 70 cents for each \$100 or fractional part thereof of the consideration therefor. For purposes of this section, consideration includes, but is not limited to, the money paid or agreed to be paid; the discharge of an obligation; an the amount of any mortgage, purchase money mortgage lien, or any encumbrance, whether or not the underlying indebtedness is assumed. If the consideration paid or given in exchange for real property or any interest therein includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest therein.

In order for there to be a tax due pursuant to Fla.Stat. § 201.02(1), there must be both a "purchaser" and "consideration paid or given in exchange for real property," as well as a deed, instrument or writing reflecting a transfer of interest of the realty. The Third District sidestepped the dual requirement that there be both a purchaser and consideration for a taxable transaction to occur. Instead, the Third District concluded without any analysis or discussion that "there is 'consideration' whenever there is a 'purchaser'". App. Tab 11, pp. 11-12.

In the case *sub judice*, there was neither a purchaser nor an exchange of consideration. The transfer of the property from Crescent to Petitioner was merely a book transaction which effected a change in legal title without any change in the equitable or beneficial ownership of the Property. Before the transfer, Crescent controlled, managed and operated the Property and received the income and revenues generated therefrom, and after the transaction, the situation was precisely the same.

In the instant action, DOR attempted to infer consideration for the transfer of the Property to CMC where in fact there was none. DOR seeks to have this Honorable Court rewrite the documentary stamp tax statute so that Petitioner and other similarly situated parties are molded to fit within the penumbra of the term "purchaser." However, DOR's arguments run contrary



to numerous decisions of the Florida Supreme Court and the District Courts of Appeal and should properly be rejected.

**A. THE THIRD DISTRICT ERRED IN DETERMINING THAT DOCUMENTARY STAMP TAX IS DUE WHEN A WHOLLY OWNED SUBSIDIARY RECEIVES A VOLUNTARY CONTRIBUTION OF UNENCUMBERED REAL PROPERTY FROM ITS PARENT WITHOUT PAYMENT OF CONSIDERATION**

It is undisputed that Petitioner neither paid any monetary consideration nor assumed an underlying indebtedness in exchange for the Property. R. 39. The Property was transferred by Crescent to its pre-existing wholly-owned subsidiary, CMC, as a contribution of capital. In a capital contribution, the grantee suffers no detriment and gives up nothing in exchange for the contribution. Although record title changes, there is no change in equitable ownership. Contrary to the Third District's statement that "after the deed was executed, Crescent had no interest in the property to convey" (App. Tab 11, p. 9), Crescent, as the sole owner of CMC through Crescent Funding and CRE Management, could have had CMC sell or transfer the Property to another grantee. The Property remained in Crescent's control. *See, e.g., Greenberg v. Morris*, 436 S.W.2d 734, 738 (Mo. 1968) (a party cannot furnish consideration to itself; "motive" differs from consideration); *Gulf Towing Co., Inc. v. The Steam Tanker, Amoco New York*, 648 F.2d 242, 245 (5<sup>th</sup> Cir. 1981) (consideration must be bargained for by the promisor and given by the promisee).

DOR instead asserts that "property other than money" was given in exchange for the Property by CMC. DOR asserts that non-monetary consideration can be found in three ways: (1) there existed a purpose for the transfer of the Property from Crescent to Petitioner; (2) the transfer of the Property shifted potential future liability arising from ownership of Property from Crescent to CMC; and (3) Crescent received valuable interest in CMC in consideration for the Property. The adoption of any of these theories would impermissibly expand the scope of § 201.02(1).

It is well-established that "tax laws are to be construed strongly in favor of the taxpayers and against the government, and all ambiguities or doubts are to be resolved in favor of the taxpayers." *Department of Revenue v. Ray Construction of Okaloosa County*, 667 So.2d 859, 865 (Fla. 1<sup>st</sup> DCA 1969), citing *Maas Brothers, Inc. v. Dickinson*, 195 So.2d 193 (Fla. 1967). "Taxes may be collected only within the clear definite boundaries recited by the statute." *Department of Revenue v. Ray Construction of Okaloosa County*, 667 So.2d at 865. If CMC is not a purchaser and paid no consideration in connection with the instant transaction, under the strict confines of § 201.02(1), no tax is due. DOR's attempts to expand the boundaries of the statute should properly be rejected.

A transfer of real property without consideration is not a taxable event under the statute; under this circumstance there is

neither a purchaser nor consideration. *Culbreath v. Reid*, 65 So.2d 556, 558 (Fla. 1953) (gift from father to daughter is not taxable; "the word 'monetary value' or 'value' or 'market value' cannot be substituted for the word 'consideration'"); *DeVore v. Gay*, 39 So.2d 796, 797 (Fla. 1949) (promise to pay future rents is not taxable; "rent is not the purchase price or consideration for a conveyance"); see also *Department of Revenue v. Race*, 743 So.2d 169 (Fla. 5<sup>th</sup> DCA 1999) (transfer of real property from husband to husband and wife to correct record title is not taxable). If the grantee is not a "purchaser" the tax provisions of § 201.02 do not apply. *Culbreath v. Reid*, 65 So.2d at 558.<sup>3</sup>

The general principle that a transfer of real property without consideration is not a taxable event has equal application in the business context. In the business arena, it is sometimes necessary to shift naked title to land in order to effectuate changes in corporate structure. To impose a documentary stamp tax on such "paper" transactions would cause an unconscionable burden upon the business community. Recognizing

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<sup>3</sup>In its Motion for Summary Judgment, DOR asserted that the transfer of the Property to CMC was "a transaction lacking economic substance," i.e., consideration, is a sham. (App. Tab 3, p. 12). This argument disregards the decision of the Florida Supreme Court which determined "that the case law of Florida does not support the proposition that the historical equitable requirement of valuable or good consideration to support enforcement of the deed of bargain and sale or of covenant to stand seized, respectively, is part of the law of Florida now applicable to deeds generally." *Chase Federal Savings & Loan Assoc. v. Schreiber*, 479 So.2d 90, 100 (Fla. 1985).

the need for transfers of property by and among related entities, this Court held that business-related transfers of real property without consideration that do not disturb the equitable or beneficial ownership of the property are not taxable. Where a corporation transfers real property to its shareholders in direct proportion to their stockholdings without any payment of consideration, i.e., real, personal or intangible property exchanged for the real estate, the transaction does not give rise to a tax due. *State Ex Rel Palmer-Florida Corp. v. Green*, 88 So.2d 493 (Fla. 1956). This is because "the stockholders-grantees were the equitable owners of the land in question." *State Ex Rel Palmer-Florida Corp. v. Green*, 88 So.2d at 494. This Court recognized that the real estate transaction in *Palmer-Florida* merely changed "the legal title on the public record" and was a "mere book transaction." *Id.* at 494-495. Such book transactions are not taxable because they do not involve an actual purchaser. *See Department of Revenue v. De Maria*, 338 So.2d 838, 840 (Fla. 1976) (a purchaser is "one who obtains or acquires property by paying an equivalent in money or other exchange in value"). For a "purchaser" to exist, there must be consideration flowing from the grantee to the grantor. If there is no such exchange, there is no purchaser.

Following the principles which it set forth in *Palmer-Florida*, this Court later found that transfers of real property

encumbered by a mortgage or involving an assignment of indebtedness gave rise to a documentary stamp taxes, but only to the extent of the mortgage or indebtedness: the equity in the property was not taxable. *Department of Revenue v. De Maria*, 338 So.2d at 840 ("the corporation's \$25,000 equity in the real property was exempted from documentary stamp taxation consistent with *State Ex Rel Palmer-Florida v. Green*, because there was a mere change in form of the stockholder's equity in the corporation"). See also *Win-San Building Corp. v. Dept. of Revenue*, 358 So.2d 112, 113 (Fla. 3d DCA 1978) (transfer of real estate between parent and wholly-owned subsidiary was subject to documentary stamp tax only to the extent of "the amount of the encumbrance").

The Third District disregarded this Court's decisions in *Palmer-Florida* and *De Maria*, and instead held that Crescent had effected "a complete change in both the legal title and the beneficial ownership inland." App. Tab 11, p. 10. This departure from established Florida law was based upon a decision of the Maryland Supreme Court interpreting that State's documentary stamp tax statute. See *Dean v. Pinder*, 538 A.2d 1184 (Md. 1988). The Third District's reliance upon *Pinder* is flawed. The Maryland statute does not contain a requirement that there be a "purchaser" in order for a transaction to be taxable. Instead, the Maryland documentary stamp tax statute imposes a tax "upon

every written instrument conveying title to real property..." *Dean v. Pinder*, 538 A.2d at 1187.

The case *sub judice* falls squarely within the principles enunciated in *Palmer-Florida*. The transaction between Crescent and its wholly owned subsidiary, Petitioner CMC, was a mere book transaction conducted for the purpose of transferring legal title of the property without any change in equitable ownership. See *State Ex Rel Palmer-Florida Corp. v. Green*, 88 So.2d at 494-495. Further, CMC neither took the property subject to a mortgage nor shifted any economic burden from Crescent to CMC. See *Department of Revenue v. De Maria*, 338 So.2d at 840. As a mere book transaction without any change in equitable ownership and absent the payment of consideration of any description, no tax is properly due pursuant to § 201.02.

The decision most closely resembling the facts of the instant action is *Kuro, Inc. v. Department of Revenue*, 713 So.2d 1021 (Fla. 2d DCA 1998). In *Kuro*, certain real property was owned by two individuals. These persons formed a corporation in which they had joint ownership. The real property was then transferred to the corporation. The *Kuro* court, deciding the case based upon the same version of the statute as was in effect for the parties to the instant action, found that the transfer of property to Kuro "effected a change in the legal ownership of the property" but that "the beneficial ownership of the property

remained unchanged" rendering it a nontaxable book transaction. *Kuro, Inc. v. Department of Revenue*, 713 So.2d at 1022.

As here, the DOR argued in *Kuro* that "under the statute and the rules, the stock issued by *Kuro* constituted consideration of property other than money, which was presumed to equal to the fair market value of the condominiums." *Id.* However, the court rejected DOR's position, finding that *Kuro* had successfully rebutted this presumption by demonstrating that the transfer was a mere book transaction in which the beneficial ownership of the property was not disturbed. *Id.*, citing *State Ex Rel Palmer-Florida Corp. v. Green*.

DOR argued that "*Kuro* is wrong."<sup>4</sup> (R. 87). DOR's basis for challenging the Second DCA's decision in *Kuro* is found in the First District's decision in *Muben-Lamar, L.P. v. Department of Revenue*, 763 So.2d 1209 (Fla. 1<sup>st</sup> DCA 2000). However, the facts presented in *Muben-Lamar* differ greatly from those in *Kuro* and the instant action. In fact, *Kuro* and *Muben-Lamar* are not at all in conflict. The lack of conflict was acknowledged by this Court. After initially accepting jurisdiction over *Muben-Lamar* on the basis of conflict with *Kuro*, this Court subsequently

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<sup>4</sup> Notwithstanding its position that *Kuro* is "wrong," DOR has followed *Kuro's* reasoning on numerous occasions in several Technical Assistance Advisements, holding that transfers of property between wholly-owned entities are not taxable. See State, Department of Revenue, TAA's 02B4-13; 04B4-004; 04B4-002; 03B4-008; 02B4-003. Copies of these Technical Assistance Advisements are collected at Tab 14 of the Appendix.

dismissed the action finding that it lacked jurisdiction and acknowledging that no conflict existed. See *Muben-Lamar, L.P. v. Department of Revenue*, 779 So.2d, 272 (Fla. 2000) (accepting jurisdiction on the basis of conflict with *Kuro*); *Muben-Lamar, L.P. v. Department of Revenue*, 789 So.2d 337 (Fla. 2001) (dismissing review).

The facts presented in *Muben-Lamar* are markedly different from those in both the instant action as well as *Kuro*. In *Muben-Lamar*, Mutual Benefit Life Insurance Co. (Mutual Benefit, the grantor of the real property), held a 98% interest in *Muben-Lamar, L.P.* *Muben Realty Co.* and *Lamar Eastern, L.P.* each held 1% interest in the partnership. While not readily apparent from the First District's published opinion, while *Muben Realty* was a subsidiary of *Mutual Benefit*, *Lamar-Eastern* was a unrelated third-party whose interest in *Muben-Lamar, L.P.* was given in exchange for a promissory note payable to the limited partnership in the sum of \$280,000. App. Tab 5, Ex. B; Tab 11, p. 7. Thus, the grantee, *Muben-Lamar, L.P.* included as a general partner a party which possessed no interest in the real property prior to the transaction. The transfer of the real property from *Mutual Benefit* to *Muben-Lamar, L.P.* involved a sale of real property in exchange for the partnership interest acquired by *Lamar Realty*. Thus, the First District determined correctly "that the partnership bought the real property by issuing valuable



partnership interests in consideration for land." *Muben-Lamar*, 763 So.2d at 1210.

While the facts of the instant action and *Kuro*, as well as those of *Palmer-Florida*, all involve a mere change in record title without any change in beneficial ownership, i.e., a book or paper transaction, *Muben-Lamar* "involved a straight-forward exchange of land for personalty." *Muben-Lamar*, 763 So.2d at 1210. Thus, the First District's decision in *Muben-Lamar* is wholly distinguishable from the situation presented in the instant action and is not in conflict with the Second District's decision in *Kuro*.

In an attempt to extricate the instant action from under the umbrella of *Palmer-Florida*, *De Maria*, *Kuro*, and *Win-San*, DOR attempts to conjure the existence of consideration where none exists. DOR advances the following arguments in its attempt to create consideration in this cause: (1) there existed a purpose or reason for the transfer of property from Crescent to CMC; (2) the transfer of the Property shifted potential future liability from Crescent to CMC; and (3) the Property was transferred to CMC in exchange for a "valuable interest" in Petitioner.<sup>5</sup> As is

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<sup>5</sup>As an initial matter, it is doubtful that either the mere existence of a purpose behind the transaction or the shifting of potential future liability strictly satisfies the requirements of § 201.02(1). In order to satisfy the statute's requirements for utilizing non-monetary consideration as the basis for a tax, the statute requires that such non-monetary consideration be "property" and that it be "paid or given in exchange." Neither the existence of a purpose for the transaction nor the shifting of potential

demonstrated herein, none of these theories serve to establish that Petitioner CMC was a "purchaser" or exchanged consideration for the property.

**1. THE MERE EXISTENCE OF A PURPOSE FOR THE TRANSACTION IS NOT CONSIDERATION**

DOR argued below that the property was transferred from Crescent to Petitioner for a purpose which constitutes economic benefit. R. 36. The Third Circuit agreed with this thesis. App. Tab 11, p. 11, n.6. The purpose for the transaction was to separate the property from the rest of Crescent's assets in order to facilitate future unsecured financing. Here again, DOR is attempting to have this Court engage in rewriting of the statute. If the existence of a reason for a transfer of real property is sufficient to constitute consideration under § 201.02(1), then every real estate transaction, whether it be a sale, a gift or a transfer in trust, would be taxable. If the legislature intended this result, the statute would merely read that there is a documentary stamp tax due on every deed with the tax calculated on the basis of the property's fair market value. The legislature did not construct the statute in this fashion intentionally.

If the mere existence of a purpose for the transaction constituted consideration, then *Culbreath v. Reed*, *DeVore v. Gay*,

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future liability constitutes "property" and neither were given by CMC in "exchange" for the real property.

*DOR v. Race, State Ex Rel Palmer-Florida Corp. v. Green, and Kuro, Inc. v. Department of Revenue* were all decided incorrectly because there existed a purpose or a motive behind each of the transactions addressed in these decisions. The purpose for the transaction in *Culbreath* was to effect a gift from father to daughter in consideration of love and affection. The purpose for the transaction in *Race* was to rectify an error which had resulted in the property being titled solely to the husband rather than to husband and wife. There existed business purposes for the transactions in *DeVore, Palmer-Florida* and *Kuro*. It is highly doubtful that there was ever a transfer of real property which was not the result of some reason, motive, or purpose. See *Greenberg v. Morris*, 436 S.W.2d at 738 (motive is not consideration).

In advancing its argument that the existence of a "business purpose" is sufficient to give rise to consideration, DOR cited *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 285, 80 Ct. 1190, 1197 (1960). *Duberstein* addressed the question of whether a voluntary payment to a resigning employee or a transfer of a motor vehicle to a business associate constituted income or gifts. As an initial matter, this case derives from federal income tax laws which tax the transfer of money and property. However, the documentary stamp tax is not a tax on transactions, it is an excise tax on documents. *Department of*

*Revenue v. McCoy Motel, Inc.*, 302 So.2d 440, 442 (Fla. 1974). Thus, the legal principles at issue differ drastically. Further, the Supreme Court in *Duberstein* expressly rejected the government's proposal that any transfer made for business reasons be excluded from the definition of a gift. *Commissioner v. Duberstein*, 363 U.S. at 284.

The mere existence of a purpose for the transaction between Crescent and Petitioner is not consideration within the purview of § 201.02(1). The purpose for the transaction is not "property" and was not "exchanged" for the real estate by Petitioner. Further, DOR's theory must be rejected because it would result in all deeds being taxed.

**2. THE SHIFTING OF POTENTIAL FUTURE LIABILITY ARISING FROM THE PROPERTY FROM CRESCENT TO CMC IS NOT CONSIDERATION**

DOR argued and the Third District agreed that consideration may be found because the transfer of the Property from Crescent to CMC also resulted in the transfer of potential future liability arising from the property to Petitioner. R. 45. App. Tab 11, p. 11, n.6. Here again, DOR is attempting to impermissibly broaden the scope of § 201.02(1). It is an elementary principle of law that the potential liability for an accident occurring on real property runs with the realty's ownership. This is the case with transactions between individuals as well as between business entities. Such liability

is an incident of ownership which passes with every transfer of real property. As a result, if DOR's interpretation were to be adopted, once again, every transfer of real property would be taxable under the statute. This is simply not the legislative intent behind § 201.02(1) as evidenced by a plain reading of the statute.

If DOR's theory were correct, then the transfer of property from a corporation to its shareholders, such as occurred in *Palmer-Florida*, would be taxable. In that situation, the corporation provided its shareholders with a "corporate shield" from liability. However, upon transferring the property from the corporation to its shareholders, the shareholders' benefit of the "corporate shield" was given up and the risk of liability shifted from the corporation to the individuals. Yet, notwithstanding the relief of future potential liability received by the corporation, the Florida Supreme Court determined that the transfer of property in *Palmer-Florida* was not taxable.<sup>6</sup>

The shifting of liability from a grantor to a grantee is a legally imposed side effect of every transfer of real property whether between individuals or business entities. To regard such a shift of the risk of liability as consideration would be to

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<sup>6</sup>A similar result would occur in the case of a gift for love and affection such as occurred in *Culbreath*. The transfer of the real property from the father to the daughter also transferred the risk of future liability as well.

impose a tax on every real estate transfer and would constitute an impermissible broadening of the documentary stamp tax statute.

**3. THE PROPERTY WAS NOT TRANSFERRED IN EXCHANGE FOR THE ISSUANCE OF VALUABLE PARTNERSHIP INTERESTS**

Relying upon *Muben-Lamar*, DOR asserted that in exchange for transferring the Property to Petitioner CMC, Crescent received valuable interests in its subsidiary. R. 31, ¶ 2. Here again, the Third District adopted DOR's argument. App. Tab 11, p. 11. However, DOR's reliance upon *Muben-Lamar* is misguided.

As discussed, *supra*, *Muben-Lamar* did not involve a straight-forward transfer of property from a parent to its wholly-owned subsidiary. Rather, the limited partnership which was the grantee had an additional third-party general partner which owned a 1% interest and had not previously held any interest in the real property. In exchange for the 1% interest, the limited partner also paid in a promissory note in the sum of \$280,000 to the limited partnership. It is this which is referred to when the First District found that the grantee "bought the real property by issuing valuable partnership interests and consideration for the land. This case involved a straight-forward exchange of land for personalty." *Muben-Lamar v. Department of Revenue*, 763 So.2d at 1210.<sup>7</sup>

<sup>7</sup>These same principles were applied by the federal courts in connection with interpretation of the now-repealed federal documentary stamp tax statute in *Carpenter v. White*, 80 F.2d 145 (1<sup>st</sup> Cir. 1935). In that case, property was transferred to one business trust to another. However, the new trust involved "new

DOR also suggests that consideration may be found in the increase in CMC's value to Crescent. DOR states that "following Crescent L.P.'s deeding the property to Miami Center, Crescent L.P.'s interest in Crescent Funding became \$ x + the fair market value of the property." App. Tab. 3, pp. 6-7. However, DOR ignores the fact that the net effect upon Crescent's assets was that while the value of its interest in CMC increased, the value of its assets in general decreased by precisely the same amount, i.e., by the fair market value of the property which it transferred to CMC. Stated otherwise, the increase in the value of its interest in CMC equaled the value of the property which it transferred; Crescent did not receive anything which it did not already have.

DOR's reliance upon *Muben-Lamar* is misguided. *Muben-Lamar* involved a transfer of property for a valuable partnership interest because there was an unrelated third-party who had taken an ownership interest in the grantee. In contrast, CMC was wholly owned by Crescent. The instant action does not involve an exchange of real property for business interests and is not taxable.

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equitable interests, not of identical character with the old ones" and constituted "a complete change in both legal title and the beneficial ownership of the property, not a continuance of the same beneficial ownership." *Carpenter v. White*, 80 F.2d at 146.

## V. CONCLUSION

For the reasons set forth herein, the Third District's decision affirming the Circuit Court's Order Granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment should properly be reversed. The instant case involves a conveyance of real property which constituted a mere change in the form of ownership without any other party acquiring an interest in the Property. The equitable and beneficial interest in the Property was unaffected by the transaction. Under such circumstances, because no monetary or non-monetary consideration was paid in exchange for the Property, the conveyance was not taxable and the Circuit Court's decision should be reversed.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this \_\_\_\_\_ day of May, 2004, to: CHARLES CATANZARO, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol Tax Section, PL 01, Tallahassee, Florida 32399-1050.

BERGER SINGERMAN  
Attorneys for Plaintiff  
200 South Biscayne Boulevard  
Suite 1000  
Miami, Florida 33131-5308  
Phone: (305) 755-9500  
Fax: (305) 714-4340

By: \_\_\_\_\_  
FRED O. GOLDBERG  
Florida Bar No. 898619

**CERTIFICATE OF COMPLIANCE**

Petitioner, pursuant to Rule 9.210(a)(2), hereby certifies that this Brief complies with the font requirements of the aforementioned Rule and has been prepared in Courier New, 12-point font.

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FRED O. GOLDBERG