

SUPREME COURT OF FLORIDA

CRESCENT MIAMI CENTER, LLC,

Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE  
OF FLORIDA,

Respondent.

Supreme Court Case No.  
SC03-2063

THIRD DCA CASE NO. 02-3002  
LT Case No. 00-21824

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**PETITIONER CRESCENT MIAMI CENTER, LLC'S  
BRIEF ON JURISDICTION**

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**STATEMENT OF THE FACTS**

On February 24, 2000, non-party Crescent Real Estate Equities Limited Partnership (hereinafter referred to as "Crescent") formed Crescent Miami Center, LLC (hereinafter referred to as "Petitioner" or "CMC"). *Crescent Miami Center, LLC v. Department of Revenue, State of Florida*, Third District Court of Appeal, Case No. 3D02-3002, Opinion filed September 10, 2003. p. 2 (hereinafter referred to as "Opinion"). Appendix, Tab 1. Petitioner CMC was a wholly-owned subsidiary of Crescent; it was directly owned by Crescent Real Estate Funding IX, LP, a wholly-owned subsidiary of Crescent. Opinion, p. 2.

On February 25, 2000, Crescent transferred a certain parcel of unencumbered real property to CMC. Opinion, p. 2. In connection with the recording of the deed for the transfer of the real property, CMC paid \$1,212,750.00 in documentary stamp tax, including Miami-Dade County documentary surtax. Opinion, p. 2. CMC did not pay any monetary consideration for the transfer of real property nor did CMC assume any indebtedness in connection with the real property or forgive any indebtedness owned by CMC to Crescent. The sole purpose for the transfer of the real estate from Crescent to CMC was to separate the

property from other assets owned by Crescent in order to facilitate possible future unsecured financing. Opinion, p. 2.

After the property was transferred, CMC made timely application for a refund of the documentary stamp tax and surtax to the Department of Revenue (hereinafter referred to as "DOR"). Opinion, p. 3. CMC's application for a refund of the documentary stamp tax and surtax was denied by DOR and the instant action followed. Opinion, p. 3.

#### **STATEMENT OF THE CASE**

On February 25, 2000, Crescent transferred certain real property to CMC. Opinion, p. 2. On that same day, CMC filed the deed with the Clerk of Courts, Miami-Dade County, Florida, and paid documentary stamp tax and surtax in the total sum of \$1,212.750.00 to the Clerk of Courts in connection with the filing of the deed. Opinion, p. 2.

On March 8, 2000, CMC applied in a timely fashion for a refund of the documentary stamp tax and surtax paid in connection with the filing of the deed. Opinion, p. 3. Respondent, DOR, denied CMC's application for a refund via notice of proposed refund denial dated May 5, 2000. Opinion, p. 3. The case *sub judice* was filed in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, on September 1, 2000.

After discovery, both CMC and DOR filed cross-motions for summary judgment. Opinion, p. 3. 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. CMC filed its Notice of Appeal to the Third District Court of Appeal in a timely fashion on November 5, 2002.

After briefing and oral argument, the Third District filed its opinion affirming the trial court's decision on September 10, 2003. Thereafter, on September 25, 2003, CMC filed in a timely fashion its Motion to Certify Conflict or, in the Alternative, for Certification of a Question of Great Public Importance. The Third District denied CMC's Motion on October 29, 2003. On November 12, 2003, CMC filed its Notice to Invoke Discretionary Jurisdiction of Supreme Court. Thereafter, on November 21, 2003, Petitioner served its Agreed Motion for Extension of Time in Which to File Brief on Jurisdiction.

#### **SUMMARY OF THE ARGUMENT**

The Third District's decision in the instant action conflicts directly and expressly with the decision of the Second District in *Kuro, Inc. v. State, Department of Revenue*, 713 So.2d 1021 (Fla. 2d DCA 1998), review denied, 728 So.2d 201 (Fla. 1998). Both decisions are based upon substantially

identical facts.<sup>1</sup> In both matters, grantees paid and sought refunds of documentary stamp taxes pursuant to Florida Statutes §201.02. However, the *Kuro* Court determined that the transaction was not subject to the documentary stamp tax while the real property transfer in the instant action was found to be taxable.

The Second District, following the precedent of this Court, determined that the transfers of property in that case were "mere book transactions." *Kuro*, 713 S0.2d at 1022. The Third District disagreed, determining that "[t]here is no exemption for 'book transactions.'" Opinion, p. 13. This conclusion conflicts with the *Kuro* decision. The Third District also disagreed expressly with the Second District concerning what constitutes "consideration" for the purposes of §201.02(1).

Both decisions interpret the same taxing statute, Florida Statutes §201.02, but reach contrary decisions based upon the same facts. As a result, an exercise of discretionary jurisdiction is appropriate under the circumstances presented here.

#### **ARGUMENT**

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<sup>1</sup>In each case, grantors transferred unencumbered real property to business entities owned wholly by the transferors without payment of monetary consideration.



CMC petitions this Honorable Court to exercise discretionary jurisdiction over the instant action pursuant to Article V, §3(b), Florida Constitution (1980), and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., on the basis that the Third District's Opinion in the instant action conflicts directly and expressly with the decision of the Second District in *Kuro, Inc. v. State, Department of Revenue*, 713 S.2d 1021 (Fla. 2d DCA 1998), review denied, 728 So.2d 201 (Fla. 1998).

The Third District in the instant action and the Second District in *Kuro* both addressed substantially identical factual circumstances in reaching their decisions concerning whether documentary stamp taxes were due pursuant to Florida Statutes §201.02 in connection with transfers of unencumbered real property. In both *Kuro* and the instant action, unencumbered real property was granted via deed to a business entity which was wholly owned by the grantors. Opinion, Page 2; *Kuro*, 713 So.2d at 1021. In both cases, the deed recited a nominal consideration of ten dollars. Opinion, Page 2; *Kuro*, 713 So.2d at 1021. In both *Kuro* and the instant action, it was uncontested that the grantee paid no actual monetary consideration for the transfer of the property. However, based upon these substantially identical facts, the Second District and Third District reached contrary and conflicting conclusions

on the same point of law, i.e., whether a transfer of unencumbered real property to a business entity wholly owned by the grantor without any exchange of actual consideration is properly taxable pursuant to Florida Statutes §201.02.

The Second District found that, under these circumstances, "the transactions effected a change in the legal ownership of the property, the beneficial ownership of the land remained unchanged." *Kuro*, 713 So.2d at 1022; Opinion, Pages 6-7. However, in the instant action, the Third District reached a contrary conclusion, determining that "[t]he deed effectuated a complete change in both the legal title and the beneficial ownership of the property." Opinion, Page 10.

In *Kuro*, these transfers of property were found to be "mere book transactions and, otherwise, were not sales to a purchaser, as contemplated by §201.02(1)." *Kuro*, 713 So.2d at 1022, citing *State ex.rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493 (Fla. 1956). However, in the case *sub judice*, the Third District again disagreed with the Second District finding that: "[t]here is no exemption for 'book transactions' which transfer an interest in real property by deed among related entities." Opinion, Page 13. In reaching this determination, the Third District found that §201.02(1), as amended in 1990, adopted a new statutory definition for "consideration" which included as

an exchange medium "the fair of the property exchanged." Opinion, Page 5-6. This is directly contrary to the Second District's observation that fair market value is merely the taxable basis when a transfer includes "consideration for property other than money". *Kuro*, 713 So.2d at 1022. As a result of the drastically different interpretations of §201.02(1) reached by the Second District and the Third District, the *Kuro* transaction was determined not to be subject to documentary stamp tax while the real property transfer in the instant action was found to be taxable.

The factual scenarios presented in the instant action and in *Kuro* are fundamentally identical. Both decisions address a transfer of unencumbered real property from grantors to a business entity wholly owned by the grantors. No monetary consideration was paid in either case. Both decisions interpret the same taxing statute, Florida Statutes §201.02, but reach contrary decisions based upon the same facts. Where, as here, an opinion of a district court

"on its face, shows the probable existence of a *direct* conflict between the two *decisions*, on the same point of law, the writ of certiorari may issue and, after study, may be discharged, or the decision of the district court of appeal may be quashed or modified to the end that any direct conflict between the decisions on the same point of law may be reconciled." (Emphasis

in original). *Florida Greyhound Owners & Breeders Association, Inc. v. West Flagler Associates, Ltd.*, 347 So.2d 408, 409 (Fla. 1977) (England, Justice, concurring), quoting *Seaboard Airline R.R. v. Branham*, 104 So.2d 356, 358 (Fla. 1958).

Thus, discretionary jurisdiction should properly be exercised under the circumstances presented here and this Honorable Court should exercise its appellate power in order to preserve "uniformity of principle and practice." *Jenkins v. State of Florida*, 385 So.2d 1356, 1358-59 (Fla. 1980).

The conflict between the decisions of the Second District in *Kuro* and the Third District in the case *sub judice* falls squarely within the parameters of the circumstances which this Honorable Court has described as justifying discretionary review jurisdiction. Here, the Third District has expressly addressed "a question of law within the four corners of the opinion itself." *Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988). Further, the conflict between the decisions is express and direct and bears upon precisely the same question of law. *Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981).<sup>2</sup>

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<sup>2</sup>While a district court need not "explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict", the Third District's decision in the instant action cites specifically to and discusses the reasoning of the Second District in *Kuro*, but merely rejects the reasoning contained in that opinion. *Ford Motor Co. v. Kikis*, 401 So.2d at 342.

Further militating in favor of this Court's exercising discretionary review jurisdiction is the strong likelihood that the decisions in *Kuro* and the instant action will cause considerable confusion for both the public, as well as practicing attorneys.<sup>3</sup> As a result of these two contrary opinions, the question of whether a transfer of unencumbered property between related parties without an actual exchange of consideration is taxable may be determined solely on the basis of where the property lies. If the transfer involves property within the Second District, the transaction would not be subject to a documentary stamp tax. However, if the property lies within the Third District, documentary stamp taxes would be due on the deed.

Further exacerbating the confusion, on December 10, 2002, the Department of Revenue issued its Technical Assistance Advisement, No. 02B4-013, which held specifically that transfers, without other consideration, of unencumbered real property from individuals to a limited liability company where ownership of the property and ownership of the limited liability company are identical does not give rise to a documentary stamp

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<sup>3</sup>The First District recently issued a *per curiam* opinion based upon the Third District's decision in the instant action. *International Paper Company v. State of Florida, Department of Revenue*, 2003 Fla.App. LEXIS 17585 (1<sup>st</sup> DCA November 19, 2003).

tax. The Department of Revenue based its decision in Technical Assistance Advisement No. 02B4-013 upon the *Kuro* decision. The Third District's opinion in the instant action creates considerable uncertainty regarding whether such a transaction is properly taxable pursuant to §201.02(1), not only on the part of the public, but also on the part of the Department of Revenue itself.

### CONCLUSION

The September 10, 2003, Opinion of the Third District conflicts expressly and directly with the Second District's decision in *Kuro v. Department of Revenue*, 713 So.2d 1021. The lack of uniformity of the decisions of the Districts concerning this important question of law threatens to create considerable confusion among both the public and the legal practitioners of this State. As a result, this Honorable Court should properly grant discretionary review of the Third District's Opinion in the instant action in order to resolve this express and direct conflict.

WHEREFORE, Petitioner, Crescent Miami Center, LLC, respectfully petitions this Honorable Court to exercise discretionary jurisdiction and review the decision of the Third District in the instant action pursuant to Article V, §3(b), Florida Constitution (1980), and Rule 9.030(a)(2)(A)(iv),

Fla.R.App.P., together with such other and further relief as the Court may deem just and appropriate under the circumstances.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That a true and correct copy of the foregoing was furnished via United States Mail this 31<sup>st</sup> day of December, 2003, to: Charles Catanzaro, Esq., Assistant Attorney General, Department of Legal Affairs, The Capitol-Tax Section, Tallahassee, Florida 32399-1050, and Mitchell I. Horowitz, Esq., Fowler White, et al., 501 East Kennedy Boulevard, 17<sup>th</sup> Floor, Post Office Box 1438, Tampa, Florida 33601-1438.

Respectfully submitted,

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By: \_\_\_\_\_  
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**CERTIFICATE OF COMPLIANCE**

Petitioner, pursuant to Rule 9.210(a)(2), hereby certifies that this Brief on Jurisdiction 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