SUPREME COURT OF FLORIDA

CRESCENT MIAMI CENTER, LLC.,

Appellant/Petitioner

v. Case No. SC03-2063

FLORIDA Department of Revenue,

Appellee/Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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)

Counsel for Respondent
Florida Department
of Revenue

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JURISDICTIONAL STATEMENT

Respondent, Department of Revenue, State of Florida ("the Department") requests that this Court exercise its discretionary review powers and review the decision of the Third District Court of Appeal in Crescent Miami Center, LLC v. Department of Revenue, Case No. 3D02-3002 (Fla. 3rd DCA September 10, 2003), rehearing denied, October 29, 2003. See App. 1. The Court has discretion to review this decision because it is in express and direct conflict with the decision of the Second District Court of Appeal in Kuro, Inc. v. Department of Revenue, 713 So. 2d 1021 (Fla. 2d DCA), review denied, 728 So. 2d 201 (Fla. 1998). See Article V, section 3(b)(3), Florida Constitution.

STATEMENT OF THE CASE AND FACTS

The Department accepts the statement of the case and facts as set forth by the Petitioner, Crescent Miami Center, LLC ("Petitioner").

SUMMARY OF ARGUMENT

The Department agrees that the decision of the Third District Court in the instant case expressly and directly conflicts with the decision of the Second District Court in Kuro, Inc. v. Department of Revenue, 713 So. 2d 1021 (Fla. 2d DCA), review denied, 728 So. 2d 201 (Fla. 1998), on the same question of law. The Department further agrees that this Court

should exercise its discretionary jurisdiction to resolve the conflict.

ARGUMENT

THE THIRD DISTRICT COURT'S DECISION IS EXPRESSLY AND DIRECTLY IN CONFLICT WITH THE SECOND DISTRICT COURT'S DECISION IN KURO, INC. V. DEPARTMENT OF REVENUE, 713 So. 2d 1021 (Fla. 2d DCA 1998), ON THE SAME QUESTION OF LAW.

The Kuro decision threatens the stability of the tax laws. Unless this decision is disapproved, it may, over time, invade other areas of the state's corporate and tax laws. The Department's concerns are not overstated. Kuro has already created the following problems:

Kuro implicitly rejects the separate entities doctrine articulated in Moline Properties, Inc. v. Commissioner of IRS, 319 U.S. 436 (1943) [holding that a taxpayer who forms a corporation must take the good with the bad and be treated as separate from its shareholders for tax purposes, not just for liability purposes]. The separate entities doctrine is a cornerstone of federal and state tax law and a linchpin of corporate law. See Regal Kitchens, Inc v. Florida Department of Revenue, 641 So. 2d 158, 163 (Fla. 1st DCA 1994).

Kuro, contrary to clear precedent from this court,[1] ignores all federal authorities, even those authorities which are on

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

point.[2]

Kuro ignores the well-settled doctrine that the "administrative construction of a statute by the agency or body charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous." Fort Pierce Util. Auth. v. Florida Public Service Comm'n, 388 So. 2d 1031, 1035 (Fla. 1980); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So. 2d 823, 828 (Fla. 1973); Pan Am. World Airways, Inc. v. Florida Public Serv. Comm'n, 427 So. 2d 716, 719 (Fla. 1983).

In Kuro, the Second District erroneously held that a family owned corporation solely acquired naked legal title to land and that beneficial ownership of the corporate land ultimately remained unchanged, with the shareholders. Yet, in reversing an administrative law judge's findings, the Second District articulated no facts to support its de novo finding of fact that a trust had been created. The only factual basis for the Second District's holding was that the corporation in question was closely held, by a father and son. The Kuro Court held:

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[2]Federal authorities are virtually on point. See, Carpenter v. White, 80 F.2d 145 (1st Cir. 1935) [The court noted that "no money consideration was paid for these conveyances" but found the transaction taxable anyway, because "[t]he trustees of the new trust issued transferable shares in agreed amount to the two grantors." Id. at 146.] Accord, Revenue Ruling M.T.4, 1942-37-11194.

> The record shows that the conveyances here were for the benefit of the Rabaus, who were merely availing themselves of the advantages of incorporation. Though the transactions effected a change in the legal ownership of the property, the beneficial ownership of the land remained unchanged. These were thus mere book transactions and, otherwise, were not sales to a purchaser, as contemplated by section 201.02(1). See State ex rel. Palmer-Florida Corp. v. Green, 88 So. 2d 493 (Fla. 1956).
>
> At the time the deeds herein were transferred and recorded, the Rabaus owned all of the real estate and all of Kuro's stock. They thus received nothing from the corporation that they did not already have. The fact that the stock issued by Kuro acquired a value equivalent to that of the real property transferred does not change our opinion.

Kuro, 713 So. 2d, at 1022-1023.

Kuro strongly invites lower courts to begin treating all closely held corporations like trusts. But whereas trusts are expressly created for the purpose of severing legal and beneficial ownership, corporations and limited partnerships are separate and distinct artificial entities, which can, and often do, own land in their own right.

The United States Supreme Court and the First District Court of Appeal, have long held that corporations should not be permitted to "pierce their own corporate veil," so as to enjoy all of the numerous benefits of separate entity status with none of the tax disadvantages. Moline Properties and Regal Kitchens, supra. This longstanding doctrine, which is known as the "separate entities doctrine," is now threatened by the decision

in Kuro.

Under Kuro, virtually any transaction between a closely held entity and its shareholders is now at risk of being mislabeled a "mere paper transaction." Unless the Kuro decision is expressly overturned by this Court, it will eventually decimate Florida's documentary stamp tax base, which the State desperately needs and relies upon to acquire and protect coastal lands, preserve water quality, assure that the housing needs of its citizens are met, and to provide general revenue. This is because Kuro judicially legislates a huge tax exemption.

In the case below, the Petitioner argued that it was not the purchaser of the real property within the meaning of Section 201.02(1), Florida Statutes. In rejecting the Petitioner's argument below, the Third District held as follows:

> Here, the deed from Crescent to CMC conveyed the real property "in fee simple forever." A title in fee simple implies absolute dominion over land and is "the highest quality of estate in land known to law." See State v. Jacksonville Expressway Auth., 139 So. 2d 135 (Fla. 1962). Crescent owned the real property on February 24th. On February 25th, CMC owned the real property, after Crescent executed a deed in consideration of $10.00 and "other good and valuable consideration." On February 25th, after the deed was executed, Crescent had no interest in the property to convey.
>
> Second, the face of the deed reflects a substantive change of ownership in exchange for consideration. Consideration follows as a natural consequence of the commercial transaction transferring intangible

> property with exchangeable value, as evidenced by the "other good and valuable consideration" recitation on the deed. Section 201.02(1) does not limit consideration to money, stock, or debt relief.

Crescent Miami, App 1. at 9-10.

Kuro is contrary to more than a half century of precedent and is in express and direct conflict with the Third District's decision in Crescent Miami. Kuro has created new uncertainties in the law, because it questions the long-settled doctrine that artificial entities, even when closely held, are nevertheless legally separate entities from their shareholders. To this extent, the decision of the Third District in Crescent Miami is a vehicle for rejecting Kuro or limiting it to its precise facts.

Finally, the Department would point out to this Court that it previously had this issue before it when it considered Muben-Lamar, L.P. v. Florida Department of Revenue, 763 So. 2d 1209 (Fla. 1st DCA 2000). In that case, the First District held that the partnership of Muben-Lamar bought real property by issuing valuable partnership interest in consideration for the land. The First District held that this transaction involved a straight forward exchange of land for personalty. The First District certified express and direct conflict with Kuro. This Court initially granted review and held oral argument, but later dismissed the appeal stating "jurisdiction was improvidently

granted." Muben-Lamar, L.P. v. Department of Revenue, 789 So. 2d 337 (Fla. 2001). The underlying issue in these cases has continued to percolate through the courts in Florida. Recently, the First District in International Paper Company v. Department of Revenue, __ So. 2d __, 28 Fla. Law weekly D2697 (Fla. 1st DCA November 19, 2003), per curiam affirmed a final administrative order issued by the Department based upon the Third District's holding in Crescent Miami. A motion for rehearing is currently pending in that case.

This Court should take this opportunity presented in the Crescent Miami case, exercise its discretionary review powers and resolve the inter-district conflict on this point of law.

CONCLUSION

WHEREFORE, the Department requests that this Court exercise its discretionary jurisdiction and accept this case to resolve the inter-district conflict between the Third and Second Districts on this point of tax law.

Respectfully submitted,

Charles J. Crist, Jr.
Attorney General

Charles Catanzaro
Fla. Bar No. 979732
Assistant Attorney General
Office of the Attorney General

The Capitol - PL 01
Tallahassee, FL 32399-1050
(850) 414-3300

Counsel for Respondent
Department of Revenue

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Respondent's Brief on Jurisdiction, 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, Mitchell I. Horowitz, Esq., Fowler White, et al, P.A., 501 E. Kennedy Blvd., 17th Floor, P.O. Box 1438, Tampa, FL 33601-1438, this ___ day of January, 2004.

Charles Catanzaro
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's Jurisdictional Brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., in that this Brief uses Courier New 12-point font.

Charles Catanzaro
Assistant Attorney General

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