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.
_________________________________/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT

____

PETITIONER'S REPLY BRIEF

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ARGUMENT

In its decision in the instant action, the Third District became the first court in Florida to eliminate judicially what is otherwise required by statute as a prerequisite to liability for documentary stamp tax on a deed; that consideration be paid by a purchaser in order for a real estate transaction to be taxable pursuant to Florida Statutes §201.02. The Court determined that the 1990 amendment to §201.02(1) created a statutory definition for consideration comprised of: (1) the payment of monies; (2) the discharge of any obligations; (3) a mortgage on property whether discharged or not; and (4) the fair market value of the property exchanged. *Crescent Miami Center, LLC, v. Department of Revenue*, 857 So.2d 904, 907 (Fla. 3rd DCA 2003). Thus the Third District opined that any deed transferring real property in fee simple creates an obligation to pay documentary stamp tax unless the transaction otherwise falls within specified exemptions. *Crescent Miami Center*, 857 So.2d at 909-910.

Seizing upon the Third District's Opinion, the Department of Revenue (hereinafter referred to as "DOR") argues that all transfers of real property fall into one of two categories: (1) gifts, which are not taxable; and (2) purchases, which are taxable unless they fall within an express exemption. The Third

District's Opinion and DOR's interpretation of §201.02(1) goes far beyond the bounds of reasonable statutory construction and is contrary both to the language of the statute, as well as its history. The Third District erred and DOR'S position should be rejected in the instant action because Crescent Miami Center, LLC (hereinafter referred to as "CMC" or "Petitioner"), paid no consideration to the grantor, Crescent Real Estate Equities Limited Partnership (hereinafter referred to as "Crescent") in exchange for the property and was not a purchaser pursuant to §201.02(1). The transaction merely effected a change in legal title without any change in the equitable or beneficial ownership of the property.

I. THE 1990 AMENDMENT TO §201.02 REQUIRES THAT A PURCHASER PAY CONSIDERATION IN ORDER FOR A DEED OF REAL PROPERTY TO BE TAXABLE

DOR asserts that the requirement of consideration paid by a purchaser as a prerequisite to tax liability pursuant to §201.02 is an "illusion." Answer Brief, p. 11. DOR reasons that this is because "[t]he consideration supporting the change in ownership of the real property is reflected in the change in property interest that followed from the transfer." Answer Brief, p. 15. Stated otherwise, DOR would have this Court find that where there is a change in ownership of real property, consideration is present because there was a change in ownership

in the real property. This approach is both circular, as well as running afoul of well-established common-law principles governing the transfer of property. In 1985, this Court determined "that the case law of Florida does not support the proposition 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 Association v. Schreiber,* 479 So.2d 90, 100 (Fla. 1985). Notwithstanding this Court's decision in Chase, DOR asserts that, as a result of the 1990 amendment to §201.02(1), all deeds of real property are automatically deemed to be supported by consideration.

If the DOR were correct in this interpretation, §201.02(1), as amended, would be in derogation of common law. However, statutes adopted or amended to change common law "must speak in clear unequivocal terms, as this rule will not be changed by doubtful implications, and, if changed or modified, the change or modification extends no further than is expressly declared." *Bryan v. Landis*, 142 So. 650, 651 (Fla. 1932). *See also Allstate Mortgage Corporation of Florida v. Strasser*, 286 So.2d 201,202 (Fla. 1973); *Gomez v. Avis Rent-a-Car System, Inc.*, 596

So.2d 510, 511 (Fla. 3rd DCA 1992); *Vanner v. Goldshein*, 216 So.2d 759, 760 (Fla. 3rd DCA 1992).

The 1990 amendment to §201.02(1) added the following language:

> 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; and the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not 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.

Prior to this amendment, Florida courts uniformly interpreted §201.02(1) as meaning that absent consideration a transfer of real property is not subject to the documentary stamp Tax. *See State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493 (Fla. 1956); *Department of Revenue v. DeMaria,* 238 So.2d 838 (Fla. 1976); *Win-San Building Corp. v. Department of Revenue,* 358 So.2d 112 (Fla. 3rd DCA 1978); *Straughn v. Story*, 334 So.2d 337 (Fla. 1976); *American Foam Industries, Inc. v. Department of Revenue*, 345 So.2d 343 (Fla. 3rd DCA 1977). With the exception of the language quoted above, the remainder of §201.02(1) remained the same as the iteration of the statute which was construed by the courts in *Palmer-Florida*, *DeMaria*,

Win-San, *Straughn,* and *American Foam*. So if the radical change advocated by DOR exists, it can only be found in the above-quoted language added to §201.02(1) by the amendment. Further, the change to the common-law rule must be set forth in the statute "in clear unequivocal terms" and "will not be changed by doubtful implications." *Bryan v. Landis*, 142 So. at 651. The language of the amendment does not support DOR's interpretation.

The language added to §201.02 does not eliminate the key requirements of a purchaser and consideration. To the contrary, Chapter 90-132, Laws of Florida, states again the requirement that consideration be exchanged whether in the form of money or other property. Even the concluding sentence of the Statute requires that consideration which "includes property other than money" be "paid or given in exchange for real property" before the presumption of fair market value as a tax base arises.

Florida's history of not taxing real estate conveyed between a wholly-owned entity and its owner was known to the Florida legislature. If the Legislature intended to reverse the above-referenced line of cases, it could easily have done so by modifying or deleting specific language in Chapter 90-132, §7, *Laws of Florida*. In fact, Chapter 90-132 did carefully make several adjustments to §201.02 without removing the requirements

that there be a purchaser and consideration. The Legislature expressly confirmed the holding in *DeMaria* by adding to §201.02(1) that "the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not underlying" would be taxable as part of a conveyance. In addition, §201.02(5) was amended to make very specific changes to the taxability of conveyance between partners and partnerships, detailing those contributions and distributions that were taxable. The requirement of consideration was not changed.

DOR suggests that for CMC to negate the existence of consideration it must prove that the transfer of property to it was a gift. Answer Brief, pp. 23-26.[1] This position, again, disregards completely the express language of §201.02(1).[2] This statute requires that there be a purchaser and an exchange of consideration before a transfer of real property is taxable; it

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[1]This gives rise to Appellees' argument that CMC is somehow seeking an exemption from the documentary stamp tax and, therefore, CMC's position must be strictly construed against it. Answer Brief, pp. 39-42. This is incorrect. CMC is not seeking a tax exemption. Rather, CMC contends that its transaction is not properly taxable because the requirements of §201.02(1), consideration paid by a purchaser, have not been met.

[2]DOR's theory is further belied by its own regulations. Rule 12B-4.014, Florida Administrative Code, lists fifteen examples of conveyances which are without consideration and are not subject to documentary stamp tax, only one of which is a gift.

does not provide that all conveyances are taxable unless they are gifts. *See supra*, pp. 2-6.

If the Legislature intended to tax all transfers of real property other than gifts and those expressly excluded, the Legislature would have done so specifically. To adopt a principle cited by DOR, "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). The Legislature's failure to include such a specific reference or, in the alternative, to exclude the requirements of a purchaser and consideration clearly establishes legislative intent.

II. CMC PAID NO CONSIDERATION TO CRESCENT; <u>THIS TRANSACTION IS NOT TAXABLE</u>

The Third District held and DOR argues that the documentary stamp tax, as an excise tax on documents, is determined based upon the face of the document and that extrinsic facts should not be considered. *Crescent Miami Center*, 857 So.2d at 909; Answer Brief, p. 6. Yet this approach conflicts with the text of §201.02(1), which requires a determination of whether consideration was paid, even if not apparent on the face of the

deed. Florida courts have consistently looked beyond the face of the document to find the existence and amount of consideration paid to determine the documentary stamp tax. *River Park Joint Venture 315076 v. Dickinson,* 303 So.2d 654, 655 (Fla. 1st DCA 1974); *DeMaria, 338 So.2d at 840; Palmer-Florida*, 88 So.2d at 494; *DeVore v. Gay,* 39 So.2d 795, 797 (Fla. 1949).

In the instant action, Crescent first created and issued membership interests in its wholly owned subsidiary, CMC. Thereafter, Crescent transferred the property to CMC. The property was unencumbered when transferred and CMC paid no money for the property. DOR concedes that "Miami Center neither paid money nor transferred real or tangible property for the real property it received from Crescent." Answer Brief, p. 26.

As this Court determined in *Palmer-Florida*, "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 §201.02." *Palmer-Florida Corp.,* 88 So.2d at 495. Just as was the transaction in *Palmer-Florida*, the transfer of the property to CMC "was a mere book transaction[3] and

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[3]DOR objects to the use of the term "book transaction," suggesting that it is meaningless. Nonetheless, the term was

was in no sense a sale to a 'purchaser'." *Id.* In the instant transaction there was no "shifting of the economic burden and benefit which supplies the consideration." *DeMaria*, 338 So.2d at 840. Because Crescent owned 100% of CMC at the time of the transaction, "the beneficial ownership of the land remained unchanged." *Kuro, Inc. v. Department of Revenue,* 713 So.2d 1021, 1022 (Fla. 2d DCA 1998). As a result, the trial court should properly have determined that the transaction was not taxable and granted summary judgment in favor of CMC.

In response to CMC's arguments, DOR advances novel constructions of the documentary stamp statute in order to establish the payment of consideration here. DOR seeks to establish the existence of consideration via two theories: (1) that Crescent's transfer of the property to CMC resulted in an increase in the value of Crescent's interest in CMC; and (2) that

the shifting of the potential risk of future liability constitutes consideration. None of DOR's arguments find any support any Florida law.

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first used in the documentary stamp tax context by this Court in *Palmer-Florida*, referring to transfers of real property between a wholly-owned business entity and its owner with no third party involved.

DOR attempts to create the existence of consideration in the instant transaction where there is none by hypothesizing that Crescent received value for the transfer of the property because the value of its interest in CMC increased as a consequence of the conveyance.[4] This theory of consideration is illusory. While the value of the interest in CMC may have increased, it was offset by the decrease in the value of Crescent's assets resulting from the conveyance. DOR concedes this at page 26 of its Answer Brief ("Crescent's net worth did not change as a result of the transfer because Crescent transferred the property as a contribution to capital").

DOR's "increase in value of interest" theory derives from *Muben-Lamar, L.P. v. Department of Revenue*, 763 So.2d 1209 (Fla. 1st DCA 2000). However, as was discussed in CMC's Initial Brief, at pp. 19-20, *Muben-Lamar* involves a factual situation drastically different from that presented herein. The First District determined correctly "that the partnership bought the real property by issuing valuable partnership interests and consideration for land" in *Muben-Lamar* because in that case the

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[4]CMC agrees with Amicus that several of DOR's administrative rules implying this theory are overbroad in that they would tax business entities in situations where they should not be taxed. However the Court need not address these regulations because in the instant situation, no tax is due based upon §201.02(1).

real property was transferred to a grantee which was not wholly owned by the grantor. This is unlike the situation in the case *sub judice* where there was no third party contributing other property in exchange for interest in the real estate.[5]

DOR's argument that consideration may be found in the "increased value" of Crescent's interest in CMC was rejected by the Connecticut Supreme Court in the context of that State's documentary stamp statute. That court found that "the term 'consideration' has a familiar legal meaning that does not encompass an increase in the monetary value of a thing if that increase was not the result of bargain or exchange." *Mandell v. Gavin,* 816 A.2d 619, 627 (Conn. 2003). *See also Tranfo v. Gavin,* 817 A.2d 88 (Conn. 2003). Federal decisions are similarly consonant with *Palmer-Florida, DeMaria* and *Muben-Lamar*. In *Carpenter v. White*, 80 F.2d 145 (1st Cir. 1935), the court found tax was due where, as in *Muben-Lamar*, where third parties were injected into a transaction causing the new interests to be different from the old. As in *DeMaria*,

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[5]In addition, the concurring opinion in *Muben-Lamar* notes that "DOR's position on the element of 'consideration' could be easily avoided in the *Kuro* circumstances by issuing capital stock of a new corporation to the subscribers in advance of the transfer of real property in the corporation." *Muben-Lamar*, 763 So.2d at 1210-1211. This is precisely what was done in the case of CMC.

transfers of property subject to existing liabilities or debt were also found to be taxable by federal courts. *See, R.H. Macy & Co. v. U.S.*, 107 F.Supp. 883 (S.D.N.Y. 1952); *Greyhound Corp. v. U.S.*, 208 F.2d 858 (7th Cir. 1954). These cases involved a shifting of economic burdens just as was addressed in *DeMaria*.

In an attempt to further bolster its "increase in value" theory, DOR resorts to an accounting analysis of a transaction in the nature of the facts presented herein. No Florida court has adopted such an accounting analysis in determining the existence of consideration for tax purposes. Further, an accounting analysis is case-sensitive and should properly been presented in the form of expert testimony. DOR offered no such expert testimony below nor any evidentiary predicate for admitting the accounting sources cited in its Answer Brief, and, thus, its analysis is speculative, unfounded and relies upon hearsay. As such, it should not be considered.

DOR's "Book-Entry System" theory is flawed when applied in the context of the documentary stamp tax. As an initial matter, it conflicts with *Palmer-Florida* and *DeMaria*, each of which utilized the "book transaction" or equitable ownership principles. DOR would have this Court determine that the mere shift of the value of the property from the "left column" (assets) to the "right" (liability and/or owner's equity)

creates consideration in a property transfer between a wholly-owned business entity and its *DeMaria* involved similar shifts between owner's quity and assets in the books of the parties involved and were found to not be taxable.

Further, the book-entry theory fails in another respect. DOR concedes that Crescent's net worth did not change as a result of the transaction. Answer Brief, p. 27. The only change, per DOR's theory, would be in Crescent's own accounting records. Nonetheless, Crescent as owner of CMC could still control the property and instruct, if it wished, that the realty be sold or further transferred. Under these circumstances, Crescent would have "paid" itself with a mere book entry. *See Greenberg v. Morris,* 2136 S.W.2d 734, 738 (Mo. 1968) (party cannot pay consideration to itself).

Florida's treatment of single member LLCs such as CMC, for tax purposes is also contrary to DOR's "change in ownership interest" theory. Florida Statutes §608.471(1) expressly provides that "a single member limited liability company which is disregarded as an entity separate from its owner for federal income tax purposes and organized pursuant to this chapter or qualified to do business in this state as a foreign limited liability company is not an 'artificial entity'." Section 608.471 (2) provides that "a limited liability company which has

only one member shall be disregarded as an entity separate from its owner for federal income tax purposes" and grants such an entity the same status under Florida law.

As a result, Department of Revenue TIP number 98 (C-105), July 1, 1998, provides that when an owner of a single member LLC is "required to file a Florida corporate income tax return, the corporation is to include its share of the LLC's sales, payroll, and property factors with its own in calculating its apportionment factor." CMC has made such an election to be treated as a disregarded entity; its books are consolidated with its owner. Thus, DOR's reliance upon decisions interpreting Federal Income Tax law cited at pp. 20-22 and 35 of its Answer Brief are inapplicable here. Similarly, DOR's accounting analysis is flawed because it does not take into account the fact that a single-member limited liability company such as CMC may be disregarded for tax purposes and its books consolidated with its owner's.

DOR also asserts that consideration could be found in the shifting of the risk of potential future liability from Crescent to CMC which results from the transaction. Again, this issue has been addressed amply in CMC's Initial Brief, pp. 23-25. 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 principle applies to 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, every transfer of real property would be taxable under the statute. This is simply not the legislative intent behind §201.02(1). Further, DOR's approach runs afoul of every Florida decision which has held that a transfer between a wholly owned entity and its owner is not taxable. Florida courts have declined to apply "corporate veil" principles to transfers of property between wholly-owned entities and their owners in the context of §201.02. *See Palmer-Florida Corp.*, 88 So.2d 493; *DeMaria,* 338 So.2d 838; *Win-San Building Corp. v. Department of Revenue*, 358 So.2d 112; *Straughn v. Story*, 334 So.2d 337; *American Foam Industries, Inc. v. Department of Revenue*; *Kuro, Inc. v. Department of Revenue,* 713 So.2d. 1021.

CONCLUSION

CMC did not pay any consideration to Crescent for the real property which was transferred to CMC. In the absence of consideration, no documentary stamp tax was due and the Third District's decision in this case should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19th day of July, 2004, to: CHARLES CATANZARO, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol Tax Section, PL 01, Tallahassee, Florida 32399-1050.

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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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