SUPREME COURT OF FLORIDA

INTERNATIONAL PAPER COMPANY, Petitioner vs. DEPARTMENT OF REVENUE, STATE OF FLORIDA, Respondent _____/		Supreme Court Case No. _____ First District Court of Appeal Case No. 1D02-3947

BRIEF ON JURISDICTION OF PETITIONER INTERNATIONAL PAPER COMPANY

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STATEMENT OF THE CASE

This case appears a "companion" or "contemporaneous" case to *Crescent Miami Center, LLC v. Florida Department of Revenue*, 857 So. 2d 904 (Fla. 3d DCA 2003), now pending before this court as Case No. SC03-2063.

Petitioner International Paper Company ("International Paper") seeks discretionary review pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, of the decision of the First District Court of Appeal reported as *International Paper Company v. Department of Revenue*, ___ So. 2d ___, 2003 WL 22715063, 28 Fla. L. Weekly D2697 (Nov. 19, 2003, rehearing denied January 21, 2004). The First District Court's *per curiam* opinion cited the Third District's *Crescent Miami* decision as controlling authority and affirmed the denial by the Florida Department of Revenue (the "Department") of a tax refund.

Jurisdiction is based on the express and direct conflict of the Third District's *Crescent Miami* decision with the decision of the Second District Court of Appeal in *Kuro v. Department of Revenue,* 713 So. 2d 1021 (Fla. 2d DCA 1998), rehearing denied 728 So. 2d 201 (Fla. 1998).

The central legal issues on the merits are whether deeds conveying unencumbered real property as a capital contribution to wholly owned subsidiary entities (i) involve the payment of "consideration" by the grantee, (ii) are deeds "to a purchaser" and (iii) are therefore taxable under Section 201.02, Florida Statutes. The Second District Court of Appeal in *Kuro v. Department of Revenue* ruled that such deeds are not taxable since they involve no "consideration" and no "purchaser". Disagreeing, the Third District Court of Appeal in *Crescent Miami* (and the First District Court of Appeal in this case) held that the parent-to-subsidiary deeds of unencumbered real property are subject to tax.

STATEMENT OF THE FACTS

On Day 1, International Paper created a wholly owned, limited liability company subsidiary, Former Champlands, LLC (the "Subsidiary") and at that time received all of the membership interests in the Subsidiary. Some twenty days later, International Paper, as a voluntary capital contribution, gave deeds to unencumbered timberlands to the Subsidiary. After conferring with the Department of

Revenue, International Paper paid under protest $102,589.20 in documentary stamp taxes on the deeds. International Paper then filed for a refund. There were no facts in dispute. The taxpayer and the Department disagreed only as to legal issues. The parties proceeded without an administrative hearing and the Department denied the refund application.

International Paper appealed the Department's order directly to the First District Court of Appeal. After briefs and oral argument, the First District affirmed *per curiam* the Department of Revenue's decision, citing *Crescent Miami*. A motion for clarification and certification was denied by the First District Court on January 21, 2004. This Court's jurisdiction was then invoked by notice filed February 20, 2004.

Prior to the First District's final disposition in this case, the taxpayer in *Crescent Miami* sought this Court's discretionary review. Case No. SC03-2063.

This proceeding is filed to seek review on the same basis as *Crescent Miami.* The relevant legal issues in *Crescent Miami* and this case are identical. Factually, the cases are substantially identical except that (1) the conveyance to the "subsidiary" in *Crescent Miami* was from a "grandparent" entity rather than the immediate "parent", and (2) the *Crescent Miami* appeal arose from a Circuit Court action rather than an administrative proceeding. This case therefore presents a simpler set of facts and a more concise record.

STATEMENT OF THE ISSUES

DOES THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN *CRESCENT MIAMI CENTER, LLC V. FLORIDA DEPARTMENT OF REVENUE*, 857 So. 2d 904 (Fla. 3d DCA 2003) DIRECTLY AND EXPRESSLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *KURO V. FLORIDA DEPARTMENT OF REVENUE*, 713 So. 2d 1021 (Fla. 2d DCA 1998) ?

DOES THIS COURT HAVE JURISDICTION WHERE THE DISTRICT COURT'S DECISION TO BE REVIEWED HAS CITED AS A CONTROLLING PRECEDENT IN ITS *PER CURIAM* OPINION A DISTRICT COURT OF APPEAL DECISION THAT IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL?

SHOULD THE COURT EXERCISE ITS DISCRETIONARY JURISDICTION?

ARGUMENT

The conflict between *Crescent Miami* and *Kuro* is direct and express.

The Briefs on Jurisdiction of both petitioner Crescent Miami Center, LLC and the Department of Revenue in the *Crescent Miami* case now pending before this Court, Case No. SC03-2063, adequately articulate the direct and express conflict between *Kuro* and *Crescent Miami*. The argument here is confined a simplification and restatement of the principal issues raised in those briefs.

This case, *Crescent Miami* and *Kuro* concern the applicability of the Florida documentary stamp tax imposed on deeds under Section 201.02(1), Florida Statutes. To have a taxable deed under the statute, there must be a "purchaser" and there must be a payment of "consideration" for the deed.

Crescent Miami, Kuro and this case all involve the application of Section 201.02(1), Florida Statutes, to deeds in which a parent entity transfers unencumbered real property as a capital contribution to a subsidiary. In such a transaction, the grantee is a mere recipient. The subsidiary grantee doesn't "pay" anything.

Kuro and *Crescent Miami* directly conflict with each other as to the legal determination of "consideration," the existence of "purchaser" status and the ultimate finding of taxability. The Second District Court in *Kuro* finds no consideration, no purchaser and no tax because the grantee pays nothing in "money or other property" and is a mere recipient. *Kuro v. Department of Revenue*, 713 So. 2d at 1022. The Third District Court in *Crescent Miami* – on facts that are indistinguishable from *Kuro* from a legal perspective -- finds that the increase in "stock" or "membership interest" value – even though not "paid" by the grantee – is "consideration" and results in both a purchaser and a tax. *Crescent Miami v. Department of Revenue*, 857 So. 2d at 910. *Crescent Miami* adopts the Department's novel theory of consideration while *Kuro* adheres to the traditional concept that "consideration" does not exist unless the grantee itself pays or gives value in an exchange.

The conflict in decisions is also express. The Second District Court of Appeal in *Kuro* held that voluntary capital contributions of real property from "parents" to a wholly owned subsidiaries involved no consideration and were

> mere book transactions and . . . were not sales to a purchaser as

> contemplated by Section 201.02(1) . . . .

713 So. 2d at 1023. *Kuro* uses the concept of a "book transaction" to describe conveyances in which ultimate beneficial ownership does not change, the subsidiary acts as a passive recipient of a deed from its affiliate and the transaction represents a "mere change in form." The *Crescent Miami* decision, although speaking in terms of an "exemption" rather than the "scope" of the tax, expressly spurns the *Kuro* conclusion that a deed evidencing a capital contribution lacks consideration and is non-taxable as a "book transaction":

> There is no exemption for "book transactions" which convey an interest in real property by deed among related entities.

Crescent Miami, 857 So. 2d at 910. Both the holding of *Crescent Miami* and its language are in direct conflict with *Kuro*.

The First District Court's citation to *Crescent Miami* in a *per curiam* opinion is sufficient to invoke this Court's conflict jurisdiction where *Crescent Miami* is found to be in direct and express conflict with *Kuro*.

This Court has repeatedly held that conflict jurisdiction exists under Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, where a District Court of Appeal, in issuing a *per curiam* opinion, cites a case that is in direct and express conflict with the decision of another District Court of Appeal or of this Court. As stated in *Jollie v. State*, 405 So. 2d 418, 421 (Fla. 1981), review is appropriate where

> a District Court cites as controlling a case that is pending review in . . . this Court.

See also, Kelly v. Community Hospital of the Palm Beaches, 818 So. 2d 469, 470 (Fla. 2002); *Walker v. State*, 682 So. 2d 555 (Fla. 1996); *Taylor v. State*, 601 So. 2d 540 (Fla. 1992); *State v. Lofton*, 534 So. 2d 1148, 1149 (Fla. 1988).

This Court Should Exercise Its Discretionary Jurisdiction.

The issues raised in *Kuro* and *Crescent Miami* are of great importance to both taxpayers and the Department of Revenue since the divergence of opinions "threatens the stability of the tax laws." Respondent Department of Revenue's Brief on Jurisdiction, Case No. SC03-2063, pp. 1, 2 and 7. Deeds recorded in counties subject to rulings of the Second District Court of Appeal can make capital contributions of unencumbered property without tax. Identical deeds recorded in counties served by the First and Third District Courts of Appeal are taxable. Taxpayers having transactions within areas served by the Fourth and Fifth District Courts of Appeal can rightfully claim confusion. The split in authority is reflected in court decisions outside of Florida.[1] The conflicting decisions should be resolved, and that is the precise function of this Court's discretionary jurisdiction.

Exercise of discretion to review *Crescent Miami* is also appropriate because *Crescent Miami* conflicts (although perhaps not expressly) with this Court's own decision in *Department of Revenue v. Joseph A. De Maria*, 338 So. 2d 838 (Fla. 1976). The theory of consideration adopted by the Third District, if applied to the facts in *De Maria*, would give a result that is at odds with the *De Maria* decision of this Court. In *De Maria*, a corporation gave shareholders a deed to real property as a dividend. The real property in *De Maria* had a fair market value of $85,000, a mortgage balance of $60,000, and an "equity" of $25,000. *Id.* at 839. This Court held that the deed was taxable to the extent of the $60,000 mortgage. As to the $25,000 in "equity," the deed was found to be non-taxable. *Id. at* 840. The new theory of consideration adopted by the Third District Court of Appeal would alter the *De Maria* result and cause this $25,000 "equity" portion to be taxed. The dividend would cause the shareholder's stock value to be lowered by $25,000. The *Crescent Miami* "theory" would then deem the shareholder to have "paid consideration" through this reduction in stock value. *Crescent Miami* conflicts with *De Maria* because no legislation has authorized a change in the *De Maria* logic or

[1] Connecticut's highest court found no documentary stamp tax to be owed on such transactions while the Maryland high court found them taxable. *See Tranfo v. Gavin*, 817 A.2d. 88 (Conn. 2003) and *Mandell v. Gavin*, 816 A.2d 619 (Conn. 2003) (parent-to-subsidiary transfers not taxable due to absence of consideration); *Dean v. Pinder*, 538 A.2d 1183 (parent-to-subsidiary transfer increased stock value, which would constitute "consideration" under Maryland statute).

outcome. While the 1990 amendments to Section 201.02 help define consideration with examples[2], the definitions set forth in 1990 actually follow -- and do not deviate from -- the *De Maria* case. Similarly, the rebuttable, evidentiary presumption created by the last sentence of Section 201.02(1) Florida Statutes[3], does not justify abandonment of *De Maria*. This rebuttable presumption does not redefine consideration, nor does it magically create consideration from whole cloth where the undisputed facts show no transfer of money or property by the grantee to exist. In each of the decisions of *De Maria*, *Kuro* and *Crescent Miami* and this case, the courts knew the precise monetary amounts involved so that any "presumption" as to value of "money or other property" paid by the grantee was unnecessary on the facts presented. *Crescent Miami*'s attempt to distinguish the *De Maria* outcome by claiming that "there was no reasonably determinable consideration"[4] in *De Maria* flies in the face of *De Maria's* clear finding that the "equity" involved was $25,000. The new theory of "consideration" propounded in *Crescent Miami* indisputably conflicts with the outcome in *De Maria* and creates a tax where none previously existed. No Act of the Legislature has authorized this change in taxation.

CONCLUSION

Crescent Miami directly and expressly conflicts with *Kuro*. This Court should exercise its discretionary jurisdiction and grant review of *Crescent Miami* and this case.

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[2] The language added to Section 201.02(1), Florida Statutes, by Chapter 90-132, Laws of Florida, to define consideration was:

> 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 the underlying indebtedness is assumed.

[3] The rebuttable presumption added to Section 201.02(1), Florida Statutes, by Chapter 90-132 Laws of Florida, reads:

> 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.

[4] *Crescent Miami Center LLC. v. Department of Revenue*, 857 So. 2d at 907.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this ____ th day of February, 2004, to **Charles Catanzaro**, Assistant Attorney General, Office of the Attorney General, The Capitol – Tax Section, Tallahassee, FL 32399-1050, and to **Richard Robinson**, General Counsel's Office, State of Florida, Department of Revenue, Post Office Box 6668, Tallahassee, Florida 32314-6668, Attorneys for Appellee; and to **Mitchell I. Horowitz**, 501 E. Kennedy Boulevard, 17th Floor, Tampa, FL 33601-1438, attorney for Amicus.

_____

John T. Sefton, Attorney

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure in that it was prepared using Times New Roman 14-point type.

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John T. Sefton, Attorney

APPENDIX