FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1188

1701 COLLINS MIAMI OWNER, LLC,

Appellant,

v.

DEPARTMENT OF REVENUE,

Appellee.

On appeal from the Department of Revenue.
Andrea Moreland, Deputy Executive Director.

May 17, 2021

PER CURIAM.

Appellant, 1701 Collins Miami Owner, LLC, appeals the final order of Appellee, the Department of Revenue, sustaining the denial of its application for a refund of documentary stamp tax and discretionary surtax it had paid on the transfer of certain property. We affirm the final order as to all three issues raised on appeal and write only to address Appellant's argument that it demonstrated its entitlement to a refund of overpaid stamp tax and surtax.

BACKGROUND

In 2015, pursuant to a Purchase and Sale Agreement ("Agreement"), Appellant sold to 1701 Miami (Owner), LLC ("Purchaser") a hotel and conference center known as the SLS Hotel South Beach ("Hotel Business") for the purchase price of $125,000,000. The Hotel Business comprised of real property, tangible personal property, and intangible personal property. The Agreement provided that "[t]he Parties hereby agree that the Purchase Price shall be allocated among the elements comprising the Property for federal, state and local tax purposes as reasonably agreed to by the parties prior to Closing." That allocation never occurred for reasons unknown, and Appellant was responsible for paying documentary stamp tax and discretionary surtax pursuant to the Agreement. The sale closed and a special warranty deed reflecting a consideration of $10 was recorded. Appellant paid $750,000 in stamp tax and $562,500 in Miami-Dade surtax based on the full purchase price of $125 million.

In 2018, Appellant timely submitted to the Department an application pursuant to section 215.26, Florida Statutes (2019), for a refund of overpaid stamp tax and surtax in the amount of $495,563, asserting it mistakenly paid the taxes on the entire sale price of the Hotel Business, which included personal property, when such taxes may only be imposed on real property pursuant to section 201.02(1)(a), Florida Statutes (2019). Appellant's refund claim was based on a Deal Price Analysis ("DPA") report prepared in 2018 by Bernice Dowell, President of Cynsur, LLC, a third party it commissioned to allocate the sale price among the categories of assets transferred in the 2015 transaction. Dowell's report explained that the DPA "allocate[d] the value to the major asset classes that transferred," and its results "indicate[d] that the implied values of the major classes of assets comprising this investment are as follows:"

Real Estate	$77,803,500	62.24%
Tangible Personal Property	$7,000,000	5.60%
Intangible Property	$40,196,500	32.16%
Total Operating Hotel	$125,000,000	100.00%

The Department issued a Notice of Decision of Refund Denial, finding that Appellant failed to provide sufficient evidence to support its refund claim because there was no evidence that the contracting parties agreed on an itemized consideration for the categories of property prior to the transfer. Appellant petitioned for a chapter 120 administrative hearing to contest the notice.

For the purposes of the final hearing held before an administrative law judge ("ALJ") of the Division of Administrative Hearings, the parties agreed in their Joint Pre-Hearing Stipulations that stamp tax and surtax are due only on the consideration paid for real property, not personal property, that Appellant bore the burden to prove that the amount sought to be refunded was not owed, that the requested refund amount is based exclusively on the DPA, that the DPA is an opinion of the implied values of the three types of property transferred, and that the Purchaser has not agreed to the valuations in the DPA.

The undisputed testimony at the hearing showed that the $125 million sale price included real, tangible personal, and intangible personal property. Appellant's corporate representative testified that each type of property had value, but to his knowledge the contracting parties never agreed to an allocation of the sale price among the property types. Holly Unck, the representative of the real estate firm Appellant hired, similarly testified that an allocation of consideration among the property categories, as called for in the Agreement, never occurred. Unck did not try contacting the Purchaser to confirm whether there was any allocation, and she had no knowledge of whether the contracting parties agreed to attribute 100% of the sale price to the real property. Dowell explained that her DPA provides an opinion of the value of the real estate within the deal, and Appellant's witnesses confirmed that the amount of refund sought is based on the DPA and that the Purchaser did not agree to the allocations of the DPA.

The Department's representatives testified that Appellant failed to support its refund application with evidence showing that the contracting parties agreed upon the consideration for the real property and that the DPA was insufficient evidence because it reflected the value of the property, not the consideration agreed upon by the parties to the transaction. In addition to Appellant

paying stamp tax and surtax on the full sale price of $125 million, $125 million was listed on the title insurance settlement statement as the total consideration for the property, and $122 million was listed as the sale price for the real property on Appellant's 2015 federal tax return. The Department's representatives testified that the buyer is responsible for ensuring that the proper tax amount is paid, even if it is not the party paying it, and without evidence to prove otherwise, the Department had to assume that the Purchaser followed the law and made sure the proper amount of tax was paid. One of the representatives added that a unilateral decision by the seller about the amount of the consideration could have tax implications for the buyer.

In his Recommended Order, the ALJ credited Dowell's DPA and found that "$77.8 million is a reasonable allocation of consideration to the [real estate] component of the Hotel Business" and because Appellant paid stamp tax on $125 million instead of $77.8 million, it overpaid the tax and is due a refund in the amount of $495,013.05. In its Final Order, the Department rejected the ALJ's recommendation to approve Appellant's refund application upon concluding in part that Appellant failed to meet its burden to prove that $77,803,500 was the consideration it received for the real property sold given the undisputed evidence that Appellant and the Purchaser never agreed that $77,803,500 would be the consideration for the real property. The Department explained that the ALJ improperly equated "value," which is produced by the DPA, with "consideration," which is required under section 201.02(1)(a). The Department sustained the denial of Appellant's refund application, and this appeal followed.

ANALYSIS

The issue we address is whether Appellant established its claim that it overpaid documentary stamp tax and discretionary surtax on the consideration for the transfer of real property, thereby entitling it to a refund. Because this issue presents a question of law, we review the Department's final order de novo. *A.W. v. Agency for Persons with Disabilities*, 288 So. 3d 91, 93 (Fla. 1st DCA 2019); *see also Brownsville Manor, LP v. Redding Dev. Partners, LLC*, 224 So. 3d 891, 894 (Fla. 1st DCA 2017) (explaining that an agency's interpretations and conclusions of law are

reviewed de novo, whereas its findings of fact are reviewed for competent, substantial evidence). We may not defer to the agency's interpretation of a statute or rule. Art. V, § 21, Fla. Const. We must remand the case or set aside the agency action if we find that the agency erroneously interpreted a provision of law and a correct interpretation compels a particular action. § 120.68(7)(d), Fla. Stat. (2019).

When confronted with a question of statutory interpretation, we must determine legislative intent by first looking to the actual language used in the statute. *Coastal Creek Condo. Ass'n, Inc. v. Fla. Tr. Servs. LLC*, 275 So. 3d 836, 838 (Fla. 1st DCA 2019). If the statutory language is unambiguous, we may not resort to the rules of statutory construction and must give the statute its plain meaning. *Id.* We must give effect to all parts of the statute, and we "may not construe a statute in a way that would extend, modify, or limit its express terms or its reasonable or obvious implications." *Id.* at 839. "Every word employed . . . is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (announcing the Court's adherence to the "supremacy-of-text principle" that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means"); *see also Crews v. Fla. Pub. Employers Council 79, AFSCME*, 113 So. 3d 1063, 1069 (Fla. 1st DCA 2013) (explaining that in determining legislative intent, "courts should give words in a statute their ordinary and everyday meaning unless the context reveals that a technical meaning applies. . . . In particular, when the Legislature uses an undefined term with a fixed legal meaning fitting the context, that meaning governs." (citations omitted)). Statutes that impose taxes must be strictly construed against the taxing authority and any ambiguity in the statute must be resolved in the taxpayer's favor. *Verizon Bus. Purchasing, LLC v. State, Dep't of Revenue*, 164 So. 3d 806, 809 (Fla. 1st DCA 2015).

The Department is charged with the administration of chapter 201, which governs excise tax on documents. § 201.11, Fla. Stat. (2019). Section 201.02(1)(a), Florida Statutes (2019), provides:

> 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 her direction, on each $100 of the consideration therefor 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; and the amount of any mortgage, purchase money mortgage lien, or other 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.

(Emphasis added); *see also* Fla. Admin. Code R. 12B–4.012(1), (2). Additionally, each county may levy a discretionary surtax on documents taxable under section 201.02, except on documents conveying interest only in a single-family residence. § 201.031(1), Fla. Stat. (2019); *see also* Fla. Admin. Code R. 12B–4.012(3). "The documentary stamp taxes shall be paid on all recordable instruments requiring documentary stamp tax according to law, prior to recordation." § 201.01, Fla. Stat. (2019); *see also* Fla. Admin. Code R. 12B–4.007 ("All instruments shall be properly taxed prior to recordation."); Fla. Admin. Code R. 12B–4.011 ("The tax attaches at the time the deed or other instrument of conveyance is delivered, irrespective of the time when the sale is made.").

Section 215.26, Florida Statutes (2019), is titled "[r]epayment of funds paid into State Treasury through error" and authorizes a refund for "[a]n overpayment of any tax." An application for refunds must generally be filed within three years after the right to the refund has accrued or is barred. § 215.26(2), Fla. Stat. The

refund application "must be supplemented with additional proof the Chief Financial Officer deems necessary to establish the claim." *Id.*; *see also* Fla. Admin. Code R. 12B–4.004(1) ("Any person who has overpaid documentary stamp tax or discretionary surtax may seek a refund by filing an Application for Refund . . . with the Department.").

In a taxpayer contest proceeding, the Department's burden of proof, except as otherwise specifically provided by general law, is limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the assessment was made. § 120.80(14)(b)2., Fla. Stat. (2019). "Once the [Department] has met this initial burden of proof, the burden shifts to the taxpayer to demonstrate by a preponderance of the evidence that the assessment is incorrect." *IPC Sports, Inc. v. State, Dep't of Revenue*, 829 So. 2d 330, 332 (Fla. 3d DCA 2002); *see also Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981) ("In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.'" (citation omitted)); *Metro. Dade Cnty. v. Colsky*, 241 So. 2d 440, 442 (Fla. 3d DCA 1970) ("A tax assessment is presumed correct and the taxpayer must carry the burden of presenting proof which excludes every reasonable hypothesis of a legal assessment." (citing *Homer v. Dadeland Shopping Ctr., Inc.*, 229 So. 2d 834 (Fla. 1969)).

This being a refund case, it is undisputed that Appellant had the burden of proving its entitlement to a refund. As the parties also agree, section 201.02(1) imposes stamp tax on the "consideration" for the transfer of real property only. As such, Appellant was required to prove its claim as to the "consideration" for the real property transferred in the 2015 transaction.

Given that section 201.02 does not define the term "consideration," we may ascertain the plain and ordinary meaning of the word from a dictionary. *See Boatman v. Hardee*, 254 So. 3d 604, 608 (Fla. 1st DCA 2018). According to the dictionary, "consideration" means "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to

engage in a legal act." *Consideration*, Black's Law Dictionary (11th ed. 2019); *see also* Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/consideration (defining "consideration" as "[s]omething bargained for and received by a promisor from a promisee. Common types of consideration include real or personal property, a return promise, some act, or a forbearance."). Because "consideration" is an undefined term with a fixed legal meaning fitting the context of section 201.02, that meaning must control. *See Crews* 113 So. 3d at 1069. In fact, the ALJ agreed with the Department that the term "consideration" in section 201.02(1)(a) "unambiguously means and refers to the bargained-for product of mutual assent between contracting parties, given in exchange for promised performance," and Appellant has not challenged that definition.

The question thus becomes whether Appellant established that the contracting parties agreed on a consideration of $77,803,500 for the real property transferred as part of the deal. It is undisputed, however, that the only consideration the contracting parties bargained for is the $125 million purchase price for the Hotel Business. Appellant nevertheless claims entitlement to a refund based on the DPA, performed years after the transfer. We find that the DPA, which was a unilateral valuation of the real property performed on behalf of Appellant, cannot serve as evidence of consideration as a matter of law because it does not represent the bargained-for product of mutual assent between the contracting parties. Relatedly, the DPA is legally insufficient proof of consideration because its results indicated the value of—not consideration for—the real property. The DPA allocated the values of the transferred asset classes and its results showed that the implied value of the real estate was $77,803,500, which is the figure upon which Appellant based its claim to a refund of $495,563. However, courts "cannot substitute in [section 201.02] the words 'monetary value' or 'value' or 'market value' for the word 'consideration.'" *Culbreath v. Reid*, 65 So. 2d 556, 558 (Fla. 1953).

In *Culbreath*, the Florida Supreme Court held that stamp tax could not be assessed on a deed made by parents to their daughter where she paid nothing for it, reasoning that section 201.02 did not apply because the daughter was not a purchaser of the property

and the love and affection parents have for their daughter, which was the only consideration shown, could not be given a monetary measure of value and the statute applied only to a monetary consideration. *Id.* at 557–58. Subsequently, the Legislature amended section 201.02(1), whereby it listed types of consideration and "provided for the valuation of nonmonetary consideration, presuming such consideration to be equal to the fair market value of the real property or interest therein." *Crescent Miami Ctr., LLC v. Fla. Dep't of Revenue*, 903 So. 2d 913, 917 (Fla. 2005).

Specifically, through a 1990 amendment, the Legislature enumerated as types of consideration "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," and it added the following as the last sentence of section 201.02(1)(a): "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." *Id.*; *see also* Ch. 90-132, § 7, Laws of Fla. The Legislature did not replace the term "consideration" with "value," and its enumeration of "the money paid or agreed to be paid" as a type of consideration is consistent with the dictionary definition of the term "consideration" as it focuses on the contracting parties' bargained-for exchange. Any reliance by Appellant on the last sentence of the sub-section is misplaced as that provision is inapplicable given that the consideration here consisted solely of money. If the Legislature wanted to substitute value for consideration under other circumstances, it could have done so; instead, it plainly limited the fair market value presumption to situations where the consideration includes property other than money. *See also State, Dep't of Revenue v. Ray Const. of Okaloosa Cnty.*, 667 So. 2d 859, 865 (Fla. 1st DCA 1996) (finding the "fair market value" provision of section 201.02(1)(a) inapplicable because "there was no property or consideration other than money").

Our decision in *Cohen-Ager, Inc. v. State, Department of Revenue*, 504 So. 2d 1332 (Fla. 1st DCA 1987), is also instructive. There, pursuant to a contract, the appellant was to construct a plaza on an undeveloped property for the county for the contract price of $2,970,000 and pay all the taxes applicable to the

conveyance of the property to the county. *Id.* The county conveyed legal title to undeveloped property to the appellant by a quit claim deed, and after the appellant took legal title and built the plaza, it deeded back to the county the land plus the improvements. *Id.* The appellant paid nothing to the county when it received title to the undeveloped property, and it was paid the contract price upon reconveyance of the newly developed property to the county. *Id.* We held that the appellant's title reconveyance of the newly developed property was not exempt from stamp taxation. *Id.* at 1334. Significantly, we stated that "because the consideration for the land and the consideration for the development and construction are indistinguishable in the contract price, the full contract price is the consideration for the warranty deed." *Id.* at 1335.

Additionally, as we noted in *Cohen-Ager, Inc.*, "Florida courts have repeatedly held that the liability to pay the documentary stamp tax, as well as the amount of the tax is to be solely determined from the form and face of the instrument, and not by proof of extrinsic facts." *Id.* at 1334 (internal citation omitted); *see also* Fla. Admin. Code R. 12B–4.002(1) ("The taxability of an instrument, as well as amount of the tax, is determined by form and face of the instrument and cannot be affected by proof of extrinsic facts."). We find Appellant's reliance on Florida Administrative Code Rule 12B–4.012(6) unpersuasive. That rule provides that "[t]he minimum tax is required on all conveyances where a nominal consideration such as 'ten dollars and other valuable considerations, etc.', is cited in the document even though such statement may be impeached by competent evidence." Fla. Admin. Code R. 12B–4.012(6). The reference to impeachment by competent evidence can reasonably be interpreted to refer to a contract or mortgage document given the related rules, statutes, and case law. In fact, here, the deed reflected a nominal consideration of $10, and Appellant paid stamp tax on the contract price. The rule does not contemplate that one of the contracting parties can unilaterally determine the consideration for the real property by allocating the purchase price for property consisting of realty and personality based on their respective values.

Of further importance is the fact that the Purchaser was responsible for ensuring that the proper amount of tax was paid

prior to recording. *See* Fla. Admin. Code R. 12B–4.002(1) ("[T]he [stamp] tax is payable by any of the parties to a taxable transaction. The parties to the transaction may agree among themselves as to who shall pay the tax, but such agreements do not relieve the others from their liability in the event the agreement is not followed."); Fla. Admin. Code R. 12B–4.007 ("In order to protect his rights, it shall be the duty of the owner and holder of the deed, mortgage, or other document, within the recording laws of this State, to see to it that proper amount of stamp taxes are attached thereto prior to recording.").*

The Department did not err in assuming that the Purchaser followed the law and ensured that the proper amount of stamp tax was paid when Appellant presented no evidence to demonstrate that the contracting parties agreed on a consideration of anything other than $125 million for the real property, the amount upon which stamp tax was paid. While the DPA appears to be a reasonable method for allocating the purchase price among the asset categories based on their implied values, such a unilateral determination of value by one of the contracting parties cannot serve as evidence of consideration for it is not the result of their bargained-for exchange and mutual assent.

CONCLUSION

The Department properly denied Appellant's refund application given Appellant's failure to prove that it overpaid stamp tax and surtax on the consideration for the transfer of real property. Therefore, we affirm the final order.

AFFIRMED.

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* The law further provides that "[w]hoever makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever, without the full amount of the tax herein imposed thereon being fully paid" is guilty of a first-degree misdemeanor. § 201.17(1), Fla. Stat. (2019); *see also* Fla. Admin. Code R. 12B–4.005.

LEWIS and LONG, JJ., concur; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

Florida law imposes a documentary stamp tax on the conveyance of real property, the amount of which is limited to the consideration paid for the real property itself; the value of personal property and intangible property may not be included in the amount that is taxed. For example, the tax applies to the sale of a $1 million home, but it does not apply to the home's $200,000 of interior furnishings and personal items; tax on the latter items is unauthorized and refundable.

In this case, the sale of the entire hotel business known as SLS Hotel South Beach—consisting of all the real estate, personal property and intangible property interests its owner had amassed at the Collins Avenue location on Miami Beach—occurred in February 2015 pursuant to a $125 million purchase and sale agreement. The parties agreed to allocate the lump sum purchase price of $125 million into the three categories of property prior to closing, but for unknown reasons that didn't happen. Soon after closing, a special warranty deed was filed and the seller, 1701 Collins Miami Owner, LLC (1701 Collins), paid a total of $750,000 in documentary stamp tax and $562,500 in local real property surtax based on the full purchase price of $125 million.

Within the time to seek a refund, 1701 Collins submitted its request to the Florida Department of Revenue that a refund be issued due to its mistaken overpayment of the tax and surtax on the full $125 million purchase price versus just the taxable real property. It requested a refund of $495,563 based on an expert report it had commissioned, called a Deal Price Analysis (DPA), that allocated the value of the three categories of properties (real,

personal, and intangible) included in the overall sale of the hotel business (62.24%, 5.6%, and 32.16%, respectively). The expert who prepared the report had thirty years of experience in property valuation and routinely prepared allocation reports nationwide of this type (approximately 1,000).

At the refund hearing, the Department presented no evidence as to valuation or allocation; instead, it argued that the DPA was unreliable and its allocation of the contractual consideration was contrary to Florida law. On this latter point, the Department maintained—and continues to urge on appeal—that the only "consideration" it may legally recognized is that agreed to and paid by the parties prior to closing. In its view, a taxpayer refund involving a lump sum conveyance of real, personal, and intangible property cannot be based on anything other than the total contractual consideration paid, which in this case is the $125 million paid for the entire hotel business; the Department takes this position even though it concedes that the documentary stamp tax imposed includes personal and intangible property, which are non-taxable and potentially worth millions of dollars according to the DPA.

The administrative law judge, in a thorough and highly detailed forty-five-page order, consisting of nineteen pages of findings of fact (thirty-six numbered paragraphs) and twenty pages of conclusions of law (thirty-four numbered paragraphs), ruled in favor of 1701 Collins and recommended a refund of taxes paid on the personal and intangible properties. The central legal premise of the order is that a refund is warranted where it is proven that the tax imposed and collected exceeds the government's tax powers, which are strictly construed in favor of taxpayers and against the taxing authority. *Fla. S & L Servs., Inc. v. Dep't of Revenue*, 443 So. 2d 120, 122 (Fla. 1st DCA 1983). The central factual premise of the order is that "consideration" for purposes of the documentary stamp tax laws means the "taxable consideration" paid for the conveyance of real estate only and not the "contractual consideration" paid for the conveyance of an entire business that includes real, personal and intangible property—the latter two categories subject to exclusion.

The Department, however, gutted the entirety of these factual findings and legal conclusions, something rarely seen,[1] by granting four general exceptions and fifty-six specific exceptions. The result is a final order denying the requested refund, the net effect of which is the government's retention of tax revenues that the administrative law judge ruled were impermissibly imposed and that the Department concedes were based on non-taxable personal and intangible properties.

1701 Collins appeals, the central question being whether a party who paid documentary stamp tax on the $125 million contractual consideration for the conveyance of all the real, personal, and intangible properties of a hotel business is precluded from seeking a refund—as the Department contends—or may it seek a refund based on an expert report separating out and allocating the taxable consideration for the real property from the non-taxable consideration for the personal and intangible property. This is an issue of first impression.

The statute in question, section 201.02(1)(a), Florida Statutes, authorizes the collection of a documentary stamp tax on the "consideration" paid solely for real property. Ideally, and commonly, the parties' sales agreement will state the specific consideration in dollars paid for the real property at issue, and in those situations the parties' specification of consideration is generally accepted (unless it is artificially low). In real estate-only transactions of that type, the issue of consideration is thereby simplified to a great degree, making a valuation of the amount of taxable consideration unnecessary (again, unless the parties' stated consideration is so minimal as to be called into question).

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[1] That's because in a documentary stamp tax proceeding, as in most other administrative law cases, the "findings of a trier of fact are entitled to as much weight and respect as the verdict of a jury and may not be overturned unless review of the entire record reveals a total lack of substantial evidence to support them." *Cohen-Ager, Inc. v. State, Dep't of Revenue*, 504 So. 2d 1332, 1335 (Fla. 1st DCA 1987).

But what if the parties convey an entire business that includes real, personal, and intangible properties in a lump sum transaction? Must the taxable consideration for documentary stamp tax purposes be limited to the total lump sum stated in the parties' written agreement at the time of sale—as the Department contends—no matter the situation? The answer is no. Nothing in the documentary stamp tax laws defines "consideration" or limits how to determine the amount of "consideration" for every type of conveyance that includes real estate.[2] No statutory authority exists for the Department's unadopted policies that impose the types of limitations and restrictions on the determination of taxable consideration done in this case. The Department, by fiat, has decided to define consideration in a way that a refund is never possible, as discussed more fully below.

Most importantly, nothing in the statutes permit the Department to collect a documentary stamp tax on anything other than the conveyance of real property. § 201.02(1)(b)6., Fla. Stat. (2020) ("The purpose of this paragraph is to impose the documentary stamp tax on the transfer for consideration of a beneficial interest in *real property*." (emphasis added)). The statutory principle that controls in this case is clear: it is unlawful to impose a documentary stamp tax on the conveyance of personal and intangible properties, period. Consistent with this principle, when the total consideration paid for a business includes both taxable real property and nontaxable components such as personal or intangible property, but no allocation is or has been made for the real estate component separate and apart from the personal and intangible property components, an accommodation must be made to avoid an unlawful imposition of the tax. *State, Dep't of Revenue v. Ray Constr. of Okaloosa Cnty.*, 667 So. 2d 859, 865 (Fla. 1st DCA 1996) ("Taxes may be collected only within the clear definite boundaries recited by the statute.").

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[2] The Department's documentary stamp tax rules describe the types of "consideration" in an open-ended way, saying that it "includes, *but shall not be limited to*, money paid or to be paid" and other listed items, signifying that a broader understanding of consideration applies. Fla. Admin. Code R. 12B-4.012 (2020) (emphasis added). In other words, room exists for a determination of what constitutes taxable consideration on a case by case basis.

Under these circumstances, however, the Department's (current) legal position is that it must impose the documentary stamp tax on the *total* consideration paid by the parties to the transaction at the moment of sale, even if that consideration erroneously includes non-taxable, non-real estate components; the Department's policy—which has not been enacted as a rule—imposes this extra-statutory gloss to the meaning of consideration, resulting in all but automatic denials of potentially legitimate refund claims.

The Department, however, has previously recognized that lump sum transactions involving real and personal property must be treated differently. Unlike run-of-the-mill real estate-only transactions, where the monetary value of the consideration paid for a conveyance is stated on the face of a document, lump sum transactions conveying real and personal property are different and thereby treated differently. For this reason, the Department has advised that an estimate of the allocation of a lump sum paid as consideration for both taxable real estate and non-taxable personal property need not be made by the parties and, instead, can be made post-transaction and based on valuations made by third parties as to the real property and personal property involved.

In Technical Advisory Assistance 88(B)4-14 (Oct. 17, 1988), the question presented to the Department was: "What is the measure of the documentary stamp tax due where seller sells its real and personal property to buyer for a lump sum amount pursuant to a sales contract which separately describes both the real and personal property?" The Department answered by saying that the tax would be determined by multiplying the lump sum amount in the sales contract ($7.5 million) by the ratio of the county tax assessor's valuation for the real property by itself ($3.4 million) divided by the total valuations of the real and personal property added together ($3.4 million + $8.8 million), which was approximately 28%. In other words, the Department allowed valuations by a third party—the county assessor—to be used to calculate the documentary stamp tax via a mathematical ratio that approximated an allocation. No indication exists that the parties had agreed to this method of allocation before, during or after the sales transaction; rather, the Department blessed a methodology

used to estimate the value of the consideration paid for real property when both real and personal property were bought via a lump sum amount, just as occurred in this case.

More importantly, nothing in Florida's documentary stamp tax laws limits the methodology by which taxable "consideration" is to be established for documentary stamp tax purposes. The law generally permits expert quantitative analysis to estimate the value of a wide range of property, financial, and personal interests, such that the use of an expert report to establish an allocation of the $125 million of the total contractual consideration in this case is wholly reasonable. *See, e.g.*, *De Vore v. Gay*, 39 So. 2d 796, 797 (Fla. 1949) ("When taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to the actual monetary considerations *or to considerations which have a reasonably determinable pecuniary value*." (emphasis added)). No statute or precedent supports the Department's contention that an estimation and allocation of a lump sum payment of "consideration" for the conveyance of real estate, personal property and intangible property is legally invalid.[3]

Indeed, there must be a dozen ways to prove and allocate consideration including not only the basic method approved in

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[3] Reliance on the statement in *Culbreath v. Reid*, 65 So. 2d 556, 558 (Fla. 1953), that "[w]e cannot substitute in the statute the words 'monetary value' or 'value' or 'market value' for the word 'consideration[,]'" is inapt because (a) the court held the documentary stamp tax statute didn't even apply to the transaction at issue such that the statement is pure dicta and (b) the issue in the case was whether a value can be placed on the "love and affection" that a parent has for their children, which the court held was "not susceptible of having a monetary value placed upon it." The court explained that "[t]here can be no greater consideration than the natural 'love and affection' of parents for their children and that consideration is entirely different from the consideration mentioned in the statute when lands are conveyed to a 'purchaser.'" *Id.* Love and affection are not at issue in this case.

TAA 88(B)-14, but also the widely-accepted methodology used in this case (by an expert with thirty years of experience who'd written at least a thousand similar reports!). While it is desirable as a policy matter that taxable consideration be easily determined—as in a real estate-only transaction—nothing in the law precludes the means for separating out the taxable consideration from the non-taxable consideration pre- or post-transaction.

What if the parties couldn't come to an agreement and relied on the DPA to make the allocation prior to closing; would that be legally impermissible and a basis for denying a refund? If one party refused to comply with the allocation clause in the sales contract, and the other party had to litigate the matter, would use of the DPA at trial be improper? Either way the answer is no. Consideration is simply a numerical value placed on taxable real property for purposes of the documentary stamp tax, which can be proven lawfully in more than one way.[4] For this reason, the fact that the parties did not make an allocation between the real, personal and intangible properties in this case beforehand doesn't negate the relevance and reliability of the DPA in establishing an allocation in a refund action.[5]

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[4] Notably, the use of estimates of the value of consideration are envisioned by the Department's own rules, which say that "[w]here property other than money is exchanged for interests in real property, there is the presumption that the consideration is equal to the *fair market value of the real property* interest being transferred." Fla. Admin. Code R. 12B-4.012(b) (2020) (emphasis added). Stated differently, where the amount of consideration paid for real property is unclear, a fair market value approach is used to create a presumption as to the amount of consideration. Given the recognized role of valuation methodologies in establishing consideration, precluding a fair market or similar valuation of the taxable versus non-taxable consideration in this case is legally unwarranted.

[5] It would be more desirable, of course, for the DPA to have been prepared close in time to the hotel conveyance to reduce the potential appearance of contrivance, but cross-examination and

An overly rigid definition of consideration—one that fails to account for the need to allocate contractual consideration in lump sum business conveyances—runs counter to the basic principle that judicial construction of tax laws must be against the sovereign and in favor of taxpayers. *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967). The contours of "consideration"—which is not defined by statute[6]—must be consistent with the principle that "[t]ax 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." *Ray Constr. of Okaloosa Cnty.*, 667 So. 2d at 865. Here, the parties to the hotel sales transaction agreed on the *total consideration* for the real, personal, and intangible properties that formed the hotel business, making it necessary to place a valuation on its taxable versus non-taxable components. As the Department previously recognized, a taxpayer may demonstrate a meaningful basis for an allocation of a lump sum by a reasonable methodology and expert valuation. *See* Technical Advisory Assistance 88(B)4-14 (Oct. 17, 1988); *see also* 53 Fla. Jur. 2d *Taxation* § 2038 (2020) ("Under a Technical Assistance Advisement issued by the Department where a sale involves both real estate and personal property, the taxpayer can allocate the total purchase price among the assets purchased, proportionately to the fair market value of each, and pay tax only on the amount allocated to the real estate.").

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opposing expert opinion is the appropriate remedy, rather than outright prohibitions of relevant methodologies.

[6] The statute and the department's rule merely provide a non-exhaustive list of some types of consideration, stating that "consideration includes, *but is not be 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." § 201.02(1)(a), Fla. Stat. (2020); *see also* Fla. Admin. Code R. 12B-4.012(a) (2020); *Crescent Miami Ctr., LLC v. Fla. Dep't of Revenue*, 903 So. 2d 913, 918 (Fla. 2005) ("The new language [added to subsection (1)(a) in 1990] simply provided nonexclusive examples of consideration.").

In sharp contrast, by the Department's current legal logic, no refund will ever be permitted in lump sum cases involving real and non-real properties because the Department does not accept any measure of consideration other than that specified by the parties at the time of sale, even if the result is the overpayment of taxes that are unauthorized and refundable. It cannot point to any statute saying that consideration must be allocated to real, personal, and intangible property prior to sale, at the time of sale, or estimated at some later time. For this reason, the fact that the parties did not make an allocation of value between the real, personal, and intangible properties in this case beforehand doesn't negate the relevance and reliability of the DPA. While it may be administratively convenient for the Department to draw a line and narrowly limit consideration to avoid litigating such matters, no legal basis exists for doing so; the legislature, not an agency or court, should be imposing a limitation with a potentially draconian effect. *Cohen-Ager, Inc. v. State, Dep't of Revenue*, 504 So. 2d 1332, 1335 (Fla. 1st DCA 1987) ("We do not believe it is appropriate for us to be influenced in this study by considerations more properly addressed to the legislature.").

In short, a documentary stamp tax may be imposed only on the "consideration" paid for real estate, thereby requiring a method for separating out the personal and intangible properties conveyed when a business is purchased in a lump sum transaction. This allocation of taxable versus nontaxable consideration can be established in different ways and is not limited by law to the Department's one-size-fits-all approach. The Department erred in overturning the entirety of the administrative law judge's factual findings and legal analysis based on an erroneous legal view of what constitutes taxable consideration, resulting in the taxation of non-taxable property, a denial of a valid refund, and a windfall to governmental coffers.

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