STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

1701 COLLINS MIAMI OWNER, LLC,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.

_______________________________/

DOAH Case Number: 19-1879
BP Number: 3732800
Audit (Refund) Number 5000171961

DOR 2020-001 - FOF
FILED
Department of Revenue – Agency Clerk
Date Filed: March 18, 2020
By: Megan Maxwell

FINAL ORDER

This cause came before the State of Florida, Department of Revenue ("Department") for the purpose of issuing a Final Order pursuant to Section 120.57, Florida Statutes (F.S.). The Administrative Law Judge ("ALJ") assigned by the Division of Administrative Hearings ("DOAH") heard this cause and submitted a Recommended Order ("Order") to the Department. A copy of the Order, issued on December 17, 2019 by Judge John G. Van Laningham, is attached to this order and incorporated by reference as if fully set forth herein as Exhibit 1.

The deadline for filing exceptions to the Order with the Department was extended to January 31, 2020. A copy of Respondent's Exceptions to the Recommended Order is attached to this order as Exhibit 2. Respondent's exceptions were timely filed. Petitioner did not file exceptions. Petitioner's response to Respondent's exceptions was timely filed on February 10, 2020, and is attached to this order as Exhibit 3.

Respondent filed a Request for Leave to File a Limited Reply to Petitioner's response to Respondent's exceptions, and Petitioner filed an objection to that request. These pleadings are deemed unnecessary, as Rule 28-106.213(3), Florida Administrative Code (F.A.C.), clearly prohibits exclusive reliance upon hearsay to support a finding unless it falls within an exception to the hearsay rule and would therefore be admissible in court – regardless of whether it was

Filed March 18, 2020 12:40 PM Division of Administrative Hearings

received in evidence over objection, or not. To find otherwise would be a departure from the essential requirements of law.

The Department has jurisdiction in this cause.

RULINGS ON EXCEPTIONS

The entire record in this matter has been reviewed in preparation of this Final Order. Pursuant to subsection 120.57(1)(k), F.S., a Final Order issued as a result of a Recommended Order:

> [S]hall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

This statutory pleading requirement provides a three-prong threshold for exceptions to a recommended order that must be explicitly ruled upon in a Final Order. Respondent's exceptions have been properly identified as required by the aforementioned statute and shall be ruled upon.

Pursuant to subsection 120.57(1)(l), F.S., when issuing a Final Order based upon a Recommended Order:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of

the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

In ***De Groot v. Sheffield***, 95 So.2d 912 (Fla. 1957), the Florida Supreme Court defined 'competent substantial evidence' as "...such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." 95 So.2d at 916. ***Laney v. Board of Public Instruction***, 15 So.2d 748 (Fla. 1943); ***J.S. v. Dept. of Children & Families***, 18 So.3d 1170 (Fla. 1st DCA 2009).

Pursuant to Subsection 120.57(1)(l), F.S., the Department is bound by the findings of fact in the Order unless, following a review of the entire record, the Department determines that a finding of fact is not based on competent, substantial evidence or that the proceedings did not comply with the essential requirements of law. In order to modify or reject a finding of fact, the Department must identify valid reasons for such modification or rejection and state those reasons with particularity. It is insufficient to merely conclude that a finding is not supported by competent, substantial evidence without explanation. ***Prysi v. Department of Health***, 823 So.2d 823 (Fla. 1st DCA 2002).

Regarding conclusions of law, Subsection 120.57(1)(l), F.S., provides that the Department may reject or modify conclusions of law and interpretations of rules over which the Department has substantive jurisdiction on the condition that the Department determines, and states with particularity the reasons, that each substituted or revised conclusion of law is as or more reasonable than the conclusion of law that was modified or rejected. ***Barfield v. Department of Health, Board of Dentistry***, 805 So.2d 1008 (Fla. 1st DCA 2001).

GENERAL EXCEPTIONS

1. Reliance upon the Deal Pricing Analysis (DPA), prepared several years after the sale of the property at issue, in lieu of "consideration" to establish the taxable basis for the documentary stamp tax is contrary to the plain meaning of Subsection 201.02(1)(a), F.S., as well as subsection 201.02(1)(b)1.b., F.S., which defines 'full consideration' as "... the consideration that would be paid in an arm's length transaction..." ***Culbreath v. Reid***, 65 So.2d 556 (Fla. 1953); ***Department of Revenue v. Ray Construction***, 667 So.2d 859 (Fla. 1st DCA 1996);

Cohen-Ager, Inc. v. State Department of Revenue, 504 So.2d 1332 (Fla. 1st DCA 1987). It is of no small consequence that s. 201.01, F.S., provides:

> The documentary stamp taxes shall be paid on all recordable instruments requiring documentary stamp tax according to law, ***prior to recordation***. (emphasis added)

In all respects – closing documentation, title insurance, documentary stamp tax payment at the time of recordation as well as subsequent Internal Revenue Service (IRS) filings – the consideration paid for the sale of the hotel business was documented as $125,000,000.00. For the foregoing reasons, and those specified in Respondent's exception, including record and case law citations, the Department finds that this legal conclusion is as or more reasonable than the ALJ's legal conclusion that a February 2018 DPA addressing valuation can be used to establish ***consideration*** as required by Chapter 201, F.S., for a 2015 sale, as a matter of law. This exception is granted. ***State v. Sturdivant***, 94 So.3d 434 (Fla. 2012); ***Surf Works, LLC v. City of Jacksonville Beach***, 230 So.3d 925 (Fla. 1st DCA 2017).

2. The admissibility of the DPA was not established pursuant to any applicable standard for evaluating the validity and reliability of opinion testimony and the evidence upon which such opinion testimony is based. ***In re Amendments to the Fla. Evidence Code***, 278 So.3d 551 (Fla. 2019); ***Castillo v. E.I. DuPont de Nemours & Co.***, 854 So.2d 1264 (Fla. 2003); ***Hadden v. State***, 690 So.2d 573 (Fla. 1997); ***SDI Quarry v. Gateway Estates Park Condo Assn.***, 249 So.3d 1287 (Fla. 1st DCA 2018). As argued in Respondent's exceptions, the DPA was based upon uncorroborated, inadmissible hearsay, including speculation and investment projections, and reliance upon it is a departure from the essential requirements of law. ***Linn v. Fossum***, 946 So.2d 1032 (Fla. 2006); ***Doctors Co. v. Department of Insurance***, 940 So.2d 466 (Fla. 1st DCA 2006); ***State v. Demeniuk***, 888 So.2d 655 (Fla. 5th DCA 2004); ***City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.***, 857 So.2d 202 (Fla. 3rd DCA 2003); ***Viti v. Florida Department of Business and Professional Regulation***, 657 So.2d 1277 (Fla. 5th DCA 1995). For the foregoing reasons, and those specified in Respondent's exception, including record citations, the Department finds that this legal conclusion is as or more reasonable than that drawn in the Order. This exception is granted.

3. The burden of proof to establish the amount of consideration received by Petitioner for the sale of the hotel business in 2015 must be met by Petitioner, as this matter

arose as a refund denial, not an assessment of tax. ***Meneses v. City Furniture***, 34 So.3d 71 (Fla. 1st DCA 2010); ***Smith's Bakery, Inc. v. Jernigan***, 134 So2d 519 (Fla. 1st DCA 1961). While Petitioner relies upon ***Timber Creek, Inc. v. Department of Revenue***, No. 83-910 (Fla. DOAH April 19. 1985 – Recommended Order) to support its use of the DPA to document consideration, the Final Order issued in ***Timber Creek*** on October 25, 1985 supports Respondent's position that "value" cannot substitute for "consideration" under Section 201.01, F.S, and that extrinsic evidence is admissible to establish the amount of consideration in documentary stamp proceedings *involving an outstanding mortgage balance*. For the foregoing reason, and those specified in Respondent's exception, including record citations, the Department finds that this legal conclusion is as or more reasonable than that drawn in the Order. This exception is granted.

4. The analogy of, equation of, even substitution of "value" and "consideration" so permeates the Order as to render the proceeding one that violates the essential requirements of law. Petitioner's speculation as to value in lieu of documentation of consideration does not meet the statutory requirements for determining a documentary stamp liability or refund. If a commissioned opinion on value would suffice to establish consideration for the purpose of Chapter 201, F.S., the word "consideration" loses all meaning. The ALJ's consistent substitution of "value" for "consideration", his failure to subject opinion testimony to any applicable standard for evaluating such testimony, the clear burden-shifting demonstrated by many of the ALJ's findings in this matter, the recommendation that the agency include a ruling on attorney fees, and the ALJ's rephrasing and refining an alleged unadopted rule demonstrate that the proceedings on which the findings in the Order are based did not comply with the essential requirements of law.

5. A DPA performed at or near the time of the sale of the hotel business with numbers agreed to by the buyer and seller would likely be deemed more valid and reliable than that provided in this matter for two reasons: 1) it would fit the legal definition of "consideration" as used in Ch. 201, F.S.; and 2) it would reduce the risk of contrived values for the purpose of reducing a tax burden. However, such a DPA would still be subject to scrutiny for its validity and reliability in order to determine its admissibility under an applicable legal standard such as ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993) or ***Frye v. United States***, 293 F. 1013 (1923); ***In re Amendments, supra; Castillo, supra; Hadden, supra, SDI, supra***.

SPECIFIC EXCEPTIONS

Exception Number One

Respondent takes exception to the legal conclusion set forth as the Statement of the Issue in the Order. The Statement of the Issue in the Order presupposes that the consideration set forth in the contract for sale of the hotel business did not apply to the real property transferred thereby. For the foregoing reason, and those specified in Respondent's exception, the Department finds that the legal conclusion suggested in Respondent's revised Statement of the Issue is as or more reasonable than that drawn in the Order. This exception is granted. ***Meneses, supra***; ***Florida Department of Transportation v. J.W.C. Co.***, 396 So.2d 778 (Fla. 1st DCA 1981).

Exception Number Two

Respondent takes exception to the third through fifth sentences of the first paragraph of the Preliminary Statement in the Order. There is no competent, substantial evidence that the parties to the sale of the hotel business agreed to allocate any portion of the consideration to personal property transferred therewith. The evidence in the record is clear and convincing that there was no such allocation by the parties. For the foregoing reasons, and those specified in Respondent's exception, including record citations, the Department finds that the suggested revisions of the third through fifth sentences in the first paragraph of the Preliminary Statement are as or more reasonable than those set forth in the Order. This exception is granted.

Exception Number Three

Respondent takes exception to a reference in the Preliminary Statement to a motion for attorney fees and costs filed in a related unadopted rule challenge proceeding[i], and purporting to deny that motion in this refund matter. Such reference, and the clear implication that the Department may rule upon that motion for attorney fees and costs in this substantial interest proceeding, are stricken as being indicative of a departure from the essential requirements of law. Pursuant to Subsection 120.56(1)(e), F.S., the findings made by the ALJ in the related rule challenge are final agency action, and an agency is not authorized to reverse or modify such findings. For the foregoing reason, and those specified in Respondent's exception, the Department finds that this conclusion is more reasonable than that drawn in the Order. This exception is granted, and the final paragraph/sentence in the Preliminary Statement is stricken.

Exception Number Four

Respondent takes exception to the last sentence in Finding of Fact number 4. There is no competent, substantial evidence in the record to establish whether either party to the sale of the hotel business did or did not declare the other to be in breach of their agreement. For the foregoing reason, and those specified in Respondent's exception, including record citations, the last sentence in Finding of Fact number 4 is stricken. This exception is granted.

Exception Number Five

Respondent takes exception to Finding of Fact number 5. There is no competent, substantial evidence in the record to establish that the parties to the sale of the hotel business treated the purchase price as undifferentiated consideration. In fact, Finding of Fact number 5 is directly contrary to Finding of Fact number 6 and the competent, substantial evidence adduced at hearing. For the foregoing reasons, and those specified in Respondent's exception, including record citations, Finding of Fact number 5 is stricken. This exception is granted.

Exception Number Six

Respondent takes exception to that provision in Finding of Fact number 6 labelling the consideration for the sale of the hotel business as "undifferentiated", as it implies that the parties to that sale made this determination in their arms-length transaction. There is no competent, substantial evidence in the record to support this finding, and this characterization is stricken. Further, Finding of Fact number 6 disregards the plain meaning of Subsection 201.02(1)(a), F.S., and controlling legal precedent, and shall be revised as suggested in Respondent's exception. This conclusion of law is as or more reasonable than that provided in the Order. This exception is granted.

Exception Number Seven

Respondent takes exception to the provision in Finding of Fact number 7 finding that the DPA was prepared for Petitioner by Bernice T. Dowell of Cynsur, LLC. There is no competent, substantial evidence that the DPA was prepared for Petitioner. In fact, the competent, substantial evidence in the record establishes that the DPA was prepared for an independent tax consultant, not Petitioner. For these reasons, and those specified in Respondent's exception, including record and case law citations, Finding of Fact number 7 shall be revised as suggested in Respondent's exception in order to conform to the evidence adduced at hearing. This exception is granted.

Exception Number Eight

Respondent takes exception to Finding of Fact numbers 13 and 14. The ALJ essentially restates the applicable statutory burden of proof herein as a "presumption" applied by Respondent to deny Petitioner's refund application. The requirement that Petitioner establish arm's-length consideration allocated to any personal property at issue in the sale of the hotel business is a direct result of the requirements of Chapter 201, F.S., and the established burden of proof in refund cases, not any "presumption" contrived by Respondent. Section 201.01, F.S., requires payment of documentary stamp tax ***prior to recordation***. All documentation at or near the time of the sale, as well as IRS filings for the tax year during which the sale occurred, is consistent with the amount of documentary stamp tax paid by Petitioner. For these reasons, and those specified in Respondent's exception, including record and case law citations, and because the revised findings are supported by undisputed competent, substantial evidence, and the essential requirements of law dictate that the plain meaning of Sections 201.01 and 201.02, F.S., be applied herein, Finding of Fact numbers 13 and 14 shall be revised as suggested in Respondent's exceptions. This exception is granted. ***Rinker Materials Corp. v. North Miami***, 286 So.2d 552 (Fla. 1973); ***State ex rel Szabo Food Services, Inc. v. Dickinson***, 286 So.2d 529 (Fla. 1973). To the extent that the determinations reflected in Finding of Fact numbers 13 and 14 are deemed conclusions of law, the revised findings are more reasonable than those found in the Order.

Exception Number Nine

Respondent takes exception to that portion of Finding of Fact number 15 characterizing an alleged agency statement Petitioner challenged as an unadopted rule as a "position of disputed scope and effect" or "PDSE". All such references shall be revised to "alleged unadopted rule", as this is the legally accurate reference to this statement. For the reasons specified in Respondent's exception, this exception is granted, as this legal conclusion is more reasonable than that found in the Order.

Exception Number Ten

Respondent takes exception to that portion of Finding of Fact number 16 concluding that a "PDSE" is relevant to this case, and that Respondent cannot rely on it in denying the refund to Petitioner. Respondent never asserted such alleged unadopted rule, nor any reliance thereon, in this matter. For the reasons specified in Respondent's exception, Finding of Fact number 16

shall be revised as suggested in Respondent's exception, as this legal conclusion is more reasonable than that set forth in the Order. This exception is granted.

Exception Number Eleven

Respondent takes exception to Finding of Fact number 17, a recommended finding regarding the aforementioned rule challenge currently on appeal before the First District Court of Appeal. The finding in the Order is based upon a statement that is "rephrased and refined" by the ALJ. For the reasons set forth in the foregoing ruling on Exception Number Ten, and for the reasons set forth in Respondent's exception, Finding of Fact number 17 is stricken as it is indicative of a departure from the essential requirements of law. This exception is granted.

Exception Number Twelve

Respondent takes exception to a portion of Finding of Fact number 18, which purports to substitute valuation for consideration in determining a documentary stamp tax obligation using a "pro-rata reasonable attribution" test. This legal conclusion violates case law, ignores the plain meaning of Chapter 201, F.S., and is indicative of a departure from the essential requirements of law. For these reasons, and those specified in Respondent's exception, including record citations, Finding of Fact number 18 is stricken and replaced by that suggested in Respondent's exception. This conclusion of law is as or more reasonable than that set forth in the Order. This exception is granted. ***Culbreath, supra; Ray Const. supra; Cohen-Ager, supra***.

Exception Number Thirteen

Respondent takes exception to Finding of Fact number 19 and reliance upon "valuation" and the DPA as well as any determination that the DPA provided an allocation of "consideration". There is no competent, substantial evidence that the DPA addressed consideration in any way. The validity and reliability of the DPA has not been established under any applicable standard for analyzing the admissibility of opinion/expert evidence. The financial projections upon which the DPA is based are inadmissible, uncorroborated hearsay. Petitioner's reliance on ***Ramirez v. State***, 542 So.2d 352 (Fla. 1989), in its response to Respondent's exceptions is somewhat surprising, as the circuit court judgment entered therein was reversed because the only evidence in the record to establish a scientific predicate for admissibility was "... the expert's self-serving statement..." 542 So.2d at 355. In other words, self-serving statements are insufficient to establish reliability for the purpose of admitting opinion testimony. As determined in paragraph 2. under General Exceptions, and for the reasons set forth in

Respondent's Second and Thirteenth exceptions, including record and case law citations, Finding of Fact number 19 is revised as suggested in Respondent's exception. This conclusion of law is as or more reasonable than that set forth in the Order. This exception is granted. ***S. 120.57(1)(c), F.S.; Linn, supra; Viti, supra.***

Exception Number Fourteen

Respondent takes exception to Finding of Fact number 20, which concludes that Respondent asserted $122 million as the consideration for sale of the hotel business, a finding not supported by competent, substantial evidence in the record, as well as the suggestion that the Respondent must establish the taxable basis for the documentary stamp tax applicable to that sale. This apparent burden-shifting is indicative of a departure from the essential requirements of law. For these reasons, and those specified in Respondent's exception, including record citations, Finding of Fact number 20 is stricken. This conclusion of law is as or more reasonable than that set forth in the Order. This exception is granted. ***Meneses, supra; J.W.C., supra; Smith's Bakery, supra.***

Exception Number Fifteen

Respondent takes exception to Finding of Fact number 21. Again, this finding describes Respondent's assignment of consideration pursuant to a presumption contrived by the ALJ, and purports to shift the burden to the Department to establish the taxable basis for documentary stamp tax. There is no competent, substantial evidence in the record that Respondent "assigned" the consideration in this refund proceeding, as that amount had already been documented by Petitioner at the time the documentary stamp tax was paid. Further, the ALJ's interpretation imposes a presumption that all contracts must allocate consideration for different property types, and there is no authority for this presumption. For these reasons, and those specified in Respondent's exception, including record citations, Finding of Fact number 21 is stricken as being indicative of a departure from the essential requirements of law. This exception is granted. ***Meneses, supra; J.W.C., supra; Smith's Bakery, supra.***

Exception Number Sixteen

Respondent takes exception to the first sentence of Finding of Fact number 22, finding that Respondent's only rebuttal to Petitioner's evidence are the "Default Allocation Presumption" and Petitioner's 2015 IRS filings. Again, the ALJ conflates "value" with "consideration" and ignores the legal requirement that consideration be bargained-for. ***Wisconsin***

& M.R. Co. v. Powers, 191 U.S. 379 (1903); ***Scott v. Sun Bank***, 408 So.2d 591 (Fla. 5th DCA 1981); ***Kirsner v. University of Miami***, 362 So.2d 449 (Fla. 3rd DCA 1978); ***Wallace v. Pillow Motors, Inc.***, 344 So.2d 949 (Fla. 1st DCA 1977). ***Consideration, Black's Law Dictionary*** (11th ed. 2019). This is indicative of a departure from the essential requirements of law. For these reasons and those specified in Respondent's exception, including record citations, the first sentence of Finding of Fact number 22 shall be revised as suggested in Respondent's exception. This exception is granted.

Exception Number Seventeen

Respondent takes exception to Finding of Fact number 23 on two bases. First, the Order finds that statements in Petitioner's IRS filings are not binding; and second, it fails to consider the interrelation between "gross sales price" and "consideration". There is no competent, substantial evidence in the record to establish that these two concepts are fundamentally different as a matter of fact. For these reasons, and those specified in Respondent's exception, including record citations, Finding of Fact number 23 shall be revised as suggested in Respondent's exception, as this finding is as or more reasonable than that set forth in the Order. This exception is granted.

Exception Number Eighteen

Respondent takes exception to the last sentence in Finding of Fact number 24, as being indicative of a departure from the essential requirements of law. For the reasons specified in Respondent's exception, the last sentence in Finding of Fact number 24 is stricken. This exception is granted.

Exception Number Nineteen

Respondent takes exception to Finding of Fact number 25 as being indicative of a departure from the essential requirements of law, and there being no competent, substantial evidence to support the finding. For the reasons specified in Respondent's exception, Finding of Fact number 25 is stricken. This exception is granted.

Exception Number Twenty

Respondent takes exception to the last sentence in Finding of Fact number 26, in which the ALJ again conflates value with consideration. ***Culbreath, supra; Ray Const., supra; Cohen-Ager, supra***. This legal conclusion is indicative of a departure from the essential requirements of

law. For these reasons, and those specified in Respondent's exception, including record citations, the last sentence in Finding of Fact number 26 is stricken. This exception is granted.

Exception Number Twenty-one

Respondent takes exception to Endnote number 3, which concluded that no evidence was presented to establish that Petitioner took indefensible or questionable positions in regard to its 2015 federal taxes. As this matter is a refund denial challenge filed by Petitioner, not a tax fraud or evasion case, such a finding exceeds the scope of this proceeding, and is indicative of a departure from the essential requirements of law. For the reasons set forth in Respondent's exception, including record and case law citations, Endnote number 3 is stricken. This exception is granted.

Exception Number Twenty-two

Respondent takes exception to Finding of Fact number 27. This finding includes speculation, conflates 'value' and 'consideration', and is inconsistent with Finding of Fact number 26, as noted in Respondent's exceptions. This finding presumes that there cannot be a transfer of personal property without consideration therefor. For these reasons, and those specified in Respondent's exceptions, including record citations, Finding of Fact number 27 is indicative of a departure from the essential requirements of law, draws unreasonable legal conclusions, and is stricken. This exception is granted.

Exception Number Twenty-three

Respondent takes exception to Finding of Fact number 28. This finding, again, conflates 'value' and 'consideration' in violation of the plain language in Chapter 201, F.S., and is indicative of a departure from the essential requirements of law. For these reasons, and those specified in Respondent's exception, Finding of Fact number 28 is stricken. This exception is granted.

Exception Number Twenty-four

Respondent takes exception to Endnote number 5. This endnote deals exclusively with valuation, is irrelevant to the determination of consideration for the purpose of a documentary stamp tax refund and is indicative of a departure from the essential requirements of law. For these reasons, and those specified in Respondent's exception, Endnote number 5 is stricken. This exception is granted.

Exception Number Twenty-five

Respondent takes exception to Finding of Fact number 29, with Respondent noting that Form 4797 was not admitted to establish an allocation of undifferentiated consideration, that the DPA and Petitioner's expert were focused upon value and not admissible under any recognized standard for admitting expert testimony, and that the DPA relies entirely upon inadmissible hearsay and speculation. There is no competent, substantial evidence in the record that Ms. Dowell had any expertise regarding "allocation of undifferentiated consideration", and there was no analysis of the opinion testimony pursuant to any recognized standard for evaluating its admissibility. For these reasons, and those specified in Respondent's exception, including record and case law citations, Finding of Fact number 29 is stricken as being indicative of a departure from the essential requirements of law. This exception is granted. ***In re Amendments to the Fla. Evidence Code, supra; SDI Quarry, supra; Demeniuk, supra; Castillo, supra; United States Sugar Corp. v. Henson,*** 823 So2d 104 (Fla. 2002)***; Hadden, supra***.

Exception Number Twenty-six

Respondent takes exception to the final sentence in Finding of Fact number 30. For the reasons specified in Respondent's exceptions to both Finding of Fact number 29 and Finding of Fact number 30, and based upon the complete lack of competent, substantial evidence in the record to establish Ms. Dowell's expertise in "consideration", the final sentence in Finding of Fact number 30 is stricken. This exception is granted. ***SDI Quarry, supra; Castillo, supra; Hadden, supra.***

Exception Number Twenty-seven

Respondent takes exception to a portion of the first sentence in Finding of Fact number 31 describing the DPA as an "allocation of the undifferentiated consideration", as there is no competent, substantial evidence in the record to establish that the DPA is an "allocation of the undifferentiated consideration" for the sale of the hotel business at issue. The ALJ again equates "value" to "consideration". For these reasons, and those specified in Respondent's exception, including record and case law citations, Finding of Fact number 31 is revised as suggested in Respondent's exception. This exception is granted. ***Culbreath, supra; Ray Construction, supra***.

Exception Number Twenty-eight

Respondent takes exception to Finding of Fact number 32. There is no competent, substantial evidence in the record that the DPA was calculated using data provided by the purchaser of the hotel business. This finding is directly contradicted by Ms. Dowell's testimony. For these reasons, and those specified in Respondent's exception, including record citations, Finding of Fact number 32 is revised as suggested in Respondent's exception. This exception is granted.

Exception Number Twenty-nine

Respondent takes exception to Finding of Fact number 33, as it purports to place a burden on Respondent to disprove the DPA methodology, which is indicative of a departure from the essential requirements of law. There is no competent, substantial evidence in the record to establish that the DPA's conclusions meet any applicable standard for establishing validity, reliability, and admissibility for the purpose of documenting consideration for determining a documentary stamp tax liability or refund. For these reasons, and those specified in Respondent's exception, including record citations, Finding of Fact number 33 is revised as suggested in Respondent's exception. This exception is granted. ***SDI Quarry, supra; Rojas v. Rodriguez,*** 185 So.3d 710 (Fla 3rd DCA 2016)***; Booker v. Sumter County Sheriff's Office,*** 166 So.3d 189 (Fla. 1st DCA 2015).

Exception Number Thirty

Respondent takes exception to Finding of Fact number 34, as it clearly equates "value" with "consideration", and there is no competent, substantial evidence that either the DPA or Ms. Dowell provided any documentation of consideration as required by Chapter 201, F.S. This finding also purports to shift the burden regarding the admissibility of the opinion testimony. For these reasons, and those specified in Respondent's exception, including record and case law citations, Finding of Fact number 34 is revised as suggested in Respondent's exception. This exception is granted. ***Linn, supra; Brim v. State,*** 695 So.2d 268 (Fla. 1997)***; Booker, supra; Doctors, supra.***

Exception Number Thirty-one

Respondent takes exception to Finding of Fact number 35. Again, the ALJ conflates "value" and "consideration", thereby extrapolating undifferentiated value as if it were documentation of undifferentiated consideration. For these reasons, and those specified in

Respondent's exceptions, including record citations, this finding is indicative of a departure from the essential requirements of law, and Finding of Fact number 35 is revised as suggested in Respondent's exception. This exception is granted. ***Culbreath, supra; Ray Construction, supra; Cohen-Ager, supra.***

Exception Number Thirty-two

Respondent takes exception to Finding of Fact number 36, as it relies upon "expert" evidence that was not subject to scrutiny of its validity, reliability, and admissibility, is based upon hearsay, and substitutes "value" for "consideration". There is no competent, substantial evidence in the record establishing that the DPA figure as the amount of consideration paid for the sale of the hotel business. The consistent substitution of "value" for "consideration" establishes that this proceeding departed from the essential requirements of law. For these reasons, and those specified in Respondent's exceptions, including record citations, Finding of Fact number 36 is stricken. This exception is granted. ***In re Amendments, supra***; ***SDI Quarry, Supra; Rojas, supra; Brim, supra; Booker, supra.***

Exception Number Thirty-three

Respondent takes exception to Conclusion of Law number 38, indicating that Respondent agreed to the terminology "LSMS" as used in the Order. This is a misstatement of the Respondent's legal position. For this reason, and those specified in Respondent's exception, Conclusion of Law number 38 is revised as suggested in Respondent's exception. The revised Conclusion of Law is more reasonable than that set forth in the Order. This exception is granted. ***Meneses, supra; J.W.C., supra***.

Exception Number Thirty-four

Respondent takes exception to Conclusion of Law number 43, as Respondent is not seeking to impose a tax in this matter, making this finding irrelevant. For this reason, and those specified in Respondent's exceptions, Conclusion of Law number 43 is stricken, as doing so is more reasonable than retaining it, and its inclusion is indicative of a departure from the essential requirements of law. This exception is granted.

Exception Number Thirty-five

Respondent takes exception to Conclusion of Law number 46, as it treats the plain meaning of Section 201.02, F.S., as a "PDSE", incorrectly characterizing the Respondent's position in this matter, and again analyzes this refund mater in terms applicable to an assessment

case. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 46 is revised as suggested in Respondent's exceptions, as this revised conclusion is more reasonable than that set forth in the Order. This exception is granted. ***Culbreath, supra; Ray Construction, supra; Cohen-Ager, supra.***

Exception Number Thirty-six

Respondent takes exception to Conclusion of Law number 47, as it again mischaracterizes Respondent's position in this matter in regard to the plain meaning of Section 201.02, F.S. In addition, contrary to the competent, substantial evidence in the record, this finding again presumes that the parties to the sale of the hotel business intended to allocate the consideration paid beyond the real property documented by the title insurance, the documentary stamp payment, and the subsequent I.R.S. filing. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 47 is stricken, as doing so is as or more reasonable than retaining it. This exception is granted. ***Culbreath, supra; Ray Construction, supra; Cohen-Ager, supra.***

Exception Number Thirty-seven

Respondent takes exception to Conclusion of Law number 48, as it misstates the Respondent's legal position herein, and finds that the Respondent is actually allocating the consideration paid in the sale of the hotel business. This finding is wholly contrary to the competent, substantial evidence in the record, and shifts the burden in a manner that is indicative of a departure from the essential requirements of law. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 48 is stricken as doing so is more reasonable than retaining it. This exception is granted. ***Meneses, supra; J.W.C., supra***.

Exception Number Thirty-eight

Respondent takes exception to Conclusion of Law number 49, as it misstates Respondent's legal position. For this reason, and those specified in Respondent's exception, Conclusion of Law number 49 is stricken, as doing so is as or more reasonable than retaining it. This exception is granted.

Exception Number Thirty-nine

Respondent takes exception to Conclusion of Law number 50, as it is a misstatement of the law governing the definition of "consideration". For this reason, as well as those specified in Respondent's exception, Conclusion of Law number 50 is revised as suggested in Respondent's

exception. This revised conclusion of law is more reasonable than that set forth in the Order. This exception is granted. ***Consideration, Black's Law Dictionary, supra.***

Exception Number Forty

Respondent takes exception to Conclusion of Law number 51 as being unduly repetitious, and purporting to define "taxable consideration" for the purpose of construing Section 201.02, F.S. Because the plain meaning of "consideration", as used in Ch.201, F.S., requires no further definition, and for the reasons specified in Respondent's exception, Conclusion of Law number 51 is stricken, as doing so is more reasonable than retaining it. This exception is granted.

Exception Number Forty-one

Respondent takes exception to Conclusion of Law number 52 as being unduly repetitious and purporting to define "nontaxable consideration" for the purpose of construing Section 201.02, F.S. Because the plain meaning of "consideration" as used in Ch. 201, F.S., requires no further definition, and for the reasons specified in Respondent's exception, Conclusion of Law number 52 is stricken, as doing so is as or more reasonable than retaining it. This exception is granted.

Exception Number Forty-two

Respondent takes exception to Conclusion of Law number 53, as the ALJ again focuses on apportionment of consideration for an assessment of documentary stamp tax and ignores the burden of proof applicable in this proceeding. The ALJ presumes that which the Petitioner is required to prove – an allocation of consideration by the parties to the sale of the hotel business. For these reasons, and those specified in Respondent's exception, including record citations, Conclusion of Law number 53 is revised as suggested in Respondent's exception, as this revised conclusion is as or more reasonable than that set forth in the Order. This exception is granted. ***Culbreath, supra; Meneses, supra; Ray Const., supra; Cohen-Ager, supra; J.W.C., supra.***

Exception Number Forty-three

Respondent takes exception to Conclusion of Law number 54, as it ignores the plain meaning of Ch. 201, F.S., and seeks to re-define "consideration" as used therein. For these reasons, and those specified in Respondent's exception, including case law citations, Conclusion of Law number 54 is stricken, as doing so is more reasonable than retaining it. This exception is granted. ***Kirsner, supra; Consideration, Black's Law Dictionary, supra.***

Exception Number Forty-four

Respondent takes exception to Endnote number 7, as there is no competent, substantial evidence in the record to support this finding, it contradicts other findings in the Order, and is indicative of a departure from the essential requirements of law. For this reason, and those specified in Respondent's exception, Endnote number 7 is stricken, as doing so is as or more reasonable than retaining it. This exception is granted.

Exception Number Forty-five

Respondent takes exception to Conclusion of Law number 55, as it ignores the plain meaning of Ch. 201, F.S., and seeks to re-define "consideration" to fit a preconceived notion based upon absence of fact. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 55 is stricken, as doing so is more reasonable than retaining it. This exception is granted.

Exception Number Forty-six

Respondent takes exception to Conclusion of Law number 56 as a complete misstatement of Respondent's position in this proceeding, and as being contrary to the burden of proof and case law. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 56 is stricken, as doing so is more reasonable than retaining it. This exception is granted. ***Meneses, supra; Cohen-Ager, supra; J.W.C., supra***.

Exception Number Forty-seven

Respondent takes exception to Endnote number 8, as it misstates the Respondent's legal position in this proceeding, and ignores the plain meaning of Ch. 201, F.S. For these reasons, and those specified in Respondent's exception, Endnote number 8 is stricken, as doing so is as or more reasonable than retaining it. This exception is granted.

Exception Number Forty-eight

Respondent takes exception to Conclusion of Law number 57, as it misstates Respondent's position in this matter, incorrectly analyzes this matter as a tax assessment rather than a tax refund, and ignores the plain meaning of Section 201.02, F.S. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 57 is stricken, as doing so is more reasonable than retaining it. This exception is granted. ***Meneses, supra; J.W.C., supra; Consideration, Black's Law Dictionary, supra.***

Exception Number Forty-nine

Respondent takes exception to Conclusion of Law number 58 as set forth in Respondent's exception. The ALJ's reliance upon ***Andean Investment Company v. Department of Revenue,*** 370 So.2d 377 (Fla. 4th DCA 1978) is misplaced, as the facts therein are distinguishable, and the issues raised therein are not applicable to this refund denial proceeding. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 58 is stricken, as doing so is as or more reasonable than retaining it. This exception is granted. ***Cohen-Ager, supra.***

Exception Number Fifty

Respondent takes exception to Conclusion of Law number 59 on the same basis as its exception to Conclusion of Law number 58. As such, Conclusion of Law number 59 is stricken for the reasons specified in the foregoing ruling regarding Exception Number 49, as this action is as or more reasonable than retaining it. This exception is granted. ***Cohen-Ager, supra***.

Exception Number Fifty-one

Respondent takes exception to Conclusion of Law number 60 on the same basis as its exception to Conclusion of Law number 58. As such, Conclusion of Law number 60 is stricken for the reasons specified in the foregoing ruling regarding Exception Number 49, as this action is as or more reasonable than retaining it. This exception is granted. ***Cohen-Ager, supra***.

Exception Number Fifty-two

Respondent takes exception to Conclusion of Law number 61 on the same basis as its exception to Conclusion of Law number 58. As such, Conclusion of Law number 61 is stricken for the reasons specified in the foregoing ruling regarding Exception Number 49, as this action is as or more reasonable than retaining it. This exception is granted. ***Cohen-Ager, supra***.

Exception Number Fifty-three

Respondent takes exception to Endnote number 9 on the same basis as its exception number 12 to Finding of Fact number 18. As such, Endnote number 9 is stricken for the reasons specified in Respondent's Exception Number 53 and the foregoing ruling regarding Exception Number 12, as this action is more reasonable than retaining it. This exception is granted.

Exception Number Fifty-four

Respondent takes exception to Conclusion of Law number 62, which purports to create an evidentiary presumption, and misstates the law. For these reasons, and those specified in

Respondent's exception, Conclusion of Law number 62 is stricken, as doing so is more reasonable than retaining it. This exception is granted. ***Cohen-Ager, supra***.

Exception Number Fifty-five

Respondent takes exception to Conclusion of Law number 63 as it misstates Respondent's position in this proceeding and re-characterizes the Petitioner's burden of proof as an unsupportable presumption. For these reasons, and those specified in Respondent's exception, Conclusion of Law number 63 is stricken, as doing so is as or more reasonable than retaining it. This exception is granted. ***Meneses, supra; Cohen-Ager, supra; J.W.C., supra.***

Exception Number Fifty-six

Respondent takes exception to Conclusion of Law number 64 on the same basis as its exceptions to Conclusion of Law number 63 and Finding of Fact number 18. As such, Conclusion of Law number 64 is stricken for the reasons specified in the foregoing rulings regarding Exception Number 12 and Exception Number 55, as this action is as or more reasonable than retaining it. This exception is granted.

Exception Number Fifty-seven

Respondent takes exception to Conclusions of Law numbered 66 through 70, in regard to the applicability of ***Daubert*** in administrative proceedings, as well as the timing of Respondent's ***Daubert*** objection. ***In re Amendments, supra; SDI Quarry, supra***. The ALJ failed to subject Petitioner's opinion testimony to any objective standard for assessing its validity and reliability. ***Ramirez, supra; Rojas, v. Rodriguez,*** 185 So.3d 710 (Fla. 3d DCA 2016). For this reason, and those specified in Respondent's exception, including record citations, Conclusions of Law numbered 66 through 70 are stricken and replaced with the paragraphs suggested in Respondent's exception. These substituted findings are as or more reasonable than those set forth in the Order. This exception is granted. ***Linn, supra; Doctors, supra; Viti, supra.***

Exception Number Fifty-eight

Respondent takes exception to the Recommendation in the Order, which is "… entirely founded on the Division's invitation for the Department to substitute valuations, based on inadmissible hearsay and derived through a methodology that has no indication of scientific reliability under any accepted test to evaluate such reliability, for consideration…" Based upon the findings herein establishing that the proceeding upon which the Order is based was a departure from the essential requirements of law, the Recommendation in the Order is rejected,

and the Respondent's refund denial is sustained. This exception is granted. ***In re Amendments, supra; Linn, supra; Castillo, supra; SDI, supra; Doctors, supra; Demeniuk, supra; Viti, supra.***

FINDINGS OF FACT

The Department adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order, as modified by its rulings on exceptions, as if fully set forth herein.

CONCLUSIONS OF LAW

The Department adopts and incorporates in this Final Order the Conclusions of Law set forth in the Recommended Order, as modified by its rulings on exceptions, as if fully set forth herein.

Accordingly, it is ORDERED that the Respondent's denial of Petitioner's refund application filed February 7, 2018 is hereby sustained.

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, P.O Box 6668, Tallahassee, Florida 32314-6668 [FAX (850) 488-7112], **AND** by filing a **copy** of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. **The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department**.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 18th day of March, 2020.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

ANDREA MORELAND
DEPUTY EXECUTIVE DIRECTOR

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the Department of Revenue and that a true and correct copy of the Final Order has been furnished by United States mail, both regular first class and certified mail return receipt requested, to Petitioner C/O Joseph C. Moffa, Jeanette Moffa, and Jonathan W. Taylor at Moffa, Sutton & Donnini, P.A., Trade Center South, 100 West Cypress Creek Road Suite 930, Ft. Lauderdale, Florida 33309 and C/O Rex D. Ware at Moffa, Sutton & Donnini, P.A., 3500 Financial Plaza Suite 330, Tallahassee, Florida 32312 this 18th day of March, 2020.

Megan Maxwell
Agency Clerk

Copies furnished to:

John G Van Laningham
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Mark S. Urban
Assistant Attorney General
Office of the Attorney General
Revenue Litigation Bureau
The Capitol-Plaza Level 01
Tallahassee, Florida 32399-1050

Dr. James Zingale
(Hand Delivery)

---

[i] Florida Department of Revenue v. 1701 Collins Miami Owner, LLC, DOAH case number 19-3639RU. This case is currently on appeal before the First District Court of Appeal under case number 1D20-127.