STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

1701 COLLINS (MIAMI) OWNER LLC,

Petitioner,

vs. Case No. 19-3639RU

DEPARTMENT OF REVENUE,

Respondent.
_________________________________/

FINAL ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on September 17, 2019, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this unadopted-rule challenge is whether Respondent, in connection with the administration of the stamp tax, has formulated a statement of general applicability for allocating undifferentiated, lump-sum payments made in purchase-and-sale transactions involving joint real estate/personal property transfers; which meets the statutory definition of a rule but has not been adopted pursuant to the rulemaking procedure; and, as used by Respondent, has the effect of creating an entitlement to collect tax on 100% of the undifferentiated consideration.

PRELIMINARY STATEMENT

Documentary stamp tax and surtax are due when a deed or other instrument reflecting the transfer of real estate is recorded. Stamp taxes are calculated based upon the consideration exchanged for real estate, not other types of property. In 2015, Petitioner 1701 Collins (Miami) Owner, LLC, sold an operating hotel business comprising real estate, tangible personal property, and intangible personal property for an undifferentiated, lump-sum of $125 million. Upon recordation of the deed, Petitioner paid stamp tax on the entire $125 million. This, Petitioner later came to believe, was a mistake, because the lump-sum purchase price had included

consideration for tangible personal property and intangible personal property.

On February 6, 2018, Petitioner timely filed an application for a documentary stamp tax and surtax refund with Respondent Department of Revenue, requesting a refund of about $500 thousand. On April 2, 2018, Respondent issued a Notice of Proposed Refund Denial indicating its intent to deny the refund application. Petitioner filed an informal protest of the denial on May 31, 2018. Respondent issued a Notice of Decision of Refund Denial on January 9, 2019, which sustained the refund denial.

On February 20, 2019, Petitioner filed its Petition for Chapter 120 Hearing to protest the intended denial of its refund application, which Respondent referred to the Division of Administrative Hearings ("DOAH"). The proceeding was docketed under DOAH Case No. 19-1879. Simultaneously, a related case (19-1883) was filed with DOAH, which arose from Respondent's denial of a similar refund request and presented nearly identical issues. As presiding officer, the undersigned administrative law judge ("ALJ") consolidated DOAH Case Nos. 19-1879 and 19-1883 (the "Refund Cases") and set the final hearing for June 28, 2019.

On June 7, 2019, Petitioner filed a motion to continue the Refund Cases, urging that the final hearing be postponed so

that Petitioner could (i) bring a rule challenge under section 120.56(4), Florida Statutes, and then (ii) move for consolidation of the rule challenge with the pending section 120.57(1) proceedings. The undersigned continued the final hearing to September 17, 2019.

On July 9, 2019, Petitioner filed its Petition to Determine Invalidity of Agency Statement, which initiated this proceeding. In due course, this unadopted-rule challenge was consolidated with the Refund Cases; DOAH Case No. 19-1883 was closed upon the filing of a Notice of Voluntary Dismissal; and the final hearing in the remaining consolidated cases, DOAH Case Nos. 19-1879 and 19-3639RU, was held on September 17, 2019.

Petitioner called five witness during its case-in-chief: Afshin Kateb, chief financial officer of YDS Investments; Holly Unck, vice president of Transaction Tax Services for CBRE, Inc.; Bernice Dowell, president of Cynsur, LLC (an expert in property valuation and allocation); Charles Phillips, revenue program administrator I for Respondent (called as an adverse witness); and Henry Small, tax conferee for Respondent (called as an adverse witness). In addition, Petitioner's Exhibits 1 through 19 were admitted into evidence.

Respondent presented its case through Messrs. Phillips and Small, during Petitioner's case. In addition, Respondent

offered Respondent's Exhibits 1 through 35, which were admitted into evidence.

The two-volume final hearing transcript was filed on October 9, 2019. Each party timely filed a proposed final order on October 29, 2019, in accordance with the deadline established at the conclusion of the hearing.

Respondent filed a Motion for Attorney's Fees and Costs on November 4, 2019. The motion is hereby denied.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2019 Florida Statutes.

FINDINGS OF FACT

1. On February 23, 2015, Petitioner 1701 Collins (Miami) Owner, LLC ("Taxpayer"), a Delaware limited liability company, entered into a Purchase and Sale Agreement ("Agreement") to sell a going concern, namely a hotel and conference center doing business in Miami Beach, Florida, as the SLS Hotel South Beach (the "Hotel Business"), to 1701 Miami (Owner), LLC, a Florida limited liability company ("Purchaser"). Purchaser paid Taxpayer $125 million for the Hotel Business.

2. The Hotel Business comprised two categories of property, i.e., real estate ("RE") and personal property ("PP"). The PP, in turn, consisted of two subcategories of property, tangible personal property ("TPP") and intangible personal property ("ITPP"). It is undisputed that the property

transferred pursuant to the Agreement included RE, TPP, and ITPP.

3. The sale closed on June 5, 2015, and a special warranty deed was recorded on June 8, 2015, which showed nominal consideration of $10. Pursuant to the Agreement, Taxpayer was responsible for remitting the documentary stamp tax and the discretionary surtax (collectively, "stamp tax"). Stamp tax is due on instruments transferring RE; the amount of the tax, payable per instrument recorded, is based upon the consideration paid for RE. Stamp tax is not assessed on consideration given in exchange for PP.

4. The Agreement contains a provision obligating the parties to agree, before closing, upon a reasonable allocation of the lump-sum purchase price between the three types of property comprising the Hotel Business. For reasons unknown, this allocation, which was to be made "for federal, state and local tax purposes," never occurred. The failure of the parties to agree upon an allocation, if indeed they even attempted to negotiate this point, did not prevent the sale from occurring. Neither party declared the other to be in breach of the Agreement as a result of their nonallocation of the consideration.

5. The upshot is that, as between Taxpayer and the Purchaser, the $125 million purchase price was treated as undifferentiated consideration for the whole enterprise.

6. Taxpayer paid stamp tax in the amount of approximately $1.3 million based on the full $125 million of undifferentiated consideration. Taxpayer paid the correct amount of stamp tax *if* the entire consideration were given in exchange for the RE transferred to Purchaser pursuant the Agreement——if, in other words, the Purchaser paid nothing for the elements of the Hotel Business consisting of PP.

7. On February 6, 2018, Taxpayer timely filed an Application for Refund with Respondent Department of Revenue (the "Department"), which is the agency responsible for the administration of the state's tax laws. Relying on a report dated February 1, 2018 (the "Deal Pricing Analysis" or "DPA"), which had been prepared for Taxpayer by Bernice T. Dowell of Cynsur, LLC, Taxpayer sought a refund in the amount of $495,013.05. As grounds therefor, Taxpayer stated that it had "paid Documentary Stamp Tax on personal property in addition to real property."

8. Taxpayer's position, at the time of the refund application and throughout this proceeding, is that its stamp tax liability should be based, not on the total undifferentiated consideration of $125 million given in the exchange for the

Hotel Business, but on $77.8 million, which, according to the DPA, is the "implied value" of——i.e., the pro-rata share of the lump-sum purchase price that may be fairly allocated exclusively to——the RE transferred pursuant to the Agreement. Taxpayer claims that, to the extent it paid stamp tax on the "implied values" (as determined in the DPA) of the TPP ($7 million) and ITPP ($40.2 million) included in the transfer of the Hotel Business, it mistakenly overpaid the tax.[1/]

9. On February 23, 2018, the Department issued a Notice of Intent to Make Refund Claim Changes, which informed Taxpayer that the Department planned to "change" the refund amount requested, from roughly $500 thousand, to $0——to deny the refund, in other words. In explanation for this proposed decision, the Department wrote: "[The DPA] was produced 3 years after the [special warranty deed] was recorded. Please provide supporting information regarding allocation of purchase price on or around the time of the sale."

10. This was followed, on April 2, 2018, by the Department's issuance of a Notice of Proposed Refund Denial, whose title tells its purpose. The grounds were the same as before: "[The DPA] was produced 3 years after the document was recorded."

11. Taxpayer timely filed a protest to challenge the proposed refund denial, on May 31, 2018. Taxpayer argued that

the $125 million consideration, which Purchaser paid for the Hotel Business operation, necessarily bought the RE, TPP, and ITPP constituting the going concern; and, therefore, because stamp tax is due only on the consideration exchanged for RE, and because there is no requirement under Florida law that the undifferentiated consideration exchanged for a going concern be allocated, at any specific time, to the categories or subcategories of property transferred in the sale, Taxpayer, having paid stamp tax on consideration given for TPP and ITPP, is owed a refund.

12. The Department's tax conferee determined that the proposed denial of Taxpayer's refund request should be upheld because, as he explained in a memorandum prepared on or around December 27, 2018, "[t]he taxpayer [had failed to] establish that an allocation of consideration between Florida real property, tangible personal property, and intangible property was made prior to the transfer of the property such that tax would be based only on the consideration allocated to the real property."

13. The Department issued its Notice of Decision of Refund Denial on January 9, 2019. In the "Law & Discussion" section of the decision, the Department wrote:

> [1] When real and personal property are sold together, and there is no itemization of the personal property, then the sales

> price is deemed to be the consideration paid for the real property. [2] Likewise, when the personal property is itemized, then only the amount of the sales price allocated for the real property is consideration for the real property and subject to the documentary stamp tax.

The first of these propositions will be referred to as the "Default Allocation Presumption." The second will be called "Consensual-Allocation Deference." The Department cited no law in support of either principle.

14. In its intended decision, the Department found, as a matter of fact, that Taxpayer and Purchaser had not "established an allocation between all properties prior to the transfer" of the Hotel Business. Thus, the Department concluded that Taxpayer was not entitled to Consensual-Allocation Deference, but rather was subject to the Default Allocation Presumption, pursuant to which the full undifferentiated consideration of $125 million would be "deemed to be the consideration paid for the" RE. Taxpayer timely requested an administrative hearing to determine its substantial interests with regard to the refund request that the Department proposes to deny.

15. Taxpayer also filed a Petition to Determine Invalidity of Agency Statement, which was docketed under DOAH Case No. 19-3639RU (the "Rule Challenge"). In its section 120.56(4) petition, Taxpayer alleges that the Department has taken a position of disputed scope or effect ("PDSE"), which meets the

definition of a "rule" under section 120.52(16) and has not been adopted pursuant to the rulemaking procedure prescribed in section 120.54. The Department's alleged PDSE, as described in Taxpayer's petition, is as follows:

> In the administration of documentary stamp tax and surtax, tax is due on the total consideration paid for real property, tangible property and intangible property, unless an allocation of consideration paid for each type of property sold has been made by the taxpayer on or before the date the transfer of the property or recording of the deed.

If the alleged PDSE is an unadopted rule, as Taxpayer further alleges, then the Department is in violation of section 120.54(1)(a).

16. The questions of whether the alleged agency PDSE exists, and, if so, whether the PDSE is an unadopted rule, are common to Taxpayer's separate actions under sections 120.57(1) and 120.56(4), respectively, because neither the Department nor the undersigned may "base agency action that determines the substantial interests of a party on an unadopted rule." § 120.57(1)(e)1., Fla. Stat. Accordingly, the Rule Challenge was consolidated with Taxpayer's refund claim for hearing.

17. It is determined that the Department, in fact, *has* taken a PDSE, which is substantially the same as Taxpayer described it. The undersigned rephrases and refines the

Department's PDSE, to conform to the evidence presented at hearing, as follows:

> In determining the amount stamp tax due on an instrument arising from the lump-sum purchase of assets comprising both RE and PP, then, absent an agreement by the contracting parties to apportion the consideration between the categories or subcategories of property conveyed, made not later than the date of recordation (the "Deadline"), it is conclusively presumed that 100% of the undifferentiated consideration paid for the RE and PP combined is attributable to the RE alone.

According to the PDSE, the parties to a lump-sum purchase of different classes of property (a "Lump—Sum Mixed Sale" or "LSMS") possess the power to control the amount of stamp tax by agreeing upon a distribution of the consideration between RE and PP, or not, before the Deadline.[2/] If they timely make such an agreement, then, in accordance with Consensual-Allocation Deference, which is absolute, the stamp tax will be based upon whatever amount the parties attribute to the RE. If they do not, then, under the Default Allocation Presumption, which is irrebuttable, the stamp tax will be based upon the undifferentiated consideration.

18. The Department has not published a notice of rulemaking under section 120.54(3)(a) relating to the PDSE. Nor has the Department presented evidence or argument on the

feasibility or practicability of adopting the PDSE as a *de jure* rule.

19. It is determined as a matter of ultimate fact that the PDSE has the effect of law because the Department, if unchecked, intends consistently to follow, and to enforce compliance with, the PDSE. Because, in the Department's hands, the PDSE creates an entitlement to collect stamp taxes while adversely affecting taxpayers, it is an unadopted rule.

CONCLUSIONS OF LAW

20. Subject to a determination that Taxpayer has standing, a matter which is discussed below, DOAH has jurisdiction in this proceeding pursuant to sections 120.56, 120.569, and 120.57(1).

21. Section 120.56(4)(a) authorizes any person who is substantially affected by an agency statement to seek an administrative determination that the statement is actually a rule whose existence violates section 120.54(1)(a) because the agency has not formally adopted the statement.

22. In administrative proceedings, standing is a matter of subject matter jurisdiction. Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009). To have standing as a "substantially affected" person to challenge an agency statement defined as a rule, the petitioner generally must show that he or she will suffer an immediate "injury in fact" within the "zone of interest" protected by the statute the

alleged unadopted rule is implementing or by other related statutes. See, e.g., Fla. Medical Ass'n, Inc. v. Dep't of Prof'l Reg., 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983).

23. Taxpayer is obviously substantially affected by the Default Allocation Presumption, which the Department intends to apply as grounds for denying Taxpayer's refund request. Despite that, the Department contends that Taxpayer lacks standing to challenge the PDSE. Because the Department's position on standing is clearly erroneous, the discussion of this issue will be brief.

24. The Department argues that Taxpayer has suffered no injury attributable to the PDSE because it presented no evidence in support of its contention that $77.8 million represents the taxable consideration given for the transfer of RE. This goes to the merits of Taxpayer's refund request and, specifically, to whether Taxpayer has met its burden of proof in the separate (but related) section 120.57(1) proceeding, DOAH Case No. 19-1879. It is irrelevant to Taxpayer's standing to maintain this section 120.56(4) action, however, whether Taxpayer wins or loses the proceeding in which it seeks a stamp tax refund. The pertinent question for standing purposes is whether the Department, unchecked, would grant or deny Taxpayer's refund claim based on the PDSE. The answer, clearly, is yes it would.

25. The Department's argument on standing, in fact, tells us so. The reason that Taxpayer, in pressing its refund claim, has presented no evidence cognizable by the Department is that, when the conclusive Default Allocation Presumption applies, the Department recognizes no evidence presented in support of a refund claim that might rebut the presumption. Because the Department believes that section 201.02, Florida Statutes, creates the Default Allocation Presumption, however, the undersigned thinks that what the Department is trying to say is that it would determine Taxpayer's substantial interests based, not on the PDSE, but on the statute, and therefore, that Taxpayer is substantially affected by the statute, not the PDSE.

26. This argument must be rejected because it begs the question on the merits of the rule challenge. If the PDSE merely reiterates the plain meaning of the statute, then it is not a "rule" and need not be adopted as such. But the question of whether the PDSE is a "rule" is *the* dispute at the heart of this case. Whether Taxpayer's rule challenge bears fruit or not is irrelevant to its standing to bring the action, because standing to challenge a rule does not depend upon the petitioner's likelihood of success on the merits.

27. The Department, left to its own devices, would apply the PDSE to determine Taxpayer's substantial interests, regardless of whether the PDSE simply restates the unambiguous

statutory text. For that reason, Taxpayer is substantially affected by the PDSE and has standing to allege, and attempt to prove, that the PDSE is not a mere paraphrase of section 201.02, but a "rule." If Taxpayer fails to prove this allegation, then it will lose the rule challenge, not forfeit standing.

28. Agency rulemaking is not discretionary under the Administrative Procedure Act. See § 120.54(1)(a), Fla. Stat.; Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 86 (Fla. 1st DCA 1997)(The "legislature's intention [was] to remove from agencies the discretion to decide whether or not to adopt rules."). Each agency statement meeting the definition of a rule under section 120.52(16) must be adopted "as soon as feasible and practicable." § 120.54(1)(a), Fla. Stat.

29. The statutory term for an informal rule-by-definition is "unadopted rule," which is defined in section 120.52(20) to mean "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54."

30. If the petitioner proves at hearing that the agency statement is an unadopted rule, the agency then has the burden of overcoming the presumptions that rulemaking was both feasible and practicable. In this regard, section 120.54(1)(a)1. provides as follows:

Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.

Section 120.54(1)(a)2. provides as follows:

Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

The Department made no attempt to prove (or even to argue) that it would have been infeasible or impracticable to adopt the PDSE at issue as a rule. Thus, feasibility and practicability are presumed.

31. The term "rule" is defined in section 120.52(16) to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes

the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." As the First District Court of Appeal explained:

> The breadth of the definition in Section 120.52(1[6]) indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," [State, Dep't of Admin. v.] Stevens, 344 So. 2d [290,] 296 [(Fla. 1st DCA 1977)], or serves "by (its) own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977); see also Jenkins v. State, 855 So. 2d 1219 (Fla. 1st DCA 2003); Amos v. Dep't of HRS, 444 So. 2d 43, 46 (Fla. 1st DCA 1983). Accordingly, to be a rule:

> [A] statement of general applicability must operate in the manner of a law. Thus, if the statement's effect is to create stability and predictability within its field of operation; if it treats all those with like cases equally; if it requires affected persons to conform their behavior to a common standard; or if it creates or extinguishes rights, privileges, or entitlements, then the statement is a rule.

Fla. Quarter Horse Racing Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 11-5796RU, 2013 Fla. Div. Admin. Hear. LEXIS 558, at *37-38 (Fla. DOAH May 6, 2013), aff'd, Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg., 133 So. 3d 1118 (Fla. 1st DCA 2014).

32. Because the definition of the term "rule" expressly includes statements of general applicability that implement or interpret law, an agency's interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, require compliance, or otherwise have the direct and consistent effect of law, is a rule, but one which simply reiterates a statutory mandate is not. Id. at *39-40; see also Grabba-Leaf, LLC v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Bevs. & Tobacco, 257 So. 3d 1205, 1208 (Fla. 1st DCA 2018)(simple reiteration of what is "readily apparent" from the text of a law falls within rulemaking exception); State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enters.-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st DCA 1990); St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

33. This is a critical precept, which must be scrupulously observed to curb executive encroachment upon legislative power. The constitutional separation of powers is deformed when a

bureaucrat legislates from his or her desk, no less so than when a judge legislates from the bench. In each instance, an employee or official of one branch of government exercises power that belongs to another branch. Critics of judicial activism should be as ready to call out the excesses of the administrative state, which, unlike the least dangerous branch, has at its disposal an impressive arsenal of executive powers that can be used to implement and enforce its preferred policies and whims. To be sure, agencies are authorized to exercise legislative power as delegated by statute, but only insofar as the legislature specifies and only in accordance with the rulemaking procedure.

34. To be generally applicable, a statement's level of generality must be such as to constitute an abstract principle, but it need not apply universally to every person or activity within the agency's jurisdiction. It is sufficient that the statement apply uniformly to a category or class of persons or activities over which the agency may properly exercise authority. See Schluter, 705 So. 2d at 83 (policies that established procedures pertaining to police officers under investigation were said to apply uniformly to all police officers and thus to constitute statements of general applicability); see also, McCarthy v. Dep't of Ins., 479 So. 2d 135 (Fla. 2d DCA 1985)(letter prescribing "categoric

requirements" for certification as a fire safety inspector was a rule).

35. In this case, the subject PDSE reflects the Department's understanding or interpretation of section 201.02. It is generally applicable because (like the statute itself) it applies to every LSMS, the parties to which have not apportioned the consideration by mutual agreement.[3/] Thus, the PDSE under consideration is, at a minimum, a statement of general applicability ("SGA"). The remaining questions are (i) whether the challenged SGA gives section 201.02 a meaning not readily apparent from its plain meaning, and, if so, (ii) whether the interpretive statement has the direct and consistent effect of law.

36. The starting point for answering the first question is section 201.02, which provides in relevant part as follows:

> (1)(a) 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.

37. In applying taxing statutes, courts must be careful not to subject to tax anything which has not been clearly so burdened. "Taxes cannot be imposed except in clear and unequivocal language. Taxation by implication is not permitted." Fla. S & L Servs., Inc. v. Dep't of Rev., 443 So. 2d 120, 122 (Fla. 1st DCA 1983). The "authority to tax must be strictly construed." Dep't of Rev. v. GTE Mobilnet, 727 So. 2d 1125, 1128 (Fla. 2d DCA 1999). As the Florida Supreme Court explained,

> It is a fundamental rule of construction that tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer. This salutary principle is found in the reason that the duty to pay taxes, which necessary to the business of the sovereign, is still a duty of pure statutory creation and taxes may be collected only within the clear definite boundaries recited by statute.

Maas Bros., Inc. v. Dickinson, 195 So. 2d 193, 198 (Fla. 1967); see also Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, 497 So. 2d 630, 632 (Fla. 1986)("The courts are not taxing authorities and cannot rewrite the statute.").

38. The SGA in question rests upon the Department's interpretation of the term "consideration" as used in

section 201.02. The Department reads the term "consideration" in section 201.02(1)(a) as meaning the bargained-for product of mutual assent between contracting parties, given in exchange for promised performance. This is a correct understanding of the statute's literal meaning. As a legal term of art, "consideration" is that bargained-for "something," which, under the law of contracts, is essential to the formation of a legally binding agreement; the statute uses the term "consideration" in this sense. For clarity, this type of consideration will be referred to as "contractual consideration."

39. Section 201.02 clearly and unambiguously (i) imposes a stamp tax on any deed or other instrument whereby a grantor conveys RE, or an interest therein, to a grantee, and (ii) specifies that the tax shall be assessed against the "consideration therefor," meaning the contractual consideration for the RE. The amount of contractual consideration given for RE, and subject to the stamp tax under section 201.02, will be called "taxable consideration."

40. Of course, not all contractual consideration is taxable consideration. Contractual consideration given for anything other than RE is "nontaxable consideration." Thus, when a contract has nothing to do with real property, the contractual consideration is 100% nontaxable consideration. Conversely, when a contract involves nothing but the transfer of

real property, the contractual consideration is 100% taxable consideration.

41. In contrast to these all-or-nothing situations, the contractual consideration in an LSMS transaction is not necessarily either 100% taxable or 100% nontaxable. Where, as here, the contracting parties do not itemize the lump-sum purchase payment by specifying the respective prices-per-item, the contractual consideration is "undifferentiated consideration," that is, a mixture of taxable consideration and nontaxable consideration in non-negotiated measures. (If, in contrast, the contracting parties to an LSMS itemize the purchase payment, then the contractual consideration is "consensually allocated consideration.") To determine the correct amount of stamp tax payable on undifferentiated consideration requires a division or apportionment of the undifferentiated consideration, so that the nontaxable consideration is separated from the taxable consideration and not included in the cost basis.

42. Whether the contracting parties agree upon an amount of taxable consideration depends, not on contract law, but on whether reaching an agreement as to consensually allocated consideration is a deal point for one or both parties. Nothing in section 201.02 requires agreement upon consensually allocated consideration. The statute, as a matter of fact, says nothing

whatsoever about either undifferentiated consideration or consensually allocated consideration.

43. In "interpreting" section 201.02 as requiring not only (i) that the contracting parties must agree upon an apportionment of any lump-sum payment made in exchange for RE and PP conveyed as a package in a single transaction; but also (ii) that, in the absence of consensually allocated consideration, the stamp tax must be imposed on the whole undifferentiated consideration, the Department has given the statute a meaning that goes way beyond a literal reading of the statutory text. Indeed, what the Department is doing here cannot fairly be called statutory construction; it is legislating.

44. It is concluded, therefore, that the challenged SGA gives section 201.02 a meaning not readily apparent from its plain meaning.

45. As for whether this agency interpretation of section 201.02 has the direct and consistent effect of law, it is worth mentioning that, in light of the relatively recent adoption of Amendment Six to the Florida Constitution,[4/] which nullified the doctrine of judicial deference in this state,[5/] the only way an agency currently can make an authoritative statement having the direct and consistent effect of law is to promulgate a rule. See Kanter Real Estate, LLC v. Dep't of Envtl. Prot.,

267 So. 3d 483, 487 (Fla. 2019)("Amendment Six declares that appellate courts may no longer defer to an agency's statutory interpretation, and must instead apply a *de novo* review."). Before Amendment Six, in contrast, "[w]ith the deference doctrine behind them, agencies expect[ed] compliance with their statutory interpretations (and [would] take action to enforce compliance if necessary), and persons under agency jurisdiction [were] practically compelled to comply. At bottom, because courts appl[ied] and enforce[d] all reasonable agency interpretations, such interpretations carr[ied] the force of law." See John G. Van Laningham, When Courts Bow to Bureaucrats: How Florida's Deference Doctrine Lets Agencies Say What the Law Is, 45 Fla. St. U. L. Rev. Online 1, 16 (2018)(available at http://www.fsulawreview.com/online/). No longer can agencies circumvent the rulemaking procedure in this fashion.

46. The time has come to bid farewell to the concept of the "incipient" or "nonrule" policy as a sort of quasi rule having almost, but not quite, the same force as a properly adopted, *de jure* rule. It was the deference doctrine, not the Administrative Procedure Act, which gave "nonrule policies" their putative authority. Without deference, a "nonrule policy" is just a policy that is not a rule. A "policy" that is not a rule is only an argument or position, lacking the coercive force

of law, but enjoying the persuasive force of logic and reason.[6/] No court, judge, or party needs to (or should) submit to an agency argument or position, i.e., any statement other than a *de jure* rule, unless he, she, or it is persuaded thereby.[7/] Naturally, an agency's arguments and positions are entitled to the same respect and consideration as any other party's arguments and positions. After Amendment Six, however, agencies no longer enjoy the tremendous advantage over private parties of being able simply to speak the law into existence.

47. If an agency statement is not a *de jure* rule, it does not——cannot——have the force and effect of law, no matter how authoritative it sounds. Therefore, whether an SGA has the effect of law is ultimately a question of fact regarding the agency's intent, which boils down to whether the agency, if unchecked, intends to be bound by, and to enforce compliance with, the SGA. Where the agency, as here, actually has taken preliminary agency action determining a party's substantial interests based on the SGA, the requisite intent to enforce is most easily shown. Actual enforcement, however, is not necessary to prove that the agency intends to require bilateral compliance with its SGA, if unhindered. In the absence of actual enforcement, the petitioner in a section 120.56(4) proceeding has a more difficult task, from an evidentiary standpoint, but not an impossible one. If, for example, the

agency has taken a firm position on a matter of statutory interpretation, then the intent to obey, apply, and enforce the statute as the agency understands it may be reasonably inferred.

48. This case does not present a close question in regard to the effect-of-law criterion. One of the seminal unadopted-rule challenge cases, Department of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 252 (Fla. 5th DCA 1996), is practically on all fours. Vanjaria arose out of a disputed assessment of sales tax on commercial rent. The taxpayer, Vanjaria, leased multiple-use commercial property on which were situated several businesses, including a motel. The lessee's rental payments were subject to sales tax except to the extent attributable to the motel, because the statute exempted from taxation properties being used as dwelling units. Id. at 254. The lessee paid the tax based on its allocation of 73% of the undifferentiated monthly rent payments to the motel, which meant that it paid tax on 27% of the rent. Id.

49. The Department determined, after conducting an audit, that the lessee had over-allocated the rent to the hotel and hence underpaid the tax. At the time, the Department's policy, as set forth in a Training Manual, was to apportion undifferentiated commercial rent for mixed-use properties by taking the ratio of the square footage of the dwelling units to the square footage of the entire property as the means of

calculating the tax-exempt share (the "presumed nontaxable percentage"). The Department treated the presumed nontaxable percentage as conclusive and beyond dispute. In Vanjaria's case, the Department found that the presumed nontaxable percentage was 24.81%, not 73%, and therefore, that the tax was payable on 75% of the rent as opposed to 27%. Id.

50. The court agreed with the trial judge that the Department's use of the square-footage ratio to calculate the presumed nontaxable percentage followed an established assessment procedure, which constituted an unadopted rule. The court explained that the assessment procedure had the effect of law because it "create[d] [the Department's] entitlement to taxes while adversely affecting property owners." Id. at 255. The procedure was generally applicable because auditors had no discretion to depart from the formula, which was consistently used in all audits. Id. at 255-56. Because the assessment procedure was an illicit, unpromulgated rule, the court held that the tax could not be based on the portion of the rent that exceeded the presumed nontaxable percentage.

51. Here, the Department apportions undifferentiated monetary consideration exchanged in connection with an LSMS based on the Default Allocation Presumption or Consensual-Allocation Deference, whichever applies, following an assessment procedure that its employees do not have the discretion to

ignore. As the Department acknowledges, it "had to deny the [Taxpayer's refund] claim" because, under the irrebuttable Default Allocation Presumption, "the DPA is not evidence of the [taxable] consideration." Like the unadopted rule in Vanjaria, in the Department's hands, the SGA under review creates the Department's entitlement to collect taxes while adversely affecting taxpayers.

52. It is concluded that the SGA under discussion, and in particular the Default Allocation Presumption, is an unadopted rule, and thus, that the Department is in violation of section 120.54(1)(a).

ORDER

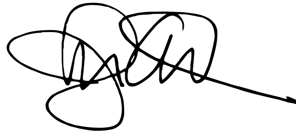
Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

A. The PDSE as described in paragraph 17 hereinabove constitutes an unadopted rule in violation of section 120.54(1)(a).

B. The Department shall pay reasonable costs and reasonable attorney's fees to Taxpayer as required under section 120.595(4)(a). Taxpayer shall have 45 days from the date of this Final Order within which to file a motion for attorney's fees and costs, to which motion (if filed) Taxpayer shall attach: (i) proof that, at least 30 days before the filing of the petition, the Department received notice that the

statement may constitute an unadopted rule, see § 120.595(4)(b), Fla. Stat.; (ii) appropriate affidavits (attesting, e.g., to the reasonableness of the fees and costs); and (iii) the essential documentation supporting the claim, such as time sheets, bills, and receipts.

DONE AND ORDERED this 17th day of December, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2019.

ENDNOTES

1/ The numbers in the text have been rounded for ease of discussion. The actual figures arrived at by Ms. Dowell for the implied values of the several property types making up the Hotel Business, as stated in the DPA, are $77,803,500 (RE); $7,000,000 (ITPP); $40,196,500 (TPP), which total $125 million.

2/ The Deadline is the date of recordation, by default. The Department has reserved the right to enlarge the Deadline but apparently has not developed criteria for limiting its exercise of discretion in this regard.

[3/] Consensual-Allocation Deference, which is the flip side of the Default Allocation Presumption, complements the PDSE at issue and, in conjunction therewith, makes an integrated interpretive statement that embraces all LSMSs. Taxpayer, however, did not specifically challenge the Consensual-Allocation Deference component of the Department's overall construction of section 201.02.

[4/] Article V, section 21, of the Florida Constitution provides as follows:

> In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

[5/] Before Amendment Six, under the then prevailing doctrine of judicial deference, "courts . . . held that an agency decision construing a statute within its substantive jurisdiction should not be reversed unless it is clearly erroneous." Brown v. Comm'n on Ethics, 969 So. 2d 553, 557 (Fla. 1st DCA 2007). "An agency's interpretation of an ambiguous statute or rule that it administer[ed] [would be found] not clearly erroneous if 'it [were] within the range of possible and reasonable interpretations.'" Soc'y for Clinical & Med. Hair Removal, Inc. v. Dep't of Health, 183 So. 3d 1138, 1145 (Fla. 1st DCA 2015).

[6/] Again, if an agency wants its statement to be normative, in the sense of prescribing law or policy, then all it needs to do is adopt the statement as a rule in accordance with section 120.54, whereupon the statement will become law.

[7/] A party must obey a final agency order, but an order *qua* order is not an SGA (although it might be proof of one). Nonparties, in other words, do not need to follow an order.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.