IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,
an agency of the State of Florida,

Appellant,

v.

DCA Case No. 1D11-2174
L.T. Case No. 09-CA-1503

RUEHL NO. 925, LLC,
a foreign limited liability company

Appellee.
_____/

ANSWER BRIEF OF RUEHL NO. 925, LLC
Appeal from a Final Order of the Circuit Court

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STATEMENT OF CASE AND FACTS[1]

Appellant/Defendant Department of Revenue's (the "**Department**") Initial Brief contains an unauthorized, argumentative "Introduction" and its Statement of the Case and Facts is incomplete and misstates the trial court's conclusions. Accordingly, Appellee/Plaintiff, Ruehl No. 925, LLC ("**Ruehl**"), sets forth the following Statement of Case and Facts.

This is an appeal of a circuit court final order issuing summary judgment in favor of Ruehl on stipulated facts. [V1 31-164; V2 336-338, 341-342] The issue in this appeal, as stated by the trial judge, Judge Terry P. Lewis, is: "[W]hether the cost of certain repairs and improvements made by [Ruehl] to leased premises that [it] occupied should be considered rent and thus taxable pursuant to Section 212.031, Florida Statutes." [V2 336] After reviewing a totality of the circumstances, Judge Lewis concluded the improvements could not be considered rent and were not taxable. [V2 336]

The undisputed facts are as follows: Ruehl was a specialty brand retailer of men's and women's clothing. [V1 7] During the periods at issue in this appeal, Ruehl was a wholly-owned affiliate of Abercrombie & Fitch Stores, Inc ("**Abercrombie**"). [V1 32] Pertinent here, Abercrombie entered into two

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[1] All record references are to volume and page number (*e.g.* [V1 1] references record volume 1, page 1). All transcript references are to page number (*e.g.* [T 1] references transcript page 1).

commercial leases under which Ruehl would operate its retail stores in two mall locations (the "**Aventura Lease**" and the **Westshore Lease**"). [V1 31-32, 35-164]

The leases specifically recognized that Ruehl, like many tenants, would need to remodel the leased space to accommodate its unique store design at its own expense—and the plans for such remodeling would have to be approved by the landlord. For instance, the Aventura Lease states that all "remodeling" must be in accordance with plans and specifications prepared by Ruehl and approved by the landlord and in accordance with all applicable building codes. [V1 48 ¶8.05] The lease then defines what "remodeling" work is to be done and approved by the landlord. [V1 48-49 ¶8.05] Likewise, the Westshore Lease provided that "alterations, additions or improvements" were Ruehl's responsibility. [V1 118 ¶5:01]

Although certain remodeling was mandatory under the leases, the Department stipulated that the remodeling was undertaken solely to ready the premises for Ruehl's occupancy. [V1 32] Moreover, the leases do not provide that the remodeling costs act as a credit towards or are in lieu of rent. Nor do the leases require that any specific amount of money be spent to remodel the properties.

Abercrombie & Fitch Procurement Services, LLC ("**Procurement Services**"), a wholly-owned affiliate of Abercrombie, paid for the materials and

related expenses required to remodel the properties. [V1 33] Ruehl then reimbursed Procurement Services. [V1 33]

Once remodeling was complete, the Department issued a tax assessment to Ruehl, asserting the cost of remodeling was taxable "rent" under section 212.031, Florida Statutes and rule 12A-1.070(19)(b), Florida Administrative Code. [V1 32-34]

Section 212.031 imposes a tax of 6 percent on the total rent charged for real property and states: "The total rent . . . charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges." § 212.031(1)(c). Rule 12A-1.070(19)(b) states that rent charged is the total consideration, whether payments, credits or other in-kind consideration, furnished by the lessee to the lessor. The Department takes the position that, under the statute and its rule, the cost of remodeling is rent "in kind" for the privilege of using the property.

Ruehl contested the assessments, asserting the costs of the remodeling were not in-kind consideration because, among other reasons: **(1)** the leases do not provide that remodeling costs are in lieu of rent; **(2)** the leases do not require any particular dollar amount be spent on remodeling; **(3)** no specific leasehold improvements are a condition of occupancy under the leases; instead, the

remodeling is totally within the discretion of the tenant so long as the remodeling meets code and other building requirements for the properties at issue; and (**4**) the remodeling was constructed on a multi-use property (*i.e.,* commercial mall location). [V2 344-345] The Department rejected Ruehl's position.

After exhausting its administrative remedies before the Department, Ruehl filed a complaint in circuit court challenging the assessment. [V1 5-22] Based on the parties' stipulated facts and the face of the leases, Judge Lewis entered summary judgment in Ruehl's favor. [V2 336-338] In doing so, Judge Lewis rejected the Department's blanket determination that all leasehold improvements are in-kind consideration and taxable.[2] Instead, he held that a court must consider the unique facts of each case to determine whether the tax applies. [V2 336-337] His order then states his reasoning for why the tax does not apply here:

> The lease in this particular case was for a store in a mall. As part of the lease, the landlord required the lessee to completely refurbish the interior of the store and to submit to the landlord all plans for improvement for its approval. There was no requirement

[2] The Department repeatedly and incorrectly states Judge Lewis acknowledged that Florida law considers leasehold improvements as consideration in kind but nevertheless found such law did not apply here. *See, e.g.,* Ini. Br. at 6, 7. Judge Lewis did not make any such acknowledgement. What Judge Lewis actually said was that this was the Department's position, but he did not believe such a blanket application was justified, finding that, whether the tax was appropriate turned on the particular facts and agreement of the parties. [V2 336-337 ("The Department's position is very straightforward. Under the statutes, the rules and the case law, the construction of improvements to the leased premises was consideration in kind, furnished by the lessee (occupant) to the lessor for the privilege or as a condition of occupancy of the premises. I don't believe, however, that such a blanket application can be justified in this case . . . .")]

> that the tenant spend a particular amount of money on these improvements. There is no indication that such improvements or refurbishing were to be done on a periodic basis, but rather a one time expenditure in order to put the premises in a condition suitable for the operation of the business for which the lessee was to use it, consistent with the architectural requirements of the landlord, building codes, etc.
>
> The Department concedes that, had the landlord agreed to pay the cost of such refurbishing, it would not be considered rent, but argued that if that had been the case, the amount of the monthly rental would have been higher. Perhaps, but there is no record evidence of that. There is also no record evidence to suggest that the requirement in the lease that the tenant pay for the cost of such improvements was an attempt to reclassify what would be rental payments so as to avoid the tax. There are often provisions in a lease that will require a tenant to expend funds—make improvements, maintain the property, keep the business open during certain hours for example. These expenditures of money by the tenant, however, are not, in the common sense meaning of the term, rent. Just because a lease provision contemplates the expenditure of funds by a tenant does not make that expenditure rent.

[V2 337] (emphasis added).]

Importantly, Judge Lewis also applied the factors considered in the only other Florida case addressing an issue similar to the one here, *Department of Revenue v. Seminole Clubs, Inc.,* 745 So. 2d 473 (Fla. 5th DCA 1999), but he explicitly distinguished that case, stating:

> The case of *[Seminole Clubs]*, upon which the Department relies, is distinguishable. There, the language of the lease demonstrated that the expenditure of money by the lessee for capital improvements to the golf course, were in lieu of paying rent. That is the classic payment of consideration in kind for the occupancy of the premises.

. . .

> In this case, there is no record evidence to suggest that the amount the lessee spent on improvements for refurbishing of the interior of the leased premises was in lieu of rent. There was no requirement that a particular minimum amount of funds be expended. There was no provision for the lessee to be credited against rental payments for such costs. There is no evidence of record that the amount of rent to be paid was somehow manipulated by this provision. Rather, it is simply an expense which the tenant had to incur to get the premises in a condition that would be suitable for its intended purposes.

[V2 337-338] (emphasis added).

After judgment was issued in Ruehl's favor, the Department filed this appeal. [V2 386-391]

SUMMARY OF ARGUMENT

The duty to pay taxes is purely a creature of statute, and taxes may be collected only within the clear definite boundaries of a tax statute. Tax laws must be strongly construed in favor of the taxpayer and against the government. Judge Lewis' conclusion that Ruehl's remodeling costs are not rent is a proper construction of the statute and should be affirmed.

The statute in this case, section 212.031, provides that taxes are to be imposed on the total rent "charged" for the use of real property, which includes "payments for the granting of a privilege to use or occupy" the property. Applying the plain language of the statute to the particular circumstances of this case, Judge Lewis correctly held the remodeling costs were not charges for the use of the

property—instead, the remodeling costs were "simply an expense [Ruehl] had to incur to get the premises in a condition that would be suitable for its intended purposes." [V2 338]

In reaching his conclusion, Judge Lewis looked to the totality of the circumstances and considered numerous factors. Nothing in the leases required any specific amount to be spent on remodeling the property. Nothing stated the amounts were in lieu of rent. Ruehl received no credit against its rent payments for amounts spent on remodeling. The remodeling costs were a one-time expense. Nothing in the record indicated the parties colluded to avoid paying rent. And the remodeling costs were expended solely to get the property ready for Ruehl's unique business operations. All of these factors, taken together, establish that the remodeling costs were not a "charge" by the landlord for rent; the remodeling costs were expended to accommodate Ruehl's unique business operations.

The Department cites language from *Seminole Clubs* out of context for its position that the only factor to be considered is whether the remodeling was mandatory under the leases. The factors Judge Lewis considered are the same factors considered by the Fifth District Court of Appeal in *Seminole Clubs.* In addition to *Seminole Clubs*, Judge Lewis' holding is supported by precedent of the United States Supreme Court addressing whether capital improvements constitute "rent."

Rather than acknowledging Judge Lewis properly evaluated the totality of the circumstances to determine whether the remodeling costs were rent, the Department discusses each factor in isolation and argues these factors are irrelevant. But other than (**1**) its citation to *Seminole Clubs* out of context, and (**2**) its own summary, self-serving statements that (**a**) the remodeling costs constitute rent, and (**b**) bargained for costs such as ad valorem taxes (which are very different from remodeling costs) are considered rent, the Department's position is wholly without support in the law.

Failing to apply the plain language of section 212.031 and accepting the Department's position could result in the sales and use taxation of myriad cash and in-kind payments never considered by the contracting parties as "rent" under the lease agreement. The legislature's stated intent is that all rent of whatever nature must be taxed. Nothing indicates the legislature meant to extend section 212.031's reach to include remodeling costs, particularly where those costs are specific to outfit property to accommodate a certain tenant's needs consistent with its unique brand identity and marketing. Judge Lewis' judgment should be affirmed.

ARGUMENT

THE COST OF REMODELING THE PROPERTIES TO ACCOMMODATE RUEHL'S UNIQUE DESIGN NEEDS IS NOT TAXABLE AS RENT.

Standard of Review.

Ruehl agrees that the standard of review is *de novo.*

Argument.

"Tax laws are to be construed strongly in favor of the taxpayers and against the government, and all ambiguities or doubts are to be resolved in favor of the taxpayers. Taxes may be collected only within the clear definite boundaries recited by the statute." *Dep't of Revenue v. Ray Constr. of Okaloosa Cnty.*, 667 So. 2d 859, 865 (Fla. 1st DCA 1996) (emphasis added) (citing *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193 (Fla. 1967)); *see also Broward Cnty. v. Fairfield Resorts Inc.*, 946 So. 2d 1144, 1147 (Fla. 4th DCA 2006) (same).

A plain reading of the statute as applied to the facts of this case firmly establishes the costs of the remodeling at issue are not rent.

Section 212.031 provides in pertinent part:

> (1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property[]
>
> . . . .

> (1)(c) For the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee. The total rent or license fee charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges.

(Emphasis added.)

The plain language of the statute says that tax is due on the total rent or fee charged for such real property, including payments for the granting of a privilege to use or occupy real property for any purposes—including base rent, percentage rents, or similar charges.

The Department's rule interpreting section 212.031 provides that the "total consideration, whether direct or indirect, payments or credits, or other consideration in kind, furnished by the lessee to the lessor is subject to tax." Fla. Admin. Code Rule 12A-1.070(19)(b) (emphasis added). Importantly, the Department's rule cannot be read to broaden what is taxable under the statute. *See, e.g., Golden West Fin. Corp. v. Fla. Dep't of Rev.,* 975 So. 2d 567 (Fla. 1st DCA 2008) (an agency's rule cannot enlarge, modify, or contravene the specific provisions of law implemented to impose a tax beyond that intended by the legislature).

Thus, the legal question is whether, under section 212.031, the remodeling costs at issue are a charge for the granting of a privilege to use or occupy real

property. Judge Lewis correctly determined, based on the particular facts of this case and applicable law, that the remodeling costs were not a charge by the landlord for the use of the property—the remodeling was solely for the purpose of accommodating Ruehl's particular retail business needs.[3]

Only one Florida case has addressed the issue in this case: *Seminole Clubs*. That case, from the Fifth District Court of Appeal,[4] supports a finding that the remodeling costs in this case are not taxable rent.

In *Seminole Clubs*, the court determined whether "capital improvements made by the taxpayer/lessee, and required by the terms of the lease agreement, constitute rental consideration flowing to the landlord" subject to taxation. 745 So. 2d at 475. The tenant in that case entered into a 67-year lease, leasing a public golf

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[3] Judge Lewis did not make, nor was he required to make in light of his holding, a determination as to whether Ruehl was required to construct the specific leasehold improvements assessed by the Department under each of the leases. However, Ruehl maintains, as it has consistently argued throughout its protest of the assessment, that under the terms of the leases Ruehl was not required to construct any specific improvement. [V2 353-356; T 16-23] The leases merely provide that Ruehl seek landlord approval once it decides on the construction of certain leasehold improvements. Landlord approval under each of the leases is expressly conditioned on Ruehl's compliance with each landlord's specific building specifications (*i.e.*, if Ruehl decided to re-route certain electrical wiring, the construction exhibits of the leases would control the type of wiring to be used).

[4] *Seminole Clubs* is persuasive but not binding authority because it is from the Fifth District Court of Appeal. *See Edney v. State*, 3 So. 3d 1281, 1283 (Fla. 1st DCA 2009) ("[A]s between District Courts of Appeal, a sister district's opinion is merely persuasive.") (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976)).

course. *Id.* at 474. The lease required the tenant to use 5% of all gross revenues "annually on capital improvements, in lieu of rent, first to the golf course itself . . . and then to building improvement and additional structures." 745 So. 2d at 474. If those amounts were not spent on improvements, the tenant was required to pay those amounts to the city as rent. *Id.* The district court held that, under these circumstances—where the capital improvements were specifically made in lieu of rent—the improvements were made for the privilege of occupancy and represented "rent in kind" taxable under section 212.031.[5] *Id.* at 475.

In applying *Seminole Clubs* to the facts of this case, Judge Lewis properly found the cost of remodeling was not taxable rent in kind. Unlike the circumstances in *Seminole Clubs,* in this case: Nothing in the leases required any specific amount to be spent on remodeling the property. Nothing stated the amounts were in lieu of rent. And Ruehl received no credit against its rent payments for amounts spent on remodeling.[6] As Judge Lewis concluded—the

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[5] As explained in detail later in this brief, the Department's reliance on *Seminole Clubs* for support of its position is based on an incorrect application of a footnote in that case—taken out-of-context—which does not stand for the proposition stated by the Department.

[6] The Department argues that upholding Judge Lewis' ruling would "invite landlords and tenants to disguise rent as leasehold improvements and effectively avoid their legal duty to collect and pay taxes on commercial rent." This concern is unfounded. For example, Ruehl does not dispute, consistent with the holding in *Seminole Clubs*, that if a tenant agrees to construct leasehold improvements in lieu of higher rentals that the value of such improvements would be taxable as in-kind rent under section 212.031.

remodeling costs are "simply an expense [Ruehl] had to incur to get the premises in a condition that would be suitable for its intended purposes." [V2 338]

In addition to *Seminole Clubs,* Judge Lewis' holding is supported by precedent of the United States Supreme Court, as well as a Maryland appellate court—each addressing whether capital improvements constitute "rent."

In *M.E. Blatt Co. v. United States*, 305 U.S. 267 (1938), the Court addressed whether the value of certain leasehold improvements constructed by a tenant resulted in the receipt of taxable income to the lessor. Section 22(a) of the Revenue Act of 1932 (now Section 61(a) of the Internal Revenue Code of 1986) provided that the receipt of "rent" represented "gross income" subject to the federal income tax. *M.E. Blatt*, 305 U.S. at 274 n.1. The tenant in *M.E. Blatt* made certain leasehold improvements to a movie theater under a written lease with a term of ten years. *Id.* at 274.

Like the Department's position here, the United States argued the value of the leasehold improvements became taxable to the landlord immediately upon construction. *Id.* at 276-77. The Court disagreed, holding no intent existed in the lease agreement that the tenant leasehold improvements would be treated as "rent" paid to the landlord. *Id.* at 277. The Court stated:

> While the lease required [the tenant] to make improvements necessary for successful operation, no item was specified, nor the time or amount of any expenditure. The requirement was one making for success of the business to be done on the leased premises. It may well

> have been deemed by the lessor essential or appropriate to secure payment of the rent stipulated in the lease. Even when required, improvements by lessee will not be deemed rent unless intention that they shall be is plainly disclosed.

Id. (emphasis added). *M.E. Blatt* remains good law and valuable precedent. *See e.g., Cash and Lincoln Fence Co. v. Comm'r of Internal Revenue*, T.C. Memo 1982-331, 1982 WL 10641 (U.S. Tax Ct. 1982).

In *University Plaza Shopping Center, Inc. v. Garcia*, 367 A.2d 957 (Md. Ct. App. 1977), the lease stated that, although the landlord was required to ready the leased premises for the tenant's use and occupancy, any additional construction was to be performed by the landlord but paid by the tenant. *Id.* at 958-59. When the tenant failed to reimburse the landlord, the landlord sued, claiming the costs were "rent" under the lease. *Id.* at 959.

In determining whether the costs were rent, the court cited to *M.E. Blatt*, finding the question turned on the intent of the parties and stating: "Even when required, improvements by lessee will not be deemed rent unless intention that they shall be is plainly disclosed." *Garcia*, 367 A.2d at 960 (emphasis added). The court concluded the improvements in that case were rent because (**1**) the charges for the improvements were set at a definite amount, (**2**) the money had to be paid to the landlord by the tenant for the tenant's use of the property, and (**3**) the lease specifically stated that any sums paid under the lease, such as the cost of improvements, constituted "additional rent." *Id.* at 961.

Judge Lewis' detailed analysis of the leases in this case follows the factors set forth in *Seminole Clubs*, *M.E. Blatt*, and *Garcia*. Although *M.E. Blatt* dealt with federal tax laws rather than section 212.031, application of the factors employed in that case is proper. First, because the term "rent" is not specifically defined in section 212.031, it is appropriate to look to decisions involving similar tax provisions for guidance. Second, *M.E. Blatt* is strong support for the proposition that, if the cost of improvements cannot be considered income to a landlord, then likewise those costs should not be taxed as rent paid to the landlord by the tenant. Third, the court in *Seminole Clubs* applied the same reasoning as that used by the United States Supreme Court in *M.E. Blatt, i.e.,* whether the terms of the lease and other circumstances establish that the improvements constituted in-kind rent to the landlord—thus showing that another Florida court has already employed these factors in evaluating whether an expenditure is rent.

As in *M.E. Blatt,* the remodeling at issue was to put the property in a condition suitable for Ruehl's retail business; it was not rent charged by the landlord. In *Seminole Clubs* and *Garcia,* the costs of the capital improvements were in lieu of or specifically characterized as rent; thus, they were in-kind taxable rent.

Rather than acknowledging that Judge Lewis properly evaluated a number of factors to determine whether the remodeling costs were rent, the Department

argues these factors should not have been used. But other than (**1**) its citation to *Seminole Clubs* out of context, and (**2**) its own summary, self-serving statements that (**a**) the remodeling costs constitute rent, and (**b**) bargained for costs such as ad valorem taxes are considered rent, the Department's position is wholly without support in the law. Instead, in an attempt to undermine Judge Lewis' well-reasoned conclusions, the Department argues it was improper for him to consider each of the factors he evaluated. Not only is the Department's position inconsistent with the plain language of the statute and its own rule, the Department's position as to each factor is simply wrong.

First, the Department says the lease need not fix the amount of money that had to be spent on remodeling for that money to be considered rent. This misses the point. The question is not whether the lease specifically fixes the amount of money for remodeling. The question is whether, as in *Seminole Clubs,* the lease requires certain specified and bargained for sums be spent on behalf of the landlord in lieu of rent or as in-kind consideration.

When a landlord mandates that a tenant spend a specific dollar amount with respect to a prescribed act (whether fixed or determinable in the future), that requirement unambiguously demonstrates the landlord has bargained for the dollar value attributable to that act. Where, as in this case, the lease agreement is silent as to the amount to be spent on remodeling, and remodeling is solely to accommodate

the tenant's unique retail needs, the lease illustrates the parties did not intend that the amounts expended would reflect a payment of "rent" to the landlord. Under such circumstances, the landlord is indifferent as to the value of the leasehold improvements constructed on the leased premises and clearly has not bargained for the value of the leasehold improvements. Therefore, the amounts expended with respect to such improvements are not intended to be "rent."

Moreover, ad valorem taxes, percentage rent, and common area maintenance charges—which are taxed as additional rent under rule 12A-1.070(4)(c) and (d)—are all amounts that will be fixed in the future. But—unlike improvements made to make the property suitable to the tenant's unique needs—those costs are all ongoing costs the tenant must pay to continue occupying the property, which also benefit the landlord. They are not costs, such as those at issue here, paid to prepare the property for the tenant's use.

Second, the Department says the tax does not turn on whether the payment is made on a periodic basis or is a one-time expenditure. The term "rent" is not specifically defined in section 212.031, and rent is commonly paid over a period of time. *See, e.g.,* Blacks Law Dictionary, 9th ed. (2009) (the common meaning of "rent" is "[c]onsideration paid, usu[ally] periodically, for the use or occupancy of property"). As a result, as a general matter, a one-time expense by a tenant is not consistent with the periodic nature of payments of "rent." Thus, while this factor is

not totally determinative standing alone, it is certainly one factor a court should consider when determining whether a cost incurred by a tenant is rent.

Here, Judge Lewis properly determined the remodeling costs were necessary for the operation of Ruehl's business. Under each of the leases, Ruehl had to make one-time expenditures for remodeling only. As Judge Lewis concluded, these one-time expenditures were made for the solitary purpose of "[putting] the premises in a condition suitable for the operation of the business for which the lessee was to use it, consistent with the architectural requirements of the landlord, building codes, etc." [V2 337] It was clear to Judge Lewis, and correctly so, that the one-time remodeling costs spent by Ruehl to accommodate its own retail needs were not monies spent within the common definition of the term "rent."

Third, the Department argues Judge Lewis erred in commenting that, had the landlord incurred the costs of remodeling, the costs would not have been taxable. Had the landlord incurred the costs, the property would already have been in a condition suitable for Ruehl's needs—which might have increased the rent. But under such circumstances, Ruehl would not have had to expend the monies itself and the landlord would have provided a benefit to Ruehl and expected higher rent in return. Here, Ruehl paid for the costs itself for its own purposes and benefit.

Although the improvements may have added to the property during the time Ruehl had possession; the very next tenant will be remodeling the property again to fit its particular needs. The design needs of a Ruehl store are very, very different from another retail clothing store—and would not accommodate the design needs of a shoe store, a book store, a drug store, or a grocery store. As the United States Supreme Court concluded in *M.E. Blatt*, when a tenant remodels a facility to accommodate its own unique business operations needs, the cost of that remodeling is not "rent."

Fourth, the Department argues it need not prove any attempt by the parties to reclassify what should be taxable rental payments so as to avoid the tax and no *mens rea* element exists. Judge Lewis did not state the Department must make a showing of tax avoidance in each case. He simply observed, as one of many factors, that the leases established the remodeling was to accommodate Ruehl's needs and was not "consideration to the landlord"—and nothing showed that the parties colluded to avoid payment of taxes in negotiating the lease terms.

Finally, the Department argues Judge Lewis should not have distinguished *Seminole Clubs*. The Department asserts that the factor to be considered is whether the improvements are mandatory. Neither the statute or rule says this is the only factor that may be considered. The statute simply says the tax must be imposed on charges, of whatever nature, for the use of the property. Again, Judge

Lewis properly concluded under the explicit terms of the leases and stipulated facts, that the remodeling was done to get the premises in a condition suitable for its intended purpose—it is not a charge by the landlord for the use of the property.

The Department's reliance on the footnote in *Seminole Clubs* is misplaced. Although the footnote does state that the cost of improvements in that case was taxable as rent because the improvements were made to the property and would remain city property, that footnote followed the finding that the cost of those improvements were paid in lieu of rent under the explicit terms of the lease. 745 So. 2d at 476 n.2. Through the footnote, the court was simply rejecting the tenant's position that—despite the explicit terms of the lease clarifying that the improvements were in lieu of rent—the improvements were not rent because they did not specifically benefit the landlord. *Id.* Moreover, the improvements in that case were not, as here, solely to put the property in a condition necessary for occupancy; the improvements were part of maintaining the property in a manner consistent with its intended purpose of operating as a golf course. *Id.*

For all the above stated reasons, Judge Lewis properly construed the statute in Ruehl's favor and found the remodeling costs at issue were not taxable as rent. Failing to apply the plain language of section 212.031 and accepting the Department's position could result in the sales and use taxation of myriad cash and in-kind payments never considered by the contracting parties as "rent" under the

lease agreement. The legislature's stated intent is that all rent of whatever nature must be taxed. Nothing indicates the legislature meant to extend section 212.031's reach to include remodeling costs, where those costs are specific to outfit property to accommodate a particular tenant's needs. Judge Lewis' judgment should be affirmed.

CONCLUSION

For the reasons expressed, the trial court's final judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jeffrey M. Dikman, Esq., Sr. Asst. Attorney General, Office of the Attorney General, Revenue Litigation Bureau, The Capitol-PL 01, Tallahassee, FL 32399-1050 (counsel for Appellant) and Warren H. Husband, Esq., Metz, Husband and Daughton, P.A., 215 So. Monroe St., Suite 505, Tallahassee, FL 32301 (counsel for *Amici*) this 18th day of August, 2011.

KATHERINE E. GIDDINGS

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

KATHERINE E. GIDDINGS