STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

1701 COLLINS (MIAMI) OWNER LLC,

Petitioner,

vs. Case No. 19-1879

DEPARTMENT OF REVENUE,

Respondent.
_____/

RECOMMENDED 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 case is whether Petitioner is entitled to a refund of nearly $500 thousand on an alleged overpayment of the stamp tax, where Petitioner paid the tax based on the entire undifferentiated consideration it had received, as a lump-sum payment, from the sale of an operating hotel business comprising real estate, tangible personal property, and intangible personal property.

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 and set the final hearing for June 28, 2019.

On June 7, 2019, Petitioner filed a motion for continuance, 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 DOAH Case No. 19-3639RU. In due course, the rule challenge was consolidated with the refund denial case; 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 recommended 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. After initiating the instant proceeding, Taxpayer 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. Although the Rule Challenge will be decided in a separate Final Order, the questions of whether the alleged agency PDSE exists, and, if so, whether the PDSE is an unadopted rule, are relevant here, as well, 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 this case for hearing.

17. The Department, in fact, *has* taken a PDSE, which is substantially the same as Taxpayer described it. The undersigned rephrases and refines the agency'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. Simultaneously with the issuance of this Recommended Order, the undersigned is rendering a Final Order in the Rule Challenge, which determines that the PDSE at issue is an unadopted rule. This determination precludes the undersigned, and the Department, from applying the PDSE as an authoritative rule of decision in determining Taxpayer's substantial

interests. The undersigned concludes further, for reasons set forth below, that the PDSE does not reflect a persuasive or correct interpretation of the applicable law. Rather, because the stamp tax is assessed only against the consideration given in exchange for RE, the law requires that, in determining the amount of stamp tax due on an instrument arising from an LSMS, a pro-rata share of the undifferentiated consideration must be allocated to the RE. The amount of the undifferentiated consideration that is reasonably attributable to the RE conveyed in an LSMS is a question of fact.

19. To prove its allegation that only $77.8 million of the consideration received from Purchaser for the Hotel Business, and not the entire $125 million, is attributable to the RE conveyed in the LSMS, Taxpayer relies upon the DPA and the testimony of Ms. Dowell, who authored that report. The Department did not present any expert testimony to rebut the opinions of Ms. Dowell concerning the allocation of the undifferentiated consideration. Rather, the Department argues that Ms. Dowell's opinions are unreliable as a matter of law and should be disregarded, if not excluded as inadmissible——a position that depends heavily upon the Daubert standard for screening expert testimony, which does not apply in administrative proceedings, for reasons that will be explained in the Conclusions of Law.

20. Alternatively, the Department asserts, based on Taxpayer's 2015 federal income tax return, that the amount paid for the RE component of the Hotel Business was actually $122 million. Although this argument is inconsistent with the Department's main position, because it concedes that the allocation is a disputable issue of material fact, rather than a legal conclusion driven by the Default Allocation Presumption or Consensual-Allocation Deference, as applicable, the Department is correct that the tax return *can* be viewed as evidence in conflict with Ms. Dowell's testimony; the undersigned will resolve the evidential conflict in favor of Ms. Dowell's testimony, in findings below.

21. Primarily, though, the Department eschews evidence bearing on the pro-rata allocation of the consideration on the grounds that the Default Allocation Presumption conclusively establishes the taxable amount as a matter of law. In other words, the Department considers Ms. Dowell's opinions to be irrelevant, regardless of her credibility as an expert witness—— or lack thereof. In this respect, the Department has made a strategic error because the Default Allocation Presumption, besides being extralegal, is both irrational and arbitrary. It is irrational to assume that the seller in an arm's length transaction would simply give away valuable PP for nothing of value in return. It is arbitrary automatically to assign all of

the undifferentiated consideration paid in an LSMS to one category of property transferred, i.e., RE, to the exclusion of the other property types exchanged. Systematically allocating the entire purchase price to *any other* involved property class, e.g., TPP, would be equally (un)justifiable. Put another way, there is no rational answer to the question: Why not deem the entire purchase price allocable to the personal property? Why not a 50/50 split instead? Or 60/40? The Default Allocation Presumption, in short, is not even a reasonable inference.

22. Without the Default Allocation Presumption to trump the DPA, the Department is left with the representations of value in the Form 4797 attached to Taxpayer's 2015 federal income tax return as its best, indeed only, rebuttal evidence. The form is used to report gain or loss from sales of business property, such as, in this instance, the Hotel Business. In its return, Taxpayer reported gross sales prices of $20 million for the hotel land, $102 million for the hotel building, and $3 million for the hotel's furniture, fixtures, and equipment. In other words, Taxpayer represented to the Internal Revenue Service that $122 million of the undifferentiated consideration for the Hotel Business was attributable to RE, with the balance going towards TPP. Notably, Taxpayer did not list, much less assign value to, any "section 197 intangible" property, such as goodwill, going concern value, workforce in place, business

records, operating systems, permits, licenses, trade names, etc. See 26 U.S.C § 197(d). Taxpayer's Form 4797 statements regarding the cumulative sales price of the RE are admissions that, arguably at least, conflict with Ms. Dowell's opinions as expressed in the DPA. See § 90.803(18), Fla. Stat.

23. What is to be made of these admissions? They are not binding, of course. Taxpayer is free to disavow or distinguish the statements in its Form 4797, which is essentially what it has done. Different taxes, different rules, different reasons—— in these general terms, Taxpayer strives to deflect attention from, and dismiss as irrelevant any serious consideration of, its federal income tax filing. Taxpayer's position is not without merit because, in fact, the stamp tax is fundamentally different from the federal income tax, as are the laws governing these noncomparable revenue raising measures.

24. On the other hand, Taxpayer *did* declare the gross sales prices of the land, building, and TPP to be as described above, and these statements of apparent historical fact would seem to be true regardless of the specific tax purposes that prompted their making. There is more to this evidence than Taxpayer would have it. Ultimately, however, the undersigned finds the Form 4797 evidence to be less persuasive than the DPA, for several reasons.

25. First, it is undisputed that ITPP was conveyed in the LSMS of the Hotel Business, and this ITPP included section 197 intangibles. But: Was Taxpayer required to segregate, and report separately, the gross sales price of these section 197 intangibles on its Form 4797? The undersigned does not know. Or, was Taxpayer allowed (or even obligated) to put the value of the section 197 intangibles onto, say, the building? Again, the undersigned does not know. To evaluate the persuasive force of the Form 4797 admissions, however, one needs to know these things. If Taxpayer were not required, for example, to report separately the value of the section 197 intangibles, and if, further, there were tax advantages in not doing so, then the admissions at issue would not be very probative.

26. There is no evidence in the record regarding how, from May 2012, when Taxpayer acquired the Hotel Business, Taxpayer valued the attendant section 197 intangibles, for federal income tax purposes. It is possible that, for reasons undisclosed in this proceeding, Taxpayer never segregated the cost of the section 197 intangibles but instead allowed the value of the ITPP to be taxed as part of the value of the building. In any event, topics such as the proper classification of business property under the Internal Revenue Code; the different amortization periods applicable to various types of property; the tax planning strategies an owner might cautiously,

aggressively, or even illegally employ to minimize its liability; and the common mistakes made, or advantages overlooked, by tax preparers, are complex and beyond the scope of the current record.[3/] As a result, the statements regarding asset prices in Taxpayer's 2015 federal income tax return, which sit in the record practically devoid of meaningful context, are consistent with too many alternative possibilities to be credited as persuasive admissions about the respective values of the land and building in question.[4/]

27. Second, as mentioned, Taxpayer did not state, on the Form 4797, that ITPP was sold for a *price* of $0, in which case one might expect Taxpayer also to have reported a loss on the sale of section 197 intangible property. Rather, Taxpayer did not disclose the *sale* of any ITPP in the LSMS at issue. This is important, from a weight-of-the-evidence standpoint, because it is an undisputed historical fact that valuable ITPP *was* conveyed to Purchaser in the subject transaction, which makes it unreasonable to infer a gross sales price of $0 for the ITPP. Imagine, however, the probative force the Form would have had if Taxpayer had listed a gross sales price of, say, $1 million for the ITPP, together with corresponding reductions in the prices of the RE and TPP; in such a hypothetical situation, the Form 4797 admissions would have been much more persuasive as an apportionment of the undifferentiated consideration. As it

stands, however, the reasonably inferable likelihood is that Taxpayer did not report the sales *price* of the ITPP because it did not report the *sale* of ITPP——not because there was no sale (for there was) or because the sales price was $0 (which is unlikely), but for other reasons, unknowable on the instant record.

28. Third, for purposes of levying Taxpayer's 2015 real estate property taxes, the Miami-Dade Tax Collector appraised the RE at $39 million. (This figure is the higher of two contemporaneous assessments by the local taxing authority.) This is less than one-third of $122 million——but, in contrast, constitutes 50% of Ms. Dowell's pro-rata allocation of consideration to the RE. There is no evidence in the record regarding the reliability of the local tax collector's appraisals of hotel property, or specifically the percentage of fair market value such assessments are reasonably likely to reflect. Therefore, the undersigned does not place too much weight on the 2015 ad-valorem tax assessments. Still, one cannot help but notice that Ms. Dowell's opinions on the RE's implied value are much closer to the Miami-Dade County Tax Collector's appraisal than the Form 4797 admissions.[5/]

29. Having found that the Form 4797 admissions possess some, but not much, probative value regarding the allocation of the undifferentiated consideration, the DPA emerges largely

unscathed. As fact-finder, the undersigned has the discretion, nevertheless, to reject, as not credible, the expert testimony of Ms. Dowell. But he credits her opinions, both because Ms. Dowell is a qualified authority on the subject matter, and because the opinions she has expressed are objectively reasonable and logically supported.

30. As for Ms. Dowell's credentials, she has a bachelor of science degree and a master of science degree, both in finance. She has worked in the field of property valuation for around 30 years. Working for major hotel companies, Ms. Dowell routinely performed the sort of allocation of value between asset classes that she has conducted in this case. In 2007, Ms. Dowell formed Cynsur, Inc., which performs value allocations for hospitality industry clients, predominately for taxation purposes, as here. Ms. Dowell has conducted approximately 1,000 deal pricing analyses for clients around the country. In the niche of implied value allocations between the categories of property transferred in LSMS transactions involving hotel operations, Ms. Dowell is clearly an experienced, knowledgeable, and credible expert.

31. The DPA that Ms. Dowell prepared is not an independent appraisal of the hotel property per se, but an allocation of the undifferentiated consideration, which uses estimates of value as the basis for dividing the lump-sum purchase price into three

shares, each representing an amount reasonably attributable to a type of property conveyed in the LSMS. The estimates of value that provide the grounds for determining the implied price-per-category are a kind of appraisal, but the DPA is not designed or expected to produce a total valuation that might exceed, or fall short of, the $125 million lump-sum purchase price that is being apportioned. Again, to be clear, the goal of the DPA is to divide the $125 million into asset classes, not to verify whether $125 million was the fair market value of the Hotel Business in 2015, because the stamp tax applies, not to fair market value as such, but to that portion of the undifferentiated consideration fairly attributable to the RE conveyed.

32. Ms. Dowell's approach to apportionment is to determine the "implied values" of the RE and TPP by analyzing the income an owner would expect to receive on a separate investment in the RE or TPP, as the case may be, apart from the Hotel Business as a whole. She starts with a discounted cash flow analysis of the Hotel Business as a going concern, using the Purchaser's pro forma projections as developed at the time of the LSMS. In this instance, Purchaser had presented a five-year projection of cash flow to analyze the investment, which assumed that the Hotel Business would be sold at the end of year five. Using Purchaser's assumptions, Ms. Dowell determined that the hotel

acquisition would yield an implied rate of return *on* (and *of*) investment of 11.99%.

33. With this in mind, Ms. Dowell sought to quantify the present value of the income that an owner would expect to receive on an investment in the hotel RE alone, based on a hypothetical or proxy rent for this asset in isolation. To determine the hypothetical rent, Ms. Dowell needed to make certain assumptions, which are set forth in the DPA. She determined, ultimately, that 12% of gross operating revenue represents a reasonable approximation of the proxy rent for the RE assets in question. Of course, the assumptions underlying this determination are not necessarily, or even probably, the only reasonable assumptions that could have been made. The Department, however, did not offer any expert opinion evidence that challenged Ms. Dowell's assumptions, nor did it present alternative rental scenarios.

34. Ms. Dowell discounted the projected, five-year RE income stream at 10%, reflecting the more conservative nature of a pure RE investment as compared to an investment in the Hotel Business as a going concern. The Department did not offer any expert opinion testimony disputing this discount factor. Ms. Dowell concluded that the net present value of the RE at issue was $77,803,500 ($77.8 million when rounded), which represents about 62% of the undifferentiated consideration for

the Hotel Business. The undersigned credits this opinion and finds that $77.8 million is a reasonable allocation of consideration to the RE component of the Hotel Business.

35. Ms. Dowell performed a similar analysis of a hypothetical standalone investment in the hotel TPP and calculated a net present value of $7 million, using a discount rate of 11%. This left the remainder of $40,196,500 to be allocated to ITPP. For present purposes, the breakdown between TPP and ITPP is relatively unimportant because the stamp tax is not payable on consideration given for PP of any stripe. Indeed, the ultimate factual determination that $77.8 million of the undifferentiated consideration is reasonably attributable to RE is the material finding; from that, it follows mathematically that the remaining balance of $47.2 million reflects consideration for the PP, however that figure might be allocated between TPP and ITPP. Thus, having found that $77.8 million is a reasonable allocation of consideration to the RE component of the Hotel Business, the undersigned is bound to determine that $47.2 million is a reasonable allocation of consideration to the PP.

36. Because Taxpayer paid stamp tax on $125 million instead of $77.8 million, it overpaid the tax and is due a refund. It is undisputed that the amount of the stamp tax that

Taxpayer paid on the excess consideration above $77.8 million is $495,013.05.

CONCLUSIONS OF LAW

37. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 72.011(1)(a), 120.569, 120.57(1), and 120.80(14)(b), Florida Statutes.

38. Although designated the "respondent," the Department has the initial, albeit limited, burden of proving "that an assessment has been made against the taxpayer and the factual and legal grounds upon which the . . . department made the assessment." § 120.80(14)(b)2., Fla. Stat. If the Department meets its burden by a preponderance of the evidence, then the taxpayer must establish, also by the greater weight of the evidence, that the assessment is incorrect. See IPC Sports, Inc. v. Dep't of Rev., 829 So. 2d 330, 332 (Fla. 3d DCA 2002). Here, the Department has carried its limited burden, and thus, the parties agree, the real burden in this case is upon Taxpayer, who seeks a refund, to establish that it overpaid the correct amount of stamp tax due on the special warranty deed because the reasonably determinable consideration given in the LSMS for the RE conveyed to Purchaser was $77.8 million.

39. Section 201.02, Florida Statutes, provides in relevant part:

> (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.

Here, there is no dispute that the special warranty deed is a taxable instrument under section 201.02; that the full amount of the consideration for the conveyance of the RE at issue was not shown on the face of the deed; and that the stamp tax is payable on the full amount of consideration given for the RE.

40. In addition to the foregoing stamp tax, each county:

> may levy, subject to the provisions of s. 125.0167, a discretionary surtax on documents taxable under the provisions of s. 201.02, except that there shall be no surtax on any document pursuant to which the interest granted, assigned, transferred, or conveyed involves only a single-family residence.

§ 201.031(1), Fla. Stat. "All provisions of chapter 201, except s. 201.15, apply to the surtax." § 201.031(2), Fla. Stat.

41. The stamp "tax attaches at the time the deed or other instrument of conveyance is delivered, irrespective of the time when the sale is made." Fla. Admin. Code R. 12B-4.011(1). Upon recordation, the clerk of the circuit court has a duty "to see to it that proper stamp taxes are paid prior to a recording of the document," and it is "the duty of the owner and holder of the deed . . . to see to it that proper amount of stamp taxes are attached thereto prior to recording." Fla. Admin. Code R. 12B-4.007.

42. A person who believes he has overpaid the stamp tax may seek a refund pursuant to section 215.26, Florida Statutes. Florida Administrative Code Rule 12B-4.004(1)(b) requires that an application for refund must be filed with the Department "within 3 years after the date the tax was paid." A taxpayer has the right to contest the denial of a refund under section 72.011(1)(a), which authorizes the filing of a complaint in circuit court, and, alternatively, the filing of a petition for formal administrative hearing, as the taxpayer's available, but mutually exclusive, remedies. Here, it is undisputed that Taxpayer timely requested a tax refund and timely elected the administrative remedy for contesting the Department's intended denial of refund.

43. 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.").

44. Section 120.57(1)(e)1. provides that neither the agency nor an "administrative law judge may . . . base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority." Accordingly, because the PDSE, which comprises the Default Allocation Presumption and

Consensual-Allocation Deference, has been determined to be an unadopted rule for reasons stated in the Final Order issued, contemporaneously, in the companion Rule Challenge,[6/] it shall not be applied as a governing principle of decision in this case.

45. There remain for resolution, broadly speaking, two legal questions, namely: (1) What is the correct understanding of section 201.02's meaning, to the extent relevant here; and (2) Does the Daubert standard for reviewing expert testimony apply in administrative proceedings such as this? These matters will be addressed, in turn, below.

46. The PDSE is, at bottom, a reflection of the Department's interpretation of section 201.02, and specifically the term "consideration" as used therein. The logic behind the Department's position can be expressed as a syllogism: because (i) the term "consideration" as used in section 201.02(1)(a) unambiguously means and refers to the bargained-for product of mutual assent between contracting parties, given in exchange for promised performance; and because (ii) Purchaser and Taxpayer never agreed that $77.8 million is the proper basis for stamp tax purposes; it follows, therefore, that (iii) the entire lump-sum payment of $125 million must be regarded as "taxable consideration" under section 201.02(1)(a). The flaw in the Department's reasoning is not in the premises, (i) and (ii),

both of which are true, and neither of which is disputed. The problem is that the conclusion, (iii), is a non sequitur.

47. To begin, the Department's position is internally inconsistent. Consider the Department's own words. The "crux of [our] argument," writes the Department, is "that *consideration* must be the product of an agreement." (emphasis added). As a means of "eliminat[ing] the arbitrariness that would ensue if any payor of documentary stamp taxes could unilaterally determine the value upon which to pay taxes," the Department goes on, section 201.02 requires the contracting parties' "agreement to establish *taxable consideration*." (emphasis added). Now, if, as the Department contends, section 201.02 requires that a specific amount of consideration for RE must be expressly agreed upon by the contracting parties in order to count as "taxable consideration" for purposes of calculating the stamp tax, then consistency demands that when a lump-sum payment is made for a mixture of properties including RE, TPP, and ITPP, as here, the whole undifferentiated consideration must *not* be taxed as though it were 100% attributable to RE *because the contracting parties never agreed to such an allocation*. The Department's argument is a paradox inasmuch as its crucial premise——no "taxable consideration" without agreed allocation——leads to a self-defeating conclusion. Because there can be no stamp tax without "taxable

consideration," the Department's argument proves that there can be no stamp tax without agreed allocation in the context of an LSMS.

48. The Department "solves" this self-created conundrum with the help of the Default Allocation Presumption, whereby it simply "deems" undifferentiated consideration to have been allocated 100% to RE transferred in an LSMS. Think of the Default Allocation Presumption as a magic wand that turns "undifferentiated consideration" into "taxable consideration." Ironically, when the Department waves this magic wand over an LSMS involving undifferentiated consideration, it conjures an allocation to which the contracting parties never agreed——or, put another way, it "unilaterally determine[s]" the "taxable consideration." The Department fails to explain why it is less arbitrary for the Department unilaterally to allocate all undifferentiated consideration to RE irrespective of the facts and circumstances surrounding the underlying transaction, than for the Department and the taxpayer, when an allocation dispute arises, to present evidence at trial or hearing from which a judge or other neutral fact-finder——and not the tax collector or payor unilaterally——can determine the "taxable consideration." Only one of the parties to the instant case, it turns out, is urging a unilateral determination of taxable consideration, and that party is not Taxpayer.

49. Look closely, and it will be seen, as well, that the Department uses a little rhetorical sleight of hand to sell the illusion of an exegesis of the statutory text, slyly inserting the term "taxable consideration" into its argument in place of "consideration," as though these terms unambiguously stand for the same concept. They do not. It is necessary, therefore, to define the relevant terminology.

50. It is axiomatic that, 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. For clarity, this type of consideration will be referred to as "contractual consideration."

51. No one disagrees that 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."

52. 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.

53. 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.

54. The Department steals an analytical base when it switches, without warning or explanation, from talking about contractual "consideration," to discussing "taxable consideration." The law of contracts requires that, to form a

legally enforceable agreement, the parties must agree on the contractual consideration; but whether they agree upon an amount of taxable consideration depends, not on contract law, but on whether consensual allocation is a deal point for one or both parties.[7/] Nor, contrary to the Department's unsupported assertion, does "the operative statute [section 201.02] require[] agreement" to a consensually allocated consideration. The statute, as a matter of fact, says nothing whatsoever about either undifferentiated consideration or consensually allocated consideration; the relevant administrative rules are equally silent on these matters.

55. Once the different meanings of "consideration" have been identified and labeled, it becomes clear that the Department has merely assumed, rather than persuasively established, not only (i) that the statute requires contracting parties to 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's understanding of section 201.02(1)(a) goes way beyond the plain meaning of the term "consideration" as used therein. Indeed, what the Department is doing here cannot fairly be called interpretation; it is legislating.

56. So what does the *statute* (as opposed to the Department) require? Despite their differences, both Taxpayer and the Department agree that, given the absence of specific direction, the plain statutory language makes it necessary, when dealing with undifferentiated consideration, to determine how much of the lump-sum purchase price is attributable to RE——to ascertain, in other words, the taxable consideration. The Department contends, as we've seen, that this particular factual issue must be determined as a matter of law, pursuant to the Default Allocation Presumption.[8/] There is no statute or rule, however, which clearly, or even arguably, supports the Department's position. Taxpayer contends that this factual issue is susceptible to ordinary methods of proof and hence must be resolved as a question of fact, based upon competent substantial evidence. Taxpayer's position squares with the plain language of the statute, for several reasons.

57. As a preliminary observation, it is important to note that, notwithstanding their dispute, the parties agree that the allocation of undifferentiated consideration must be determined based upon facts extrinsic to the deed. The Department would presume an allocation of 100% of the $125 million purchase price as taxable consideration, from the basic fact——which, although undisputed, is not found within the four corners of the special warranty deed——of the contracting parties' failure or inability

to allocate the purchase price themselves, by mutual agreement. Taxpayer, for its part, relies upon the DPA and Ms. Dowell's testimony to prove the allocation it desires, all of which are extrinsic to the deed as well. The undersigned concludes that section 201.02(1)(a) plainly supports this use of extrinsic evidence in situations where the full amount of the consideration is not shown on the face of the deed, as here. Were extrinsic evidence inadmissible in this case, the stamp tax would have to be assessed against the nominal consideration of $10 as stated in the special warranty deed——an outcome that no one is advocating.

58. The courts have approved this understanding of the statute. A good, and apposite, example is Andean Investment Company v. Department of Revenue, 370 So. 2d 377 (Fla. 4th DCA 1978), where the taxpayer, a general partnership, protested the Department's imposition of stamp taxes on conveyances of RE to the partnership. The RE transfers were of separately owned warehouses, the owners of which each agreed to convey his property to the partnership, which took the assets subject to existing mortgages. In return for the conveyance of his warehouse, each owner received a share in the partnership in an exact proportion to his equity in the property he transferred. Id. at 378. The taxpayer argued that there had been no taxable consideration given for the RE transfers, because no money had

changed hands and the partners remained liable, as partners, for the respective mortgage debts. The court rejected this contention on the grounds that the partnership's assumption of the mortgages constituted "a shifting of the economic burden," which "is sufficient consideration in the transfer of real property to warrant paying of the [stamp] taxes." Id.

59. The court agreed with the taxpayer, however, that the Department had "miscalculated the amount of the tax liability." Id. at 379. In computing the tax, the Department had followed its existing rule for determining the taxable consideration when "the owner of property forms a general partnership with other parties and he conveys the property to the partnership subject to a mortgage for which the partnership assumes the burden of making mortgage payments," which the court acknowledged established "a proper method for determining the amount of tax owed." Id. Nevertheless, the court held that the Department would need to "reduce the consideration figure, in this case, by the proportionate share of the individual grantor's liability as a partner in the entire partnership burden of indebtedness." Id. The court explained:

> All transactions should be taxed the same; to apply [the computation rule] strictly in each case would not recognize cases, such as this, which vary from the norm in terms of the consideration received by the grantor. If we say the transaction is taxable because an economic burden is shifted then we must

> accurately assess that burden shifting by adjusting the consideration figure. If one partner's transfer reduces his actual liability then the consideration for his transfer is proportionately increased. When another partner's actual liability is increased as a result of the transfer the consideration for that transfer is proportionately reduced.

Id.

60. As the court in Andean surely recognized, "adjusting the consideration" on a per-partner basis to account for each partner's particular share of the partnership's total indebtedness would require findings of material fact, which in turn might lead to a hearing or hearings if any of those facts happened to be disputed by one or more of the individual partners. Clearly, some cases arising under section 201.02—most likely, for the most part, those which "vary from the norm in terms of the consideration received by the grantor," such as Andean; such as this case—will need to be *adjudicated*. That is not a function of any statutory ambiguity but of the many ways a free people, operating in a robust capitalist economy, may choose to structure their consensual arrangements in both personal and business affairs, which give rise to such a variety of RE transactions that disputes over taxable consideration are inevitable.

61. Equally important, Andean teaches us, upon reflection, that undifferentiated consideration must be adjusted to ensure

that all transactions are taxed the same. Imposing the tax on the nontaxable consideration received by the grantor for PP transferred in an LSMS is no different conceptually, and no less objectionable, than imposing the tax on a partner's net *increase* in liability as the result of a transfer in which he receives a proportionate share of partnership liability that exceeds his pro-rata share of the preexisting personal liability he had under a mortgage whose burden has been shifted to the partnership. The undifferentiated consideration received by Taxpayer in this case should be reduced, in determining the taxable consideration, *to* the implied value of the RE ($77.8 million) as a proportionate share (62%) of the negotiated value of the Hotel Business ($125 million), for the same reason that, in Andean, the pro-rata value of the partnership's assumption of each partner's mortgage liability needed to be further reduced (or increased), on a per-partner basis, by the respective partners' proportionate shares of the entire partnership burden of indebtedness: namely, to burden with tax no more or less than the reasonably determinable amount of consideration received for the transfer of RE.[9/]

62. That the amount of taxable consideration is potentially a triable issue in a RE transfer involving undifferentiated consideration does not, of itself, require that the Default Allocation Presumption be rejected. Evidentiary

presumptions are a well-known feature of the landscape of litigation, after all, and thus, the ALJ could conceivably apply the Default Allocation Presumption in a proceeding to determine stamp tax liability, if he or she were to decide, in the exercise of independent judgment, that the statute is best interpreted as providing therefor. There is, however, a good reason *not* to read the Default Allocation Presumption into section 201.02(1)(a)——besides the obvious one that the statute is unambiguous and needs no such "interpretation"——namely, the principle that "presumptions arise as a matter of law, and the power to establish them is reserved solely to the courts and the legislature." B.R. v. Dep't of HRS, 558 So. 2d 1027, 1029 (Fla. 2d DCA 1989)(agency policy requiring finding of child abuse if bruises remained visible for at least 24 hours was unauthorized and unconstitutional). Thus, "[a]n agency of the executive branch of our government has no authority to formulate an evidentiary presumption." Id.; see also, Little v. Dep't of Labor & Emp. Sec., 652 So. 2d 927, 928 (Fla. 1st DCA 1995) (agency lacks implied or inherent power to adopt or apply a legal presumption absent specific statutory or constitutional authority; McDonald v. Dep't of Prof'l Reg., 582 So. 2d 660, 664 (Fla. 1st DCA 1991).

63. The Department does not have the power to enact, on its own authority, an evidentiary presumption such as the

Default Allocation Presumption. Further, in any event, because section 201.02 does not plainly and unambiguously provide for such a presumption, the undersigned will not infer, from silence, a meaning that would expand the reach of the stamp tax. As mentioned, taxing statutes are to be construed against the tax collector, to the extent reasonably possible; reading the Default Allocation Presumption into section 201.02 would turn this canon of statutory construction on its head.

64. It is concluded that the Default Allocation Presumption is neither compatible with, nor supported by, the plain meaning of section 201.02. The Department's claim that undifferentiated consideration must be deemed taxable consideration in all circumstances is therefore rejected. As a result, in sum, the undersigned has treated the amount of taxable consideration received by Taxpayer in the RE transfer at issue as a disputed issue of material fact, which he has resolved in Taxpayer's favor, in his capacity as the trier-of-fact, based upon the greater weight of the competent substantial evidence adduced at hearing.

65. As a final legal subject, the undersigned turns to section 90.702, Florida Statutes, wherein the legislature has codified the Daubert standard for evaluating the reliability of testimony by experts. See Daubert v. Merrell Dow Pharm., Inc.,

509 U.S. 5779, 113, S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The statute provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

66. The Department objected at hearing to Ms. Dowell's testimony, urging the undersigned not to accept her as an expert under the Daubert standard. The objection was overruled. The Department continues to argue that, at a minimum, Ms. Dowell's opinions, even if admissible, should be placed under the section 90.702 microscope, found wanting, and disregarded as unreliable. The undersigned addresses this issue to express his opinion that the Daubert standard does not apply in administrative proceedings.

67. The undersigned is, of course, well aware that, in SDI Quarry v. Gateway Estates Park Condominium Association, 249 So. 3d 1287, 1293 (Fla. 1st DCA 2018), the First District

Court of Appeal wrote that section 90.702 (the Daubert standard) would "apply in administrative proceedings under Chapter 120." This was a dictum, however, because, as the court held, "Appellant never raised a *Daubert* objection or requested a *Daubert* hearing below," and therefore, failed to "preserve[] for appeal" the issue of whether certain expert testimony should have been excluded under section 90.702. Id. Since there was no Daubert ruling for the court to review, it was not necessary for the court to decide whether Daubert would apply in administrative proceedings.

68. Further, to the extent the SDI Quarry dictum on Daubert can be regarded as law, it is directly and irreconcilably in conflict with the Florida Supreme Court's decision in Florida Industrial Power Users Group v. Graham, 209 So. 3d 1142 (Fla. 2017), a controlling case which the First District Court of Appeal inexplicably did not even mention. In Graham, the Court held that "the Florida Evidence Code is not applicable to administrative proceedings." Id. at 1146. Because section 90.702 is part of the Florida Evidence Code, it cannot be enforced here, per Graham, as though it were applicable to administrative proceedings. At the very least, the ALJ has the discretion to refuse to apply the Daubert standard.

69. In Graham, the Court held that "the Public Service Commission has discretion on whether to apply the Florida Evidence Code and, in particular, the rule of sequestration to its proceedings." Id. at 1145. This discretion, the Court added, necessarily included "the discretion to refuse to apply the rule of sequestration, codified in section 90.616, Florida Statutes, during its proceedings." Id. at 1146. Perhaps the Court would say the same about section 90.702, leaving it to the discretion of the ALJ to apply, or not to apply, the Daubert standard on a case-by-case basis. But given that subjecting the testimony of experts to scrutiny under the Daubert standard carries the genuine potential to affect the outcome of a case, whereas invoking (or not invoking) the Rule is unlikely in most instances to be dispositive, the undersigned is not confident the Court would be as willing to authorize the discretionary use of this powerful evidentiary tool. In the undersigned's view, the decision on whether to make Daubert applicable to proceedings before DOAH should be left to the legislature, which can amend the Administrative Procedure Act to incorporate section 90.702 if it desires.

70. At any rate, if the undersigned has discretion on whether to follow section 90.702, which he doubts but will assume for the limited purpose of making this last point, it was well within such discretion for the undersigned to refuse to

apply the Daubert standard at hearing, as he did, when the Department——despite having been on notice of Ms. Dowell's opinions since February 2018——raised its Daubert objection for the very first time. See, e.g., Rojas v. Rodriguez, 185 So. 3d 710, 711-12 (Fla. 3d DCA 2016); see also Club Car, Inc. v. Club Car (Quebec) Imp., Inc., 362 F.3d 775 (11th Cir. 2004)(judge has broad discretion to reject Daubert objection not raised before trial).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order approving Taxpayer's claim and authorizing payment of $495,013.05 to Taxpayer as a refund of overpayment of the stamp tax, plus statutory interest if and to the extent section 213.255, Florida Statutes, requires such additional compensation. (If a dispute of material fact arises in connection with the payment of interest, the Department should return the matter to DOAH for a hearing.)

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

JOHN G. VAN LANINGHAM
Administrative Law Judge
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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); and $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/] To be clear, there is no evidence that Taxpayer underreported its 2015 income, filed a fraudulent return, or took any indefensible or questionable positions vis-à-vis its federal taxes.

[4/] Although Taxpayer has the real burden of proof in this proceeding, it was up to the Department, as the proponent of the Form 4797 admissions, to provide evidence (or argument at least) from which the undersigned could evaluate the import and significance of Taxpayer's Form 4797 statements. The Department

failed in this regard, and, consequently, the undersigned finds the Form 4797 to be of limited evidential weight.

[5/] Along the same lines, it is of passing interest that the average of $122 million (Form 4797) and $39 million (local tax collector) is $80.5 million——which is practically indistinguishable from Ms. Dowell's opinion. The undersigned does not suggest that this is a scientifically or statistically reliable measure, but it does provide some reassurance that Ms. Dowell's opinion is not out of line.

[6/] See 1701 Collins (Miami) Owner, LLC v. Dep't of Rev., DOAH Case No. 19-3639RU (Fla. DOAH December 17, 2019).

[7/] In the instant case, such an allocation obviously was not a material deal point because the transaction closed without one, despite the contractual provision obligating the parties to itemize the lump-sum payment, which they apparently waived.

[8/] Under Consensual-Allocation Deference, the Department would accept the contracting parties' timely agreement to apportion the lump-sum purchase price between taxable and nontaxable consideration as conclusive proof of the taxable consideration.

[9/] See Dep't of Rev. v. Dix, 362 So. 2d 420, 422 (Fla. 1st DCA 1978)(taxable consideration must be "actual monetary consideration" or "consideration with a reasonably determinable pecuniary value"). Here, the undifferentiated consideration is *actual* monetary consideration ($125 million), but the taxable consideration is not because the transfer of RE occurred as part of an LSMS involving no actual allocation. Since the RE transferred has a reasonably determinable, *implied* pecuniary value, however, we can reasonably determine the taxable consideration by apportioning the undifferentiated consideration.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.