FLORIDA DOCUMENTARY STAMP TAX UPDATE:

Because of Winn-Dixie

MARK E. HOLCOMB, ESQ.
HOLLAND & KNIGHT LLP
315 SOUTH CALHOUN STREET
SUITE 600
TALLAHASSEE, FL 32301
(850) 425-5634 PHONE
(850) 425-5800 FAX
mholcomb@hklaw.com

EQUIPMENT LEASING ASSOCIATION OF AMERICA
TAX EXECUTIVES ROUNDTABLE
SAN FRANCISCO, CALIFORNIA

JUNE 7, 2005
These materials update the application of Florida documentary stamp tax to equipment leases. Following an overview of the legal principles governing this tax, the materials analyze the recent court decision in Florida Department of Revenue v. Winn-Dixie Stores, Inc., 884 So. 2d 1100 (Fla. 5th DCA 2004), its impact on the taxability of true leases and the Department of Revenue's policy for future administration of the tax. The materials conclude with an analysis of the taxability of conditional-sale type leases and jurisdictional issues affecting true leases.

I. BACKGROUND

The Florida documentary stamp tax is a unique – and archaic – tax. Applying this tax requires that one put aside all legal principles governing the imposition of other excise, privilege and ad valorem taxes. This is the quintessential "form over substance" tax. It is rigidly applied, which enables equipment lessors to avoid its imposition by maintaining a flexible approach to documenting a lease transaction.

A. A Short History

1. The Florida documentary stamp tax was enacted in 1931. Ch. 15787, Laws of Florida (Ex. Sess. 1931). Little has changed since, except for increases in the tax rate.


1 Prior to this time, legal authority existed for imposing the tax on certain equipment leases. E.g., Atty. Gen. Op. 060-34 (Feb. 18, 1960) (tax applied to 3-year equipment lease providing that “cancellation or termination of the
(noncancellable equipment lease was subject to tax because it fixed an unconditional obligation to pay a debt). This Attorney General Opinion led the Florida Department of Revenue ("DOR") to adopt an administrative regulation in late 1986, which provided that:

A lease of tangible personal property containing a written unconditional obligation to pay money is subject to tax.

Rule 12B-4.053(2)(b), Fla. Admin. Code. This regulation was the impetus for a large scale audit program by DOR to target equipment leasing companies across the country for documentary stamp tax compliance.

3. Roughly 10 years of vigorous enforcement of the tax against equipment lessors ensued, culminating in the court decision of Computer Sales International, Inc. v. Department of Revenue, 656 So. 2d 1382 (Fla. 1st DCA 1995). In that case, the court upheld an assessment of tax on true leases that imposed a "hell-or-high water" payment obligation on the lessee. To reach that result, the court adopted an expansive approach to applying the tax, disregarding 60 years of legal precedent in the process.


5. Since the enactment of HB 1337, DOR has issued numerous private rulings concluding that particular equipment leases were not subject to documentary stamp tax, because the documents did not contain an unconditional

lease shall not release lessee from any obligations hereunder.") However, there was no concerted effort by the Department of Revenue to ensure widespread compliance.
obligation to pay a fixed sum. E.g., TAA 98(B)4-006 (March 26, 1998); TAA 98(B)4-009 (July 20, 1998); TAA 99(B)4-002 (Feb. 11, 1999); TAA 99(B)4-004 (Feb. 19, 1999); TAA 00B4-012 (Oct. 11, 2000); TAA 02(B)4-002 (Feb. 7, 2002); TAA 02M-008 (Aug. 9, 2002); TAA 04(B)4-006 (May 13, 2004); TAA 04(B)4-009 (July 21, 2004). While these rulings are not binding legal precedent, they do evidence DOR's consistent pattern of applying the law.

**B. Governing Statutes and Regulations**

1. The documentary stamp tax statutes do not specifically mention equipment leases; rather, depending upon their terms, equipment leases (whether true leases or conditional-sale type leases) may be taxed as "written obligations to pay money:"²

   Section 201.08(1)(a), Fla. Stat., imposes the tax:

   On promissory notes, nonnegotiable notes, written obligations to pay money . . . made, executed, delivered, sold, transferred, or assigned in the state, and for each renewal of the same, the tax shall be 35 cents on each $100 or fraction thereof of the indebtedness or obligation evidenced thereby.

   (Emphasis supplied.)

2. In order to be taxed as a "written obligation to pay money," a document must: (1) contain an unconditional obligation to pay; (2) require the payment of a sum certain in money; and (3) be signed by the lessee. Rule 12B-4.053(1) and (2)(b), Fla. Admin. Code; Rule 12B-4.054(4), Fla Admin. Code. See,

² In addition, conditional-sale type leases may be taxed as mortgages under certain limited circumstances. This portion of the materials will focus on true leases, followed by a discussion of conditional-sale type leases in Section III of these materials.
e.g., Metropolis Publishing Co. v. Lee, 170 So. 2d 442, 444 (Fla. 1936); Department of Revenue v. Peterson Outdoor Advertising, 296 So. 2d 120, 121 (Fla. 1st DCA 1974).

3. Whether a lease contains an unconditional promise to pay, and a sum certain, must be determined solely from the face of the lease and cannot be affected by proof of extrinsic facts (i.e., facts that may be known or proved outside of the information contained in the lease). Rule 12B-4.002 (1)(b), Fla. Admin. Code. Metropolis Publishing Co., 170 So. 2d at 444; see also, United States v. Isham, 84 U.S. 496, 504-05 (1873). This is the so-called "four corners" doctrine that is essential to the form-over-substance nature of the documentary stamp tax.

4. Section 201.08(6), Fla. Stat., further defines the "four corners" doctrine and limits the scope of documents that can be reviewed in determining whether a document contains the elements of a "written obligation to pay money." Only if a separate document is expressly incorporated into the document under review may the terms of that separate document be considered in determining the existence of the elements necessary to impose the tax:

Taxability of a document pursuant to this section shall be determined solely from the face of the document and any separate document expressly incorporated into the document. Taxability of a document pursuant to this section shall not be determined by reference to any separate document referenced or forming part of the same contract or obligation unless the separate document is expressly incorporated into the document. When multiple documents evidence, secure or form part of
the same primary debt, tax pursuant to this section shall not be imposed more than once, on the total indebtedness evidenced, notwithstanding the existence of multiple documents.

(Emphasis supplied.) This was part of the law restored by HB 1337 in 1997.

5. One document does not expressly incorporate another by implication, or by mere reference to and description of the other document. The application of this "express incorporation" concept is illustrated in DOR's regulation:

(6) Written Obligation or Promise to Pay Money

* * * *

(b) Taxability of a written obligation to pay money is determined from the form and face of the document.

1. Whether a document is taxable is determined by reference to that document and any other document or documents expressly incorporated therein.

2. A document does not expressly incorporate another document by implication or by mere reference and description of the other document.

3. Express incorporation occurs when words in a document under examination provide that another document or documents are expressly incorporated into the document under examination.

4. Following are examples of terminology whereby a document is expressly incorporated.

a. [document] is incorporated herein
b. [document] the terms of which are incorporated herein

c. [document] is made a part hereof

d. [document] is made a part of [this document]

e. the agreement consists of [this document] and [separate document] the same as if it were fully set forth herein

f. [document] shall become a part of [document]

g. [document] and [document] constitute a single document

5. Following are examples of terms in a document under examination that do not expressly incorporate another document, unless the document under examination otherwise contains language that meets the criteria of subparagraphs (b)3. or (b)4. above.

   a. in the attachment hereto
   b. is subject to
   c. is subject to the terms of
   d. pursuant to
   e. pursuant to the terms of
   f. as set forth in
   g. reference is made to
   h. governed by

6. An integration clause or a default remedy clause, does not, by itself, expressly incorporate another document, unless the clause contains language that meets the criteria of 12B-4.052(6)(b)3. or 4. above.

C. Some Other Guiding Principles

Several other unique documentary stamp tax principles have developed through case law and contribute to the form-over-substance nature of this tax.

1. Nothing but the document
   a. The taxability of a document is determined solely by its terms, regardless of whether an alternate means of structuring the same transaction would have yielded a different result. *E.g.*, McCoy Motel, Inc. v. Department of Revenue, 302 So. 2d 440 (Fla. 1st DCA 1974). Thus, structuring a transaction in a nontaxable manner will not incur the tax merely because another form of the same transaction would have triggered the tax.

   The documentary stamp tax is a ‘form over substance’ tax, the imposition of which depends on the terms of the documents at issue and not on the underlying transaction.
It does not matter whether the same type of transaction is widely structured in a taxable manner.

2. **Moment of Execution**

   a. All of the elements necessary to impose the tax (unconditional obligation to pay a sum certain signed by the obligor) must be present at the time of execution of the documents. *Lee v. Kenan*, 78 F. 2d 425 (5th Cir. 1935); Rule 12B-4.054(4), Fla. Admin. Code. If those elements are not present until some subsequent point in time, the document is not taxable.

   b. The tax does not apply where the obligation to pay "is dependent upon the happening of a contingency before any obligation to pay is created." *Maas Brothers, Inc. v. Dickinson*, 195 So. 2d 193, 196 (Fla. 1967) (emphasis supplied). A common contingency to payment in any bilateral agreement is performance by the other party. E.g., *Department of Revenue v. Peterson Outdoor Advertising Co.*, 296 So. 2d 120, 121 (Fla. 1st DCA 1974) (payment contingent upon payee's performance of advertising services); *Wometco Enterprises, Inc. v. Frank*, 382 So. 2d 832, 833 (Fla. 4th DCA 1980) (payment
contingent upon payee furnishing equipment and services).

c. However, an obligation to pay that is unconditional at the moment of execution is taxable regardless of the terms and certainty of subsequent payment (e.g., demand notes, forgiveness of debt, etc.) Rule 12B-4.052(6)(a), Fla. Admin. Code. A written obligation to pay money is taxable at the moment of execution even though payment is made immediately after execution and regardless of the period of time the obligation may be outstanding. Rule 12B-4.053(22), Fla. Admin. Code.

3. **A selective tax**

   a. The documentary stamp tax is a “selective tax.” Metropolis Publishing Co. v. Lee, 170 So. 442 (Fla. 1936). It is not intended to be all-embracing and cover every kind and grade of commercial instrument; rather, the only instruments intended to be taxed are those specified in the statute (e.g., promissory notes, nonnegotiable notes and written obligations to pay money).

   b. Each document must be analyzed on its own terms. One cannot categorically say that all equipment leases are or
are not taxable, because the tax is imposed based on the form of each document and not its underlying substance. Thus, courts have found that a variety of executory contracts did not contain the requisite unconditional promise to pay a specified sum of money. E.g., Metropolis, supra (newspaper advertising agreement); Haverty Furniture Co. v. United States, 286 F. 985 (N.D. Ga. 1922) (agreement to purchase furniture); Bankers' Trust Co. v. Eastcoast Railway Co., 8 F. Supp. 874 (S.D. Fla. 1934), aff'd, Lee v. Kenan, 78 F. 2d 425 (5th Cir. 1935)(contract to purchase electric power); DeVore v. Lee, 30 So. 2d 924 (Fla. 1947) (short-term lease of real property); Department of Revenue v. Peterson Outdoor Advertising, 296 So. 2d 120 (Fla. 1st DCA 1974) (contract for outdoor advertising services); Wometco Enterprises, Inc. v. Frank, 382 So. 2d 832 (4th DCA 1980) (same); Maas Brothers, Inc. v. Dickinson, 195 So. 2d 193 (Fla. 1967) (retail credit card sales agreement); Gay v. S & B Construction Corp., 44 So. 2d 286 (Fla. 1950)(building construction contract); State ex rel. Weinberg v. Green, 132 So. 2d 761 (Fla. 1961) (contract for deed). Typically,
the extrinsic event that precluded imposition of the tax in these cases was performance by the obligee.

c. In contrast, some agreements have been found to be subject to the documentary stamp tax based on their particular terms. E.g., Nelson v. Watson, 155 So. 101 (Fla. 1933) (rocking chair “lease” was a retained title contract and taxable as a mortgage); Gulf American Land Corp. v. Green, 157 So. 2d 70 (Fla. 1963)(contract for deed containing 6-month right of recision was taxable after the right of recision had expired).

d. The tax may be imposed only within the clear, definite boundaries of the law. Maas Brothers, Inc. v. Dickinson, 195 So. 2d 193, 196 (Fla. 1967). If there is any doubt as to the taxability of a document, it must be excluded from taxation. Id.; Bankers' Trust Co. v. Florida East Coast Ry. Co., 8 F. Supp. 874 (S.D. Fla. 1934), aff'd., Lee v. Kenan, 78 F.2d 425 (5th Cir. 1935).

II. THE WINN-DIXIE CASE

Against the backdrop of these legal principles, DOR pursued a documentary stamp tax assessment against Winn-Dixie Stores, Inc. ("Winn-Dixie"), as lessee, and Computer Leasing Company of Michigan, Inc. ("CLC"), as lessor, on certain computer equipment lease agreements. The case was litigated through the trial
and intermediate appellate courts, both of which issued decisions favorable to the taxpayers (albeit for different reasons). Although a solid victory for equipment lessors that potentially expands the grounds for avoiding the tax, the Winn-Dixie decision is troubling in that it casts doubt on the enforceability of "hell-or-high water" payment clauses in Florida.

A. Facts

Winn-Dixie entered into a Master Lease Agreement with CLC for the periodic lease of computer equipment. The structure of the lease was fairly typical: the Master Lease Agreement contained standard terms and conditions applicable to all leases between the parties; the parties subsequently executed an Equipment Schedule to document each particular lease, which described the specific equipment, the lease term, and the periodic rental rate. Winn-Dixie was also required to execute and return to CLC a Certificate of Acceptance, verifying the Acceptance Date on which Winn-Dixie "unconditionally" accepted the equipment. Winn-Dixie's obligation to pay rent began on the Acceptance Date.

In paragraph 1 of the Master Lease, the parties agreed to lease from each other "the equipment and features, together with all replacements, parts, repairs, additions, attachments, and accessories incorporated therein." The Master Lease contained a typical disclaimer of warranties and waiver of liability for damages caused by CLC. The Master Lease also contained a "hell-or-high water" clause under which Winn-Dixie's obligation to pay rent was "absolute and unconditional
and [ ] not subject to any abatement, reduction, setoff, defense, counterclaim or recoupment" once Winn-Dixie accepted the equipment.

Winn-Dixie bore the risk of loss of the equipment and the obligation to maintain and repair the equipment. Winn-Dixie was required to return the equipment at the end of the lease term and did not have any option to purchase the equipment; title to the equipment remained with CLC during the term.

In addition to furnishing the equipment, CLC was required by the Master Lease to not "interfere with lessee's right of quiet enjoyment and use of the equipment."

B. Trial Court Opinion

The case was heard by the trial court on the legal issue of whether Winn-Dixie's leases were taxable as "written obligations to pay money."

The trial court ruled in favor of Winn-Dixie on two grounds. First, the trial court held that a "true lease" is not a type of document that is subject to documentary stamp tax. Second, the trial court held that, even if true leases were a category of potentially taxable documents, Winn-Dixie's leases were not subject to tax because the obligation to pay was contingent upon CLC's good faith fulfillment of its duty to replace parts and make repairs to the equipment during the term.

---

3 As a side note, Winn-Dixie had filed (through CLC) a sales tax refund claim in the alternative, contending that the leases were either subject to sales tax (as true leases) or documentary stamp tax (as written obligations to pay), but could not be subject to both taxes. Winn-Dixie's sales tax refund claim was not resolved by the trial court, because the trial court held that the leases were not subject to documentary stamp tax.
1. **Taxability of True Leases.**

The trial court reviewed the language of Section 201.08(1)(a), which imposes tax on "promissory notes, nonnegotiable notes, and written obligations to pay money," and observed that "true leases" were not listed:

"The Florida Legislature has legislated on this area of law for seventy-two years and they have not included a 'True Lease' as one of the transactions subject to the documentary stamp tax."

(Order, p. 4.) Adopting a literal interpretation of the statute, the court was persuaded that "Section 201.08 specifically did not call for the tax to apply to [a] True Lease." (Id.)

This blanket categorization of true leases is unprecedented, but is potentially subject to attack by DOR on two grounds. First, the documentary stamp tax is imposed on the obligation to pay and not on the underlying transaction (as the Winn-Dixie court itself noted elsewhere in the opinion). *E.g.*, Metropolis Publishing Co. v. Lee, 170 So. 442 (Fla. 1936); Choctawatchhee Electric Cooperative, Inc. v. Green, 132 So. 2d 556, 558 (Fla. 1961). DOR may therefore contend that it doesn't matter whether "true leases" – or any other type of "transaction" is specifically listed in the statute. Second, the Florida Supreme Court has repeatedly ruled that the phrase "written obligations to pay money" in Section 201.08(1)(a) is a catch-all category that applies to any obligation that has the characteristics of a promissory note: an unconditional obligation to pay a sum certain signed by the obligor. *See, e.g.*, Metropolis Publishing Co., supra. Thus, DOR's position is that the Legislature need not list every conceivable type of document in the statute, because the phrase
"written obligations to pay money" is interpreted by the courts to be sufficiently broad to tax obligations to pay regardless of the type of transaction involved.

2. **Conditional Nature of Payment Obligation.**

There is no doubt that Winn-Dixie's obligation to pay was conditional and not taxable (as described in the appellate court's opinion discussed below), but this portion of the trial court's reasoning potentially undermines the enforceability of the lessee's payment obligation.

After correctly noting that a lease containing a conditional obligation to pay is not subject to documentary stamp tax, the trial court called into question whether a hell-or-high water payment clause is enforceable in Florida:

> Although the payment provision contained in the lease stated that the lessee has [an] unconditional obligation to pay money, such a characterization is not totally accurate when the lease document is viewed as part of an [sic] business arrangement. The parties in this case are dealing at arms length for the lease of computer equipment over a period of time. . . . Florida law recognizes [an] implied covenant of good faith and fair dealing to protect the parties' reasonable expectation [sic]. Regardless of the 'unconditional' language in the lease, there is no doubt that a court would find a remedy at law for the shown aggrieved party should a conflict arise.

(Order, p. 5) (Emphasis supplied.) Granted, this statement is considered *obiter dictum* in the law (not necessary to the legal basis for the court's decision) and therefore is not binding legal precedent,⁴ but it is troubling nonetheless that the

---

⁴ There is also some question whether the court's statement accurately reflects Florida law. The implied covenant of good faith and fair dealing cannot override the express terms of a contract, nor can an action be maintained for its breach absent proof that an express term of the contract has been breached. *Insurance Concepts and Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1234-35 (Fla. 4th DCA 2001). Here, the trial court applies the implied covenant in a manner than would override an express term – the hell-or-high water clause – of the lease.
court would not enforce the clear terms of this unconditional payment obligation. The plain language of a hell-or-high water clause is the parties' "reasonable expectation" and should be enforced by the courts as part of the bargain struck by the parties. That clause cannot be viewed in a vacuum apart from the context of the overall lease terms and the parties' relationship, in determining whether it is enforceable.

The trial court further determined that the lease contained a specific condition to Winn-Dixie's payment obligation, namely, CLC's duty to "continue to replace, add and make repairs" to the equipment. (Order, p. 6). The court derived this duty from a provision of the Master Lease Agreement that:

Lessor, by its acceptance hereof at its home office, agrees to lease to Lessee, and Lessee agrees to lease from Lessor, in accordance with the terms and conditions herein, the equipment and features, together with all replacements, parts, repairs, additions, attachments and accessories incorporated therein (collectively called the "Equipment" and individually called a "Leased Item") described in each executed Equipment Schedule.

(Master Lease Agreements, ¶ 1.) Although perhaps inartfully drafted, it appears that this clause was intended to provide an omnibus definition of the "Equipment," rather than impose an affirmative obligation on CLC to replace parts or repair the Equipment. In fact, the Master Lease Agreement elsewhere expressly imposed on Winn-Dixie the risk of loss on the Equipment, the obligation to maintain and repair the Equipment, and required Winn-Dixie to return the Equipment in good working condition at the end of the lease term. (See appellate court opinion at p. 3.) Thus, there is some question whether CLC actually had a continuing duty to perform
repairs and make replacements that would render Winn-Dixie's payment obligation conditional and nontaxable.

C. Appellate Court Opinion

On appeal, the Fifth District Court of Appeal affirmed the trial court's ruling in favor of Winn-Dixie. The appellate court did not adopt the trial court's reasoning, however. In the law, an appellate court may affirm a lower court decision as the "right result for the wrong reason." That principle would seem to apply to Winn-Dixie.

1. True Leases are Not Categorically Beyond the Scope of the Tax.

The appellate court did not specifically address the trial court's determination that true leases are not a category of documents subject to tax under Section 201.08(1)(a), Florida Statutes. It speaks volumes, however, that the appellate court proceeded to analyze whether Winn-Dixie's leases were taxable as "written obligations to pay money," determined by whether its payment obligation was unconditional. (Slip Opinion, p. 3.)

This analysis amounts to a rejection of the trial court's categorical exclusion of true leases from the documentary stamp tax. Had the appellate court agreed with the trial court's reasoning on that threshold point, there would have been no need to address the merits of whether Winn-Dixie's payment obligation was unconditional. The appellate court looked to the terms of the documents themselves, rather than to the type of document or the nature of the underlying
transaction, in determining whether the leases were subject to tax. E.g., *Maas Brothers, Inc.*, 195 So. 2d at 196.

2. **The Payment Obligation was Subject to Two Conditions Precedent.**

The appellate court also ruled that Winn-Dixie's payment obligation was conditional, but for entirely different reasons than the lease provision relied on by the trial court. The appellate court examined the terms of the lease and found that "two significant conditions precedent to payment are manifest." (Slip Opinion, p. 4.)

First, the appellate court determined that "the Lessor has the obligation to furnish the equipment at the outset" of the lease. This was clearly a fundamental condition precedent to Winn-Dixie's obligation to pay, and properly served to exclude the lease from tax. Because, according to the lease terms, Winn-Dixie's obligation to pay became "absolute and unconditional" upon its acceptance of the equipment (confirmed by Winn-Dixie's execution of a separate Certificate of Acceptance that was not expressly incorporated into the Master Lease Agreement or Equipment Schedule), any failure by CLC to furnish the equipment would necessarily mean that Winn-Dixie's obligation to pay rent never commenced. E.g., *Peterson Outdoor Advertising*, 296 So. 2d at 121; *Wometco Enterprises*, 382 So. 2d at 833. Since one could not determine by examining the face of the Master Lease Agreement and Equipment Schedule whether CLC ever furnished the equipment (that was evidenced only by the separate Certificate of Acceptance), Winn-Dixie did not have an unconditional obligation to pay at the moment of executing the lease and documentary stamp tax did not apply.
Second, the appellate court found an equal and independent ground for determining that Winn-Dixie did not have an unconditional payment obligation: CLC's covenant of quiet enjoyment. The court said:

Second, and no less significant, even after acceptance of the equipment, the Lessor must permit the continued, quiet enjoyment of Lessor's equipment throughout the lease term. (Slip Opinion, p. 4.) The court's reasoning on this point echoes the trial court's question whether the hell-or-high water payment clause was enforceable according to its terms. A covenant of quiet enjoyment is a condition subsequent to the commencement of the lessee's obligation to pay rent – that is, a condition that must occur or be satisfied after the lessee begins paying rent. Ordinarily, the terms and certainty of payment are not material if an obligation to pay is unconditional at the moment of execution, so what happens after that moment is irrelevant. Rule 12B-4.052(6)(a), Fla. Admin. Code. Recall that the tax does not apply where the payment obligation "is dependent upon the happening of a contingency before any obligation is created." Maas Brothers, 195 So. 2d at 196 (emphasis supplied). The same principal was not previously applied to a contingency occurring after the obligation to pay became fixed.

Yet, the appellate court held that nonperformance by CLC of this covenant of quiet enjoyment would relieve Winn-Dixie of its obligation to pay rent. (Slip Opinion, p. 4.) The court concluded that the lease "is unlike a note wherein the consideration for payment has been fully provided and payment is truly unconditional." (Id.) (Emphasis supplied.) The court cited as authority De Vore v.
Lee, 30 So. 2d 924 (Fla. 1947), in which the Florida Supreme Court held that a lease of real property was not taxable because the rent was payable in arrears each month and, consequently, was due only after the lessee had enjoyed beneficial use of the property for that month.

The court disregarded the fundamental difference in the nature of the payment obligations in Winn-Dixie and De Vore v. Lee: in the former, the lessee's obligation to pay is fixed and absolute at the moment of accepting the equipment, regardless of any subsequent performance (or nonperformance) by the lessor; in the latter, the lessee's obligation to pay rent at the end of each month is contingent on the lessor having satisfactorily performed by providing habitable premises during that month. By citing De Vore v. Lee, the appellate court implicitly questions whether the "absolute and unconditional" payment obligation in Winn-Dixie's lease was enforceable according to its terms. Otherwise, the court could not have characterized CLC's covenant of quiet enjoyment a "significant condition[ ] precedent to payment." (Slip opinion, p. 4) (emphasis supplied.)

D. Implications of Winn-Dixie

Several implications of the Winn-Dixie decision are apparent for both lessors and the Department of Revenue in applying the documentary stamp tax to equipment leases.

1. Are True Leases Categorically Excluded From the Tax?

No. Although the trial court was persuaded to make that determination, its reasoning was not adopted by the appellate court and is therefore not a legal basis for
the ultimate decision in Winn-Dixie's favor. Moreover, the trial court's ruling is subject to challenge based on established principles of documentary stamp tax law that the terms of a document determine its taxability, not the nature or substance of the transaction.

Interestingly, the Department of Revenue has informally stated that it reads Winn-Dixie as a signal to discontinue enforcing the documentary stamp tax against true leases.\(^5\) The Department rejects the trial court's reasoning, but apparently believes that a covenant of quiet enjoyment such as that relied on by the appellate court would be implied into all true leases of equipment. Even though Winn-Dixie involved an express covenant of quiet enjoyment, the Department has stated that it reads the practical effect of the appellate court's decision to exclude true leases from tax.

2. **Does Winn-Dixie apply to Conditional-Sale Type Leases?**

Not directly. The appellate court specifically noted that the lease in question "is not a disguised financing/sale arrangement wherein the lessee has the option to purchase the equipment at the conclusion of the lease for nominal consideration." (Slip Opinion, p. 3 n.1.) Thus, the taxability of conditional-sale type leases was not at issue in Winn-Dixie and is not directly affected by the opinion.

However, conditional-sale leases should be subject to the same legal analysis regarding whether they are taxable as "written obligations to pay money." In fact, the Department of Revenue in a number of private rulings cited in the materials

---

\(^5\) Equipment lessors should never rely on such statements from any Department of Revenue employees. Lessors are urged to obtain their own private rulings if they have any questions as to the taxability of their leases.
above has applied the same analysis to both true leases and financing leases. E.g., TAA 04(B)4-009 (July 21, 2004).

The Department of Revenue has informally stated its position that conditional-sale type leases are categorically subject to tax, however. In the Department's view, conditional-sale type leases are akin to promissory notes where -- in the words of the Winn-Dixie court -- "the consideration for payment has been fully provided and payment is truly unconditional." However, there is no principled reason why a conditional-sale type lease cannot contain a payment obligation subject to the same contingencies as a true lease (e.g., the lessee's acceptance of the equipment). Whether the Department pursues that theory against other equipment lessors remains to be seen, but its stated position on this point appears to be legally unsound.

3. What Types of Contingencies May be Used to Avoid Imposition of Documentary Stamp Tax?

Any contingency that operates as a true condition precedent to the lessee's payment obligation, satisfaction of which is not shown in the lease or in any document expressly incorporated into the lease (i.e., satisfaction of the condition precedent is an extrinsic event) is sufficient to avoid the documentary stamp tax. The most common contingency is delivery and/or acceptance of the equipment, when that fact is not confirmed on the face of the lease (i.e., it is typically confirmed by a separate delivery and acceptance certificate). That is the type of contingency found in Winn-Dixie to be sufficient to avoid the tax.

The other "condition precedent" relied on by the Winn-Dixie court -- a covenant of quiet enjoyment -- is problematic because it is arguably a condition
subsequent to the commencement of the lessee's payment obligation. If the lessee's payment obligation is fixed and absolute – i.e., the hell-or-high water clause is enforceable – then a condition subsequent would be irrelevant for documentary stamp tax purposes. The contingency found by the Winn-Dixie trial court, the lessor's duty to repair and maintain equipment, would fall into the same category. Equipment lessors should be cautious about relying on any condition subsequent as a means to avoid the tax; the better approach would be to adopt a true condition precedent and contend that the hell-or-high water clause is enforceable by its terms.

4. Is Winn-Dixie Now the Law in Florida?

Yes. Winn-Dixie was decided by an intermediate (district) appellate court. Under Florida law, a decision by one district court of appeal is binding on all trial courts throughout the state, in the absence of a contrary decision on the same point of law from another district court of appeal. A decision by one district court of appeal is also persuasive authority on the same point of law in any case heard by a different district court of appeal. At this time, there is no appellate court decision in Florida contrary to Winn-Dixie. Therefore, Winn-Dixie applies as binding legal precedent in all trial courts throughout Florida and is persuasive authority in all appellate courts of the state.

III. APPLICATION OF TAX TO CONDITIONAL-SALE TYPE LEASES

Conditional-sale type leases may be subject to documentary stamp tax either as "written obligations to pay money," under the standards discussed above or, in certain limited circumstances, as mortgages.
A. Filed or Recorded in Florida

Any time a conditional-sale type equipment lease (or true lease, for that matter) is filed or recorded in the public records of Florida (e.g., county property records or Secretary of State), documentary stamp tax will be due. Section 201.08(1)(b), Florida Statutes. Merely filing a UCC-1 Financing Statement, without attaching the lease agreement, does not trigger the tax. Rule 12B-4.054(29), Fla. Admin. Code.

B. Unrecorded Mortgage

Documentary stamp tax also applies to a limited category of unrecorded mortgages: those that incorporate the certificate of indebtedness. Given the Department of Revenue's informal statement that it views all conditional-sale type leases as being inherently taxable, it is likely that these leases will receive greater scrutiny from the Department in the future.

The documentary stamp tax applies both to recorded mortgages and to unrecorded mortgages that incorporate the certificate of indebtedness. Section 201.08(1)(b), Fla. Stat. A Department of Revenue regulation provides that:

Mortgages that incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are taxable.

Rule 12B-4.051(2), Fla. Admin. Code. The Department's regulation on the taxability of chattel mortgages illustrates that these are two separate categories of taxable mortgages, by juxtaposing unrecorded mortgages containing a promissory obligation within the body of the mortgage, and mortgages that are recorded:
A chattel mortgage or conditional bill of sale, which contains in the body of the contract or mortgage the promise to pay not evidenced by a separate note or writing shall bear the required documentary stamp tax. If there is a separate promissory note evidencing the indebtedness, and a recorded chattel mortgage which is security for such note, the tax is to be paid on the recorded document at the time of recordation and a notation of the stamps and the amount thereof made on the promissory note.


In *Nelson v. Watson*, 155 So. 101 (Fla. 1933), the Florida Supreme Court held that a document purporting to be a lease of tangible personal property was, in substance, a conditional sale agreement and subject to tax as a mortgage. The Court held that the lease was taxable under what is now the second sentence of Section 201.08(1)(b):

```plaintext
By the terms of this written instrument the amount of the indebtedness which must be paid before the property becomes vested in the vendee is incorporated in the instrument and is not otherwise shown in a separate instrument. Therefore, we hold it to be a mortgage which incorporates the certificate of indebtedness not otherwise shown in a separate instrument and it is subject to the provisions of [current Section 201.08(1)(b)].
```

*Id.* at 103. This court decision is expressed in two Department regulations prescribing the taxability of leases that operate as chattel mortgages. The first rule provides that:

```plaintext
An instrument which purports to be a lease, whereby title to tangible personal property remains vested in the seller, until the total of the payment of rentals equals the value of the property leased at which time the 'lessee' becomes the unconditional owner of the property, is a 'mortgage' and is subject to tax, even though payment of
the rentals is not an unconditional obligation to pay money.

Rule 12B-4.053(2)(a), Fla. Admin. Code. The second rule echoes this principle:

A lease of tangible personal property which does not contain an unconditional obligation to pay money is not subject to tax, unless the lease provides that the lessee will become the unconditional owner of the property when the total of rental payments equals the value of the property being leased.

Rule 12B-4.054(8), Fla. Admin. Code. Note that, unlike the "written obligation to pay money" discussed above, these rules apply regardless of whether the document contains a contingent obligation to pay.

The Department has issued a number of private rulings since 1997 that fail to distinguish between a "true or operating lease" and a "finance or capital lease" for documentary stamp tax purposes. E.g., TAA 00B4-012 (Oct. 11, 2000) (concluding that use of the same lease form for both types of leases did not result in imposition of the tax because the lessee's obligation to pay was contingent upon an extrinsic condition precedent). Likewise, the Department has ruled that wholesale financing agreements are not taxable unless they contain an unconditional obligation to pay a fixed sum or are filed or recorded in the state. E.g., TAA 00B4-004 (Mar. 30, 2000); TAA 97(B)4-009 (Jul. 10, 1997). These private rulings reflect that the documents reviewed did not constitute mortgages that incorporate the certificate of indebtedness. Although these private rulings are not legal precedent and cannot be relied upon by any other taxpayer, see, Section 213.22(1), Fla. Stat., they do indicate that the "four corners" doctrine may be used to avoid imposition of tax on conditional-sale type leases.
Even if a conditional sale-type lease may theoretically be taxed as a chattel mortgage, tax would apply only if the “mortgage” incorporated the “certificate of indebtedness”. Although there is no direct authority as to what the phrase "certificate of indebtedness" means in this context, it appears from these private rulings that the term applies to the payment terms and obligation to pay. As such, the tax may be avoided by putting the payment terms (amount, term, obligation, etc.) in a separate document that is not expressly incorporated into the document creating the lien or otherwise securing the obligation to pay. For example, a Master Lease Agreement may contain the lien or security interest and other standard terms, while a separate Lease Schedule contains the obligation to pay and the amount of and terms for payment (subject to acceptance of the equipment confirmed in a separate Certificate of Acceptance). By doing so, the “mortgage” will not expressly incorporate the “certificate of indebtedness,” and no tax will be due.

IV. TAXABLE SITUS FOR TRUE LEASES

Even if a true lease contained an unconditional obligation to pay a fixed sum and thereby constituted a "written obligation to pay money," the document must be made, executed, delivered, sold, transferred, assigned or renewed in Florida before the tax can be imposed. Section 201.08(1)(a), Fla. Stat. At least one of these jurisdictional events must occur in Florida before a "written obligation to pay money" can be subject to tax. Ultimate Corp. v. C.G. Data Corp., 575 So. 2d 1338, 1339 (Fla. 3d DCA 1991); Atty. Gen. Op. 080-79 (1980).
If both parties sign the lease documents in Florida, then all of these events occur in the state. If both the lessor and lessee sign the lease documents outside of Florida, the documents will be "made," “executed” and “delivered” outside the state. To document that these events occurred outside of Florida, it is sufficient to have both parties sign an affidavit before an out-of-state notary attesting to these facts. Rule 12B-4.053(34)(a), Fla. Admin. Code.

A more complex case is where one party signs the documents in Florida and the other signs them outside the state. Florida law is clear that a bilateral contract is "made" and "executed" for documentary stamp tax purposes at the place where the last party signs the contract. In Computer Sales International, Inc. v. Department of Revenue, 656 So. 2d 1380 (Fla. 1st DCA 1995), the Master Lease and Equipment Schedule were signed by the lessee in Florida and sent to the lessor for execution in Missouri. Id. at 1383. After both parties executed these documents, the equipment was delivered to the lessee and the lessee thereupon executed a Certificate of Acceptance confirming receipt of the equipment and commencing the lease. Id. The court held that the Certificate of Acceptance formed a part of the lease and the Certificate was signed last by the lessee in Florida, giving the lease a taxable situs here:

[O]nce the leasing contracts were completed by the execution of the ‘Certificate of Acceptance,’ which occurred in Florida, the leases contained an unconditional obligation to pay and there had a taxable situs.
Id. at 1383 (emphasis supplied). By deciding that the Certificate of Acceptance formed a part of the lease, the court rejected the taxpayer’s argument that the leases had no taxable situs in Florida because the last act necessary to complete the Master Lease and Equipment Schedule — execution by the lessor — occurred outside the state.

The CSI court also confirmed that the signing of an ‘incomplete’ contract in Florida did not establish a taxable situs in this state:

[T]he lease could not commence until the date each unit of equipment was actually installed, and the only information in the record designating this date is the certificate, which the lessee executed in Florida at some time after the execution of the prior two documents. Thus, the Certificate of Acceptance was essential to the formation of the contract, which could not be enforced without proof of the equipment’s delivery.

Id. at 1383 (emphasis supplied). The court emphasized that a contract must be completed upon execution in Florida in order for it to have a taxable situs here:

Because CSI, the lessor, had no right to enforce the terms of the lease until the commencement date, the Certificate of Acceptance, which was the only writing in the record evidencing this date and which the lessee executed last in Florida, must be considered an integral part of the leasing agreement....

Id. at 1384 (emphasis supplied).

The CSI decision follows from the court’s earlier opinion in Rainey v. Department of Revenue, 354 So. 2d 387 (Fla. 1st DCA 1977), cert. den., 360 So. 2d 1248 (Fla. 1978). In Rainey, an instrument between multiple borrowers and a bank

6 CSI’s taxable situs analysis remains valid and is unaffected by the 1997 change in the law.
was signed by all but one of the borrowers in Florida; the remaining borrower signed the document in Georgia, where it was accepted by the bank. Id. at 388. The Department contended that the instrument was “made, signed, and executed” in Florida because most of the borrowers signed the document in Florida and each borrower was independently liable for the debt. Id. The court asked: “Was the transaction completed in its essential elements in Florida?” Id. at 389. The court found that the document had no taxable situs in Florida because “[t]he essential execution of the instrument was that of [the last borrower] which was affixed in Georgia.” Id.; see also, Ultimate Corp. v. C. G. Data Corp., 575 So. 2d at 1339. A bilateral contract must be signed by both parties in order to be enforceable. See, Biber v. City of Miami, 82 So. 2d 747, 748 (Fla. 1955).

V. CONCLUSION

Winn-Dixie confirms how documentary stamp tax principles apply to true leases and potentially expands the grounds on which equipment lessors may legitimately avoid the tax. While a favorable decision, the case is troubling from the standpoint of questioning whether a lessee's hell-or-high water payment obligation will be enforced according to its terms. Winn-Dixie's analysis should be equally applied to conditional-sale type leases, although these leases must also be analyzed for taxability as unrecorded mortgages. Finally, even if a true lease does not contain a condition precedent to the lessee's payment obligation, such as in Winn-
Dixie, consideration should be given to whether there are jurisdictional grounds to avoid imposition of the tax.