

TRANSACTION COSTS: TRANSFER TAX

I. DOCUMENTARY STAMP TAX

In Florida, there is a documentary stamp tax imposed on deeds, notes, and mortgages. Therefore, if any of these types of documents are executed within the state, then a documentary stamp tax is due for the execution of such document.¹

A. DOCUMENTS

i) DEEDS

In general, a documentary stamp tax is imposed on deeds transferring property. As set forth in the statute, the documentary stamp tax is imposed on all deeds, instruments, or writings where real property or any interest in real property, is granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by his or her direction *for consideration*.² Some of the types of documents transferring an interest in property which may be subject to the documentary stamp tax are warranty deeds, quit claim deeds, contracts for deed, assignments of leasehold interests, and deeds in lieu of foreclosure.

The amount of the tax is equal to seventy cents (\$.70) for each one hundred dollars (\$100) of consideration.³ For example, if the purchase price for real property transferred is \$250,000, then the documentary stamp tax imposed on the deed transferring the property is equal to \$1,750 ($\$250,000/100 \times .70$). For purposes of the documentary stamp tax on deeds,

¹. F.S. 201.01.

². F.S. 201.02.

³. F.S. 201.02.

consideration includes, but is not limited to, the money paid or agreed to be paid, the discharge of an obligation, the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness is assumed.⁴

The documentary stamp tax applies even though the parties may not exchange the property for money or a promise to pay money for the property. The consideration paid may include an exchange of property or any other consideration which has value. If the consideration paid or given in exchange for real property or any interest in real property includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest in real property⁵

As a prior condition to recording any deed transferring an interest in real property, the grantor or the grantee must execute and file a return with the clerk of the circuit court.⁶ Before the deed or other instrument transferring the property is recorded, a *Return for Transfers of Interest in Florida Real Property* (Form DR-219) must be filed with the clerk of the circuit court in the county where the property is located.

One exception to the general rule is the transfer of property between spouses incident to divorce. The documentary stamp tax does not apply to a deed, transfer, or conveyance between spouses or former spouses pursuant to an action for dissolution of their marriage wherein the real

⁴. F.S. 201.02.

⁵5. F.S. 201.02.

⁶. F.S. 201.022.

property is or was their marital home.⁷ If any documentary stamp taxes were paid on a deed, transfer, or conveyance between spouses one year before the dissolution of marriage, the taxes shall be refunded.⁸

ii) MORTGAGES

Typically, most real property transactions will involve a mortgage when money is borrowed to finance the purchase. This mortgage is also subject to the documentary stamp tax. The statute provides that a documentary stamp tax is imposed on the mortgage securing the indebtedness on the property which is filed or recorded in Florida.⁹ The tax rate on the mortgages, trust deeds, security agreements, or other evidences of indebtedness is equal to thirty-five cents (\$.35) for each one hundred dollars (\$100) of the indebtedness or obligation evidenced by such document.¹⁰

EXAMPLE: The property is sold for a price of \$200,000. The purchaser pays \$100,000 cash and executes a promissory note in the amount of \$100,000 which is secured by a mortgage of equal value. A documentary stamp tax will be due on the deed transferring the property in an amount equal to \$1,400 ($\$200,000/100 \times .70$). Additionally, a documentary stamp tax will be imposed on the mortgage in the amount of \$350 ($\$100,000/100 \times .35$).

When there is both a mortgage, trust deed, or security agreement and a note, certificate of

⁷. F.S. 201.02(7).

⁸. F.S. 201.02(7).

⁹. F.S. 201.08(1)(b).

¹⁰. F.S. 201.08(1)(b).

indebtedness, or obligation, the tax shall be paid on the mortgage, trust deed, or security agreement at the time of recordation.¹¹ If a mortgage is recorded in Florida to secure a note which was previously subject to the documentary stamp tax and the tax was paid on such note, then the tax on the subsequently filed mortgage shall only be due on the amount of the indebtedness which exceeds the aggregate amount upon which tax was previously paid on the note.¹²

iii) NOTES

The documentary stamp tax applies to all promissory notes and other written obligations to pay money that are executed, transferred, or assigned in Florida.¹³ The tax rate on notes and other written obligations is thirty-five cents (\$.35) for each one hundred dollars (\$100) of the amount of the indebtedness.¹⁴ The tax on these types of documents is limited to \$2,450.¹⁵

iv) FILING OF RETURNS

If the person filing the documentary stamp tax return has less than five (5) taxable transactions per month, then Form DR-228, *Documentary Stamp Tax Return for Nonregistered Taxpayers* Unrecorded Documents, should be filed to remit the tax. However, if the person has five (5) or more taxable transactions per month, then that person must register with the

¹¹. F.S. 201.08(1)(b).

¹². F.S. 201.08(1)(b).

¹³. F.S. 201.08(1)(a).

¹⁴. F.S. 201.08(1)(a).

¹⁵. F.S. 201.08(1)(a).

Department of Revenue. To register for filing these returns, the person must file an *Application to Collect and/or Report Tax in Florida* (Form DR-1). Registered persons will then file a *Documentary Stamp Tax Return for Registered Taxpayers' Unrecorded Documents* (Form DR-225) to remit the documentary stamp taxes. These forms and instructions can be found at the Department of Revenue's website at www.myflorida.com.

B. CONSIDERATION FOR EXCHANGE OF REAL PROPERTY

When applying the documentary stamp tax to a transfer of real property by deed, consideration includes *the discharge of an obligation*.¹⁶ As discussed below, the courts have applied the documentary stamp tax to transfers involving owners and their wholly owned companies if the transfer involves property that is encumbered.

If the consideration paid or given in exchange for real property or any interest therein includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest in real property.¹⁷ The Department of Revenue has attempted to impose the documentary stamp tax on transactions involving corporations and their sole shareholders based on this provision. The Department has asserted that consideration exists since owners of property exchange value when transferring property between owners and the company for exchange of interests in those companies. However, the Supreme Court has held that this language "simply provided nonexclusive examples of consideration."¹⁸ The Supreme Court found that this provision "added a means of determining value assigned nonmonetary

¹⁶. F.S. 201.02(1).

¹⁷. F.S. 201.02.

¹⁸. *Crescent Miami Center, LLC v. Florida Department of Revenue*, 903 So. 2d 913 (Fla. 2005).

consideration, but it did not change the requirement that consideration actually exist for the transfer.¹⁹

C. CHANGE IN FORM OF OWNERSHIP

On numerous occasions, real property transactions will involve transferring real property between owners of companies and their corporation, limited liability company, and/or partnership. These deeds transferring the real property may be subject to the documentary stamp tax. The documentary stamp tax statute only specifically addresses transfers between partners and partnerships. In various cases, the courts have attempted to interpret whether the documentary stamp tax applies to these types of transfers.

The statute states that the documentary stamp tax applies to all conveyances of real property to a partner from a partnership for property conveyed to the partnership after July 1, 1986 if (a) the partner receiving the real property from the partnership is a partner other than the partner who conveyed the real property to the partnership; or (b) the partner receiving the real property from the partnership is the partner who conveyed the real property to the partnership and there is a mortgage debt or other debt secured by such real property for which the partner was not personally liable prior to conveying the real property to the partnership.²⁰ The value of the consideration paid for the conveyance of the real property to the partner from the partnership

¹⁹. *Id.*

²⁰. F.S. 201.02(5).

includes, but is not limited to, the amount of any outstanding mortgage debt or other debt which the partner pays or agrees to pay in exchange for the real property, regardless of whether the partner was personally liable for the debts of the partnership prior to the conveyance to the partner from the partnership.²¹

The Supreme Court has determined that a change in the form of ownership of property, without any exchange of value, does not constitute consideration.²² As the Supreme Court held in *Crescent Miami Center, LLC v. Florida Department of Revenue*, the transfer of property between a grantor and its wholly owned grantee, absent any exchange of value is without consideration or a purchaser and thus not subject to the documentary stamp tax.²³ In *Crescent Miami*, a company transferred unencumbered property to a second tier subsidiary ultimately wholly owned 100% by the company.²⁴

The Supreme Court concluded that a mere change in form of the stockholder's equity in the corporation is not sufficient consideration to meet the requirements to impose a documentary stamp tax.²⁵ The Supreme Court reasoned that there is no consideration for such transfers and thus no exchange in value and no purchaser.²⁶ In *Crescent Miami*, the Supreme Court upheld its

²¹. F.S. 201.02(5).

²². *Crescent Miami Center, LLC v. Department of Revenue*, 903 So. 2d 913 (Fla. 2005).

²³. *Id.*

²⁴. *Crescent Miami Center, LLC v. Department of Revenue*, 903 So. 2d 913 (Fla. 2005).

²⁵.
Id.

²⁶. *Id.*

decisions in the cases *State ex rel. Palmer-Florida Corp. v. Green* and *Florida Department of Revenue v. De Maria*.²⁷ In these cases, the Supreme Court determined that transfers from a corporation to its shareholders are not subject to the documentary stamp tax because the shareholders were not purchasers within the meaning of the statute.²⁸ In *Palmer-Florida*, a corporation transferred property from the corporation to its shareholders in proportion to their shares in the corporation.²⁹ The Florida Supreme Court held that the shareholders were not purchasers, the transaction did not involve any form of consideration and was not subject to the documentary stamp tax.³⁰ In *De Maria*, the corporation transferred encumbered property to its sole shareholder.³¹ The Supreme Court determined that the grantor corporation received a benefit by not having to pay the mortgage, since the economic burden of the mortgage had been transferred to the individual.³² Thus, the part of the transaction involving the property encumbered by the mortgage was not a mere transfer of title.³³ Thus, the documentary stamp tax was imposed on the part of the property subject to the mortgage, but not the equity interest in the property.³⁴

²⁷. *Id.*

²⁸. *Id.*

²⁹. *State ex rel. Palmer-Florida Corp. v. Green*, 88 So. 2d 493 (Fla. 1956).

³⁰. *Id.*

³¹. *Florida Department of Revenue v. De Maria*, 338 So. 2d 838, 840 (Fla. 1976).

³². *Id.*

³³. *Id.*

³⁴. *Id.*

In a case involving a partnership, the Supreme Court dismissed review of *Muben-Lamar* in which the First District Court of Appeal held that the issuing of partnership interests for real property was consideration and thus a transaction subject to the documentary stamp tax.³⁵ In *Muben-Lamar*, the partnership consisted of three partners and only two of the partners owned the property prior to transferring it to the partnership as a capital contribution.³⁶ When mentioning this case, the Supreme Court seemed to distinguish *Muben-Lamar* by emphasizing that there were various and diverse interests in the partnership and that the partners gained interests in the contributed property which they previously had not had.³⁷

II. INTANGIBLE PERSONAL PROPERTY TAX

In Florida, there is an intangible personal property tax imposed on a note that is secured by a mortgage or other lien upon real property.³⁸ This intangible personal property tax is a one time nonrecurring tax.³⁹ The tax applies only to a note or obligation only to the extent it is secured by mortgage, deed of trust, or other lien upon real property situated in Florida⁴⁰ This tax does not apply to the portion of the note that is secured by personal property or by real property

³⁵. *Muben-Lamar, L.P. v. Department of Revenue*, 763 So. 2d 1209 (Fla. 1st DCA 2000), *dismissed* 789 So. 2d 337 (Fla. 2001).

³⁶. *Crescent Miami Center, LLC v. Department of Revenue*, 903 So. 2d 913 (Fla. 2005), *mentioning Muben-Lamar, L.P. v. Department of Revenue*, 763 So. 2d 1209 (Fla. 1st DCA 2000). *dismissed* 789 So. 2d 337 (Fla. 2001).

³⁷. *Id.*

³⁸. F.S. 199.133(1).

³⁹. F.S. 199.133(1).

⁴⁰. F.S. 199.133(2).

situated outside this state.⁴¹

The tax must be paid prior to recording the mortgage. The tax imposed on the note which is secured by a mortgage shall be due and payable when the mortgage is presented for recordation.⁴² The tax is paid to the clerk of the circuit court in the county where the instrument is recorded.⁴³ The mortgagee or lender is solely liable for payment of the tax.⁴⁴

The amount of the tax is equal to 2 mills on each dollar of the just valuation of the note or other obligation.⁴⁵ The note is valued on the principal amount of the indebtedness evidenced by such obligation.⁴⁶ For example, if the principal amount of the note is equal to \$125,000, then the amount of the intangible personal property tax imposed on the note is \$250 ($\$125,000 \times .002$).

⁴¹. F.S. 199.133(2).

⁴². F.S. 199.135.

⁴³. F.S. 199.135(1).

⁴⁴. F.S. 199.135(4).

⁴⁵. F.S. 199.133(1).

⁴⁶. F.S. 199.155.