



Finance & Tax Council

**Wednesday, March 3, 2010
1:30 PM
404 HOB**

**Larry Cretul
Speaker**

**Ellyn Setnor Bogdanoff
Chair**

Council Meeting Notice
HOUSE OF REPRESENTATIVES

Finance & Tax Council

Start Date and Time: Wednesday, March 03, 2010 01:30 pm
End Date and Time: Wednesday, March 03, 2010 04:00 pm
Location: 404 HOB
Duration: 2.50 hrs

Consideration of the following bill(s):

HB 109 Excise Tax on Documents by Jenne

Workshop on the following:

Hotel Intermediaries and Transient Rental Taxation

Pursuant to rule 7.13, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Tuesday, March 2, 2010.

By request of the Chair, all council members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Tuesday, March 2, 2010.

NOTICE FINALIZED on 03/01/2010 15:21 by BAI

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Section 201.02(1), F.S., currently imposes documentary stamp tax on documents that transfer an interest in Florida real property. The tax is calculated based on the "consideration" of the transfer. Consideration includes money paid or to be paid, the discharge of an obligation, and the amount of any mortgage or other encumbrance. The current tax on deeds and other documents related to real property is \$0.70 for each \$100 of consideration.

Subsections (6) through (9) of s. 201.02, F.S., provide exemptions and limitations to imposition of the documentary stamp tax. These include:

- Transfers of real property from a nonprofit organization to specified governmental entities;
- Transfers of a marital home between spouses or former spouses as part of an action for dissolution of marriage; and
- Contracts to sell the residence of an employee relocating at his or her employer's direction, when the sales contract is between the employer and the employee, or the employee and a person providing employee relocation services.

There is also a limitation applied to certain judicial sales of real property under a foreclosure order. The certificate of title issued by the clerk of court is subject to the tax; however, the amount of the tax is computed based on the amount of the highest and best bid received at the foreclosure sale.

For fiscal year 2008-2009, total documentary stamp tax collections were approximately \$1.12 billion, a 42.6 percent drop from FY 2007-2008. Revenue from the documentary stamp tax is distributed between the General Revenue Fund and various trust funds¹.

¹ Office of Economic and Demographic Research, The Florida Legislature et al., *Florida Tax Handbook, Including Fiscal Impact of Potential Changes* (2010), available at <http://edr.state.fl.us/taxhandbooks/taxhandbook2010.pdf> (last visited Feb. 28, 2010).

Short Sales

A "short sale" is the sale of real property in which the purchase price is less than the outstanding debt secured by the property (i.e. a mortgage). In most short sale situations, the seller either is, or is likely to soon be, in default and the property securing the debt has decreased in value. In order to avoid foreclosure, the seller wants to sell the property as soon as possible.² Due to the recent downturn in the economy and limited availability to credit, the real estate market in Florida has experienced an increase in the number of short sales.

In the majority of real estate transactions, the lender receives full payment of the loan obligation and agrees to release its lien on the secured property upon the sale of the property. In these transactions, the amount paid by the purchaser for the property is consideration and subject to documentary stamp tax.³

However, in short sale transactions because the purchase price of the property is less than the outstanding loan balance, the lender agrees to receive partial satisfaction of the loan obligation with the remaining debt cancelled. This cancelled debt has value to the seller because the seller is repaying less than what the seller borrowed to purchase the property; as a result, the issue arises as to whether the amount of cancelled debt should be treated as consideration for the transfer and therefore included in calculations for documentary stamp tax purposes under s. 201.02, F.S.⁴

On September 23, 2008, the Department of Revenue (Department) issued a technical assistance advisement in response to a request for guidance in determining the correct tax on deeds for short sales in Florida. The Department concluded, "[W]hen the lender cancels indebtedness of the seller, that cancellation is not included in determining the amount of consideration subject to tax under s 201.02, Florida Statutes."⁵ In reaching this conclusion, the Department reasoned:

"The lender's agreement to satisfy its lien and cancel a portion of the seller's debt is a separate, unrelated transaction between the seller and the lender. The seller and the purchaser alone have entered into their contract for the transfer of real property. The lender is not related to either one of those parties and is not bound by any aspect of the contract between the seller and the purchaser.

Independently, the lender has agreed to satisfy its lien and cancel a portion of the seller's debt. The lender is not related to or controlled in any way by either other party, and neither the lender nor any of its related parties is receiving any interest in the real property. The lender has merely evaluated its risk as a creditor of the seller and the decreasing value of the seller's collateral, and the lender has made a business decision to cancel a portion of the seller's debt in return for the current payment of a lesser amount. Section 201.02(1), Florida Statutes, does not clearly impose tax merely because the seller happens to be a party to both transactions.

...

Unlike other situations where an obligation is discharged in exchange for real property ..., it is at best unclear whether the Legislature intended to impose tax on the amount cancelled by the lender. When the application of a taxing provision is unclear or ambiguous, the Department is bound to construe that taxing statute narrowly, against the imposition of tax. See, e.g., *State*

² Florida Dep't of Revenue, *Technical Assistance Advisement No. 08B4-006, Documentary Stamp Tax – "Short Sales" of Florida Real Property*, 1 (Sept. 23, 2008), available at <https://taxlaw.state.fl.us/wordfiles/DOC%20TAA%2008B4-006.pdf> (last visited Feb. 28, 2010).

³ *Id.* at 4.

⁴ *Id.* at 3.

⁵ *Id.* at 4.

ex. Rel. Seaboard A.L.R. Co v. Gay, 160 Fla. 445 (Fla. 1948). Thus, we construe the statute not to include the lender's cancellation of debt as consideration in the instant case. However, the Legislature may choose to clarify the application of the statute through legislation."

Effect of proposed changes

This bill will clarify the law governing the calculation of documentary stamp tax owed when real property is conveyed via short sale. HB 109 creates s. 201.02(11), F.S., to provide that consideration does not include the unpaid indebtedness that is forgiven or released by a mortgagee holding a mortgage on the property. The bill defines a short sale as the purchase and sale of real property in which:

- The grantor's (seller's) interest in the real property is encumbered by a mortgage or mortgages securing indebtedness in an aggregate amount greater than the purchase price paid by the grantee (buyer).
- A mortgagee releases the real property from its mortgage in exchange for a partial payment of less than the outstanding mortgage indebtedness owing to the releasing mortgagee.
- The releasing mortgagee does not receive, directly or indirectly, any interest in the property transferred.
- The releasing mortgagee, grantor, and grantee are dealing with each other at arm's length.

This bill provides that the Department may put into action rules establishing criteria governing whether parties to a short sale are dealing with each other at arm's length. This bill further codifies the Department's advisement conclusion that in a short sale transaction, cancellation of debt is not consideration used to determine documentary stamps tax.

B. SECTION DIRECTORY:

Section 1: Creates s. 201.02(11), F.S., to provide that the taxable consideration for a short sale transfer does not include the unpaid indebtedness that is forgiven or released by a mortgagee holding a mortgage on the property. Additionally, the bill defines a short sale.

Section 2: Provides that Department of Revenue will adopt rules establishing criteria governing whether parties to a short sale are dealing with each other at arm's length.

Section 3: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

No Impact. (See FISCAL NOTES)

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

No Impact. (See FISCAL NOTES)

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

On February 24, 2010, the Revenue Estimating Conference (REC) adopted an estimate that the provisions of this bill would not have a fiscal impact on either state or local government revenues because the bill codifies existing Department procedures.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal government.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Revenue will have rule making authority that adopt rules establishing criteria governing whether parties to a short sale are dealing with each other arm's length.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to the excise tax on documents; amending
 3 s. 201.02, F.S.; imposing the tax on the consideration for
 4 short sale transfers of real property; excluding certain
 5 unpaid indebtedness from such consideration; defining the
 6 term "short sale"; authorizing the Department of Revenue
 7 to adopt rules establishing arm's length criteria for
 8 short sale purposes; providing an effective date.

9
 10 Be It Enacted by the Legislature of the State of Florida:

11
 12 Section 1. Subsection (11) is added to section 201.02,
 13 Florida Statutes, to read:

14 201.02 Tax on deeds and other instruments relating to real
 15 property or interests in real property.--

16 (11) The tax imposed by this section applies to any deed,
 17 instrument, or writing that transfers any interest in real
 18 property pursuant to a short sale. The taxable consideration for
 19 a short sale transfer does not include unpaid indebtedness that
 20 is forgiven or released by a mortgagee holding a mortgage on the
 21 grantor's interest in the property. For purposes of this
 22 subsection, the term "short sale" means a purchase and sale of
 23 real property in which all of the following apply:

24 (a) The grantor's interest is encumbered by a mortgage or
 25 mortgages securing indebtedness in an aggregate amount greater
 26 than the purchase price paid by the grantee.

27 (b) A mortgagee releases the real property from its
 28 mortgage in exchange for a partial payment of less than the

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29 total of the outstanding mortgage indebtedness owed to the
 30 releasing mortgagee.

31 (c) The releasing mortgagee does not receive, directly or
 32 indirectly, any interest in the property transferred.

33 (d) The releasing mortgagee, grantor, and grantee are
 34 dealing with each other at arm's length. For purposes of this
 35 subsection, the fact that the parties are related or controlled
 36 by one another is not, alone, sufficient evidence that the
 37 parties are not dealing with each other at arm's length.

38 Section 2. The Department of Revenue may adopt rules
 39 establishing criteria that indicate when the parties to a short
 40 sale are not dealing with each other at arm's length.

41 Section 3. This act shall take effect July 1, 2010.

Amendment No. 1

COUNCIL/COMMITTEE ACTION

ADOPTED ___ (Y/N)
ADOPTED AS AMENDED ___ (Y/N)
ADOPTED W/O OBJECTION ___ (Y/N)
FAILED TO ADOPT ___ (Y/N)
WITHDRAWN ___ (Y/N)
OTHER _____

1 Council/Committee hearing bill: Finance & Tax Council
2 Representative Jenne offered the following:
3

4 **Amendment (with title amendment)**

5 Remove lines 16-40 and insert:

6 (11) The taxable consideration for a short sale transfer
7 does not include unpaid indebtedness that is forgiven or
8 released by a mortgagee holding a mortgage on the grantor's
9 interest in the property. For purposes of this subsection, the
10 term "short sale" means a purchase and sale of real property in
11 which all of the following apply:

12 (a) The grantor's interest is encumbered by a mortgage or
13 mortgages securing indebtedness in an aggregate amount greater
14 than the purchase price paid by the grantee.

15 (b) A mortgagee releases the real property from its
16 mortgage in exchange for a partial payment of less than the
17 total of the outstanding mortgage indebtedness owed to the
18 releasing mortgagee.

Amendment No. 1

19 (c) The releasing mortgagee does not receive, directly or
20 indirectly, any interest in the property transferred.

21 (d) The releasing mortgagee is not controlled by or
22 related to the grantor or the grantee.

23

24

25

T I T L E A M E N D M E N T

26

Remove lines 3-8 and insert:

27

28 s. 201.02, F.S.; excluding certain unpaid indebtedness from the
29 taxable consideration for short sale transfers of real property;
30 defining the term "short sale"; providing an effective date.

**Hotel Intermediaries &
Transient Rental Taxation**

Hotel Intermediaries and Transient Rental Taxation

**House Finance & Tax Council
March 3rd, 2010**

Outline

- ◎ Issue
- ◎ Business Models
- ◎ Law in Florida- Statutes
 - > State
 - > Local
- ◎ Law in Florida- Administration
 - > State
 - > Local
- ◎ Law in Florida- Litigation
- ◎ Litigation in Other States
- ◎ Federal Developments
- ◎ Law in Florida- Legislation Introduced
- ◎ Revenue Implications
- ◎ Policy Options

Issue

- ◎ What is the charge for transient rentals that is subject to state and local tax in Florida?

Background

- ◎ Business models
 - > Traditional Model
 - > Agent Model
 - > Merchant Model

Law in Florida- State

- Sales Tax- Section 212.03(1)(a), F.S., provides in part:

... every person is exercising a taxable privilege who **engages in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations** (emphasis supplied)

... a tax is hereby levied in an amount equal to 6 percent of and on **the total rental charged** for such living quarters ... (emphasis supplied)

- Section 212.02, F.S., defines in part:

(16) "Sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale ...

Law in Florida- State

- ◎ Sales Tax- Section 212.03(2), F.S., provides in part:

The tax provided for herein shall be in addition to the total amount of the rental, **shall be charged by the lessor or person receiving the rent** in and by said rental arrangement to the lessee or person paying the rental ...

Law in Florida- Local

- ◎ Tourist Development Tax- Section 125.0104(1), F.S., provides in part:

(c) The tourist development tax shall be levied ... [on] **the total consideration charged** for such lease or rental. (emphasis supplied)

(f) The tourist development tax shall be **charged by the person receiving the consideration** for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental.

- ◎ Tourist Impact Tax- Section 125.0108(1)(d), F.S., provides in part:

(d) The tourist impact tax shall be levied ... [on] **the total consideration charged** for such taxable privilege. ... (emphasis supplied)

Law in Florida- Local

- ◎ Convention Development Tax- Section 212.0305(3), F.S., provides in part:

The convention development tax on transient rentals ... shall **apply to the amount of any payment** made by any person to rent, lease, or use ... any living quarters or accommodations ... (emphasis supplied)

- ◎ Municipal Resort Tax- Chapter 67-930, L.O.F., provides in part:

... [authorized cities and towns] are hereby given the right to levy and collect ... a municipal resort tax, **upon the rent** of every occupancy of a room or rooms in any hotel, motel ... (emphasis supplied)

The tax authorized ... shall not exceed two per cent (2%) **of the rent received by the person renting such room** or rooms ... (emphasis supplied)

Law in Florida- Administration

- ◉ Department of Revenue
- ◉ Local Governments

Law in Florida- Litigation

- ◎ Orange County, Florida v. Expedia, Inc., et. al. (2006-CA-0021 04) Ninth Judicial Circuit, Orange County, Florida
- ◎ Leon County, et. al. v. Expedia, Inc., et. al. (2009-CA-4319) Second Judicial Circuit, Leon County, Florida
- ◎ Orbitz, LLC, et. al. v. Broward County, Florida, et. al. (37 2009 CA 000126) Second Judicial Circuit, Leon County, Florida
- ◎ State of Florida, Office of the Attorney General, Department of Legal Affairs v. Expedia, Inc., Orbitz, LLC, and Orbitz, Inc. (37 2009 CA 004303) Second Judicial Circuit, Leon County, Florida

Other States- Litigation

- ◎ Claims/Basis for lawsuits have varied:
 - > Equitable claims
 - > Unjust enrichment
 - > Demand for an accounting
 - > Declaratory actions
 - > Audit challenges

Law- Federal Developments

- ◎ No federal legislation has been introduced, however, draft language has been circulating for the past two years. It has been referred to as the “Internet Travel Tax Fairness Act.”
 - > Intent apparently to ban state/local taxation of the “markup.”
 - > Concern raised that the draft language may, however, be broad enough to ban state/local taxation of the entire charge of rooms booked online.

Law in Florida- Legislation Introduced

- ◎ Legislation considered to clarify that tax is due on full amount charged (including the “markup”):
 - > 2005- HB 1357, SB 2454, SB 2558
 - > 2006- HB 655
 - > 2009- HB 579, SB 1970 and CS/SB 2518
 - > 2010- HB 335, SB 156, SB 996
 - > Most were prospective and contained amnesty provisions for past periods

- ◎ Legislation considered to clarify that tax is due amount paid to hotel by OTC (does not include the “markup”):
 - > 2008- CS/SB 2788, HB 7147
 - > 2010- HB 1241, SB 2436

Revenue Implications

- ◎ From a 2009 Revenue Estimating Conference Impact Analysis:
 - > State and local sales taxes: \$31 million
 - > Local tourist development taxes: \$23 million
- ◎ Implications -
 - > If law is clarified that tax is due on full amount charge (including the “markup”).
 - > If law is clarified that tax is due on amount paid to hotel by OTC (does not include the “markup”).

Policy Options

- Judicial
- Legislative

Questions?