



# e-newsletter

## **Florida Documentary Stamp Update - Florida Legislature Closes the Loophole for the Drop and Swap Documentary Stamp Tax Avoidance Technique**

**August 12, 2009**

Effective July 1, 2009, Florida Statutes Section 201.02 was modified to eliminate the so-called “drop and swap” technique frequently used to avoid Florida documentary stamp taxes on the transfer of Florida real property.

Generally, the transfer of Florida real property is accomplished by a grantor executing a deed in favor of a grantee and recording this deed in the county where the real property is located. Florida Statutes Section 201.02 requires that Florida documentary stamp taxes be paid upon the recording of the deed in the amount of seventy cents (\$0.70) for every \$100.00, or portion thereof, of consideration paid for the real property. For purposes of calculating documentary stamp taxes, the amount of debt secured by a mortgage encumbering the real property is included as consideration regardless of whether or not the new owner assumed such debt.

In 2005, the Florida Supreme Court paved the way for a documentary stamp tax avoidance technique known in legal circles as the “drop and swap.” In Crescent Miami Center, LLC v. Florida Department of Revenue, 903 So. 2d 913, 916 (Fla. 2005) the Florida Supreme Court ruled that no Florida documentary stamp tax is owed when a grantor executes and records a deed transferring unencumbered Florida real property to a wholly owned subsidiary entity for no consideration (i.e., the “drop”). Once the real property is transferred to the wholly owned subsidiary entity, the ownership interest in this entity (whether it be the stock of a corporation, membership interest in an limited liability company, or partnership interest in a general or limited partnership) is transferred to the ultimate purchaser (i.e., the “swap”). In essence, the purchaser buys the ownership interest in the entity that owns the Florida real property rather than buying the Florida real property directly. The ownership interest in an entity is not transferred by a deed and is therefore not subject to the imposition of Florida documentary stamp taxes.

The recent modifications to Florida Statutes Section 201.02 are intended to close this loophole by taxing the “swap” portion of the above described transaction. Florida Statutes Section 201.02 now provides that documentary stamp taxes are owed when Florida real property is conveyed to a subsidiary entity for less than full consideration, and an ownership interest in this subsidiary entity is transferred for consideration within three years following the initial conveyance to the subsidiary entity. The amount of documentary stamp taxes owed will be calculated based on the consideration paid for the ownership interest in the entity. When the entity holds assets other than the Florida real property transferred to it, the tax shall be prorated based on the percentage the value of such real property represents of the total value of all assets owned by the entity. Transfers of interests in the entity to irrevocable trusts, or as a gift, will not be subject to the

documentary stamp tax. Furthermore, the transfer of an ownership interest that is exchanged on public, regulated security exchanges will be exempt from the documentary stamp tax.

This change applies to transfers for which the initial conveyance to the subsidiary entity occurred after July 1, 2009. The Florida Department of Revenue may enact emergency rules to implement the change. However, at this time no such rules have been promulgated.

The transfer of an ownership interest in an entity owning Florida real property should not be confused with the transfer of a beneficial interest in a trust owning Florida real property. An assignment of a beneficial interest in a trust owning Florida real property is subject to documentary stamp tax based on the consideration paid for said beneficial interest pursuant to Rule 12B-4.013 (26) of the Florida Administrative Code. Again, the amount of debt secured by a mortgage encumbering the real property is included as consideration regardless of whether or not the new owner assumed such debt.

If you have any questions on the legislation's potential impact, please contact Jonathan Wallace (407-428-5162 or [jwallace@deanmead.com](mailto:jwallace@deanmead.com)) or Christine Weingart (407-428-5175 or [cweingart@deanmead.com](mailto:cweingart@deanmead.com)).

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