

100 S. Ashley Drive, Suite 700
Tampa, FL 33602-5358
(813)228-0555 / (800)342-5957
(813)228-0301 (Fax)
www.oldrepublictitle.com
Home Office: Minneapolis, Minnesota 55401-2499

MEMO

To: All Old Republic National Title Agents and Offices
Re: Documentary Stamps on a Short Sale Transaction
Date: September 24, 2008

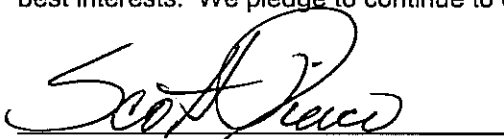
Last month, the Florida Department of Revenue issued an unofficial opinion that documentary stamps on a short sale transaction should be paid on the amount paid for the property plus the amount of the relinquished debt. This raised a host of legal and public policy issues. More importantly, given the predominance of short sales in the marketplace, it potentially threatened the livelihood of independent title agents in Florida.

Old Republic Title recognized the chilling effect the unofficial position of DOR would have on pending sales statewide. We were the only underwriter, after fully researching this issue, to authorize its agents to conduct business as usual, as shown in our Bulletin 08-10 distributed on August 25th, until a formal ruling was received from DOR. In doing so, we weathered some criticism from competing underwriters who argued that we were putting agents at risk. They failed to appreciate our resolve to stand behind independent closing agents until this matter was successfully concluded.

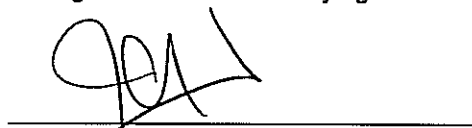
To further our effort to resolve this issue on behalf of our agents, Kevin Crowley, our lobbyist, and our senior counsel, Jim Russick, met in Tallahassee on August 27th with the General Counsel for DOR and two deputies. They presented substantial legal and public policy arguments, a good portion of which is seen in the attached response from the DOR. We believe we were the only title insurance underwriter to advocate on behalf of agents.

With the publication of the attached TAA, your business continues as usual. Those who followed our advice are not currently exposed to customers seeking refunds of improperly overcharged documentary stamps.

We would like to extend our appreciation to our loyal agents who support Old Republic Title. We appreciate that you have a choice, but it is your conscious choice that permits us to advocate in your best interests. We pledge to continue to do so as we go forward in these trying times.



Scott Pierce
Senior Vice President
Southeast Regional Manager



James C. Russick
Vice President
Florida State Counsel



September 23, 2008

Florida Association of Realtors
c/o Victoria L. Weber
Hopping Green & Sams
123 South Calhoun Street
Tallahassee, Florida 32301

Subject: Technical Assistance Advisement No. 08B4-006
Documentary Stamp Tax – “Short Sales” of Florida Real Property

Dear Ms. Weber:

This Technical Assistance Advisement responds to your request dated August 20, 2008. Your request satisfies the requirements of Rule 12-11.003, Florida Administrative Code, and the Department issues this advisement pursuant to Section 213.22, Florida Statutes.

FACTS

You have requested technical assistance on behalf of a taxpayer association, the Florida Association of Realtors. You request guidance in determining the correct documentary stamp tax on deeds for “short sales” of real property in Florida.

A “short sale” refers to the sale of real property for a price that is less than the owner’s outstanding debt secured by the property. In a typical short sale, the seller is in financial distress and is currently defaulting on the debt secured by the seller’s property or will likely default in the near future. Additionally, the property securing the seller’s debt has declined in value due to market conditions, and the seller wants to sell the property to satisfy as much of the debt as possible.

The short sale involves three parties: (1) a real property owner (seller), (2) a lender that holds a lien against the seller’s real property, and (3) a purchaser. None of the parties are related, nor does any party have a principal/agent or fiduciary relationship with any other party. All parties are acting in good faith and at arm’s length. The seller’s debt to the lender was incurred in an unrelated, prior transaction, and no other obligations or relationships between any of the parties are involved, except as described in this advisement.

Child Support Enforcement – *Ann Collin, Director* • General Tax Administration – *Jim Evers, Director*
Property Tax Oversight – *James McAdams, Director* • Administrative Services – *Nancy Kelley, Director*
Information Services – *Tony Powell, Director*

www.myflorida.com/dor
Tallahassee, Florida 32399-0100

As part of the sale to the purchaser, the seller is required to transfer the real property free of any mortgage liens or other debt-related encumbrances. The seller will contact its lender to determine if the lender will release its lien on the property for less than the full amount of the seller's debt.

Lenders have standard processes for agreeing to satisfy liens for less than a full pay-off. Generally, the seller completes an application once an offer is received,¹ and the lender evaluates the situation to determine whether it will agree to satisfy its lien for what the lender will receive under the sale. We understand that lenders generally have the property appraised to determine the fair market value of the real property, and lenders typically review the transaction to ensure that the seller and purchaser are negotiating at arm's length. After consideration of the seller's application and the risks involved, the lender will notify the seller whether it will agree to satisfy its lien under the circumstances.

Lenders that agree to satisfy their liens typically do so in three different ways. First, the lender may agree to satisfy its lien, but makes no representation concerning whether it will cancel the seller's remaining debt. Second, the lender may agree to satisfy its lien, but requires the seller to execute a separate promissory note for the remainder of the debt, explicitly establishing that it will not cancel the remaining debt. Third, the lender agrees to satisfy its lien, and agrees to cancel all or a portion of the remaining amount of debt after receipt of the proceeds remaining from the purchase price. The lender and the seller alone negotiate the satisfaction of the lien and the potential cancellation of debt; the purchaser has no influence or control over the relationship between the seller and the lender.

Once the lender has agreed to satisfy its lien on the property, the lender will provide a pay-off statement to the closing agent, notifying the agent of the amount of the proceeds from the sale to pay the lender at closing. The lender also files a satisfaction of lien and other applicable paperwork even though it is receiving an amount less than the outstanding debt on the property.

Although the lender's pay-off statement will identify the amount expected at closing, the pay-off statement does not include any information concerning the disposition of any remaining debt between the lender and the seller.

Typical procedures for the sale of real property are followed at the time the seller and purchaser close their transaction. The purchaser will provide the purchase price, and the seller will deed the property to the purchaser free of any mortgage or debt-related encumbrance.

REQUEST FOR ADVISEMENT

You request guidance on determining the consideration for the transaction for purposes of Section 201.02(1), Florida Statutes, when a lender cancels a portion of the seller's debt.

¹ While rare, it appears that some sellers will contact their lenders prior to listing the property for sale. In this circumstance, the lender may notify the seller that it will only release its lien on the seller's property for a certain amount, or it may wait until an offer is received before making the determination.

DISCUSSION

Florida imposes documentary stamp tax on documents that transfer an interest in Florida real property. The tax is calculated based on the "consideration" for the transfer. Consideration includes, but is not limited to, money paid or to be paid, the discharge of an obligation, and the amount of any mortgage or other encumbrance. See Section 201.02(1), Florida Statutes.

When the seller executes the document that transfers the real property to the purchaser, that document transfers an interest in real property and, thus, is taxable.

In determining consideration for the transfer, we note that the only thing of value given by the purchaser is the purchase money. Under the facts you provided, the purchaser is not giving any other property; the purchaser does not discharge any of the seller's obligations; the property is not subject to any liens, mortgages, or other encumbrances when it is transferred; and the purchaser is not directing any other party to give anything of value. The only other thing of value received by the seller is the lender's cancellation of debt.

In many common real estate transactions that are not short sales, the lender receives full payment of the loan obligation that the seller has incurred in an unrelated prior transaction. Once the lender has determined that this obligation is satisfied or will be satisfied, the lender agrees to satisfy its lien on the property. In a short sale, however, there is a partial satisfaction rather than full satisfaction of the loan obligation. The lender has determined that in the given circumstances it is willing to take present value dollars in satisfaction of the loan obligation, essentially discounting the amount of the loan by the full or partial cancellation of the amount of loan debt that is not satisfied in the short sale transaction. This cancellation of debt is valuable to the seller; thus, the question arises whether the amount of cancelled debt should be considered as consideration for the transfer. For the reasons discussed below, we conclude that it is not consideration for the transfer.

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 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 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 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, in the situation described above, 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 ex. rel. Seaboard A.L.R. Co. v. Gay, 160 Fla. 445 (Fla. 1948). Thus, we construe the statute to not 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.

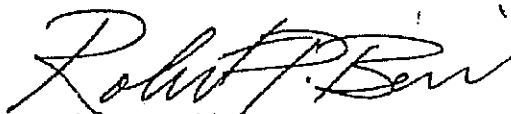
POSITION OF THE DEPARTMENT

The amount paid or given by the purchaser, or paid or given by another on behalf of the purchaser, for an interest in Florida real property is consideration and subject to tax. However, in the transactions described above, when the lender cancels indebtedness of the seller, that cancellation is not included in determining the amount of consideration subject to tax under Section 201.02, Florida Statutes. This advisement does not address the application of Sections 201.08 and 201.09, Florida Statutes, when a promissory note or other security is executed between the lender and the seller.

This Technical Assistance Advisement is binding on the Department only under the facts and circumstances described in the request for this advice and only for the taxpayer involved in this advisement. Additionally, subsequent changes to the applicable law may subject similar future transactions to a different treatment than expressed in this response; the Legislature may clarify how documentary stamp tax is to be applied in this situation.

Lastly, this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Normally, confidential information, such as the identify of the person to whom an advisement is issued, must be deleted before public disclosure. When a taxpayer association requests an advisement on behalf of its members, the identity of the requesting association is helpful to those using the advisement for guidance. No specific taxpayer information is included in an advisement issued to a taxpayer association, and concerns about protecting proprietary information are not present under such circumstances. Pursuant to your written authorization, the association's name will be included in the published advisement.

Sincerely,



Robert P. Babin
Deputy Director, TADR
Florida Department of Revenue



OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

100 South Ashley Drive Ste 700
Tampa, Florida 33602-6358
(813) 228-0555
(800) 324-5957
oldrepublictitle.com

August 27, 2008

Ms. Lisa Echeverri, Executor Director
Florida Department of Revenue
104 Carlton Building
5050 W Tennessee St
Tallahassee, FL 32399-0100

Re: Short Sales of Real Property
and Applicability of Documentary Stamp Tax

Dear Director Echeverri:

The health of Florida's real estate economy relies on a variety of elements to sustain its vitality. The current downturn in the state's real estate market poses potentially adverse long term consequences. Against this backdrop, I address the concerns of my title insurance company, the title insurance industry generally, as well as other affected economic sectors that are faced with dealing with and surviving the current real estate slump.

In real estate parlance, a "short sale" occurs when a parcel of property is sold at a price which is less than the total outstanding mortgage indebtedness encumbering the property. In Florida's distressed real estate market, short sales are common and widespread. From the standpoint of the lender who must write-off the excess debt, this method of transferring the property is a more efficient, more expeditious and less costly alternative to foreclosure proceedings against an owner whose property has lost value relative to the mortgage.

The issue arises as to the application of the documentary stamp tax to short sales. Your staff is currently reviewing the question whether documentary stamp taxes should be paid based on the actual price paid by the buyer or whether the tax should be paid based upon the seller's mortgage indebtedness. My purpose in this letter is to highlight the public policy considerations and the legal basis in urging the Department to adopt a position which recognizes that the documentary stamp tax should be applied on the real, actual consideration between buyer and seller on the short sale real estate transaction.

In terms of public policy, it clear the legislature intended that the tax on an instrument conveying real property be based on the consideration attendant to the sale. Section 201.02, Florida Statutes. In the context of a short sale, the imposition of the tax based on the actual sales price plus an amount representing the "short" indebtedness would have significant adverse consequences. A process which would discourage short sales would unnecessarily create a chilling effect on real estate transfers in this difficult period. A decline in the number of short sales will result in an increase in the number of foreclosures and bankruptcies, thereby making the process of unraveling debt more cumbersome and expensive. The goal of policy makers should be to create an environment which makes it easier to buy and sell property. A vibrant real estate market is essential to a sound state economy.

Lenders are already severely impacted by outstanding loans that no longer reflect the lower values of the properties which secure the loans. In the context of a prospective short sale, it is the lender who has to make the difficult decision to write off debt in favor of a more realistic encumbrance (and better situated borrower). To impose documentary stamps on short sale indebtedness will only discourage the use of the short sale and push the lender to employ foreclosure proceedings. Under the foreclosure process, documentary stamp tax is paid on the highest bid at the foreclosure sale, i.e., the actual price paid for the property. Section 201.02(9), Florida Statutes and Rule 12B-4.013, F.A.C. Again, the public policy objective ought to be the removal of impediments to smooth and efficient real property transfers.

A process which would artificially raise the amount of consideration actually paid in a short sale transaction also would erroneously affect ad valorem taxation. The local tax assessor uses the documentary stamp tax as a measure of the property's value and thus the benchmark by which ad valorem taxes are assessed. This result would set up an immediate conflict between the new property owner and the tax collector. Good public policy calls for the valuation of real property to be based on the actual price paid by the buyer.

As noted, your staff is currently examining this issue. The mechanism of the short sale in lieu of foreclosure has only recently emerged on a large scale due to the decline in the real estate markets. Thus, this may be a case of relative first impression for the Department. The legal analysis begins with Section 201.02, Florida Statutes which states that the tax shall be paid based on the consideration for the conveyance and further states:

"...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..."

The foregoing sentence was added to Section 201.02 in 1990 (Laws of Florida, Chapter 90-132). Legislative history is meager. The post-session staff analysis simply recites this and other language was added to Section 201.02 "to close loopholes in the administration of the excise tax on documents."

Since the phenomenon of the short sale was not in practice in 1990, it is obvious that the legislative amendment regarding the definition of "consideration" was not directed to short sales. Recent appellate decisions would indicate that the 1990 amendment was directed to transactions between corporate and partnership entities and their shareholders or partners. See e.g. DOR v. PMR Resorts, Inc., 868 So.2d 621 (Fla. 2d DCA 2004) and Crescent Miami Center, LLC v. DOR, 903 So.2d 913 (Fla. 2005). In the cases cited therein, the debate centered on the concept of benefit and burden shifting of mortgage indebtedness to ascertain the nature of consideration. The issues included the distinction between assuming mortgage indebtedness and taking title subject to such indebtedness. I posit that the 1990 amendment was intended to address those issues.

Ms. Lisa Echeverri
August 27, 2008
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In the case of short sales, mortgage obligations are not discharged within the meaning of the statute. The short sale mechanism merely recognizes that the value of the real property no longer stands as real security for the totality of the underlying debt. Again, it is the alternative to the foreclosure process. The short sale is virtually identical to the fact pattern in Keebler v. DOR, 360 So.2d 77 (Fla. 1st DCA 1978, cert den 365 So.2d 711). There the Court recognized in a very practical, well-considered opinion that the real consideration in the transaction was the market value of the property and not the illusory, uncollectible mortgage debt.

Keebler remains good law. Pre – 1990 case law was not overruled by the 1990 amendment to the statute. See Crescent Miami Center, 903 So. 2d 913.

It is important to note that Crescent is critical on another point – the emphasis that 201.02, F. S. is only applicable in "...those situations in which property is exchanged for something of value." 903 So. 2d 913, 918. The prevailing practice in the lending community when considering whether or not to accept a short sale offer is important. Procedures typically entail significant due diligence by the lender and a conclusion that the balance of the obligation is uncollectible from the borrower. It is, therefore, a reasonable presumption that the relinquished debt in a normal short sale transaction is uncollectible and not "something of value."

As you and your staff review this matter, I note longstanding principles of statutory construction holding that the provisions of Chapter 201 should be strictly construed and all doubts and ambiguities resolved in favor of the taxpayer. The recent startling increase in the number of short sales stands in sharp contrast to past decades in which property owners could rely on the steady appreciation of real estate values. I may suggest that the Department look for guidance from the next legislature before instituting a new policy with respect to taxing short sales. I thank you in advance for your consideration of this important policy issue.

Sincerely,



James C. Russick
Board Certified Real Property Attorney
Florida State Counsel
Email: jrussick@oldrepublictitle.com
Fax: 813-228-0301

JCR/

Cc: Mr. Jeff Kielbasa
Mr. Marshall Strandburg

100 S. Ashley Drive, Suite 700
Tampa, FL 33602-5358
(813)228-0555 / (800)342-5957
(813)228-0301 (Fax)
www.oldrepublictitle.com
Home Office: Minneapolis, Minnesota 55401-2499

September 8, 2008

Marshall Stranburg, Esq.
General Counsel
Florida Department of Revenue
Room 204, Carlton Building
Tallahassee, FL 32399-0100

Re: Calculation of Documentary Stamp Tax to "Short Sales" of Real Property

Dear Mr. Stranburg:

Thank you for meeting with Kevin Crowley and me last week regarding the difficult public policy, legal, and practical issues surrounding short sale transactions. We very much appreciate your time and interest in acquiring all the facts necessary to resolve this pressing matter.

I have enclosed, per your request, key documentation collected from demonstrative short sale transactions in an effort to give you some factual perspective of the documentary stamp tax difficulties presented to a closing agent. Specifically, enclosed are contracts, HUD-1 closing statements, and acceptance letters from short seller's lenders/lienors. While these documents have been redacted by me to protect the privacy of the parties, all are from legitimate, recently closed transactions in Florida.

During our conversation, you and your staff showed particular interest in the mechanics of a short sale. I hope you will find the attached contracts to be helpful. Specific note should be made to the "short sale addendums" which essentially state that there is no contract between buyer and seller until all third parties with an interest (meaning lienholders) agree to compromise their lien position(s) for less than the outstanding obligation. It is not unusual for a lender to solicit and receive multiple "contracts" for review. Their selection of one over another finalizes only that specific proposal. This protracted process and the necessary contractual contingencies are the root cause of the requirement for the listing agent to disclose up front the fact that a particular property is being offered as a short sale.

These contracts should be read within the broader context of the due diligence documents that I left with your staff last week. The process, in the aggregate, clearly shows a demonstrated pattern of conduct by the lender community in general to determine not only the true current value of the security, but more importantly, the solvency of their borrower and their ability to collect on the underlying promissory note. These papers underscore the reasonable presumption that can be inferred by your Department that any relinquished debt in a short sale is worthless and uncollectible. The logical extension of this fact is that no documentary stamps should be due on any portion of the consideration that has no value.

Marshall Stranburg, Esq.
September 8, 2008
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It is clear that the lender community is generally absorbing the excess costs to close, including those documentary stamps that might arguably be due on the amount of relinquished debt. The acceptance letters and the closing statements help substantiate this fact. It is equally clear that a lender would not relinquish a valuable and collectable obligation merely to save the relatively minor amount of documentary stamps. Rather, the more likely result would be a reluctance on the part of the lender community to write off unsecured obligations. So the public policy implications are significant. The Department's official ruling, if unaltered from the unofficial preliminary statement, would promote more bankruptcy filings by Floridians.

The key to understanding the pragmatic taxing difficulties with short sales is to be found in the acceptance letters from the short seller's lender. These transactions can be categorized into three groups. First are those letters that notify the seller that there will be continuing liability on the original promissory note or, alternatively, require the seller to sign a new promissory note representing the remaining obligation from the original note and mortgage. I have not attached any of those examples for the mere fact that there is no relinquishment of debt and are not at issue.

The vast majority of the acceptance letters from short sellers fail to acknowledge the amount written off by the lender as uncollectible and relinquished. The lender merely acknowledges that the obligation has been written off without revealing to what extent. As I indicated in our meeting, requiring a closing agent to proceed on an estimate presents significant obstacles that include potential implications under federal law.

Lastly are those letters where there is an express amount of relinquished debt disclosed. These are relatively rare but do exist.

Again, I appreciate your assistance and focus on correctly resolving this issue. Please do not hesitate to contact me if I can assist any further.

Sincerely,

James C. Russick
Vice President and Florida State Counsel
Board Certified Real Estate Attorney
Email: jrussick@oldrepublictitle.com
Fax: 813/228-0301

JCR/cmw

cc: Jeff Kielbasa, Esq.
Robert P. Babin, Esq.