# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 283 Discretionary Surtax on Documents
**SPONSOR(S):** Lopez-Cantera
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1960

| | REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|---|
| 1) | Military & Local Affairs Policy Committee | 13 Y, 0 N | Rojas | Hoagland |
| 2) | Economic Development & Community Affairs Policy Council | 14 Y, 0 N | Rojas | Tinker |
| 3) | Finance & Tax Council | | Wilson | Langston |
| 4) | | | | |
| 5) | | | | |


## SUMMARY ANALYSIS

The documentary stamp tax imposes an excise tax on deeds or other documents that convey an interest in Florida real property. The tax rate is 70 cents on each $100 of consideration for deeds, instruments, or writings whereby lands, tenements, or other real property, or any interest therein, are granted, assigned, transferred, conveyed, or vested in a purchaser, there are also various exemptions and limitations to imposition of the documentary stamp tax. The proceeds of the tax go to the state to fund a variety of state programs and are distributed based on a statutory formula. Miami-Dade county's local discretionary surtax authority was grandfathered in at a rate of 60 cents when the state documentary stamp tax was increased in 1992.

The bill extends the authority for Miami-Dade County to assess a discretionary surtax on documents by extending the surtax sunset from October 1, 2011, to October 1, 2031. The bill further requires financial audits by the Office of Program Policy Analysis and Government Accountability (OPPAGA) of surtax revenues and expenditures, creates reporting requirements, authorizes the adoption of a housing plan every 3 years, limits the amount of surtax revenues which may be used for administrative expenses and specifies percentages of surtax revenues be used to provide homeownership assistance and percentages of surtax revenues to be used for construction, rehabilitation, or purchase of rental housing.

The bill also allows Miami-Dade County, at the option of the county governing board, to create and administer a Housing Choice Assistance Voucher program. It would allow private-sector employers that pay the surtax to apply to the county for housing assistance.

This bill also allows a person transferring real property to their own legal entity to choose to pay documentary tax either on the property's market value at the time of the transfer, or subsequently when there is either a change in the ownership interest in the property, or in any interest in the entity. If a subsequent transfer of the interest in the entity simply returns the property back to the original owner, with no change to their original ownership interest, no tax is due on that subsequent transfer. The document evidencing the election must be recorded at the time of the transfer.

The bill has two separate fiscal issues.

The Revenue Estimating Conference (REC) has adopted a positive fiscal impact on state and local revenues for section 3 of the bill which details when a person must pay documentary tax when transferring real property. State Revenues are expected to increase by $26.4 million in FY 2009-10 and by $29.4 million in FY 2010-11. Local Revenues (Miami-Dade County) are expected to increase by $1.1 million in FY 2009-10 and $1.2 million in FY 2010-11.

On March 27th, 2009 the REC also adopted a fiscal impact related to the extension of the Miami-Dade Surtax. The REC estimated that beginning in FY 2011-12 the extension of this sunset would have a -$8 million impact on state revenues. The fiscal impact on local government due to the Miami-Dade Discretionary Surtax would be $9.5 million. In FY 2012-13, the impact on state revenues would grow to -$14.5 million. The fiscal impact on local government due to the Miami-Dade Discretionary Surtax would be $17.2 million.

## 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

**Overview of Documentary Stamp Tax**

The documentary stamp tax imposes an excise tax on deeds or other documents that convey an interest in Florida real property. The tax rate is 70 cents on each $100 of consideration for deeds, instruments, or writings whereby lands, tenements, or other real property, or any interest therein, are granted, assigned, transferred, conveyed, or vested in a purchaser. Section 201.02(6) - (9), F.S., provide various 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.

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 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.

Documentary stamp tax collections were at a peak in Fiscal Year 2005-06 at $4.1 billion. In comparison, the forecast for this year is below $1.1 billion. Positive growth in documentary stamp tax collections is not expected until 2010-11[1].

[1] State of Florida, General Revenue Consensus Estimating Conferenece, Comparison Report , Documentary Stamp Tax Collections. March 13, 2009.

## LOCAL DISCRETIONARY SURTAX

Background and Current Law

### Discretionary Surtax on Documents

In 1983, the Legislature enacted chapter 83-220, Laws of Florida, creating s. 125.0167, F.S., to authorize the governing body of certain counties[2] to levy a discretionary surtax on documents for the purpose of establishing and financing a Home Ownership Assistance Loan Trust Fund. Revenues in the fund were to be used to assist low and moderate income families in the purchase of a home or an apartment. Not less than 50 percent of the funds were to be used to assist low-income families, defined as families whose income did not exceed 80 percent of the median income for the area. The remaining funds could be used to assist families whose income was in excess of 80 percent, but not more than 140 percent, of the median income for the area. The surtax could not exceed the rate of 45 cents per $100 or fractional part thereof, and could apply only to documents taxable under s. 201.01, F.S., except that no surtax could be imposed on a deed conveying a single family residence, identified as a detached dwelling, a condominium unit, or a unit held through stock ownership or membership representing a proprietary interest in a corporation owning a fee or a leasehold initially in excess of 98 years.

The governing body was directed to adopt an ordinance to levy the discretionary surtax and create the trust fund. The ordinance was required to establish the policies and procedures of the assistance program. The county was directed to deposit revenues from the surtax into the trust fund to be used only for the purchase of a home or an apartment, or the rehabilitation of an existing home or apartment. The surtax could not be used for rent subsidies or grants.

Section 201.031, F.S., was created to establish the discretionary surtax and require counties levying the surtax to submit a financial report (under s. 218.32, F.S.) showing the revenues and expenses of the trust fund. The Department of Revenue was directed to distribute all surtaxes collected within each county to that county's governing authority. The act was scheduled to sunset on October 1, 1993.

In 1984, chapter 84-270, Laws of Florida, changed the name of the Home Ownership Trust Fund to the Housing Assistance Loan Trust Fund with the specified purpose of assisting the financing of construction, rehabilitation, or purchase of housing for low and moderate income families. Funds could be used for first or second mortgages, and buying property to form housing cooperatives. Special consideration was to be given to neighborhood economic development programs of Community Development Corporations. Not more than 50 percent of the revenues collected each year could be used to finance new construction.

In 1989, the Legislature enacted chapter 89-252, Laws of Florida, to provide that the discretionary surtax program will sunset on October 1, 2011. In 1992, the Legislature enacted chapter 92-317, Laws of Florida, to provide that a portion of the discretionary surtax revenues deposited into the Housing Assistance Trust Fund could be deposited into the Home Investment Trust Fund of the county as defined by and created under the requirements of federal law. These set-aside funds are to be used to finance the construction, rehabilitation, or purchase of housing for low-income and moderate-income families and to fund any local matching contributions required under federal law.

The income restrictions and the cap on the discretionary surtax remain unchanged since 1983.

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[2] Counties that meet the definition of "county" in s. 125.001(1), F.S. Currently only Miami-Dade County satisfies this definition.

**State Excise Tax on Documents**
Chapter 201, F.S., levies a statewide tax on deeds or other documents that convey an interest in Florida real property. The tax rate on such documents is 70 cents per $100 of consideration paid for the transferred property, except in Miami-Dade County, where the tax rate is 60 cents per $100 of consideration.[3]

Section 2 of chapter 92-317, Laws of Florida, enacted a 10 cent increase in the state excise tax rate on deeds referenced above, bringing the tax rate from 60 cents to 70 cents per $100 of consideration. Section 34 of chapter 92-317 (now codified in 201.0205, F.S.) exempted deeds in Miami-Dade County from the 10 cent tax rate increase, on the condition that the Discretionary Surtax on Documents is levied.

**Miami-Dade County Affordable Housing Documentary Surtax Program**
The discretionary surtax imposed by Miami-Dade County is contained in section 29-7 of the Code of Miami-Dade County, and is known as the "Metropolitan Dade County Documentary Surtax Ordinance." The ordinance directs that the surtax be assessed at the full rate of 45 cents per $100 of value on deeds and instruments transferring real property with the exception of documents transferring title to a single-family residence. The ordinance also contains the Miami-Dade County Housing Assistance Loan Trust Fund and establishes the purposes for which surtax revenues may be used.

Miami-Dade County reports that over the past five years, the surtax program has provided more than $179 million for the construction, rehabilitation, and purchase of housing for low-income and moderate-income families, including $29 million for 652 homeownership loans.

**Local Housing Assistance Plans**
Subsection (1) of s. 420.9075, F.S., requires each county or eligible municipality participating in the State Housing Initiatives Partnership (SHIP) program to develop and implement a local housing assistance plan. The plan must be created to provide affordable residential units available to very low, low, and moderate income persons. The plan must also address the special housing needs of the homeless, the elderly, and migrant farm workers, as well as other persons who may need special housing assistance. The plans are also required to include definitions for essential service personnel including teachers and educators, police and fire personnel, health care personnel, skilled building trades personnel, and may include other job categories. Also, local governments are encouraged to develop a strategy within the assistance plan to recruit and retain essential service personnel, and a strategy to address the needs of persons deprived of affordable housing due to the closure of a mobile home park or the conversion of affordable rental units into condominiums.

Subsection (1) of s. 420.9075, F.S., requires that each county or eligible municipality participating in the SHIP program submit an annual report to the Florida Housing Finance Corporation (FHFC) by September 15th of each year. The report must include the following:

- The number of households served by income category, age, family size, race, and special needs.
- The number of units and average cost of producing units under each assistance strategy included in the plan.
- The average area purchase price of single-family units and the amount of rent charged based on unit size.
- The number of mortgages, the average mortgage rate, and the number of defaults by income category.
- A description of the status of implementing each strategy contained in the assistance plan
- Support services available to residents.
- The sales price or value of the housing produced broken down into percentages financed by the local housing distribution, other public funds, and private resources.
- Anything else considered significant by the reporting entity.

[3] Sec. 201.02(1), F.S.

Effect of Changes
The bill amends section 3 of chapter 83-220, Laws of Florida, as amended by section 1 of chapter 84-270, Laws of Florida, and section 1 of chapter 89-252, Laws of Florida, to provide that the discretionary surtax on documents for Miami-Dade will be repealed on October 1, 2031, instead of on October 1, 2011.

The bill also amends s. 125.0167, F.S., to require the following:

- No more than 10 percent of the surtax may be used for administrative costs.
- No less than 35 percent of the revenues collected shall be used to provide homeownership assistance for low and moderate income families in purchasing a home as their primary residence.
- No less than 35 percent of the revenues collected shall be used to finance construction, rehabilitation or purchase of rental housing for income limited families or persons.
- Any funds allocated for homeownership assistance or rental housing units that are not committed at the end of the fiscal year will be rolled forward and become eligible for any of the above mentioned uses and not subject to the 35 percent cap.
- Rehabilitation of housing owned by a recipient government is allowed only after an affirmative vote of the county governing body that no other sources of funds are available.
- A county levying the discretionary surtax on documents is given the option to create a housing choice assistance voucher program to be funded from surtax proceeds. Subject to procedures and requirements approved by the county, private-sector employers that pay the surtax may apply to the county for housing assistance allocations to be funded by up to 50% of the surtaxes paid by the employer. Such employers are to, in turn, distribute vouchers to qualified employees. The vouchers must be used for the purchase of a single-family residence within the county and within a 5 mile radius of the purchasing employer to be used by a low-income or moderate-income person who is actively employed by the purchasing employer and who is prequalified for a mortgage loan by a certified lending institution. Housing choice assistance allocations must be used within one year of the initial payment of surtax by the employer.
- Any housing assistance paid pursuant to the housing choice assistance voucher program is to be included in calculation of the percentage of the surtax revenues attributable to use for homeownership purposes.

The bill also amends s. 201.031, F.S., to require the following:

- By June 30, 2012, and every 5 years thereafter OPPAGA is to conduct a financial review of the discretionary surtax program in a levying county and provide a report to the Legislature.
- The governing body of a county implementing the surtax shall, by resolution, adopt a housing plan every three years. The housing plan must include provisions which are substantially similar to the requirements of the local housing assistance plan required in s. 420.9075(1),
- Counties levying the discretionary surtax on documents must adopt an affordable housing element to its comprehensive land use plan that complies with s. 163.3177(6)(f).
- The staff or entity with authority to implement the housing plan must prepare and submit an annual report to the governing body. The report must contain similar data to that required by the Florida Housing Finance Corporation in annual reports submitted by local governments who participate in the State Housing Initiatives Partnership program and who also implement a local housing assistance plan.

**AVOIDANCE OF DOCUMENTARY STAMP TAX**

Background and Current Law

**Conveyances from Grantor to Wholly Owned Grantee**

In 1990[4] the legislature amended s. 201.02. F.S., to add the last two sentences of subsection (1). In response to the legislation, the Department of Revenue (DOR) amended the Florida Administrative Code[5] (F.A.C.) to provide that a conveyance from a shareholder to a corporation in exchange for stock is subject to the

[4] Ch. 90-132, s.7, Laws of Florida
[5] Fla. Admin Code Rule 12B-4.013(7)

documentary stamp tax. This rule reflected the Department's interpretation of the 1990 legislation. DOR's position was later supported by a 2003 opinion of the Florida's 3rd District Court of Appeal.[6]

In 2005, the Florida Supreme Court addressed the question of whether the conveyance of property from a grantor to its wholly owned grantee was subject to Florida's documentary stamp tax in *Crescent Miami Center, LLC v. Florida Department of Revenue*[7].

In the *Crescent* case, Crescent Real Estate Equities formed Crescent Miami Center, LLC, and then transferred 99.9 percent of its interest in Crescent Miami Center to a subsidiary limited partnership that Crescent Real Estate Equities owned. The remaining 0.1 percent interest was transferred to another limited liability company. On the same day, the latter limited liability company transferred the 0.1 percent interest to the limited partnership so that the limited partnership became the sole owner of Crescent Miami Center.

The Supreme Court held that the documentary stamp tax did not apply to the transfer of real estate to a taxpayer owned solely by the grantor. The Court found "that 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."

**Effect of *Crescent* Decision**

The Supreme Court's opinion eliminated documentary stamp tax on the recordation of transfers of real estate when unencumbered property is transferred to a corporate entity that is owned by the same individual or individuals, who own the property in the same ownership proportions. Examples include transfers from:

- A corporation to a wholly owned subsidiary, or from a subsidiary to its sole corporate parent;
- From the owner of single member limited liability company to the limited liability company, or from a single member limited liability company to its sole owner;
- From partners to a limited liability company in which the partners each own equal membership interests, or from a limited liability company to the partners.

The author of an article in the October 2005 issue of *The Florida Bar Journal*[8]*,* opined that "in certain instances, practitioners could conceivably utilize *Crescent* to avoid the application of the documentary stamp tax on future transfers of real estate. A simple example demonstrates the planning potential in this area." The Journal article then provides the following example:

> Assume seller (*S*) and purchaser (*P*) have entered into a purchase and sale contract with a purchase price of $5 million in connection with the sale of real estate. Absent any documentary stamp tax planning, the sale of the real estate would generate documentary stamp tax of $35,000. However, the transaction could alternatively be structured as follows: 1) *S* contributes the real estate to a wholly owned special purpose limited liability company formed solely for the transaction (*S* LLC); 2) *S* then sells the membership interest in *S* LLC to *P* for the $5 million purchase price; 3) *P* then dissolves *S* LLC and takes title to the real estate. *S* and *P* end up in the same exact place, except that the documentary stamp tax has been avoided.

The author's opinion is that no documentary tax is due under *Crescent* given the facts in the example. In 2007, DOR published a Technical Assistance Advisement[9] in response to a question about the impact of *Crescent.* The Department's advisement agreed with the author's opinion that no tax is due on the recorded transfer of real property where the same owner of the property owns the real property in equal proportion after the transfer and there is no mortgage or other consideration given for the land.

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[6] *Crescent Miami Center, LLC v. Florida Department of Revenue*, 857 So.2d 904 (Fla. 2003).
[7] ***Crescent Miami Center, LLC v. Fla. Dep't of Revenue***, 903 So. 2d 913, 916 (Fla. 2005).
[8] *Crescent—Did the Florida Supreme Court Effectively Repeal the Documentary Stamp Tax on Transfers of Real Estate?*, **Florida Bar Journal** (October 2005).
[9] TAA No. 07B4-004.

It appears that a significant number of real estate transactions are being structured to allow real property sales to be recorded without incurring a documentary stamp tax liability. These transactions are structured to conform to what the Supreme Court determined was not a taxable transfer in *Crescent Miami.*

Effect of the Bill

This bill authorizes a person transferring real property to their own artificial legal entity to elect to pay the documentary tax due on the transfer at the time of recording the transfer, or at the time of any subsequent change in the ownership interest in the property, or at the time of any subsequent transfer of interest in the entity. If the subsequent transfer returns the property back to the original owner with no change, no tax is due on the subsequent transfer. A document showing that the election was made must be recorded at the time of the first transfer.

Specifically, the bill permits the recording of a transfer of real property from a grantor to a wholly owned grantee without the payment of documentary stamp tax under certain circumstance. The bill amends s. 201.02, F.S., to specify the characteristics of qualifying transactions to which such an election applies. Such a transaction must meet three conditions:

- A deed transfers an interest in real property from the owner of an artificial legal entity to that entity;
- There is a mere change in the form of ownership without effecting any change in beneficial ownership interests; and
- The only consideration for the transaction is an increase in the value of any ownership interests in the grantee entity.

If a transaction meets these three conditions, the bill provides that the parties may elect to pay the documentary stamp tax otherwise due on the fair market price of the property at the time of the transfer or, in the alternative, tax may be paid on the fair market value of the property upon any subsequent transfer of an ownership interest in the grantee artificial legal entity, or an interest in the real property.

An exception to the requirement for payment of tax on a subsequent transfer is provided when it represents a return of the interest in the real property from the artificial legal entity to the original owner, resulting in no change in the beneficial ownership interests previously held in the property.

When tax liability is triggered, the amount of consideration for purposes of calculating the tax due will be the greater of:

- Any increase in the value of any ownership interest in the grantee entity; or
- The fair market value of the interest in the real property at the time of the transfer.

Currently, the documentary stamp tax rate is 70 cents on each $100 of the consideration paid for a property transfer. The bill revises the definition of consideration under s. 201.02, F.S., to include any increase in the value of any ownership interest in a grantee entity, or any other entity.

The bill provides that if consideration is not determinable at the time of the transfer, consideration is presumed to equal fair market value.

B. SECTION DIRECTORY:

**Section 1.** Amends section 3 of chapter 83-220, Laws of Florida, as amended by chapter 84-270, Laws of Florida, and section 1 of chapter 89-252, Laws of Florida. Extends the authority of Miami-Dade County to assess a discretionary surtax on documents by extending the surtax sunset from October 1, 2011 to October 1, 2031.

**Section 2.** Amends s. 125.0167, F.S creates guidelines for use of surtax revenues and creates reporting requirements.

**Section 3.** Amends s. 201.02, F.S. authorizes a person transferring real property to their own artificial legal entity to elect the time to pay documentary tax.

**Section 4.** Amends s. 201.031, F.S. so that counties levying the discretionary surtax on documents must adopt an affordable housing element to its comprehensive land use plan

**Section 5.** Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill has two separate fiscal issues.

   The Revenue Estimating Conference (REC) has adopted positive fiscal impact on state and local revenues for section 3 of the bill which details when a person must pay documentary tax when transferring real property. State Revenues are expected to increase by $26.4 million in FY 2009-10 and by $29.4 million in FY 2010-11.

   On March 27th, 2009 the REC estimated in FY 2011-12 the extension of the Miami-Dade Surtax sunset would have a -$8 million impact on state revenues, including a -$3.2 million fiscal impact to General Revenue, and a -$4.8 million fiscal impact to various trust funds. In FY 2012-13, the impact on state revenues would grow to -$14.5 million, including a -$6.8 million to General Revenue, and a -$7.7 million to state trust funds.

2. Expenditures:

   The bill requires a dedication of state resources by requiring financial audits by OPPAGA of surtax revenues and expenditures. OPPAGA has stated that it can perform this within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   In 1983, the Legislature enacted chapter 83-220, Laws of Florida, creating s. 125.0167, F.S., to authorize the governing body of certain counties[10] to levy a discretionary surtax on documents for the purpose of establishing and financing a Home Ownership Assistance Loan Trust Fund.

   The extension of the sunset provision will continue the levy of the surtax in Miami-Dade County and avoid a reduction of local tax revenues beginning in 2011-12. On March 27th, 2009 the REC estimated the fiscal impact on local government due to the Miami-Dade discretionary surtax would be $9.5 million. In FY 2012-13, the fiscal impact to local government would grow to $17.2 million.

   On March 20, 2009, the REC adopted a positive fiscal impact for local government related to section 3 of the bill. Local government revenues (Miami-Dade County) are expected to increase by $1.1 million in FY 2009-10 and $1.2 million in FY 2010-11.

2. Expenditures:

   None.

[10] Counties that meet the definition of "county" in s. 125.001(1), F.S. Currently only Miami-Dade County satisfies this definition.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Persons who sell and buy real estate will continue to pay the discretionary surtax on documents if assessed by Miami-Dade at a rate of 45 cents/$100 of consideration. In addition, certain transfers of property not subject to tax under the Department of Revenue's current administration of ch. 201, F.S., as a result of the opinion announced by the Supreme Court opinion in *Crescent,* are again subject documentary stamp taxation under the bill.

D. FISCAL COMMENTS:

If the Miami-Dade discretionary surtax were allowed to sunset, current local housing distributions state-wide would likely be impacted. The distribution formula in s. 420.9073(1)(b), F.S., specifically excludes Miami-Dade. Therefore this would necessitate revising the formula by 2011 to include Miami-Dade in the statewide distribution formula. Miami-Dade would participate on the same basis of the rest of the state whether this would positively or negatively affect Miami-Dade's current funding levels, or if this increase in necessary funding would be offset by the 10-cent increase in state documentary stamp tax in Miami-Dade County cannot be determined.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

N/A

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.