

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 2040

INTRODUCER: Judiciary Committee and Senator Geller

SUBJECT: Documents Excise Tax

DATE: April 9, 2008

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	Fav/CS
2.			FT	
3.			GA	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill provides an alternative methodology for calculating documentary stamp tax liability when real property is transferred by a grantor to an artificial legal entity that the grantor owns. The bill appears to be designed to address a decision of the Florida Supreme Court that the transfer of real estate to a taxpayer owned solely by the grantor is not subject to documentary stamp tax. The bill specifies that revenues received under the legislation shall be deposited into the “Sadowski Affordable Housing Trust Fund.”

This bill substantially amends section 201.02, Florida Statutes.

**II. Present Situation:**

**Documentary Stamp Tax – Overview**

The excise tax on documents – also known as the documentary stamp tax – provides for the imposition of documentary stamp tax on deeds or other instruments that convey an interest in

Florida real property.<sup>1</sup> The tax rate is 70 cents for each \$100 of consideration for deeds, instruments, or writings whereby lands, tenements, or other real property, or any interest therein, are granted, assigned, transferred, or vested in a person.<sup>2</sup>

Subsections (6) through (9) of s. 201.02, F.S., provide for certain exemptions and limitations to the documentary stamp tax imposed under that statute. Those exemptions relate to:

- 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 a 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.<sup>3</sup>

The limitation is 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.<sup>4</sup>

For fiscal year 2006-2007, total documentary stamp tax collections were an estimated \$3.1 billion. Revenue from the documentary stamp tax is divided between the General Revenue Fund and various trust funds that are used to acquire public lands or support affordable housing.<sup>5</sup>

### **Conveyances from Grantor to Wholly Owned Grantee**

In 2005, the Florida Supreme Court – in the case of *Crescent Miami Center, LLC v. Florida Department of Revenue* – addressed the question of whether the conveyance of property from a grantor to its wholly owned grantee was a transaction subject to the documentary stamp tax.<sup>6</sup> Under the facts of that 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.

On February 25, 2000, Crescent Equities transferred a tract of real property ... in fee simple to [Crescent Miami Center]. According to the deed, [Crescent Miami Center] paid ten dollars and “other good and valuable consideration” for the

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<sup>1</sup> Section 201.02(1), F.S.

<sup>2</sup> *Id.* The tax is also levied on a second base. Certificates of indebtedness, promissory notes, wage assignments, and retail charge account agreements are taxed at 35 cents per \$100. Florida Senate, Florida House of Representatives, Office of Economic and Demographic Research, and Department of Revenue, *Florida Tax Handbook: Including Fiscal Impact of Potential Changes*, 53 (2007).

<sup>3</sup> Section 201.02(6)-(8), F.S.

<sup>4</sup> Section 201.02(9), F.S.

<sup>5</sup> Florida Senate, Florida House of Representatives, Office of Economic and Demographic Research, and Department of Revenue, *Florida Tax Handbook: Including Fiscal Impact of Potential Changes*, 53 (2007).

<sup>6</sup> *Crescent Miami Center, LLC v. Fla. Dep't of Revenue*, 903 So. 2d 913, 916 (Fla. 2005).

property. ... The deed was recorded, and [Crescent Miami Center] paid \$1,212,750 in documentary stamp tax, which was comprised of the state documentary stamp tax and a Dade County documentary surtax.

...

After paying this tax, [Crescent Miami Center] filed for a refund of the documentary stamp tax, but the Florida Department of Revenue (DOR) denied the application. [Crescent Miami Center] filed suit and asserted that it should not have been required to pay the tax because it was not a purchaser of real property under section 201.02(1). Since beneficial ownership of the property did not actually change, [Crescent Miami Center] argued, the transfer was a mere book transaction and thus not subject to the documentary stamp tax in section 201.02(1).<sup>7</sup>

The Supreme Court held that the tax did not apply to the transfer of real estate to a taxpayer owned solely by the grantor. The court concluded “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.”<sup>8</sup>

Some property appraisers and others have expressed concerns about the fiscal impact to the state because the types of transactions described in the *Crescent Miami Center* case are not subject to the documentary stamp tax.<sup>9</sup>

### III. Effect of Proposed Changes:

This bill addresses the application of the documentary stamp tax to the transfer of real property from a grantor to its wholly owned grantee. The bill establishes an alternative methodology for the payment of tax in these types of transfers. The bill appears to be designed to address the 2005 Florida Supreme Court case of *Crescent Miami Center, LLC v. Department of Revenue*, in which the court held that a transfer of real property from a grantor to a wholly owned grantee was not a transaction subject to the documentary stamp tax.<sup>10</sup>

The bill amends s. 201.02, F.S., to prescribe the type of transaction to which the alternative tax methodology will apply. The applicable transaction has three features:

- A deed transfers an interest in real property between the owner of an artificial legal entity and that entity;
- “There is a mere change in form of ownership without effecting any change in beneficial ownership interests;” and

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<sup>7</sup> *Id.* at 914-15.

<sup>8</sup> *Id.* at 919.

<sup>9</sup> See, e.g., Jeff Ostrowski, *Critics push to plug drain in tax loophole*, Palm Beach Post, August 12, 2007, available at [http://www.palmbeachpost.com/business/content/business/epaper/2007/08/12/m1a\\_TAX\\_LOOPHOLE\\_0812.html](http://www.palmbeachpost.com/business/content/business/epaper/2007/08/12/m1a_TAX_LOOPHOLE_0812.html) (last visited April 6, 2008).

<sup>10</sup> *Crescent Miami Center*, 903 So. 2d at 919. See the **Present Situation** section of this analysis for a discussion of the case.

- The sole consideration for the transaction is an increase in the value of any ownership interests in the grantee entity.

If a transaction meets these conditions, the bill provides that the parties can pay the documentary stamp tax on that transaction document or, in the alternative, elect to instead pay the tax that becomes due when there is a transfer of an ownership interest in the grantee artificial legal entity or a subsequent document that transfers an interest in the real property – whichever occurs first.

An exception under the bill is provided when the transfer 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 – thus laying a foundation for the alternative method of calculating the tax in transactions involving an artificial legal entity. Additionally, the bill specifies that exemptions from the documentary stamp tax must be expressly provided for in chapter 201, F.S., and that, absent an exemption, the tax shall apply to all deeds or other documents that transfer an interest in real property.

The bill specifies that tax collections resulting from the new provisions shall be deposited into the “Sadowski Affordable Housing Trust Fund.” There is not a trust fund with this name currently codified in the Florida Statutes. The intended reference may be to the State Housing Trust Fund under s. 420.0005, F.S., which currently is one of the trust funds to which documentary stamp tax distributions are made under s. 201.15, F.S.<sup>11</sup>

The bill provides an effective date of upon becoming a law, and it applies to property transfers in which the first transfer to an artificial entity occurs after the effective date.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

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<sup>11</sup> See, e.g., s. 201.15(9) and (10), F.S.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

This bill appears to be designed to address a Florida Supreme Court ruling that certain transfers of property between a grantor and a wholly owned grantee are not subject to the documentary stamp tax. By subjecting these kinds of transactions to taxation through an alternative methodology, it is anticipated that the bill will result in a potentially significant increase in tax collections over time. The Revenue Impact Conference discussed the proposed policy at its meeting on April 4, 2008; however, the conference participants did not release a final determination of the fiscal impact of the bill pending additional research on and discussion of the issue. The bill is on the April 11, 2008, conference agenda.

B. Private Sector Impact:

Certain transfers of property between a grantor and its wholly owned grantee will give rise to documentary stamp taxation, while presently they do not.

C. Government Sector Impact:

Currently, documentary stamp tax collections are deposited in the General Revenue Fund and in certain trust funds that support affordable housing and the acquisition of public lands. The bill specifies that tax collections resulting from the new provisions shall be deposited into the "Sadowski Affordable Housing Trust Fund." There is not a trust fund with this name currently codified in the Florida Statutes. The intended reference may be to the State Housing Trust Fund under s. 420.0005, F.S., which currently is one of the funds to which documentary stamp tax distributions are made under s. 201.15, F.S. To the extent that the provisions of the bill result in the taxation of transactions that currently are not subject to tax, the bill will generate additional revenue that may benefit activities funded through the affected trust fund.

The bill provides for certain taxpayers to elect an alternative methodology for the payment of documentary stamp tax. The bill specifies that the election shall be made using a form to be developed by the Department of Revenue. The department may experience expenses related to the development of the form, although it is not anticipated that the expenses would be significant.

**VI. Technical Deficiencies:**

The bill specifies that revenues resulting from its revisions to s. 201.02, F.S., shall be deposited into the "Sadowski Affordable Housing Trust Fund." Currently, the manner of distributing all documentary stamp taxes collected under ch. 201, F.S., is prescribed in detail in s. 201.15, F.S. In order to avoid potential inconsistency within the chapter, the Legislature may wish to

incorporate the bill's specialized distribution of a portion of the tax collections under ch. 201, F.S., into the provisions of s. 201.15, F.S.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on April 8, 2008:**

The committee substitute adds a provision specifying that tax revenues resulting from the changes made by the bill shall be deposited into the "Sadowski Affordable Housing Trust Fund."

- B. **Amendments:**

None.