

**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 2430

INTRODUCER: Judiciary Committee and Senator Lawson

SUBJECT: Excise Tax on Documents

DATE: March 27, 2009                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	<b>Fav/CS</b>
2.			FT	
3.			GA	
4.			WPSC	
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:**

Under this bill, a person transferring unencumbered real property to the person's own legal entity may elect not to pay documentary stamp tax at the time of the transfer, and to instead pay tax on the fair market value of the property when there is a subsequent change in an ownership interest in the property or a transfer of an interest in the real property. However, no tax is due if a subsequent transfer of the interest in the legal entity or a subsequent transfer of an interest in the real property simply returns the identical property interest back to the original owner, with no change to the owner's original ownership interest.

The bill prescribes the characteristics of a transaction to which an election applies. In addition, it specifies that the document evidencing the election must be recorded at the time of the transfer.

The bill represents a proposed response to a 2005 decision of the Florida Supreme Court holding 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.

This bill substantially amends section 201.02, Florida Statutes.

## II. Present Situation:

### Documentary Stamp Tax – Overview

The documentary stamp tax imposes an excise tax on deeds or other documents that convey an interest in Florida real property.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

### Conveyances from Grantor to Wholly Owned Grantee

Following 1990 legislation,<sup>5</sup> the Department of Revenue (DOR or department) amended the Florida Administrative Code<sup>6</sup> to provide that a conveyance from a shareholder to a corporation in exchange for stock is subject to the documentary stamp tax. This revision reflected DOR's understanding of the 1990 legislation. The department position was supported by a 2003 opinion of Florida's Third District Court of Appeal.<sup>7</sup>

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 the documentary stamp tax in *Crescent Miami Center, LLC v. Florida Department of Revenue*.<sup>8</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

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

<sup>2</sup> *Id.* A similar tax is also levied in s. 201.08, F.S., on a different tax base: certificates of indebtedness; promissory notes; wage assignments; and retail charge account agreements. See 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 (2008).

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

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

<sup>5</sup> Chapter 90-132, s. 7, Laws of Fla.

<sup>6</sup> Fla. Admin. Code Rule 12B-4.013(7).

<sup>7</sup> *Crescent Miami Center, LLC v. Fla. Dep't of Revenue*, 857 So. 2d 904 (Fla. 3d DCA 2003).

<sup>8</sup> *Crescent Miami Center, LLC v. Fla. Dep't of Revenue*, 903 So. 2d 913, 916 (Fla. 2005).

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. According to the Supreme Court:

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 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.

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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>9</sup>

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.”<sup>10</sup>

Some property appraisers and others have expressed concerns about the potential 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>11</sup>

In fiscal year 2005-06, Florida’s documentary stamp tax collections totaled roughly \$4 billion - the second highest source after sales tax. Estimates for state fiscal year 2007-2008 and 2008-2009 are below \$2 billion, largely reflecting continued weakness in the real estate market. In addition, however, 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 found was not a taxable transfer in *Crescent Miami*.

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<sup>9</sup> *Id.* at 914-15.

<sup>10</sup> *Id.* at 919.

<sup>11</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 March 22, 2009).

### Consequences of *Crescent*

The Supreme Court's opinion eliminates<sup>12</sup> documentary stamp tax on the recordation of transfers of real estate when unencumbered property is transferred to a corporation, or an LLC, which 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;
- To an owner of single member limited liability company, or from a single member limited liability company to its sole owner;
- Partners to a limited liability company in which the partners each own equal membership interests, or from a limited liability company to the partners.

As pointed out in the October 2005 issue of *The Florida Bar Journal*, "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."<sup>13</sup> 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.<sup>14</sup>

The author's opinion is that there is no documentary tax due under *Crescent* given the facts in the example when documents are recorded in the official records. In 2007, the Department of Revenue published a technical assistance advisement<sup>15</sup> in response to a question about the impact of *Crescent*. The department's advisement appears to agree 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.

### III. Effect of Proposed Changes:

The bill permits recordation of a transfer of real property from a grantor to a wholly owned grantee without the payment of documentary stamp tax under certain circumstances.

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<sup>12</sup> Minimum tax is due.

<sup>13</sup> Stephen G. Vogelsang and Adi Rappoport, *Crescent – Did the Florida Supreme Court Effectively Repeal the Documentary Stamp Tax on Transfers of Real Estate?*, 79 FLA. B.J. 44 (Oct. 2005).

<sup>14</sup> *Id.* at 48.

<sup>15</sup> Florida Department of Revenue, TAA No. 07B4-004.

Specifically, the bill authorizes a person transferring unencumbered real property to the person's own legal entity to elect to pay documentary tax either on the property's market value at the time of the transfer or subsequently when there is a change in an ownership interest in the property or a transfer of an interest in the real property.

The bill amends s. 201.02, F.S., to prescribe the characteristics of a transaction to which an election applies. Such a transaction must meet three conditions:

- A deed transfers an interest in real property;
- There is a mere change in the form of ownership without effecting any change in beneficial ownership interests; and
- 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 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, they may elect to pay tax on the fair market value of the property upon any subsequent change in an ownership interest in the real property or transfer of an interest in the real property.

An exception to the requirement for payment on the 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.

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 specifies that, if consideration paid in exchange for property includes property other than money, it shall be presumed that there is a purchaser.

The bill addresses a 2005 decision of the Florida Supreme Court holding 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. 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 on or after the effective date.

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

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

None.

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

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

This bill has not been reviewed by the Revenue Estimating Conference's impact conference. The conference reviewed a similar bill during the 2008 Regular Session (SB 2040) and concluded that the bill would have a positive cash impact in fiscal year 2008-2009 of \$30.1 million with a positive annualized impact of \$50.2 million.

B. Private Sector Impact:

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 in *Crescent Miami Center, LLC v. Florida Department of Revenue*, would again be subject to documentary stamp taxation under the bill.<sup>16</sup>

C. Government Sector Impact:

Florida relies on documentary stamp tax revenue to fund the payment of debt service on a variety of environmental bond issuances as well as a variety of trust funded programs. State General Revenue receives a residual amount after other distributions set forth in statute.

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 Department of Revenue noted the following technical or administrative concerns with the bill:

Paragraph 201.02(1)(a), F.S., as created, provides that consideration includes any increase in the value of any ownership interest in a grantee entity or any other entity. An increase in the value of any ownership interest occurs only on transfers into an artificial entity. Similar language is needed to include as consideration any decrease in the value of any ownership interest in a grantor entity or any other entity on transfers out of an artificial entity.

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<sup>16</sup> See the Present Situation section of this bill analysis for a discussion of the Supreme Court case.

Subparagraph 201.02(1)(b)2., F.S., as created, speaks to certain transfers between owners and their artificial entities. These transfers would include not only transfers to an artificial entity but also those transfers from an artificial entity.

Subparagraph 201.02(1)(b)3., F.S., as created, provides for transfers to an artificial entity where the consideration given is an increase in the value of any ownership interests in the grantee entity. There is no similar language dealing with transfers out of an artificial entity.<sup>17</sup>

The department also notes that the bill's effective date – upon becoming a law – likely will not afford the department sufficient time to promulgate the form required under the legislation and notify affected taxpayers.<sup>18</sup>

## 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 March 25, 2009:**

The committee substitute:

- Eliminates language from the bill which provided that, if consideration is not determinable at the time of the transfer, the consideration is presumed to equal fair market value and that the burden of proving otherwise is on the person liable for payment of the tax.
- Removes language from the bill which specified that exemptions from the documentary stamp tax must be expressly provided for in ch. 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.
- Revises one of the triggers for future payment of tax. Under the original bill, future payment of tax was based, in part, on a transfer of an ownership interest in the grantee artificial legal entity; under the committee substitute, it is based, in part, on a change in any ownership interest in the real property.
- Revises the effective date to specify that the act applies to property transfers for which the first transfer to an artificial entity occurs on (as well as after) the date the measure becomes a law.

### B. Amendments:

None.

<sup>17</sup> Department of Revenue, 2009 Bill Analysis, *SB 2430*, March 16, 2009 (on file with the Committee on Judiciary).

<sup>18</sup> *Id.*

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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