

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 Finance and Tax Committee

BILL: CS/CS/SB 728

INTRODUCER: Finance and Tax Committee, Judiciary Committee and Senator Bennett

SUBJECT: Excise Tax on Documents

DATE: April 2, 2009

REVISED: _____

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

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| 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 defines the term “short sale” and provides that the documentary stamp tax applies to transfers of real property pursuant to a short sale, but that the taxable consideration does not include unpaid indebtedness that is forgiven or released by a mortgagee holding a mortgage on the property.

The bill defines a short sale as a purchase and sale of real property where:

- The seller’s interest in the real property is encumbered by a mortgage in an amount greater than the purchase price paid by the buyer;
- A mortgagee releases the real property from its mortgage for an amount less than the outstanding mortgage indebtedness;
- The releasing mortgagee does not receive any interest in the property transferred; and
- The releasing mortgagee, grantor and grantee are engaged in an arm’s length transaction.

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.¹ The tax is calculated based on the consideration for the transfer, which includes money paid or agreed to be paid, the discharge of an obligation, and the amount of any mortgage or other encumbrance.² When first enacted in 1931, the documentary stamp tax rate was 10 cents per \$100 of consideration.³ Since that time major rate increases have occurred in 1957, 1963, 1979, 1981, 1985, 1987, 1990, 1991, and 1992.⁴ The current tax rate is 70 cents on each \$100 of consideration for deeds, instruments, or writings under which lands, tenements, or other real property, or any interest in the property, are granted, assigned, transferred, conveyed, or vested in a purchaser.⁵

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.⁶

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 of court 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.⁷

For fiscal year 2007-2008, total documentary stamp tax collections were an estimated \$2.3 billion. This amount is a 24.89 percent drop from FY 2006-2007. 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.⁸

¹ Section 201.02(1), F.S.

² *Id.*

³ Office of Economic and Demographic Research, The Florida Legislature et al., *Florida Tax Handbook, Including Fiscal Impact of Potential Changes*, 56 (2008), available at <http://edr.state.fl.us/reports/taxhandbooks/taxhandbook2008.pdf> (last visited Feb. 9, 2009).

⁴ *Id.*

⁵ Section 201.02(1), F.S. 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 Tax Handbook*, *supra* note 3, at 56.

⁶ Section 201.02(6)-(8), F.S.

⁷ Section 201.02(9), F.S.

⁸ *Florida Tax Handbook*, *supra* note 3, at 56.

Documentary Stamp Tax and Short Sales

People are engaging in “short sales”⁹ more frequently because of recent changes in the real estate market. In a short sale situation, lenders often agree to release the lien on the property for less than the full amount of the seller’s debt.¹⁰ When this happens there is sometimes a question on what is the proper consideration amount for determining the documentary stamp tax pursuant to s. 201.02, F.S. On September 23, 2008, the Department of Revenue (DOR) issued a technical assistance advisement in response to a request for guidance from the Florida Association of Realtors in determining the correct tax on deeds for short sales in Florida. In this advisement, DOR opined:

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 the 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 the 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 the 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.

...

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.¹¹

The Department of Revenue limited its holding to the specific facts provided in the request from the Florida Association of Realtors, and DOR stated that the Legislature may wish to clarify how the documentary stamp tax is to be applied in short sale situations.

⁹ A “short sale” is the “sale of real property for a price that is less than the owner’s outstanding debt secured by the property.” Florida Dep’t of Revenue, *Technical Assistance Advisement No. 08B4-006, Documentary Stamp Tax – “Short Sales” of Florida Real Property*, 1 (Sept. 23, 2008), available at <https://taxlaw.state.fl.us/wordfiles/DOC%20TAA%2008B4-006.pdf> (last visited Feb. 9, 2009).

¹⁰ *Id.* at 2.

¹¹ *Id.* at 3-4.

III. Effect of Proposed Changes:

This bill amends s. 201.02, F.S., to provide that the documentary stamp tax applies to a deed, instrument, or writing that transfers any interest in real property pursuant to a short sale. However, the taxable consideration for a short sale transfer does not include the unpaid indebtedness that is forgiven or released by a mortgagee holding a mortgage on the property.

The bill defines a short sale as the purchase and sale of real property in which:

- The grantor's (seller's) interest in the real property is encumbered by a mortgage or mortgages securing indebtedness in an aggregate amount greater than the purchase price paid by the grantee (buyer);
- A mortgagee releases the real property from its mortgage in exchange for a partial payment of less than all of the outstanding mortgage indebtedness owing to the releasing mortgagee;
- The releasing mortgagee does not receive any interest in the property transferred; and
- The releasing mortgagee, grantor and grantee are engaged in an arm's length transaction.

This bill provides an effective date of July 1, 2009.

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 clarifies s. 201.02, F.S., by providing that the documentary stamp tax applies to transfers of real property pursuant to a short sale, but that the taxable consideration does not include unpaid indebtedness that is forgiven or released by a mortgagee. See "Government Sector Impact" below.

B. Private Sector Impact:

By specifically providing that the taxable consideration for a short sale transfer does not include unpaid indebtedness that is forgiven or released by the mortgagee, the bill has the potential to decrease the cost of taxes certain purchasers might be required to pay.

C. Government Sector Impact:

This bill provides that the taxable consideration for a short sale transfer, as defined in the bill, does not include unpaid indebtedness that is forgiven or released by the mortgagee holding a mortgage on the property. Accordingly, this bill will result in less excise tax being collected than would be collected if the forgiven indebtedness were part of the taxable consideration. Because the Revenue Impact Conference has not yet reviewed this bill, the exact fiscal impact of the bill is unknown at this time. However, the Department of Revenue notes that this bill codifies its interpretation of existing law; therefore, the bill should not have a significant fiscal impact to the state.

VI. Technical Deficiencies:

None.

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 Finance and Tax on April 2, 2009:**

The C/S clarifies the limitation on the rights of the party releasing the mortgagor from the debt to receive an interest in the property and that the release is an arm's length transaction.

CS by Judiciary on February 18, 2009:

The committee substitute limits the scope of the bill by clarifying that the taxable consideration for a *short sale* transfer does not include unpaid indebtedness that is forgiven or released by the mortgagee holding the mortgage on the property. Additionally, the committee substitute provides a definition for the term "short sale."

B. Amendments:

None.