



Florida Department of Revenue Emergency Rule Relating to Documentary Stamp Taxes Due on Transfers of Ownership Interests in Legal Entities

The Florida Department of Revenue published its [Emergency Rule 12BER09-04](#) on October 30, 2009 in the *Florida Administrative Weekly*, backdating the effective date to October 14, 2009. The Emergency Rule implements [Chapter 2009-131](#), Laws of Florida, which imposes a documentary stamp tax at the rate of 70¢ per US\$100 (or fraction thereof) on any transfer of an ownership interest in a so-called "conduit entity" when the transfer occurs within three years of a post-July 1, 2009 transfer of Florida real property into the conduit entity.

Chapter 2009-131 is intended to overrule the Florida Supreme Court's decision in *Crescent Miami Center, LLC v. Florida Department of Revenue*, 903 So. 2d 913 (Fla. 2005). The court's decision held that there is no consideration (and, accordingly, no 70¢ per US\$100 documentary stamp tax on deeds due) when owners of Florida real property unencumbered by a mortgage convey an interest in such property to an artificial entity whose ownership is identical to the ownership of the real property immediately before conveyance. The statute states that it is "to be liberally construed to effectuate [its] purpose" to tax transfers in beneficial interests in Florida real property.

Chapter 2009-131 defines a conduit entity as "a legal entity to which [Florida] real property is conveyed without full consideration by a grantor who owns a direct or

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indirect interest in the entity, or a successor entity" and defines "full consideration" as "the consideration that would be paid in an arm's length transaction between unrelated parties." The determination of whether sufficient consideration has been paid or deemed to have been paid (and taxes due on such amount paid) may not occur until some years following the conveyance with the Department of Revenue and the former property owner presenting conflicting expert testimony by property appraisers.

The tax is imposed upon (1) the conveyance of real property (after July 1, 2009) to the conduit entity for less than "full" consideration followed within three years by (2) the transfer of an ownership interest in the conduit transferee for any consideration. The tax on deeds is due on any consideration paid or deemed paid by the conduit entity at the rate of 70¢ per US\$100 (or fraction thereof). The statute exempts certain estate planning transactions.

The first half of the Emergency Rule paraphrases Chapter 2009-131. The significant provisions are in the five examples stated in the Emergency Rule, especially Examples 2 and 5:

Example 2 – On July 2, 2009 Calvin and Sally transferred Florida real property (the real property), which they owned jointly, to a limited liability company (LLC) owned equally by Calvin and Sally. The full consideration at the time of the transfer would have been \$30,000. Documentary stamp tax of \$210 was paid on the document that transferred the real property to the LLC. On July 10, 2009, Calvin and Sally sold their ownership interests in the LLC for \$35,000. The only asset owned by the LLC at the time was the real property. No documentary stamp tax was due on the transfer of Calvin and Sally's ownership interests in the LLC, since tax was paid on the full consideration for the real property when it was transferred to the LLC.

Example 2 suggests that, if documentary stamp tax is paid on the deed, the Department will not seek to impose additional tax on the transfer of ownership interests in the conduit entity at a "profit" a short time later.

Example 5 – On July 2, 2009, Tom transferred Florida real property (the real property) owned by him alone to a limited liability company (LLC) he owned alone. No documentary stamp tax was paid on the document that transferred the real property to the LLC. On July 10, 2009, Tom sold 50% of his interest in the LLC to Imogene for \$200,000. Tax of \$1,400 was due on the transfer of Tom's ownership interest in the LLC based on consideration of

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\$200,000, since documentary stamp tax was not paid on full consideration for the real property when it was transferred to the LLC. On July 25, 2009, Tom sold one-half of his remaining 50% ownership interest in the LLC for \$105,000, and Imogene sold one-half of her 50% ownership interest in the LLC for \$105,000. Tax of \$735 was due on the transfer of Tom's ownership interest, since Tom was the grantor of the real property and since tax was not paid on the fair market value of the real property when it was transferred to the LLC. No tax was due on Imogene's transfer, since Imogene was not a grantor of the real property.

Example 5 is consistent with Example 2. These examples suggest that, once tax is paid on a transaction (in Example 2, the deed to the LLC; in Example 5, the transfer of a 50-percent LLC interest to Imogene), the Department will not seek to impose additional tax when the conduit entity owners further sell interests at a "profit" a short period of time following the taxed transaction.

As comforting as these examples may be to owners of Florida real property, it is important to note that they are merely examples. Nothing in Chapter 2009-131 or in the Emergency Rule precludes the Department from auditing a transaction to determine whether the correct tax was paid on the deed (Example 2) or on the ownership interests in the entity acquiring the real property (Example 5) so as to determine whether additional tax is due on the subsequent transfer of ownership interests.

The property owner may be better placed in Example 5 because, if additional tax is asserted on the value of the ownership interest, the now former property owner will effectively receive a credit for taxes paid on the earlier transfer of ownership interests in the conduit entity. In an Example 2 assessment, the property owner will have paid tax on the deed conveying the real property but will receive no credit when the Department assesses a second tax on the transfer of ownership interests in the conduit entity if it turns out that less than full consideration has been paid.

The Emergency Rule ignores what will be the most common transaction – the transfer of Florida real property that is encumbered with a mortgage to a conduit entity, without cash consideration, and subsequent transfers of an ownership interest in that entity to a third party. Since 1990 the Florida documentary stamp tax has provided that the consideration (taxed currently at the rate of 70¢ per US\$100 or fraction thereof) for conveyances of Florida real property "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" (Florida Statutes, § 201.02(1)(a)).

The property owner will pay documentary stamp tax on the deed when conveying real property to the conduit entity, measured by the outstanding balance of the mortgage. Following the logic of Example 2 of the Emergency Rule, the subsequent transfer of an ownership interest in the conduit entity should be free of additional documentary stamp tax (although the conduit entity may be obligated to submit a Notice of Change in Ownership or Control Non-Homestead Property on form DR-430 to the local property appraiser under *ad valorem* assessment statutes).

For more information regarding how this new tax may affect you, please contact one of the Squire Sanders lawyers listed in this alert.

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