

ARE YOU CHECKING FOR DOCUMENTARY STAMP TAXES ON TRANSFER OF ENTITY INTERESTS [FLORIDA]?

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Florida recently issued emergency rules relating to the imposition of documentary stamp taxes on the transfer of conduit entity interests. The rules do not greatly expand on the statutory rules, but are a useful reminder of the broad reach of the conduit rules. I would wager a significant sum that there are many transactional attorneys and business persons that are not routinely reviewing the potential application of Florida documentary stamp taxes on the transfer of interests in corporations, partnerships, LLC's, and other entities.

Florida imposes documentary stamp taxes at the rate of \$0.70 per \$100 of consideration paid for Florida real property. Some counties impose an additional surtax. In recent years, Florida law has developed to allow or acknowledge that oftentimes real property can be transferred to an entity without incurring the tax. This has opened the door to planning whereby taxpayers would transfer real property free of tax to an entity, and then sell the entity to a third party buyer (instead of selling the real property directly) to avoid documentary stamp taxes on that sale.

In 2009, Florida sought to close the door on this type of planning. It revised Fla.Stats. §201.02 to impose tax on transfers of interests in "conduit entities." Generally, a tax will be imposed if (a) real property is conveyed to a conduit entity, (b) within 3 years of the conveyance, and (c) all or a portion of the grantor's direct or indirect ownership interest in the conduit entity is subsequently transferred for consideration. If the entity owns assets other than real property, then the tax will be prorated. A "conduit entity" is a legal entity to which real property is conveyed without full consideration by a grantor who owns a direct or indirect interest in the entity, or a successor entity.

Exceptions exist. Transfers of interests in a conduit entity that are in the nature of a gift (that is, they are without consideration), are not taxable. Transfers of interests in publicly traded entities are also exempt. A transfer of an interest to an irrevocable

grantor trust is exempt – this appears directed at exempting sales to defective grantor trusts. A transfer of an entity interest at death generally should not be subject to tax since there is usually an absence of consideration paid.

The new emergency rules clarify that if the transfer to the entity was subject to documentary stamp taxes, then the transfer of the interest in the entity is not taxable as to that real property. They also have an example that makes clear that the buyer of an interest in the conduit entity will not be subject to tax on a subsequent resale of that interest, since the buyer was not the original “grantor.” The rules also provide that that tax is due on the earliest of the 20th day of the month following the month the ownership interest is transferred or the date that an instrument evidencing the transfer is filed or recorded in Florida.

Thus, any time there is a transfer of an interest in any nonpublicly traded entity for consideration, the question needs to be asked if Florida real property was transferred to it within 3 years by the seller (including indirect transfers through entities). This is similar to another set of tax rules that can relate to transfers of entities that is often overlooked – Code §1445 withholding on dispositions by foreign persons of interests in entities that are U.S. real property interests by reason of ownership of U.S. real property.

Florida Administrative Code §12BER11-2 (May 13, 2011)

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