

STORAGE NAME: h1835.jo.doc
DATE: March 28, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1835
RELATING TO: Excise Tax / Real Property
SPONSOR(S): Committee on Judicial Oversight and Representative Crow
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT YEAS 9 NAYS 0
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The state collects a documentary stamp tax applicable to certain types of documents. One of the most common documents upon which a documentary stamp tax is due upon is a deed.

This bill amends the documentary stamp tax provisions regarding deeds to provide that:

- The documentary stamp tax is not chargeable as to a deed, transfer, or conveyance of homestead real property for the purpose of creating a tenancy by the entireties.
- The documentary stamp tax on a certificate of title is calculated solely on the final bid amount if the certificate of title is issued to the party in whose favor the judgment of foreclosure is granted in the foreclosure proceeding, notwithstanding the amount of any underlying indebtedness. This bill further provides that this provision applies retroactively, except that all taxes that have been collected must be remitted and taxes remitted before the effective date are not subject to refund.

The recurring fiscal impact on state tax revenues for the exemption regarding transfers between spouses is estimated at \$900,000 annually. The fiscal impact on state tax revenues for the change regarding certain foreclosures is unknown. This bill will have a minimal impact on local government revenues.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Section 201.02, F.S., imposes a tax on deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interests therein is granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser, or any other person by his or her direction. The tax attaches at the time the deed or other instrument of conveyance is delivered, irrespective of the time when the sale is made.¹ A documentary stamp tax is also assessed on mortgages and stock certificates. The total of all documentary stamp taxes under ch. 201, F.S., collected in fiscal year 1999-2000 was \$1,212,177,570.²

Currently, the tax under s. 201.02, F.S., on deeds, instruments, documents, or writings whereby any lands, tenements, or other realty or any interest therein is transferred or conveyed is 70 cents³ on each \$100 or fractional part thereof of the consideration paid, or to be paid.⁴ "Consideration" under s. 201.02, F.S., includes, money paid or to be paid, the amount of any indebtedness discharged by a transfer of any interest in real property, mortgage indebtedness and other encumbrances which the real property interest being transferred is subject to, notwithstanding that the transferee may be liable for such indebtedness. Where property other than money is exchanged for interests in real property, there is the presumption that the consideration is equal to the fair market value of the real property interest being transferred.⁵

Transfers Between Spouses.

A transfer of unencumbered real property between spouses is not taxable, except that any consideration paid by one spouse to the other spouse for additional shares greater in value than their undivided interest is taxable. Where the property is encumbered, however, the documentary stamp tax on the transfer is based on the mortgage balance in proportion to the interest transferred by the grantor.⁶

¹ F.A.C. 12B-4.011

² Tax Statistics from the Department of Revenue, at <http://sun6.dms.state.fl.us/dor/tables/f2fy00.html>.

³ In Dade County, the rate is 60 cents per \$100 consideration, although the county imposes an additional 45 cents local surtax.

⁴ F.A.C. 12B-4.012(1)

⁵ F.A.C. 12B-4.012(2)

⁶ F.A.C. 12B-4.013(32)

For example, assume an unmarried person purchases a house and later marries. After the marriage, the person then wishes to add the spouse's name to the title. If the house is worth \$150,000 and is encumbered by a \$120,000 mortgage, the documentary stamp tax due on the conveyance that creates joint ownership is \$420, calculated as follows: \$60,000 (1/2 of the outstanding mortgage balance) x 0.007 (70 cents per \$100) = \$420.

This same rule used to apply to deeds when a spouse or former spouse would transfer title to a jointly owned home subsequent to divorce. However, in 1997, s. 201.02(7), F.S., was created to exempt from the documentary stamp tax any deed, transfer, or conveyance of the marital home, or any interest therein, between spouses or former spouses upon dissolution of their marriage.⁷ The exemption applies regardless of any consideration, including the assumption of underlying indebtedness.

A "tenancy by the entireties" is a "tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that, upon death of either, other takes whole to exclusion of deceased heirs."⁸

Section 196.031, F.S., provides that certain real property is entitled to what is known as a "homestead tax exemption". To obtain the exemption, the owner must reside on the property and must intend that the property is a permanent residence.

Documentary Stamp Tax and Foreclosures.

At the conclusion of a foreclosure proceeding, a clerk of court issues a certificate of title to the winning bidder. The certificate of title is recorded, and shows in the public record the transfer of title, as a deed does. A clerk's certificate of title is subject to documentary stamp taxes imposed by s. 201.02, F.S. The general rule is that the documentary stamp tax is calculated using the final bid price. 1953-1954 Op.Atty.Gen. 267. The clerk of court must collect the documentary stamp tax due from the winning bidder before issuing the certificate of title. 1960 Op.Atty.Gen., 060-177.

In practice, clerks of court have calculated the documentary stamp on behalf of the parties, and utilized solely the final bid in the calculation. If the foreclosure is a foreclosure of the first mortgage, as the vast majority of foreclosures are, the clerk's calculation based solely on the amount of the winning bid is the correct calculation. If the plaintiff is foreclosing a second mortgage, however, the clerk's calculation based solely on the bid amount will be incorrect. Section 201.02, F.S., was amended in 1990 to add the following:

For purposes of this section, consideration 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.

Subsequent to this change, the calculation of the documentary stamp tax on a foreclosure of an inferior lien (including a foreclosure of a second mortgage, homeowners' association fees, or condominium or cooperation association fees) must use the bid amount plus the outstanding balance of the first mortgage as the consideration upon which the documentary stamp tax is calculated. In practice, clerks of court calculating the documentary stamp tax on a certificate of title

⁷ Chapter 97-191, L.O.F., HB 153, by Representative Thrasher.

⁸ Black's Law Dictionary, 6th Edition, at 1465.

will not research the property records to discover the existence of superior liens, and plaintiffs and their counsel have unwittingly and uniformly failed to pay the correct documentary stamp tax since s. 201.02, F.S., was amended.

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 201.02(7), F.S., to provide that the documentary stamp tax is not chargeable as to a deed, transfer, or conveyance for the purpose of creating a tenancy by the entireties in property to which the homestead tax exemption is applicable.

This bill creates s. 201.02(8), F.S., to provide that the documentary stamp tax on a certificate of title is calculated solely on the final bid amount if the certificate of title is issued to the party in whose favor the judgment of foreclosure is granted in the foreclosure proceeding, notwithstanding the amount of any underlying indebtedness. This bill further provides that this provision applies retroactively, except that all taxes that have been collected must be remitted and taxes remitted before the effective date are not subject to refund.

The effective date of this bill is July 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes".

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Deeds between spouses: On March 23, 2001, the Revenue Estimating Conference estimated that this provision would result in an annual negative fiscal impact on revenues of \$900,000.

Foreclosures: The Revenue Estimating Conference has not met regarding this exemption.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill will have an insignificant negative impact on local governments. Section 201.11(2), F.S., provides that the county comptroller, or, the clerk of the court if there is no county comptroller, receives a collections commission of 0.5% of documentary stamp tax collected.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will directly benefit persons who transfer title to their home to themselves and their spouse by exempting the transaction from documentary stamp tax.

This bill will directly benefit persons foreclosing second mortgages, and homeowners' and condominium associations that are foreclosing to collect fees due to them, by lessening the amount of documentary stamp tax that they have to pay as part of the foreclosure process.

D. FISCAL COMMENTS:

The documentary stamp tax on deeds is expected to generate approximately \$767.3 million in FY 2001-2002. The approximate cost of the current tax exemption for deeds relating to dissolution of marriage exemption is \$5.6 million.⁹

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The exemption for transfers between spouses may perhaps be written overly broad, and thus exempt all deeds to any married couple.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A.

⁹ 2001 Florida Tax Handbook, at pages 48-49.

STORAGE NAME: h1835.jo.doc

DATE: March 28, 2001

PAGE: 6

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

Lynne Overton, J.D.