

## **Drop and Swap, Fishing, and Dogs**

We have the privilege of living in a state that constitutionally prohibits personal income tax. Florida is one of only seven states in the country that does not have a state personal income tax. But, Florida makes up for this gift by taxing us in other areas:

- Florida is in the top tier of states for sales taxes charged, at 6 percent. Colorado charges the lowest at 2.9 percent and California charges the highest at 7.25 percent.
- Florida is also ranked ninth out of the fifty states for taxes imposed on real estate transfers. The transfer tax is paid through the state documentary stamp tax. The documentary stamp tax rate is .7 percent of the selling price and is paid when the deed is recorded in the county's public records. So, for every \$100,000 of real property purchased, the seller or buyer owes \$700 in documentary stamp tax.

Seems simple, doesn't it? But, in the world of taxes, there is always someone looking for a way to beat out the tax man. It seems that for every loophole someone discovers there is legislation enacted to plug the hole. Once a new tax law is passed, the cycle starts all over again.

### **Drop and Swap**

This has been the case with documentary stamp taxes. Prior to 1990, the law evolved to the point where a transfer of unencumbered real property between an individual and his wholly owned company was not subject to documentary stamp tax. Further, on property that was encumbered by a mortgage, documentary stamps were only due on the amount of the mortgage debt. However, in 1990 the Florida Legislature changed the language in the documentary stamp tax statute to make a transfer of real property between an individual and his wholly owned company subject to the documentary stamp tax. This new legislation went unchallenged until 1998 when a father and son sued the Department of Revenue over documentary stamps charged on a transfer of ownership in condominiums they owned into their wholly owned corporation. The Florida courts (trial and appellate level) ruled that there was no real change in ownership and held there was no documentary stamp tax due on the transfer.

The Department of Revenue continued to collect documentary stamp tax on transfers of real property between individuals and their wholly owned companies. In 2003, the issue was once again in front of the Florida courts. However, this time an appellate court in Miami sided with the Department of Revenue and ruled that a transfer of real property between a corporate grantor to its wholly owned subsidiary was subject to documentary stamp taxes. This created a conflict among the appellate courts, and the Florida Supreme Court was called on to resolve the conflict between the Florida courts.

In 2005, in a case known as *Crescent Miami Center*, the Florida Supreme Court resolved the conflict in Florida and decided that a transfer of unencumbered real property between a company and its wholly owned subsidiary is not subject to the documentary stamp tax. After fifteen years can this debate over documentary stamp tax finally be put to rest? Unfortunately, the Florida Supreme Court's ruling is not the end of the story.

Following the Supreme Court's ruling in the *Crescent Miami Center* case, real estate attorneys devised a method to transfer property between a buyer and a seller that would have normally been subject to documentary stamps. The new transfer method was called the "Drop and Swap." Here is how the "Drop and Swap" worked:

John Black, owner of land he called Blackacre, contracts to sell Blackacre to Janet Green. There is no mortgage on Blackacre. John Black sets up a new company, JB Properties, LLC, which he wholly owns. He then deeds Blackacre to JB Properties, LLC. Based on the Supreme Court's ruling in *Crescent Miami Center*, no documentary stamps are due on the transfer. He then sells his interest in JB Properties, LLC (which consists only of Blackacre) to Janet Green. Green now owns Blackacre as the sole owner of JB Properties, LLC and no documentary stamps were paid on the transfer.

The "Drop and Swap" worked for several years, until this year when the legislature decided that it needed to curb this practice and enacted a new law potentially taxing the sale of ownership in a company that owns real property. Under the new law, if you sell an ownership interest in a company that owns real property, payment of documentary stamp tax may be required.

To be subject to the documentary stamp tax under the new law, the real property must have been transferred into the company during the three years prior to the company being sold and the initial transfer of the real property into the company must have been made under a *Crescent Miami Center* transaction (transfer of real property between individual and wholly owned company or company and its wholly owned subsidiary). Gifts of ownership interest in such companies are not subject to the tax. Also, sales of stock or equity interest in publicly traded companies are not subject to taxation. This new documentary stamp tax is paid directly to the Department of Revenue, not to the county clerk, as there is no deed recorded with the sale of a company interest.

Recently, two new cases were reported out of the Florida appellate courts related to documentary stamp tax and the *Crescent Miami Center* case. One of the decisions in those cases was consistent with the early documentary stamp tax cases (discussed above) in that the court ruled that documentary stamp tax is due on transfers of mortgaged real property between related entities based upon the amount of debt on the property. However, the court did not stop there and went on to hold that a transfer of real property for no consideration between two companies which were wholly owned by the same individual was subject to the documentary stamp tax. This doesn't seem logical, if the same transaction were broken into two steps: (1) transfer the property from a company to its sole owner, and (2) transfer the property from the owner to another wholly owned company, then no documentary stamps would be due. So why couldn't you skip over a step and transfer directly between the two companies? It makes no sense, but gives us guidance on what not to do. Take the two steps and be safe.

## **Fishing and Dogs**

There are two other cases that I thought would be of interest to you. The first one deals with liability arising from the release of pollutants. In the petroleum business, there is great concern about the liability that could arise from the discharge of contaminants into the water from underground storage tank systems. The question usually asked is how far downstream does that liability run? In a recent case out of Tampa the court held that commercial fishermen had no claim against a company that discharged pollutants into Tampa Bay. The fishermen sought damages for lost profits due to the fish kill caused by Company X's discharge of pollutants into the bay. The Florida courts dismissed the case finding that the commercial fishermen had no property interest in the fish which were killed as a result of the discharge and that Florida gave no statutory right of redress to from the polluter.

The last case that I will leave you with gave me a chuckle. A woman was walking her dog on a public sidewalk and decided to use a private property owner's yard for her dog to relieve itself. She ventured off the sidewalk into the owner's yard and let her dog relieve itself. As she was walking back across the owner's yard, she tripped on an old fence post protruding from the ground and fell and injured herself. The dog owner sued the property owner for her injuries. Fortunately, both the Florida courts made the right call and dismissed the case because it reeked. They said the dog owner (and her dog) was an uninvited guest when she crossed the property line to allow her dog to leave an unsolicited package on the private property. The private property owner was not responsible for making sure the uninvited guest was safe. Sometimes I wonder where lawyers come up with such ridiculous claims.

If you have any questions relating to transferring real property or relating to any other real estate, environmental or petroleum matters, please feel free to call us on the Petroleum Hotline (800-226-7091).

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