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Florida Amends Stamp Tax to Apply to Real Property Entity Sale Structures

Opportunities Remain for Pending Sales

Florida has enacted a change of law that may affect the taxation of pending or contemplated sales of Florida real property, but that may provide a window of opportunity for tax savings and planning until July 1, 2009.

Florida imposes a “documentary stamp tax” at the rate of 0.7 percent on the recordation of deeds or other instruments that transfer interests in real property located in Florida. In 2005, the Florida Supreme Court case *Crescent Miami Center, LLC v. Florida*, 903 So. 2d 913 (Fla. 2005), concluded that the documentary stamp tax did not apply to a transfer of unencumbered real property by a property owner to a wholly owned legal entity. Property owners soon thereafter began effecting sales of Florida real property by contributing the unencumbered property to a wholly owned subsidiary, and then selling the equity interest in the subsidiary, taking the position that the stamp tax did not apply to either element of the transaction. The Florida taxing authorities ultimately agreed that neither element of the structure was subject to tax, effectively recognizing that this structure allowed a sale of real property in Florida without incurring stamp tax liability. A contribution to a subsidiary of property with an accompanying assumption of mortgage debt was treated as subject to stamp tax to the extent of the assumed principal of the debt, with any recorded assumed principal subject also to Florida’s 0.3 percent nonrecurring intangibles tax. See *Department of Revenue v. PMR Resorts, Inc.*, 868 So 2d 621 (Fla. Dist. Ct. App. 2004).

On May 26, 2009, the Florida legislature presented Senate Bill 2430 to the Governor for signature into law, which is expected to occur. Among other things, the bill prospectively attacks the *Crescent Miami* documentary stamp tax structuring technique. Generally, the bill recognizes that a contribution of unencumbered property to a wholly owned entity for no consideration continues not to be subject to the documentary stamp tax. However, the bill amends the documentary stamp tax to impose the 0.7 percent tax on the sale within three years of part or all of the equity of such a subsidiary (called a “conduit entity”), as follows:

When real property is conveyed to a conduit entity and all or a portion of the grantor’s direct or indirect ownership interest in the conduit entity is subsequently transferred for consideration within 3 years of such conveyance, tax is imposed on each such transfer of an interest in the conduit entity for consideration at the rate of 70 cents for each \$100 or fraction thereof of the consideration paid or given in exchange for the ownership interest in the conduit entity.

Significantly, S.B. 1430 has an effective date of July 1, 2009, but provides that the new tax on transfers of interests in conduit entities “applies to transfers for which the first transfer to a conduit entity occurs after July 1, 2009.” As a consequence, it appears that if unencumbered property is transferred to a wholly owned subsidiary at any time on or before July 1, 2009, there is a reasonable position that a subsequent sale of an interest in the subsidiary would not be subject to the 0.7 percent tax, even if the sale of the interest in the subsidiary occurs after July 1.

This effective date provision could have important implications for pending Florida real property transactions. Even if a pending or contemplated Florida real property transaction will not close by July 1, it appears that if a seller can transfer the property to a wholly owned subsidiary on or before July 1, and the buyer is willing to acquire ownership of the property by thereafter purchasing the subsidiary, the documentary stamp tax may not apply to the consideration paid by the buyer for the subsidiary after July 1. The issues are more complex if the property is encumbered by an existing mortgage that must remain in place and be assumed by the subsidiary, but tax savings may still be available if an encumbered property is contributed to a wholly owned subsidiary before July 1, depending on the facts.

We anticipate that the Florida Department of Revenue will issue administrative rules interpreting the provisions of S.B. 2430, which may affect our analysis. However, the Florida Department of Revenue likely will not issue guidance prior to the July 1, 2009, effective date of the bill.

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