

**RPPTL WHITE PAPER  
REGARDING DOCUMENTARY STAMP TAXES ON “SHORT SALES”  
DRAFT OF 9/18/08**

**I. SUMMARY ANALYSIS**

Following the mortgage crisis nationally and significant declines in the value of homes in parts of Florida, some lenders are finding it preferable to accept less than the full amount owed on their mortgages in a negotiated sale (a “short sale”) rather than incurring the costs and uncertainties of foreclosing on the property, maintaining the property pending sale and locating another purchaser. Such sales have become quite common and relieved a significant additional burden on the court system.

It is doubtful that the legislature considered the prospect of wide spread short sales in drafting sec. 201.02. The statutory language and rules interpreting the statute can and have been read to reach diametrically opposed views as to whether documentary stamp taxes are due as to the amount of secured indebtedness forgiven by the lender in connection with a short sale to a third party.

In August 2009, a DOR staff member’s opinion to the effect that the amount of forgiven indebtedness on a short sale is part of the consideration subject to documentary stamps, received wide circulation. The consequences of this interpretation reach well beyond the higher documentary stamp tax on a short sale deed. These higher taxes will generate the public impression (which will be relied on by appraisers who look to documentary stamp amounts) that the property sold for a much higher price.

This process is expected to result in unjustifiably higher ad valorem tax appraisals, the appearance that home values are rising dramatically and a resultant delay in working out the existing mortgage crisis.

A stamp tax exemption for the indebtedness forgiven in short sales will have a fiscal impact on state and local government revenues or expenditures by reducing documentary stamp taxes and by reducing artificially increased assessed property valuations. A short sale exemption should reduce the expenditures of tax assessors in defending valuations based on artificially inflated valuations.

**II. BACKGROUND AND CURRENT LAW**

Following the mortgage crisis nationally and significant declines in the value of homes in parts of Florida, some lenders are finding it preferable to accept less than the full amount owed on their mortgages in a negotiated sale (a “short sale”) rather than incurring the costs and uncertainties of foreclosing on the property, maintaining the property pending sale and locating another purchaser. Such sales have become quite common and relieved a significant additional burden on the court system.

In these short sale transactions, property is conveyed to a third party purchaser and the existing first mortgage lender agrees to satisfy the existing mortgage for a sum less than what is owed. As part of such short sale transactions, subordinate mortgage and lien holders agree to satisfy their mortgages and liens for a small payment, well below the amounts owed and secured by the property. Since the costs of the transaction are not fully computed at the time of the agreement, and no funds rightfully accrue to the property owner, many first mortgage lenders require the payment to them of all net proceeds even if that exceeds the agreed minimum.

Sec 201.02(1) imposes a documentary stamp tax on the full amount of the consideration for the execution, assignment, transfer, or conveyance of the property. The statute is vague as to whether it applies to “consideration paid” or “consideration received” but is clear that taxable consideration does include the “discharge of an obligation.”

There is a legitimate difference of opinion as to the proper interpretation of the application of this statute to the discount on a short sale, with very good attorneys having diametrically opposed views.

One side of the argument fervently believe that the short sale discount is not consideration “given in exchange for” the real property and therefore not subject to documentary stamp taxes. Even if it were, they argue that the amount of the mortgage being forgiven is viewed as uncollectible by the lender, and thus as having essentially no economic value. Even if it is consideration within the definition in the statute, it has no value so shouldn’t affect the computation.

Other equally reputable counsel agree with a staff persons interpretation that all amounts released at a discount which were previously secured by a lien against the property, including principal, interest, default interest, late fees, costs and even attorneys fees, are part of the obligation discharged, and therefore subject to tax.

Almost all institutional mortgages also secure default interest, late fees, costs and attorneys fees incurred in connection with efforts to collect or restructure the debt. After a default, these amounts quickly and dramatically increase the total debt secured by the mortgage.

Because the payment to the first mortgage holder is often defined in terms of “net proceeds”, normal closing costs of the sale paid to realtors, for title insurance, the recording charges and even the taxes paid to the state reduce the payment to the mortgage holder. Thus, closing costs increase the amount of debt forgiven and the consideration subject to documentary stamp taxes. In a traditional sale, closing costs are not part of the consideration paid, so not subject to documentary stamp taxes.

The taxing of the amount of debt forgiven is comparable to the result where a property is conveyed to the mortgage holder by a deed in lieu of foreclosure. In that instance, tax is due on the unpaid portion of any mortgages or other encumbrances the property is subject

to, plus any other consideration as defined in Section 201.02(1), F.S., including accrued interest. 12B-4.013(2) F.A.C.

On the other hand, if the same property subject to short sale were taken through a complete foreclosure, the documentary stamp tax would be computed on the amount of the highest and best bid received for the property at the foreclosure sale. 12B-4.013(3)(a) F.A.C. When viewed in this light, the tax is higher when the debt is voluntarily compromised than when the same obligation is judicially foreclosed.

Documentary Stamp Taxes paid on a deed are the primary source of information relied upon by County Property Appraisers, private appraisers, realtors and reporting companies as to the prices at which properties sold. With the elimination of the requirement for filing Form DR-219 effective June 1, 2008, Ch 2008-24, Law of Fla. there is no other systematic source of such information or place to report a transaction that should not be used as a market comparable. Lawyers, Realtors and title companies are subject to various state and federal privacy obligations that preclude them from sharing that information with appraisers.

With the dramatic increase in the number of short sales, charging documentary stamp taxes on the amount of debt forgiven will often give the erroneous impression that the selling price of properties has increased from its peak a few years. This is expected to result in:

- a. Overvaluations of properties for ad valorem tax purposes and increased challenges to property tax appraisals;
- b. An overvaluation of the same properties for private purposes, which will make lenders less willing to work with over-extended homeowners and extend the workout of the mortgage crisis;
- c. Another opportunity for over-appraisal of properties feeding additional mortgage fraud in Florida.

### **III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT.**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues: An exemption for debt forgiven in a short sale will reduce Documentary Stamp Tax revenues by an indeterminable but sizeable amount. As there is no central registry of short sales, exact numbers will be difficult to identify, as will specific transactions potentially subject to this added tax.

As this is a recent interpretation of the statute, revenue estimates presumably do not factor this into future year estimates.

#### **2. Expenditures:**

As there is no central registry for short sale transactions, costs of DOR in identifying and enforcing these taxes will increase.

## **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

### **1. Revenues:**

Ad valorem property tax revenues will decrease from the artificially inflated levels which would otherwise occur as a result of taxing the debt forgiven in a short sale. Given the recent re-interpretation of the statute by DOR, one can presume that the additional documentary stamp taxes on forgiven debt have not yet worked through the system into appraised values.

### **2. Expenditures:**

There will be a savings to County Property Appraisers resulting from fewer challenges to appraised value.

## **IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The impact on the private sector will exactly match the lost revenues to the state and local governments.

## **V. RULE-MAKING AUTHORITY:**

The Department of Revenue has authority under sec. 201.02(c) to adopt rules relating to Documentary Stamp Taxes. However, such rules must be consistent with the statutory mandates. Given the statutory determination that consideration includes “the discharge of an obligation”, there is significant doubt as to whether the Department could resolve this issue by rule.

## **VI. CONSTITUTIONAL ISSUES.**

No Constitutional Issues are presented.