

## DOCUMENTARY STAMP TAXES AND SHORT SALES

by Shawn, Yesner, Yesner & Boss, P.L.

The Bay Area Real Estate Council (BAREC) provides these questions and answers as a service to GTAR members. BAREC members are experienced real estate attorneys committed to delivering timely expertise in negotiating and closing real estate transactions and providing title insurance services. This Q & A is offered to provide a general understanding of the law, not as a substitute for individual legal consultation.

**Q.** How can I ensure that documentary stamp taxes charged to my seller client in connection with a property that is being sold via short sale were properly calculated?

**A.** Florida Statute section 201.02 provides for the payment of docu-

mentary stamp taxes in the amount of \$.70 on each \$100 of the consideration paid, on deeds or other instruments that convey lands or other real property. In connection with a short sale, the question arises as to what exactly constitutes "consideration" and whether or not "consideration" is synonymous with (1) the purchase price, or (2) the purchase price plus any discharged debt.

There were two views to this controversy in 2008. The first, taken by sellers, buyers, and most real estate and title agents was that the documentary stamp taxes should be calculated based upon the purchase price alone, (using the example above \$150,000). The problem with this view is that a further reading of Florida Statute section 201.02 states that "consideration includes, but is not limited to, the money paid or agreed to be paid;

the discharge of an obligation...."

Following the statute in its entirety, consideration includes not only the purchase price, represented by the \$150,000 in the above example, but also the amount of mortgage debt discharged. Therefore reading the statute strictly would provide that documentary stamp taxes in the above example would have to be calculated based on the entire \$200,000.


Interpreting section 201.02 more in its entirety, the Department of Revenue stated in a letter dated August 7, 2008, that documentary stamp taxes are to be collected based on the "total consideration" of both money paid and any debt forgiven. However, in September of 2008, the Department of Revenue stated that no formal position had been taken on the issue as of yet which left many real estate professionals confused on how to advise their clients and close short sale transactions.

After much pressure from the Florida Association of REALTORS®, title insurance underwriters (including Attorneys' Title Insurance Fund, Inc.) and others in the real estate industry, the Florida Department of Revenue issued an advisory opinion on September 23, 2008. The Department of Revenue held that in a situation like the example above, the amount paid or given by the purchaser, or paid or given by another on behalf of the purchaser, for an interest in Florida real property is consideration and subject to tax. The Department further stated that in short sale transac-

tions such as the example above, the lender's cancellation of indebtedness of the seller is not included in determining the amount of consideration subject to tax under Florida Statute sec. 201.02.


Following the issuance of opinion by the Department of Revenue (Technical Assistance Advisory 08B4-006) it is clear that for the purposes of Florida Statute sec. 201.02 the purchase price paid by a buyer in a short sale transaction is the amount that should be used to calculate documentary stamp taxes that are due on the deed. In the above example documentary stamp taxes would be calculated based upon a \$150,000 purchase price. Real estate professionals should advise their clients and close transactions in accordance with the Department of Revenue's Technical Assistance Advisory Opinion.

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