



Florida Court Authorizes Imposition of Documentary Stamps on Real Estate Transactions

By Michael N. Jonas

Towards the end of 2007, Fox Rothschild reviewed a proposed transaction for a client involving commercial property in Leesburg, Florida. In a conference call with the seller's counsel, we raised the issue of documentary stamps on the transfer of membership interests in a limited liability company that owned Florida real estate. The seller's counsel took the position that as long as the property was not subject to a mortgage, the membership interests could be transferred without documentary stamp consequences. We took the position that since no case in Florida was reported approving a transfer of membership interests to an unrelated party without documentary stamps being paid on the value of the real property being transferred, we did not share the Seller's confidence. The seller's counsel relied on *Crescent Miami Center, LLC v. Florida Department of Revenue*, 903 So. 2d (Fla. 2005). However, *Crescent Miami* was decided on the facts that a corporation transferred land, which was not subject to a mortgage, to its wholly owned subsidiary.

The Second District Court of Appeals in Florida has jurisdiction over cases arising in the Circuit Court, which has jurisdiction over Leesburg, Florida. In a recent decision, the Second District Court of Appeals addressed the documentary stamp consequences on the sale of membership interest between third parties. The *Department of Revenue v. Pinellas VP, LLC*, Case No. 2D07-6038, 34 Fla L. Weekly D101 (Fla. 2d DCA January 7, 2009) states:

Crescent Miami is factually distinguishable from the cases before us for at least two reasons: (1) *Crescent Miami* involved no mortgage, and (2) *Crescent Miami* involved a direct transfer between a parent corporation and its wholly owned subsidiary. We cannot ignore the existing mortgages which section 201.02(1), specifically includes as forms of consideration. Nor can we accept that the transfers are immune from taxation merely because the grantors and grantees, separate and distinct corporations or limited liability companies, shared a common individual shareholder or member.

The Court concluded that Florida Statute section 201.02(1)"... plainly authorizes the imposition of a tax on the underlying real estate transactions..." and"...*Crescent Miami* is factually distinguishable...".

Based upon the imposition of the tax in this case, we may see the Florida Department of Revenue become more aggressive in other jurisdictions. In 2008 the Governor signed legislation that requires the parties engaged in the transfer of interests in business entities that own real estate to report the transfer to the County Property Appraiser. The look back period is 10 years, and the stated purpose is to recapture taxes that should have been paid based upon assessments that would have taken into consideration the unreported transfer. However, this information could be shared with the Department of Revenue and could be used in its pursuit of unpaid documentary stamps. Please note that in addition to the opinion in *Department of Revenue v. Pinellas VP, LLC*, the Florida Senate is reviewing legislation that seeks to limit the consequences of *Crescent Miami* to its facts.

For more information about this topic, contact Michael Jonas at 561.804.4404 or mjjonas@foxrothschild.com.



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