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MEMORANDUM Ref #2008-09.25

TO : ALL AGENTS

FROM: Craig R. Lynd (Counsel for KEL Title Insurance Group, Inc.)

DATE: 09/25/2008

RE : Document Stamps on Short Sale transactions

Please be advised that due to new information released this past week by the Florida Department of Revenue, KELTIG has changed its position regarding the calculation of documentary tax due on short sale properties. Please note that when a lender cancels a portion of its indebtedness, the cancellation is not included in determining the amount of consideration subject to tax under Section 201.02, Fla. Stat. Only the actual amount paid for an interest in Florida real property is considered and subject to tax.

Keep in mind also that documentary stamp tax is not a title insurance matter and is not covered by a title insurance policy, but we want our agents to be among the most informed.

Attached is a copy of the original memo and a copy of a letter from the Department of Revenue regarding this matter.

Please feel free to call our office if you have questions about this memo or any others.



****ATTACHMENT TO
MEMO DATED 9/25/2008****

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MEMORANDUM Ref #2008-09.4

TO : ALL AGENTS

FROM: Craig R. Lynd (Counsel for KEL Title Insurance Group, Inc.)

DATE: 09/04/2008

RE : Short Sale transactions

Please be advised the following policy regarding certain Short Sale transactions which are accompanied by a simultaneous flip.

The Problem: A short sale lender (the lender accepting less funds than it is otherwise entitled to) could theoretically make a claim that its satisfaction or agreement to enter the short sale transaction was obtained fraudulently. Particularly, if one of the parties involved is suggesting or providing information to the short sale lender about the property's value, then taking that parcel and selling it, typically the same day, for a much higher price. The relationship of the parties involved could be problematic if there is anything less than full disclosure. By way of example, the party negotiating the price with the short sale lender and the ultimate end buyer could be less than forthright in describing the situation depending on who his or her audience is at the time. Typically, these folks are doing whatever they can to make the deal go through.

The Solution: The Policy of KELITIG regarding short sales and simultaneous flips is that these transactions are prohibited. Short sales by themselves are fine and those transactions are encouraged with careful attention being paid to the closing instructions of the short sale lender.

The Exception: KELITIG will relax its policy as noted above provided that the law firm of Kaufman Englett and Lynd P.A., are engaged to facilitate the transaction which includes the negotiation of the short sale. This is the only way to assure KELITIG that the relationship of the parties involved in these transactions can not be challenged in the future.

For questions, please call Debra Winston of Kaufman, Englett & Lynd, P.A., via (407) 513-1900, ext. 7105.



September 23, 2008

Florida Association of Realtors
c/o Victoria L. Weber
Hopping Green & Sams
123 South Calhoun Street
Tallahassee, Florida 32301

Subject: Technical Assistance Advisement No. 08B4-006
Documentary Stamp Tax - "Short Sales" of Florida Real Property

Dear Ms. Weber:

This Technical Assistance Advisement responds to your request dated August 20, 2008. Your request satisfies the requirements of Rule 12-11.003, Florida Administrative Code, and the Department issues this advisement pursuant to Section 213.22, Florida Statutes.

FACTS

You have requested technical assistance on behalf of a taxpayer association, the Florida Association of Realtors. You request guidance in determining the correct documentary stamp tax on deeds for "short sales" of real property in Florida.

A "short sale" refers to the sale of real property for a price that is less than the owner's outstanding debt secured by the property. In a typical short sale, the seller is in financial distress and is currently defaulting on the debt secured by the seller's property or will likely default in the near future. Additionally, the property securing the seller's debt has declined in value due to market conditions, and the seller wants to sell the property to satisfy as much of the debt as possible.

The short sale involves three parties: (1) a real property owner (seller), (2) a lender that holds a lien against the seller's real property, and (3) a purchaser. None of the parties are related, nor does any party have a principal/agent or fiduciary relationship with any other party. All parties are acting in good faith and at arm's length. The seller's debt to the lender was incurred in an unrelated, prior transaction, and no other obligations or relationships between any of the parties are involved, except as described in this advisement.

Child Support Enforcement - Ann Coffin, Director • General Tax Administration - Jim Evers, Director
Property Tax Oversight - James McAdams, Director • Administrative Services - Nancy Kelley, Director
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As part of the sale to the purchaser, the seller is required to transfer the real property free of any mortgage liens or other debt-related encumbrances. The seller will contact its lender to determine if the lender will release its lien on the property for less than the full amount of the seller's debt.

Lenders have standard processes for agreeing to satisfy liens for less than a full pay-off. Generally, the seller completes an application once an offer is received,¹ and the lender evaluates the situation to determine whether it will agree to satisfy its lien for what the lender will receive under the sale. We understand that lenders generally have the property appraised to determine the fair market value of the real property, and lenders typically review the transaction to ensure that the seller and purchaser are negotiating at arm's length. After consideration of the seller's application and the risks involved, the lender will notify the seller whether it will agree to satisfy its lien under the circumstances.

Lenders that agree to satisfy their liens typically do so in three different ways. First, the lender may agree to satisfy its lien, but makes no representation concerning whether it will cancel the seller's remaining debt. Second, the lender may agree to satisfy its lien, but requires the seller to execute a separate promissory note for the remainder of the debt, explicitly establishing that it will not cancel the remaining debt. Third, the lender agrees to satisfy its lien, and agrees to cancel all or a portion of the remaining amount of debt after receipt of the proceeds remaining from the purchase price. The lender and the seller alone negotiate the satisfaction of the lien and the potential cancellation of debt; the purchaser has no influence or control over the relationship between the seller and the lender.

Once the lender has agreed to satisfy its lien on the property, the lender will provide a pay-off statement to the closing agent, notifying the agent of the amount of the proceeds from the sale to pay the lender at closing. The lender also files a satisfaction of lien and other applicable paperwork even though it is receiving an amount less than the outstanding debt on the property.

Although the lender's pay-off statement will identify the amount expected at closing, the pay-off statement does not include any information concerning the disposition of any remaining debt between the lender and the seller.

Typical procedures for the sale of real property are followed at the time the seller and purchaser close their transaction. The purchaser will provide the purchase price, and the seller will deed the property to the purchaser free of any mortgage or debt-related encumbrance.

REQUEST FOR ADVISEMENT

You request guidance on determining the consideration for the transaction for purposes of Section 201.02(1), Florida Statutes, when a lender cancels a portion of the seller's debt.

¹ While rare, it appears that some sellers will contact their lenders prior to listing the property for sale. In this circumstance, the lender may notify the seller that it will only release its lien on the seller's property for a certain amount, or it may wait until an offer is received before making the determination.

DISCUSSION

Florida imposes documentary stamp tax on documents that transfer an interest in Florida real property. The tax is calculated based on the "consideration" for the transfer. Consideration includes, but is not limited to, money paid or to be paid, the discharge of an obligation, and the amount of any mortgage or other encumbrance. See Section 201.02(1), Florida Statutes.

When the seller executes the document that transfers the real property to the purchaser, that document transfers an interest in real property and, thus, is taxable.

In determining consideration for the transfer, we note that the only thing of value given by the purchaser is the purchase money. Under the facts you provided, the purchaser is not giving any other property; the purchaser does not discharge any of the seller's obligations; the property is not subject to any liens, mortgages, or other encumbrances when it is transferred; and the purchaser is not directing any other party to give anything of value. The only other thing of value received by the seller is the lender's cancellation of debt.

In many common real estate transactions that are not short sales, the lender receives full payment of the loan obligation that the seller has incurred in an unrelated prior transaction. Once the lender has determined that this obligation is satisfied or will be satisfied, the lender agrees to satisfy its lien on the property. In a short sale, however, there is a partial satisfaction rather than full satisfaction of the loan obligation. The lender has determined that in the given circumstances it is willing to take present value dollars in satisfaction of the loan obligation, essentially discounting the amount of the loan by the full or partial cancellation of the amount of loan debt that is not satisfied in the short sale transaction. This cancellation of debt is valuable to the seller; thus, the question arises whether the amount of cancelled debt should be considered as consideration for the transfer. For the reasons discussed below, we conclude that it is not consideration for the transfer.

The lender's agreement to satisfy its lien and cancel a portion of the seller's debt is a separate, unrelated transaction between the seller and the lender. The seller and purchaser alone have entered into their contract for the transfer of real property. The lender is not related to either one of those parties and is not bound by any aspect of the contract between the seller and purchaser.

Independently, the lender has agreed to satisfy its lien and cancel a portion of the seller's debt. The lender is not related to or controlled in any way by either other party, and neither the lender nor any of its related parties is receiving any interest in the real property. The lender has merely evaluated its risk as a creditor of the seller and the decreasing value of seller's collateral, and the lender has made a business decision to cancel a portion of the seller's debt in return for the current payment of a lesser amount. Section 201.02(1), Florida Statutes, does not clearly impose tax merely because the seller happens to be a party to both transactions.

Unlike other situations where an obligation is discharged in exchange for real property, in the situation described above, it is, at best, unclear whether the Legislature intended to impose tax on the amount cancelled by the lender. When the application of a taxing provision is unclear or ambiguous, the Department is bound to construe that taxing statute narrowly, against the imposition of tax. See, e.g., State ex. rel. Seaboard A.L.R. Co. v. Gay, 160 Fla. 445 (Fla. 1948). Thus, we construe the statute to not include the lender's cancellation of debt as consideration in the instant case. However, the Legislature may choose to clarify the application of the statute through legislation.

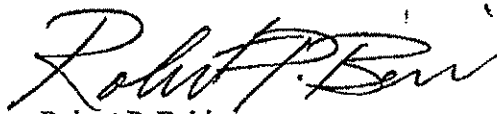
POSITION OF THE DEPARTMENT

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. However, in the transactions described above, when the lender cancels indebtedness of the seller, that cancellation is not included in determining the amount of consideration subject to tax under Section 201.02, Florida Statutes. This advisement does not address the application of Sections 201.08 and 201.09, Florida Statutes, when a promissory note or other security is executed between the lender and the seller.

This Technical Assistance Advisement is binding on the Department only under the facts and circumstances described in the request for this advice and only for the taxpayer involved in this advisement. Additionally, subsequent changes to the applicable law may subject similar future transactions to a different treatment than expressed in this response; the Legislature may clarify how documentary stamp tax is to be applied in this situation.

Lastly, this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Normally, confidential information, such as the identify of the person to whom an advisement is issued, must be deleted before public disclosure. When a taxpayer association requests an advisement on behalf of its members, the identity of the requesting association is helpful to those using the advisement for guidance. No specific taxpayer information is included in an advisement issued to a taxpayer association, and concerns about protecting proprietary information are not present under such circumstances. Pursuant to your written authorization, the association's name will be included in the published advisement.

Sincerely,



Robert P. Babin
Deputy Director, TADR
Florida Department of Revenue