

Merging out of state entities holding Florida real estate



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Many entities, both domestic and foreign, hold real property in the State of Florida. However, it's important to note the State of Florida imposes a documentary stamp tax on certain transfers of Florida real property. The question that arises is whether such a transfer occurs, requiring payment of Florida documentary stamp tax, when an out-of-state entity holding Florida real property merges with another non-Florida entity. Florida statutes provide no clear answer to this question.

The Florida documentary stamp tax is an excise tax levied on the documents described in Florida Statute Chapter 201. Generally, unless exempt, documentary stamp taxes are imposed on deeds that convey real property or any interest in real property at \$0.70 per \$100 or portion thereof of the consideration given or received in exchange for the property. Fla. Stat. § 201.02. Consideration includes but is not limited to: money paid or to be paid and the amount of any mortgage or other encumbrance on the property conveyed, whether or not the underlying indebtedness is assumed. Further, documentary stamp tax is also levied at the rate of \$0.35 per \$100 (or portion thereof) on documents that are executed or delivered in Florida (e.g. notes, bonds, mortgages, and liens). Fla. Stat. § 201.08. Although Florida law limits the maximum tax due on notes and other written obligations to \$2,450, there is no limit on the documentary stamp tax due for mortgages or liens filed or recorded in Florida.

In 2003, the Florida Department of Revenue issued a Technical Assistance Advisement ("TAA") providing:

“ There is no specific provision found in Florida statutes that exempts from documentary stamp tax a document that conveys an interest in Florida real property pursuant to a merger or the assumption of a note pursuant to a merger where neither of the artificial entities merging is a Florida entity. There also is no provision found in the Florida statutes that provides that either transaction, the conveyance of the property or the assumption of the debt, where neither of the artificial entities merging is a Florida entity, occurs by operation of law.

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Technical Assistance Advisement No. 03M-001, State of Florida (September 2, 2003). A TAA is a written opinion concerning a question of state tax law issued by the Department of Revenue in its discretion in response to a specific request submitted by or on behalf of a taxpayer. The opinion is binding on the department only with respect to the particular taxpayer(s) identified in the submitted request, and only under the particular facts and circumstances described in the request. Notwithstanding the lack of a specific statutory provision on this point, the Florida Department of Revenue has taken the position that documentary stamp taxes imposed under Fla. Stat. § 201.01 and 201.08, would not be due on either the conveyance of interest in Florida real property or the assumption of a debt by the surviving entity *if the conveyance is made by operation of applicable law of another state*. In other words, the merger laws of the other state would need to be similar to the merger laws of the State of Florida. See e.g. Fla. Stat. § 607.1106. For example, if another state's applicable law provides: 1) for real property to become the property of the surviving entity under a merger without reversion or impairment, and 2) the debt of the merging entity to become the debts of the surviving entity

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under a merger, then no documentary stamp taxes would be due on either the conveyance or on the assumption of the debts. For the most part, this rationale has remained unchanged in subsequent TAAs. See e.g. Technical Assistance Advisement No. 12B4-004, State of Florida, 2012 WL 3257661, at *1 (June 27, 2012).

However, mergers generally encompass several steps before they are finalized. Because of the complexity of certain mergers, each step should be evaluated for compliance with Florida law (even the most basic facts could play a role in the analysis, e.g. whether the assumptions are executed, signed and delivered inside or outside of Florida). The determination of whether documentary stamp taxes are due should be made on a case-by-case basis.