

conclusion is in accord with the provisions of §28.2401, F. S., providing a uniform filing fee for estates of decedents and requiring the circuit court clerk to collect a fee of sixty dollars for "filing of *all documents* in any estate having an inventory value not exceeding \$60,000." (Emphasis supplied.) As noted in AGO 072-327, this filing fee covers the clerk's services in filing the claims of creditors.

I understand that a reviser's bill to be introduced in the 1973 Session of the Legislature will amend §733.16, *supra*, to clarify this matter in accordance with the foregoing conclusion. In the meantime, it is suggested that the claims of creditors be filed with the circuit court clerk rather than with the circuit judge himself.

073-67—March 21, 1973

TAXATION

AMOUNT OF SURTAX LIABILITY ON CERTAIN CONVEYANCES

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee
Prepared by: William R. Cave, Assistant Attorney General and James D. Whisenand, Legal Intern

QUESTION:

When computing the surtax due under §201.021(1), F. S., on a deed of conveyance, does the total consideration on which such tax is based include a mortgage which the grantee assumes and agrees to pay when the original mortgagor (grantor) is released from the obligation by the mortgagee?

SUMMARY:

The total consideration for the measure of the surtax imposed by §201.02(1), F. S., includes the amount of a mortgage which the grantee assumes, agrees to pay, and from which the mortgagee releases the grantor (as mortgagor).

This question should in my opinion be answered in the affirmative. Section 201.021(1), F. S., levies a surtax on certain documents:

A documentary surtax, in addition to the tax levied in §201.02, is levied on those documents taxed by §201.02, at the rate of fifty-five cents per five hundred dollars of the consideration paid; provided, that when real estate is sold, the *consideration*, for purposes of this tax, *shall not include amounts of existing mortgages* on the real estate sold. If the full amount of the consideration is not shown on the face of the document, then the tax shall be at the rate of fifty-five cents on each five hundred dollars or fractional part thereof of the consideration. (Emphasis supplied.)

Existing mortgages, such as a mortgage assumed by grantee without release of the grantor by the mortgagee, on real estate conveyed, are exempt from the surtax imposed by §201.021(1), F. S. *Hubbard v. Highland Realty & Investment Co.*, 156 So. 322 (Fla. 1934). The grantee assumes primary liability and the grantor-mortgagor remains secondarily liable, permitting the initial mortgage to remain binding. *Kendall House Apartments, Inc. v. Department of Revenue*, 245 So.2d 221 (Fla. 1971).

A novation occurs when the contracting parties mutually agree to discharge a valid existing obligation (the original mortgage) and replace it with a new obligation. [See] 23 Fla. Jur. *Novation* §2; *United Bonding Insurance Co. v.*

Southeast Reg. Bldrs., Inc., 236 So.2d 460 (1 D.C.A. Fla., 1970); Board of Public Instruction v. State, 199 So. 760 (Fla. 1941). An essential element in this transaction is that the original debtor be released from liability by the mortgagee. Mills v. McMillan, 82 So. 812 (Fla. 1919).

Upon application of the referenced principles to the submitted facts, I would conclude that the existing obligation has been extinguished, the original mortgagor released from liability, and a new mortgage created. As such, the tax should be measured by the total consideration, which includes assumed liability under such new obligation.

073-68—March 21, 1973

TAXATION

DOCUMENTARY STAMP TAX—LIABILITY FOR CONVEYANCE FROM HUSBAND AND WIFE TO CORPORATION WHOLLY OWNED BY THEM

To: *Kenneth A. Plante, Senator, 14th District, Oviedo*

Prepared by: *Winifred L. Wentworth, Assistant Attorney General*

QUESTIONS:

1. When real property owned by husband and wife as tenants by the entirety is conveyed as a contribution to the capital of an existing corporation wholly owned by them as tenants by the entirety and not in exchange for corporate stock, is there liability for documentary stamp tax under §§201.02 and 201.021, F. S.?
2. Assuming the same facts as in question 1, is the tax owed when the deed of conveyance contains an assumption of a purchase-money mortgage encumbering the property?

SUMMARY:

Documentary stamp tax is imposed upon a conveyance by husband and wife as tenants by the entirety as contribution to capital of a corporation wholly owned by them as tenants by the entirety and not in exchange for corporate stock, the consideration to include assumption of a purchase money mortgage.

Both questions in my opinion should be answered in the affirmative. In AGO 063-18, one of my predecessors in office considered a similar inquiry and concluded as follows:

Likewise, a conveyance from stockholders of a corporation to said corporation, as a contribution to capital, will result in an increase of the value of the outstanding corporate stock affected, and is a taxable transaction. In such cases the actual or book value of the corporate stock, not its par value, will be the measure of such consideration. . . .

See also AGO 071-30 and State *ex rel.* Palmer-Florida Corp. v. Green, 88 So.2d 493 (Fla. 1956).

The conclusion with respect to question 1 is based on recognition that the conveyance is between two distinct entities and that the consideration flowing, through increase in value of the close corporate stock, is between legally distinguishable taxpayers. This should, of course, be distinguished from the factual situation when a new corporation sells or otherwise exchanges its stock, which has no book value, for nonmonetary consideration. In *Dickinson v. Grove View Estates, Inc.*, 243 So.2d 464 (1 D.C.A. Fla., 1971), the court determined such an