

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

exchange taxable and measured by the only reasonable consideration, in that transaction, of par value.

As to the second question, the "consideration" by which the amount of documentary stamp tax is measured under §201.02, F. S., includes the total consideration paid in the transfer, including outstanding mortgages whether they are "assumed" or the transfer is made "subject to" such obligations. *Kendall House Apartments, Inc. v. Department of Revenue*, 245 So.2d 221 (Fla. 1971); *Raspberry v. Dickinson*, 243 So.2d 236 (1 D.C.A. Fla., 1971). Section 201.021(1), F. S., however, specifically excludes "amounts of existing mortgages on the real estate sold," except for those situations when the original mortgagor (grantor) is released from liability. *United Bonding Ins. Co. v. Southeast Reg. Bldrs., Inc.*, 236 So.2d 460 (1 D.C.A. Fla., 1970); *Mills v. McMillan*, 82 So. 812 (Fla. 1919); AGO 073-67.

073-69—March 22, 1973

TAXATION

ATTACHMENT OF SEVERANCE TAX LIABILITY TO SULPHUR PRODUCTION

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Winifred L. Wentworth, Assistant Attorney General and James D. Whisenand, Legal Intern

QUESTION:

Is the Department of Revenue authorized to tax the severance of sulphur under part II, Ch. 211, F. S.?

SUMMARY:

Pursuant to part II, Ch. 211, F. S., the Department of Revenue is required to tax the severance of the solid mineral of sulphur when it is removed from the soil or water of this state in a molten form for commercial use.

Your question should in my opinion be answered in the affirmative under the provisions of part II, Ch. 211, F. S. You indicate that the sulphur in question is extracted from the soil or water as sour crude oil in a molten state and kept in this state for ease of transportation. A separation process produces a sweet crude oil, gas, and sulphur. The sulphur production is a by-product of the first stage of refining.

Part II of Ch. 211, F. S., imposes a tax on the severance of solid minerals as levied by §211.31(1):

There is hereby levied, to be collected as provided herein, an excise tax upon every person engaging in the business of severing solid minerals from the soils and waters of this state for commercial use. Such tax shall be 5 percent of the value at the *point of severance* of the identifiable solid minerals severed. . . . (Emphasis supplied.)

A mineral is severed when it is extracted from the soil or water, whether upon or below the surface, and the point of severance is that point at which the solid mineral being severed is identifiable as to its kind and quality; §211.30(2) and (6), F. S. The term "solid mineral" is defined in §211.30(1), F. S.:

The words "solid mineral" mean *all* solid minerals, including, *but not limited to*, clay, gravel, phosphate rock, lime, shells (excluding live shellfish), stone, sand, and *any rare earths* which have heretofore been discovered or may be discovered in the future, which are contained in the soils or waters of this state. (Emphasis supplied.)