



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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May 27, 2011

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The Honorable Yvonne G. Smith
Clerk of the Circuit Court of Henrico County
Post Office Box 90775
Henrico, Virginia 23273-0775

Dear Ms. Smith:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire, in light of an apparent conflict between the *Code of Virginia* and the Virginia Administrative Code, how to calculate the recordation tax on deeds of trust when the amount secured under the deed is greater than the fair market value of the property subject to the deed.

Response

It is my opinion that, when the amount secured by a deed of trust is known, the Clerk of Court should calculate the recordation tax based on the amount of indebtedness rather than the fair market value of the encumbered property.

Applicable Law and Discussion

Section 58.1-803(A) of the *Code of Virginia* provides that

A recordation tax on deeds of trust or mortgages is hereby imposed at the rate of 25 cents on every \$100 or portion thereof of the amount of bonds or other obligations secured thereby. . . . In any case in which the amount which may be secured under a deed of trust or mortgage is not ascertainable, the tax shall be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust or mortgage.

Section 58.1-203(A) provides:

The Tax Commissioner shall have the power to issue regulations relating to the interpretation and enforcement of the laws of this Commonwealth governing taxes administered by the Department. Such regulations shall not be inconsistent with the Constitutions and applicable laws of this Commonwealth and of the United States.

Pursuant to this authority, the Commissioner has promulgated that

The recordation tax is not a tax on property but on a civil privilege, i.e., the privilege of utilizing the registration laws of Virginia. The tax is generally measured by the consideration or actual (fair market) value of the property transferred, whichever is greater, and the amount of bonds or other obligations secured by deeds of trust or mortgages.^[1]

The regulations also provide the following illustration:

A. Examples of deeds of trust, mortgages and supplemental indentures taxable under § 58.1-803 of the Code of Virginia:

1. A deed of trust secured by real estate with a lesser value than the note. For example, if real estate valued at \$30,000 secures a note of \$160,000, the tax is based upon the value of the real estate.^[2]

Applying these regulations, the Tax Commissioner has opined that:

The [recordation] tax is not imposed on the total amount of the bonds or other obligations described in a deed of trust, but on the amount that is secured by the property conveyed. Therefore, the amount secured by a recorded deed of trust can never be more than the fair market value of the property described and conveyed by the deed. The tax will be limited to the fair market value of the property conveyed whenever the amount of the bonds or other obligations exceeds the value of the property conveyed.^[3]

When a statute is unambiguous on its face, it will be interpreted according to its plain language.⁴ The plain language of § 58.1-803(A) states in its opening sentence that the recordation tax on deeds of trust shall be imposed on “the amount of bonds or other obligations secured thereby.” “Secured thereby” means “secured by the deed of trust.”⁵ The statute allows for levying the recordation tax based on the fair market value of the collateral property legally conveyed to the trustee in situations where the loan amount secured by the deed of trust is *not* ascertainable. The statute is silent with regard to fair market value where the loan amount *is* ascertainable.⁶ By the express terms of the statute, consideration of fair market value occurs only when the amount of indebtedness is unknown. Other provisions of the statute support this reading.⁷

¹ 23 VA. ADMIN. CODE § 10-320-10.

² *Id.* at § 10-320-40.

³ Ruling of the Tax Comm’r, No. 06-77 (August 23, 2006).

⁴ *See, e.g.,* Hubbard v. Henrico Ltd. P’ship, 225 Va. 335, 339-40; 497 S.E.2d 335, 337-38 (1998).

⁵ *See* 2002 Op. Va. Att’y Gen. 132, 134.

⁶ *See* Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 483, 666 S.E.2d 361, 370 (2008) (“The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word . . .”) (quoting Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984)). *See also* Hubbard, 225 Va. at 340, 497 S.E.2d at 338 (“[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.”).

⁷ *See* § 58.1-803(C) (recording tax on mortgage is determined by the value of bonds issued rather than on the fair market value of the property); § 58.1-803(D) (recording tax in refinance situation is based on the amount that is in addition to the original debt secured by the deed of trust, not the fair market value of the property).

Moreover, previous opinions of this Office have concluded that “the measure of the recordation tax . . . is the amount of the obligation secured[,]”⁸ and that “Section 58.1-803(A) provides that the tax shall be assessed on the basis of the fair market value of the property *only* where the amount of the obligation cannot be ascertained from the face of the instrument.”⁹ This is so even where the amount of the loan secured is considerably less than the fair market value of the property.¹⁰ Further, where the question presented was whether the tax should be based on the maximum amount authorized under the line of credit or the fair market value of the property, this Office determined that “[t]he proper tax should be based upon the maximum amount for which the owners may be held liable under their guaranty. That maximum is the same maximum amount which is authorized under the line of credit line and not the fair market value of the property conveyed.”¹¹

The underlying purpose of the statute confirms that the recordation tax is ordinarily to be based on the amount stated in the obligations that are secured, not the fair market value of the property. “The recordation tax is not a tax on property . . . but a tax on a civil privilege[,]”¹² *i.e.*, the privilege of utilizing the registration laws of Virginia. The Recording Act¹³ provides that a recorded deed takes priority over any unrecorded deed and any deed subsequently recorded.¹⁴ Recording is required for one reason only: to perfect an instrument against claims of competing title or right by those claiming an interest through an unrecorded instrument and by subsequent purchasers and creditors.¹⁵ Therefore, the statute logically provides for the tax to be based on the amount being protected by the recordation when that amount is ascertainable, rather than on the initial (and often fluctuating) fair market value of the property that is used as collateral.

I therefore conclude that the example provided in Title 23, § 10-320-40(A)(1) of the Administrative Code is inconsistent with the plain language of Virginia Code § 58.1-803, so that when

⁸ 1981-82 Op. Va. Att’y Gen. 388.

¹¹ 1990 Op. Va. Att’y Gen. 257, 258 (Emphasis added).

¹⁰ See 1981-82 Op. Va. Att’y Gen. 388 (holding that where only part of the loan amount was secured by the subject deed of trust, and the remainder of the note was secured elsewhere, the recordation tax was based on the amount specifically agreed to in the deed of trust).

¹¹ 1984-85 Op. Va. Att’y Gen. 386, 387.

¹² See *Pocahontas Consol. Collieries Co., Inc., v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912) (describing recordation as a privilege by which purchasers and creditors may avail themselves, on the terms prescribed by the statute, of the benefits and advantages of the state’s public registry) (citing Attorney General of the United States holding that tax on the recordation of a deed conveying property to the United States was a tax upon a civil right and not a tax upon property, *Opinions of Attorney General of the U.S.*, Vol. 18, p. 491). See also *White v. Schwartz*, 196 Va. 316, 321, 83 S.E.2d 376, 379 (1954) (following *Pocahontas*, holding that the recording tax is not a tax on property but a tax on a civil privilege); 23 VA. ADMIN. CODE § 10-320-10.

¹³ VA. CODE ANN. §§ 55-95 through 105 (2009).

¹⁴ See § 55-96 (providing, in pertinent part, that every deed, deed of trust, or mortgage “shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record . . .”).

¹⁵ An unrecorded deed is effective as between the parties to the deed. *Turner v. Stip*, 1 Va. (1 Wash.) 319 (1794); *Barton v. Brent*, 87 Va. 385, 13 S.E. 29 (1891); *Hunton v. Wood*, 101 Va. 54, 43 S.E. 186 (1903).

the amount secured by a deed of trust is known, the recordation tax is to be based on that amount rather than the fair market value of the collateral.¹⁶

Conclusion

Accordingly, it is my opinion that, when the amount secured by a deed of trust is known, the Clerk of Court should calculate the recordation tax based on the amount of indebtedness rather than the fair market value of the encumbered property.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
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¹⁶ See § 58.1-203(A). See also *Hancock Co. v. Stephens*, 177 Va. 349, 356, 14 S.E.2d 332, 334 (1941) (“We must construe the law as it is written. An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute.”).