



Bart L. Graham  
Commissioner

State of Georgia  
**Department of Revenue**  
Administrative Division - Tax Law & Policy  
Suite 15311  
1800 Century Blvd.  
Atlanta, Georgia 30345-3205  
(404) 417-6649

Frank M. O'Connell  
Director

May 26, 2010

[REDACTED]

Re: Intangible Recording Tax Protest and Claim for Refund per O.C.G.A. § 48-6-76(c) in the amount of [REDACTED] paid upon recording a Modification Agreement with the Clerk of Superior Court, [REDACTED] on July 15, 2009. Parties are [REDACTED] (Grantor) and [REDACTED] (Grantee)

Dear [REDACTED]

I have carefully considered your Protest and Claim for Refund of intangible recording tax per O.C.G.A. § 48-6-76(c) pursuant to the above-captioned matter. Your Protest and Claim for Refund, and all correspondence with accompany enclosures were considered in the review. It is my determination that your Claim for Refund in the amount of [REDACTED] is denied. The amount may not be refunded.

I also find that an additional [REDACTED] in intangible recording tax is due and payable plus payment of interest totaling [REDACTED]

In brief, intangible recording tax is an excise tax. It is not an ad valorem tax. It is "paid for the privilege of filing a document to protect the note secured by the recording of the security instrument, and the fact that it is based on the value of the property is only ancillary." *Bankers Trust Co. v. Jackson*, Ga. App., 1999 Ga. App. LEXIS 212, S.E.2d (1999).

O.C.G.A. § 48-6-60 contains definitions for a "collecting officer," a "security instrument," a "Long-term note secured by real estate," and a "Short-term note secured by real estate." O.C.G.A. § 48-6-61 provides in pertinent part that security instruments must be filed and the intangible recording tax paid no later than ninety days from the date of execution by the parties.

Ga. Comp. R. & Regs. r. 560-11-8-.14 Exemptions, at (b), provides in pertinent part that a

[REDACTED]  
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security instrument is not subject to payment of intangible recording tax: (b) "Where any of the following is Grantee [lender]: a federal credit union, a state of Georgia chartered credit union, or a church."

In the instant matter, the original recording between the parties with [REDACTED] as Borrower-Grantor, constituted a short-term note secured by real estate. It was recorded on January 8, 2003, and evidenced a principal loan amount of [REDACTED]. The parties executed six subsequent "Modification Agreements" although there is no record that the first one was ever officially recorded by the Clerk of Superior Court, [REDACTED].

Modification Agreement #4 between the parties was recorded on September 21, 2007. It set forth a Date of Execution of August 1, 2007, a Maturity Date of September 1, 2017, and a principal loan amount of [REDACTED]. The stated Maturity Date of more than ten years from the Date of Execution transformed what had been a short-term note secured by real estate into a long-term note secured by real estate. Accordingly, intangible recording tax was due and payable on the security instrument in the amount of [REDACTED]. However, the Clerk of Superior Court, [REDACTED] failed to collect the tax due upon recording. Therefore, as of October 31, 2007, the "ninety-first day" from the Date of Execution, a Bar to Foreclosure was automatically imposed on the instrument in conformance with O.C.G.A. § 48-6-77. In addition to the tax, a penalty of 50 percent was thereupon due with interest at the rate of one percent (1%) per month due and payable until all tax due is paid.

O.C.G.A. § 48-2-42 provides that "All penalties imposed by law are part of the tax and are to be collected as such. The proceedings to collect the original tax, the tax constituted from penalties imposed, and the interest shall all be conducted in the same manner . . . ."

Modification Agreement #5 between the parties advanced an additional [REDACTED] in long-term indebtedness when it was recorded on June 5, 2008. Its Date of Execution was April 25, 2008. However, the Clerk of Superior Court, [REDACTED] again failed to realize that there was an existing "tax deficiency" on record plus the fact that additional intangible recording tax was due based upon this instrument. Because additional tax in the amount of [REDACTED] was not paid by the ninety-first day, July 25, 2008, from the Date of Execution, a 50 percent penalty thereupon became due with interest at the rate of one percent (1%) per month due and payable until all tax due is paid.

The final document, Modification #6, which was also long-term, was recorded under Protest on July 15, 2009. It set forth a stated amount of long-term principal of [REDACTED]. The Clerk of Superior Court, [REDACTED] imposed intangible recording tax due totaling [REDACTED] which is thus the subject of the instant matter.

Based upon a careful review of all facts and documents submitted, because [REDACTED] is the Borrower-Grantor with respect to what became a long-term security instrument subject to tax, your Protest must necessarily be denied.

[REDACTED]  
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Because there exists a Bar to Foreclosure dating back to the recording of September 21, 2007, which has not yet been remedied by payment of all tax, penalty and interest, plus recordation of a subsequent Modification Agreement on June 5, 2008, which also added to the long-term indebtedness on record, with added penalty and interest still outstanding for that instrument, my findings with respect to this entire matter are as follows:

1) There is a deficit in the intangible recording tax in the amount of [REDACTED] with respect to the long-term instrument recorded on September 21, 2007, at [REDACTED]

2) There is a deficit in the intangible recording tax in the amount of [REDACTED] with respect to the Modification Agreement recorded on June 5, 2008, at [REDACTED]

3) The amount of [REDACTED] in intangible recording tax that was paid under protest may be applied toward the base amount of the delinquent tax due which totals [REDACTED]. Therefore, additional intangible tax of [REDACTED] shall be paid to the Clerk of Superior Court, [REDACTED]

4) Penalty at the rate specified in O.C.G.A. § 48-6-77 totaling [REDACTED] is due on Modification #4 and Modification #5 described above;

5) Interest at the rate specified in O.C.G.A. § 48-2-40 totaling [REDACTED] is due on Modification #4 and Modification #5 as described above.

Based upon the failure of the Clerk of Superior Court, [REDACTED] to properly collect all intangible recording tax due upon the recording of what had become a long-term instrument on September 21, 2007, plus additional intangible recording tax due upon recording of a Modification Agreement recorded on June 5, 2008, the request for a Penalty Waiver by claimant is hereby granted.

Upon payment of the amount still due and owing of [REDACTED] in intangible recording tax, plus payment of interest totaling [REDACTED] the Bar to Foreclosure upon the instrument will be lifted.

A copy of this decision is being provided to the Clerk of Superior Court, Camden County so that the instructions herein may be processed expeditiously. The Clerk is instructed to distribute the protested amount, along with the additional [REDACTED] intangible recording tax and the interest payment of [REDACTED] in accordance with the statute.

Sincerely,

*Frank M. O'Connell*  
Frank M. O'Connell

cc: Clerk of Superior Court, [REDACTED]