



State of Georgia

Douglas J. MacSinnitie  
Commissioner

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

Frank M. O'Connell  
Director

September 6, 2012

[REDACTED]

Re: An 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 an "Affidavit Regarding Payment of Georgia Intangible Recording Tax" with the Clerk of Superior Court, [REDACTED] on April 13, 2012. Parties are [REDACTED] (Borrower) and [REDACTED] (Lender)

Dear [REDACTED]

I have carefully considered your Protest and Claim for Refund of intangible recording tax, penalty, and interest 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 accompanying enclosures were considered in the review. This letter ruling contains the Department's decision with respect to each aspect of the Protest and Claim for Refund.

It is followed by "Additional Findings of Fact" that relate to the overall issues presented.

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," respectively. O.C.G.A. § 48-6-61 provides 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. The tax is imposed on each instrument at a rate of \$1.50 per \$500.00 or fraction thereof of the face amount of the note secured by the instrument.

O.C.G.A. § 48-6-76 concerns the procedure for filing a Protest of intangible recording tax. In brief, the Protest must be filed contemporaneous with recording of the instrument and payment of the tax (and penalty and interest, if applicable). It cannot be filed *ex post*.

O.C.G.A. § 48-6-77 is titled, Failure to pay intangible recording tax bars action on indebtedness; removal of bar; penalty; conditions under which penalty waived; acquisition of instrument by holder exempt from tax.

O.C.G.A. § 48-2-40. Rate of interest on past due taxes. "Except as otherwise expressly provided by law, taxes owed the state or any local taxing jurisdiction shall bear interest at the rate of 1 percent per month from the date the tax is due until the date the tax is paid. For the purposes of this Code section, any period of less than one month shall be considered to be one month. . . ."

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

An "Opinion of the Attorney General" holds, "When any of debt is repayable more than three years from date, it is all long-term and subject to the rates applicable thereto." **1960-61 Op. Att'y Gen. p. 519.**

The entire class of intangible recording tax regulations were legally promulgated and became effective on July 7, 1996. Since that date they have never been changed or amended in any way. A brief list of relevant regulations may prove instructive.

Rev. Reg. 560-11-8-.06 – Additional Advance, provides in pertinent part that in the case of a new note or a modification of a preexisting note, representing an additional extension of credit to be secured by a previously recorded instrument which otherwise requires no further recording, the intangible recording tax is determined according to the terms of the new note. This regulation contemplates that in the case of future advances, the collecting official will collect any additional tax due based upon the increased indebtedness.

Ga. Comp. R. & Regs. r. 560-11-8-.12 Instrument Securing Short-Term and Long-Term Notes, states: "Where a single instrument secures both long-term and short-term notes, intangible recording tax is due on the sum of the amounts of both the long-term and short-term notes, up to the maximum tax allowed per instrument."

Ga. Comp. R. & Regs. r. 560-11-8-.13 Secured Lines of Credit, provides that intangible recording tax is due and payable on an instrument that secures a long-term revolving line of credit secured by real estate, line of credit, or equity line of credit. It is based upon the total amount of the line of credit whether advanced or not. The \$25,000 maximum amount of intangible recording tax will apply with respect to the total amount of credit contemplated. . . . No additional tax will due on subsequent advances as long as the principal outstanding at any one time does not exceed the maximum amount permitted to be outstanding as determined from the face of the instrument.

This Protest and Claim for Refund concerns three separate payments of intangible recording tax, penalty and interest. They will be referred to hereinafter as the "2004 payment," the "2007 payment," and the "2011 payment." A brief summation concerning each follows below.

*2004 payment*

The Clerk of Superior Court imposed a total of [REDACTED] on the "2004 payment." This security instrument combined (what will be hereinafter referred to as) Note A [a short-term note executed in 2002 but never recorded; when it was added to a 2004 instrument securing Note B, which was long-term and for which intangible tax was paid (recorded on February 4, 2004; maturity date of January 1, 2009), a "Note to the Clerk" on the face of the instrument stated that no tax was due on Note A because it was a short-term note] and Note B. The amount of Note A was [REDACTED]. It thus remained unsecured from its Date of Execution until April 13, 2012, a.k.a. the date the tax was paid.

The [REDACTED] Clerk assessed the following amounts on Note A: Tax=[REDACTED]  
Penalty=[REDACTED] Interest=[REDACTED]

*2007 payment*

The Clerk of Superior Court imposed a total of [REDACTED] on the "2007 payment." A "First Amendment to a Georgia Security Deed and Security Agreement" was recorded on February 17, 2009. Repeating the pattern described above, this document encompassed Note A, Note B, and (what will be hereinafter referred to as) Note C, a short-term note in the amount of [REDACTED] with a Date of Execution of March 28, 2007. Given that no tax was ever paid as part of its inclusion in the First Amendment, Note C thus remained unsecured from its Date of Execution until April 13, 2012, a.k.a. the date the tax was paid.

The [REDACTED] Clerk assessed the following amounts on Note C: Tax=[REDACTED]  
Penalty=[REDACTED] Interest=[REDACTED]

*2011 payment*

The Clerk of Superior Court imposed a total of [REDACTED] on the "2011 payment." A "Second Amendment" to the above long-term Security Deed, with a Date of Execution of October 20, 2011, was recorded on November 16, 2011. Repeating the pattern described above, it advances principal to the Borrower via (what will be hereinafter referred to as) Note D in the amount of [REDACTED]. A "Note to the Clerk" on the face of the instrument states that because Note D is a short-term note, that no intangible recording tax is due.

It is also relevant that on page 2, the Security Deed states that Note A [upon which no tax had ever been paid up to this time, November 16, 2011] in the [original] amount of [REDACTED] had been paid in full.

The [REDACTED] Clerk assessed these amounts on the 2011 payment: Tax=[REDACTED]  
Penalty=[REDACTED] Interest=[REDACTED]

With respect to the instant protest and claim for refund, counsel for claimant is requesting:

- A refund of [REDACTED] in intangible recording tax paid.
- A full Penalty Waiver (of all penalties paid totaling [REDACTED]).
- A refund of [REDACTED] in accrued interest.

Findings of Fact

*Intangible Recording Tax*

Based upon statutory law and Department Regulations, all amounts of the base of intangible recording tax assessed by the Clerk of Superior Court, [REDACTED] concerning each of the three separate payments described above were correctly imposed. Each of the documents recorded in 2004, 2007, and 2011 meets the definition of a security instrument under the *Code*. As provided by 560-11-8-.06 Additional Advance, in the case of a new note or a modification of a preexisting note, representing an additional extension of credit . . . intangible recording tax is determined according to the terms of the new note. In the case of future advances the collecting official should collect any additional tax due based upon the increased indebtedness.

A review of the recordings at issue reveals that each one asserts via a "Note to the Clerk" on the face page that no additional tax is due because the new note being secured is short-term and therefore not subject to tax. Based upon Ga. Comp. R. & Regs. r. 560-11-8-.12 Instrument Securing Short-Term and Long-Term Notes, as well as a corresponding "Opinion of the Attorney General" as cited on page 2, intangible taxes were legally due.

Therefore, it is my finding that claimant's request for a refund of [REDACTED] in intangible tax is denied. The amount may not be refunded.

*Penalty*

Based upon the finding immediately above concerning intangible tax, all amounts of Penalty were imposed correctly according to statute by the Clerk of Superior Court, [REDACTED]

Therefore, it is my finding that claimant's request for a full Penalty Waiver representing [REDACTED] in penalties is denied. The amount may not be refunded.

*Interest*

*The 2004 payment*

When the "Second Amendment to Georgia Security Deed and Security Agreement" (the final document in the chain of recordings at issue) was recorded on November 16, 2011 [Deed Book 987, Pages 1-10], page 2, paragraph 3 of the instrument states: "The term loan by Lender to [REDACTED] evidenced by that certain Promissory Note dated September 3, 2002, made by [REDACTED] to the order of Lender in the original principal amount of [REDACTED] has been paid in full[.]"

Although no tax was paid on Note "A" at the time of recording on February 4, 2004, it became subject to collection of intangible tax due to its being incorporated into a long-term security instrument. Note "A" thus became subject to payment of penalty and interest on the 91<sup>st</sup> day from the date of recording: May 5, 2004.

Therefore, based upon the date range of May 5, 2004, until November 16, 2011, when the Second Amendment was legally recorded and states Note "A" had been paid in full, it is my finding that collection of interest due on Note "A" should terminate as of November 16, 2011 – a total of 91 months from the 91<sup>st</sup> day from the date of recording. (And not through April 13, 2012, the date that the tax was paid and the Protest filed.) Using 91 months as the applicable period/timeframe for calculation of interest (@1% per month per the base of the tax, or [REDACTED]), the result is Total Interest Due of [REDACTED]. This is [REDACTED] less than the amount assessed.

#### *The 2007 payment*

Interest assessed upon Note "C", a short-term note in the amount of [REDACTED] should be treated precisely as Note "A" above because the essential facts and circumstances mirror each other.

Note "C" was executed on March 28, 2007. The maturity date was March 20, 2008. It remained unsecured even after Note "C" was appended to the "First Amendment to Georgia Security Deed and Security Agreement," recorded on February 17, 2009, because no tax was ever paid on Note "C". It remained unsecured until April 13, 2012, the date that the tax was paid and the Protest filed. The amount of Interest assessed was [REDACTED]

Note "C" became subject to payment of penalty and interest, however, on the 91<sup>st</sup> day from the date of recording: May 19, 2009. Therefore, based upon the date range of May 19, 2009, through April 13, 2012, a total of 35 months represents the applicable period/timeframe for calculation of interest (@1% per month per the base of the tax, or [REDACTED]). The result is Total Interest Due of [REDACTED]. This is [REDACTED] less than the amount assessed.

#### *The 2011 payment*

Contrary to counsel's statement on page 5 of his letter dated April 13, 2012, interest in the amount of [REDACTED] was correctly calculated and imposed on Note "D" (the 2011 payment), a short-term note upon which no tax was paid at the time of recording.

#### *Summation of Interest Portion*

Based upon an overpayment of interest for Note "A" totaling [REDACTED] and an overpayment of interest for Note "C" totaling [REDACTED] it is my finding that a total of [REDACTED] in interest was overpaid with respect to those two notes.

Accordingly, counsel for claimant's request for a refund of interest totaling [REDACTED] is approved – plus an additional [REDACTED].

*Conclusion*

The Clerk of Superior Court, [REDACTED] is directed to refund to claimant a total of [REDACTED] from the special escrow account into which the protested amount of [REDACTED] was placed according to statute.

The Clerk of Superior Court, [REDACTED] is also hereby authorized to remove the remaining protested amount of [REDACTED] from the special escrow account and distribute it according to Georgia law.

Additional Findings of Fact

Based upon documents provided upon request from the Clerk of Superior Court, [REDACTED] it is also relevant to the instant matter that a long-term Deed to Secure Debt was recorded in [REDACTED] Georgia on December 29, 2005. The Date of Execution is December 1, 2005. As stated on page 4 of the Deed, the Maturity Date is December 1, 2022. The Deed secures a "Letter of Credit and Reimbursement Agreement" in the maximum principal amount of [REDACTED]. Its Date of Execution is December 1, 2005. The Deed lists [REDACTED] as "Borrower" with [REDACTED] captioned as "Owner", and [REDACTED] ("Bank"). The value of the [REDACTED] [REDACTED] is listed on the cover page of the Letter of Credit documents as [REDACTED].

These "Opinion[s] of the Attorney General" may prove instructive:

**Whether instrument is bond or long-term note is a fact question.** – Determination of whether an instrument is a bond or a long-term loan secured by real estate for purposes of determining which intangibles tax provisions shall apply is a fact question. 1954-56 Op. Att'y Gen. p. 772.

**Tax held applicable.** – Intangible recording tax imposed by O.C.G.A. § 48-6-61 is applicable to a long-term note secured by real estate held by a lender who was enabled to make the loan through the deposit of the proceeds of revenue bonds issued by a local housing authority and which deposit was conditioned upon the lender making the loan. 1984 Op. Att'y Gen. No. 84-17.

Although no tax was ever paid upon this recording, it is my determination that Intangible Tax based upon the stated Letter of Credit amount of [REDACTED] remains due. Consequently, intangible tax of [REDACTED] is due and payable to the Clerk of Superior Court, [REDACTED]. Additionally, applicable Penalty based upon the statutory rate is also due in the amount of [REDACTED].

With respect to Interest (@ 1% per month), using the Date of Recording of December 29, 2005, as the starting point, the 91<sup>st</sup> day from that date is March 30, 2006. Therefore, Interest that remains due and payable in the amount of [REDACTED] is predicated upon a 78-month timeframe, or March 30, 2006, through no later than September 30, 2012 (a.k.a. the "date the tax [will have been] paid").

[REDACTED]  
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Thus, the corresponding amounts due and payable to [REDACTED] with respect to the Letter of Credit are as follows:

Tax=[REDACTED] Penalty=[REDACTED] Interest=[REDACTED]. TOTAL AMOUNT DUE TO [REDACTED]  
[REDACTED] [REDACTED] No part of the total amount due may be refunded.

*Conclusion*

Payment of [REDACTED] should be remitted in full by the claimant to the Clerk of Superior Court, [REDACTED] no later than September 30, 2012. Should any part of that amount fail to be paid, then interest will continue to accrue at the statutory rate.

As the "collecting officer" under the *Code*, the Clerk of Superior Court, [REDACTED] is hereby directed to process that payment expeditiously and distribute it according to Georgia law.

Sincerely,

  
Frank O'Connell

FOC/RJL/me

cc: Clerk of Superior Court, [REDACTED]  
Clerk of Superior Court, [REDACTED]