

July 8, 2002

Lynn G. Howell, Supervisor of  
Recording & Licensing  
Circuit Court for Harford County  
20 West Courtland Street  
Bel Air, Maryland 21014-3783

Dear Ms. Howell:

By letter dated May 24, 2002, you requested advice concerning whether any transfer and recordation taxes should have been collected in connection with a deed and deed of trust that were recently recorded without payment of any recording taxes. The transaction involved a deed whereby a woman added her three adult children to title to her property; as part of the same transaction, the mother and her three children took out a loan, secured by a new deed of trust on the property, the proceeds of which loan were used to pay off the mother's prior deed of trust indebtedness. The property is the principal residence of only the mother. In your letter, you note that the parties claimed that the deed was exempt from State recordation and transfer taxes pursuant to Tax-Property Article (TP"), §§12-108(c) and 13-207(a)(2) and that the deed of trust was exempt from recordation tax pursuant to TP §12-108(g). With respect to the latter claimed exemption, you note in your letter that the clerks were advised, by memorandum dated May 6, 1986 from Assistant Attorneys General Catherine Shultz and Beth Pepper, that the refinance exemption under TP §12-108(g) applies to family members who acquire title to property and do not pay recordation tax at that time because they qualify for the exemption under TP §12-108(c).<sup>1</sup>

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<sup>1</sup> You point out that the 1986 memorandum did not address whether such family members have to be using the subject property as their principal residence in order to qualify for the exemption.

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For the following reasons, I have concluded that, in the transaction you describe in your letter, the exemption under TP §§12-108(c) and 13-207(a)(2) was not applicable to the deed because the grantees were not taking subject to and assuming an open mortgage or deed of trust indebtedness. Instead, the property was being conveyed free and clear of the old deed of trust because, as part of the transaction, the indebtedness secured thereby was being paid off and the deed of trust was being released. Moreover, the deed of trust qualified as a refinance deed of trust only to the extent of the mother's undivided quarter interest in the property and comparable share of the new loan proceeds used to refinance the prior debt; with respect to the three adult children, the deed of trust would qualify as a purchase money mortgage if it satisfies the requirements of TP §12-108(i). Contrary to the advice provided in the May 6, 1986 memorandum, mortgagors<sup>2</sup> do not qualify for the refinance exemption if they do not pay recordation taxes at the time they acquire the property subject to an open mortgage or deed of trust that they are assuming. Further, in order to qualify for the refinance exemption, a mortgagor on the new mortgage/deed of trust must use the mortgaged property as his or her principal residence. In the event some but not all new mortgagors qualify, a partial credit is allowable.

#### Rules of Statutory Construction

Whether interpreting TP §§12-108(c) and 13-207(a)(2) or §12-108(g), the general rules of statutory construction, together with the special rules for tax exemptions, must be applied. In *Md. Park Comm. v. Dept. of Taxation*, 110 Md.App. 677, 688-690 (1996), the Court summarized those rules as follows:

...we first look to the principles of statutory construction, and then, narrowing our inquiry, turn to those principles that are applicable to the taxation arena. Ever mindful of our desire to discern and effectuate the General Assembly's intent [citation omitted], we examine the language of the enactment and give to the language of the enactment its natural and ordinary import. [Citation omitted.] If the language is plain and free from ambiguity and expresses a definite and sensible meaning, we will, ordinarily, end our inquiry. ... Where the General Assembly has chosen not to define a term used in a statute, we will give that term its ordinary and natural meaning and not resort to subtle or forced interpretations for the purpose of extending or limiting the operation of the statute. [Citation omitted.] Furthermore, we examine the entire statutory scheme and consider the purpose behind the particular statute before us. [Citation omitted.] Cognizant that the language of the statute is the foundation from which our inquiry commences, we also review legislative history and the prior state of law, and contemplate the particular evil, abuse, or defect that the General

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<sup>2</sup> The term "mortgagors" is used herein to include grantors of a deed of trust.

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Assembly wished to remedy with the enactment of the statute at issue. [Citation omitted.]  
Moreover, the examination of related statutes is not beyond our reach. [Citation omitted.]  
When interpreting tax exemptions, we strictly construe the exemption and resolve any  
doubt in the taxing authority's favor.

*See also, State Dept. of Assessments and Taxation v. Maryland-National Park and Planning  
Comm'n.*, 348 Md. 2 (1997).

#### Exemption Under TP §§12-108(c) and 13-207(a)(2)

Applying the above-referenced rules, the interpretation of TP §12-108(c), which is incorporated  
by reference in §13-207(a)(2), must begin with its language. Section 12-108(c) provides as follows:

When property is transferred subject to a mortgage or deed of trust, the recordation tax  
does not apply to the principal amount of debt assumed by the transferee, if the instrument  
of writing transfers the property from the transferor to a:

- (1) spouse or former spouse;
- (2) son, daughter, stepson, or stepdaughter;
- (3) parent or stepparent;
- (4) son-in-law, daughter-in-law, stepson-in-law, or stepdaughter-in-law;
- (5) parent-in-law or stepparent-in-law; or
- (6) grandchild or stepgrandchild.

The language clearly states that the exemption applies only when property is conveyed subject to a  
mortgage or deed of trust that is being assumed by the grantee.<sup>3</sup> Thus, the exemption does not apply when  
property is being transferred free and clear of a prior mortgage or deed of trust that is being released, rather  
than subject to such mortgage or deed of trust, and the indebtedness secured by the mortgage or deed of  
trust is being paid off, rather than being assumed.

Because the language of TP §12-108(c) is unambiguous, the inquiry need go no further.  
Nonetheless, examination of the section's legislative history and the statutory scheme of which it forms a

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<sup>3</sup> As explained in *Pritchett v. Kidwell*, 55 Md.App. 206 (1983), whether a mortgage or deed of  
trust indebtedness is being assumed depends on the expectations of the grantor and grantee and is not  
dependent on whether the secured lender is releasing the grantor from personal liability or requiring the  
grantee to sign an agreement to be personally liable for the debt.

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part supports the same conclusion, *i.e.* that the exemption applies only when the grantee takes title to the property subject to a mortgage or deed of trust that the grantee is assuming. Sections 12-103(a) and 13-203(a) both provide that “consideration payable,” for purposes of computing recordation and transfer taxes, “includes the amount of any mortgage or deed of trust assumed by the grantee.” Thus, any assumed mortgage or deed of trust indebtedness is subject to recordation and transfer tax unless a specific exemption applies. In enacting §12-108(c), the General Assembly created an exception to the taxability of an assumed mortgage or deed of trust indebtedness when the grantee who is taking title subject to and assuming such indebtedness is a specified relative of the grantor.

What is now TP §§12-108(c) and 13-207(a)(2) was added to the Code by Acts of 1979, Chapter 585, and was then Article 81, §277(b)(2).<sup>4</sup> The purpose clause of the bill stated, in pertinent part, as follows:

FOR the purpose of eliminating payment of recordation and transfer taxes on certain transactions to the extent that the consideration for the transaction consists of an express or implied assumption of a mortgage or deed of trust ....

The original language of the exemption was as unambiguous as the current version; the statute provided that “[w]hen any property subject to a mortgage or deed of trust is transferred to a spouse, former spouse, son, daughter, or parent of the transferor, the tax is not applicable to the amount of any outstanding mortgage debt assumed by the transferee.” When, as part of Code revision, the Tax-Property Article was enacted and the exemptions from recordation tax were recodified in TP §12-108, the Revisor’s Note stated that “[s]ubsections (a) through (q) of this section are new language derived **without substantive change** from former Art; 81, §277 ... and (b)(2) ... as those sections related to exemptions from tax ....” (Emphasis added.)

Therefore, if one of the specified relatives enumerated in §12-108(c) is paying consideration for the grantor’s equity in the property, as well as taking subject to and assuming the mortgage indebtedness on the property, the consideration payable for equity is subject to the recordation and transfer taxes; only the assumed indebtedness is exempt. Similarly, recordation and transfer taxes apply if the grantee is paying off the balance due on the grantor’s mortgage indebtedness as part of the transaction and the property is conveyed free and clear of the old mortgage, which is being released.<sup>5</sup> Thus, in the transaction described

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<sup>4</sup> As part of the same legislative change, the exemption for transfers between spouses or former spouses in connection with a divorce decree or separation agreement also was added.

<sup>5</sup> If the grantee is borrowing the money to make the pay off and putting a new mortgage on the property to secure repayment of that loan, the new mortgage constitutes a purchase money mortgage to the

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in your letter, the §12-108(c) exemption was not applicable. The three quarter interests in the property were not conveyed to the grantor's adult children subject to an outstanding mortgage that the children were assuming. Rather, the three children, together with the mother, were paying off the mother's prior deed of trust indebtedness. The deed should have been subjected to recordation and transfer taxes on 3/4 of the payoff amount.

Exemption Under TP §12-108(g)

In interpreting TP §12-108(g), the language of the statute, once again, is the point of beginning. That statute states as follows:

(1) In this subsection, "original mortgagor" includes an individual who assumed a debt secured by real property that the individual purchased as a principal residence and who paid the recordation tax on the consideration paid for the property.

(2) A mortgage or deed of trust is not subject to recordation tax to the extent that it secures the refinancing of an amount not greater than the unpaid principal amount secured by an existing mortgage or deed of trust at the time of refinancing by the original mortgagor of real property that is used as a principal residence by the original mortgagor.

(3) To qualify for an exemption under paragraph (2) of this subsection an original mortgagor shall include a statement in the recitals or in the acknowledgment of the mortgage or deed of trust, or submit with the mortgage or deed of trust, an affidavit under oath, signed by the original mortgagor, stating:

- (i) that the individual is the original mortgagor;
- (ii) that the mortgaged property is the principal residence of the original mortgagor; and
- (iii) the amount of unpaid principal of the original mortgage or deed of trust that is being refinanced.

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extent it complies with the requirements of TP §12-108(i).

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The language clearly provides that the refinancing must be done by the original mortgagor(s).<sup>6</sup> The term “original mortgage,” given the ordinary meaning of the words, means the mortgage on the original mortgage that is now being refinanced. The statute expands the ordinary meaning of the words to include an individual who purchases the property to be his or her principal residence, takes subject to and assumes the outstanding mortgage on the property, and pays tax based on the consideration paid. The consideration paid includes the outstanding mortgage debt assumed. *See* TP §§12-103(a) and 13-203(a).

Nothing in the language of the statute expressly or impliedly provides that an individual who was not a mortgagor on the original mortgage that is being refinanced will qualify as an “original mortgagor” for purposes of this exemption if he or she acquired the property, or an interest therein, without paying tax on the consideration payable and/or without any intent to reside at the property as her or her principal residence. Nor is there anything in the statute to suggest that all mortgagors who are jointly incurring the new debt that is being used to refinance the old one are intended to derive the benefit of the tax exemption so long as at least one of them qualifies as an “original mortgagor.”

The exemption that now appears in TP §12-108(g) was added to the Code by Acts of 1981, Chapter 512, as §277(a)(2)(ii)1 of Article 81; at that time, it covered only original mortgagors in the ordinary meaning of those words. The purpose clause of the bill and the text of the new provision read as follows:

FOR the purpose of providing an exemption for a certain amount from recordation tax for certain mortgages or deeds of trust for refinancing by original mortgagors; and clarifying language and structure.

(ii) The term “instrument of writing” does not include:

1. Mortgages or deeds of trust for refinancing, to the extent that the amount of the refinancing is not more than the outstanding principal amount of the existing mortgage at the time of refinancing, by the original mortgagor, of the property used as the original mortgagor’s principal residence if the mortgagor furnishes a statement that he is the original mortgagor, that the property is his principal residence, and specifying the amount of unpaid principal on the existing mortgage that is being financed, and the statement shall be in the

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<sup>6</sup> Article 1, §8 provides that in construing statutes, “[t]he singular always includes the plural, and vice versa, except where such construction would be unreasonable.”

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mortgage instrument offered for record as part of its recitals or as part of the acknowledgment, or in a separate affidavit accompanying the instrument signed under the penalties of perjury by the mortgagor.

The purpose clause of the bill and text of the original exemption confirm that the refinancing must be accomplished by individuals who are "original mortgagors." In other words, the mortgagors on the new mortgage must have been the mortgagors on the prior mortgage that is being refinanced by means of the new mortgage loan, and the property must be such mortgagors' principal residence.

The expansion of the refinance exemption to include an individual who purchases the property subject to a mortgage that the purchaser assumes was accomplished by Acts of 1984, Chapter 594. The following sentence was added to then Article 81, §277(a)(2)(ii)1:

If an individual in purchasing a principal residence assumes a mortgage secured by that property and pays the recordation tax based on the actual consideration paid for the property, as provided in subsection (b)(3) of this section, then that individual shall be treated as an original mortgagor in accordance with this sub-subparagraph.

Subsection (b)(3) of Article 81, §277 provided as follows:

A statement of the amount of the actual consideration paid or to be paid, if any, including the amount of any mortgage, or deed of trust assumed by the grantee, or the principal amount of the debt secured, and incurred, if any, as applicable, shall either be included in every instrument taxable under this section offered for record as part of its recitals or as part of the acknowledgment, or be contained in a separate affidavit accompanying the instrument, signed under the penalties of perjury by a party to the instrument or the agent of the party.

As stated above, the exemption from recordation and transfer taxes for specified relatives of the grantor who acquired property subject to an outstanding mortgage or deed of trust that the grantee was assuming was set forth in §277(b)(2). The new sentence added to the refinance exemption did not refer to that subsection.

Clearly the 1984 addition to the refinance exemption was intended to extend the exemption only to someone who pays the recordation tax, as well as transfer tax, when purchasing the property as his or her principal residence and taking subject to and assuming an outstanding mortgage or deed of trust on the property. By so extending the exemption, the General Assembly avoided twice subjecting the same individual to payment of the recordation tax on the same secured indebtedness if the individual subsequently

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refinances the mortgage indebtedness that the individual assumed. If a certain relative of the grantor acquires the property subject to an outstanding mortgage or deed of trust that the relative assumes, no recordation tax is paid on such assumed indebtedness because of the exemption afforded under TP §12-108(c); in that case, there is no double taxation to avoid if the relative subsequently refinances the assumed mortgage indebtedness.

In their memorandum dated May 6, 1986, Assistant Attorneys General Shultz and Pepper do not refer to or rely on the language of the statute to support their conclusion that the exemption applies to an individual who takes subject to and assumes an outstanding mortgage or deed of trust but does not pay tax thereon because he or she qualifies for the exemption afforded under TP §12-108(c). This interpretation is inconsistent with the language of the statute. In support of their conclusion, Ms. Shultz and Ms. Pepper simply state: "We believe that the Legislature did not intend to exclude relatives from the definition of 'original mortgagor' under the refinance exemption because, but for the exemption allowed for transfers between relatives, these relatives would have paid recordation tax on the amount of mortgage debt assumed by them." The attorneys do not cite any legislative history to support this belief.

This presumed legislative intent ignores the reference in the statute to the individual who assumed the indebtedness as one who "purchased" the property as a principal residence and renders nugatory the phrase "who paid the recordation tax on the consideration paid for the property." The only grantees of residential real property who are not required to pay recordation and transfer taxes on any assumed indebtedness portion of the consideration payable are the specified relatives who qualify for the §12-108(c) exemption. Thus, under the interpretation set forth in the May 6, 1986 memorandum, an "original mortgagor" as used in the refinance exemption would include anyone who purchases or is gifted residential real property that he or she will use as a principal residence whether or not he or she pays any recordation tax on the assumed indebtedness. Not only is there no legislative history to support this liberal interpretation favoring the taxpayer, but also it breaches the rule of statutory construction for construing tax exemptions narrowly and in favor of the taxing authority.

Neither the language nor the legislative history of TP §12-108(g) addresses the situation when one or more, but not all, of the mortgagors of the new mortgage qualify as original mortgagors, *e.g.*, when one or more of the new mortgagors either acquired title to the property subject to the mortgage that is being refinanced without paying taxes thereon and/or do not use the property as their principal residence. For the following reason, I have concluded that the exemption may be applied to exempt the same percentage of the principal balance of the mortgage being refinanced as the interest(s) in the property owned by any qualifying original mortgagor(s).

When the General Assembly intends an all-or-nothing application of a tax exemption, it usually includes language expressing that intent. For example, in the new exemption set forth in TP §12-108(bb),

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the General Assembly has indicated that the contribution-to-limited-liability-company exemption applies only when, *inter alia*, all the grantors are members of the grantee limited liability company. The statute requires, in pertinent part, that “**each** member’s allocation of the profits and losses of the limited liability company is identical to that member’s allocation of the profits and losses of the conveying real estate enterprise.” (Emphasis added.) Similarly, TP §13-203(b) affords a reduced tax rate only when all the grantees qualify as either a “first-time Maryland home buyer” or a guarantor of the purchase money loan who will not use the property as his or her principal residence. The statute provides that “[t]o qualify for the exemption under paragraph (3) of this subsection, **each grantee** shall provide a statement that is signed under oath by the grantee stating that ....” (Emphasis added.) By contrast, TP §12-108(g) does not expressly or impliedly provide that all mortgagors must qualify as original mortgagors for the exemption to apply.

Thus, if A and B, who jointly bought a residence that only A uses as a principal residence, subsequently refinance their original mortgage, the new mortgage will be exempt only to the extent of A’s portion of the principal balance due on the original mortgage. Clearly, if A owned the property alone, A would be entitled to a 100% credit for the principal balanced due on the mortgage being refinanced. On the other hand, if B owned the property alone, B would be entitled to no credit against the new mortgage. Where both own the property and jointly refinance their original mortgage, A is entitled to credit for A’s share of the refinanced principal debt and B is entitled to no credit for B’s share. Similarly, if C conveys to D an undivided half interest in property that only C uses as his or her principal residence and both C and D jointly refinance C’s mortgage indebtedness thereon, only 50% of the principal balance due on the prior mortgage is exempt. C, who qualifies for the exemption, is refinancing only half the prior debt with his/her half of the new loan proceeds. D, who does not qualify for the exemption, is refinancing the other half of C’s prior mortgage indebtedness.

Therefore, the deed of trust in the transaction described in your letter only partially qualified for the refinance exemption. The exemption applied to the mother’s quarter share to the extent she was using her quarter of the new loan proceeds to refinance a quarter of her prior mortgage indebtedness; the other three quarters were being refinanced by her three children using their shares of the new loan proceeds. Of course, if the mother qualified for the new loan by herself, she could have refinanced her prior mortgage first, qualifying for the entire exemption, and then deeded quarter interests in the property, subject to the new mortgage, to her three children. Even if they assumed responsibility to help pay the new mortgage, the deed would not be subject to the recordation and transfer tax on the assumed indebtedness because of the exemption under TP §12-108(c) and 13-207(a)(2).

If you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,

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Julia M. Andrew  
Assistant Attorney General

JMA/s