TAXATION: STATE RECORDATION TAX.

Recordation tax should be collected on deeds of trust where federal government is guarantor or beneficiary.

The Honorable J. Curtis Fruit
Clerk, Circuit Court of Virginia Beach
August 13, 2002

**Issue Presented**

You ask whether the recordation tax imposed pursuant to § 58.1-803 should be collected on deeds of trust under which the federal government is either the guarantor or beneficiary.

**Response**

It is my opinion that the recordation tax imposed pursuant to § 58.1-803 should be collected on deeds of trust under which the federal government is either the guarantor or beneficiary.

**Applicable Law and Discussion**

The recordation tax on deeds of trust is imposed pursuant to § 58.1-803 based on the value of the property secured under such deeds. This tax normally is paid by the grantor of the deed of trust, i.e., the borrower.\(^1\) Section 58.1-811(B) enumerates five exemptions from the recordation tax imposed by § 58.1-803, none of which applies to a deed of trust in which the federal government or agency is involved as guarantor or beneficiary.

States and localities generally are prohibited from taxing the federal government and its agencies except when Congress has expressly authorized them to do so.\(^2\) Under the Supremacy Clause of the Constitution of the United States, this prohibition against taxing applies regardless of whether a state has granted specific exemptions.\(^3\) Therefore, the absence of a statutory exception, by itself, is not dispositive.

The status of the federal government and its agencies in a recordation transaction is critical to determining whether the recordation tax should be collected. No grantor tax is charged to the federal government when it is taking title to real estate as a party.\(^4\) Additionally, no tax is imposed where agencies of the federal government, like the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, take title to property as receivers.\(^5\)
Your question concerns transactions where the federal government acts as guarantor or beneficiary under a deed of trust. The federal government, as guarantor under a deed of trust, may guarantee payment by a borrower to a third party, such as a bank, mortgage company or other lender, or it may be a beneficiary entitled to collect payment under the deed of trust from the borrower. In neither status is the federal government a "borrower" responsible for payment of the recordation tax, nor does it hold legal or equitable title under the deed of trust.

Federal agencies, such as the Federal Housing Administration and the Veterans’ Administration, guarantee real estate loans. These and similar programs serve public policies that enhance home ownership, encourage certain types of development, and provide benefits to armed services members. The federal government’s involvement in these programs is as a facilitator, or guarantor, for individual loans rather than as a party to the transaction. The tax imposed under § 58.1-803 in these loans is a cost borne by the grantor and borrower, and not the federal government and its agencies. The mere fact that the federal government is involved in some capacity, either as guarantor or beneficiary, does not exempt a transaction from the recordation tax.

Conclusion

Accordingly, it is my opinion that the recordation tax imposed pursuant to § 58.1-803 should be collected on deeds of trust under which the federal government is either the guarantor or beneficiary.


2The Supreme Court of the United States has recognized in First Agricultural National Bank of Berkshire County v. State Tax Commission that, “if a change is to be made in state taxation of national banks, it must come from Congress” (392 U.S. 339, 346 (1968)), and ruled in that case that the Commonwealth of Massachusetts could not apply its sales and use tax to national banks as they are not among the methods of taxation by which Congress permits states to tax such banks (id. at 339). In an earlier case, the Supreme Court of Virginia held that a tax on the grantee for recording a deed to land acquired by mortgage foreclosure is unenforceable against the Federal Land Bank of Baltimore, a federal instrumentality that can only be taxed as allowed by federal law. See Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935).

3U.S. Const. art. VI, cl. 2; see Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211 (1824) (stating that act of Congress is supreme and state law must yield to it and must not interfere with or be contrary to laws enacted pursuant to Constitution); Op. Va. Att’y Gen.: 1992 at 183, 185; 1990 at 259, 259; 1987-1988 at 504, 505; 1974-1975 at 477, 477.


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