
CITY OF BALTIMORE

BRANDON M. SCOTT,
Mayor



DEPARTMENT OF LAW
EBONY M. THOMPSON,
ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

TO: Maryland House of Delegates - Ways and Means Committee

FROM: John P. (Jack) Machen, Special Chief Solicitor, Baltimore City Law Department

RE: Testimony in Support of HB 457 (Amendment to Tax Property Article §12-108(i) Recordation Tax – Purchase Money Mortgage or Purchase Money Deed of Trust – Extent of Exemption)

DATE: February 4, 2023

Pursuant to Tax Property Article §12-105, the State of Maryland imposes a recordation tax on mortgages and deeds of trust that are recorded in the land records. Tax Property Article §12-108 grants a number of exemptions from the recordation tax, among them, under subclause (i), an exemption for a mortgage or deed of trust that secures a loan made to finance the purchase price of real property.

The reason for the exemption is that the buyer/borrower has paid the recordation tax on the deed, and therefore assessing the tax on the accompanying purchase money mortgage is deemed an unfair double tax on the same dollars.

Here is the problem. Tax Property Article 12-108(i) defines purchase money mortgage as one that (among other things) secures the purchase price “in whole or in part” and further provides that any mortgage that meets the definition is exempt. A literal interpretation leads to the conclusion that all it takes is some purchase money, no matter how small, to exempt a mortgage of any size.

For example, a developer buys a property for \$1 million and wants to construct a building costing \$10 million. The developer borrows \$11 million. Developer argues that the entire \$11 million mortgage is exempt because it secures purchase money “in part.”

Baltimore City, the jurisdiction that I represent, as well as other counties with which I have conferred, take the position that this is abusive. The purpose of the purchase money mortgage exemption is to avoid unfairly taxing the purchase price twice: once on the deed and again on the mortgage. It was never the intent to piggy-back the purchase money exemption on an otherwise fully taxable construction loan.

This has long been the position of the Maryland Attorney General’s office. The exemption exists only to the extent that recordation taxes have been paid on the accompanying deed:

[Purchase money mortgages are] exempt from the tax because of the fact that they are executed and recorded simultaneously with a deed conveying the property to the mortgagor [in circumstances in which a] tax on the full price paid for the property is paid upon the recording of the deed. . . . 24 *Op. Md. Att’y Gen. 981 (1939)*.

Since this particular exemption is limited to the amount of the purchase money consideration, any future advance under the deed of trust is “additional debt” ... which requires that recordation tax on the amount of such additional debt be paid by the debtor before it is incurred.” *50 Md. A.G. Op. 428 (1965)*.

The grantee’s mortgage or deed of trust will qualify for the purchase money mortgage/deed of trust exemption from State recordation tax only to the extent recordation tax was paid on the deed. ... This exemption is designed to avoid double taxation. To the extent recordation tax is collected on the purchase money (consideration payable) set forth in the deed, recordation tax will not be collected again on the purchase money secured by the mortgage/deed of trust given as part of the same transaction. *Letter of Advice dated July 9, 1996 from Asst Atty Gen. Julia Freit to Charles C. Keller, Clerk.*

The courts have likewise respected this position and adopted the common sense interpretation that “The rationale behind the Maryland exemption from recordation tax is simply to avoid double taxation of both the deed and the purchase money deed of trust.” *Case of Eastmet Corp.*, 907 F.2d 1487 (4th Cir. 1990).

This has also been the long-standing practice of real estate attorneys and title companies that whenever a loan combines purchase money along with construction financing, the security instrument would be captioned “Partial Purchase Money Deed of Trust,” and the exemption would only be claimed on the amount of the loan that represented purchase financing.

Nonetheless, there have been instances in recent years where recordation tax refunds were sought on the basis that as long as any part of a mortgage secures purchase price, the amount of the mortgage that secures construction financing should be exempted from the recordation tax. So far, local jurisdictions have prevailed on these refund cases, but it is prudent for the statute to be amended to confirm long-standing practice and to clarify the intent that the purchase money exemption applies only to the extent that the mortgage or deed of trust secures purchase money.

One further point bears mentioning. Recording clerks will limit the purchase money exemption to the loan dollars actually applied to purchase money. Some lawyers, however, believe that the exemption should apply to the amount of the deed consideration, irrespective of how the loan proceeds are used. For example:

- a. Deed for \$100,000.
- b. Mortgage of \$150,00 where the lender has held back \$80,000 for construction.
- c. The practice among recording clerks is to limit the purchase money exemption only to the \$70,000 of the loan proceeds that are actually used to finance the purchase and will tax the \$80,000 construction loan.

There are some lawyers, however, who prefer that the exemption apply to the \$100,000 amount in the deed and only \$50,000 of the construction loan should be taxed. Their argument is that such an approach is simpler to administer and, of course, results in a tax saving for their clients.

The simplicity argument is not persuasive. It is easy to tell from the settlement sheet, which is usually submitted with the recording package, how much of the loan proceeds are applied to the purchase. Recording clerks have been doing this for decades.

As referenced above, the Attorney General and courts have said that the purchase money exemption is to avoid a double tax on the money borrowed from the lender and then delivered to the seller. Those dollars are taxed on the deed and should not be taxed a second time on the mortgage. However, the dollars that are loaned to the borrower for construction have not been taxed before, and therefore there is no risk of double tax.

The purchase money exemption should only be for purchase money. HB 457 makes this clear. The purchase money exemption would apply only “to the extent” that the mortgage or deed of trust secures purchase money.

Respectfully submitted,

A handwritten signature in blue ink that reads "John P. Machen". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

John P. (Jack) Machen
Special Chief Solicitor
Baltimore City Law Department