

ATAPCO HOWARD SQUARE I
BUSINESS TRUST, et al

vs.

HOWARD COUNTY
DEPARTMENT OF FINANCE

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No. 11-RC-OO-0805
through 0811

IN THE
MARYLAND TAX COURT

MEMORANDUM AND ORDER

Petitioners, Atapco Howard Square I Business Trust, The Columbia Bank, Maple Estates, L.C., Simpson Mill, LLC, Susquehanna Bank and SFH 5, Inc. seek a refund of their payment of recordation tax, together with interest from the Respondent, Howard County Department of Finance. The relevant facts are set forth in the joint stipulation of facts with exhibits.

Petitioners claim Respondent forced the Petitioners as lenders in the transactions to pay recordation taxes on the recordation of deeds from the substitute trustees for properties sold at foreclosure sales. Petitioners contend that they willingly paid the recordation and transfer taxes on the deed that granted title to the property but were forced by Respondent to pay recordation tax on the foreclosed Indemnity Deeds of Trust as a condition of recording the deeds. Petitioners paid the recordation tax under protest with the reservation of its rights and bought these claims for refund of recordation taxes from the Respondent. The Respondent denied Petitioners' claim and Petitioners' have filed this appeal from the Respondent's denial requesting a refund of the recordation tax plus interest at 6% per annum from the date of recordation.

This case concerns a financial structure known as an Indemnity Deed of Trust

(IDOT) transaction. An IDOT transaction involves a loan to a person or entity (the "borrower") and the guaranty of that loan by a different person or entity (the "guarantor"). As security to the loan to the borrower, the guarantor grants to the lender an indemnity deed of trust on property owned by the guarantor. The guarantor under the IDOT structure is not primarily liable on the loan from the lender to the borrower. Under Tax Property Article Section 12-105 (f)(1) "...if the total amount of secured debt has not been incurred at the time of recording...the recordation tax applies only to the principal amount of the debt incurred at that time." Thus, if the guarantor is not primarily liable on the loan, the secured debt on which the recordation tax is based "has not been incurred" by the guarantor.

However, the guarantor becomes primarily liable for payment of the recordation tax when a contingency occurs such as a default under the loan to the borrower. But there is no statutory authority or legal precedent that provides for liability of any other party (i.e., the lender) other than the guarantor on an indemnity deed of trust.

Respondent further contends that Real Property Section 3-104 (b) of the annotated Code of Maryland permits Respondent to require payment of the recordation tax before a subsequent instrument may be recorded. In the present cases, the Respondent contends that it can disallow the recordation of a deed issued after a foreclosure sale if there is an Indemnity Deed of Trust in the chain of title on which recordation tax has not been paid under section 3-104 (b).

The Court finds that Real Property Section 3-104 (b) is only applicable if there are taxes, assessments or charges currently due and owed on the property. [Recordation tax in Maryland is an excise tax on the privilege of recording documents among the land records in Maryland and consequently a recordation tax is a tax on a document, not a tax

on real property. *Dean vs. Pinder*, 312 Md. 154, 159, 538 A.2d 1184 (1988).] Moreover, there is no provision in the Maryland Code in which an unpaid recordation tax constitutes a lien upon any real property merely as a result of the non-payment of that tax.

The Respondent also contends the Tax Property Section 12-105(f)6 is applicable to Indemnity Deeds of Trust. The Court finds no merit or authority supporting Respondent's statutory interpretation of Tax Property Section 12-105(f)6 in the present cases.

The court concludes the recordation tax was not the obligation of the foreclosing lender or the Petitioners and the tax did not become a lien on the respective properties. Accordingly, it is this *28th* day of *August*, 2012 hereby order that the decision of the Respondent in denying the refund claims of the Petitioner is hereby **REVERSED**, and the taxes will be refunded with interest at a rate of 6% per annum from the date the taxes were paid pursuant to Tax Property §14-917 (a).

CC: George F. Ritchie, Esq.
Gary W. Kuc, Esq.

CERTIFIED TRUE COPY
TEST: John T. Hearn, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.