

OFFICE OF THE ATTORNEY GENERAL

91-00302



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JUN 14 1991

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Honorable George R. Reynolds
Probate Judge
110 Courthouse
Birmingham, Alabama 35263-0068

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| OPINION OVERRULED | |
| Date: | 12-17-96 |
| To: | Frank H. Riddick |
| File: | 97-00052 |

Probate Judge - Recordation of Documents - Assumption Agreement - Modification Agreement - Mortgagor - Privilege Tax

Pursuant to §40-22-2, Code of Alabama 1975, mortgage privilege tax should be assessed on an Assumption Agreement when presented for recording in order to perfect the record of the transaction.

Dear Judge Reynolds:

This opinion is issued in response to your request for an opinion from the Attorney General.

QUESTION

Should privilege tax be assessed on an Assumption Agreement that releases the original mortgagor from liability on a note?

FACTS AND ANALYSIS

Previously, additional mortgage privilege tax was not required on an Assumption of Mortgage where there was no change in the amount of indebtedness or any extension of the maturity date. However, a new Assumption Agreement form has started to appear that provides for the release of the original note. The new Assumption Agreement form works a complete change of parties and releases the original maker in full, substituting a new and different party.

Generally, the Alabama mortgage recording statute, §40-22-2, Code of Alabama 1975, does not mandate that the taxpayer record his mortgage instrument. It merely establishes the procedures that are to be followed when mortgage instruments are presented for recording, and the formula for determining the amount of tax, if any, to assess. Mortgagees and mortgagors who choose to record their mortgages or security interests, do so to avail themselves of the notice and protection recording provides against potential lienholders. Therefore, the assessment of mortgage (and deed) tax is simply payment for the privilege of enjoying the protection afforded by the State of Alabama that recording bestows. To this end, §40-22-2, Code of Alabama 1975, states in pertinent part as follows:

No mortgage, deed of trust, contract of conditional sales or other instrument of like character which is given to secure the payment of any debt which conveys any real or personal property situated within the state . . . shall be received for record or for filing in the office of any probate judge of this state unless the following privilege or license taxes shall have been paid . . .

In underscoring the basis for assessing tax upon the recordation of an instrument, the Alabama Supreme Court stated:

. . . The plain purpose of its recordation, therefore, is not for the perfection of the title . . . but the perfection of the record of the transaction. But for that privilege the statute exacts a tax . . .
Hawkins v. Pure Oil Co., 169 So. 307, 232 Ala. 660.

Applying the facts presented to the above premise, it is obvious that the Assumption Agreement is subject to tax. With the concurrence of the mortgagee, the purchaser has purchased the mortgage from the mortgagor. The purchaser has become a new and different party not present in the original mortgage, who

has purchased the debt which the purchaser now seeks to record. In addition, the previous mortgagor has been released from liability under the original note and is therefore no longer indebted to the mortgagee. Neither is the previous mortgagor a party in the present transaction; thus, the underlying debt as far as the previous mortgagor is concerned, is no longer in existence. Since mortgage privilege tax was previously paid on the initial amount of indebtedness, mortgage privilege tax should only be assessed now on the amount of indebtedness that the purchaser has presently incurred under the Assumption Agreement.

CONCLUSION

It is my opinion, that pursuant to §40-22-2, Code of Alabama 1975, mortgage privilege tax should be assessed on an Assumption Agreement when presented for recording for "the perfection of the record of the transaction."

It is hoped that the above information sufficiently answers your question. Should there be any further questions or if this office can be of any further assistance, then please do not hesitate to contact us.

Sincerely,

JIMMY EVANS
Attorney General
By-


JAMES R. SOLOMON, JR.
Chief, Opinions Division

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