

**BEFORE THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA**



FILED
GA. TAX TRIBUNAL

AUG 06 2019

Yvonne Bouras
Yvonne Bouras
Tax Tribunal Administrator

KPCII 61 WHITCHER, LLC, for itself as)
 assignee from, and on behalf of, PRINCIPAL)
 LIFE INSURANCE CO.,)
)
 Petitioners,)
)
 v.)
)
 DAVID CURRY, in his official capacity as)
 COMMISSIONER OF GEORGIA)
 DEPARTMENT OF REVENUE,)
)
 Respondents.)
)
)
)
)
)

Docket No. 1905248

DECISION

I. INTRODUCTION

Petitioners, KPCII, 61 WHITCHER, LLC (“KPCII” or “New Borrower”), for itself as assignee from, and on behalf of Principal Life Insurance Company (hereinafter “Principal Life Insurance” or “Lender”) (together, “Petitioners”), brought this case before the Georgia Tax Tribunal to appeal the Respondent Commissioner’s (“Commissioner”) denial of Petitioners’ Intangible Recording Tax Protest and Claim for Refund on Assumption and Release Agreement. On May 24, 2019, the Parties each moved for summary judgment, and each Party responded to the other’s Motion on July 1, 2019.

Specifically, the question before this Tribunal is:

Where an agreement (1) modifies an original security instrument by transferring the original debtor’s rights, title, and obligations under the original security instrument and loan documents to a new debtor; (2) transfers the original indebtedness from the original debtor to a new debtor; and (3) does not create new indebtedness through the lending of new money, is that agreement exempt from the intangible recording tax under O.C.G.A. § 48-6-65(a)(1) if the intangible

recording tax imposed by O.C.G.A. § 48-6-61 was paid when the original security instrument was filed?

After careful consideration of the Parties' arguments and the applicable law, the Tribunal answers this question in the affirmative. Accordingly, and for the reasons set forth below, Petitioners' Motion for Summary Judgment is **GRANTED** and the Commissioner's Motion for Summary Judgment is **DENIED**.

II. FINDINGS OF FACT¹

On July 12, 2016, the Original Security Instrument ("Original Security Instrument") between Kennestone Physicians Center II, L.P. ("Original Borrower"), Wellstar Health System, Inc. ("Owner"), and Principal Life Insurance Company ("Lender") was recorded in Deed Book 15354, Page 5155 of the Cobb County, Georgia records. (JSOMF ¶ 1). The original principal loan amount secured by the Original Security Instrument was \$12,250,000 ("the Indebtedness"), and the intangible recording tax imposed by O.C.G.A. § 48-6-61 was paid in the maximum amount of \$25,000 at the time of filing. (*Id.*).

The Original Security Instrument expressly contemplates that it may be "modified, supplemented or amended" in the future. (Orig. Security Instr. p. 1). It also contemplates that the Loan Agreement and Note underlying the Original Security Instrument ("the Loan Documents") may "be amended, restated, replaced, supplemented or otherwise modified from time to time." (*Id.*). Indeed, the Original Security Instrument was executed and recorded "to secure the payment of the Indebtedness in accordance with the terms and conditions of the Loan Documents, and all extensions, modifications and renewals thereof and the performance of the covenants and agreements contained therein[.]" (*Id.* at 2 (emphasis added)).

¹ The Parties submitted a Joint Stipulation of Undisputed Material Facts ("JSOMF"), which set forth the basic time line of events and stipulated to the authenticity of all documents attached thereto. The documents referenced in this Decision were attached to the JSOMF and authenticated by the Parties.

On December 18, 2017, Petitioners executed an Assumption and Release Agreement (“the Assumption Agreement”) that modified the Original Security Instrument. (JSOMF, ¶ 2). The purpose of modifying the Original Security Instrument was to allow the Original Borrower to transfer its leasehold interest in the real estate and all of its rights and obligations under the Original Loan Documents to KPCII—a modification that was expressly contemplated in the Original Security Instrument, which does not permit “a sale, conveyance, option to sell, assignment, transfer, encumbrance . . . or other disposition” of the real estate “without the prior written consent of [Principal Life Insurance].” (Orig. Security Instr. § 3.1). Indeed, the Assumption Agreement expressly states that it is a modification of the Original Security Instrument and Loan Documents to incorporate all of the Assumption Agreement’s terms and that the Original Security Instrument would continue to secure the real estate subject to repayment of the remaining Indebtedness. (See Assumption Agreement, ¶¶ A – F).²

And through the Assumption Agreement, the Original Borrower transferred to KPCII, and KPCII unconditionally assumed, the obligation to pay the remaining Indebtedness:

Original Borrower does hereby assign, transfer and convey to New Borrower all of its right, title and interest in and to the Loan Documents, and . . . New Borrower hereby unconditionally assumes the Loan Documents and agrees to comply with all covenants and obligations therein, including, without limitation, the obligation to pay the unpaid balance due and owing on the Loan and all interest thereon.

(Id. at § 3(a) (emphasis added)). See also id. at § 12 (“This Agreement does not, and shall not be construed to, constitute the creation of new indebtedness or the satisfaction, discharge or extinguishment of the debt secured by the [Original] Loan Documents”).

² See also id. at § 18 (“It is hereby agreed that the terms and conditions of the [Original] Security Instrument, the Note and other Loan Documents, as modified by this Agreement shall remain in full force and effect and shall be binding upon [KPCII].”).

In sum, (1) the Assumption Agreement merely modified the Original Security Instrument by transferring the rights, title, and obligations under the Original Loan Documents from Original Borrower to KPCII; (2) the Indebtedness was transferred to and assumed by KPCII and neither the amount nor the terms of repayment changed; (3) the Original Security Instrument continued to secure the Indebtedness from the effective date of the Original Security Instrument's recording; (4) no new funds were advanced to KPCII; and (5) the lender remained the same.

On January 3, 2018, the Assumption Agreement was recorded in Deed Book 15505, Page 4868 of the Cobb County, Georgia records. (JSOMF ¶ 3). At the time of recording, the Cobb County Superior Court Clerk required Petitioners to pay an intangible recording tax imposed by O.C.G.A. § 48-6-61. (*Id.*). Petitioners paid the tax in the amount of \$25,000 under protest and subsequently filed Petitioners' Protest and Claim for Refund ("Petitioners' Claim"), arguing that the Assumption Agreement was exempt pursuant to O.C.G.A. § 48-6-65. (*Id.* at ¶¶ 4, 5). In a letter dated June 15, 2018, the Commissioner summarily denied Petitioners' Claim on the basis that O.C.G.A. § 48-6-65(a) and Revenue Regulation 560-11-8-.04 apply only to transfers and assignments of instruments between lenders, stating:

1. "[T]he assumption of a note by a new borrower does not qualify under § 48-6-65 and Regulation 560-11-8-.04."
2. "The 'transfer' and 'assignment' of a note referenced in that code section and regulation apply only to transfers and assignments between lenders. Thus, the county clerk correctly assessed an intangible recording tax of \$25,000."

(Denial Letter, 06/15/18, at 2). Petitioners timely appealed the Commissioner's decision to this Tribunal. (*Id.* ¶ 7).

III. CONCLUSIONS OF LAW³

Every holder of a long term-note that is secured by real estate must record the security instrument in the land records of the county in which the real estate is located. O.C.G.A. § 48-6-61. At the time of recording, the holder is required to pay “an intangible recording tax at the rate of \$1.50 for each \$500.00 or fraction thereof of the face amount of the note secured by the recording of the security instrument[.]” and the maximum amount of the tax “with respect to any single note shall be \$25,000.00.” *Id.* Additionally, when a new note or a modification to a preexisting note is secured by a previously recorded instrument, and the new note or modification is for a new or additional indebtedness, the recording tax must be paid on only the “portion of the instrument which is an additional advance of indebtedness secured by the previously recorded instrument.” O.C.G.A. § 48-6-65(a)(1); O.C.G.A. § 48-6-62 (providing for intangible recording tax on a new note or modification of a preexisting note).

By contrast, no additional recording tax is required on any instrument that is merely an extension, transfer, assignment, modification, or renewal of the original indebtedness as long as the recording tax has been paid on the original security instrument and no new funds have been advanced:

(a) No tax other than as provided for in this article shall be required to be paid on any instrument which is an extension, transfer, assignment, modification, or renewal of, or which only adds additional security for, any original indebtedness or part of original indebtedness secured by an instrument subject to the tax imposed by Code Section 48-6-61 when:

(1) It affirmatively appears that the tax as provided by this article has been paid on the original security instrument recorded;

³ The standard of review in all proceedings before the Georgia Tax Tribunal is *de novo*. Ga. Comp. R. & Regs. 616-1-3-.11(a).

O.C.G.A. § 48-6-65(a)(1). See also Ga. Rev. Reg. 560-11-8-.04 (“Intangible recording tax is not required to be paid on any instrument that modifies by extension, transfer, assignment or renewal, or gives additional security for an existing note, when the intangible recording tax has been paid on the original instrument or the original note or holder of the original instrument was exempt.”).⁴

Thus, the intangible recording tax scheme set forth in O.C.G.A. § 48-6-61, *et seq.*, looks to the *amount* of indebtedness created by the long-term note and secured by the original security instrument; and in the case of a new note or a modification of a preexisting note, it looks to whether the instrument created a new or additional indebtedness that was not taxed when the original security instrument was first recorded. Accordingly, the terms of the note govern whether new or additional indebtedness was created upon which an intangible recording tax is owed. See Ga. Comp. R. & Regs. 560-11-8-.06 (“In the case of a new note or a modification of a preexisting note, representing an additional extension of credit to be secured by a previously recorded instrument which otherwise requires no further recording, the intangible tax is determined according to the terms of the new note.” (emphasis added)).

Here, the Parties agree that the Assumption Agreement is subject to the intangible recording tax under O.C.G.A. § 48-6-61 unless it qualifies for exemption under O.C.G.A. § 48-6-65(a). Thus, the Tribunal must look to the terms of the Assumption Agreement to determine whether any new or additional indebtedness has been created or whether the Assumption agreement is merely an “extension, transfer, assignment, modification, or renewal of” the original indebtedness secured by the Original Security Instrument.

⁴ “Instrument” is defined as “any written document presented for recording for the purpose of conveying or creating a lien or encumbrance on real estate for the purpose of securing a long-term note secured by real estate.” O.C.G.A. § 48-6-60(2).

A. The Exemption Provided By O.C.G.A. § 48-6-65(a)(1) Looks To The Instrument's Effect On The Original Indebtedness.

In denying the Petitioners' Claim that the Assumption Agreement should have been exempted from the intangible recording tax under O.C.G.A. § 48-6-65(a)(1), the Commissioner stated that "[t]he 'transfer' and 'assignment' of a note referenced in that code section and regulation apply only to transfers and assignments between lenders." (Denial Letter, 06/15/18, at 2 (emphasis added)). And although the Commissioner provided no analysis or authority to support its conclusion, the Commissioner urges the Tribunal to give "great weight and deference" to the administrative agency's interpretation of the statute. (Comm'r. Br. 7 (quoting *Georgia Dep't of Revenue v. Owens Corning*, 283 Ga. 489, 490 (2008))). The Tribunal is "'not bound to blindly follow' an agency's interpretation," however, and deference should be given only where the statute is ambiguous and the agency's interpretation "reflects the meaning of the statute and comports with legislative intent." *Hicks v. Florida State Bd. of Admin.*, 265 Ga. App. 545, 547 (2004) (quoting *Schrenko v. DeKalb Cnty. Sch. Dist.*, 276 Ga. 786, 791 (2003)).

Here, the statute is not ambiguous and the Commissioner's interpretation does not reflect the meaning of the statute's plain terms. The statute's focus is on whether the instrument is an "extension, transfer, assignment, modification, or renewal of, . . . any original indebtedness or part of original indebtedness[.]" O.C.G.A. § 48-6-65(a) (emphasis added). That is, the plain language of O.C.G.A. § 48-6-65(a)(1) exempts instruments based on their effect on the original indebtedness.

B. The Exemption Broadly Applies To Any Instrument And Is Not Limited To Instruments That Are Transfers And Assignments Between Lenders.

There is nothing in the plain language of the statute that would limit the exemption to "[t]he 'transfer' and 'assignment' of a note . . . between lenders." Instead, the express words of

limitation contained in the exemption set forth in subparagraph (b) of O.C.G.A. § 48-6-65 demonstrate that the exemption in subparagraph (a) is to be broadly applied. Indeed, the exemption in subparagraph (b) is applicable only where the instrument is a refinancing *by the original lender* and not where the indebtedness is refinanced by a lender to whom the note was transferred:

(b) No tax shall be collected on that part of the face amount of a new instrument securing a long-term note secured by real estate which represents a refinancing by the original lender of unpaid principal on a previous instrument securing a long-term note secured by real estate if

O.C.G.A. § 48-6-65(b) (emphasis added). By contrast, the exemption in subparagraph (a) expressly applies to “any instrument” without reference or restriction to a narrow class of extensions, transfers, assignments, modifications, or renewals. O.C.G.A. § 48-6-65(a).

Indeed, the Tribunal is required to construe statutes “‘in relation to other statutes of which it is a part,’ reading all statutes together ‘so as to ascertain the legislative [intent] and give effect thereto.’” Aircraft Spruce & Specialty Co. v. Fayette Cnty. Bd. of Tax Assessors, 294 Ga. App. 241, 244 (2008) (alterations in original) (quoting Goldberg v. State, 282 Ga. 542, 546-547 (2007)). See also Sikes v. State, 268 Ga. 19, 21 (1997) (“in construing language in any one part of a statute, a court should consider the entire scheme of the statute and attempt to gather the legislative intent from the statute as a whole”). Thus, the language used in O.C.G.A. § 48-6-65(a)(1) must be reconciled with the inconsistent language contained in O.C.G.A. § 48-6-65(b) so that each word is given meaning and the provisions “are consistent and harmonious.” Sikes, 268 Ga. at 21.

Here, by adding the limitation “by the original lender” in subparagraph (b) and not including the limitation “by the original lender” or “between lenders” in subparagraph (a), and

by use of the word “any,” the legislature’s intent is clear. The exemption found in subparagraph (a) is not limited to “transfers and assignments *between lenders*.”

C. The Assumption Agreement Is Exempt From The Intangible Recording Tax Because It Modifies The Original Security Instrument By Transferring And Assigning The Original Indebtedness From The Original Borrower To KPCII.

By denying Petitioners’ Claim on the basis that the Assumption Agreement was not a “transfer[] and assignment[] between lenders,” the Commissioner impliedly recognized that it was a transfer and assignment from the Original Borrower to KCC. Now, however, the Commissioner argues that the Assumption Agreement did not transfer and assign the Original Security Instrument and Loan Documents at all. Instead, the Commissioner argues, the Assumption Agreement *cancelled* the Original Security Instrument and Loan Documents, creating an entirely new and separate security instrument and note.

However, the Assumption Agreement’s plain terms make clear that it did not cancel the Original Security Instrument and Loan Documents and create an entirely new security instrument and note:

It is hereby agreed that the terms and conditions of the [Original] Security Instrument, the Note and other Loan Documents, as modified by this Agreement shall remain in full force and effect and shall be binding upon [KPCII].

(Assumption Agreement § 18). Instead, it modified the Original Security Instrument and Loan Documents to reflect the transfer and assignment of all of the Original Borrower’s rights, title, and obligations to KPCII, including the transfer and assignment of the Indebtedness.⁵

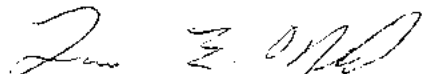
⁵ Indebtedness can refer to either the amount owed to a creditor (an asset) or the obligation to repay a debt (a liability). See INDEBTEDNESS, Black’s Law Dictionary (10th ed. 2014) (defining indebtedness as “the quality, state, or condition of owing money”). Moreover, common sense and understanding of the words “transfer” and “assign” do not restrict the terms’ applications to the conveyance of only assets and not liabilities.

Indeed, by executing the Assumption Agreement, the parties “confirm[ed] and acknowledge[d]” the amount remaining on the original Indebtedness as of the Effective Date, and KPCII “adopt[ed], ratifie[ed] and confirm[ed] . . . all of the representations, warranties and covenants” contained in the Original Security Instrument and Loan Documents. (Id. at §§ 1(a), 3(a)). Moreover, the Assumption Agreement expressly states that the terms and conditions of the Original Security Instrument and Loan Documents “shall remain in full force and effect.” (Id. at § 18). Indeed, no new money was advanced and no new indebtedness was created. Instead, the Indebtedness was transferred and assigned to KPCII; the outstanding amount owed on the Indebtedness and the terms of repayment remained unchanged; and the Original Security Instrument continues to secure the outstanding Indebtedness effective as of its original date of recording.

In short, the Assumption Agreement’s plain terms clearly state that it was intended to modify the Original Security Instrument to reflect the transfer and assignment of the original Indebtedness to KPCII. And because the intangible recording tax was paid on the Original Security Instrument, the Assumption Agreement met the exemption set forth in O.C.G.A. § 48-6-65(a)(1).

Accordingly, and for the reasons set forth above, the Commissioner’s Motion for Summary Judgment is **DENIED** and Petitioners’ Motion For Summary Judgment is **GRANTED**.

SO ORDERED, this 6th day of August, 2019.



Lawrence E. O’Neal, Jr., Chief Judge
Georgia Tax Tribunal