

TAXATION: STATE RECORDATION TAX.

Grantor's assignment that merely modifies parties to proprietary lease, which was previously admitted to record and on which full recordation tax was paid, qualifies for exemption from recordation tax.

The Honorable J. Curtis Fruit

Clerk, Circuit Court of the City of Virginia Beach

May 7, 1998

You ask whether certain documents submitted to the clerk's office for recordation, which convey real property in a retirement community in the City of Virginia Beach, are exempt from state recordation taxation.

You relate that these documents memorialize the lease and occupancy of the dwelling units located within the retirement community. In each instance, both a proprietary lease between the parent corporation¹ and a wholly owned subsidiary corporation ("proprietary lease"), and an assignment of the subsidiary corporation's interest in such lease to an individual lessee occupying the property ("grantor's assignment"),² are presented for recordation. You ask whether either document is entitled to an exemption from recordation taxes.

Section 58.1-807(A) of the *Code of Virginia* imposes a recordation tax on all contracts relating to real or personal property admitted to record.³ The clear and unambiguous terms of § 58.1-807(B) apply to the recordation of leases and assignments of leases, for which a recordation tax is levied, "unless provided otherwise in § 58.1-809." Section 58.1-809 applies only to instruments that modify the parties to, or the terms of, a previously taxed instrument.⁴ Section 58.1-809 specifically provides that § 58.1-807 is not to be construed to require payment of a tax for the recordation of any contract or other writing supplemental to a contract previously admitted to record and on which the tax has been paid,

when the sole purpose and effect of the supplemental instrument or writing is to convey property, in addition to or in substitution, in whole or in part, of the property conveyed in a prior instrument, to secure or to better secure the payment of the amount contracted for in a prior instrument, to alter the priority of the instrument, or to modify the terms, conditions, parties, or provisions of such prior instruments, other than to increase the amount of the principal obligation secured thereby.^[5]

A 1984 opinion of the Attorney General concludes that, if "the sole effect of the instrument presented to [the clerk for recordation] is to modify the parties and ... if the recordation tax was paid when the original [instrument] was recorded, this instrument escapes the tax under [§ 58.1-809]."⁶ A 1987 opinion notes that "[a]n assignment, even though it is a contract relating to real property within the meaning of § 58.1-807, can also be a supplemental writing under § 58.1-809 and, as such, is not taxable."⁷ The opinion concludes that when the assignment merely modifies the parties, it would qualify for the exemption from taxation contained in § 58.1-809.⁸

The proprietary lease provides for the lease of a residential unit within the retirement community commencing on a specific date and continuing thereafter until the cooperative is terminated. The grantor's assignment modifies the parties to the proprietary lease. Accordingly, assuming the full recordation tax is paid upon recordation of the proprietary lease, I am of the opinion that the grantor's assignment merely modifies the parties and, therefore, qualifies for the exemption from recordation taxes as provided in § 58.1-809.

¹The parent corporation is a cooperative created in accordance with the Virginia Real Estate Cooperative Act to provide independent retirement living. See Atlantic Shores Proprietary Lease at 1 (effective Oct. 23, 1996) (copy of which has been provided by you and found in Circuit Court of Virginia Beach Deed Book 374, at 1767).

²See Assignment of Proprietary Lease and Share of Stock (effective June 5, 1997) (copy of which has been provided by you and found in Circuit Court of Virginia Beach Deed Book 374, at 1778).

³Section 58.1-807(A) provides: "Except as hereinafter provided, on every contract ... relating to real or personal property admitted to record, a recordation tax is hereby levied" "The recordation of a deed of lease ... or assignment of the lessee's interest therein ... shall be taxed according to the provisions of [§ 58.1-807], unless provided otherwise in § 58.1-809" Section 58.1-807(B).

⁴1990 Op. Va. Att'y Gen. 257, 258, and opinions cited therein.

⁵Section 58.1-811 provides certain exemptions from recordation taxes, none of which applies to the facts you present.

⁶1984-1985 Op. Va. Att'y Gen. 251, 252 (interpreting former version of § 58.1-809, repealed § 58-60); accord 1984-1985 Op. Va. Att'y Gen. 381, 382.

⁷1987-1988 Op. Va. Att'y Gen. 562, 563.

⁸*Id.*