

The Dreaded Documentary Transfer Tax: Updated
by Dale S. Alberstone, Esq.

All counties and many cities in the State of California impose a tax on deeds and other instruments which convey title to real property. The tax is collected by the county recorder when the instrument is recorded. Some years ago, I discussed the tax for AOA readers in this magazine. This month's column will update that discussion.

With the exception of the County of San Francisco (whose tax is significantly higher), all counties impose a tax of \$1.10 per thousand dollars of declared value of the property.

More specifically, each county will assess what is known as a "documentary transfer tax" on the consideration or value of the interest or real property conveyed, exclusive of the value of any lien or encumbrance which was on the property before the conveyance and remains on the property after the conveyance, which exceeds \$100. Technically, the rate is \$0.55 per \$500, rounded up to the highest \$500. For simplicity, we typically ignore the \$0.55 per \$500 requirement and instead calculate it at \$1.10 per thousand dollars of value.

In addition, certain cities impose their own documentary tax in addition to the County tax. For example, in Los Angeles County, five cities have passed ordinances imposing the following rates of tax per \$1,000 of the consideration or value of the property (exclusive of existing liens remaining of record after the conveyance):

Los Angeles	\$ 4.50
Culver City	\$ 4.50
Pomona	\$ 2.20
Redondo Beach	\$ 2.20
Santa Monica	\$ 3.00

I recall that some 18 or more years ago, when the City of Los Angeles was debating whether to then impose its own city documentary transfer tax (in addition to the existing county tax), the City's advocates argued that sellers would simply pass the tax along to the buyers. Even at that time the concept rankled me because (1) I did not believe that passing the documentary transfer tax along to the buyer would become customary, and (2) it was just as offensive to me that the buyer would have to pay a new transfer tax as would the seller have to pay the new tax. As it has turned out, sellers almost always pay the City imposed tax. Rarely do contracts shift the burden and impose the obligation of reimbursement on the buyer.

Thus, for property sold in the City of Los Angeles, the documentary tax of declared value in excess of liens remaining against the property upon transfer is a whopping \$5.60 per \$1,000. For a sale price of \$1,000,000, the tax is \$5,600. Move the property to Beverly Hills, West Hollywood or Malibu and the tax would only be \$1,100.

For property sold in the City of San Francisco, the city tax added to the County tax of \$1.10 per thousand dollars is \$6.80 per \$1,000 on property from \$250,000 to \$1 million, \$7.50 per \$1,000 for \$1 million to \$5 million, and \$15.00 per thousand for \$5 million +.

Be that as it may, the documentary transfer tax is with us and is unlikely to be extinguished during our lifetimes.

Exemptions

Significantly, there are 15 exemptions to the transfer tax. If any one of them applies, then no transfer tax need be paid. The exemptions are:

1. Conveyances which confirm that title is already vested in the grantee.
2. Conveyances in dissolution of a marriage by one spouse to the other.
3. Conveyances which are used to secure a debt.
4. The reconveyance of a property upon satisfaction of a debt.
5. Conveyances of property, or an interest therein, into or out of a living trust.
6. Conveyances which change the manner in which title is held whereby the grantors and grantees remain the same and continue to hold title in the same proportionate interest.
7. Conveyances that are court ordered provided that they are not pursuant to a sale.
8. Conveyances which in fact are a bona fide gift and the grantor receive nothing in return.
9. Conveyances which establish that the property is the sole and separate property of a spouse, such as a quitclaim deed from one spouse to the other.
10. Conveyances which confirm that the property is a community property holding which was purchased with community funds.
11. Conveyances which confirm a name change, but the grantor and grantee remain the same parties.
12. Conveyances of an easement.
13. Conveyances where the liens and encumbrances are equal or more than the value of the property, and no further consideration is given.
14. Conveyances of an equitable title from a trustee under a land contract to the buyer at the consummation of the contract.

15. Conveyances from an individual or legal entity to an individual or legal entity where the grantors and grantees are comprised of the same parties and the parties continue to hold the same proportionate interest in the property. One exception to this exemption is a dissolution of a partnership (which is subject to the documentary transfer tax).

Ordinarily, the amount of the documentary transfer tax is stated on the face of the deed. Thus, if a person wants to ascertain the purchase price of property the last time it was sold, he could look at a photocopy of the deed (obtained from the county recorder or any title company), and from the amount of tax stated thereon, calculate what is likely to have been the sale price.

For example, if a deed to property situated in the City of Los Angeles declares that the documentary transfer tax was \$5,600, then one could determine that the sale price was likely to have been \$1,000,000, which was paid at the rate of \$1.10 per thousand dollars to the County and \$4.50 per thousand dollars to the City. (Collectively, the tax would have been \$5.60 per \$1,000.) The math is as follows: Divide \$5,600 by \$5.60 and then multiply by \$1,000.

There are two caveats relative to using the documentary tax to ascertain the prior sale price. First, the transfer tax is based on the value of property excluding any trust deeds or other liens which are against the property both before and after the conveyance. Thus, if the buyer purchases a property subject to an existing \$500,000 first trust deed, the documentary transfer tax shown on the deed will understate the sales price by \$500,000. Thus, it is a good idea to research title when calculating the price based on the transfer tax in order to determine whether there existed any remaining trust deed at the time of the conveyance.

Second, there is nothing illegal about a buyer paying a sum of money toward the documentary tax in addition to what is required, just as a writer of a letter may affix additional stamps to the envelope over and above what the Postal Service charges by the ounce. To an unsuspecting person, the additional tax will make it appear that the sales price for the property was actually more than it really was.

The reason a buyer may pay the extra amount is to attempt to artificially inflate the value of his property. When other individuals later procure a photocopy of the recorded deed from the county recorder to ascertain the prior sales price, they may be fooled into thinking it was more than the true price.

For example, for property in the City of Beverly Hills, the documentary transfer tax is \$1.10 per \$1,000 of value. On a \$1,000,000 sale, that would require a transfer tax of \$1,100. If a person wants others to conclude that he actually paid \$1,200,000 for the property, he might deposit with escrow, to be paid to the county recorder, an additional \$220 so that the deed reflects that a total of \$1,320 was paid as the transfer tax. Thus, someone who looks at the transfer tax of \$1,320 and (naively) calculates the sales price to have been \$1,200,000, does so at his peril, because the actual price was only \$1,000,000.

In most transactions, buyers do not pay any additional transfer tax, which is why the amount of the declared tax is generally reflective of the actual sales price.

Another aspect of the reporting of the tax is that there is a provision in law which allows the seller to declare the amount of the transfer tax on a separate piece of paper which is not recorded. In that event, the documentary tax is not stated on the deed. Thus, one could not then look at the recorded instrument to calculate, or even estimate, the prior sales price of the property. For most practical purposes, the documentary transfer tax would be undisclosed.

However, attorneys who read this column should be alerted to the fact that on July 19, 2007, the Office of the Attorney General for the State of California issued an opinion that the non-recorded, separate sheet of paper which declares the amount of the tax is discoverable under the California Public Records Act of the Government Code. Counsel may contact my office to obtain a copy of the opinion.

In conclusion, sellers should bear in mind that they are lawfully allowed to negotiate whether they or the buyer will pay the tax upon the recordation of the deed. It is essential; however, that such negotiation occurs prior to the time that sales agreement is executed. If the buyer, rather than the seller, is to pay the tax, then that arrangement should be clearly set forth in the contract.

Dale Alberstone is a prominent litigation and transactional real estate attorney who has specialized in real property law for the past 33 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell, which is a registered certification of Reed Elsevier Properties, Inc. An AV rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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