

FILED

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

OCT 26 9 43 AM '99

1137 19th STREET ASSOCIATES, L.P.
1828 L STREET ASSOCIATES, L.P.,
Petitioners

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

V.

Tax Docket No. 6745-96
6746-96
(consolidated)

DISTRICT OF COLUMBIA,
Respondent.

JUDGMENT

This matter came before the Court for consideration of the Petitioners' Motion for Summary Judgment, Respondent's Opposition and Cross-Motion for Summary Judgment, Petitioner's Reply, Respondent's Response, Petitioners' Supplemental Brief Regarding Legislative Intent, and Respondent's Analysis of Legislative Objective and Intent of the District of Columbia Code Sections 45-922(11) and 45-923(a). After careful review of the record and the applicable law, the Court issued an Order dated October 4, 1999.

WHEREFORE, it is on this 26th day of October 1999,

ORDERED, that Petitioners' Motion for Summary Judgment is GRANTED in part and DENIED in part; and it is further

ORDERED, that Respondent's Motion for Summary Judgment is GRANTED in part and DENIED in part; and it is further

ORDERED, that judgment is entered in favor of Petitioner, 1828 L Street Associates, L.P. and against Respondent, District of Columbia for the refund of recordation tax in the amount of \$165,000.00, and it is further

ORDERED, that Summary Judgment is entered in favor of Respondent, District of Columbia and against Petitioner, 1137 19th Street, L.P.

CLERK OF THE COURT

By *Claudette Fluckes.*
Clerk
Tax Division

Copies to:

David H. Dickieson, Esq.
Donald B. Reynolds, Jr., Esq.
John S. Ross, III, Esq.
Silverstein and Mullens, PLLC
1776 K Street, NW
Suite 800
Washington, DC 20006

Harold Gordon, Esq.
11501 Huff Court
Kensington, MD 20895

Joseph F. Ferguson, Jr., Esq.
Assistant Corporation Counsel
441 4th Street, NW
Washington, DC 20001

FILED

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

Oct 5 2 52 PM '99

1137 19th STREET ASSOCIATES, L.P.
1828 L STREET ASSOCIATES, L.P.,
Petitioners

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

v.

Tax Docket No. 6745-96
6746-96
(consolidated)

DISTRICT OF COLUMBIA,
Respondent.

ORDER

This matter comes before the Court for consideration of the Petitioners' Motion for Summary Judgment, Respondent's Opposition and Cross-Motion for Summary Judgment, Petitioner's Reply, Respondent's Response, the Petitioners' Supplemental Brief Regarding Legislative Intent, and the Respondent's Analysis of Legislative Objective and Intent of District of Columbia Code Sections 45-922(11) and 45-923(a).

The Petitioners seek summary judgment relief from District of Columbia recordation tax paid in 1995 upon the recording of instruments with the Recorder of Deeds. The two properties in question are 1137 19th Street, NW, Washington, DC (herein after "19th Street") and 1828 L Street, NW, Washington, DC (herein after "L Street"). The Respondents seek cross summary judgment.

In accordance with Superior Court Rule of Civil Procedure 56(e), a successful motion for summary judgment requires that the movant must show that there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law. The burden lies on the moving party to demonstrate the absence of a dispute of material facts. The Petitioners, as Movants, have filed a Statement of Undisputed Material Facts. The Respondent, as Cross-Movant, agrees that no material facts are in dispute. Summary judgment may be properly granted where the only issue between the parties is not a factual issue, but rather a legal issue. District of Columbia v. Galliher, Inc., 656 A.2d 296, 302 (D.C. 1995). The Court finds that no material issues of fact exist and that judgment as a matter of law is appropriate in the above-captioned cases. The undisputed facts are stated below.

19th Street Undisputed Facts

The commercial property in question is square 140, lot 907, known as 1137 19th Street, NW, Washington, DC, owned by 1137 19th Street Associates. In June 1979, 19th Street Associates Limited Partnership closed on a construction loan. On June 14, 1979, the construction loan Deed of Trust was recorded. No recordation tax was paid, nor required by the statute in effect at that time. On June 30, 1980, the construction loan was increased to the ultimate amount of \$22,000,000.00. No recordation tax was paid, nor required by statute.

On January 14, 1981, the construction loan was refinanced with a permanent loan of \$23,500,000.00. The difference between the construction loan value and the permanent loan value was \$1,500,000.00. A deed of trust on the construction loan was recorded and 19th Street Associates paid \$15,000.00 in recordation tax with respect to the \$1,500,000.00 increment of the permanent loan that exceeded the principal amount of the construction loan.

On January 31, 1995, the principal balance of the 19th Street Partnership's permanent loan was approximately \$22,000,000.00. On that date, the 19th Street Partnership closed a new \$22,000,000.00 loan that refinanced the outstanding balance of the 1981 loan. The January 31, 1995 refinance loan is the instrument in dispute. The 19th Street Partnership paid, under protest, a recordation tax in the amount of \$242,000.00 upon recording of the 1995 deed of trust. The Petitioner asserts that the 19th Street property qualifies for (1) a permanent loan deed of trust exemption, and (2) a refinancing exemption. The Petitioner, 19th Street Partnership, now seeks a refund of \$242,000.00.

L Street Property Undisputed Facts

On April 2, 1962, the "L Street Joint Venture" was organized for the purpose of acquiring a 99-year leasehold interest in commercial property located in the District of Columbia.¹ On April 6, 1962, the Joint Venture entered into a Deed of Lease as tenants for a term of 99 years. The lease was assignable by the tenants and granted the tenants the right to construct improvements on the property and to mortgage or encumber their leasehold interest. The Lease provided that any such mortgage or encumbrance would be subject to the terms of the lease, which would not be subordinated.

On January 30, 1967, the L Street Limited Partnership was formed. On January 30, 1968, the Joint Venture assigned the lease to the Limited Partnership. In January 1970, the Partnership closed on a construction loan in the amount of \$8,000,000.00. On February 28, 1995, the balance of the construction loan was \$1,073,493.28. On that same date, the construction loan was refinanced for

\$15,000,000.00. In March 6, 1995, the leasehold trust instrument was submitted for recordation. The Petitioners paid a recordation tax in the amount of \$165,000.00, or 1.1% of \$15,000,000.00. The Petitioner asserts that the L Street property qualifies for (1) a permanent loan deed of trust exemption, and (2) a "99 year or less" lease exclusion from recordation tax. The Petitioner L Street Partnership seeks a refund of \$165,000.00.²

The Respondent, the District of Columbia, asserts, that neither the 19th Street property instrument, nor the L Street property instrument qualifies for exemption from recordation tax. In relation to the 19th Street property, the Respondent argues that a recordation tax "is required since no tax on the construction loan deed of trust had ever been 'timely and properly paid.'" The Respondent further argues that "the Recorder of Deeds must apply the current law, not the provisions of older statutes. Because the current statute calls for an exemption only if the tax on the underlying construction loan deed of trust was paid, petitioners cannot now rely on earlier statutory language that exempted from tax the recording of such instruments." Thus, the Respondent argues, the 19th Street property is subject to recordation tax under D. C. Code §45-923(a)(3). In reference to the L Street property, the Respondent argues that while the statutory definition of a "deed" excludes leases of 99 years or less, the Petitioners have filed a "leasehold deed of trust," not a deed, thus no exemption is appropriate under D.C. Code §45-922 and tax is applicable under §45-923(a)(3). As an alternative interpretation, the Respondent asserts that

¹Square 107, lot 74 known as 1828 L Street, NW, Washington, DC.

² The amount of recordation tax in controversy is \$165,000. Under their "lease exemption" theory, the Petitioners seek a refund of the entire \$165,000 in tax paid. In the alternative, the Petitioners seek a refund of \$88,000 under their "permanent loan deed of trust exemption" theory. It appears

even if the lease is excluded from the definition of a deed, it is a security interest instrument taxable under §45-923(a)(3).

Recordation Tax

District of Columbia Code section 45-923 imposes a tax on the recordation of three categories of instruments: (1) deeds that title real property; (2) deeds that evidence a transfer of economic interest in real property; and (3) security interest instruments. At the time it is submitted for recordation, the deed or security interest instrument is to be taxed at a specified rate, in accordance with the statute. For instance, the statute specifies that deeds which title real property shall be taxed at a rate of 1.1% of the total consideration for the deed. Security interest instruments are taxed at the rate 1.1% on the total debt incurred and not previously taxed. Deeds that evidence a transfer of economic interest in real property are taxed at the higher rate of 2.2 % of the total consideration.

Nevertheless, there are exemptions to the recordation tax. Code Section 45-922 identifies twenty-two instances in which a deed or security interest instrument is exempt. One such instance arises where a permanent loan deed of trust is submitted for recordation and the tax on the underlying construction loan has been paid; no additional tax is imposed, except on the amount that the permanent loan liability exceeds the construction loan debt. This exemption is set out in section 45-922(11) and shall hereinafter be referred to as the “permanent loan deed of trust exemption.”

In addition to the enumerated exemptions, section 45-923(a)(3) also limits the recordation tax. The limitation applies to security interest instruments. When

that the Petitioners arrive at this figure by subtracting the amount of tax paid on a prior recording, under previous law at the rate of 1.0%, from the tax due under current law at the rate of 1.1%.

existing debt is refinanced, section 45-923(a)(3) provides that the recordation tax will only apply to the “new” debt, meaning the amount of debt incurred over and above the existing debt due. This exemption-by-limitation shall hereinafter be referred to as the “refinancing exemption.”

The Petitioners assert that the “permanent loan deed of trust exemption” applies to both the 19th Street and the L Street recordations. In the alternative, the Petitioners assert that the “refinancing exemption” applies to the 19th Street recordation and that a “lease exemption” applies to the L Street recordation.

The District counters that the “permanent loan deed of trust exemption” is not applicable to either recordation because no tax was paid on the construction loans of either property. As to the “refinancing exemption,” the District asserts that such an exemption is limited to the recordation of a current refinancing of a construction loan, not the refinancing of a permanent loan, as in the case of 19th Street. The District further argues that the L Street leasehold trust is a security interest in real property, and thus, is subject to the recordation tax without exception.

In construing tax law, the Court is mindful of the maxim that “tax laws ought to be given reasonable construction, without bias or prejudice against either the taxpayer or the state, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve.” District of Columbia v. Acme Reporting Co., 530 A.2d 708, 712 (D.C. 1987); 3A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §66.02 (quoting State v. Brandt, 31 N.W. 2d 5 (1948)). As a rule, tax laws are to be strictly construed

against the state and in favor of the taxpayer if the statute in controversy is unclear and ambiguous. Id. On the other hand, *exemptions* from taxation are not favored, but are strictly construed in favor of the state. See Pittman v. Housing Authority of Baltimore City, 25 A.2d 466, 468 (Md. 1942)(emphasis added). Exemptions from taxation are to be strictly construed against those claiming exemption. See Conference of Major Religious Superiors of Women, Inc. v. District of Columbia, 348 F.2d 783, 121 U.S. App. D.C. 171 (1965); Gordon v. District Unemployment Compensation Bd., 402 A.2d 1251 (D.C.1979)(there is to be strict construction of an exemption from taxation). The taxpayer must affirmatively show that the alleged exemption is clearly allowed by law, and if there is real doubt upon the subject, that doubt must be resolved in favor of the state. Pittman, 25 A.2d at 468. Therefore, 19th Street Associates and L Street Associates, the taxpayers and Petitioners in the instant case, have the burden of showing that an exemption applies to the 19th Street and L Street 1995 recordations.

Analysis of Section 45-923: the Imposition of Tax

Title 45, subchapter II, is titled "Recordation Tax on Deeds. Code section 45-923 imposes the recordation tax. However, in accordance with Code section 45-923, a recordation tax is imposed not only on instruments typically known as "deeds," as relating to title to real property, but also on security instruments that are secured by an interest in real property. The statutory definition of a "deed" encompasses not only instruments that convey title, but also those which convey an interest in real property, a security interest in real property, or an economic interest in real property. See §45-921(3)(A).

Security interest instruments subject to recordation tax.

Security interest instruments are subject to the recordation tax pursuant to §45-923(a)(3), which provides that at the time it is submitted for recordation, a security interest instrument shall be taxed at a rate of 1.1% of the total amount of debt incurred which is secured by the interest in real property. For the purposes of the recordation tax, a security interest instrument means any instrument which conveys, vests, grants, transfers, bargains, sells, or assigns a security interest in real property. A security interest instrument may include the following:

- (A) A mortgage;
- (B) A deed of trust;
- (C) A financing statement;
- (D) A refinancing statement; or
- (E) Another document, instrument, or writing which creates an encumbrance on real property.

D.C. Code §45-921(14).

The **L Street instrument**, on which recordation tax is now appealed, is the refinancing instrument secured by a deed of trust encumbering a leasehold and recorded on June 2, 1995. Whether the leasehold trust instrument is a security interest instrument, as defined under §45-921, will be discussed below. A question for consideration is whether the L Street leasehold trust, used to secure the refinanced debt, is an encumbrance on real property. The applicability of §45-923(a)(3), and hence, the proper imposition of recordation tax, depends on whether the leasehold trust is a "security interest instrument... which creates an encumbrance on real property," as defined by statute. The Court will discuss this L Street issue at a later point in this Memorandum Order.

The 19th Street instrument, on which recordation tax is now appealed, is the refinance instrument of January 31, 1995. The January 31, 1995 instrument refinanced an existing permanent loan deed of trust, to the tune of \$22,000,000.³ Refinancing statements are included in the definition of security interest instruments. See D.C. Code § 45-921(14)(D). The 19th Street instrument is a security interest instrument because it is a refinancing statement that creates an encumbrance on real property. The real property, in the case of 19th Street, is square 140, lot 907, Washington, D.C., owned by the 19th Street Partnership. Since the recordation tax applies to security interest instruments on real property, the 19th Street January 31, 1995 refinancing instrument is subject to the recordation tax, unless an exemption applies.

19th Street Security Interest Instrument

Refinancing Exemption

As discussed above, the “refinancing exemption” flows from Code section 45-923(a)(3). The Code requires that, upon recordation, a security interest instrument shall be taxed at a rate of 1.1% of the total amount of debt incurred. The Code further states:

However, when existing debt is *refinanced*, the recordation tax shall only apply to the amount of any new debt incurred over and above the amount of the principal balance due on existing debt if the existing debt was a purchase money mortgage or purchase money deed of trust or subject to taxation under this paragraph.

³ The lineage of the 19th Street refinance instrument is recapped as follows: A construction loan deed of trust was recorded on June 14, 1979; the construction loan increased to the ultimate amount of \$22,000,000 on June 30, 1980. On January 14, 1981, the construction loan was replaced by a permanent loan deed of trust, in the amount of \$23,500,000 and tax was paid on the difference. The balance of the permanent loan was eventually paid down to \$22,000,000 and on January 31, 1995, the permanent loan was refinanced in the amount of \$22,000,000.

D.C. Code §45-923(a)(3)(emphasis added). The “refinancing exemption” analysis requires the identification and classification of the “existing debt.” In reference to the 19th Street instrument recordation, the “existing debt” is the permanent loan deed of trust recorded on January 14, 1981. The 1981 permanent loan deed of trust was originally made in the amount of \$23,500,000, but had been paid down to \$22,000,000 by the time of the permanent loan refinance instrument recordation presently before this Court.⁴ Thus, the “existing debt” is the January 1981 permanent loan deed of trust and the existing debt amount is \$22,000,000.

In accordance with §45-923(a)(3), in order to qualify for the “refinancing exemption,” the existing debt must have been a purchase money mortgage or deed of trust, or the existing debt must have been “subject to taxation under this paragraph.” The January 1981 permanent loan, the “existing debt” in this case, was *not* a purchase money mortgage or deed of trust. As stated above, the January 1981 instrument was a refinance of the construction loan. Therefore, in order to qualify for the refinancing exemption, the existing debt must have been “subject to taxation under this paragraph.”

The Petitioner claims that the 19th Street 1995 refinancing instrument qualifies for the “refinancing exemption” and asserts that the existing debt (the January 14, 1981 permanent loan deed of trust) was subject to the recordation tax and when it was recorded, the tax, in the amount of \$15,000, was paid.⁵ The District, on the other hand, declares that a recordation tax is required on the 19th

⁴ The 1981 permanent loan refinanced the \$22,000,000 construction loan and a \$15,000.00 tax was paid on the difference with the 1981 instrument was recorded.

⁵ The \$15,000 tax was 1% of the difference between the construction loan figure of \$22,000,000 and the 1981 permanent loan amount of \$23,500,000.

Street 1995 refinancing statement since the tax on the *underlying construction loan* deed of trust had not been “timely and properly paid.” Thus, in its counter-argument, the District disregards analysis of the debt liability immediately prior to the present refinancing and recordation. In other words, instead of addressing the 1981 permanent loan deed of trust as the “existing debt,” the District points to the underlying construction loan, recorded on June 14, 1979, as the existing debt for current analysis. This Court finds, however, that although the construction loan is the *original debt*, the construction loan was replaced by the 1981 permanent loan. Thus, the 1981 permanent loan deed of trust is the “existing debt,” which the Petitioners refinanced and recorded in 1995, for the purposes of the section 45-923(a)(3) exemption analysis.

Refinancing Exemption: Section 45-923(a)(3) Statutory Interpretation

In order to qualify for the section 45-923 refinancing exemption, the existing debt must have been “subject to taxation under this paragraph.” See D.C. Code §45-923(a)(3). Thus, the issue before the Court is whether the existing debt -- specifically the January 14, 1981 permanent loan deed of trust -- was subject to the tax mandated by section 45-923(a)(3).⁶ In other words, was the existing debt subject to taxation at the rate required under this paragraph, that rate being 1.1% of the total amount of debt incurred? In this instance, the answer is “no.” The Court finds that although the 1981 permanent loan was subject to tax under the statute in

⁶ The Court finds that an illumination of the words “under this paragraph” is in order. What follows is a brief review of the mechanics of statutory construction: The code in question is *title 45, section 923, subsection a, paragraph 3*. Thus, the reader must look specifically at §45-923(a)(3) for the exception to taxation under §45-923(a)(3).

effect at the time the 1981 loan was recorded, it was not subject to the tax required by the law currently in effect. Therefore, since the existing debt was not “subject to taxation under this paragraph,” the 1995 security interest instrument does not qualify for any exception to tax under 45-923(a)(3).

The Petitioners argue that since a recordation tax was paid on the 1981 permanent loan deed of trust, pursuant to the statutory provision then in effect, the 1995 instrument should qualify for the section 45-923(a)(3) exemption. This Court finds, however, that the language of the current statute, which must be applied to the 1995 recordation presently before the Court, does not allow for such an interpretation.

The District of Columbia Court of Appeals has opined that in construing acts of the legislature, “we must look first to the language of the statute and, if it is clear and unambiguous, give effect to its plain meaning.” District of Columbia v. Acme Reporting Company, 530 A.2d 708, 712 (D.C. 1987)(citing Office of People’s Counsel v. Public Service Commission, 477 A.2d 1079, 1083 (D.C. 1984).

This Court finds that the words “subject to taxation under this paragraph” are so key in analyzing this statute section that they cannot be ignored. It is a basic axiom of construction that effect must be given every word of a statute and interpretations that operate to render a word inoperative should be avoided. District of Columbia v. Acme Reporting Co., 530 A.2d 708, 713 (D.C. 1987). A statute should not be construed in such a way as to render certain provisions superfluous or insignificant. Id.; Tuten v. United States, 440 A.2d 1008, 1010 (D.C. 1982). This Court finds that although section 45-923(a)(3) allows an exemption from tax,

the statutory language limits the exemption to certain tax situations. This limitation on possible exemption is imposed by the words “subject to taxation under this paragraph.” Thus, according to the whole text, an exemption is only available in the specific situations that the statutory language allows. With due consideration to the phrase “subject to taxation under this paragraph,” this Court finds that the plain meaning of the words insist that an exception-by-limitation of tax is allowed *if* the existing debt was subjected to the very tax imposed by §45-923(a)(3), at the stated rate of 1.1%. In the instant case, the existing debt was not subject to the tax as mandated in current section 45-923(a)(3); thus, the current exemption cannot apply, unattached from the specified tax consequence.

Moreover, “in determining the true construction of a specific statutory phrase one must consider the connection of the clause with other clauses in the same statute, and the conclusions which on comparison with other clauses, may reasonably and obviously be drawn.” Acme Reporting, 530 A.2d at 714. Upon consideration of the other paragraphs of section 45-923 that impose recordation tax, the Court notes that 923(a)(1) and 923 (a)(2) do not include exemptions to the tax that they impose. Section 923(a)(3) is unique in its language. The legislature specifically intended to include the phrase “subject to taxation under this paragraph” in 923(a)(3). The Court can only construe that the legislature intended that the words would have effect.

The legislative history of section 45-923(a) also addresses the recordation tax on security interests and the exemption that may be available when a debt is

refinanced. The pertinent excerpt from the Council of the District of Columbia

Report is as follows:

The legislation also provides that if the debt is refinanced, the tax will apply only to the amount that exceeds the amount of the original deed of trust, unless no tax was paid on the original deed of trust.

See Council of the District of Columbia Report, March 22, 1994, "Omnibus Budget Support Act of 1994," Bill 10-575, p. 16; D.C. Act 10-225; D.C. Law 10-128.

The Court notes that the Committee comment, cited above, most strikingly does not use the same terminology as the enacted statute. The historical comment uses the amount of the "original deed of trust" as the liability on which tax must have been paid. The enacted statute, however, promulgates that the principal balance due on the "existing debt" is the liability on which tax must have been paid in order for the exemption to apply. The Court finds that the terms "original" liability and the "existing" liability are not identical. The terms are not the same in plain words, nor in plain meaning. The Court finds that the term "original," used only in the historical comment, could very well be a reference to the construction deed of trust, as the District asserts; or the term "original" could have been intended as a synonym for "existing," the term ultimately chosen and enacted in the statute. At any rate, the task before the Court is not to "construe" committee comments: the judicial task is to construe statutory language on its face. The enacted statute is promulgated with the words "existing debt." A court "is generally not at liberty to surmise a legislative intent contrary to the letter of the statute, or to indulge in the license of inserting or omitting words with the view of making the statute express an intent which is not evidenced in the original form." St. Paul Ins. Co. v. House, 533

A.2d 301, 309 (Md. Ct. Spec. App. 1987). Therefore, in determining whether the exemption from tax applies, the Court is obliged to look to what debt exists when the refinancing instrument is submitted for recordation. In the case of the 19th Street 1995 recordation, the 1981 permanent loan was the existing debt that was refinanced.

The 1981 permanent loan deed of trust was recorded on January 14, 1981. The Court notes that at that time, the recordation tax statute in effect required that a 1% tax be paid on the amount that the permanent loan exceeded the construction loan. The prior statute, however, has since been amended by the current law. The current law requires a 1.1% rate. This Court therefore concludes that the 19th Street 1995 recordation does not qualify for a refinancing exemption under D.C. Code §45-923(a)(3) because the existing debt, the January 1981 permanent loan deed of trust, was not subject to tax under section 923(a), paragraph 3.

Permanent Loan Deed of Trust Exemption:

19th Street and L Street Recordations

The Court will now address the permanent loan deed of trust exemption allowable under section 45-922. The taxpayers assert that both the 19th Street recordation and the L Street recordation qualify for an exemption from the recordation tax pursuant to 45-922(11). Section 45-922 (11) allows a permanent loan deed of trust exemption. The Code states as follows:

When a permanent loan deed of trust or mortgage is submitted for recordation and the tax on the construction loan deed of trust or mortgage has been timely and properly paid, no additional tax liability arises under §45-923, except where the amount of the obligor's liability secured by the

permanent loan deed of trust or mortgage exceeds the amount of his construction loan deed of trust or mortgage, in which case the tax shall be calculated only on the amount of such difference; provided, however, that such permanent loan deed of trust or mortgage shall contain a reference to the construction loan deed of trust or mortgage and the date and instrument number where it is recorded.

D.C. Code §45-922(11).

In order to qualify for the section 922(11) exemption, the instrument submitted must be a permanent loan deed of trust or mortgage.

A “permanent loan deed of trust or mortgage” is defined as a deed of trust or mortgage upon real estate which secures an instrument made by the same obligors who made the instrument which the construction loan deed of trust or mortgage secured, and which conveys substantially the same real estate.

D.C. Code §45-921 (10). The 19th Street January 21, 1995 instrument is a “refinanced” permanent loan instrument.⁷ The record shows that the existing permanent loan instrument on the 19th Street property was recorded on January 14, 1981. The 1981 permanent loan replaced the underlying construction loan recorded on June 14, 1979. The 1979 construction loan, the 1981 permanent loan, and the 1995 refinanced permanent loan are all secured by substantially the same real estate. In addition, the chain of deeds of trust were made by the same obligors, the 19th Street Associated Limited Partnership. This Court finds that the 19th Street 1995 instrument meets the definition of a permanent loan deed of trust.

The L Street March 6, 1995 instrument is a deed of trust encumbering a leasehold interest which secures an instrument made by the same obligors who made the instrument which the construction loan deed of trust or mortgage secured, and which conveys substantially the same leasehold interest in real estate.

⁷ The 19th Street recordation does not, however, qualify for the refinancing exemption under §45-923(a)(3), as discussed above.

In order to qualify for the permanent loan deed of trust exemption under section 45-922(11), the “tax on the construction loan deed of trust or mortgage” must have been “timely and properly paid.” The taxpayer argues that since no tax was required on construction loan recordations under the law in effect at the time the 19th Street construction loan deed of trust was recorded in June 1979, no tax is now due. The District asserts that since no tax was paid on the construction loan recordations, any exemption allowable under current law does not apply.

As noted above, in construing legislation, the court must first look to the language of the statute and, if it is clear and unambiguous, give effect to its plain meaning. District of Columbia v. Acme Reporting Co., 530 A.2d 708 (D.C. 1987)(citing Office of People’s Counsel v. Public Service Commission, 477 A.2d 1079, 1083 (D.C. 1984). The first step is to determine whether the statutory term is ambiguous and unclear; if so, then the second step is to examine the legislative history surrounding the enactment of the statute in question. See Acme Reporting, 530 A.2d at 713; Office of People’s Counsel, 477 A.2d at 1085. Although this Court finds that the language “timely and properly paid” is clear, the *application* of the language is unclear. The question that arises is whether the legislature intended that section 922(11) exemptions shall apply only to recordations where tax was paid on the underlying construction loan deed of trust *or* if the legislature intended to allow the current section 922(11) exemption in instances where there was no tax under a prior statutory scheme. The Court, therefore, turns to an examination of the legislative history for understanding the legislative intent.

Legislative History

The District of Columbia Real Estate Deed Recordation Tax Act, approved March 2, 1962, created a tax of .5% on the consideration of each deed at the time the deed was submitted for recordation. Deeds which secure a debt or other obligation were exempt from the tax. The Revenue Act of 1975 amended the 1962 Act by increasing the rate of tax from .5% to 1%. Security interest deeds, however, continued to be exempt from tax at that time.

The District of Columbia Revenue Act of 1980 expanded the base of the deed recordation tax to include construction loan deeds of trust or mortgages and permanent loan deeds of trust or mortgages. The Revenue Act of 1980 repealed the exemption for deeds which secure a debt by requiring payment of the deed recordation tax on all construction loan deeds of trust or mortgages and permanent loan deeds of trust or mortgages.

According to the legislative history, the intent of Revenue Act of 1980 was to “[include] loan deeds of trust or mortgages under the provisions of the deed recordation tax, because the current exemption of such instruments has cost the District substantial amounts of revenue by allowing developers acquiring substantial properties to pay the recordation tax on only a small portion of the ultimate value of the property even though deeds evidencing the total value are recorded.”

Legislative history of D.C. Law 3-92 at page 3.

Under provisions of the Revenue Act of 1980, no additional deed recordation tax was required to be paid on a permanent loan deed of trust or mortgage when it was recorded within three years of a construction loan deed of

trust or mortgage, secured by the same real estate. The legislative history of the Act of 1980 further explains that the deed recordation tax would have to be paid, however, on any amount by which the permanent loan or deed of trust exceeded the amount of the construction loan or deed of trust, or mortgage.

The Omnibus Budget Support Act of 1994 amended the District of Columbia Real Estate Deed Recordation Act, D.C. Code tit. 45, §§ 921-923. In accordance with the legislative history, the Act of 1994 was intended to implement measures that would “generate revenue to balance and help finance the revised fiscal year 1994 budget and the fiscal year 1995 budget.” See Legislative History of Law 10-128. In furtherance of this fiscal goal, the Act of 1994 increased the recordation tax rate on security interest instruments. The Act of 1994, with an effective date of June 14, 1994, created a 1.1% recordation tax on security interest instruments. The 1.1% security interest instrument recordation tax is promulgated in D.C. Code §45-923(a)(3).

The legislative history of the Act of 1994, however, states as follows: “*the legislation also provides that if the debt is refinanced, the tax will apply only to the amount that exceeds the amount of the original deed of trust, unless no tax was paid on the original deed of trust.*”⁸(emphasis added). The Court finds this passage to be most illuminating; the history explains that the tax exemption-by-limitation of tax is applicable **unless no tax was paid** on the original deed of trust. The “original deed of trust” is the construction loan deed of trust. In the instant case, no tax was paid on the 19th Street construction loan deed of trust, nor on the L Street construction loan deed of trust.

Thus, this Court finds that the legislative intent of section 922(11), inclusive of the phrase “timely and properly paid,” is that the 922(11) exemption is available only to those recordations on which tax was paid on the original construction loan deed of trust. Therefore, since no tax was paid on the original construction loans, neither 19th Street nor L Street qualify for the permanent loan deed of trust exemption under D.C. Code §45-922(11).

No Retroactive Tax Effect

This Court notes that, in application, the language of §45-922(11), as well as of §45-923, requires a “look-back” to prior debt. The District’s arguments strongly suggests that the recordation tax shall have a retroactive effect. The Court finds, however, that the recordation tax cannot be said to have a retroactive effect.

A statute is not retroactive merely because it draws upon antecedent facts for its operation. Neild v. District of Columbia, 110 F.2d 246, 255-256 (D.C. Cir. 1940). In the Neild case, the tax in question was a tax “levied only when the taxpayer both exercises the privilege of doing business in the taxable year and has been in receipt of gross receipts during a *previous year*.” 110 F.2d at 255 (emphasis added). The tax statute, at issue before the U.S. Court of Appeals for the District of Columbia in the Neild case, used the gross receipts figure of the previous year as the “measure of value of the privilege taxed.” Id. The court in Neild decided that “the retrospective measure provided by the pertinent statute is a proper and reasonable one.” The Neild court found that the net income for the preceding calendar year was a reasonable measure for a tax on the privilege of doing business, a tax levied on an annual basis.

⁸ Legislative History of Law 10-128 at page 16.

Likewise, this Court finds that whether or not the tax was paid on the original underlying construction loan is a reasonable basis for the determination of whether a current exemption from tax should apply to the recordation of an instrument secured substantially by the same real estate and made by the same obligors. The exemption is meant to give a “break” to those obligors/taxpayers who have already paid tax.

The 1995 19th Street security interest instrument is subject to recordation tax in accordance with §45-923(a)(3). Neither the refinancing exemption under §45-923(a)(3), nor the permanent loan deed of trust exemption under §45-922(11) apply to the 19th Street recordation. Likewise, this Court finds that the permanent loan deed of trust exemption does not apply to the 1995 L street recordation because no tax was paid on the underlying construction loan deeds of trust.

L Street Security Interest Instrument

The Court will now address the taxpayer’s argument that the L Street instrument enjoys a “lease exemption” from the payment of recordation tax. The L Street tax issue, presently before the Court, concerns the recordation of a security interest secured by a 99-year lease. The lease in question is on the property located at 1828 L Street, NW, Washington, DC. On February 28, 1995, the L Street Limited Partnership refinanced a construction loan, in the amount of \$15,000,000, secured by a “deed of trust” encumbering its interest in the L Street lease. This leasehold deed of trust was submitted for recordation on March 6, 1995, and was subsequently taxed. The Petitioner asserts that the 1995 Trust was not subject to the recordation tax because the 99-year leasehold interest possessed by the petitioner

does not constitute “real property” for the purposes of D.C. Code §§ 45-923(a)(3), 45-921(14), and 45-921(4).⁹

L Street Lease is Not a Deed

The L Street leasehold deed of trust is not a “deed” for the purposes of the recordation tax scheme. The Court notes, that in accordance with the statutory definition, the word “deed” shall not include a will or lease with a term of 99 years or less. D.C. Code § 45-921(3)(B). The Court finds that since the L Street lease is for a term of 99 years, the lease is not a deed in accordance with the recordation tax statutory definitions.

The recordation tax statute, however, not only imposes a recordation tax on “deeds,” but also on security interest instruments. D.C. Code §45-923. In accordance with District of Columbia Code, a “security interest instrument” means “any instrument which conveys, vests, grants, transfers, bargains, sells, or assigns a *security interest in real property*. D.C. Code §45-921(14)(emphasis added). Thus, whether the leasehold interest is a security interest in real property is at issue.

The phrase “security interest” means any interest in real property acquired for the purpose of securing payment of a debt. D.C. Code §45-921(13). District of Columbia Code section 45-921(4) defines the words “real property” to mean “every estate or right, legal or equitable, present or future, vested or contingent in lands, tenements, or hereditaments located in whole or in part within the District.” D.C.

⁹ The Petitioner further argues that the leasehold interest is *not* real property because a leasehold is not a fee simple interest in land. The Petitioner seeks to promote the principle that a leasehold interest in realty for a term of years is personal property in this context. The Petitioner, citing D.C. Code §45-204, asserts that an estate for years is a chattel real, meaning *personal* property rather than an interest in real property.

Code §45-921(4).¹⁰ The record shows that the L Street Lease (a) was assignable by the Petitioner as Tenant; (b) granted the Tenant the rights to construct permanent improvements on the land, and (c) granted the Tenant the right to mortgage or encumber the leasehold interest. On the other hand, the Court finds that the Lease provided that (a) any mortgage or encumbrance would be subject to the terms of the lease, (b) the lessor held the interest in the land, (c) the lease was for a term of 99 years, and (d) the lease is a “contract” for the use of the land, albeit long term use. This Court finds that the security interest transferred in the case of L Street is an interest in the *right to use* the real property, not in the real property itself.

The statutory law specifically states that a lease with a term of 99 years or less is not included in the definition of a deed. *See* D.C. Code § 45-921(3)(B). The Court, nevertheless, has given consideration to the argument that the leasehold deed of trust should be defined as a security interest in real property. The Court finds that there is no conflict between the definition of a deed, excluding leases of 99 years or less, set out in section 45-921(3)(B) and the definition of a “security interest instrument” in real property found in section 45-921(14). Moreover, where two statutes appear to conflict, the more specific statute is deemed to control the more general one. *See Allen v. Card*, 799 F.Supp.158 (D.D.C. 1992); *See also Mail Order Ass’n of America v. U.S. Postal Service*, 986 F.2d 509, 300 U.S. App. D.C. 46 (1993); *Sanker v. U.S.*, 374 A.2d 304 (D.C. 1977). District of Columbia Code section 45-921(3)(B) is more specific in that it speaks directly to leases with a term

¹⁰ This statutory definition is to be applied when considering the provisions of section 45-923(a)(3) and 45-921(14).

of 99 years or less.¹¹ The Court further notes that the District of Columbia Municipal Regulations instruct that "leases shall be exempt from tax." 9 DCMR 501.2 (1997).¹² Therefore, this Court finds that the L Street leasehold deed of trust is exempt from tax.

WHEREFORE, it is on this 4th day of October, 1999, hereby

ORDERED, that the Petitioners' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part; and it is further

ORDERED, that the Respondent's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part; and it is further

ORDERED, that the Petition for refund of recordation tax as to the 19th Street recordation, submitted by Petitioner 1137 19th Street Associates, L. P. is **DENIED**; and it is further

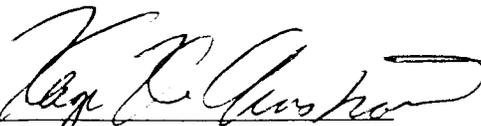
ORDERED, that the Petition for refund of recordation tax as to the L Street recordation, submitted by Petitioner, 1828 L Street Associates, L. P. is **GRANTED**; and it is further

¹¹ As indicated by amendments to the law, and by the legislative history, the legislature has, from time to time, subjected previously unincorporated instruments to the recordation tax. The District of Columbia legislature has given consideration to the recordation tax laws of Maryland and Virginia, as indicated by the legislative history of the District's Omnibus Budget Support Act of 1994. Maryland and Virginia, however, unequivocally tax the recordation of a deed of lease for a term of years. See Md. Code Ann., Tax-Prop. §12-105(d); Va. Code Ann. §58.1-807(B).

¹² The Municipal Regulations also state that a lease for more than ninety-nine (99) years shall be treated as a fee for purpose of this chapter. 9 DCMR 526.1. For the purpose of the length of a lease term, options to renew shall be included. 9 DCMR 526.2.

ORDERED, that Petitioner 1828 L Street Associates, L. P. is awarded a refund of recordation tax in the amount of \$165,000 as to the L Street recordation.

SO ORDERED.


JUDGE KAYE K. CHRISTIAN

Copies to:

David H. Dickieson, Esq.
Donald B. Reynolds, Jr., Esq.
John S. Ross III, Esq.
Silverstein and Mullens, PLLC
1776 K Street, NW
Suite 800
Washington, DC 20006

Harold Gordon, Esq.
11501 Huff Court
Kensington, MD 20895

Joseph F. Ferguson, Jr., Esq.
Assistant Corporation Counsel
441 4th Street, NW
Washington, DC 20001

Judge Cheryl Long