

Q & A: Illinois Real Estate Transfer Tax

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The psychic wounds have now healed and the baleful tears now dried. The passing of the "Green Sheet" into the Great Beyond, however much a shock it was, is sufficiently behind us. It is an appropriate time to review some of the issues related to the latest Illinois Real Estate Transfer Declaration Form (PTAX-203, revised July 2000). This article will discuss Illinois real estate transfer tax issues generally, with particular emphasis on statutory exemptions.

Owing to the multiplicity of individual county and municipal transfer tax requirements and exemption procedures, this review is limited to transfer tax topics at the state level. The review is not intended as a "paint by numbers" course but presumes some level of previous experience with the more elemental aspects of the topic, including the basic process of filling out the form(s).

The statutory basis for the State's tax is found in the provisions of 35 ILCS 200/31-10. The allowed exemptions, established and authorized by the provisions of 35 ILCS 200/31-45, are attached hereto as Exhibit "A". A reproduction of the State's Transfer Declaration (PTAX-203), referred to in that section, is attached hereto as Exhibit "B". Also attached hereto as Exhibit "C" is Supplemental Declaration Form A (PTAX-203-A), which is required for some transactions as discussed below. The real estate transfer declaration forms can also be accessed on the Internet. The State's web site is www.revenue.state.il.us/retd. The forms can be printed upon completion, provided all required fields have been filled out.

Although attempts have been made to corroborate the accuracy of the stated answers, nothing herein should be construed as an endorsement by any governmental official of the replies given to the questions.

Exemptions: No Declaration Required

(Exemption Paragraphs A,C,D,E,F,G,H,I,J,L)

Mark on Deed: "I hereby declare that the attached represents a transaction exempt under the provisions of 35 ILCS 200/31-45(), Real Estate Transfer Tax Act." Insert Paragraph Exemption. Then sign and date.

Q: If a grantor decides to donate a parcel of land to a unit of government, must a declaration form be used?

A: No. Although a transfer involving a governmental body ordinarily involves Paragraph B and therefore

requires a declaration form, as long as the consideration passing to the grantor is less than \$100.00, the transaction is exempt pursuant to Paragraph E.

Q: When we handle a transaction involving an assignment of beneficial interest in a land trust, what, if anything, must be recorded?

A: If the assignor of a beneficial interest receives \$100.00 or more, a facsimile assignment must be recorded in the county in which the property is located. As with a deed, the assignment must be accompanied by an executed PTAX-203 transfer declaration form. With respect to assignments for less than \$100.00 (which are exempt under Paragraph E) and collateral assignments to a lender (which are exempt under Paragraph C), the rules may be different. Such assignments need to be recorded only if the subject property is situated in Cook County. The Land Trust Recordation and Transfer Tax Act, 765 ILCS 420/1 et seq., requires that the facsimile assignment must be recorded to evidence exempt transfers only in counties with a population of more than 2,000,000.

Q: When one spouse conveys a tract of land to another as part of a settlement or order in a divorce proceeding, is the transaction exempt?

A: Though perhaps a matter of surprise to the divorce and real estate bar, the Illinois Department of Revenue has taken the position that as long as a value of \$100.00 or more has been ascribed to the real estate as part of the allocation of assets in the proceeding, that value accrues to the grantor and a tax must be paid upon such sum. This position is contrary to the actual practice of most attorneys. Creative lawyering, however, might legally circumvent the distress and chagrin caused by the Department's stance. One example would center on the common divorce settlement provision that relieves the grantor of liability from the mortgage indebtedness incurred by both spouses. The grantee's assumption of that portion of the pre-existing debt owed by the grantor would call for a line 15 deduction. This type of deduction would be permitted by the Department.

Q: Is a deed issued pursuant to a mortgage foreclosure exempt from taxation?

A: The Paragraph L exemption is operative only if the deed is issued to the holder of the mortgage. If a separate party bids at the foreclosure sale and receives a deed to the property, a tax must be paid on the bid price. On the other hand, a deed in lieu of foreclosure issued to an assignee that has purchased the obligation from the original mortgagee is exempt since such assignee is the holder of the mortgage at the time of the deed-in-lieu transaction.

As a result of the distinction between the holder of the mortgage and the independent bidder at a foreclosure sale, a court order requiring the county Recorder of Deeds to permit recordation of a judicial or sheriff's deed to such a bidder without payment of a transfer tax would appear to be in contravention of state law.

Q: We have learned that a deed we prepared and recorded contains an error that needs to be

corrected. Should we mark the deed as exempt when we re-record the amended original instrument?

A: Yes. Paragraph D should be used. It is interesting to note an anomaly in the wording of this exemption paragraph. The exemption as written contemplates a new, separate instrument that in some way amends the prior instrument. A county Recorder might thus accept the original document without the reference to the exemption. However, the Illinois Department of Revenue has instructed county recorders that any deed submitted for recordation must be accompanied by a transfer declaration or an appropriate exemption. The re-recorded deed should also contain a recital of the reason for the re-recordation.

Exemptions: Declaration Required
(Exemption Paragraphs B, K and M)

Mark on Deed: "I hereby declare that the attached represents a transaction exempt under the provisions of 35 ILCS 200/31-45(), Real Estate Transfer Tax Act." Insert paragraph exemption. Then sign and date. In addition, reflect the appropriate exemption on Line 16 of the Transfer Declaration.

Q: Is a transfer to a church for consideration an exempt transaction?

A: Yes. It is sometimes erroneously assumed that the tax is determined by the status of the grantor. Even though the property is sold for \$100.00 or more, if the grantee is an entity specified in Paragraph B, no tax needs to be paid. Thus, a governmental body or organization operated exclusively for charitable, religious or educational purposes need only be a party (grantor or grantee) to the deed in order to trigger the state exemption. Local transfer tax ordinances, however, may differ from the state exemption provision.

Q: My client, a church, is selling its property. It is the beneficiary of the land trust that holds title. Do we still qualify for the Paragraph B exemption?

A: Yes. Provide an explanation of the situation on line 10p. The Illinois Department of Revenue does not require that a copy of the trust agreement be attached to the declaration but doing so may avoid a later call from the Department. Although even less common, use of exemption Paragraph B would likewise be permitted in connection with the recordation of an executor's deed to a bona fide purchaser when a church is a legatee named in a decedent's will. The exemption would apply to the extent of the church's participation in the proceeds from the sale. Should the church take less than all of the proceeds, the amount it receives would represent the amount that line 17 is reduced from line 13. Line 16 and the deed should reflect the Paragraph B exemption and an explanation should be provided on line 10p or on an attached page.

Q: Must a charitable, religious or educational organization submit proof of its tax-exempt status in order to utilize Paragraph B?

A: No. Proof of such status is only one way to authenticate the organization's qualification. It is not a requirement that the relevant entity have obtained a federal exemption under Section 501 of the Internal Revenue Code. If, however, the Section 501 (c) (3) certificate is available, submission of a copy would reduce the possibility of a subsequent query from the Illinois Department of Revenue.

Q: Is it true that if the Administrator of Veterans' Affairs is the grantee in a deed resulting from a foreclosure proceeding, the deed is not only exempt under Paragraph B but a declaration form is not required?

A: Yes, but this special rule applies to no other governmental agency, including the VA when it is a grantor.

Q: Does Paragraph B apply to an entity created by the government but which is not itself a governmental entity?

A: No. The Illinois Department of Revenue's position is that an agency such as the FDIC, though a federal instrumentality, is not a governmental body entitled to the exemption. FNMA would be another example of what are sometimes referred to as "quasi-governmental" entities that are not entitled to the exemption, as distinguished from a governmental agency such as the Department of Housing and Urban Development. In addition, a deed from a bankruptcy trustee, who is an officer of the court, or a county judge, is likewise not exempt unless another exemption paragraph can be utilized.

Q: We plan to exchange parcels of real estate with another party, but the parcel we are trading is worth \$10,000.00 more than the parcel we are receiving. Must a tax be paid on the difference?

A: Yes. This differential is sometimes referred to by the tax lexicon phrase of "boot." As is clear from line 14, it is only the value of the exchanged real estate that can be exempted when employing Paragraph K. The transfer tax must be paid by the transferor whose transfer price exceeds the value of the real estate he is acquiring. The tax is reflected on the revenue declaration form for the property that such transferor is selling. Both deeds, including the one wherein the grantor is receiving the boot, should bear the Paragraph K exemption. Likewise, line 16 of *both* revenue declaration forms should bear a mark signifying such exemption. According to the Illinois Department of Revenue, the exemption is applicable to simultaneous and not deferred exchanges (the latter of which entail two separate transfers and thus two taxable events). Line 10n should also be marked off in an exchange transaction.

The Declaration

Q: Is the seller obligated to pay the transfer tax?

A: Although municipal transfer tax ordinances ordinarily charge the tax obligation to either the seller or buyer, state law does not specifically ascribe the state tax obligation to any party. An argument could be made that the reference to a tax "imposed on the privilege of transferring title to real estate..." in 35

ILCS 200/31-10 imposes the burden upon the seller. But in the event that the Illinois Department of Revenue audits the transaction and finds a shortfall, the buyer, as the current party in interest, will likely be "requested" to pay any additional tax found due. In any event, in Illinois the tax is customarily borne by the seller. Of course, payment of the tax can always be the subject of negotiation between the parties. The State is only concerned that the tax is paid and not who pays it.

Q: The buyer has asked the seller to finance the acquisition through a "take-back" or purchase money mortgage. Is the tax reduced by the amount of the mortgage?

A: No. Line 15 calls for a deduction in the tax calculation only if the buyer takes title subject to a pre-existing indebtedness. This deduction, which is authorized by the provisions of 35 ILCS 200/31-10, does not contemplate the same treatment for an indebtedness created at the time of the transaction.

Q: The buyer has agreed to assume the seller's existing mortgage, and line 15 will reflect the deduction to be taken. Must the deed make reference to the mortgage?

A: Yes. The provisions of 35 ILCS 200/31-10 require such a reference, but there appears to be no requirement as to the language that should be made part of the instrument's "subject to" clause.

Q: Line 18 calls for a tax calculation that divides the net consideration by 500. Why was this line added in Form PTAX-203?

A: The Illinois Department of Revenue sought to alleviate a misunderstanding in calculating the true amount of tax due. The statutory tax is based on the rate of 50 cents for each \$500.00 of value or fraction thereof. An example of the confusion that precipitated the addition of this line is as follows: When a property is being sold for \$152,050.00, the State tax would sometimes be erroneously listed as either \$152.00 or \$153.00. The State tax on this sales price is, rather, \$152.50. Since the county tax is 25 cents per \$500.00, that charge would be \$76.25, with a total tax of \$228.75.

Utilizing the above example, the sales price of \$152,050.00 would be divided by 500. The result is 304.1. This figure, according to line 18 instructions, is then rounded to the next highest whole number, which would be 305. Line 19 (Illinois tax stamps) and line 20 (County tax stamps) then call for this number to be multiplied by 0.50 and 0.25, respectively. The results are the \$152.50 and \$76.25 figures so noted.

Q: The old "Green Sheet" had a space on page one for explanations. If we elect to explain something on Form PTAX-203, where can we put it?

A: Any explanation can be added to the 10p ("Other") space or on an attached page or pages. Any attached pages must measure 8.5" x 11".

Q: On the sale of a condominium unit, how can we fill out the second part of line 3a, which calls for lot size or acreage?

A: Indicate square footage of the unit instead. Never leave this part blank. The Illinois Department of Revenue requires some entry in this space.

Q: We are selling property consisting of several parcels but do not know the acreage for each individual parcel. Must we obtain this information?

A: No. One need only indicate the total acreage on line 3a.

Q: Our legal description consists of a fee parcel (described as parcel 1) and an easement parcel (described as parcel 2). How many parcels do we identify on line 2?

A: Only one. The line is intended as identifying the number of fee parcels being transferred.

Q: Can a county Recorder determine from a transfer declaration whether there may possibly be Plat Act violations?

A: Yes. When the property being sold is only part of a tax parcel bearing a certain permanent index number, the State's instructions call for adding the letters "pt" before such number or numbers on line 3. As is clear from a perusal of the Plat Act (765 ILCS 205/1(b)2.), even the division of an existing subdivided lot can trigger such a violation. When line 3 contains the required "pt" letters, a savvy clerk at a Recorder's office may well determine that either a Plat Act affidavit must accompany the deed or that a plat of subdivision may be required.

Q: Must Supplemental Form PTAX-203-A be filled out any time a property is sold for over \$1,000,000.00?

A: No. The form is applicable to commercial and industrial transactions with a purchase price over \$1,000,000.00. The form is not applicable to residences, apartment buildings of no more than six units, unimproved property or farms. Further, the determination is based on the primary current, not intended, use. When the form is applicable, it is not an alternative to Form PTAX-203. Both forms must be submitted.

Q: When we sell our property, we will be using one deed to convey one portion and another deed to convey another portion. Can we use one declaration form and mark the second deed as exempt under Paragraph E?

A: The test of the Illinois Department of Revenue is whether the grantor in each deed is receiving \$100.00 or more as consideration for the transfer. If so, a separate declaration is needed for each deed. The second deed cannot be marked exempt if the property transferred is valued at more than \$99.99. The better practice is to use two declarations and allocate value to each portion of the land conveyed. A variation on this problem is encountered when several heirs are selling property and more than one deed

is used, perhaps because the sellers live in different states. A separate declaration form is needed for each deed if the grantor is receiving more than the exemption ceiling. On the other hand, no matter how many parties are conveying, if only one deed is used, only one declaration form is required. To avoid the requirement of more than one declaration form, a single deed may contain separate pages for each signature line and notarization clause.

Q: Can the value of fixtures be deducted from the sales price?

A: Generally, no. If the fixture is of a type that would not ordinarily be removed from the property upon a sale, the value of such item or items cannot be deducted. Thus, a portable refrigerator that a builder supplies for a new home and which is listed on the bill of sale he signs may be deducted, but a carpet he installs would not be entitled to the same treatment. Personalty that would be considered a trade fixture can be deducted. A test of reasonableness is applied. This deduction is made on line 12a. The State's instructions provide examples of deductible personalty. Itemization of personal property is required when its total value is greater than the percentage of the sales price as cited in the instructions.

Q: Both the seller and buyer in our transaction have agreed to a value to be assigned to personalty. Can we show only the assigned value of the realty on line 11 without making reference to the personalty on line 12a?

A: No. This would not be permitted by the Illinois Department of Revenue if the "personalty" is of the kind that is not allowed to be deducted.

Q: Does line 10a require that the execution date of each real estate sales contract be stated?

A: No. This line was designed for situations involving articles of agreement for deed in which the buyer has paid installments over time and title is now being transferred after the final payment. The line should be completed if the contract was initiated in a calendar year prior to the calendar year in which the deed is recorded. The form, as revised July 2000, makes it clear that this line is not applicable to conventional sales wherein the seller at closing either takes the entire sales price or acts as a purchase money note holder, in whole or in part.

Q: We are selling property in two different counties. Should we use two deeds and two transfer declaration forms?

A: Yes. The parties should allocate the value of each respective property. The respective tax based upon each separate value should be paid to the appropriate county recorder.

Q: What is the purpose for line 10 and its sub-sections?

A: The Illinois Department of Revenue designed line 10 to gather information relevant to the Department's sales and assessments studies. Beyond this primary purpose, though, the answers to be

provided on line 10 may signify to the Department and the county Recorder certain situations that call attention to the need for compliance with other matters. For example, line 10i may signify that the deed should be marked exempt pursuant to Paragraph B (unless there was no consideration). Line 10n signifies that the deed should be marked exempt pursuant to Paragraph K. Conversely, utilization of these exemptions on the deed call for the appropriate line 10 answers. The options on line 10, however, may also apply to non-exempt transactions and must also be answered, when applicable.

Parenthetically, the presence of line 10e appears to be an anomaly: A "sale in lieu of foreclosure" would be exempt under Paragraph L. A transfer declaration form is not required when this exemption is used. However, in those relatively rare instances in which the transferor has equity and the transferee provides him consideration in exchange for the deed, this line would be applicable inasmuch as the declaration would be necessary to reflect the tax required to be paid on the amount the transferor received. The transferee should take care not to release the mortgage at the time of this transaction in order to deduct the mortgage's outstanding indebtedness on line 15. Should the mortgage be released as a part of this form of "sale in lieu of foreclosure," the Illinois Department of Revenue has indicated that the transfer tax would be based on the full value of the property as determined by the parties since there would then be no "outstanding mortgage."

Q: My clients are selling their property for consideration to a governmental agency, so the transaction is exempt under Paragraph B. Is it true that we show "zero" on lines 11 and 13?

A: No. Although lines 17, 18, 19, 20 and 21 should be so marked, the seller must still recite on lines 11 and 13 the sales price. The same requirement holds even if the seller is a governmental body.

Q: We have been buying property pursuant to an installment agreement, but now we plan to sell to a new purchaser. We want to direct our seller to convey the property directly to our purchaser so that there is only one deed and one declaration form. Is this allowable?

A: No. According to the Illinois Department of Revenue, this would be treated as two separate transactions requiring two deeds, two declarations, and two separate payments of transfer tax, each depending on the respective sales amount. See *infra*, however, regarding legal circumvention of the tax by use of one deed from party A to party C in conjunction with an assignment to C of the interest of B.

The same analysis applies to the case of an owner whose sale is handled by a relocation company. If the company purchases the property for its own account (not merely in some brokerage or trust capacity), and then sells to the ultimate buyer, the Illinois Department of Revenue considers this to be two separate transactions. It matters not that the company has directed its own purchaser to be inserted as the named grantee on the deed from its own seller, particularly when the typical relocation company directs the escrowee to name it as the seller on the settlement statement. An alternate practice of such a company would likewise receive similar treatment by the Department. The company in this scenario provides consideration to its seller and takes a deed to the property. The deed to the ultimate purchaser is accompanied by a declaration form showing the original grantor as the seller, which then serves to justify

the exemption of the first deed. To the contrary, the first deed requires a declaration form and represents a taxable transfer.

Q: Although we are about to receive a deed from the current owner in exchange for consideration, we have decided to immediately dispose of the land in a simultaneous closing with another purchaser. We are selling the property for the same amount as our purchase price. The funds from this ultimate purchaser will be used to pay our seller. Can we mark the second deed exempt?

A: No. The Illinois Department of Revenue considers this two separate transactions. That a seller is not profiting from a sale is not a test of whether a revenue declaration form is needed and a tax required to be paid.

Q: We have been dealing with our tenant on a "lease with option to purchase" basis. He has now exercised his option, and we will be conveying the property to him. The rental payments have been applied to the purchase price. Can we deduct these payments in calculating the amount of the tax?

A: No. Since the seller has received the full sales price, even if over time and in the form of rental payments, the tax must be calculated on the basis of the full amount without deduction. This situation is similar to that of a vendor who has been accepting payments under an installment contract and is now completing the contract by executing a deed to the vendee.

Q: We have been selling our property pursuant to an installment contract, and the vendee is now making his final payment. Do we include in the full actual consideration on line 11 the interest paid over the course of the contract?

A: No. Since interest need not be reported on the State's transfer declaration, show only the original sales price.

Q: We have been selling our property pursuant to an installment contract. The vendee is now making his final payment, but none of it is going to us. We have directed the vendee to execute a check payable to our lender so that we can retire the existing mortgage. Do we need to prepare a transfer declaration and pay a transfer tax?

A: Yes. In this case, the purchase price payments have still legally accrued to the vendor, notwithstanding the vendor's instructions to direct them to another party. The tax is to be calculated based on the original sales price.

Q: If an interest such as a lease, an easement, mineral rights or an installment contract is assigned by means of an assignment instrument, is the State transfer tax imposed if the assignor is receiving \$100.00 or more?

A: No. The Illinois Department of Revenue requires payment of the tax and submission of the revenue

declaration form only if a deed is utilized to effect the transfer of the interest. Further, no indication of an exemption is needed on the assignment instrument. See, e.g., Attorney General Opinion No. S-504 (1972) in connection with leases and assignments thereof. There is one exception to this rule. Pursuant to the Land Trust Recordation and Transfer Tax Act, *supra*, and 35 ILCS 200/31-10, the assignment of a beneficial interest in a land trust is taxable unless the assignment is otherwise exempt and the applicable exemption so stated. The State's treatment of assignments is a good example of why the transferor needs to address the requirements of each governmental body having jurisdiction over the property, as the county and/or municipality in question may treat a particular assignment as a taxable event.

Q: We plan to write a separate check for the payment of the transfer tax. Should the check be made payable to the Illinois Department of Revenue?

A: No. The State will accept a check only from the county itself. The check from a party to the transaction should therefore be made payable to the Recorder of Deeds of the county in question. Of course, in practice, the monies are usually paid to the title insurer, which then pays the county.

An understanding of the Illinois real estate transfer tax and the PTAX-203 revenue declaration form and exemptions that relate to it are not a small part of a smooth and successful real estate closing. The questions posed and answers provided herein may assist the practitioner with that understanding. It is always recommended, however, that an appropriate official be consulted prior to commencement of any action pertaining to these issues. Questions regarding the State's tax and allowable exemptions may be posed to the Illinois Department of Revenue by calling 217/785-6619. Officials at individual county Recorder offices may also be consulted.



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