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Recent Tax Issues Associated with Real Estate Transactions in the Washington, DC Metropolitan Area.

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Virginia

Beginning on January 2, 2008 the Northern Virginia jurisdictions within the area covered by The Northern Virginia Transportation Authority (the "Authority") began collecting the $.40/$100 added to the Grantor's Tax by the Authority as provided by the transportation bill passed by the General Assembly in 2007. The tax was collected upon each deed tendered for recordation between that date and February 29, 2008 – the day the Virginia Supreme Court ruled the tax to be a violation of the State's Constitution. The Court held that the Authority, a body not directly elected by the voters, was not empowered to levy such a tax. As may have been suspected, the ruling was met with a great deal of frenzy by the General Assembly. Not only did it need to find a way to replace the lost revenue, but it needed to authorize the refunding of the amounts already collected. Prior to the ending of its regular session in March, the Assembly was partially successful. Governor Kaine recently signed House Bill 1578 establishing procedures to return taxes and fees collected by the Authority. The Clerks of the Circuit Courts will work with the various title professionals who had recorded deeds in order to process the refunds to the proper parties within a specified period of time. No legislation had been enacted at this writing creating replacement revenue for the lost taxes levied by the authority. It is widely believed that will be a topic of hot debate in an upcoming Special Session of the Assembly.

Maryland

There are a number of issues to discuss in Maryland:

Increase to the Recordation Tax levied by Montgomery County. Prior to March 1, 2008, the Recordation Tax in Montgomery County was $3.45/$500. Beginning on that date the Tax was revised so that the former rate of $3.45/$500 was applied only to the first $500,000 of consideration/secured loan amount. Amounts in excess of $500,000 are now taxed at the rate of $5.00/$500.

Increase to the State Income Tax and the Associated Withholding Required from Non-Resident Sellers. The revenue bill enacted in 2007 increased the individual rate from 6% to 6.75% and the corporate rate from 7% to 8.25%. The withholding required to be paid upon the recordation of deeds from non-resident sellers was increased to coincide with the applicable rate. Additionally, in order to be treated as a resident entity for purposes of being exempt from the withholding requirement, foreign entities must now have been qualified to do business in Maryland for not less than 90 days prior to Closing. It is thought that this provision may catch a number of Sellers by surprise. Those representing Sellers should take care to alert them early in the sale process to the requirement that they qualify in Maryland in order to avoid the withholding. There are new forms associated with both the withholding and the exemption. Please contact us should you require a copy of either or both.

Transfer and Recordation Taxes to be Applied to Transfers of Controlling Interests in Certain Real Property Entities. This common loophole in the Transfer and Recordation Tax was closed by the 2007 revenue bill and goes into effect, if not repealed, on July 1, 2008. On and after that date a "Controlling Interest" in a "Real Property Entity" will be subject to Transfer and Recordation Taxes. Not surprisingly, the definition of each such phrase is key to the applicability of the tax to a particular transaction.

First, a "Real Property Entity is defined as:

> "…a corporation, partnership, association, limited liability company, limited liability partnership, other unincorporated form of doing business or trust that directly or beneficially owns real property that:
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> 1. Constitutes at least 80% of the value of its assets; and
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> 2. Has an aggregate value of at least $1,000,000.

Second, a "Controlling Interest" is defined as:

1. More than 80% of the total value of all classes of stock of a corporation;
2 More than 80% of the total interest in capital and profits of a partnership, association, limited liability company, or other unincorporated form of doing business; or
3. More than 80% of the beneficial interest in a trust.

Although there are a number of exemptions and exclusions enumerated in the Act, should a transaction be structured so as to involve a transfer of such an interest, both Transfer and Recordation Taxes are likely to apply to the consideration paid therefore.