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IN THE MATTER OF:	*	IN THE
HOWARD COUNTY DEPT. OF FINANCE	*	CIRCUIT COURT
PETITIONER	*	FOR
v.	*	HOWARD COUNTY
ATAPCO HOWARD SQUARE I BUSINESS TRUST, *et al.*	*	Case No.: 13-C-12-092323
RESPONDENTS	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

This appeal is brought by the Howard County Department of Finance ("Petitioner") from a ruling of the Maryland Tax Court ("Tax Court"), directing the Petitioner to refund recordation taxes in the total amount of $499,112.50 to five claimants, namely: Atapco Howard Square I Business Trust, The Columbia Bank, Maple Estates, L.C., Simpson Mill, LLC, and Susquehanna Bank and SFH 5, Inc. ("Respondents"). Among the amounts ordered to be refunded is $29,607.50 to Columbia Bank. The Tax Court quashed certain discovery propounded by the Petitioner during the pendency of proceeding there.

I. Questions Presented for Review

The Petitioner raises four issues that the Court reframes as follows:

1. Did the Tax Court err in directing the refund of recordation tax to the Respondents?
2. Did the Tax Court err in directing the refund of $29,607.50 to Columbia Bank, which failed to exhaust its administrative remedies when it raised the claim for the first time during proceedings before the Tax Court?
3. Did the Tax Court err in quashing the Petitioner's discovery?

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II. Statement of Facts

The issues before the Court stem from a form of transaction frequently used in commercial financing. The Lender tenders a loan directly to Borrower, and requires the loan to be guaranteed by a third party ("Guarantor"). The Lender requires as security, not only real property of Borrower, but real property of Guarantor. The Guarantor does not become liable for the debt at the outset in this transaction, but guarantees the repayment of the debt; in other words, if Borrower defaults on the loan, Guarantor then becomes liable to pay the remaining debt, having indemnified the Lender. In each instance, the security interest is given by the use of a deed of trust. The deed of trust of the Guarantor is called an indemnity deed of trust, or an "IDOT"[1]. In the event of default, Lender can foreclose on Borrower's deed of trust and on Guarantor's IDOT. Deeds of trust and IDOTs are recorded among the land records of the county in which the land lies. Maryland imposes a recordation tax on the recording of deeds of trust. However, prior to changes enacted by the Legislature in 2012, it did not require payment of the recordation tax on IDOTs at the time of recordation.

In each of the seven transactions that are the subject of this action, the IDOTs were recorded without the payment of recordation taxes, the borrowers subsequently defaulted, and the Lenders, who are the Respondents here, exercised their rights as creditors against the Guarantors. No recordation taxes were paid on the IDOTs at the time of the Borrower's default or at any time thereafter. In five of the seven transactions, the Respondents foreclosed against the properties that were the subject of IDOTs, and in two others, the Respondents entered into forbearance agreements and later sold the properties that were the subject of those IDOTs.

When the Respondents subsequently conveyed the properties, the Director refused to certify the payment of all taxes as to the subject properties until the recordation tax was paid on the IDOTs, from which Respondents gained their interests in the property. Each of the Respondents paid the recordation tax on the respective IDOTs under protest in order to have the subsequent conveyances recorded. Respondents then filed demands for refunds from the Director. When the Director denied those demands, Respondents appealed to the Tax Court,

[1] In this opinion, the Court refers to "deeds of trust" as security instruments given by borrowers to secure the debt and "indemnity deeds of trust," or "IDOTs" as security instruments given by guarantors to secure the guarantee of the underlying debt.

which reversed the decision of the Director and ordered that the recordation taxes be returned with interest.

Columbia Bank did not file a written request for a refund of $29,607.50 with the Director at the time the other requests were originally filed. It did present its claim for the additional $29,607.50 in the hearing before the Director on the Bank's original claim for $67,687.50 that it had previously filed, and maintained the additional $29,607.50 claim in its brief and argument before the Tax Court.

During the pendency of proceedings before the Tax Court, Petitioner served subpoenas for depositions and production of documents, seeking to learn the finances of the guarantors to determine the extent of their capitalization. The Tax Court granted Respondents' Motion to Quash the Discovery.

Petitioner takes the position that the recordation tax became due on each transaction when the original borrower defaulted, causing the Guarantor of each IDOT to incur, or become liable for, the debt and triggering the requirement that the recordation tax be paid. Petitioner asserts that the law does not specify who must pay the tax when it becomes due and that anyone may pay it. Regardless of who pays the tax, it argues, each Respondent has an obligation that must be paid. Until the tax is paid neither the Director nor the Clerk of the Circuit Court will acknowledge subsequent transfers of title to the property that was the subject of the IDOT. In essence, it claims, the recordation tax is a charge on the property that must be satisfied.

III. **Statutory Background**

The imposition of the recordation tax is a creation of the Maryland General Assembly. The requirements and structure of the imposition of the tax are set out in the Maryland Code, Tax-Property Article, Title 12. Deeds, deeds of trust and other documents that convey an interest in real property are "instruments of writing." Md. Code Ann., Tax-Prop. § 12-101(f) (2012). The amount of recordation tax on a deed of trust is calculated on the basis of the amount of the debt secured. *Id.* §12-103(a) (1).

Generally, the recordation tax must be paid at the same time as the recording of the deed of trust or any other instrument of writing. An exception is provided when a deed of trust

secures a loan in which the entire amount of the loan is not advanced before the recording of the deed of trust, referred to in the statute as a *partial debt. Id.* § 12-105(f).[2] In that instance, the tax "applies only to the principal amount of the debt *incurred* at that time." *Id.* § 12-105(f) (1) (emphasis added). When additional amounts are advanced by the lender, "additional debt is *incurred* ... and the tax shall be paid on the additional debt by the debtor." *Id.* § 12-105(f) (2) (emphasis added). Prior to 2012 Title 12 made no specific reference to IDOTs.

The Maryland General Assembly has enacted a statutory framework to ensure that certain charges for the property are paid prior to the recording of a transaction involving the conveyance of real property from one party to another. Section 3-104[3] of the Real Property Article provides that the Clerk of the Circuit Court shall record an instrument " that effects a change of ownership" if the instrument is presented along with proper verification that certain charges have been paid. Md. Code Ann., Real Prop. § 3-104(a)(1) (2012). Likewise, the Supervisor of Assessments shall transfer ownership of property in the assessment records upon receipt from the clerk. *Id.* § 3-104(b)(1).

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[2] *Partial debt.* –

(1) Except as provided in paragraph (4) if this subsection, if the total amount of secured debt has not been incurred at the time of recording or filing the instrument of writing, the recordation tax applies only to the principal amount of the debt incurred at that time.

(2) Except as provided in paragraphs (3), (4) and (6) of this subsection, on or before 7 days after any additional debt is incurred after recording or filing an instrument of writing, a statement under oath of the amount of additional debt shall be filed with the clerk of the circuit court or with the Department, and the recordation tax shall be paid on the additional debt by the debtor.

[3] Section 3-104 reads:

(a) *Transfer on assessment books.* –

(1) The Clerk of the Circuit Court may record an instrument that effects a change of ownership if the instrument is:

(i)Endorsed with a certificate if the collector of taxes of the county in which the property is assessed, required under subsection (b) of this section ....

(b) Payment of taxes prior to transfer on assessment books or records; special provisions as to certain counties. ...

(1)[P]roperty may not be transferred on the assessment books or records until (i) All public taxes, assessments, and charges currently due and owed on the property have been paid to the treasurer, tax collector or director of finance

(3) [I]n Cecil, Charles, Dorchester, Harford, Howard, Kent, Queen Anne's, Somerset, and St. Mary's counties no property may be transferred on the assessment books or records until (1) all public taxes, assessments, any charges due a municipal corporation, and charges due on the property have been paid as required by law...

IV. Standard of Review

The ability of either party to a Maryland Tax Court proceeding to appeal a final decision of the Tax Court to the circuit court is provided in Tax-Property, § 14-513, Tax-General, § 13-532, and State Gov't, §10-222. Even though it is known as the "Tax Court," the Tax Court is an adjudicatory administrative agency, and therefore, is subject to the same standard of judicial review as the other administrative agencies as outlined in State Gov't, § 10-222. *Frey v. Comptroller of the Treasury,* 422 Md. 111, *cert. denied*, 132 S. Ct. 1796 (2011).

The Court of Appeals has held that an administrative agency's decision is "prima facie correct and presumed valid," and therefore a reviewing court must "review the agency's decision in the light most favorable to it." *Comptroller of the Treasury v. Citicorp Int'l. Commc'ns,* 389 Md. 156, 163 (2005). The appellate courts have also articulated this same standard of review in tax court decisions. *Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's Cnty.,* 138 Md. App. 589 (2001) (holding that "Tax Court decisions are considered prima facie correct, and are reviewed "in the light most favorable to that court") (citing *Maisel v. Montgomery Cnty.*, 94 Md. App. 31, 34 (1992)).

In *Ridgewood Long Homes,* the Court of Special Appeals employed a three-step analysis for courts that review a Tax Court decision, namely: (1) the reviewing court must determine whether the agency recognized and applied the correct principles of law governing a case, (2) if the tax court did not err in its determination of the applicable law, then the reviewing court should examine the factual findings to determine if they are supported by substantial evidence, and (3) the reviewing court should examine how the agency applied to the law to the facts. *Ridgewood Log Homes v. Comptroller of the Treasury,* 77 Md. App. 382, 386-87 (1988); *see also Vulcan Blazers of Balt. City, Inc. v. Comptroller of the Treasury,* 80 Md. App. 377, 383-84 (1989).

For the first step of the *Ridgewood* analysis – the application of law - the Tax Court's decision must be affirmed if the decision is not erroneous as a matter of law. *Id.* at 387; *see also Supervisor of Assessments of Balt. Cnty. v. Keeler,* 362 Md. 198 (2001); *Comptroller of the Treasury v. Blanton,* 390 Md. 528, 535 (2008); *Dun & Bradstreet Corp. v. Comptroller of the Treasury*, 86 Md. App. 258 (1991). Further, when reviewing determinations of law, the reviewing court is not bound by any presumption of correctness, but may substitute its judgment

for that of the tax court. *State Dept. of Assessments and Taxation v. Metrovision of Prince George's Cnty., Inc.*, 92 Md. App. 194 (1992). The substituted judgment standard applies to a Tax Court's legal analysis, including its interpretation of statutory provisions. *Rouse-Fairwood Dev. Ltd. P'ship,* 138 Md. App. at 618. A reviewing court should not defer to the agency's legal conclusions, and instead review *de novo* the agency's legal conclusions. *State Dep't of Assessments & Taxation v. Consumer Programs, Inc.*, 331 Md. 68, 72 (1993).

Compared to legal interpretation made by the Tax Court, the scope of appellate review for factual findings is much narrower. If there is substantial evidence in the record to support factual findings, the appellate court should not substitute its judgment, related to the facts of the case, for that of the agency. *Metrovisions of Prince George's Cnty., Inc.*, 92 Md. App. 194.

For the final step of the analysis set forth in *Ridgewood,* the reviewing court must examine how the agency applied to the law to the facts. 77 Md. App. at 388. This is a "judgmental process involving mixed questions of law and fact, and great deference must be accorded to the agency. The test of appellate review of this function is 'whether, ... a reasoning mind could reasonably have reached the conclusion reached by the [agency], consistent with a proper application of the ... controlling legal principles.'" *Vulcan Blazers of Balt. City, Inc. v. Comptroller of the Treasury,* 80 Md. App. 377, 384 (1989) (citing *Ramsey, Scarlett & Co. v. Comptroller of the Treasury,* 302 Md. 825, 838); *see also Comptroller of the Treasury v. Blanton*, 390 Md. 528, 534 (2006) (citing *Md. Aviation Admin. v. Noland,* 386 Md. 556, 571-72 (2005)).

V. Analysis

A. Liability for Payment of the Tax

1. *Statutory Construction*

The Court of Appeals has consistently guided lower courts in the proper approach to statutory interpretation: "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature... Legislative intent must be sought in the first instance in the actual language of the statute." *Read v. Supervisor*, 354 Md. 383, 392 (1999). "Where the statutory language is clear and free from ambiguity, and expresses a definite and simple

meaning, courts do not normally look beyond the words of the statute itself to determine legislative intent. *Id.* The court may resort to other means to interpret a statute if the statute is unclear or ambiguous. *Ryder Truck Lines v. Kennedy*, 296 Md. 528, 536 (1983).

The language of Title 12 of the Tax-Property Article is quite specific as to the purpose and calculation of the recordation tax in regards to a typical deed of trust. The statute specifies when and by whom the tax must be paid on partial debt. However, the statute is not so clear when an IDOT is involved. In the instance of an IDOT, the statute does not specify exactly when or by whom the tax must be paid. Prior to 2012, Title 12 did not even make any specific provision for or reference to IDOTs. Therefore, the Court must resort to "other means" to interpret Legislative intent in the application of recordation tax to IDOT's.

The opinion in *Board of Examiners in Optometry v. Spitz*, 300 Md. 466 (1984) provides significant guidance. In that case, the Court of Appeals was called upon to interpret the Maryland optometry statute. The Board had brought suit to enjoin Spitz, an optician, from fitting contact lenses, claiming that he did so in violation of the optometry statute. Spitz, who was trained in Florida, began working in Maryland, where he also trained ophthalmology residents in the fitting of contact lenses at Maryland General Hospital.

The optometry statute was first enacted in 1914 when the use of contact lenses was unknown. In *Spitz,* the Court of Appeals considered two sources to aid it in interpreting the statute. First, the Court took note of an Attorney General opinion that advised that the fitting of contact lenses by an optician did not violate the optometry statute. 61 Op. Att'y Gen. 630 (1976). The Court also noted that opticians had been fitting contact lenses since they were first introduced to the public.

Quoting its earlier opinion in *Read Drug & Chemical Co. v. Claypool*, 165 Md. 250, 257-58 (1933), the Court noted:

> . . . [W]hile courts are not bound by an Attorney General's opinion, or an administrative construction in conformity therewith, yet, when the meaning of the legislative language is not entirely clear, such legal interpretation and administrative construction should be given great consideration in determining the legislative intent. The Legislature knew, or must be presumed to have known, of this interpretation and administrative construction at the time of the passage of the act of 1933, and must be held to have employed the language it did with that interpretation in view.

300 Md. at 477.

Inaction by the Legislature following an interpretation by the Attorney General gives rise to the implication that the Legislature has acquiesced in the Attorney General's interpretation. *Twin Brook Swim Pool v. Comptroller*, 274 Md. 88, 94 (1975).

The *Spitz* court also noted the long-standing practice of the fitting of contact lenses by opticians:

> A practical construction given by the public generally, as indicated by a uniform course of conduct over a considerable period of time, and acquiesced in by a public official charged with the duty of enforcing the act, is entitled to great weight in the interpretation which should be given it, in case there is any ambiguity in its meaning serious enough to raise a reasonable doubt in any fair mind.
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> 300 Md. at 480.

The Attorney General's Office has issued two opinions between the enactment of the recordation tax statute in 1939 and its most recent revision in 2012. As described above, in 1973, the Attorney General advised that the tax was not due on an IDOT at the time of filing because the guarantor had not then incurred a debt. 58 Md. Op. Att'y Gen. 792 (1973). In 1989, the Attorney General, citing the 1973 opinion, also analogized the deferred payment of recordation tax on the deed of trust securing a "partial debt" to the deferred payment on an IDOT. Since the IDOT is given as security for the debt of another, the Guarantor has not *incurred* a debt, but has merely guaranteed the borrower's repayment of the debt, and therefore there is no debt on which to base recordation tax. Furthermore, the Attorney General concluded, in the event of default on the underlying obligation, the guarantor *incurs* the debt, and it is then the guarantor who must pay the tax. 74 Md. Op. Att'y Gen. 281 (1989).

The analysis of the Attorney General is persuasive. The long-standing practice has been not to require the payment of recordation tax at the time of the recording of an IDOT; the Legislature did not choose to create a different result. The guarantor, who executes an IDOT, is the party responsible to pay the recordation tax at the time of default.

2. *Tawes v. HOLC*

The Petitioner argues that, regardless of the identification of the responsible party, the tax must be paid. Petitioner looks to Respondents, who benefited from the recording of the IDOT. In support of that position, the Petitioner relies on *Tawes v. Home Owners Loan Corp.*, 180 Md. 401 (1941). *Tawes* arose from the demand of the Home Owners Loan Corporation ("HOLC") that the Comptroller of Maryland refund recordation taxes it had previously paid when recording deeds of properties it had conveyed to individuals. HOLC was a corporation of the United States and exempt from the payment of the tax. The Court of Appeals held that, while the obligation to pay the tax was that of the grantee of a deed, when HOLC (the grantor) presented a deed for recording, it was acting as agent of the grantee and therefore must pay the tax. *Id.* at 406. The Petitioner argues that, in like manner, even if the guarantor is held to be the liable party, the Respondents who took title through the deeds of trust were acting as "payment agents" of the guarantors and must pay the tax.

Tawes establishes that, when an instrument upon which tax is due is presented for recordation, the tax must be paid regardless of who is identified by statute as the responsible party. In fact, Section 12-111 provides that "By agreement, recordation tax may be paid by any person." Md. Code Ann., Tax-Prop, §12-111. The facts of the instant case are distinguishable from those of *Tawes*. In *Tawes*, the issue was: who must pay the tax *before* an instrument may be recorded? In the absence of any direction in the statute, the court identified the grantee of a deed. HOLC was found to be the agent of the grantee because it was delivering the deed for recordation on behalf of the grantee, a step necessary to complete the transaction. Here the issue is: who pays the tax upon the occurrence of a *subsequent* event, specifically the later default by the borrower? Merely because the Respondents took title to the same property that was the subject of the IDOTs, well after the fact of their recording, does not make them the agents of the Guarantors.

The Respondents were neither guarantors nor agents of the guarantors. There is nothing in the statute or case law to support a conclusion that the Respondents are liable on either basis.

The Tax Court was correct.

3. *Form over Substance*

The Petitioner next argues that even if the Respondents are not liable as parties in the shoes of the Guarantors or otherwise made liable by the language of Title 12, they must be found

liable because each of the underlying transactions was structured to escape payment of the tax. The Petitioner asserts that the Respondents expect the court to recognize the *form* of the transactions over the *substance* of the statute. The Petitioner claims that each Guarantor was simply an alter ego of the Borrower, i.e. a corporation or limited liability company created by, or closely affiliated with the Borrower, and that it was always expected that the Guarantors would be unable to pay the recordation tax upon default of the loan, and thereby evade any payment for the recordation tax upon the default of the Borrower.

Courts have held parties liable to pay taxes they sought to avoid by entering into various schemes, some of which are known as "step transactions." The Court of Appeals refused to honor such a transaction in *Read v. Supervisor*, 354 Md. 383 (1999). "The incidence of taxation depends on the substance of a transaction." *Id.* at 398. In its opinion, the Court explained and reviewed transactions, described as "step transactions," which are entered into by parties who engage in a transaction by a series of "steps" undertaken only to produce an outcome that avoids tax liability. Recognizing the right of taxpayers to decrease tax liability legally, the Court nonetheless will view the transaction as a whole to determine if the steps were of substance or only taken to create a run around tax consequences. *Id.* at 397-98 (citations omitted). In other words, the Court will determine the bona fides of the transaction by examining its substance and not merely its form, or appearance.

The Petitioner points to the close relationship between the borrowers and guarantors and the deferral of the requirement to pay recordation tax on IDOTs in support of its claim that the creditors were engaged in a step transaction or some type of scheme to avoid paying the tax.

Maryland appellate courts have considered IDOTs and the application of recordation tax, although none have addressed the issues in this appeal. In *Springhill Lake Investors Ltd. Partnership v. Prince George's County,* the Court of Special Appeals considered the county's requirement to pay recordation tax on the filing of subsequent IDOTs in the instance of refinancing. 114 Md. App. 420 (1997). (Prince George's County Code requires the payment of *county* recordation tax upon the filing of an IDOT.) The Court of Appeals in *Prince George's County v. Brown* noted in dicta that "state recordation tax is deferred on an indemnity instrument until a default occurs on the loan that is guaranteed..."334 Md. 650, 657 (1994). Those two cases

and many others exemplify that IDOTs are customarily employed in financial transactions in Maryland.

The simple answer is that IDOTs have been elements of financial transactions for years. The statute authorizes just such a transaction as those that are the subject of this case. As discussed above, IDOTs have been recognized by the courts, the Attorney General of Maryland and by parties to financial transactions. Notwithstanding the recognized practice of executing and recording IDOTs, the Legislature never included as condition of tax treatment that a guarantor have any minimum capital or any particular separation from the borrower. To the extent that more than one step might be considered to be a part of the transaction, those steps are not designed to avoid a tax.

The Tax Court was correct.

4. *Section 3-104*

Without conceding that the Respondents are not liable to pay the recordation tax on the IDOTs, Petitioner falls back on the provisions of Section 3-104 of the Real Property Article to support its position that the new instruments may not be recorded until the tax is paid. Md. Code. Ann., Real Prop., §3-104 (2012). That section also establishes the prerequisites that must be met before an "instrument that effects a change of ownership" may be recorded. *Id.* § 3-104(a)(1). The statute provides that the Clerk of the Circuit Court may not accept such an instrument for recording unless he or she receives notice of payment of certain taxes. *Id.* Subsection (b)(1)(i) requires that "All public taxes, assessments, and charges currently due and owing *on the property* have been paid...." Md. Code Ann., Real Prop. § 3-104(b)(1)(i) (2012)(emphasis added). Subsection (b)(3) applies to Howard County, among eight other counties, and requires payment of "All public taxes, assessments and charges due a municipal corporation and *charges due on the property*...." Md. Code Ann., Real Prop. § 3-104(b)(3) (2012)(emphasis added). The latter subsection tracks the language of the former except for the insertion of municipal obligations. The reference in each instance to "public taxes," "assessments," and "charges due on property" all indicate that Section 3-104 is intended to enforce the payment of property tax.

The recordation tax is an excise tax imposed on the privilege of recording instruments of writing; it is not a tax on property. *Dean v. Pinder*, 312 Md. 154, 159 (1988). The Court of Appeals explained the nature of excise taxes and distinguished them from property taxes in

Weaver v. Prince George's County, 281 Md. 349 (1977). An excise tax is a "tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Id.* at 357 (citations omitted). An "excise tax is said to embrace every form of taxation that is not a burden directly imposed on persons or property." *Id.* at 358. Unlike unpaid real estate tax or public utility charges which are taxes on property, recordation tax does not attach to the property in the same manner. Section 3-104 does not apply; it does not authorize the any refusal to record the creditors' subsequent deeds when recordation tax has not been paid on prior IDOTs in the chain of title.

While the Petitioner does not directly argue that the unpaid recordation tax becomes a lien on the properties in question, it impliedly makes that argument by its reference to a "tax on property" in Section 3-104. The Legislature did not provide in the Tax-Property Article that the tax is a lien. Generally, "taxes are not a lien on property unless expressly made so by statute." *Home Owners' Loan Corp. v. Mayor and City Council of Baltimore*, 175 Md. 676, 681-82 (1939). In Section 12-402 of the Tax-Property Article, the Legislature provides that real property tax is a lien on property. Md. Code. Ann., Tax-Prop., § 12-402. In Section 13-805 of the Tax-General Article, the Legislature provides that unpaid inheritance, estate and generation-skipping taxes are liens on property. The Legislature made no such provision with regard to recordation tax, although it obviously knows how to do so.

Unpaid recordation taxes are not a charge that must be paid before the Director transfers ownership of property on the assessment records and the clerk records subsequent instruments.

For the reasons described in this section, the Petitioner has not established that the ruling of the Tax Court was erroneous as a matter of law. The decision of the Tax Court is correct as a matter of law, and there are substantial facts to support the legal determination made by the Tax Court.

B. Exhaustion of Administrative Remedies

Petitioner appeals from the Tax Court Order that the Director refund the additional amount of $29,607.50 to Columbia Bank. The latter did not include that claim in its original written request for refund. Columbia Bank did present its claim for the additional $29,607 during the hearing before the Director, but the Director did not address it in his decision. Petitioner argues here, as it did before the Tax Court, that by not submitting its written claim to

the Director, Columbia Bank has failed to exhaust its administrative remedies and that that particular claim should not have been considered by the Tax Court.

A prerequisite to the filing of an appeal to the Tax Court is that the appealing party exhausts its administrative remedies, in this case filing a written claim. Md. Code Ann., Tax-Prop. § 14-512. A long line of appellate opinions in Maryland and other jurisdictions recognizes the principle. The purpose of the rule is set out in *Comptroller v. Brand Iron, Inc.*, 65 Md. App. 207, 211 (1985):

> The purposes of the doctrine of exhaustion of administrative remedies are threefold. It is designed to encourage the determination of particular issues by agencies with special expertise to those issues; to avoid the judicial resolution of matters the legislature thought "could best be performed by an agency;" and to keep from the courts matters that they might never be called upon to decide "if the prescribed administrative remedy was followed."

The long established principle is not to be ignored. Yet it also must be applied with common sense in the context of the matter at hand. The claim of Columbia Bank rests on the same fundamental facts and legal issues as all the others involved in this appeal. The parties and the court have had the benefit of the expertise of the Director on all the other claims, and rest of the policy rationale underlying the doctrine of administrative remedies is inapplicable to the instant case. The Director's rulings have been consistent in regard to its denials of the Respondent's claims for refunds that were properly presented to the Director. Petitioners cannot reasonably argue that the outcome of this claim, if remanded, would be different from those claims. It is a matter of judicial and administrative economy to end it here.

The Tax Court's decision to consider Columbia Bank's additional claim for $29,607.50 was correct.

C. **Discovery**

Petitioner complains that it is entitled to seek the information demanded in its subpoenas, in particular the financial information that would potentially disclose the degree of capitalization of the guarantors, perhaps supporting Petitioner's theory that they were merely shells or straw parties established to create form over substance, for example, in a step transaction. As noted above, the structure of the transaction, giving a guarantee secured by an IDOT has long been practiced and has been passively recognized by the Legislature since recordation tax was first

instituted in 1939. The capitalization, of lack thereof, of a guarantor, has never been made a condition of the requirement to pay, recordation tax on an IDOT. The capitalization of the guarantors has no bearing on the application of the recordation tax.

Maryland's liberal rules of discovery do have some boundaries. Rule 2-402 (a) provides that a party may seek discovery of any matter, "not privileged …if the matter sought is relevant to the subject matter involved in the action." Md. R. 2-402 (a). The financial worth of the guarantors has no relevance to the subject matter of this action.

The Tax Court's ruling, denying the Petitioner's request for discovery, was correct.

THE DECISION OF THE TAX COURT IS AFFIRMED.

John H. Tisdale, Judge
Circuit Court for Howard County