



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

April 27, 1978

ATTORNEY GENERAL OPINION NO. 78-171

Velma Branfort
Register of Deeds
Clay County Courthouse
Clay Center, Kansas 67432

RE: Mortgage Registration Tax - Collection -
Principal Debt Defined - Uniform Consumer
Credit Code and Truth in Lending Transactions
Distinguished. K.S.A. 79-3102; K.S.A. 16a-2-501,
16a-2-509, 16a-2-510, 16a-3-202, 16a-3-206;
K.A.R. 75-6-3.

SYNOPSIS: Mortgage Registration Tax is collected upon the principal debt or obligation secured by a lien on real estate. Where the mortgage instrument states a total obligation, which includes not only the amount loaned but also a finance charge for interest, taxes, insurance, official fees, etc. all of which are payable in a specific number of consecutive monthly payments, there appearing no provision for rebate upon prepayment and the finance charge becomes part of the lien, then the tax is due on the whole sum of payments. A distinction must be made for transactions under the Kansas Uniform Consumer Credit Code, where by law the lender must set out in detail in the debt instrument exactly what charges are made and how the debt shall be paid. The borrower has positive notice that the debt may be prepaid at any time without penalty, and receive a rebate of all unearned finance charge. In such case, the finance charge must not be taxed, because, at the time of filing, no obligation existed to pay a definite sum for finance charge.

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Dear Ms. Branfort:

You send us three mortgages, a Household Finance loan secured by a mortgage on real estate and a contract for the sale of real estate, and you ask us to review the manner in which you have been assessing the mortgage registration tax.

The Cannizzo and Hahn mortgages are for a single sum loaned. Provision is made for repayment at a certain rate of interest upon unpaid balances by monthly installments which include both principal or interest. But provision is made in the instruments for acceleration in payment of the loan. In Cannizzo, the interest payments are qualified by the words: "if not sooner paid". In Hahn, provision is made for interest "as may become due" and "until" payment of the loan is made in full.

You were correct in charging tax only on the basic loan sum and not including the interest, in Cannizzo and Hahn. K.S.A. 79-3102 does not require or contemplate that the Register of Deeds collect, or the mortgagee pay, at the time of recording, mortgage registration tax on unaccrued items just because the mortgagor agrees to pay them as they accrue, nor is such tax collectable at the time of foreclosure. Frost v. Kirkpatrick, 141 Kan. 517, 518, 41 P.2d 719 (1935).

The third mortgage, Barnes, is different. The language of the mortgage makes no reference in any way to prepayment or rebate. It just says that the note for \$12,596.50 is "due and payable as follows: 120 monthly installments of \$163.00 due an(d) payable on the 24th of each month beginning with the month of April, 1978." Your stamp on the back indicates that you collected tax in the sum of \$31.50 only on \$12,596.50.

But, if you continue to read this mortgage, it contains some language that does not appear in the first two mortgages. The Barnes mortgage calls for Barnes to pay taxes, interest, costs and insurance, and then says: "and the expense of such taxes and accruing penalties, interest and costs, and insurance, shall from the payment thereof be

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and become an additional lien under this mortgage upon the above described premises, . . ."

If you multiply 120 monthly payments by \$163.00, you get a total payment of \$19,560.00, or \$6,919.50 in excess of the amount loaned. The mortgagee, in this case, has given public notice to all intervening lienholders and creditors of a priority of a lien, not for \$12,650.50, but for \$19,560.00. This is a situation similar to that which generated our Opinion No. 78-12, which we again reaffirm. If an instrument undertakes to place a lien on real estate, a tax of 25 cents on each \$100.00 of the principal debt or obligation secured shall be assessed. We would suggest that the Barnes mortgagee be called upon to pay an additional mortgage registration tax on \$6,919.50, unless by recording the note there is shown a positive right for prepayment without penalty.

The fourth instrument you submit is an installment loan made to Brown by a Finance Corporation "licensed under Kansas Uniform Consumer Credit Code." Both the Kansas UCCC and the Federal Truth In Lending Act require a complete pre-computation which shows, not only the method of payment, but all items which will constitute the principal debt and the "finance charge". K.S.A. 16a-2-501, 16a-3-202.

Under UCCC rules, any taxes paid by the mortgagee in connection with a consumer credit transaction will not be made a part of the finance charge, but must be itemized and added to the principal debt. K.S.A. 16a-2-501(1)(a). There has been no objection about the payment of the mortgage registration tax on this principal debt. But the objection arises when the finance charge is added to the principal debt, and additional mortgage registration tax is assessed against such added charge. There is a positive right under UCCC to prepay the principal debt, and to be rebated any unearned finance charge. K.S.A. 16a-2-509, 16a-2-510. But there is no way for the consumer to be rebated an overpayment in mortgage registration tax.

It is our opinion that in UCCC mortgages, where the pre-computation of finance charges is strictly a statutory requirement for disclosure, such charges have not accrued at the time of filing, and some may never accrue because of prepayment rights. To tax the finance charge in full at the time of recording the mortgage could result in an overpayment of tax and an unjust burden on the consumer.

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We are further impressed by K.A.R. 75-6-3, a regulation of the Kansas Consumer Credit Commissioner, which says: "A dollar amount of finance charge disclosed to comply with the federal truth-in-lending act does not in itself constitute a pre-computed finance charge." The only purpose of the pre-computation is to disclose full information to the consumer, not to create a debt certain.

We believe that in the Brown instrument a registration tax should be assessed only on the basic loan of \$4,751.32, and that all UCCC Consumer Credit transactions be considered in the same light as the first two mortgages above and the case of Frost, supra. The right to prepay at any time without penalty renders it impossible to include a finance charge as a part of a taxable obligation at the time of recording.

The last instrument you submit, an executory contract for the sale of real estate to Johnson, which names a sale price of \$34,000.00, but it shows that \$9,860.00 was paid down, leaving a balance of \$24,140.00 owing, payable in annual installments over a period of five years. You charged the registration tax on \$24,140.00.

You are correct in charging a mortgage registration fee upon recording this instrument. K.S.A. 79-3101 says that an executory contract for the sale of land, complete performance of which is delayed for a longer period than ninety days, where the grantee is entitled to possession and the grantor holds title as security, shall be treated as a mortgage of real estate for the purpose of this act.

You are further correct in assessing the tax only on \$24,140.00. This is the "debt or obligation" secured by the instrument at the time of recording and upon which K.S.A. 79-3102 requires taxation.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:CJM:gw