



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

October 5, 1981

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 81-229

Douglas S. Brunson  
Kiowa County Attorney  
Greensburg, Kansas 67054

Re: Taxation--Mortgage Registration Fee--Computation  
of Amount Due

Synopsis: The mortgage registration fee is measured by the principal debt or obligation secured by a mortgage of real property. If the principal debt or obligation secured by a mortgage of real property is increased, an additional mortgage registration fee is payable. In such situations, a mortgage registration fee need be paid only upon the amount of the new consideration given the mortgagor by the mortgagee, and upon which no mortgage registration fee has been paid. Cited herein: K.S.A. 1980 Supp. 79-3102.

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Dear Mr. Brunson:

You seek an opinion concerning the amount of mortgage registration fee to be imposed against a mortgage to be tendered for filing with the Kiowa County Register of Deeds. The facts are as follows: On or about August 25, 1978, a Chicago bank made a loan, in the principal amount of \$450,000, to a land company. To secure payment of the loan, the land company gave the bank a mortgage on real property located in Kiowa County, Kansas. The land company also gave the bank a mortgage on property located in Edwards County, Kansas. Upon tender of the mortgages to the register of deeds of the respective counties, mortgage registration fees based upon the principal amount of the debt (\$450,000) was paid. Thereafter, the financial situation of the borrower deteriorated. The bank thus demanded that the borrower give additional security to secure the loan. The borrower-land company complied with the

bank's demand by giving the bank a mortgage on other property the land company owned in Edwards County. This mortgage was recorded without the payment of additional mortgage registration fees, pursuant to K.S.A. 1979 [now 1980] Supp. 79-3102(2). No question is raised, and properly so, as to the propriety of the above-described actions.

To date, the bank has received no payment on either the principal amount of the loan or the interest which has accrued thereon, although periodic payments of both principal and interest were to be made by the borrower. The bank has incurred expenses in attempting to secure these payments from the borrower.

The bank and the borrower apparently have been attempting to resolve their difficulties, without the bank foreclosing on the mortgages given it by the borrower. The solution apparently agreed upon by the parties is that the bank will renew the loan made to the borrower and, also, will loan the borrower additional funds in the amount of the interest that has accrued on the original indebtedness, plus the expenses heretofore incurred by the bank in attempting to secure payment thereof.

In completing the above-described transaction, the bank plans to have the borrower execute a note, the principal amount of which will equal the amount of the original loan (\$450,000), plus the interest accrued on the original loan and the amount of expenses heretofore incurred by the bank in connection with said original loan. Of course, interest will be charged on the principal amount of the new loan.

The new loan is to be secured by the mortgages currently on file in the State of Kansas. Those mortgages are to be amended, by written agreement of the parties, to reflect the current amount of the principal indebtedness secured by said mortgages.

Correspondence concerning this proposed transaction, and the amount of mortgage registration fee that would be incurred in connection therewith, has been exchanged between an attorney for the bank and the Edwards County Attorney. You have provided us that correspondence, and from these communications, it appears the bank's position is that the transaction would not require the payment of any additional mortgage registration fee. It maintains that since the mortgages already on file secure not only the principal amount of the first loan, but also the interest accrued thereon, plus the expenses incurred by the bank in an effort to collect that loan, no mortgage registration fee is due.

The Edwards County Attorney, however, maintains that the bank is making an entirely new loan to the borrower and, in effect,

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is receiving a "new" mortgage to secure payment of said loan. Therefore, he is of the opinion a mortgage registration fee, based upon the total amount of the principal debt secured by the new mortgage, is required before the "new" mortgage may be received and filed for record. You ask us to resolve the difference of opinion.

We cannot accept either of the foregoing interpretations. While the bank's assertion is correct that the mortgages currently on file secure both the principal amount of its loan to borrower, plus the interest thereon and expenses incurred in connection with the collection of said principal amount and interest, the difficulty with its position is that the mortgage registration fee paid on those mortgages was based solely on the principal amount of the debt secured by said mortgages. That amount was \$450,000. The principal debt to be secured by those mortgages, when amended, will be substantially increased. No mortgage registration fee has been paid on the difference between the "new" principal debt and the "original" principal debt. A mortgage registration fee must be paid on that difference.

In this regard, the bank's assertion that "it certainly is not the bank's intention to . . . make any new loans" to the borrower, is unsubstantiated by the admitted facts. The bank unquestionably is loaning the borrower the funds necessary for it to pay interest that has accrued on the loan and the expenses incurred by the bank. To this extent, the bank certainly is making a "new" loan to this borrower.

We disagree with the position of the Edwards County Attorney on the basis of fundamental principles of property taxation and the provisions of K.S.A. 1980 Supp. 79-3102, under which provisions the mortgage registration fee is imposed. In applying the provisions of K.S.A. 1980 Supp. 79-3102, it always must be borne in mind the mortgage registration "fee," in fact, is a property tax. See Missouri Pacific R.R. Co. v. Deering, 184 Kan. 283 (1959) and cases cited therein. The property being taxed is "invested funds," secured by a lien on real property. In Deering, supra, the Court said:

"In considering the important questions raised by the appeal, we shall first consider the nature of the so-called mortgage registration 'fee.' The lending of funds secured by liens on real estate has been an important business from the beginning of the history of this state. There has always been a companion question as to the method and means by which these funds so secured, as well as other invested funds, should be taxed by the state. [Emphasis added.] It

will be remembered that in the early history of the state, the chief revenue of all governmental units came from ad valorem property taxes. It will be remembered that article 11, section 1, of the state constitution was amended by the people in 1924 to read in part: 'Mineral products, money, mortgages, notes and other evidences of debt may be classified and taxed uniformly as to class as the legislature shall provide.' [Emphasis by the Court.]

"After the adoption of the above amendment and as authorized thereby the legislature enacted the statute providing for the mortgage registration fee (Laws 1925, ch. 273, now appearing as G.S. 1949, 79-3101 to 79-3107a). Neither the legislature nor this court has shown any disposition to disguise the evident fact that the mortgage registration fee is a tax. In section 79-3103, it is provided that after the payment of the tax of twenty-five cents on each one hundred dollar valuation of the secured note 'the note secured thereby shall not be otherwise taxable.' Thus, the legislature not only recognized the 'fee' to be a tax, but provided that it should be in lieu of all present and future taxes. [Emphasis by the Court.]

"This court has always recognized that the mortgage registration fee constituted a tax. [Cites omitted.]

. . . .

"It is quite evident to anyone having any knowledge of the problem of taxation that the collection of any tax upon intangible personal property presents difficulty. Of course, the question of the collection of taxes upon personal property of all kinds has always presented a problem. The legislature with authority from the state constitution framed this reasonable property tax in the form of an excise tax, providing that the tax would be paid at the time of recording of the mortgage for record. This was the first and usual time when most mortgagees use the special facilities furnished by the state for their benefit. If the fee or tax is paid at that time, the notes thereafter are tax exempt. However, if the tax is not paid because the mortgagee chooses

not to record his lien, and runs the risk of loss of his priority, no penalty is exacted, his note and mortgage is still valid, but if he chooses to use the courts of the state to collect a judgment, he must pay the normal tax due on his property." [Emphasis added.] Id. at 286, 289.

The foregoing statements of the Court make it clear the mortgage registration "fee" is a property tax which is imposed upon invested funds secured by a lien on real property. The tax is to be paid before any instrument granting the lien is received and filed for record. However, under the provisions of K.S.A. 1980 Supp. 79-3102, the tax is imposed only upon "the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid." [Emphasis added.] In addition, the statute provides:

"No registration fee whatsoever shall be paid, collected or required for or on any mortgage or other instrument . . . (3) upon that portion of the consideration stated in the mortgage tendered for filing which is verified by affidavit to be principal indebtedness covered or included in a previously recorded mortgage or other instrument with the same lender upon which the mortgage registration fee has been paid . . . ."

Under the facts of this case, there is no question but that a mortgage registration fee has been paid on \$450,000 of the principal debt or obligation secured by the mortgages currently filed for record in the State of Kansas. Nor is there any question but that \$450,000 of the principal indebtedness to be secured by those mortgages, as amended, was "covered or included in" previously recorded mortgages, upon which the registration fee has been paid.

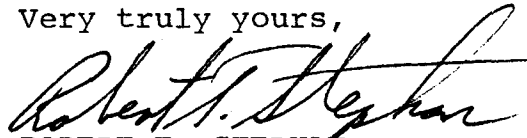
Thus, in our judgment, the bank may avail itself of the right granted by the above-quoted provisions of K.S.A. 1980 Supp. 79-3102 to file an affidavit verifying that a mortgage registration fee has been paid on \$450,000 of the consideration stated in the mortgage modification agreement. If such is done, a mortgage registration fee would be payable only on the amount of the principal debt or obligation secured by the mortgages in excess of the original principal debt upon which the mortgage registration fee has been paid. In general terms, it is our opinion that, where a mortgage of real property is renewed and extended, because the mortgagee has advanced new consideration to the mortgagor, said mortgagee, if it complies with the affidavit requirement of K.S.A. 1980 Supp. 79-3102(3), must pay a mortgage registration fee based only upon the amount

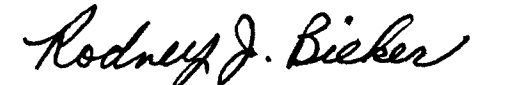
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of the new consideration given the mortgagor.

Applying the foregoing rule to the facts of this case, it is our opinion a mortgage registration fee would be payable, based upon the difference between the new principal debt and \$450,000, the "original" principal debt.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Rodney J. Bieker  
Assistant Attorney General

RTS:BJS:RJB:jm:hle