



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 84- 121

Robert H. Diehl  
Ellis County Attorney  
P. O. Box 725  
Hays, Kansas 67601

Re: Taxation -- Mortgage Registration -- Mortgage  
Registration Fee

Synopsis: Based on existing decisions, the federal courts would construe the Kansas mortgage registration fee to be "a stamp tax or similar tax" within the meaning of 11 U.S.C.A. §1146(c). Consequently, this tax may not be imposed upon a mortgage of real property which is given pursuant to a reorganization plan that has been confirmed under the federal bankruptcy code. Cited herein: K.S.A. 79-3101, K.S.A. 1983 Supp. 79-3102, K.S.A. 79-3104, 11 U.S.C.A. §1146(c).

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Dear Mr. Diehl:

On behalf of the Ellis County Register of Deeds, you seek an opinion on whether a mortgage of real property executed pursuant to a confirmed bankruptcy reorganization plan is exempt from the mortgage registration fee of K.S.A. 1983 Supp. 79-3102 by virtue of the provisions of 11 U.S.C.A. §1146(c). This federal statute provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." You

question whether the Kansas mortgage registration fee would be deemed "a stamp tax or similar tax" within the meaning of section 1146(c).

The term "stamp tax" is descriptive of any type of tax which is imposed upon a written instrument and which requires that payment of the tax be shown by affixing stamps to the instrument or by placing a notation or endorsement upon the instrument that the tax has been paid. The term also has been used to describe taxes imposed upon various types of transactions which are evidenced by a written memorandum. See 71 Am.Jur.2d State and Local Taxation, §§639-641.

The broad language employed in section 1146(c) convinces us that Congress intended to encompass the various taxes that might be imposed by state or local governments in regard to transactions, under a confirmed bankruptcy plan, that relate to the issuance of a security or the making or delivery of an instrument of transfer. Congress apparently intended to prevent these types of transactions from resulting in an additional liability for a debtor, who, through reorganization, might avoid liquidation. As stated in In re Heatron, Inc., 6 B.R. 493 (W.D. Mo. 1980): "The policy of the Code . . . is to encourage reorganization if there is a possibility of success. In re Colonial Realty Investment Co., 516 F.2d 154, 160 (1st Cir. 1975); In re Bermec Corporation, 445 F.2d 367 (2nd Cir. 1971)." Id. at 496.

The applicability of the tax exemption prescribed in section 1146(c) to a recordation tax is discussed in the case of In re Jacoby-Bender, Inc., 34 B.R. 60 (E.D.N.Y. 1983). The issue in this case was whether a deed, given by a debtor involved in Chapter 11 reorganization proceeding prior to the reorganization plan being confirmed, could be recorded without payment of a recordation tax imposed by the City of New York. The Court held that since the debtor's reorganization plan had not been confirmed at the time the instrument was offered for filing, the recording tax would have to be paid before the deed could be filed. However, the court made it clear the debtor could seek judicial relief later, if the debtor's reorganization plan was confirmed.

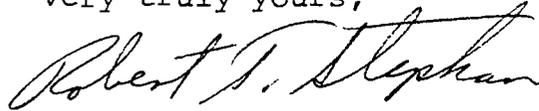
In light of this decision and the policy of the code to encourage reorganization, we believe the federal courts would view the Kansas mortgage registration fee as an imposition proscribed by section 1146(c). Our Supreme Court has consistently held that the mortgage registration fee, in fact, is a tax. See Assembly of God v. Sangster, 178 Kan. 678, 679 (1955); Home Owners' Loan

Robert H. Diehl  
Page Three

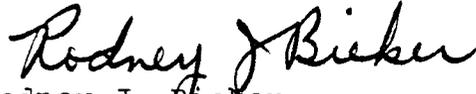
Corp. v. Anderson, 145 Kan. 209, 210 (1937); and Davis-Wellcome Mortgage Co. v. Haynes, 119 Kan. 1, 4 (1925). It is a tax imposed upon mortgages of real property. K.S.A. 79-3101, K.S.A. 1983 Supp. 79-3102 and National Bank of Tulsa v. Warren, 177 Kan. 281, 285 (1955). The tax is required to be paid before any mortgage of real property may be filed of record (K.S.A. 1983 Supp. 79-3102) and the register of deeds is required, by K.S.A. 79-3104, to "endorse upon the instrument presented a receipt for the payment of such fee." Thus, the mortgage registration fee possesses the characteristics of a stamp tax.

Therefore, we are constrained to conclude that the federal courts probably would determine the Kansas mortgage registration fee to be "a stamp tax or similar tax" within the meaning of 11 U.S.C.A. §1146(c). Consequently, this tax may not be imposed upon a mortgage of real property which is given pursuant to a reorganization plan that has been confirmed under the federal bankruptcy code.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Rodney J. Bieker  
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RTS:JSS:RJB:sc