



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 95

John E. Lang  
Pottawatomie County Counselor  
Courthouse  
Westmoreland, Kansas 66549

Re: Taxation--Mortgage Registration and Intangibles;  
Mortgage Registration--Mortgage Registration; Fee,  
Exemptions

Synopsis: If the security stated in a mortgage meets the definition of "real property" for purposes of the mortgage registration tax act, an agreement to characterize it as personalty has no affect on the obligation to pay the tax. The two mortgages presented for our review secure the same indebtedness, so the tax need only be paid once. Cited herein: K.S.A. 79-3101; K.S.A. 1990 Supp. 79-3101.

Dear Mr. Lang:

As Pottawatomie county counselor, you request our opinion regarding the applicability of the mortgage registration tax act to the filing of two mortgages.

The first mortgage (hereinafter referred to as the indenture) provides as security, among other things, certain improvements including "buildings, other constructions, structures and improvements, together with all appurtenances thereto. . . ." Indenture, § 1.2. You inform us that as part of the financing arrangement the parties to the indenture and the underlying participation agreement have agreed to characterize this property as personalty because it is in effect being severed from the realty for purposes of the financing -- one entity

owns the realty, a separate entity owns the improvements. While a security agreement will be filed pursuant to the Kansas uniform commercial code, the parties wish to file the indenture in the real estate filings of the register of deeds office as a precautionary measure. You question whether mortgage registration tax should be collected upon such filing.

K.S.A. 1990 Supp. 79-3102 provides in part:

"(a) Before any mortgage of real property, or renewal or extension of such a mortgage is received and filed for record, there shall be paid to the register of deeds of the county in which such property or any part thereof is situated a registration fee of \$.26 for each \$100 and major fraction thereof of the principal debtor obligation which is secured by such mortgage, and upon which no prior registration fee has been paid."

The term "mortgage of real property" is defined in K.S.A. 79-3101 as "every instrument by which a lien is created or imposed upon real property, notwithstanding that the debt secured thereby may also be secured by a lien upon personal property." "Real property" is defined as follows:

"The words 'real property' and 'real estate' as used in this act, in addition to the definition thereof contained in the Revised Statutes of 1923, shall include all property a conveyance or mortgage of which is entitled to record as real property or interest therein under the laws of this state." K.S.A. 79-3101.

The Kansas Supreme Court discussed these definitions in Shawnee County Commissioners v. Wright, 147 Kan. 542, 547 (1938):

"The first section just above quoted referred to other definitions of real estate in the Revised Statutes of 1923. The following are three of them:

"The word "land," and the phrases "real estate" and "real property," include lands, tenements and hereditaments, and

all rights thereto and interest therein, equitable as well as legal.' (R.S. 77-201, sub-div. 8.)

"That the terms "real property," "real estate," and "land," when used in this act, except as otherwise specifically provided, shall include not only the land itself, but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto.' (R.S. 79-102.)

"That all fixed mains, flumes, aqueducts, reservoirs, receptacles, standpipes, purifiers, regulators, lamps, lampposts, meters, shackle-rods, plugs, tanks, wires and all other property, whether herein enumerated or not, used as part of a system and employed in leading, conducting or distributing heat, light, power, oil, gas, water or other commodity between the place of generation, production or supply and the place of distribution, consumption, use, manufacture, market, or further shipment shall be listed and taxed by the city, town, school district, township or county in which said property or any part thereof is located, and in the same manner returned as is provided by law for real estate.' (R.S. 79-422.)

"Under these sections there can be no question but that some of these items usually spoken of as personal property, such as rights of way, easements, poles, lines, viaducts, pipes, meters and other similar property, should be considered as real property under the requirements of this mortgage-registration tax law as well as under other laws concerning the taxing of property of public utilities and under the general definition of real property, including 'all rights thereto and interests therein, equitable as well as legal,' for the purpose of distribution of

this mortgage-registration tax." See also Shawnee County Commissioners v. Wright, 153 Kan. 19, 32, 33 (1941).

Based on the above, it is our opinion that part of the property given as security under the indenture is real property for purposes of the mortgage registration tax act and therefore a mortgage registration fee based on the amount of principal debt or obligation secured by the indenture should be collected before placing it in the county's real estate filings. Agreement of the parties to treat property as personalty does not change the characterization of the property under the mortgage registration tax act.

Since we have opined that mortgage registration fees are to be collected upon filing the indenture, the question arises as to the applicability of K.S.A. 1990 Supp. 79-3102(d)(2) or (3) to filing the second mortgage. K.S.A. 1990 Supp. 79-3102(d)(2) and (3) state:

"No registration fee whatsoever shall be paid, collected or required for or on:  
. . . (2) any mortgage or other instrument given for the purpose of providing additional security for the same indebtedness, where the registration fee herein provided for has been paid on the original mortgage or instrument; (3) any mortgage or other instrument 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 or their assigns upon which the registration fee herein provided for has been paid. . . ."

The application of either of these provisions depends upon whether both mortgages secure the same indebtedness.

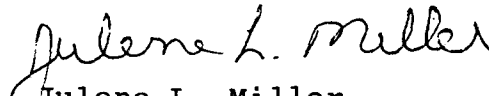
The indenture is given to secure repayment of certain notes, the proceeds of which are to be used to finance a portion of the purchase price of an undivided interest in the Jeffrey Energy Center. As mentioned previously, the indenture lists as security improvements which constitute the facility. Also securing the debt are rental payments on the undivided interest being acquired. Indenture, §§ 1.4., 1.5 and 1.3.

The second mortgage is given to secure the obligations under the lease of the undivided interest and lists as collateral the land upon which the improvements are located. Mortgage, § 1. Our review of the documents leads us to conclude that the transactions are so intertwined that both mortgages can be viewed as securing the same indebtedness. For example, the lessee under the lease of the undivided interest has the ability to cause the redemption or refinancing of the loan covered by the indenture, Participation Agreement, § 3; portions of the indenture, the trust agreement and the payment terms of the notes cannot be amended without the lessee's consent. Participation Agreement, §§ 5.2.4, 7.2.1, 5.2.3, 6.2.2, 8.2.2; the amount of rent payable under the lease is closely tied to the amount of principal and interest payable under the indenture, Participating Agreement, § 9.1.33; Lease Agreement, § 3, and the lessee is to wire such payments directly to the indenture mortgagee until the debt is satisfied, Lease Agreement, § 3.6; upon default, the indenture mortgagee has the authority to enforce lessee's obligations under the lease, Lease, § 14.2, Indenture, §§ 5,7.1; and the lessee has an option to purchase the undivided interest, Participating Agreement, § 17.1, Lease, § 6. For these reasons, we believe both mortgages, in the form presented to us, secure the same indebtedness and the filing of the second will not require payment of additional mortgage registration fees if the appropriate affidavit is executed and presented with the mortgage.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Julene L. Miller  
Deputy Attorney General

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