



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

April 28, 1975

Opinion No. 75- 186

Mr. Matthew Dowd, Esq.
County Counselor
Shawnee County Courthouse
Topeka, Kansas 66603

RE: K.S.A. 1974 Supp. 79-3102
Mortgage Registration Tax-
Exemption

Dear Mr. Dowd:

You request an opinion from this office relative to the application of K.S.A. 1974 Supp. 79-3102 to the recordation in Shawnee County of a Public Buildings Purchase Contract and Trust Indenture, dated July 22, 1974, between the United States of America, acting by and through the Administrator of General Services and American Security and Trust Company, a private banking corporation duly incorporated and existing under the laws of the District of Columbia, as "Trustee".

We understand that one of the new public building projects, approved by Congress in Section 5 of the Public Building Amendments of 1972, P.L. 92-313 (86 Stat. 216) is a Federal Court House and Office building with parking facilities to be constructed in Topeka, Kansas. Under the above Purchase Contract, the funds to finance the payment of the "purchase price" of this Topeka Project were derived from the sale of a series designated Participation Certificates, Series K, due July 15, 2004. We understand that these certificates are backed by the full faith and credit of the United States.

We further understand that these certificates, Series K, have all been purchased by the Federal Financing Bank which was created by Congress by Pub. L. 93-224, Dec. 29, 1973, 87 Stat. 937. Section #4 of that act states: "The Bank shall be an instrumentality of the United States Government..." Section #9b gives the Bank power to sell any obligation acquired.

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Under this Contract, the U.S. Government sells, assigns, transfers and sets over to the Trustee and its successors and assigns forever all right, title and interest in and to the improvements being built with the proceeds from the sale of the Series K Participation Certificates. The Contract further provides that, in case of any default in the payment of principal or interest on said Certificates, the trustee shall occupy and take possession of the trust property, collect rents, make leases and manage the property until the certificate holders have received payment in full.

To make this contract a matter of record in Shawnee County, Kansas, and thereby to secure the certificate holders in their rights in case of default and the trustee in its right to possession, the trustee now tenders this contract to the Register of Deeds of Shawnee County for recordation. Thus, the question is presented: Must the Trustee pay a mortgage registration tax pursuant to K.S.A. 1974 Supp. 79-3102 to the Register of Deeds at the time of recordation?

In our opinion the Purchase Agreement and Trust Indenture, if recorded, will constitute an "interest in land". Land is defined by K.S.A. 1974 Supp. 77-201 (Eighth) "The word "land" and the phrases "real estate" and "real property" includes lands, tenements, hereditaments, and all rights thereto and interest therein, equitable as well as legal." K.S.A. 79-3101 states that the words "mortgage of real estate" shall "include every instrument by which a lien is created or imposed upon real property," *Assembly of God v. Sangster*, 178 Kan. 678, Syl. #1, 290 P.2d 1057. The above contract will create and impose a lien on real property improvements built with the Certificate proceeds, and is therefore covered by K.S.A. 1974 Supp. 79-3102.

The "mortgage registration fee" charged under the statute is in fact not a fee, but a tax. It is property tax collected at the time of registration, and is in lieu of all other property taxes. *Wheeler v. Weightman*, 96 Kan. 50, 149 Pac. 977; *Missouri Pac. R. Co. v. Deering*, 184 Pac. 283, 336 P.2d 482, appeal dismissed 361 U.S. 12, 80 S. Ct. 84, 4 L. Ed. 2d 51. (1959).

This tax cannot be collected from an instrumentality of the federal government when that agency directly loans money and then records its mortgage. *Home Owner's Loan Corp. v. Anderson*, 145 Kan. 209, 64 P.2d 14. In that case there was no question the mortgagee was a federal instrumentality, and there was no waiver by Congress of the exempt status.

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In this instant matter, the lender is the purchaser of the Series K Participation Certificates, namely, the Federal Financing Bank. There is no question but that this Bank is a federal instrumentality. But that Bank may sell obligations to persons or corporations that are not federal instrumentalities.

For this, or some other reason, Congress did make an exception to the exempt status of that Bank in these words: "except that (1) any real property and any tangible personal property of the Bank shall be subject to Federal, State and local taxation to the same extent according to its value as other such property is taxed, and (2) any obligations issued by the Bank shall be subject to Federal taxation to the same extent as the obligations of private corporations are taxed." Pub. L. 93-224, Section 10(a), December 29, 1973, 87 Stat. 940, 12 USCA 2290(a).

Congress has power to determine the extent that its instrumentalities shall enjoy immunity from state taxation, and that the Federal Land Bank should pay real estate taxes, but not personal property taxes. Fed. Land Bank v. Kiowa County, 368 U.S. 148, 82 S. Ct. 282, 7 L. Ed. 2d 199 (1961).

A state may tax a contractor doing business within a state, even though the economic burden of the tax is ultimately borne by the United States. U.S. v. Boyd, 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed 2d 713 (1964).

Where Congress creates a "managing agent" who enjoys "the entire worth of the buildings and improvements", even though the government holds title, it is "only a paper title", and Congress is held to have relinquished immunity from state taxation. Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151 (1956).

So, under the act of Congress creating it, the Federal Financing Bank must pay state taxes on any interest in real property which it owns. But Series K Certificates, owned by the Bank, under the purchase Contract and Trust Indenture sought to be recorded in Shawnee County, Kansas, will constitute a lien upon and an interest in real property located in Shawnee County, Kansas. Therefore, the Federal Financing Bank, under its organic law, or the Trustee acting on behalf of that bank,

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must pay the Kansas Registration Tax as required by K.S.A.
1974 Supp. 79-3102.

Very truly yours,

A handwritten signature in cursive script that reads "Curt Schneider".

CURT T. SCHNEIDER
Attorney General

CTS:CJM:gw

CC: James D. Waugh, Attorney
for General Services
Administration
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