



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

March 21, 1977

ATTORNEY GENERAL OPINION NO. 77-103

Mr. Laurel D. McClellan
Wilson County Attorney
430 North Seventh Street
Fredonia, Kansas 66736

RE: Taxation - Mortgage Registration Tax - Exemption

SYNOPSIS: The mortgage registration fee is a tax upon the debt or obligation secured by the instrument offered for recording, and is in lieu of all other taxation upon that debt. The tax is paid by the owner of that debt, who pays the tax at the time of recording a lien against real estate to secure payment. Where an agency of the federal government owns the debt, a state may not tax the federal agency in securing payment of that debt. It is different where a private bank loans the money, owns the debt, seeks to record a mortgage lien to secure payment, and claims exemption because the Farmers Home Administration, a federal agency, has guaranteed repayment of the loan. The imposition of the registration tax on the bank is no direct burden on the federal agency, nor does it impair its usefulness. The bank cannot clothe itself with the immunities of the agency.

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Dear Mr. McClellan:

You say that the United States Department of Agriculture, acting through the Farmers Home Administration, guarantees private loans made by accredited lending institutions. You have an accredited private bank which has loaned its own money to a private borrower and wants to secure the loan by a mortgage on the borrowers land. The FHA has guaranteed payment of any loss suffered by the bank in making this loan. You ask if there is any exemption from registration tax of this particular mortgage because the FHA has guar-

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anted the loan.

Where a federal agency makes the loan itself, owns the obligation, and takes a mortgage on the borrower's land to secure repayment of the loan to the agency, there is no question but that the general rule, of exemption of federal agencies and instrumentalities from state or local taxation, applies. Home Owners Loan Corp. v. Anderson, 145 Kan. 209, Syl. #1, 64 P.2d 14 (1937).

But we do not have that situation here. This mortgagee is a private bank. It has loaned its own money to a private borrower. It wants a mortgage recorded against land to secure repayment of its loan. Even if the borrower be an exempt body, this does not excuse the private bank from the registration tax. Assembly of God v. Sangster, 178 Kan. 678, 680, 290 P.2d 1057 (1955). It is the mortgagee who is interested in recording a mortgage, and it is he who pays the fee.

The registration tax is imposed, not directly on the FHA, but directly upon the bank. This tax does not burden any governmental function of the federal agency, or impair its usefulness and efficiency, or frustrate the purpose of national legislation. Clinton v. State Tax Comm., 146 Kan. 407, 71 P.2d 857 (1937), cited in support of text in 84 C.J.S. 396, Taxation, Sec. 207. Federal Agencies.

A bank once tried to avoid a mortgage registration tax, claiming it was only a necessary procedural step in a federal plan and scheme, and failed. First National Bank in Dallas v. Lowman, 193 Kan. 349, 395 P.2d 313 (1964). Even a Federal Court in a railroad reorganization order has no authority to order mortgages filed without payment of the Kansas registration taxes. Missouri Pacific Railroad Co. v. Deering, 184 Kan. 283, 336 P.2d 482, cert. den. 361 U.S. 12, 4 L.Ed. 2d 51, 80 S.Ct. 84, rehearing denied, 361 U.S. 904, 4 L.Ed. 2d 159, 80 S.Ct. 206 (1959).

In our opinion the statutory registration fee should be assessed as required by K.S.A. 79-3101 et seq., even though the FHA has guaranteed repayment of the loan. The FHA cannot cast its cloak of exemption over non-exempt taxpayers. See our opinion no. 75-447, dated December 4, 1975.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:CJM:gw