



STATE OF KANSAS

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Attorney General

January 11, 1978

ATTORNEY GENERAL OPINION NO. 78- 12

Nora Steinberger
Register of Deeds
Montgomery County Courthouse
Independence, Kansas 67301

RE: Mortgage Registration Fees - Amount where mortgage and note include both principal and interest. K.S.A. 79-3101, 79-3103, 79-3107; K.S.A. 1976 Supp. 79-3102.

SYNOPSIS: Where the mortgage and the note thereby secured includes both principal and interest in a total sum, which is to be paid by installments, the mortgage registration fee must be paid on the total sum. The mortgage and note are intangibles, and the registration fee is a tax in lieu of all other taxation. Where the mortgagee requires the borrower to include interest in the debt and obligation, such mortgagee is imposing upon the real estate a lien that secures not only the payment of the amount loaned, but also the interest. By doing so, the lender enjoys a priority of lien over intervening lienholders for the total amount, including interest. The interest has been made a part of the total obligation and the mortgagee must pay the registration fee on the total sum specified.

* * *

Dear Ms. Steinberger:

You have been presented for recording a mortgage and installment note for \$1,422.00 which is to be paid by 18 monthly installments of \$79.00 each. It is then explained

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that the principal amount of the loan was \$1,159.20 and a "finance charge" of \$262.80 is added to make the total of \$1,422.00. The mortgagee wanted to pay a mortgage registration fee only on \$1,159.20, but you charged it on \$1,422.00. You ask who is right?

In our opinion you were right, because in this type mortgage and note the interest is pre-added into the principal debt or obligation which is secured by a lien on real estate.

There is no question but that the charge made upon mortgages at the time of recording, while designated as a "fee", is in reality a "tax". Missouri Pacific Railroad Co. v. Deering, 184 Kan. 283, 286, 336 P.2d 482 (1959). Both the Mortgage Registration Fee Law and the Intangibles Tax act were passed by the 1925 Session of the Kansas, one Chapter 273 and the other Chapter 277. They were companion acts passed after the Kansas people voted on November 4, 1924 to amend Article 11, Section 1 of the Kansas Constitution to allow the legislature to tax separately mortgages and intangibles. The Revisor of Statutes has codified both laws under Article 31 entitled Mortgage Registration and Intangibles, of Chapter 79 on Taxation, and assigned section numbers K.S.A. 79-3101 through 79-3107 to Mortgage Registration and K.S.A. 79-3108 through 79-3120e to Intangibles.

Of these companion acts the Kansas Supreme Court has said:

"Together they were a part of a plan to cause so-called intangibles to be put on the tax rolls at a somewhat lower rate than other property. Obviously the simplest means of collecting a tax on mortgages was to provide that the tax should be collected when the instrument was offered for recording." National Bank of Tulsa v. Warren, 177 Kan. 281, 284-285, 279 P.2d 262 (1955)

K.S.A. 79-3101, which has been unamended since 1925, provides: "The words 'mortgage of real property' shall include every instrument by which a lien is created or imposed upon real property" The amount of the lien here, in both the note and mortgage is \$1,422.00. K.S.A. 1976 Supp. 79-3102, imposes a rate of tax on "the principal debt or obligation which is secured by such mortgage,". The total amount secured by this mortgage and note is \$1,422.00.

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In the conventional mortgage and note the exact sum of the loan is stated and the mortgagor agrees to pay a certain rate of interest annually, and to keep taxes paid, etc. It is true that the mortgage registration tax on such mortgages has been imposed upon the capital or "principal" amount stated as loaned, and upon foreclosure the mortgagee is entitled to recover, not only the amount loaned, but also the accumulated interest, taxes and other expense outlays, without paying any more registration tax. Frost v. Kirkpatrick, 141 Kan. 517, 41 P.2d 719 (1935).

But in such a conventional loan, the mortgage and note limits the lien to the amount loaned, making the additional items collectable at the time of foreclosure. In this installment type mortgage and note here offered, the principal sum includes finance charges, but taxes, insurance, maintenance, and other charges still are collectable upon foreclosure. If the mortgage and note had been increased still further, to include the posting of a reserve for taxes, insurance, etc., in the total amount and in the installment payments, then the enlarged total amount shall be the base for computing the registration tax, because that is the sum which is imposed as a lien on real property, and that is what is taxed.

Traditionally, there has been a distinction between principal and interest. Capital or principal is the source of income. Income is the fruit of capital. But this general rule does not contemplate the comingling of both capital and finance charges in one principal debt or obligation in the original instrument. We are impressed with a case cited in 33A Words and Phrases, 277-278, PRINCIPAL - Income Distinguished:

" . . . once income accumulations are added to "principal" which constitutes the capital sum or corpus, such accumulations cannot be resurrected as income." McCulloch v. Franchise Tax Bd., 37 Cal. Rptr. 636, 390 P.2d 412, 417, 61 C. 2d 186 (1964).

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:gw