



STATE OF KANSAS

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September 27, 1979

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ATTORNEY GENERAL OPINION NO. 79- 211

Ms. Nora Stienberger
Register of Deeds
Montgomery County Courthouse
Independence, Kansas 67301

Re: Taxation--Mortgage Registration Fee--Imposition
of and Exemption Therefrom

Synopsis: A mortgage, executed between a mortgagor and a lending institution, which replaces a mortgage executed between said mortgagor and a different lender, is subject to the mortgage registration fee. However, upon tender of the mortgage for filing, the mortgage registration fee is imposed upon only that portion of the debt or obligation secured thereby upon which no prior registration fee has been paid.

* * *

Dear Ms. Stienberger:

The following factual situation has prompted you to request an opinion from our office. It is our understanding that, in order to construct a multifamily dwelling, a contractor obtained a \$100,000 loan from a local bank. In order to secure this loan, the contractor executed a mortgage of real property. Upon tender of the mortgage for recording in your office, the mortgage registration fee was paid and the mortgage duly recorded. Shortly thereafter, as is common in regard to construction loans, the bank discounted (sold) the note and mortgage to a savings and loan association and made an assignment transferring both the note and mortgage to the savings and loan association. That assignment has been duly recorded and raises no problem.

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The problem arises from the fact that the contractor-mortgagor needs an additional \$25,000, which the savings and loan association is willing to lend. The association, however, in order to avoid having both a first and a second lien on the real estate, desires to have the contractor-mortgagor execute a new mortgage of real property securing the total amount loaned to the contractor, i.e., \$125,000. The association does not, however, wish to pay a mortgage registration fee based upon the total amount owed to it by the mortgagor, if such is not required by the provisions of K.S.A. 79-3102, as amended (L. 1979, ch. 317, §1).

Thus, the issues presented by this situation are: (1) Under the current provisions of K.S.A. 79-3102, as amended, would the newly-executed mortgage, to be given to the savings and loan association to secure the total indebtedness of \$125,000, be subject to the mortgage registration fee? (2) If said mortgage is subject to the fee, upon what amount should the fee be based? That is, should the fee be based upon the amount of \$125,000, or upon only the \$25,000 additional advance which was not included in the previously recorded mortgage and upon which no prior registration fee was imposed?

In our judgment, determination of the first question posed herein involves only the provisions of 79-3102, as amended, by which the tax is imposed, and the provisions of K.S.A. 79-3101, which define the term "mortgage of real property."

That portion of K.S.A. 79-3102, as amended, by which the mortgage registration fee is imposed, provides:

"Before any mortgage of real property, or renewal of extension of the same shall be 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 twenty-five cents (25¢) for each one hundred dollars (\$100) and major fraction thereof, of the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid"

K.S.A. 79-3101, in relevant part, establishes the scope of the term "mortgage of real property" thusly: "The words 'mortgage of real property' shall include every instrument by which a lien is created or imposed upon real property" (Emphasis added.)

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In our judgment, these provisions, as they relate to your first inquiry, are plain and unambiguous, and thus, no need or justification exists to "construe" the same. [See Thomas County Taxpayers Ass'n v. Finney, 223 Kan. 434, Syl. para. 2 (1978), for a recent affirmation of the foregoing principle.]

Thus, as there is no question but that the mortgage tendered for filing in your office by the savings and loan association is a mortgage of real property, we have absolutely no hesitancy in concluding that said mortgage is subject to the mortgage registration fee.

Resolution of your second inquiry, however, is a much more difficult task. That inquiry is: If the mortgage is subject to the fee, upon what amount should the fee be based?

This question arises from the fact that a portion of the total debt or obligation secured by the savings and loan association's mortgage was secured by the mortgage previously recorded by the bank, and a mortgage registration fee, based upon the amount of \$100,000, was paid by the bank. Thus, the question arises whether the association should pay a fee based upon the amount of \$125,000, or upon the amount of \$25,000.

In regard to this question, we note initially that the tax imposition portion of 79-3102, as amended, clearly and unequivocally provides that the tax is to be imposed upon only "the principal debt or obligation which is secured by the mortgage and upon which no prior registration fee has been paid." Thus, in our judgment, it clearly and logically follows that if a mortgage tendered for filing secures a debt or obligation upon which a prior registration fee has been paid, the registration fee is not imposed, again, upon that debt or obligation. It likewise follows, in our judgment, that if a mortgage tendered for filing secures a debt or obligation, upon a portion of which a prior registration fee has been paid, a fee is to be paid upon only that portion of said debt or obligation "upon which no prior registration fee has been paid."

Consequently, in our judgment, considering only the tax imposition provisions of 79-3102, it seems obvious that, upon tender, by the association, of its mortgage securing the mortgagor's total principal indebtedness in the amount of \$125,000, K.S.A. 79-3102, as amended, requires it pay a mortgage registration fee based upon only the amount of \$25,000, i.e., that portion of the "principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid." (Emphasis added. 79-3102, as amended.)

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However, notwithstanding what we perceive to be plain and certain, our analysis of your second inquiry cannot end here. This situation arises from the fact it is a well-settled canon of statutory interpretation, that in construing the provisions of any statute, it is not proper to consider only an isolated part of the statute, but rather, all the parts thereof must be considered and construed. (For cases in which this rule is stated and applied, see the cases collected at 9 Kan. Digest, Statutes, §§204-211, inclusive.)

Moreover, invocation of this rule is necessitated by the fact that 79-3102 includes both the provisions by which the tax is imposed and also, those by which exemptions therefrom are granted. Together, they comprise the totality of 79-3102, as amended. Of course, while normally this fact would not create any difficulty in applying the provisions of a statute, such fact, in this case, due to the provisions contained therein, creates an enormous degree of uncertainty and ambiguity as to the requirements and meaning of this statute.

K.S.A. 79-3102, as amended, in its entirety, provides:

"Before any mortgage of real property, or renewal or extension of the same shall be 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 twenty-five cents (25¢) for each one hundred dollars (\$100) and major fraction thereof, of the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid. As used herein 'principal debt or obligation' shall not include any finance charges or interest. In any case where interest has been precomputed, the register of deeds may require the person filing the mortgage to state the amount of the debt or obligation owed before computation of interest. No registration fee whatsoever shall be paid, collected or required for or on any mortgage or other instrument, (1) given solely for the purpose of correcting or perfecting a previously recorded mortgage or other instrument, (2) given for the purpose of providing additional security for the same indebtedness, where the registration fee herein provided has been paid on the original mortgage or instrument, (3) upon

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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 upon which the registration fee herein provided for has been paid (4) for any lien, indenture, mortgage, bond or other instrument or encumbrance nor for the note or other promise to pay thereby secured, all as may be assigned, continued transferred, reissued or otherwise changed by reason of, incident to or having to do with the migration to this state of any corporation, by merger or consolidation with a domestic corporation as survivor, or by other means, where the original secured transaction, for which the registration fee has once been paid, is thereby continued or otherwise acknowledged or validated or (5) given in the form of an affidavit of equitable interest solely for the purpose of providing notification by the purchaser of real property of his or her interest therein. The register of deeds shall receive no additional fees or salary by reason of the receipt of fees as herein provided. After the payment of the registration fees as aforesaid the mortgage and the note thereby secured shall not otherwise be taxable." (Emphasis added.)

All of the above emphasized provisions were added to the statute by a 1973 amendment thereto. Due to those provisions, a very perplexing problem arises when an attempt is made to determine the intent of the legislature which prompted it, in 1973, to add all of the above emphasized language. That is, due to the addition of the phrase "and upon which no prior registration fee has been paid," to the imposition portion of this statute, there appears to be no need for the third and fourth exemption provisions, because pursuant to the tax imposition section, and particularly the above-quoted phrase, the mortgage registration fee is not imposed upon the instruments, or a portion of the debt or obligation, granted exempt status in those clauses of the statute. Of course, there is no need to grant an exemption to certain items from a tax, if that tax is not, in the first place, imposed upon such items. Yet, that seems to be exactly what the legislature has done pursuant to the provisions of 79-3102, as amended.

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Thus comes the dilemma. A choice must be made. Is the phrase in the imposition section to be ignored so as to give the third and fourth exemption clauses effect, or are the plain and unambiguous provisions of the imposition section to be acknowledged?

In making the choice as to which of the alternative courses we should follow, we note, and concur in, the observation made by Attorney General Schneider in Attorney General Opinion No. 76-191, where it is stated:

"There had always been legal problems with the law as written [i.e., prior to 1973] when a new mortgage was filed and a claim made that no fee was due because the new mortgage was 'solely' to secure the 'same indebtedness.' First Nat'l. Bank v. Lovitt, 158 Kan. [sic] 535, 540, 148 P.2d 738 (1944). This problem came to a head in Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35, 505 P.2d 1127 (1973)."

Following this comment, General Schneider notes the 1973 amendment to 79-3102 and, then, concludes that said amendment was designed to eliminate the problem existing prior thereto, by providing that "a new mortgage will not incur another fee on the old debt." (Attorney General Opinion No. 76-191.)

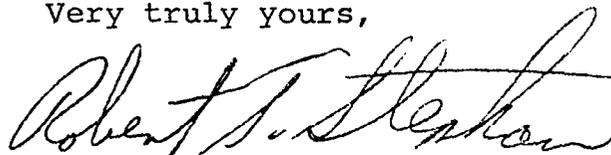
We recognize, of course, that General Schneider's opinion involved application of the third exemption clause contained in 79-3102, and is, therefore, not directly applicable to this inquiry. However, we think his observation is correct that the paramount legislative purpose and intent for enactment of the 1973 amendment was to provide that the amount of the fee imposed upon a mortgage tendered for filing is to be based upon only that portion of the debt or obligation secured by said mortgage, and upon which debt or obligation, no prior registration fee has been paid.

In reaching our conclusion herein, we also apply a special rule of statutory construction applicable to tax statutes. That rule, as stated by the Court in Grauer v. Director of Revenue, 193 Kan. 605 (1964), is: "Where there is reasonable doubt as to the meaning of a taxing act, it will be construed most favorably to the taxpayer. (Following Equitable Life Assurance Society v. Hobbs, 154 Kan. 1, 114 P.2d 871.)" Id. at Syl. para. 3.

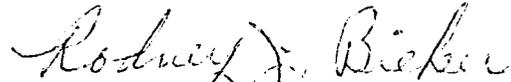
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Thus, given that which we and a previous Attorney General perceive to be the paramount purpose and intent of the legislature underlying the 1973 amendment, and, further, given the rule followed in Grauer, we conclude that the fee to be imposed upon the mortgage tendered for filing in your office by the savings and loan association is to be based upon only that portion of the debt or obligation secured thereby upon which no prior registration has been paid. Specifically, in our judgment, the fee should be based upon only the amount of \$25,000.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:gk