



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

May 24, 1982

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 82-107

Leonard L. Buddenbohm
Atchison County Counselor
109 North 6th Street
Atchison, Kansas 66002

Re: Taxation -- Mortgage Registration Fee -- Instruments Subject Thereto; Contracts For Deed

Synopsis: Executory contracts for the sale of real estate having the characteristics specified in K.S.A. 79-3101 are mortgages covered by the Mortgage Registration Fee Act, and \$.25 on every one hundred dollars (\$100) of principal debt or obligation secured by any such contract must be collected by the Register of Deeds before recording the instrument. However, an affidavit of equitable interest, filed by the purchaser pursuant to K.S.A. 1981 Supp. 79-3102(5), may be recorded without payment of the mortgage registration fee on the executory contract which gives rise to the affidavit of equitable interest. If the contract itself is offered for filing, the fee collected should reflect the total debt secured, and not merely the amount outstanding at the time of filing. Cited herein: K.S.A. 79-3101, K.S.A. 1981 Supp. 79-3102, K.S.A. 79-3107.

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Dear Mr. Buddenbohm:

As Counselor for Atchison County, you request our opinion on a question concerning the assessment of the mortgage registration fee imposed by K.S.A. 1981 Supp. 79-3102. Specifically, you inquire whether the fee is required to be collected on contracts for deed or assignments of such contracts if they have not previously been filed. You further inquire as

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to the amount of fee which should be collected, i.e., should it be based on the face amount of the contract or the balance remaining unpaid at the time of filing?

The mortgage registration fee is imposed pursuant to K.S.A. 1981 Supp. 79-3102, which, in pertinent part, 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 After the payment of the registration fees as aforesaid the mortgage and note thereby secured shall not otherwise be taxable." (Emphasis added.)

K.S.A. 79-3101 provides the following definitions:

"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. The words 'mortgage of real property' shall include 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. An executory contract for the sale of real estate, or a bond for a deed, the complete performance of which is deferred for a longer period than ninety days from its execution, under which the grantee or vendee is entitled to the possession of such real estate, by the terms of which the grantor holds the legal title as security for the unpaid purchase money, shall for the purpose of this act be treated as a mortgage of real property to secure the balance of the unpaid purchase price." (Emphasis added.)

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As a final part of the statutory framework, K.S.A. 79-3107 provides:

"Any mortgage of real property executed on or after March 1, 1925, on which the registration fee as herein provided has not been paid, shall not be filed for record by any register of deeds, and such mortgage shall not be received in evidence in any suit, action or proceeding, and no judgment, decree or order for the enforcement thereof shall be rendered, made or entered in or by any court in this state."
(Emphasis added.)

In view of the above, it is clear that a contract for deed, executory in nature and of a type which requires more than 90 days for performance, is a "mortgage of real property" for purposes of the registration fee. Numerous prior opinions of this office have so held, and we reaffirm their conclusions. See, e.g., Attorney General Opinion Nos. 78-207, 80-29, 81-180. It remains our opinion that a contract for deed, having created an evidence of debt, properly subjects the one who profits by such action (i.e. the seller) to pay the required fee, which acts as a tax on an intangible belonging to the seller. Assembly of God v. Sangster, 178 Kan. 678 (1955). Accordingly, if a seller of real property through a contract for deed wishes to provide notice of his interest through a public filing, the registration fee must be paid pursuant to K.S.A. 1981 Supp. 79-3102.

This is not to say, however, that a purchaser involved in such a transaction has no means available, short of recording the executory contract, to give notice of his or her interest. An exemption to the general requirement for payment of the fee is provided by subsection (5) of K.S.A. 1981 Supp. 79-3102, which states:

"No registration fee whatsoever shall be paid, collected or required for or on any mortgage or other instrument . . . (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." (Emphasis added.)

Therefore, notice of the contract may be given without payment of the fee, although the contract itself cannot be filed, under a strict construction of the above-quoted language. Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35 (1973).

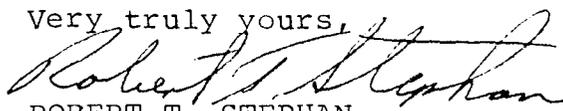
In that the mortgage registration fee is assessed only once upon each creation of debt, the mere assignment of a contract for deed would not require the payment of a new fee. If the contract had previously been filed and the fee paid, no new debt would be created through the assignment that would require payment of a second fee. However, if the assignment concerned a contract which had not previously been filed, payment of the fee for the contract would be required before notice of the assignment could be filed. Alternatively, if an assignment of the proceeds of the contract is made, the filing is subject to the Uniform Commercial Code (UCC), not the Mortgage Registration Fee Act. See Attorney General Opinion Nos. 80-29 and 80-29A, copies of which are enclosed.

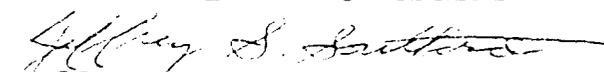
It is further our opinion that, where an executory contract is filed for recordation and payment of the mortgage registration fee is required, the amount to be taxed would properly be the face amount of the contract, regardless of payments previously made. This is in keeping with the wording of K.S.A. 1981 Supp. 79-3102, which calculates the amount due based on the "debt or obligation which is secured." Even if a portion of the contract has been paid, the lien initially imposed is for the amount set forth in the contract, and it is upon this intangible that the tax must be assessed.

While the conclusion drawn in Attorney General Opinion No. 78-207 held that the fee due must reflect the entire amount of the contract, language does appear therein that could be interpreted to allow assessments to be made on a partial amount. Such language is withdrawn as no longer representing the opinion of this office.

In conclusion, executory contracts for the sale of real estate are mortgages covered by the Mortgage Registration Fee Act, and \$.25 on every one hundred dollars (\$100) of principal debt or obligation secured by any such contract must be collected by the Register of Deeds before recording the instrument. However, an affidavit of equitable interest, filed by the purchaser pursuant to K.S.A. 1981 Supp. 79-3102(5), may be recorded without payment of the mortgage registration fee on the executory contract which gives rise to the affidavit of equitable interest. If the contract itself is offered for filing, the fee collected should reflect the total debt secured, and not merely the amount outstanding at the time of filing.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Jeffrey S. Southard
Assistant Attorney General

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