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ATTORNEY GENERAL OPINION NO. 86- 78

The Honorable Joan Finney
State Treasurer
700 Harrison, 3rd Floor
P.O. Box 737
Topeka, Kansas 66601

Re: Taxation--Mortgage Registration and Intangibles--
Application of Mortgage Registration Fee
Requirements to Federal Land Banks

Synopsis: Federal law prescribes that federal land banks are exempt from state taxation, except for those taxes on real estate held by a federal land bank. In that federal law supersedes inconsistent state law, and that the Kansas mortgage registration fee is a tax on an intangible, the federal land bank must be allowed to register its validly executed mortgages in Kansas without being required to pay mortgage registration fees, and such mortgages are enforceable in Kansas courts. Cited herein: K.S.A. 79-3101, 12 U.S.C. §§931, 2011, 2055.

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Dear Mrs. Finney:

As the Treasurer of the State of Kansas, you have requested our opinion regarding whether federal land banks must pay intangibles taxes and are thus subject to the provisions of the Kansas mortgage registration tax act found at K.S.A. 79-3101 et seq.

You cite in your letter that federal land banks are "considered to be private corporations and not governmental agencies." Federal Land Bank at Wichita v. Read, 237 Kan. 751 (1985). That statement is not entirely in context. While it is true the land bank was determined to be a private corporation in Kansas, it was construed as such for the purposes of due process under the 5th amendment to the U.S. Constitution. The Kansas Supreme Court cited DeLaigle v. Federal Land Bank of Columbia, 568 F.Supp. 1432 (S.D. Ga. 1983) with approval in Read. The language the Supreme Court accepted was

". . . the Court holds that the Federal Land Bank of Columbia is a private corporation without sufficient governmental involvement to support a cause of action under the federal due process clause of the Fifth Amendment."
568 F.Supp. at 1439.

These cases are an attempt to establish that federal land banks are not subject to the administrative hearing requirements imposed by the Fifth Amendment. The courts have thus tried to allow the land banks to operate in the market place.

For most purposes, federal land banks are federal instrumentalities. 12 U.S.C. §2011. As such, the land bank comes under regulation of the federal government and is granted protections and privileges afforded by federal statutes. One such protection is from the plenary power of the state to tax; one such privilege is that of immunity from state taxation at the discretion of Congress. Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149, 82 S.Ct. 282, 7 L.Ed.2d 199 (U.S. Kan. 1961). Kansas has held that this protection and privilege extends to instrumentalities to exempt them from paying taxes on mortgages offered for registration. Home Owner's Loan Corp. v. Anderson, 145 Kan. 209 (1937). These protections and privileges are codified for land banks at 12 U.S.C. §2055 (essentially a recodification of 12 U.S.C. §931) which states:

"Every federal land bank and every federal land bank association and the capital, reserves and surplus thereof, and the income derived therefrom shall be exempt from federal, state, municipal, and local taxation, except taxes on real estate held

by a federal land bank or a federal land bank association to the same extent, according to its value, as other similar property held by other persons is taxed."

Thus, the only state tax the Federal land bank is required to pay is one placed on real estate.

The Kansas mortgage registration fee is a tax. Berger v. Bierschbach 201 Kan. 740, 745 (1968). It is not a fee charged for the administrative work necessary to protect land titles with mortgages. Home Owners' Loan Corp. v. Anderson, 145 Kan. 209, 210. The mortgage registration tax is imposed upon the mortgage instrument. See, Attorney General Opinion No. 79-84. In that the federal land bank is a federal instrumentality immune from state taxes other than those placed upon real property, 12 U.S.C. §2055, and the mortgage registration tax is imposed upon the instrument evidencing debt upon the real property, but not on the property itself, the land bank is not required to pay mortgage registration fees on mortgages it holds.

The state is not bound, however, to provide a registry for the land bank for free. The state may charge a reasonable fee to meet the administrative expenses of the registry. Federal Land Bank of New Orleans v. Crosland, 261 U.S. 374, 378, 43 S.Ct. 385, 67 L.Ed. 703 (U.S. Ala. 1923), Home Owners Loan Corp. v. Anderson, 145 Kan. at 211. The state, though, has not recognized the fee as a registration fee, but rather as a tax. 145 Kan. at 211. If it attempted to disguise the mortgage registration tax by confusing it with an administrative fee, then courts may be called upon to determine how far the charge is in excess of administrative expenses. The legislature has never attempted to do this, however, impliedly adopting the court-imposed interpretation of the mortgage registration fee as a tax.

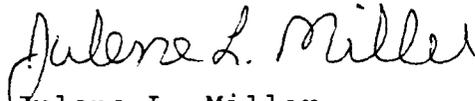
Although the tax could conceivably be considered optional, the law of Kansas makes it a necessity to record such mortgages to alert third party purchasers without notice. The fee is required in practicality for access to Kansas courts. Since federal law supersedes inconsistent laws of the state, it is our judgment that the federal land bank must be allowed to register its mortgages in Kansas without being required to pay mortgage registration taxes and is protected from the usual consequences for failure to pay mortgage registration taxes. It is our opinion, therefore, that all validly executed federal land bank mortgages may be filed without payment of

the mortgage registration fee, and such mortgages are enforceable in Kansas courts.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

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