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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

December 31, 1987

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

ATTORNEY GENERAL OPINION NO. 87- 190

Myrtilla E. Zeigler  
Register of Deeds  
Wabaunsee County Courthouse  
Alma, Kansas 66401

Re: Taxation--Mortgage Registration and Intangibles;  
Mortgage Registration--Exemption Therefrom

Synopsis: Executory contracts for the sale of real estate which have the characteristics described in K.S.A. 79-3101 are mortgages of real property for purposes of the mortgage registration fee statutes. Federal land banks, which are exempt from all but real estate taxes assessed by the state, are thus exempt from the payment of mortgage registration fees upon the filing of such contracts. Similarly, production credit associations, as instrumentalities of the United States government, are exempt from mortgage registration fee requirements. Cited herein: K.S.A. 79-3101; 12 U.S.C.A. §§2055, 2098 (West Supp. 1987).

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Dear Ms. Zeilger:

As Wabaunsee County Register of Deeds you request our opinion regarding assessment of mortgage registration fees.

You first ask whether mortgage registration fees may be collected when the Federal Land Bank (FLB) files a real estate contract in which it is the seller. K.S.A. 79-3101 includes in its definition of "mortgage of real property" any

"[E]xecutory contract for the sale of real estate, . . . 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."

The Installment Real Estate Sales Contract you have provided for our review appears to meet this definition: The complete performance of the contract will not take place within ninety days of its execution (paragraph 2); the buyer is entitled to possession of the real estate pending performance of the contract (paragraph 10); and title to the real estate is to be placed in escrow pending complete performance of the contract (paragraphs 14, 20, 21). Thus, this real estate contract is to be treated as a mortgage of real property for purposes of collecting mortgage registration fees. However, as you have indicated in your request letter, this office has previously issued an opinion concluding that the FLB may not be required to pay mortgage registration fees upon filing a mortgage of real property. Attorney General Opinion No. 86-78. You question whether the same applies when the FLB files an executory contract for the sale of real estate.

In Attorney General Opinion No. 86-16, this office set forth the following with regard to the FLB:

"Federal land banks were established by Congress in 1916 and continued by further legislation in 1971 to furnish sound, adequate and constructive credit to agricultural producers. Each land bank is a federal instrumentality. 12 U.S.C. §2011. As such an instrumentality, it enjoys certain of the protections and privileges of the federal government, including protection from the plenary power of the state to tax and the privilege of immunity from state taxation at the discretion of Congress. Federal Land Bank v. Board of County Comrs., 368 U.S. 146, 149, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961); McCulloch v. Maryland, 4 Wheat 316, 4 L.Ed. 579 (1819). Congress

granted this privilege to land banks in 12 U.S.C. §2055 by stating:

'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.'

"By the Supremacy Clause of the Constitution of the United States, this statute overrules any conflicting law of any state. Article VI, paragraph 2, clause 3. Accordingly, a federal land bank is subject only to Kansas taxes on real property, not personal property."

Mortgage registration fees are a tax on an intangible. See Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35, 44 (1973); National Bank of Tulsa v. Warren, 177 Kan. 281, 285 (1955); Attorney General Opinions No. 84-121; 78-64; 76-280. This is true whether the instrument filed is a mortgage or a real estate contract. Since it is not a tax upon real property, mortgage registration fees may not be collected from the FLB upon its filing of a mortgage or an executory contract.

You also question whether production credit associations (PCAs) must pay mortgage registration fees. The federal law dealing with taxation of PCAs states as follows:

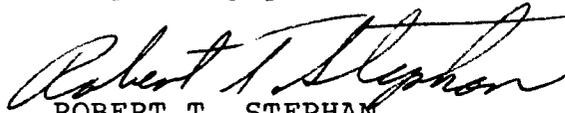
"Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority." 12 U.S.C.A. §2098 (West Supp. 1987).

In considering the application of mortgage registration fees to another instrumentality of the United States, the Kansas Supreme Court stated:

"There can be little doubt that as operated at the present time the Home Owners' Loan Corporation is an instrumentality of the federal government comparable to the United States Bank dealt with in McCulloch v. State of Maryland, 4 Wheat, 316. The United States supreme court has held that such instrumentalities were not required to pay tax on mortgages offered for registration." Home Owners Loan Corp. v. Anderson, 145 Kan. 209, 211 (1937). See also Attorney General Opinions No. 80-7; 81-180; 85-144.

Thus, we must conclude that, as an instrumentality of the federal government and pursuant to 12 U.S.C.A. §2098 as amended, the PCA is not required to pay mortgage registration fees when filing its mortgages or executory contracts of record.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Julene L. Miller  
Deputy Attorney General

RTS:JLM:jm