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Jun 07, 1990

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Case Nos. 90-004 DC

In re:
Petitions for Declaratory Statements of
BARNETT BANK OF SOUTH FLORIDA, N.A.;
SOUTHEAST BANK, N.A.; and
SUN BANK/MIAMI, N.A.

DECLARATORY STATEMENT

Petitioners, Barnett Bank of South Florida, N.A., Southeast Bank, N.A., and Sun Bank/Miami, N.A., seek a declaratory statement pursuant to s. 120.565, F.S., and Rules 12-2.010 through 12-2.013, F.A.C., that documentary stamp tax does not apply to a product line offered by petitioners and known generally as home equity lines of credit. These lines of credit are established by an agreement between borrower and a petitioner as lender and secured by a mortgage which is recorded in the Official Records of the applicable county. From time to time a petitioner may desire to record a "combined mortgage" which expressly incorporates the agreement. Petitioners thus present the following issues upon which a declaratory statement is sought:

1. Is a documentary stamp tax due upon recordation of the mortgage?
2. Is a documentary stamp tax due upon the recordation of the combined mortgage?

Filing of the petitions was duly noticed in the Florida Administrative Weekly.

As each petitioner presents the same facts, issues and legal arguments for determination, the petitions have been consolidated, and this declaratory statement is the Department's response to each such petition.

Petitioners are national banking associations engaged in the banking business in the State of Florida. Each petitioner offers a home equity line of credit. A borrower is required to execute an account agreement and, in order to secure any repayment obligation arising under the agreement, a single document labeled either "mortgage" or "mortgage and security agreement" (collectively referred to herein as "mortgage").

The operative language in each mortgage provides that Mortgagor and Mortgagee have entered into an agreement whereby mortgagor may borrow from and repay to Mortgagee "an undetermined sum not to exceed" a maximum principal sum, and that the mortgage is given as security for the payment of that obligation.

No funds are advanced at the time of closing of the agreement and execution and recording of the mortgage. The borrower makes draws against the equity line by use of personal checks which do not contain a separate promise to pay. A petitioner records either the mortgage or combined mortgage prior to any funding of the line of credit. When such documents are recorded, a petitioner is liable for any failure to collect or pay any documentary stamp tax.

Documentary stamp tax is imposed on mortgages by s. 201.08(1), F.S., which provides in pertinent part as follows:

> On mortgages, trust deeds, security agreements, or evidences of indebtedness filed or recorded in this state, and for each renewal of the same, the tax shall be 15 cents on each $100 or fraction thereof of the indebtedness or obligation evidenced thereby.... When there is both a mortgage, trust deed, or security agreement and a note, certificate of indebtedness, or obligation, the tax shall be paid on the mortgage, trust deed, or security agreement at the time of recordation. (emphasis added)

As construed in Department of Revenue v. Lincoln Pointe Associates, Ltd., 544 So.2d 291 (Fla., 1st DCA, 1989) [hereinafter, Lincoln Pointe), this section imposes a tax measured according to information appearing on the face of the document recorded, and information derived from other documents may not be used to vary this amount.

In the Department's opinion, the essential facts of Lincoln Pointe are indistinguishable from the facts of the instant petitions. In Lincoln Pointe the Department assessed a tax on the face amount of first and second mortgages stating a principal sum, each containing the qualifying language, "or so much thereof as may be advanced, to be paid in accordance with a note." One mortgage was for $23,800,000 and the other was for $5,950,000. A handwritten legend on the first mortgage modified the principal amount by indicating on the face of the recorded mortgage that the amount financed would not exceed $20,000,000. During litigation over the amount to be taxed, the parties agreed that the actual amount financed under the notes referred to in the mortgages was $23,800,000.

The court held that the notes were extrinsic evidence which could not be used to vary the taxability of the mortgages or the measure thereof according to the information on the face of the mortgages. Thus, even though the parties agreed that the amount financed was less, the court ruled that the tax on the mortgages imposed pursuant to s. 201.08, F.S., was to be measured according to the sum of the face amounts thereof, a total of $25,950,000 (taking into consideration the handwritten legend on the face of the first mortgage).

Accordingly, based upon Lincoln Pointe, the Department notified petitioners and other similarly affected taxpayers that documentary stamp tax is due on all mortgages when recorded measured by the maximum indebtedness secured, regardless of whether advances are made or not. If a mortgage contains a future advance clause, such advances are taxable when made. See s. 201.08(1), F.S. However, the mortgages at issue herein do not contain such a clause; rather, they provide security for "an undetermined sum not to exceed" a stated sum.

Petitioners cite to administrative rules of the Department of Revenue which appear to contemplate measurement of the tax on mortgages by "looking through" a mortgage to the note or other evidence of indebtedness secured thereby. Those rules are not determinative of the issue, since they are reiterations of prior caselaw and, to the extent inconsistent with Lincoln Pointe, are superseded as applied to mortgages.

Petitioners state that their mortgages are contingent obligations and therefore exempt from documentary stamp tax under a long line of cases best summarized by Maas Brothers, Inc. v. Dickinson, 195 So.2d 193 (Fla. 1967). However, neither that case nor any other cited case addresses the application of documentary stamp tax to mortgages. Each cited case predates the 1977 amendment that added "mortgages" to the documents taxed by what is now s. 201.08, F.S. Since mortgages by definition may be "conditioned or defeasible" obligations, see s. 697.01(1), F.S., it is clear that the addition of "mortgages" to documents taxable under Ch. 201, F.S., indicates a legislative intent that the tax was to be imposed on some contingent obligations, notwithstanding prior caselaw relating to fixed obligations or promises to pay. Of course, the mortgage in Lincoln Pointe was contingent ("so much thereof as may be advanced"), and it was held taxable.

Petitioners next contend that the tax is an excise tax on the promise to pay, citing some of the caselaw referenced earlier with respect to contingent obligations. However, the Lincoln Pointe holding is clear and precise, quoting Department of Revenue v. McCoy Motel, Inc., 302 So.2d 440, 442 (Fla. 1st DCA 1974), as follows:

> The taxes imposed by the documentary stamp tax statute on promissory notes and written obligations to pay (Ch. 201, Florida Statutes) are excise taxes on the documents themselves and not upon the transaction contemplated by the documents. (emphasis supplied)

Moreover, as the petitions admit in a later argument, "a mortgage does not typically contain a promise to pay."

Nevertheless, the Legislature has enacted s. 201.08, F.S., which imposes a documentary stamp tax on mortgages. It therefore follows that the Legislature has, by extending the tax to mortgages, imposed the tax on some documents that do not contain a promise to pay.

Petitioners next argue that the tax is not on the transaction, a position with which the Department agrees. The Department views this argument and the preceding one as contradictory and mutually exclusive. A tax on the promise to pay would tax the entire transaction, since the mortgage is security for the promise to pay. Rather the tax is on the mortgage, a single document, and not on the transaction as a whole. This is recognized by s. 201.08(1), F.S., since it provides that where there is a note and a mortgage as parts of a transaction, the tax is assessed on and measured by the mortgage, not the note secured by the mortgage.

Petitioners ultimately seek to distinguish Lincoln Pointe from the facts submitted concerning mortgages securing home equity lines of credit. First, it is noted that the Lincoln Pointe opinion recited that no notes were attached to or recorded with the mortgages at issue, suggesting that such attachment and recordation might have made some difference in the holding. Second, petitioners rely on the stipulation of the parties in Lincoln Pointe as substantiating that there were in fact moneys loaned, in alleged contrast to the instant facts. Third, petitioners contend that neither Lincoln Pointe mortgage contained the type of contingent language in the instant mortgage documents. Fourth, Lincoln Pointe is inconsistent with administrative rules of the Department of Revenue. Finally, reference is made to the first opinion in the Lincoln Pointe case by Judge Ervin, which the petitioners state "became the majority opinion" when rehearing was granted, the prior opinion withdrawn, and a new opinion issued and published.

The Department finds no indication that attachment or recording of notes with the Lincoln Pointe mortgages would have made any difference to the court's holding. Any such notes would only have confirmed the stipulation of the parties as to the actual amount financed, and the court measured the tax on

the mortgages without regard to that amount, because it was extrinsic to the mortgages themselves.

As to the stipulation of the parties in Lincoln Pointe concerning the amount financed, the court as noted upheld assessment of tax in an amount greater than the stipulation. In doing so, the court confirmed that it is the face amount of the mortgage--not any extrinsic facts--that is used to measure the tax. Similarly, tax on the home equity mortgages at issue here must be measured by the face of the document. Therefore, the petitioners' refusal to concede that the mortgages secure financing in any amount is not significant to the Department's application of the Lincoln Pointe holding to the instant facts.

While the language of the mortgages at issue--mortgagor may borrow from mortgagee "an undetermined sum not to exceed" a stated principal sum--is not identical to the language of the Lincoln Pointe mortgages--"or so much thereof as may be advanced"--the Department is unable to determine that the differences are significant enough to alter the application of the Lincoln Pointe holding.

Any inconsistency between Lincoln Pointe and the Department's administrative rules has been addressed previously, and the Department does not feel that any response is required to an argument that cites an appellate opinion which was subsequently withdrawn by the court. The Department relies on the final opinion actually issued and published.

Petitioners' final point is that the "combined mortgage" which attaches to and incorporates the borrower's agreement in the recorded document establishes that the transaction and the mortgage itself are contingent on the borrower actually borrowing funds. The Department, relying upon Lincoln Pointe, finds no significance in the issue of contingency. Mortgages are by definition contingent. Attaching and recording a note with a mortgage to establish a contingency should have no effect on the taxability vel non of a mortgage or on the measure of tax thereon. Moreover, to determine either taxability or the measure thereof based on such a combined mortgage would violate the principle clearly established in the caselaw that the tax is

on the document itself, i.e., the mortgage, not the transaction.

Therefore, the issues upon which declaratory statements are sought are answered as follows:

1. A documentary stamp tax measured by the face amount of the mortgage is due upon recordation of a mortgage securing a home equity line of credit.

2. A documentary stamp tax measured by the face amount of the mortgage is due upon recordation of a combined mortgage securing a home equity line of credit and incorporating therein the borrower's agreement with the lender.

DONE AND ORDERED this 7th day of June, 1990, at Tallahassee, Leon County, Florida.

J. THOMAS HERNDON
Executive Director

JUDICIAL REVIEW

Any party whose substantial interests are determined by this Declaratory Statement has the right to seek judicial review of the Declaratory Statement pursuant to s. 120.68, F.S., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of the General Counsel, Room 202, Carlton Building, Tallahassee, Florida 32301, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days of the date this Declaratory Statement is filed with the Clerk of the Department.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed and a true and correct copy thereof has been furnished by U.S. Mail this 7th day of June, 1990, to Russell B. Hale, Attorney for Petitioners, Akerman, Senterfitt & Eidson, 255 South Orange Avenue, P.O. Box 231, Orlando, Florida 32802.

Patricia P. Taylor

Clerk

State of Florida

Department of Revenue