

Dec 18, 1995

Re: Technical Assistance Advisement No. 95(M)-008

Documentary Stamp Tax; Out of State Notes; Assignment of Note and Mortgage; Renewal Note; Consolidated Note and Mortgage; Splitting of Notes; Restricting Recoverability

Under a Mortgage:

Intangible Tax; Assignment of Note and Mortgage; Renewal Mortgage; Consolidated Mortgage; Restricting Recoverability

Under the Mortgage;

XXX (Borrower)

XXX (the Initial Lender)

XXX (First Assignee)

XXX (the Second Assignee)

XXX (the "Interim Lender")

XXX (the "New Lender")

Dear :

You have petitioned for a Technical Assistance Advisement pursuant to s. 213.22, F.S., and Rule 12-11.003, F.A.C.

Issue

Whether the assignment of an existing note and mortgage to a new lender, the execution of a refinancing note and mortgage in favor of the new lender, and the cross-collateralization provisions of the mortgages are subject to documentary stamp tax under s. 201.08, F.S., and intangible tax under s. 199.145, F.S.

Facts

Your client, the Borrower, has entered into a refinancing transaction with respect to real and personal property owned by the Borrower that is located both inside and outside the State of Florida. The property located in Florida is referred to in your letter as the "Florida Property", and the property located outside Florida, as same may be added to, released or otherwise changed from time to time, is referred to in your letter as the

"Out-of-State Property". The following is a chronology of events that preceded the refinancing transaction:

1. The Borrower previously executed a Promissory Note dated June 12, 1992, in the original principal amount of One Hundred Fifty-Five Million and No/100 Dollars (\$155,000,000.00) (the "Original Note") to the order of the Initial Lender.
2. The Original Note was secured by a First Mortgage, Security Agreement, Fixture Filing Statement, Assignment of Leases and Rents and Financing Statement, executed by the Borrower in favor of Initial Lender, dated as of June 1, 1992, recorded on June 15, 1992, in Official Records of a Florida County (the "Original Mortgage"). The Original Mortgage encumbers only the Florida Property.
3. The Original Note was also secured by mortgages (the "Out of State Mortgages") encumbering property located outside the State of Florida, each recorded in the state where each such property was located.
4. Non-recurring intangible personal property tax was properly paid upon the recording of the original Mortgage, prorated based upon the ratio of value of the Florida Property to the total value of the Florida Property and the property located outside the State of Florida (i.e., the Florida Property comprised 45.37% of the total collateral securing repayment of the Original Note). Documentary stamps were properly paid on the recording of the original Mortgage, based on the full face amount of the Original Note.
5. The Original Note and the Original Mortgage were assigned by Initial Lender to the First Assignee, pursuant to that certain Assignment of First Mortgage, Security Agreement, Fixture Filing Statement and Assignment of Rents and Leases, dated as of June 1, 1992, recorded on June 15, 1992, in Official Records Book of a Florida County.
6. The Original Note and the original Mortgage were further assigned by the First Assignee to the Second Assignee, pursuant to an Assignment of First Mortgage, Security Agreement, Fixture Filing Statement and

Assignment of Rents and Leases and Financing Statement, dated September 12, 1994, and recorded on September 19, 1994, in Official Records Book of a Florida County.

7. The Original Mortgage was modified pursuant to that certain Modification of First Mortgage, Security Agreement, Fixture Filing Statement, Assignment of Leases and Rents and Financing Statement dated September 12, 1994 (the "Initial Modification"), and recorded on September 19, 1994, in Official Records Book of a Florida County. The Initial Modification was exempt from documentary stamp tax and intangible tax, pursuant to Rule 12B-4.054(1), F.A.C., and s. 199.145(4), F.S., because it satisfied all requirements of a renewal note and mortgage.
8. The Original Note and the Original Mortgage, as modified by the Initial Modification, were further assigned by the Second Assignee to the Interim Lender, pursuant to that certain Assignment of First Mortgage, Security Agreement, Fixture Filing Statement and Assignment of Rents and Leases, dated September 12, 1994, and recorded on September 19, 1994, in Official Records Book of a Florida County.

For purposes of your request for a technical assistance advisement, the Department assumes that documentary stamp taxes and intangible taxes were properly affixed to the Original Mortgage at the time of recording, and that the Initial Modification was exempt from taxation because it satisfied all requirements of a renewal note and mortgage.

II. Refinancing Transaction

The Borrower has entered into a refinancing transaction whereby it has renewed the Original Note and borrowed additional funds, all of which were thereafter consolidated and secured by the Florida Property and by the Out of State Property. At the time of recordation of the Second Mortgage, as defined below, and the Consolidated Mortgage the value of the Florida Property was not more than 45.37% of the total value of all collateral (the Florida Property and the Out-of-State-Property).

In order to effectuate the refinancing transaction, the following steps were taken in the order indicated:

1. First, the Interim Lender assigned the original Mortgage, as modified by the Initial Modification, and the Original Note to the New Lender by Assignment of Note and Mortgage (the "Assignment"). The Assignment was recorded on July 6, 1995 in Official Records of a Florida County.
2. Second, the Borrower made, executed and delivered to the New Lender an additional promissory note in the face amount of \$125,000,000 (the "Second Note"). The Second Note was made, executed and delivered by the Borrower to the New Lender outside the State of Florida, and such out-of-state execution and delivery was evidenced in accordance with the provisions of Rule 12B-4.053(35), F.A.C.
3. Third, the Borrower made, executed and delivered to the New Lender a \$125,000,000 Blanket Mortgage (the "Second Mortgage") . The Second Mortgage was recorded on July 6, 1995, in Official Records Book of a Florida County. The Second Mortgage encumbers the Florida Property and the Out of State Property. The Second Mortgage secures repayment of the Second Note, and all modifications, extensions, renewals, supplements, and substitutions therefor; provided, however, that with respect to the Florida Property only, recovery under the Second Mortgage on account of the principal balance of the Second Note is limited to the maximum amount of \$100.00, together with accrued interest thereon, and advances for taxes, legal fees and costs of enforcement of the Second Mortgage.
4. Fourth, the Borrower made, executed and delivered to the New Lender a Consolidation and Splitting Agreement (the "Consolidation and Splitting Agreement"). The Consolidation and Splitting Agreement was recorded on July 6, 1995, in Official Records of a Florida County. The Consolidation and Splitting Agreement was made, executed and delivered outside the State of Florida, and such out-of-state execution and delivery was

evidenced in accordance with the provisions of Rule 12B-4.053(35), F.A.C. The Consolidation and Splitting Agreement provided for the Borrower to execute and deliver to the New Lender outside the State of Florida:

- (i) a Consolidated Demand Renewal Note (the "Consolidated Note"),
- (ii) two Restated Global Fixed Rate Notes, one Restated Global Floating Rate Note, and one Regulation S Restricted Global Floating Rate Note (collectively, the "Notes"), and
- (iii) a First Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing (the "Consolidated Mortgage").

5. Fifth, pursuant to the Consolidation and Splitting Agreement, the Borrower made, executed and delivered to the New Lender the Consolidated Note and the Notes. The Consolidated Note and the Notes were all made, executed and delivered by the Borrower to the New Lender outside the State of Florida, and such out-of-state execution and delivery was evidenced in accordance with the provisions of Rule 12B-4.053(35), F.A.C. The Consolidated Note was a renewal, consolidation and restatement of the Original Note and the Second Note, without enlargement of the principal balance of either of such notes. The Notes were in renewal of and substitution for the Consolidated Note, without enlargement of the principal balance of the Consolidated Note.

6. Sixth, pursuant to the Consolidation and Splitting Agreement, the Borrower made, executed and delivered to New Lender, the Consolidated Mortgage. The Consolidated Mortgage was recorded on July 6, 1995, in Official Records of a Florida County. The Consolidated Mortgage consolidated the Original Mortgage and the Second Mortgage, and amended and restated them in their entirety. The Consolidated Mortgage secures the Notes, and all modifications, extensions, renewals, supplements and substitutions therefor; provided, however, that with respect to the Florida Property only, recovery under the Consolidated

Mortgage on account of the principal balance due under the Notes is limited to the maximum amount of \$155,000,100 (which is the sum of the maximum principal amounts recoverable under the two mortgages being consolidated), together with (i) interest on such \$155,000,100 amount; (ii) the prepayment penalty, if any, payable in respect of such \$155,000,100 amount; (iii) a gross up for any portion of the interest payable on account of such \$155,000,100 amount which is required to be withheld on payments to non-resident aliens pursuant to the Internal Revenue Code of 1986 (so that non-resident alien taxpayers will receive the same net interest payments set out in the Notes after taxes are withheld from the source); and (iv) advances for taxes, insurance, attorneys' fees and costs incurred in enforcing the Consolidated Mortgage. The Consolidated Mortgage encumbers only the Florida Property (and not the Out of State Property). The Out of State Property is encumbered by separate mortgages, all securing the Notes (to the full extent of the Notes), which have been recorded in the respective states in which the Out of State Property is located.

III. Analysis And Rulings Requested

You submit that the proper treatment of each step of the refinancing transaction described above for State of Florida documentary stamp tax and intangible tax purposes is subject to the analysis set forth by you below. Also set forth below are the rulings requested by you from the Department of Revenue with respect to each step of the refinancing transaction.

1. Consequences of Assignment of Original Note and Original Mortgage by the Interim Lender to the New Lender.

(a) Documentary Stamp Tax Analysis.

Rule 12B-4.054(6), F.A.C., provides, in part, as follows:

An assignment of a mortgage by a lender (mortgagee or owner of the asset) to a new lender who has purchased the note and mortgage and becomes the holder of the note and mortgage is not taxable.

Accordingly, in your opinion, no documentary stamp tax is due on the Assignment.

You request a ruling that no documentary stamp tax is due on the Assignment.

(b) Non-recurring Intangible Tax Analysis:

Section 199.145(2), Florida Statutes, provides as follows:

No additional non-recurring tax shall be due upon the assignment by the obligee of a note, bond or other obligation for the payment of money upon which a non-recurring intangible tax has previously been paid.

Accordingly, in your opinion, no additional non-recurring intangible tax is due on the Assignment.

You request a ruling that no non-recurring intangible tax is due on the Assignment.

2. Consequences of Execution and Delivery of the Second Note.

(a) Documentary Stamp Tax Analysis.

Rule 12B-4.053(35), F.A.C., provides, in part, as follows:

Promissory notes, nonnegotiable notes, and written obligations to pay money (hereinafter, called notes), made, executed, and delivered to a Florida lender in another state are not subject to Florida documentary stamp tax.

Accordingly, in your opinion, no documentary stamp taxes are due in connection with the making, execution and delivery of the Second Note by the Borrower to the New Lender outside the

State of Florida.

You request a ruling that the making, execution and delivery of the Second Note by the Borrower to the New Lender, outside the State of Florida are exempt from documentary stamp tax.

(b) Non-Recurring Intangible Tax Analysis.

Section 199.133(2), Florida Statutes, provides, in part, as follows:

The non-recurring tax shall apply to a note, bond or other obligation for payment of money only to the extent it is secured by mortgage, deed of trust, or other lien upon real property situated in this state.

In your opinion, the making, execution and delivery of the Second Note outside the State of Florida, standing alone, does not give rise to non-recurring intangible taxes, pursuant to the express provisions of Section 199.133(2), Florida Statutes.

You request a ruling that pursuant to s. 199.133(2), F.S., no non-recurring intangible taxes are due upon the making, execution and delivery of the Second Note outside the State of Florida.

3. Consequences of Execution and Recording of the Second Mortgage.

a. Documentary Stamp Tax Analysis

Section 201.08(1), F.S., provides for the documentary stamp tax to be paid on mortgages recorded in the State of Florida (regardless of where executed), at the rate of \$.35 on each \$100 of the indebtedness or obligation evidenced thereby.

However, Rule 12B-4.053(32)(b), F.A.C., provides, in part, as follows:

When a note is made in another state and is secured by a

multi-state mortgage recorded in Florida which describes and pledges the Florida property and the out-of-state property, tax will be due on the mortgage when filed or recorded in Florida based upon the percentage of indebtedness which the value of the mortgaged property in Florida bears to the total value of all the mortgaged property. However, where the mortgage limits recovery to less than the amount of the indebtedness secured, the tax is due on the amount to which recovery is limited.

In your opinion, because the recovery under the Second Mortgage is limited, as to the Florida Property, to \$100, together with accrued interest thereon, and advances for taxes, legal fees and costs of enforcement of the Second Mortgage, the amount of documentary stamp tax due upon the recording of the Second Mortgage should be based on the \$100 principal amount to which recovery is limited pursuant to the terms of the Second Mortgage.

You request a ruling that the documentary stamp tax due upon the recording of the Second Mortgage is \$.35, based on the \$100 principal amount to which recovery is limited pursuant to the terms of the Second Mortgage.

b. Non-recurring Intangible Tax Analysis

Section 199.133(1), F.S., provides for a nonrecurring tax of 2 mills on each dollar of just valuation of all notes, bonds and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in Florida. Section 199.133(2), F.S., provides, in part, as follows:

The non-recurring tax shall apply to a note, bond, or other obligation for payment of money only to the extent it is secured by mortgage, deed of trust, or other lien upon real property situated in this state.

In your opinion, because the Second Mortgage secures payment of the maximum principal amount of \$100 due under the Second Note, the nonrecurring intangible tax due upon the

recording of the Second Mortgage should be based on the \$100 principal amount of the Second Note to which recovery is limited.

You request a ruling that the non-recurring intangible tax due upon the recording of the Second Mortgage is \$.20, based on the \$100 principal amount of the Second Note to which recovery is limited.

4. Consequences of Execution and Delivery of Consolidation and Splitting Agreement.

(a) Documentary Stamp Tax Analysis.

Section 201.08(1), F.S., provides for documentary stamp tax to be payable on (i) promissory notes, non-negotiable notes, written obligations to pay money, or other compensation made, executed, delivered, sold, transferred or assigned in the State of Florida, and for each renewal of same, and (ii) mortgages, trust deeds, security agreements, or other evidences of indebtedness filed or recorded in Florida, and for each renewal of same.

The Consolidation and Splitting Agreement does not fall within any of the categories described above, but rather evidences the consolidation and splitting of various notes and mortgages, the consequences of which are addressed elsewhere in this request for a technical assistance advisement. Accordingly, in your opinion, no documentary stamp tax is due on the Consolidation and Splitting Agreement.

You request a ruling that no documentary stamp tax is due in connection with the making, execution, delivery or recording of the Consolidation Agreement.

(b) Non-Recurring Intangible Tax Analysis. Section 199.133(1), F.S., provides for the non-recurring intangible tax to be paid on notes, bonds and other obligation for the payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in Florida.

The Consolidation and Splitting Agreement does not fall within any of the categories described above, but rather evidences the consolidation and splitting of various notes and mortgages, the consequences of which are addressed elsewhere in this request for a technical assistance advisement. Accordingly, in your opinion, no non-recurring intangible tax is due on the Consolidation and Splitting Agreement.

You request a ruling that no non-recurring intangible tax is due in connection with the making, execution, delivery or recording of the Consolidation Agreement.

5. Consequences of Execution and Delivery of Consolidated Note and Notes.

(a) Documentary Stamp Tax Analysis

Rule 12B-4.053(35), F.A.C., provides, in part, as follows:

Promissory notes, nonnegotiable notes, and written obligations to pay money (hereinafter, called notes), made, executed, and delivered to a Florida lender in another state are not subject to Florida documentary stamp tax.

In your opinion, because the Consolidated Note and the Notes were made, executed and delivered by the Borrower to the New Lender outside of the State of Florida, documentary stamp tax is not due on the making, execution or delivery of the Consolidated Note and the Notes.

You request a ruling that the making, execution and delivery of the Consolidated Note and the Notes by the Borrower to the New Lender outside the State of Florida are exempt from documentary stamp tax.

(b) Non-Recurring Intangible Tax Analysis.

Section 199.133(2), F.S., provides, in part, as follows:

The nonrecurring tax shall apply to a note, bond or other

obligation for payment of money only to the extent it is secured by mortgage, deed of trust, or other lien upon real property situated in this state.

The making, execution and delivery of the Consolidated Note and the Notes outside the State of Florida, standing alone, does not give rise to non-recurring intangible taxes, pursuant to the express provisions of s. 199.133(2), F.S.

You request a ruling that pursuant to s. 199.133(2), F.S., no non-recurring intangible taxes are due upon the making, execution and delivery of the Consolidated Note and the Notes outside the State of Florida.

6. Consequences of Execution, Delivery and Recording of the Consolidated Mortgage.

(a) Documentary Stamp Tax Analysis.

Section 201.09(1), F.S., provides for an exemption from the State of Florida documentary stamp tax where a renewal obligation satisfies the following criteria:

- (i) The renewal obligation is signed by the same obligor without any additional obligors added;
- (ii) There is no increase in the principal balance;
and
- (iii) Documentary stamp taxes were paid upon the initial obligation in the full amount due thereon.

Rule 12B-4.054(1)(a), F.A.C., treats as an exempt renewal a consolidation of two or more contractual obligations, without enlargement of the existing principal balance.

Rule 12B-4.054(1)(c), F.A.C., treats as an exempt renewal two or more notes which are substituted for an existing note, without enlargement of the existing principal balance.

In your opinion, because the Borrower is the sole obligor on the Original Mortgage, the Second Mortgage and the

Consolidated Mortgage, the first requirement of s. 201.09, F.S., is satisfied.

The outstanding principal balances of the Original Note and the Second Note were not increased by the Consolidated Note, and the outstanding principal balance of the Consolidated Note was not increased by the Notes. Similarly, the maximum principal amount recoverable against the Florida Property on account of the Original Mortgage and the Second Mortgage was not increased on account of the Consolidated Mortgage (i.e., recovery against the Florida Property under the Consolidated Mortgage continues to be limited to \$155,000,100, the sum of the principal amounts recoverable under the Original Mortgage and the Second Mortgage). Accordingly, in your opinion, the second requirement is satisfied because there has been no increase in the outstanding principal balances of the Notes secured by the Original Mortgage and the Second Mortgage, (i.e., \$280,000,000), and there has been no increase in the maximum principal amount recoverable against the Florida Property (i.e., \$155,000,100).

In your opinion, because documentary stamp taxes were paid on the Original Mortgage and on the Second Mortgage in the full amount due thereon (in the case of the Original Mortgage, at the rate of 35 cents per \$100 of indebtedness, and in the case of the Second Mortgage, based on the principal amount to which recovery was limited), no additional documentary stamp tax is due upon the execution, delivery or recording of the Second Mortgage. Thus, the third requirement is satisfied.

You request a ruling that no documentary stamp tax is due upon the execution, delivery or recording of the Consolidated Mortgage.

(b) Intangible Tax Analysis.

Section 199.145(4)(a), F.S., provides as follows:

Where a note, bond or other obligation upon which a non-recurring tax has previously been paid is refinanced with the original obligee or its assignee:

(a) No additional non-recurring tax is due if the principal balance of the new obligation is less than or equal to the unpaid principal balance of the original obligation, plus accrued but unpaid interest, as of the refinancing.

In your opinion, because the outstanding principal balance of the Consolidated Note is not greater than the combined principal balances of the Original Note and the Second Note, and because the recovery amount under the Consolidated Mortgage has not been increased beyond the sum of the recovery amounts under the original Mortgage and the Second Mortgage, the execution, delivery and recovery of the Consolidated Mortgage is exempt from any additional non-recurring intangible tax.

You request a ruling that the execution, delivery and recording of the Consolidated Mortgage is exempt from any additional non-recurring intangible tax.

Discussion and Law

Your Florida Statutes and Florida Administrative Rules analyses are correct and appropriate for the rulings requested as to whether the documentary stamp tax and intangible tax are due on the transactions described.

Department's Position

Therefore, the assignment of the Original note and Original mortgage by the Interim Lender to the New Lender is exempt from both the documentary stamp tax and intangible tax under s. 201.09, F.S., and s. 199.145, F.S. In addition, the execution, delivery of the Second note by the Borrower to the New Lender out of Florida is exempt from the documentary stamp tax and intangible tax under s. 201.09, F.S., and s. 199.145, F.S. Further, the recordation of the Second Mortgage is taxable for only the \$.35 documentary stamp tax and \$.20 intangible tax based on the \$100 recovery amount set forth in the mortgage. As to the execution, delivery, or recordation of the Consolidation Agreement and Splitting Agreement, the Consolidated Note and the Notes, neither the documentary stamp tax nor the intangible tax is due. Also, the recordation of the Consolidated Mortgage is

not taxable for either the documentary stamp tax or the intangible tax.

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in s. 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response and your request are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of s. 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect the confidentiality of such information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or the response.

Sincerely,

James E. Silvey
Tax Law Specialist
Tax Policy and Dispute Resolution
Office of General Counsel

JES/mh