

## SUMMARY

An out-of-state limited liability company has entered into a wholesale warehouse mortgage loan agreement with an out-of-state corporation. The out-of-state limited liability company made Florida and non-Florida loans to third parties which are either secured by mortgage(s) securing real and personal property, by a perfected security interest in personal property, or secured by leases of personal property. The loans were pledged to the out-of-state corporation under the terms of the warehouse mortgage loan agreement. A Florida corporation affiliated with the out-of-state corporation made certain Florida and non-Florida loans to third parties secured in the same manner as the out-of-state limited liability company's loans. For purposes of a securitization transaction, the out-of-state limited liability company will transfer and assign its loans to a new affiliate ("Parent"), formed for the purposes of the securitization transaction. Parent will then transfer and assign the loans to the Florida corporation, who will in turn transfer and assign the loans to the taxpayer in exchange for a limited partnership interest in the taxpayer.

As part of the securitization transaction, the taxpayer will enter into an Indenture and wholesale warehouse mortgage loan agreement with a bank. Certain bonds will be issued by the taxpayer to an out-of-state grantor trust and will grant to the bank a security interest in the collateral obligations held by the taxpayer to secure the taxpayer's obligation to repay the bonds. The bonds and wholesale warehouse mortgage loan agreement will be made, executed and delivered outside of Florida.

The only mortgages securing the Florida mortgage warehouse agreements are Florida mortgages where all documentary stamp tax and intangible tax has been paid. The bonds and warehouse loan agreement are not subject to documentary stamp tax and intangible tax as they are made, executed and delivered outside of Florida. No tax is due on any of the transfers and assignments of collateral obligations made by

the parent to the Florida corporation, nor is any tax due on the transfer and assignment of loans from the Florida corporation to the taxpayer. No tax is due upon the execution, delivery, filing or recordation in Florida of the Florida Collateral Assignment documents, which pledge Florida collateral obligations to the bank as security for the taxpayer's obligation under the bonds and warehouse loan agreement.

\*\*\*\*\*

Refer to Revised TAA 98(M)-004R

Jul 16, 1998

Re: Technical Assistance Advise ment No. 98(M)-004

Documentary Stamp Tax and Nonrecurring Intangible Tax;

Warehouse Mortgage Exemption

ss. 199.133, 199.145, 201.01, 201.08, 201.21, 201.23, F.S;

XXX (The Taxpayer)

XXX (Corporation)

XXX (FI)

XXX (FIII)

XXX (FI & FIII)

Dear :

This is in response to your letter dated May 30, 1997, requesting a Technical Assistance Advise ment regarding the applicability of Documentary Stamp Tax and Intangible Tax, under the facts and documents set forth herein.

**Statement of Facts Presented by the Taxpayer**

FIII, an out-of-state limited liability company, has negotiated and entered into a wholesale warehouse mortgage loan agreement (the "FIII Warehouse Loan Agreement") with Corporation, also located outside of Florida. The FIII Warehouse Loan Agreement was the subject of TAA 97(M)-004.

Pursuant to the terms of the FIII Warehouse Loan Agreement,

FIII has made certain Florida and non-Florida loans to third parties (the "FIII Loans"). These loans are either (i) secured by a recorded mortgage encumbering a fee simple interest in real estate, (ii) secured by a recorded mortgage encumbering a leasehold interest in real estate, (iii) secured by a perfected security interest in personal property, or (iv) secured by leases of personal property which, for Florida documentary stamp tax purposes, are treated as personal property financing transactions. Such loans were pledged to Corporation under the terms of the FIII Warehouse Loan Agreement. Additionally, FIII used the FIII Warehouse Loan Agreement proceeds to purchase Florida and non-Florida real property which it then leased to third parties ("True Lease Transactions").

FI, a Florida corporation which is an affiliate of FIII, also made certain Florida and non-Florida loans to third parties (the "FI loans") that are secured in the same manner as the FIII Loans and are pledged to another lender under the terms of a separate warehouse loan agreement. Additionally, FI used its warehouse loan agreement proceeds to enter into True Lease Transactions.

As part of a proposed securitization transaction (the "Securitization Transaction"), FIII will transfer and assign the FIII Loans to a new affiliate, Parent, which will be formed for purposes of the Securitization Transaction and which will own and hold all of the issued and outstanding capital stock and equity member interests of FI and FIII. The transfer of the FIII Loans to Parent will be a distribution to Parent in its capacity as the sole equity member of FIII. Upon receipt of title to the FIII loans, Parent will transfer and assign the FIII Loans to FI as a contribution to the capital of FI. FI then will immediately transfer and assign the FI Loans and FIII Loans to Taxpayer as a capital contribution in exchange for a limited partnership interest in Taxpayer. This transfer is necessary because, under the terms of the FIII Warehouse Loan Agreement, FIII may not own a limited partnership interest in Taxpayer.

The FI Loans and the FIII Loans will hereinafter be referred to individually and collectively as the "Collateral

Obligations."

As part of the Securitization Transaction, Taxpayer is negotiating and will enter into an Indenture and Wholesale Warehouse Mortgage Agreement (the "Warehouse Loan Agreement") with a to-be-determined national bank (the "Indenture Trustee"). Under the terms of the Warehouse Loan Agreement, Taxpayer will issue certain bonds (the "Bonds") to an out-of-state grantor trust (the "Grantor Trust") and will grant to the Indenture Trustee a security interest in the Collateral Obligations held by Taxpayer to secure Taxpayer's obligation to repay the Bonds in accordance with the terms thereof and the terms of the Warehouse Loan Agreement. The Grantor Trust then will sell interests in the Bonds to investors in the form of Grantor Trust certificates. The Bonds and the Warehouse Loan Agreement will be made, executed, and delivered outside of Florida.

As of this date, the Bonds and Warehouse Loan Agreement have not been executed and nothing has been filed or recorded in Florida with regard to the Warehouse Loan Agreement or any collateral to be provided by Taxpayer to secure its payment obligations thereunder (as described below). The Indenture Trustee will hold the Warehouse Loan Agreement outside of Florida.

For purposes of analyzing the Florida taxation issues in connection with the Securitization Transaction, the Collateral Obligations (as summarized above) generally may be categorized as follows: (1) Florida Collateral Obligations, (2) non-Florida Collateral Obligations, and (3) non-Collateral Obligations (i.e., True Lease Transactions).

Florida Collateral Obligations arise from FI and FIII making loans to third parties which are secured by mortgages or pledges of Florida assets (i.e., real and personal property located in Florida). Notes, mortgages and security agreements creating the Florida Collateral Obligations generally were made, executed and delivered in Florida. When notes or other written obligations to pay money were made, executed or delivered in Florida, or when mortgage or security agreements relating to Florida Collateral Obligations were filed or recorded in

Florida, documentary stamp taxes were paid on the principal amount of the Collateral Obligations as required by s. 201.08, F.S., as well as appropriate nonrecurring intangible taxes due under Chapter 199, F.S.

Non-Florida Collateral Obligations involve FI and FIII making loans to third parties which are secured by mortgages or pledges of real and personal property outside of Florida. All notes or other written obligations to pay money, mortgages and security agreements creating and securing the non-Florida Collateral Obligations were made, executed and delivered outside of Florida. Some documents, such as commitment letters, closing statements, UCC financing statements, side letters, construction loan agreements, draw requests and escrow agreements, may have been made, executed or delivered in Florida. In no event are documents evidencing or securing the non-Florida Collateral Obligations recorded or filed in Florida, and none of the non-Florida Collateral Obligations made, executed or delivered in Florida contain a written promise to pay; define, amend, modify or enlarge any existing promise to pay; or acknowledge receipt of funds.

True Lease Transactions involve FI and FIII using FI and FIII Warehouse Loan Agreement proceeds to purchase (and in some cases construct improvements on) Florida and non-Florida real property, and then lease the property to third party lessees pursuant to the terms of a typical arm's length (nonfinancing) lease agreement. Such transactions may also involve FI and FIII entering into a ground lease of undeveloped Florida or non-Florida real property and then constructing improvements thereon for eventual lease to third parties under a typical lease agreement. The documentary stamp taxes on deeds under s. 201.02, F.S., were paid on FI and FIII's purchase of any Florida real property, as well as the documentary stamp tax and nonrecurring intangible tax imposed under Chapters 201 and 199, F.S., in respect of any recorded collateral assignments of leases or mortgages on Florida property granted by FI and FIII to the warehouse lenders.

The Warehouse Loan Agreement requires Taxpayer to grant a security interest in the Collateral Obligations to or in favor

of the Indenture Trustee (the "Collateral Assignments") to secure Taxpayer's repayment of the indebtedness represented by the Bonds. The Collateral Assignments will either be a collateral assignment of mortgage or an assignment of security agreement. Similarly, the Warehouse Loan Agreement requires Taxpayer to grant a security interest in favor of the Indenture Trustee in its rights relating to the True Lease Transactions, either by a collateral assignment of the landlord's interest in a lease or by a recorded mortgage. The documents pledging Taxpayer's interest in the Collateral Obligations and True Lease Transactions in favor of the Indenture Trustee are hereinafter referred to collectively as the "Collateral Assignment Documents."

The Collateral Assignments and the Collateral Assignment Documents will not incorporate by reference the Warehouse Loan Agreement, but will state that they are given as security for Taxpayer's obligations under the Warehouse Loan Agreement. The Assignment Documents assigning Taxpayer's interest in Florida Collateral Obligations and True Lease Transactions to or in favor of the Lender may be made, executed and delivered, and will be recorded or filed in Florida. The Collateral Assignment Documents transferring Taxpayer's interest in non-Florida Collateral Obligations and True Lease Transactions to or in favor of the Indenture Trustee may be made, executed and delivered in Florida, but will be recorded outside of Florida.

Additional facts relevant to the request, provided in a letter dated June 19, 1998, concern the structure of the notes and mortgages. The only mortgages securing the Florida mortgage warehouse agreements are Florida mortgages that had all the proper documentary stamp tax and intangible tax paid. There are no out of state mortgages securing the Florida mortgage warehouse agreements.

#### **Requested Advisement**

- A) The Bonds and Warehouse Loan Agreement will not be subject to Florida documentary stamp tax because they will not be made, executed or delivered in Florida.
- B) No documentary stamp tax or nonrecurring intangible

- tax will be due on the transfer and assignment by FIII to Parent of Florida and non-Florida Collateral Obligations, which Collateral Obligations represent loans previously originated by FIII.
- C) No documentary stamp tax or nonrecurring intangible tax will be due on the transfer and assignment by Parent to FI of Florida and non-Florida Collateral Obligations, which Collateral Obligations represent loans previously originated by FIII.
- D) No documentary stamp tax or nonrecurring intangible tax will be due on the transfer and assignment by FI to Taxpayer of Florida and non-Florida Collateral Obligations, which Collateral Obligations represent loans previously originated by FI and FIII.
- E) Documentary stamp tax and nonrecurring intangible tax will not be due upon the execution, delivery, filing or recordation in Florida of the Florida Collateral Assignment Documents, which documents pledge Florida Collateral Obligations to the Indenture Trustee as security for Taxpayer's obligation under the Bonds and Warehouse Loan Agreement.

### **Provisions of Law**

Section 201.08, F.S., imposes documentary stamp tax on promissory notes and other written obligations to pay money which are made, executed or delivered in Florida, and upon mortgages, trust deeds, security agreements and other evidences of indebtedness which are filed or recorded in Florida.

A promissory note which is made, executed and delivered outside of Florida is generally not a taxable document for documentary stamp tax purposes within the purview of ss. 201.01 and 201.08, F.S. 1980 Op. Att'y. Gen. Fla. 080-79 (Sept. 24, 1980); See also Rule 12B-4.053(34), F.A.C.

An assignment of a mortgage by a lender to a new lender who has purchased the note and mortgage and becomes the holder of the note and mortgage is not subject to documentary stamp tax. (State v. Sweat, 152 So 432 (1934)). However, where the assignment of a mortgage is given as collateral security for a

new loan, the assignment is a taxable mortgage when recorded in Florida. See Rules 12B-4.054(6) and 12B-4.053(28), F.A.C.

Section 201.21, F.S., exempts from all excise taxes principal obligations when the maker thereof pledges or deposits with the payee or holder thereof, pursuant to any agreement commonly known as a wholesale warehouse mortgage agreement, as collateral security for the payment thereof, any collateral obligation or obligations, provided all excise taxes imposed under Chapter 201, F.S., upon or in respect to such collateral obligation or obligations shall have been paid. The term "collateral obligation" means any note, bond, or other written obligation to pay money secured by mortgage, deed of trust, or other lien upon real or personal property. A collateral assignment of a collateral obligation made pursuant to a wholesale warehouse mortgage agreement does not invalidate the exemption from documentary stamp taxation under this provision. See Rule 12B-4.054(4), F.A.C.

Section 199.133(1), F.S., imposes a one-time nonrecurring tax on every promissory note and other obligation for payment of money if, and to the extent, such note or obligation is secured by a mortgage, deed of trust, or other lien upon Florida real property.

Under the provisions of s. 199.133(2), F.S., the nonrecurring tax applies 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 Florida.

Per s. 199.145(2), F.S., no additional nonrecurring intangible tax is due upon the assignment by the obligee of a note, bond, or other obligation for the payment of money upon which the nonrecurring tax previously has been paid.

### **Determination**

The responses to your questions are as follows:

- A) The Bonds and Warehouse Loan Agreement will not be



subject to Florida documentary stamp tax because they will not be made, executed or delivered in Florida.

The Taxpayer's written obligation to pay off the Bonds will be set forth exclusively in the Bonds and Warehouse Loan Agreement. Both the Bonds and the Warehouse Loan Agreement will be made and executed by the Taxpayer outside Florida and delivered to the Indenture Trustee or Grantor Trust outside Florida. Since the Florida documentary stamp tax is not imposed upon obligations to pay money which are made, executed and delivered outside Florida, the Bonds and Warehouse Loan Agreement are not subject to the documentary stamp tax.

- B) No documentary stamp tax or nonrecurring intangible tax will be due on the transfer and assignment by FIII to Parent of Florida and non-Florida Collateral Obligations, which Collateral Obligations represent loans previously originated by FIII.

#### Documentary Stamp Tax

Since the distribution of Collateral Obligations by FIII to Parent is in the nature of a transfer for consideration of receivables, which is not a transfer of real property under s. 201.02, F.S., and is not a transfer of collateral security for a new loan, the transfer will be exempt from documentary stamp tax.

#### Nonrecurring Intangible Tax

No additional nonrecurring intangible tax will be due on the transfer and assignment by FIII to Parent of the Florida Collateral Obligations since the tax has previously been paid on the Florida Collateral Obligations. No nonrecurring intangible tax will be due on the transfer and assignment by FIII to Parent of the non-Florida Collateral Obligations because the obligations will not be secured by a mortgage, deed of trust, or other lien on Florida real property.

- C) No documentary stamp tax or nonrecurring intangible tax will be due on the transfer and assignment by Parent to FI of Florida and non-Florida Collateral Obligations, which Collateral Obligations represent loans previously originated by FIII.

Documentary Stamp Tax. An assignment of a mortgage by a lender to a new lender who has purchased the note and mortgage and becomes the holder of the note and mortgage is not taxable; provided, however, that where the assignment of a mortgage is given as collateral security for a new loan, it is a taxable mortgage when recorded in Florida. Since the contribution of Collateral Obligations by Parent to FI is in the nature of a transfer for consideration of receivables, which is not a transfer of real property under s. 201.02, F.S., and is not a transfer of collateral security for a new loan, the transfer will be exempt from documentary stamp tax.

Nonrecurring Intangible Tax. No additional nonrecurring intangible tax will be due upon the transfer and assignment by Parent to FI of the Florida Collateral Obligations because a nonrecurring tax previously has been paid. No nonrecurring intangible tax will be due upon the transfer and assignment of the non-Florida Collateral Obligations because such obligations will not be secured by a mortgage, deed of trust, or other lien upon Florida real property.

- D) No documentary stamp tax or nonrecurring intangible tax will be due on the transfer and assignment by FI to Taxpayer of Florida and non-Florida Collateral Obligations, which Collateral Obligations represent loans previously originated by FI and FIII.

Documentary Stamp Tax

Since the contribution of Collateral Obligations by FI to Taxpayer is in the nature of a transfer for

consideration of receivables, which is not a transfer of real property under s. 201.02, F.S., and is not a transfer of collateral security for a new loan, the transfer will be exempt from documentary stamp tax.

#### Nonrecurring Intangible Tax

No additional nonrecurring intangible tax will be due on the transfer and assignment by FI to Taxpayer of the Florida Collateral Obligations since the tax has previously been paid on the Florida Collateral Obligations. No nonrecurring intangible tax will be due on the transfer and assignment by FI to Taxpayer of the non-Florida Collateral Obligations because the obligations will not be secured by a mortgage, deed of trust, or other lien on Florida real property.

- E) Documentary stamp tax and nonrecurring intangible tax will not be due upon the execution, delivery, filing or recordation in Florida of the Florida Collateral Assignment Documents, which documents pledge Florida and non-Florida Collateral Obligations to the Indenture Trustee as security for the Taxpayer's obligation under the Bonds and the Warehouse Loan Agreement.

Documentary Stamp Tax. The documentary stamp tax, absent an exemption, taxes collateral assignments of mortgages or security agreements which are filed or recorded in Florida. However, the wholesale warehouse mortgage exemption provided in s. 201.21, F.S., exempts from the documentary stamp tax promissory notes and other obligations to pay money ("principal obligations") where, pursuant to a wholesale warehouse mortgage agreement, the maker of the principal obligation pledges to or deposits with the obligee, as collateral security for the payment of the principal obligation, any note or other written obligation to pay money which is secured by a mortgage, deed of trust, security agreement, or other lien upon real or personal property with respect to which all

documentary stamp taxes imposed thereon have been paid. The pledging of a specific collateral obligation to secure a specific principal obligation, if required under the terms of the wholesale warehouse mortgage agreement, does not invalidate the applicability of the wholesale warehouse mortgage exemption. Per the additional facts provided in the letter of June 19, 1998, the only mortgages securing the Florida warehouse mortgage agreements are Florida mortgages, where all documentary stamp tax has been paid.

In the present case, the mere execution and delivery of Collateral Assignment Documents in Florida will not subject such documents to documentary stamp tax because such documents will not contain a promise to pay. The filing or recording in Florida of Collateral Assignment Documents assigning the Taxpayer's interests in Florida Collateral Obligations in favor of the Lender, absent a specific exemption, would be subject to Florida documentary stamp tax. However, pursuant to the terms of the Warehouse Loan Agreement, the Taxpayer is required to pledge or collaterally assign to or in favor of the Indenture Trustee the Florida Collateral Obligations as collateral security for the payment of the Taxpayer's obligation to pay money under the Bonds and the Warehouse Loan Agreement. Accordingly, if all Florida documentary stamp taxes due upon or with respect to all Florida Collateral Obligations have been paid, the Collateral Assignment Documents assigning the Taxpayer's interests in Florida Collateral Obligations pledged to or in favor of the Indenture Trustee under the Florida Wholesale Warehouse Agreement, will not be subject to Florida documentary stamp tax.

Nonrecurring Intangible Tax. No additional nonrecurring intangible tax will be due upon the recordation or filing in Florida of the Florida Collateral Assignment Documents because a nonrecurring tax previously has been paid upon the recordation or filing of the Florida Collateral Obligation documents.

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,

Joy B. Eldred, C.P.A.  
Tax Law Specialist  
Technical Assistance and Dispute Resolution  
Office of General Counsel

JBE/mh