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SC TECHNICAL ADVICE MEMORANDUM #88-7

TO: Mr. William R. Geddings, Jr., Director
Office Services Division

FROM: Jerry B. Knight, Manager
Tax Policy and Procedures Department

DATE: March 1, 1988

SUBJECT: Documentary Tax: Deeds conveying realty to and from certain federally chartered institutions

REFERENCE: S.C. Code Ann. Section 12-21-310 (1976)
S.C. Code Ann. Section 12-21-380 (Supp 1987)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question:

1. Are deeds conveying realty to and from the Government National Mortgage Association (GNMA), Federal National Mortgage Association (FHMA), Federal Land Bank, Production Credit Association, Bank for Cooperatives, Federal Intermediate Credit Bank, and the Federal Home Loan Mortgage Corporation (Freddie Mac) subject to the documentary tax?

Facts:

Code Section 12-21-310 of the 1976 Code, as amended, imposes the documentary tax upon the creation of several documents, or instruments, including deeds. This section provides, in part:

There shall be levied collected and paid...by any person who makes, signs, issues, sells, removes, consigns or ships them or for whose benefit or use they are made ...the several taxes specified in said sections. (emphasis added)

Code Section 12-21-380 imposes a tax on the creation of "a deed, instrument, or writing whereby lands, tenements or other realty sold is granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or any other person by his direction....."

The Federal Government has established various associations, banks and corporations which purchase and sell real estate in South Carolina.

Discussion:

The South Carolina Supreme Court, in the case of Investors Premium Corp. v. South Carolina Tax Commission 260 S.C. 13, 193 S.E.2d 642 (1973), with respect to the Code Section 12-21-310 stated:

We are of the opinion that in this statute the "or"; while marking an alternative, must also be construed as introducing a substitute. That is, it does not set up an alternative of choice available to the Tax Commission but allows an alternative of necessity. We can find no logic in a purely equal alternative, and yet we must give some significance to the "or" and the alternative it provides. We find that the legislature meant "or" as introducing a substitute taxpayer in the event holding the primary taxpayer liable is impractical. (emphasis added)

In Attorney General's Opinion No. 3888, 1974, p.319 it was stated that:

Although these statutes do not specifically exempt conveyances by the United States to an individual, the same are not subject to tax in that the State has no power to tax an instrumentality of the Federal Government. This conclusion was reached in the case of Federal Land Bank of New Orleans v. Crosland 43 S.Ct 385, 29 A.L.R. 1, which involved the issue whether or not a state could require documentary stamps for the privilege of registering an instrument between the Federal Land Bank and an individual. The Court said that this tax could not apply in such case as the same may preclude or hinder a transaction in which the Federal Government was involved.

Code Section 12-21-380 reads, in part:

Any deed, instrument, or writing whereby any lands, tenements, or other realty is granted, assigned, transferred, or otherwise conveyed to, or vested in, the State of South Carolina, or any of its political sub-divisions and departments, for highway or other public purposes is exempted from the documentary tax requirements of this Section, and any clerk of court or register of mesne conveyances may record these deeds or other instruments without revenue stamps affixed and without penalty.

The statute does not grant a similar exemption for instruments conveying property to the Federal Government or its instrumentalities. The U.S. Supreme Court has found unconstitutional a State statute exempting from the tax sales to the State and its political subdivision and not exempting sales to the Federal Government. United States v. Department of Revenue of the State of Illinois 191 F. Supp. 723, vacated at 368 U.S. 33, 82 S.Ct. 146 on remand 202 F. Supp. 757, affirmed 371 U.S. 21, 83 S.Ct. 117. The court deemed that such a statute was discriminatory.

In that case, the court prohibited the collection of all taxes on sales to the Federal Government during the period in which sales to the State of Illinois and its political subdivisions were exempt.

The Federal Government has established various associations, banks, and corporations. The following is a list of federal code sections which established these organizations and established certain tax exemptions for such organizations.

<u>Organization</u>	<u>Federal Code Sections</u>
Government National Mortgage Assoc. (GNMA)	12 USCS 1717 12 USCS 1723a (c)(1)
Federal National Mortgage Assoc. (FNMA)	12 USCS 1717 12 USCS 1723a (c)(2)
Production Credit Association	12 USCS 2091 12 USCS 2098
Federal Land Banks	12 USCS 2011 12 USCS 2055
Federal Intermediate Credit Bank	12 USCS 2071 12 USCS 2079
Federal Home Loan Mortgage Corp (Freddie Mac)	12 USCS 1452(a) 12 USCS 1452(d)
Bank for Cooperatives	12 USCS 2121 12 USCS 2134
Federal Land Bank Associations	12 USCS 2031 12 USCS 2055

In all cases, with the exception of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (Freddie Mac), these organizations are deemed to be by statute, instrumentalities of the Federal Government.

Effective September 1, 1968, the Federal National Mortgage Association (FNMA), which operated within the Department of Housing and Urban Development (HUD), was partitioned into two separate corporations. One corporation, the Governmental National Mortgage Association, remained an instrumentality of the Federal Government as part of HUD. The second corporation, the Federal National Mortgage Association, was federally chartered but is a private corporation subject to substantial federal regulations. For example, FNMA requires HUD approval for issuance of debt obligations and stock. HUD also has authority, though never exercised, to audit FNMA's financial transactions.

Federal statute, 12 USCA 1723a (c)(2), established various tax exemptions for FNMA and reads:

The corporation, including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, shall be exempt from all taxation now or hereafter imposed by any State, territory, possession, Commonwealth, or dependency of the United States, or by the District of Columbia, or by any county, municipality, or local taxing authority, except that any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent as other real property is taxed.

The Federal Home Loan Mortgage Corporation is not an instrumentality of the United States and in fact pays federal income taxes. However, it has been granted certain other tax exemptions under 12 USCA 1452(d) which reads:

The Corporation, including its franchise, activities, capital, reserves, surplus, and income, shall be exempt from all taxation now or hereafter imposed by any territory, dependency, or possession of the United States or by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

Conclusion:

Deeds conveying realty from the above referenced organizations, with the exception of FNMA and Freddie Mac, to an individual or corporation are not subject to the documentary tax. These organizations, as instrumentalities of the Federal Government and as grantors, cannot be held liable for the tax. In addition, the individual purchasing the property (grantee) cannot be held liable for the tax. Code Section 12-21-310 provides for a substitute taxpayer as an alternative of necessity when it is impractical to hold the grantor liable. This section does not provide an equal alternative of choice. It is not impractical to tax these instrumentalities of the Federal Government, but is prohibited by Federal law.

Deeds conveying realty to these instrumentalities of the Federal Government are not subject to the documentary tax. The statute is discriminatory in that deeds conveying realty to the State are exempt from taxation. Pursuant to the U.S. Supreme Court case of United States v. Department of Revenue of the State of Illinois, supra, such deeds are exempt from taxation as long as the statute exempting deeds conveying realty to the State is in place.

FNMA and Freddie Mac are not instrumentalities of the Federal Government; however, they do enjoy certain tax exemptions. As such, FNMA and Freddie Mac are exempt from the documentary tax on deeds conveying realty to others. When realty is conveyed to FNMA or Freddie Mac, the makers of such deeds (grantors) are deemed liable.