Sep 22, 1994

Re: Technical Assistance Advisement No. 94(M)-009

Documentary Stamp Tax and Intangible Tax; Instruments and Amendments Executed Pursuant to a Confirmed Plan Under Chapter 11 of U.S. Bankruptcy Code

XXX (the "Company")
XXX (Debtor Subsidiaries), Company (Mortgagors)
XXX (Assignees)

Dear:

This is in response to your letters of August 11, 1994, and September 1, 1994, in which 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 execution, recordation, renewals and assignment from time to time of mortgages encumbering Florida real property as substitute collateral securing exempt notes previously issued by Borrower pursuant to a plan of reorganization as confirmed by the U.S. Bankruptcy Court (Confirmed Plan) under Chapter 11 of the U.S. Bankruptcy Code (Code) are subject to the Documentary Stamp Tax or the Intangible Tax.

I. BACKGROUND AND STATEMENT OF FACTS

In April 1990 the Company and the Debtor Subsidiaries filed voluntary bankruptcy petitions for reorganization under Chapter 11 of the Code in the United States Bankruptcy Court for the XXX District of Florida. On March 27, 1992, the bankruptcy court confirmed the Company's plan of reorganization (the "Confirmed Plan"), which directed the Company to execute a Working Capital and Term Loan
Agreement dated as of March 31, 1992 (the "Loan Agreement") and certain negotiable promissory notes (the "Notes") in favor of each of the various banks extending credit thereunder to the reorganized Company. The Notes evidence two credit facilities under the Loan Agreement: (i) a revolving line of credit in the maximum principal amount of $20,000,000 (the "Working Capital Loan") under which the Company may borrow, repay and reborrow funds from the Note holders, and (ii) a term loan facility (the "Term Loan") in the original principal amount of $25,000,000 under which repayments by the Company cannot be reborrowed.

As required by the original Loan Agreement executed pursuant to the Confirmed Plan, the Debtor Subsidiaries executed guaranties of payment of the Company's Notes (the "Guaranties"), and the Mortgagors issued and recorded mortgages (the "Mortgages") on certain Florida real property owned by them to secure the Notes and the Guaranties. The original Loan Agreement also requires the Mortgagors to secure the indebtedness by granting additional liens from time to time on properties subsequently acquired by them. The Mortgages were made in favor of XXX Company (now known as XXX Bank) as collateral agent (the "Collateral Agent") for the benefit of the holders of the Notes (the "Assignors"). The original Loan Agreement contemplates the transfer and assignment of Notes from one holder to the next holder.

The Notes and the Mortgages were and are exempt from documentary stamp taxes and intangible taxes pursuant to 11 U.S.C. s. 1146(c) of the Code. The Department issued its Technical Assistance Advisement No. 92(M)-006 (the "First TAA) confirming, among other things, this s. 1146(c) exemption. The Confirmed Plan as well as the Department's First TAA both state that subsequent renewals and modifications of the various exempt Notes, Mortgages and other security documents issued under the Confirmed Plan would also be exempt from Florida documentary stamp taxes and intangible taxes under s. 1146(c). The First TAA states that in the Department's opinion future advances would not be exempt from these taxes.

In addition, the Department also issued a Technical
Assistant Advisement No. 94(M)-006 (the “Second TAA”) confirming that the s. 1146(c) exemptions include mortgage liens on real property that the Company is required to grant under the credit documents and the Confirmed Plan as substitute, replacement or additional security for promissory notes that were issued by the Company under the Confirmed Plan and are exempt under s. 1146(c).

The Assignees have offered to purchase the Loan Agreement and the Notes from the Assignors for the aggregate principal amount outstanding under the Working Capital Loan and the Term Loan. When the Notes are purchased, the principal amount outstanding under the Working Capital Loan will be the maximum amount of the line of credit ($20,000,000), but a principal payment will reduce the amount outstanding under the Term Loan to $12,500,000. The Notes would be assigned and endorsed by all of the Assignors to all of the Assignees, and the Company would then renew these Notes by executing two renewal notes (the “Renewal Notes”) in favor of each of the Assignees in the aggregate principal amount purchased by each Assignee. One Renewal Note for each Assignee would evidence its share of the renewed Working Capital Loan ("Renewal Revolving Note") and the other Renewal Note for that Assignee would evidence its share of the renewed Term Loan (the "Renewal Term Note"). In connection with the assignment and renewal of the Notes, the Company and the Debtor Subsidiaries would amend and restate the Loan Agreement and the Guaranties to reflect the payment terms and other covenants required by the Assignees and the Mortgages would all be renewed and consolidated into one Mortgage securing the amended and restated Loan Agreement and Guaranties. The Collateral Agent or Successor Agent would remain the mortgagee named in the consolidated renewal Mortgage and would continue to hold the consolidated renewal Mortgage as security for the Renewal Notes held by the Assignees. Notwithstanding the assignment, amendment, restatement, consolidation and renewal of these loan documents, (i) no obligors other than the Company would execute the Renewal Notes, (ii) no obligors other than the original Mortgagors would execute the Loan Agreement and Guaranties as amended and restated, (iii) no obligors other than the original Mortgagors would execute the consolidated renewal Mortgage, and (iv) the aggregate outstanding principal balance
of the Renewal Notes would be identical to the aggregate outstanding principal balance of the Notes at the time of renewal. Separately from the Mortgagors, other affiliates of the Company will also guarantee the amended and restated loans, but their separate guaranties will not be secured by the consolidated renewal Mortgage.

In addition to the purchase of the Notes, the Assignees have offered to make an additional term loan to the Company in the amount of $12,500,000, which will be evidenced by additional new promissory notes from the Company to the respective Assignees (the "Advance Notes"), will be guaranteed by the Debtor Subsidiaries and will be a future advance secured under the consolidated renewal Mortgage. Florida documentary stamp taxes and intangible personal property taxes will be paid by the Company based on the aggregate principal amount of the Advance Notes upon recordation of a notice in the public records evidencing the future advance under the consolidated renewal Mortgage.

The notice of future advance will also spread the lien of the consolidated renewal Mortgage to encumber additional property of the Company as required by the original Loan Agreement and the Confirmed Plan.

The Assignees have requested that the Company consolidate the Renewal Term Notes with the Advance Notes held by the Assignees by executing and delivering a consolidated renewal term note to each Assignee (the "Consolidated Term Notes"). The Renewal Revolving Notes would not be consolidated and the maximum principal amount of the renewed Working Capital Loan would not be increased. Because the Renewal Term Notes are exempt from documentary stamp taxes and intangible taxes and because all such taxes are being paid for the Advance Notes, the taxpayers believe that the Consolidated Term Notes would be exempt from such taxes. However, the Company and the Assignees do not wish to incur taxes unnecessarily and wish to obtain the Department's advice before executing or delivering any such Consolidated Term Notes.

II. RULING REQUESTED
Based on the foregoing facts of the transaction and the relevant authorities, the taxpayers respectfully request the Department's ruling that:

1. No Florida documentary stamp taxes or intangible taxes are due on the assignment of the Notes from the Assignors to the Assignees, on the execution and delivery of the Renewal Notes, or on the repayment and borrowing of funds from time to time under the Renewal Revolving Notes, because the Notes are exempt from such taxes under 11 U.S.C. s. 1146(c), or because the Renewal Notes are exempt renewals under s. 201.09, F.S., and exempt refinancings under s. 199.145, F.S.

2. Insofar as they pertain to the Renewal Notes (as distinguished from the Advance Notes), the amendment and restatement of the Loan Agreement and the Guaranties and the renewal and consolidation of the Mortgages are not subject to Florida documentary stamp taxes or intangible taxes because renewals and modifications of instruments exempt under 11 U.S.C. s. 1146(c) are authorized and exempted under the Confirmed Plan and the First TAA, or because these amendments, restatements and consolidations are exempt renewals under s. 201.09, F.S., and exempt refinancings under s. 199.145, F.S.

3. Provided that documentary stamp taxes and intangible taxes are paid on the amount of the future advance evidenced by the Advance Notes, then no other documentary stamp taxes or intangible taxes will be required on the proposed amendment and restatement of the Loan Agreement and the Guaranties, on the renewal and consolidation of the Mortgages, or on the spreading of the consolidated renewal Mortgage to encumber additional property of the Company as security.

4. Provided that documentary stamp taxes and intangible taxes are paid on the amount of the future advance evidenced by the Advance Notes, then no other documentary stamp taxes or intangible taxes will be required on the execution and delivery of any
Consolidated Term Notes because they would qualify as exempt renewals under s. 201.09, F.S., and exempt refinancings under s. 199.145, F.S.

III. RELEVANT AUTHORITIES

Pursuant to 11 U.S.C. s. 1146(c) of the Code, the issuance, transfer or exchange of a security, or the making of or delivery of an instrument of transfer under a plan confirmed under 11 U.S.C. s. 1129 may not be taxed under any law imposing a stamp tax or similar tax. Furthermore, federal case law has held that acts in furtherance of a confirmed plan of reorganization are exempt from the imposition of stamp taxes and similar taxes pursuant to 11 U.S.C. s. 1146(c) of the Code. City of New York v. Jacoby-Bender, Inc., 758 F.2d 840 (2d Cir. 1985); City of New York v. Smoss Enterprises Corp., 54 Bankr. 950 (E.D.N.Y. 1985).

The Notes were originally delivered by Company pursuant to the Confirmed Plan and are therefore exempt from Florida documentary stamp tax and intangible tax. As provided in the Confirmed Plan and the Department's First and Second TAA, the Notes and the security documents securing the Notes may be renewed or modified without affecting the tax exemption. The Renewal Notes, the amended and restated Loan Agreement and Guaranties and the consolidated renewal Mortgage, including the spreading of the Mortgage lien to additional property, are renewals and modifications within the Confirmed Plan and are therefore exempt.

Even if the Confirmed Plan had not included renewals and modifications, however, the Renewal Notes and the amendment and restatement of the Loan Agreement and Guaranties and the consolidated renewal Mortgage would still be exempt from Florida documentary stamp taxes because they meet all the requirements for exempt renewal notes and mortgages under s. 201.09, F.S., and exempt refinancings under s. 199.145, F.S. Specifically, the aggregate principal amount of the Renewal Notes is equal to the aggregate principal amount outstanding under the Notes when renewed, and no new obligors are executing the Renewal Notes or the amended and restated Loan Agreement and Guaranties or the consolidated renewal Mortgage.
The proposed Consolidated Term Notes would also be exempt from these taxes because each would renew and consolidate a Renewal Term Note and an Advance Note. The Renewal Term Note would be exempt under the federal s. 1146(c) exemption and the Florida renewal and refinancing exemptions, and the Advance Note would be eligible for further exempt renewal and refinancing because all required taxes would have been previously paid.

**Discussion and Law**

**Intangible Tax**

Where deeds, mortgages, notes, or other instruments are issued under a Chapter 11, s. 1146(c) plan of the Bankruptcy Code which has been confirmed, no taxes are due.

Chapter 199, F.S., imposes a nonrecurring tax of two mills on obligations for the payment of money which are secured by Florida real property. In addition, s. 199.145, F.S., provides that when a mortgage secures an identical debt where the tax was paid on the original, no additional tax will be due. Rule 12C-2.004(2), F.A.C., provides that the nonrecurring intangible tax on a note or obligation for the payment of money secured by realty located both in and out of Florida is apportioned based on the value of the Florida property to the total property secured times the amount of the obligation secured. Further, future advances are taxable at the time each advance is made based on the amount advanced.

**Documentary Stamp Tax**

Where deeds, mortgages, notes, or other instruments are issued under a Chapter 11, s. 1146(c) plan of the Bankruptcy Code which has been confirmed, no taxes are due.

Rule 12B-4.051(1), F.A.C., provides that tax is required on a note executed in Florida with the tax measured by the amount of the note. In addition, a document executed or recorded which renews or extends an existing obligation is subject to tax, unless it meets the requirements of s. 201.09, F.S. Rule 12B-
4.054(1), F.A.C., provides that an original note may be renewed for the unpaid balance of the amount which was previously disbursed provided all other requirements of s. 201.09, F.S., are met without additional tax due. Section 201.09, F.S., provides that a note may be renewed without tax due when it extends or continues the identical contractual obligations as the original. In order to be exempt, the renewal note shall not be executed by any person other than the original obligor and must renew and extend only the unpaid balance of the original.

Finally, Rule 12B-4.053(32), F.A.C., provides that the documentary stamp tax on mortgages securing out-of-state notes secured by Florida property is taxable. If the mortgage secures only Florida property, the tax is based on the percentage of the indebtedness which the value of the mortgaged property located in Florida bears to the total value of all mortgaged property, but not less than the value of the Florida property, unless the amount recoverable is limited. If the mortgage recorded in Florida secures the property located in Florida and all other property wherever located, the tax is due on the prorated amount.

**U.S. Bankruptcy Code**

Chapter 11, s. 1146 (c), U.S.C., provides that the issuance, transfer or exchange of a security or the making of or delivery of an instrument of transfer under a confirmed plan is exempt from a stamp tax or similar tax.

**Department’s Position**

1. Based on the provisions of 11 U.S.C. s. 1146(c), and since the Renewal Notes are exempt renewals under F.S., s. 201.09 and exempt refinanceings under F.S., s. 199.145, no Florida documentary stamp taxes or intangible taxes are due on the assignment of the Notes from the Assignors to the Assignees, on the execution and delivery of the Renewal Notes, or on the repayment and borrowing of funds from time to time under the Renewal Revolving Notes.
2. Also based on the provisions of 11 U.S.C. s. 1146(c),
and since the Renewal Notes are exempt renewals under s. 201.09, F.S., and exempt refinancings under s. 199.145, F.S., the Renewal Notes (not the Advance Notes), the amendment and restatement of the Loan Agreement and the Guaranties and the renewal and consolidation of the Mortgages are not subject to Florida documentary stamp taxes or intangible taxes as stated in the First and Second TAA.

3. Provided that documentary stamp taxes and intangible taxes are paid on the amount of the future advance evidenced by the Advance Notes, then no other documentary stamp taxes or intangible taxes will be required on the proposed amendment and restatement of the Loan Agreement and the Guaranties on the renewal and consolidation of the Mortgages, or on the spreading of the consolidated renewal Mortgage to encumber additional property of the Company as security.

4. Provided that documentary stamp taxes and intangible taxes are paid on the amount of the future advance evidenced by the Advance Notes, then no other documentary stamp taxes or intangible taxes will be required on the execution and delivery of any Consolidated Term Notes as they would qualify as exempt renewals under s. 201.09, F.S., and exempt refinancings under s. 199.145, F.S.

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
Technical Assistance

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