

**SUMMARY**

It is incumbent upon the lender providing the loan forms to provide sufficient proof either within the document (executed, delivered and accepted outside Florida and later sent in to Florida for warehousing, servicing and safekeeping within Florida) or in additional documentation executed at that same time that the loans are not subject to documentary stamp tax and/or Florida intangible tax.

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Nov 19, 1998

Re: Technical Assistance Advisement No. 98(M)-005

Documentary Stamp Tax: Safekeeping of Out-of-State Notes  
Recurring Intangible Tax: Safekeeping of Out-of-State Notes  
ss. 199.032, 199.052, 199.175, 201.08, F.S.

XXX (Main Bank)

XXX (Florida Division)

XXX (Georgia Division)

XXX (Divisions)

XXX (Affiliates)

Dear :

This is in response to your letter dated May 14, 1998, requesting a Technical Assistance Advisement, in which you ask if certain exhibits will avoid the Florida documentary stamp tax imposed by s. 201.08, F.S., and intangible tax imposed by ss. 199.032, 199.052, 199.175, F.S., upon Loan Documents (not secured by Florida real property) executed outside Florida and later brought into Florida for warehousing, servicing and safekeeping.

**ISSUE ONE**

Whether the taxability of documents executed outside Florida and maintained in Florida for safekeeping can be dependent upon:

1. Main Bank's accounting system;
2. Separate color-coded files for out-of-state documents kept in Florida; and
3. Separate storage areas for out-of-state documents separated from Florida documents, rather than upon documentary evidence obtained at the time of execution, such as that outlined in Rule 12B-4.053(34), F.A.C.

## **ISSUE TWO**

Whether Exhibit B, if contained within the body of a promissory note signed by the Borrower together with a **separate** Exhibit C signed by the Borrower and an authorized officer of the Non-Florida Division, would be sufficient evidence that the out-of-state Loan Documents are exempt from the Florida taxes.

## **ISSUE THREE**

Whether Exhibit D would be sufficient to establish the out-of-state execution and delivery of the Loan Documents subsequently brought into Florida.

## **ISSUE FOUR**

Whether Exhibit E will be sufficient to avoid the Florida taxes on Loan Documents executed outside Florida and brought into Florida for safekeeping.

## **ISSUE FIVE**

Whether the burden of proof is upon the Taxpayer or upon the Department of Revenue to prove that the documents brought into Florida are subject to the above Florida taxes.

## **ISSUE SIX**

Whether the warehousing, servicing and safekeeping described herein at the Florida Division will subject the Loan Documents (executed out-of-state and not secured by Florida real

property) to the annual Florida intangible tax.

### FACTS PRESENTED BY PETITIONER

Main Bank is a national banking association maintaining its principal place of business in a state other than Florida. Certain banks (Divisions) in several other states have merged into Main Bank, including Florida Division and Georgia Division. Other mergers may take place in the future. Main Bank also owns directly or indirectly certain "Affiliates" which maintain their commercial domicile outside the State of Florida and are engaged in the business of lending money.

The out-of-state Divisions of Main Bank and Affiliates send some, but not all, of their executed loan documents to Florida for warehousing, servicing and safekeeping. Loan documents are distinguished by market segments. Some market segments of loan documents are warehoused in Florida. Other market segments of loan documents are warehoused in other states.

Florida Division also separately houses its own loan documents executed in Florida, which are subject to Florida documentary stamp tax and/or intangible taxes under Chapters 199 and/or 201, F.S.

The out-of-state loan documents warehoused at the Florida Division which are **not** subject to Florida documentary stamp taxes and Florida intangible taxes must be differentiated in some manner to distinguish them from the documents warehoused at the Florida Division which **are** subject to the taxes.

Once these out-of-state loan documents reach Florida, it is crucial that they retain this differentiation if these Florida taxes are not to be applied to the documents.

Among other warehousing duties, Florida Division will:

- \* Review and inventory loan documents delivered by the separate Non-Florida Divisions to the Florida Division;
- \* Prepare Loan Documents evidencing or renewing these loans

in accordance with instructions received from an out-of-state loan officer and forward such documents to the out-of-state loan officer for execution and delivery by the (out-of-state) Borrower;

\* Fund non-discretionary advances against commercial lines of credit upon request by (out-of-state) Borrower and in accordance with authorization received from the out-of-state loan officer having discretionary authority with respect to such loans;

\* Receive and, after research, respond to customer inquiries regarding loan balances, etc.;

\* Maintain payment histories and provide periodic reports to the separate Non-Florida Divisions pertaining to the loans evidenced by the Loan Documents;

\* "Collect" the payments upon the loans evidenced by the Loan Documents and transmit such payments to the separate Non-Florida Division which is responsible for the loan;

\* Send out automatic reminder notices to a Borrower in the event a Borrower fails to make a payment when due.

All decisions pertaining to underwriting, enforcement and collection of the loans evidenced by the Loan Documents, including the decision to extend or renew credit, declaration of defaults and acceleration of the loans, will be made by the separate Non-Florida Divisions originating the loans and their personnel located outside the State of Florida.

Through its accounting system, Main Bank maintains records showing which separate state division made which loans. Main Bank maintains separate ledgers reflecting the lending activities of the separate Non-Florida Divisions. The accounting system will be used to classify (by state and business location within that state) all notes and other related Loan Documents transferred to the Florida Division as well as notes and other related Loan Documents not sent into Florida but warehoused in other state locations.

In addition, the Loan Documents of each separate Non-Florida Division will be assigned a separate color coded file to identify them as being Loan Documents from such Non-Florida Division. All loan files from each Non-Florida Division will be kept together in one location and separate from the loan files of the Florida Division and the other Non-Florida Divisions.

Conditions have changed since the issuance of Technical Assistance Advisement 95M-007R in December 1995. Since that time, more banks have been merged into Main Bank. It is not uncommon for a promissory note and the supporting documents relating to a loan made by Non-Florida personnel, including non-Florida attorneys, to be on forms other than that supplied by Main Bank. According to your letter, as a result, it is virtually impossible for Main Bank to ensure that the forms used to document the loans made by the Non-Florida Divisions will, in all cases, be accompanied by an appropriate affidavit or certification. This problem is further compounded by the increased number of Non-Florida Divisions for which the Florida Division will hold promissory notes.

### **DISCUSSION AND LAW**

Generally, the determination whether a document in Florida is subject to documentary stamp tax under Chapter 201, F.S., is made from information contained within the document. Florida Administrative Code Rules allow for additional documentation as proof in certain instances to show that the document is exempt from the tax.

A loan document or promissory note is subject to documentary stamp tax if it is made, executed, delivered, sold, transferred or assigned in Florida, as provided in Rule 12B-4.051 (1), F.A.C. A loan document that is made, executed and delivered in another state, and which is not recorded in Florida, is generally not subject to this tax.

Documents (physically located in Florida) must be distinguished by the content within the document itself or other evidence required by Rule 12B-4.053(34), F.A.C., to establish

that there is no basis for imposition of tax.

Where loan documents (if not secured by Florida real property, and if execution, delivery and acceptance occurred entirely outside Florida) are later sent into Florida merely for safekeeping, certain elements of proof are required to differentiate the documents from documents subject to the documentary stamp tax and/or annual intangible tax.

Rule 12B-4.053, F.A.C., refers to notes signed out of state that are still subject to the tax:

(9) Document Signed in Another State; Payable in Florida: Where a promissory note is signed by its maker in another state and mailed to the payee in this state, after which it is examined, approved and accepted and a loan in the principal amount of the note is made to the maker, such note is subject to tax. (1956 Op. Att'y. Gen. Fla. 056-339 (Dec. 7, 1956); (1958 Op. Att'y. Gen. Fla. 058-106 (March 25, 1958); (1962 Op. Att'y. Gen. Fla. 062-11 (Jan. 18, 1962))

Rule 12B-4.053(34), F.A.C., requires additional proof if notes (executed, delivered and accepted out of state but later brought into Florida) are to be considered exempt from the tax:

(34) Promissory Notes, Nonnegotiable Notes, and Written Obligations to Pay Money Made, Executed, and Delivered in Another State, and Not Secured by a Florida Mortgage: 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's documentary stamp tax. If the notes then are brought into Florida for collection after they have been made, executed, and delivered to the Florida lender, or its agent, in another state, no tax is due. However, if a note is made and executed in another state and delivered to the lender in Florida, the note would be subject to tax. The Department will presume that if a note is made payable to a Florida lender and the note is held by the Florida lender in Florida, then tax will be

due unless the lender can establish that the note was made, executed, and delivered to the lender outside the state.

Proof sufficient to establish that a note is not subject to tax includes:

(a) A sworn affidavit made before an out-of-state notary public at the time of the signing of the note by the borrower(s) and delivery of the note to the lender attesting that the signing and delivery of the note occurred in the presence of the out-of-state notary, or

(b) The note itself could bear a notarization and acknowledgment as to where the note was executed, together with an affidavit made before an out-of-state notary by the lender attesting that the note was delivered to the lender, or its agent out-of-state. Execution and delivery need not occur in the same jurisdiction, provided that both execution and delivery occurred outside of Florida, or

(c) Any other proof that the borrower made, executed, and delivered the note in another state to a Florida lender. Travel vouchers, airplane stubs, and hotel receipts corresponding with the signing and delivery of the note would be acceptable proof. (e.s.)

After the merger date of a bank into Main Bank, the new unsecured loan documents themselves (if they are to be sent into Florida) must evidence whether or not Florida's taxes apply to the loans they represent. Any proof that a note is exempt from the imposition of documentary stamp tax (as required by Rule 12B-4.053(34), F.A.C.) must either be contained within the four corners of the loan document itself or supplemented by other documents that also evidence exemption of the loan documents from imposition of Florida taxes. This proof of exemption must be prepared at the time the Borrower executes the document out-of-state.

Upon renewal of these loans, including non-discretionary advances, the promissory notes must be **signed and delivered entirely out-of-state**, or Florida documentary stamp tax will apply regardless of where the original loan was executed. The

evidence proving out-of-state execution must contain the same type of information as required upon the execution of the original note.

The annual intangible tax is imposed by s. 199.032, F.S., on intangible personal property that has taxable situs in Florida. Section 199.175(1), F.S., states that intangible personal property that is owned, managed or controlled by any person domiciled in Florida has taxable situs in Florida.

### **DEPARTMENT'S POSITION**

The Department issued Technical Assistance Advisement No. 95M-007R on December 14, 1995, stating requirements sufficient to ensure that certain of Main Bank's documents will be presumed to have been made, executed and delivered in another state. Mergers into Main Bank subsequent to the merger date are still subject to the requirements as stated in TAA 95M-007R.

Renewals and/or advances if evidenced by a note must contain the proof required to exempt them from Florida's documentary stamp tax. Otherwise they will be subject to the tax just as any other document is subject to tax under s. 201.08, F.S.

It is incumbent upon the lender providing the loan forms to provide sufficient proof either within the document (executed, delivered and accepted outside Florida), or in additional documentation executed at that same time, that they are not subject to Florida documentary stamp tax and Florida intangible tax.

### **ISSUE ONE**

The items proposed in Issue One will not suffice as documentary evidence that the loans are not subject to Florida documentary stamp tax. After the merger into Main Bank, **each** new loan document or supplemental document must contain proof that it is not subject to Florida's documentary stamp tax and intangible tax. Extraneous evidence such as accounting systems, colors of files, and storage areas are not proof of out-of-state



execution and delivery, although it would be helpful to separate the out-of-state loans from the Florida loans. These items are not sufficient documentary proof of exemption from Florida's taxes because they do not conform to the requirements established by the Florida Administrative Code Rules.

### **ISSUE TWO**

Exhibits B and C do not state that they were executed at the time that the loan documents were executed, rather than prepared after-the-fact. They are not witnessed by a notary public to establish the date or out-of-state location where the note was signed or accepted. Exhibit C used by itself without express incorporation into the document containing Exhibit B could, by the comma after the word "Borrower," be construed to indicate that the promissory note and loan documents were signed in **any** location, including Florida, and then delivered by the Borrower to the Lender. The same applies to Exhibit B.

At present Exhibits B and C merely specify **where** the note and documents were delivered to the Payee. However, if Exhibits B and C were expressly incorporated within the promissory note **specifying the city and state in which the Borrower signed the promissory note and were notarized at the time of execution in that state outside Florida**, then the unsecured promissory note would be presumed to have been executed outside Florida. In addition, if these documents also specified that the loan was delivered and accepted outside Florida (**in "X" city, state**), then these documents would be sufficient to establish that the loan was executed, delivered, accepted outside Florida.

### **ISSUE THREE**

Exhibit D contains an affidavit stating that an accompanying list of promissory notes were executed and delivered outside the State of Florida.

The affidavit states that attached to it:

... is a list of promissory notes which have been executed and delivered outside of the State of Florida to [\_\_\_\_\_]

Division], located in (city and state).

... some, but not all, of the promissory notes referred to in Schedule A together with related security documents are being transmitted to the offices of [Florida Division]...and will be held for safekeeping and servicing purposes...on behalf of and for the benefit of [\_\_\_\_\_ Division] located in (city, state).

Exhibit D is a list which is a separate document from the other loan documents themselves. The list is merely additional documentation. It is presumably produced after the promissory notes and other loan documents have been executed.

If this affidavit is used only with notes and loan documents which were executed and delivered outside Florida **prior to the date of merger into Main Bank**, then, absent fraud, it will be treated as sufficient evidence that the listed documents were executed and delivered outside of Florida. This affidavit should be completed before the notes and loan documents are sent to Florida, and before any audit is initiated.

**After the date of merger into Main Bank**, for loan documents prepared thereafter, the affidavit and list are **not** sufficient to prove that the loan documents were executed and delivered outside of Florida.

#### **ISSUE FOUR**

Exhibit E, signed by the borrower and by an officer of the Division Bank, is a separate certificate describing the loan and stating that the promissory note and related loan documents evidencing or securing the referenced loan were executed by the Borrower. The Exhibit does not state **where** the Borrower executed the documents. It states only that they were **delivered** to the (Division Bank) in a state other than Florida. The certificate is not notarized.

A change in the wording of Exhibit E relating to where the borrower signed the promissory note is as follows:

....the above referenced loan have been executed by the Borrower in (City, State) and delivered in (City, State) to Main Bank

This change, combined with notarization by a notary public at the time of signing of the note in a location outside Florida (and incorporated within the promissory note itself), stating that the execution, delivery and acceptance of the loan occurred in the Non-Florida Division entirely outside Florida, would be accepted as sufficient proof, for unsecured loans, that they were in fact executed and delivered outside of Florida.

With the removal of certain stated deficiencies in Exhibits B, C, and E, and the incorporation of the certifications into the loan documents themselves, the loan documents would be presumed to have been made, executed and delivered in another state.

#### **ISSUE FIVE**

When the loan document is made payable at a Florida bank or is held in a Florida bank, the burden of proof to establish that a document is not subject to Florida taxes is upon the taxpayer. The proof should be either within the four corners of the document, or in additional documentary proof supplied at the time of execution of the document. See Rule 12B-4.053(34), F.A.C.

#### **ISSUE SIX**

The annual intangible tax is imposed by s. 199.032, F.S., on intangible personal property that has taxable situs in Florida. Section 199.175(1), F.S., states that intangible personal property that is owned, managed or controlled by any person domiciled in Florida has taxable situs in Florida. To the extent that these notes will not be owned, managed or controlled by any person domiciled in Florida, but will merely be stored in Florida for the described warehousing and safekeeping, the notes will not have taxable situs under s. 199.175(1), F.S.

The activities, as described, would not, in and of themselves, establish taxable situs under s. 199.175(1), F.S. You are referred to Rule 12C-2.0062, F.A.C., for guidance with respect to management or control of intangible personal property.

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 treatment different from that 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,

M.E. Clemens, C.P.A.  
Senior Tax Specialist  
Tax Policy and Dispute Resolution  
Office of General Counsel

MEC/mh