

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ONE DEZAVALA CENTER, LTD.,)
)
 Petitioner,)
)
vs.) CASE NO. 87-0057
)
STATE OF FLORIDA OFFICE OF)
THE COMPTROLLER,)
)
 Respondent.)

SUGAR CREEK BUSINESS CENTER,)
)
 Petitioner,)
)
vs.) CASE NO. 87-0058
)
STATE OF FLORIDA OFFICE OF)
THE COMPTROLLER,)
)
 Respondent.)

RECOMMENDED ORDER

Final hearing in the above-styled action was held on March 13, 1987 in Orlando, Florida, before Mary Clark, Hearing Officer of the Division of Administrative Hearings.

The parties were represented as follows:

For Petitioners: Jay A. Decator, Esquire
Post Office Box 3309
Orlando, Florida 32802

For Respondent: Kevin J. O'Donnell, Esquire
Assistant Attorney General
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, Florida 32399-1050

BACKGROUND AND PROCEDURAL MATTERS

Petitioners in these consolidated cases filed applications for documentary stamp tax refunds in July and August, 1986. In separate orders entered on December 3, 1986, Gerald Lewis, as Comptroller of the State of Florida, denied the applications.

Petitioners requested informal hearings pursuant to section 120.57(2) F.S., and the cases were forwarded to the Division of Administrative Hearings on behalf of the Comptroller's Office. The agency requested a formal hearing since issues of material fact were in controversy.

Petitioners' Motions for Consolidation were granted in an Order of Consolidation entered on January 27, 1987.

At the hearing, Petitioners presented the testimony of John R. Simpson, Jr., Esquire. Petitioners' exhibits Nos 1-8 were received without objection. Exhibits No. 1 and No. 5 were the parties' stipulations to certain material facts. In addition, the parties stipulated that affidavits of William M. Stanley, F. Woodrow Coleman and Robert H. Smith be included in the record of this proceeding. With the exception of the affidavit of William M. Stanley, Respondent presented no evidence.

Both parties made very thorough and articulate legal arguments at the hearing. No transcript was furnished. After the hearing, the parties submitted proposed recommended orders and Petitioners also submitted a memorandum of law. These matters have been carefully considered in the preparation of this recommended order. Specific rulings on the proposed findings of fact are found in the attached appendix.

ISSUE

The issue in this proceeding is whether the Petitioners are entitled to refund of documentary stamp taxes paid pursuant to Sections 201.01 and 201.08 Florida Statutes.

FINDINGS OF FACT

1. Both Petitioners are limited partnerships validly existing and in good standing under the laws of the State of Florida. (Petitioner's exhibits No. 1 and No. 5.)

Sugar Creek Business Center
Phase I, Ltd. ("Sugar Creek")

2. As to this Petitioner, the parties have further stipulated:

a. On or about March 27, 1986, Petitioner and First Union National Bank, a national banking association, with its principal office located in Charlotte, North Carolina (the "Lender"), entered into a certain Construction Loan Agreement (the "Loan Agreement"). Pursuant to the Loan Agreement, Lender agreed to make and Petitioner agreed to accept a loan in the amount of \$6,300,000.00 (the "Loan") to be used solely for the purpose of paying for the cost of developing and constructing a commercial building in Charlotte, Mecklenberg County, North Carolina.

b. The Lender retained the law firm of Fowler, White, Gillen, Boggs, Villareal & Banker, P. A., Post Office Box 1438, 501 E Kennedy Boulevard, Suite 1700, Tampa, Florida 33602, as its Florida counsel in connection with closing the Loan. Petitioner retained the law firm of Peirsol, Boroughs, Grimm, Bennett & Griffin, Professional Association, Post Office Box 3309, Orlando, Florida 32802, as its counsel in connection with closing the Loan.

c. On or about March 27, 1986, the General Partners of Petitioner executed a promissory note in the amount of \$6,300,000.00 payable to Lender (the "Note"), a Deed of Trust and Security Agreement securing the Note in favor of Gibson L. Smith, Jr. Trustee, and First Union National Bank, Beneficiary (the "Mortgage"), and all other loan closing documents pursuant to the Loan Agreement.

d. The Mortgage encumbers only land and the improvements thereon located in Charlotte, Mecklenberg County, North Carolina and was filed in the Public Records of Mecklenburg County, North Carolina on March 27, 1986, subsequent to closing upon the Loan Agreement.

e. The proceeds of the Loan evidenced by the Note and secured by the Mortgage were used solely to develop and construct a commercial building upon the land encumbered by the Mortgage in Charlotte, Mecklenburg County, North Carolina.

f. Florida documentary stamps were purchased from the area office of the Department of Revenue located in Tampa, Florida on May 1, 1986 and affixed to the Note to evidence payment of Florida documentary stamp tax with respect to the Note in the amount of \$9,450.00 pursuant to Sections 201.00 and 201.08, Florida Statutes. (Petitioner's Exhibit No. 1)

3. John Simpson, Jr., Esquire of Peirsol, Borroughs, Grimm, Bennett and Griffin, P. A. represented Sugar Creek in the purchase of property and the acquisition and closing of construction financing for improvements. The loan documents were mailed to him. He gave them to his client in Orlando, who signed and delivered them back to him in escrow. Simpson took the documents to Charlotte, North Carolina, for the closing on or around March 27, 1986. The purchase of property and loan closed simultaneously and the funds were disbursed in Charlotte.

(Testimony of John Simpson, Jr., Esquire)

One Dezavala Center, Ltd.

4. As to this Petitioner, the parties have stipulated:

a. On or about July 30, 1985, Petitioner and the First National Bank of Chicago, a national banking association, with its principal office located in Chicago, Illinois (the "Lender"), entered into a certain Construction Loan Agreement (the "Loan Agreement"). Pursuant to the Loan Agreement, Lender agreed to make and Petitioner agreed to accept a loan in the amount of \$6,600,000.00 (the "Loan") to be used solely for the purpose of paying for the cost of developing and constructing four commercial buildings located in San Antonio, Bexar County, Texas.

b. The Lender retained the law firm of Holland & Knight, 1200 Brickel Avenue, Post Office Box 015441, Miami, Florida 33101, as its Florida counsel in connection with closing the Loan. Petitioner retained the law firm of Peirsol, Borroughs, Grimm, Bennett & Griffin, Professional Association, Post Office Box 3309, Orlando, Florida 32802, as its counsel in connection with closing the Loan.

c. On or about July 30, 1985, the General Partners of Petitioner executed a promissory note in the amount of \$6,600,000.00 payable to Lender (the "Note"), a Deed of Trust, Mortgage, and Security Agreement securing the Note in favor of Harry M. Roberts, Jr., Esquire, Trustee (the "Mortgage"), and all other loan closing documents as required under the Loan Agreement.

d. The Mortgage encumbers only land and the improvements thereon located in San Antonio, Bexar County, Texas and was filed in the Public Records of Bexar County, Texas on August 1, 1985, subsequent to closing upon the Loan Agreement.

e. The proceeds of the Loan evidenced by the Note and secured by the Mortgage were used solely to develop and construct four commercial buildings on the land encumbered by the Mortgage in San Antonio, Bexar County, Texas.

f. Florida documentary stamps were purchased from the area office of the Department of Revenue located in Miami, Florida on August 5, 1985, and affixed to the Note to evidence payment of Florida documentary stamp with respect to the Note in the amount of \$9,900.00 pursuant to Sections 201.00 and 201.08 Florida Statutes.

5. John Simpson, Jr., Esquire, also represented One Dezavala in the closing for the acquisition of the property and the loan.

The note and other loan documents were signed in Orlando by Petitioner's General Partners. The documents were given to the lender's Florida Counsel in escrow, who sent the documents to the lender's Texas counsel.

Closing on the acquisition of property and the loan took place simultaneously in San Antonio, Texas and the funds were disbursed in San Antonio.

(Testimony of John Simpson, Jr., Esquire)

6. Photocopies of the notes and stamps were admitted as Exhibits No. 3 and No. 7. The parties, by oral stipulation at the final hearing, agreed that before the Comptroller could be compelled to issue a Final Order authorizing the refund of such money as may properly be found owing Petitioners, Petitioners would make available to the Comptroller or his representatives, for inspection, cancellation and/or obliteration, the original documentary stamps forming the basis for the request for refund.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties in this proceeding. Section 120.57(1) F.S.

8. Respondent contends that the subject documentary stamp taxes are due under the following provisions of Chapter 201, Florida Statutes:

201.01 Documents taxable, generally.--
*There shall be levied, collected, and paid
the taxes specified in this chapter, for
and in respect to the several documents,*
bonds, debentures or certificates of stock
and indebtedness, and other documents,
instruments, matters, writings, and things

described in the following sections, *or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing, or thing, or any of them, is written or printed by any person who* makes, signs, executes, issues, sells, removes, consigns, assigns, records, or ships *the same,* or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, recorded, or shipped *in the state.* The documentary stamp taxes required under this chapter shall be affixed to and placed on all recordable instruments requiring documentary stamps according to law, prior to recordation. With respect to mortgages or trust deeds which do not incorporate the certificate of indebtedness, a notation shall be made on the note or certificate that the tax has been paid and that the proper stamps have been affixed to the mortgage or trust deed. (emphasis added between *)

* * *

201.08 Tax on promissory or nonnegotiable notes, written obligations to pay money, or assignments of wages or other compensation; exception.--

(1) *On promissory notes, nonnegotiable notes, written obligations to pay money, or assignments of salaries, wages, or other compensation made, executed, delivered, sold, transferred, or assigned in the state and for each renewal of the same, the tax shall be 15 cents on each \$100 or fraction thereof of the indebtedness or obligation evidenced thereby.* On mortgages, trust deeds, security agreements, or other evidences of indebtedness filed or recorded in this state, and for each renewal of the same, the tax shall be 15 cents on each \$100 or fraction thereof of the indebtedness or obligation evidenced thereby. Mortgages, including, but not limited to, mortgages executed without the state and recorded in the state, which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate. When there is both a mortgage, trust deed, or security agreement and a note, certificate of indebtedness, or obligation, the tax shall be paid on the mortgage, trust deed, or security agreement at the time of recordation. A notation shall be made on

the note, certificate of indebtedness, or obligation that the tax has been paid and the proper stamps affixed to the mortgage, trust deed, or security agreement. If the mortgage, trust deed, security agreement, or other evidence of indebtedness subject to the tax levied by this section secures future advances, as provided in s. 697.04, the tax shall be paid at the time of recordation on the initial debt or obligation secured, excluding future advances; at the time and so often as any future advance is made, the tax shall be paid on all sums then advanced regardless of where such advance is made.

Notwithstanding the aforestated general rule, any increase in the amount of original indebtedness caused by interest accruing under an adjustable rate note or mortgage having an initial interest rate adjustment interval of not less than 6 months shall be taxable as a future advance only to the extent such increase is a computable sum certain when the document is executed. Failure to pay the tax shall not affect the lien for any such future advance given by s. 697.04, but any person who fails or refuses to pay such tax due by him is guilty of a misdemeanor of the first degree. The mortgage, trust deed, or other instrument shall not be enforceable in any court of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid. (emphasis added between *)

9. The Petitioners signed the promissory notes in Florida. That act alone is sufficient to subject the document to taxation, according to the plain language of section 201.01 F.S.

10. The term "sign" does not appear in section 201.08(1) F.S. Nor does it need to appear in that subsection as the general liability is already created in section 201.01 F.S. Without a comma after "...or other compensation...", the terms "made, executed, delivered, sold, transferred, or assigned in the state..." do not limit or define "promissory notes", but rather only limit or define "assignments of salaries, wages, or other compensation". This interpretation is supported by the statutory rule of construction known as the "doctrine of the last antecedent": "...relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." *McKensie Tank Lines, Inc. v. McCauley* 418 So 2nd 1177, 1178-9 (Fla. 1st DCA 1982).

11. The debate, however, is not terminated that simply. Punctuation is considered to be the most fallible and least reliable indication of the legislative intent in interpreting a statute. 1/ Wagner V. Botts 88 So 2nd 611 (Fla. 1956)

12. As grounds for its recommendation of denial of the refund, the Department of Revenue relied on its Rule 12B-4.053(3) F.A.C. which provides:

(3) Note Executed in Florida: A note mailed to a bank in another state and payable there was taxable where note was made in Florida, loan was used in Florida, and it was in all essential factors a Florida Transaction. (Plymouth Citrus Growers Ass'n V. Lee (1946) 157 Fla. 893, 27 So.2d 415)

13. Petitioners argue that since the loan was not used in Florida and the only activity in Florida was the signing of the note, the transaction was not "in all essential factors a Florida transaction".

14. In the Plymouth Citrus Growers Assn. case cited in the rule, the note was signed in Florida and delivered in due course to a bank in Columbia, South Carolina. The note was accepted by and was payable at the South Carolina bank. Unlike the instant case, however, the loan was used in Florida. The Court in Plymouth, supra, rejected the taxpayer's contention that since every act essential to its completion was not performed in Florida, the note was not taxable.

15. While all acts essential to the completion of a transaction need not be performed in Florida, at least one such act must occur in Florida in order to subject the transaction to taxation in Florida.

16. In State ex rel Peninsular Telephone Company v. Gay 90 So.2nd 132 (Fla 1956) the Supreme Court required the refund of documentary stamp taxes paid by a Florida corporation on its bonds authorized, sold, delivered and proceeds paid in the State of New York. The court held that no tax was due when the record failed to reveal "that any single solitary aspect of the transaction essential to the authorization, execution, sale and delivery of the bonds took place within the limits of the State of Florida...", State V. Gay, supra, P. 136.

17. If one but not all essential acts must take place in Florida, are some acts more essential than others? In D. I. Rainey v. Department of Revenue, 354 So 2nd 387 (Fla. 1st DCA 1977) documentary stamp taxes were held not due when the project to be refinanced was in Florida and the note was signed in Florida by all but one of the jointly and severably liable obligors and the promise to pay was recorded in Florida. The last remaining obligor delivered, and signed the note in Thomasville, Georgia.

18. A search of the cases construing Sections 201.01 and 201.08 F.S. fails to reveal a single authority clearly on point where the only act in Florida is the signature of the obligor. The parties either embrace or distinguish the cases cited here, and others. Both parties rely for support on Plymouth, supra and Rule 12B-4.053(3) F.A.C.

19. In all of the cases cited upholding a tax, the note was signed in Florida. In each of the cases cited rejecting the tax liability, the note was

signed outside the State of Florida. From a reading of the statutes themselves, and from the case law the essential element of the transaction is the signing of the note.

20. Petitioners argue that this conclusion would render taxable a note signed in Florida, but never delivered. At the final hearing, counsel made an eloquent live demonstration of writing and signing a \$1,000,000.00 note and placing it in his a pocket, with the query, "So is that taxable?"

The argument is specious. Without delivery, the note itself is inconsequential. Delivery, however, does not need to take place in Florida. We know this from Plymouth. Petitioners' notes were delivered in due course.

Petitioners' notes are subject to the documentary stamp taxes already paid.

Based on the foregoing, it is hereby,

RECOMMENDED:

That a Final Order be entered denying the applications for refund sought by One Dezavala Center, Ltd. and Sugar Creek Business Center Phase I, Ltd.

DONE and RECOMMENDED this 5th day of May, 1987 in Tallahassee, Florida.

MARY CLARK, Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 1987.

ENDNOTE

1/ Presumably, because more legislators are lawyers rather than grammarians.

APPENDIX

DOAH Case Nos. 86-0057 and 86-0058

The following constitute my rulings on the proposed findings of fact submitted by Petitioner:

Sugar Creek

1. Adopted in Paragraph No. 2(a).
2. Adopted in Paragraph No. 2(c).
- 3-4. Adopted in Paragraph No. 3.
5. Adopted in Paragraph No. 2(d).
6. Adopted in Paragraph No. 2(e).
7. Adopted in Paragraph No. 2(f).

One Dezavala Center, Inc.

1. Adopted in paragraph No. 4(a).
2. Adopted in paragraph No. 4(c).
- 3-4. Adopted in substance in paragraph No. 5.
5. Adopted in paragraph No. 4(d).
6. Adopted in paragraph No. 4(e).
7. Adopted in paragraph No. 4(f).

The following constitute my rulings on the proposed findings of fact submitted by the Respondent.

- 1-2. Adopted in introductory section of the Recommended Order.
3. Adopted in paragraph No. 1.
4. Adopted in substance in paragraphs No. 2(e) and No. 4(c).
5. Adopted in paragraphs No. 3 and No. 5.
6. Adopted in substance in paragraph No. 4(a).
7. Adopted in paragraph No. 4(b).
8. Adopted in paragraph No. 4(c).
9. Adopted in paragraph No. 4(e).
10. Adopted in paragraph No. 2(a).
11. Adopted in paragraph No. 2(b).
12. Adopted in paragraph No. 3(c).
13. Adopted in paragraph No. 2(e).
- 14-15. Adopted in paragraphs No. 2(f) and No. 4(f).
16. Rejected as unnecessary.
17. Adopted in paragraph No. 6.
- 18-21. Rejected as cumulative and unnecessary.
22. Rejected as inconsistent with the facts established.
The documents were delivered in Texas.
- 23-24. Rejected as unnecessary.
25. Rejected as inconsistent with the facts established.
The documents were delivered in North Carolina.
- 26-34. Rejected as unnecessary.

COPIES FURNISHED:

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