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## Debtor-in-Possession Financing

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This tax bulletin addresses whether debtor-in-possession financing secured by a mortgage is exempt from mortgage recording tax.

Mortgages made pursuant to a confirmed plan under section 1129 of Chapter 11 of the Bankruptcy Code are exempt from mortgage recording tax (see Tax Regulations section 644.1(b)(3)).

In addition, section 1146(a) of the bankruptcy code provides:

The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

However, debtor-in-possession financing typically refers to financing authorized under the bankruptcy code, but not under a confirmed plan authorized by section 1129 of the code.

While debts approved under other sections are approved by the bankruptcy court (e.g., see 11 USC, sections 363, 364, and 365), they generally predate the confirmation of the plan authorized under section 1129. The Supreme Court of the United States has found that section 1146(a) affords a stamp-tax exemption only to transfers (including mortgages) made pursuant to a Chapter 11 plan that has been confirmed. Therefore, the exemption does not apply to pre-confirmation transfers.<sup>1</sup>

**Note:** A Tax Bulletin is an informational document designed to provide general guidance in simplified language on a topic of interest to taxpayers. It is accurate as of the date issued. However, taxpayers should be aware that subsequent changes in the Tax Law or its interpretation may affect the accuracy of a Tax Bulletin. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

### References and other useful information

**Tax Law:** Section 252

**Regulations:** Section 644.1(b)(3)

**US Code:** Sections 1129 and 1146(a)

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<sup>1</sup> *Florida Department of Revenue v. Piccadilly*, 128 S. Ct. 2326 (2008).