

**First American Title Insurance Company
of New York
228 East 45th Street, New York, New York 10017-3303
www.firstam.com www.titlelaw-newyork.com**

CURRENT DEVELOPMENTS

This is a special edition of the bulletin issued to clients of First American on cases, legislation and other matters of interest. Issues of “Current Developments” are available on the Internet at www.titlelaw-newyork.com. Fax recipients are requested to forward their email addresses to Michael J. Berey, Senior Underwriting Counsel for First American, at mberey@firstam.com for the issuance of future bulletins.

The Technical Services Bureau, Taxpayer Services Division, of the New York State Department of Taxation and Finance has issued its anticipated Bulletin on the application of Tax Law Section 253-b to commercial credit line mortgages. TSB-M-99(1)R, scanned for ease of email distribution, is provided below for your information.

August 30, 1999

TSB-M-99(1)R
Mortgage Recording
June 25, 1999

Application of the Mortgage Recording Tax to Commercial Credit Line Mortgages

On August 8, 1996, the mortgage recording tax was amended by Chapters 489 and 490 of the Laws of 1996. These amendments modified section 253-b of the Tax Law to extend the favorable tax treatment afforded residential credit line mortgages to all other credit line mortgages (commercial) that secure a maximum principal indebtedness of less than \$3 million, effective for commercial credit line mortgages recorded on or after November 6, 1996.

Since that time, we have received numerous questions about the mortgage recording tax as applies to the special commercial credit line mortgage provisions of section 253-b of the Tax Law. This memorandum answers those questions.

For the following questions and answers, unless otherwise stated, assume that reference to any mortgage means a credit line mortgage that creates a lien on an interest in real property that is not principally improved or to be improved by a one to six family owner-occupied residence or dwelling (commercial credit line mortgage).

Question One: A credit line mortgage securing payment of a debt of \$3 million or more, represented by a revolving credit agreement, was recorded prior to November 6, 1996. If that mortgage and the underlying credit agreement were modified and amended on or after November 6, 1996, to reduce the amount of the debt and the amount secured by the mortgage to less than \$3 million, would the mortgage, as modified and amended, receive the benefit of section 253-b?

No. The provisions of Chapter 489 and 490 of the Laws of 1996 apply to all credit line mortgages recorded on or after November 6, 1996. The statute does not provide that a modification of a previously recorded credit line mortgage would be eligible to receive the benefit of section 253-b. Therefore, the recording of an instrument evidencing a reloan or readvance made pursuant to the mortgage, as modified, would be subject to the mortgage recording tax.

Question Two: The lien of a credit line mortgage secures payment of a \$1 million revolving credit agreement, and also secures payment of a \$1.5 million obligation that is not a revolving credit agreement. Does the mortgage receive the benefit of section 253-b?

No. Tax Law section 253-b(2) defines a *credit line mortgage* as "... any mortgage or

deed of trust... which states that it secures indebtedness under a note, credit agreement or other financing agreement that reflects the fact that the parties reasonably contemplate entering into a series of advances..., and that limits the aggregate amount at any time outstanding to a maximum amount specified in such mortgage...” Since the mortgage secures two notes, only one of which contemplates a series of advances and readvances, the mortgage does not, meet the statutory definition of a credit line mortgage.

Question Three: If a debt in the form of a revolving credit agreement of \$3 million or more were partially secured by a credit line mortgage of less than \$3 million, would the mortgage receive the benefit of section 253-b?

No. The indebtedness under the note, credit agreement or other financing agreement must limit the aggregate amount at any time outstanding to a maximum amount specified in the mortgage or deed of trust.

Question Four: An unsecured revolving credit agreement (not secured by the lien of a credit line mortgage) of \$4 million is severed into two separate debts, each a revolving credit agreement of \$2. million. Each agreement is then secured by a separate credit line mortgage, executed by the same or related mortgagors, that create a lien on separate and distinct real property interests. Do each of the mortgages receive the benefit of section 253-b?

No. Regulation section 647.4 provides that, for purposes of determining whether a credit line mortgage secures a maximum principal indebtedness of less than \$3 million, two or more mortgages will be treated as a single mortgage (and the amounts of the maximum principal debts secured by the mortgages shall be aggregated), where the mortgages form part of the same or related transactions and have the same or related mortgagors.

Question Five: If an unsecured term loan of \$3 million or more, whether or not in existence prior to November 6, 1996, is modified and severed into two separate notes, the first a revolving credit agreement of less than \$3 million secured by the lien of a credit line mortgage, and the second a term loan for the balance of the debt not secured by a mortgage, would the credit line mortgage receive the benefits of section 253-b?

Yes, provided the credit line mortgage was recorded on or after November 6, 1996.

Question Six: If real property is sold subject to the lien of a credit line mortgage of less than \$3 million to a grantee unrelated to the grantor, and the proper amount of mortgage recording tax is paid on the recording of the deed, does the grantee receive the benefits of section 253-b regarding future reloans and readvances made to the new owner (grantee)?

No. The statute limits the benefits afforded by section 253-b to the “original obligor” only.

Question Seven, Part (I): On May 1, 1998, A executed a mortgage to B Bank. The mortgage was granted to secure payment of a revolving credit agreement of \$2 million. The mortgage is a lien on property X. On June 1, 2000, an additional mortgage is executed by A to B Bank to secure payment of a second revolving credit agreement of \$2.5 million. This mortgage is a lien on property Y. The additional loan transaction was not contemplated at the time of the original borrowing and is in all respects unrelated to the first loan. Do each of the mortgages receive the benefit of section 253-b?

Yes, because the transactions were separate and distinct..

Question Seven, Part (II): Would the result be different if the mortgages were spread and consolidated, cross-defaulted, or cross-collateralized?

Yes. Under any of those situations, the mortgages would be considered to be part of two related transactions, and the maximum principal indebtedness secured by the mortgages would be aggregated. Therefore, the maximum principal indebtedness exceeds \$3 million, and the mortgages would not receive the benefit of the credit line mortgage provisions.

Question Seven, Part (III): If in part (I) above, the second credit line mortgage is granted to Z Bank rather than B Bank and simultaneously Z Bank acquires the first mortgage from B Bank by assignment, would the amounts secured by the two mortgages be aggregated?

Yes. The transactions are related. Therefore, the mortgages would be treated as a single mortgage and the amounts of the maximum principal indebtedness secured by the mortgages would be aggregated regardless of whether the mortgages were spread and consolidated, cross-defaulted, or cross collateralized.

Question Eight, Part (I): ABC Corporation owns two commercial parcels of land (Parcels A and B). Parcel A is subject to the lien of a credit line mortgage which secures a revolving credit agreement in the amount of \$2 million. This mortgage was recorded on or after November 6, 1996. Parcel A will be sold. Immediately prior to the sale, the lien of the credit line mortgage will be spread to Parcel B and the lien of the mortgage will then be released from Parcel A. Does the mortgage, as spread, continue to receive the benefits of section 253-b?

Yes. It does not matter that the real property securing the mortgage is changed.

Question Eight, Part (II): If, as part of the above described transaction, the mortgage were assigned to a new mortgagee, does the mortgage continue to receive the benefits of section 253-b?

Yes. The credit line mortgage will continue to receive the benefits of section 253-b even though the mortgage is assigned to a new mortgagee. The answer is the same whether or not the new mortgagee is unrelated to the prior mortgagee.

Question Eight, Part (III): If, under the facts described in Part (1), Parcel B were owned by DEF Corporation rather than ABC Corporation and the stock of both ABC Corporation and DEF Corporation were owned by the same person, would the mortgage continue to receive the benefits of section 253-b?

No. Subdivision 1 of section 253-b provides that “[i]f the tax imposed by and pursuant to the authority of this article is paid on such maximum principal amount, no further tax shall be payable on advances or readvances by the lender pursuant to the recorded primary mortgage, provided such advances or readvances are made to the original obligor or obligors named in such recorded primary mortgage.” (Emphasis added.) The term “original obligor named in the recorded primary mortgage” means the mortgagor named in the initial credit line mortgage. The statute does not extend its benefits to a credit line mortgage which is modified by substituting one mortgagor for the original mortgagor, even in circumstances where the new mortgagor is controlled by or controls the original mortgagor or where both the original mortgagor and the new mortgagor are controlled by the same person or entity.

Question Nine, Part (I): Can a conventional mortgage (not a credit line mortgage) which is a lien on commercial property and recorded on or after November 6, 1996, be modified and amended to be a credit line mortgage and the mortgage, as modified and amended, receive the benefits of section 253-b subsequent to such modification?

No. The provisions of Chapters 489 and 490 of the Laws of 1996 are applicable to all credit line mortgages recorded on or after such date. Thus, the benefits provided by that statute were intended to be applicable only to newly created credit line mortgages recorded on or after such date. The modification and amendment of an existing recorded conventional mortgage would not be covered by the statute.

Question Nine, Part (II): Would the answer to Part (I) above be the same if the mortgage were a lien on real property principally improved or to be improved by a one to six family owner-occupied residence or dwelling, regardless of the date of recording?

Yes. The answer would be the same. A conventional mortgage secured by real property principally improved or to be improved by a one to six family owner-occupied residence or dwelling which is modified and amended to become a credit line mortgage is not entitled to receive the benefits of section 253-b.

(End)