A PRIMER ON NEW YORK'S MORTGAGE RECORDING TAX

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This article explains New York State's mortgage recording tax in a manner intended to afford any attorney handling a real estate transaction with a basic understanding of this complex subject. Mortgage tax, a tax on the "privilege" of recording a mortgage in New York, [1] is imposed under the authority of Article 11 ("Tax on Mortgages") of the State's Tax Law.

Mortgage tax rates vary depending on where the mortgage is to be recorded. They range from $.75 for each $100 of principal amount secured or major fraction thereof [2] in certain upstate counties, to $2.80 for each $100 of principal amount secured or major fraction thereof for a mortgage of $500,000 or more on commercial real property in The City of New York. [3] Accordingly, recording a mortgage in New York State can be expensive. For example, the mortgage tax payable to record a $100,000,000 mortgage on commercial real property in New York City is $2,800,000. The tax payable to record a $400,000 mortgage on a one-to-three family dwelling ranges from $3,000 and $8,200, less a small credit against part of the Additional Tax, discussed below, depending on the location of the property.

As reported in the Annual Statistical Report of New York State Tax Collections, the mortgage tax provides state and local government with a significant amount of revenue. [4]

New York City

In New York City, the applicable rate for mortgage tax varies depending on the type of real property and the amount secured. All mortgages securing less than $500,000 are taxed at the rate of $2.05 for each $100 of the principal obligation secured. A mortgage on a one-to-three family dwelling, or on an individual residential condominium unit, securing $500,000 or more is taxed at the rate of $2.175 for each $100 of the principal obligation secured. The so-called commercial rate of $2.80 for each $100 of principal secured applies when a mortgage secures $500,000 or more and is a lien on other than a 1-3 family residence or an individual residential condominium unit. A mortgage securing an obligation of $500,000 or more on more than one uncombined condominium unit is subject to the $2.80 rate.

New York State's Department of Taxation and Finance (the "Department") issued an Advisory Opinion dated July 2, 2014 [5] on the application of mortgage tax to a purchase money mortgage securing more than $500,000 encumbering three separate but adjacent units intended to be combined by the mortgagor into a single apartment. According to the Department, the applicable rate is $2.175. However, the Advisory Opinion indicates that if the units are not, in fact, later combined, further tax will be owed, computed on the spread between the rates of $2.175 and $2.80, presumably with interest and penalties applied due to the underpayment of tax.

State law authorizes New York City's local legislative body to adopt a local law imposing mortgage tax on a lien imposed on an individual cooperative apartment located within the City, but this has not been done. [6]

The principal amounts secured by mortgages on real property in New York City may be aggregated to reach $500,000 to apply the higher, commercial rate. There is a presumption that all mortgages, executed by the same or related persons and recorded against real property anywhere in the City within a twelve-month period, are part of a related transaction and, as such, they may be treated as a single mortgage for the purpose of determining the applicable rate of tax on each of the mortgages. [7]

In practice, when a mortgage of record less than one year is to be satisfied and a new mortgage is to be recorded, which is more likely with residential real property, an affidavit may be submitted with the mortgage being recorded affirming that the existing mortgage has been paid off and will be satisfied of record and requesting that aggregation not apply.

Elements of the Mortgage Tax

Mortgage tax includes a Basic Tax of $.50 for each $100 of principal obligation secured [8] [Tax Law Section 253], a Special Additional Tax of $.25 for each $100 of principal obligation secured [Tax Law Section 253-1a] [9], both of which apply in all counties, and, in a number of counties, an Additional Tax of $.25 or, in counties within the Metropolitan Commuter Transportation District, $.30 for each $100 of principal obligation secured [Tax Law Section 253-2a]. [10] Local mortgage taxes are also charged on recording a mortg age in New York City and in other counties. In Westchester and Rockland counties, for example, adding the local tax, the rate is $1.30 for each $100 of principal obligation secured, except for mortgages on real property in the City of Yonkers where the total rate of tax is $1.80.

Tax Law Section 253-1a requires that the Special Additional Tax be paid by the lender when the mortgaged property is principally improved, or is to be improved, by a 1-6 family dwelling with separate cooking facilities, or when the mortgagor is a not-for-profit organization no part of the net earnings of which ensure to the benefit of any officer, director or member and which is exempt from taxation under IRC Section 501. [11] This can be an issue at closing if the lender is unwilling to pay the tax.

There is case law holding that the Special Additional Tax need not be paid by a federally chartered savings association, including federal savings banks [12], and the Department continues to take the position, notwithstanding a decision in 2010 by the Supreme Court, New York County, [13] that the Special Additional Tax is not payable on a mortgage given to a federal credit union on real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each having its own separate cooking facilities. [14] The Special Additional Tax is not payable at all on a mortgage on such a property made to a New York State chartered credit union organized under the Banking Law. [15]

Under Tax Law Section 253, when the mortgagee is a natural person, a mortgage on real property with six or less residential dwelling units each with separate cooking facilities, is exempt from payment of the Special Additional Tax. [16]

An affidavit must be submitted to the recording officer claiming an exemption.

For the Additional Tax, if a mortgage recites that the real property is improved or will be improved by a one-or-two family house or a residential dwelling unit, there is an exemption of up to $25 or $30, depending on the applicable rate of Additional Tax. [17] Since July 1, 2017, the exemption for the Additional Tax is not available when an Industrial Development Authority is a part to a mortgage and the property is in a county in which the Additional Tax applies. [18]

Multiple Counties

If a mortgage encumbers real property in multiple counties, under Tax Law Section 260 mortgage tax is apportioned based on the relative tax assessed values of the mortgaged properties. In practice, tax computed using Department Form MT-15 [19] is paid to the recording officer of the county in which the mortgage is first recorded, accompanied by Form MT-15. A certified copy of the mortgage as first recorded will then be recorded in the other counties affected by the mortgage, accompanied by an explanatory affidavit. The Department will divide the tax paid among the jurisdictions involved.

Alternatively, the mortgage can be recorded in, and the full tax paid without allocation, to the recording officer of a county with the highest tax rate amongst the counties in which the mortgage is to be recorded, the other mortgages being recorded elsewhere as additional collateral security for the same indebtedness, accompanied by an affidavit claiming exemption on the grounds that the tax on the full amount of the mortgage was already paid. Since tax is being paid at the highest applicable rate on the entire obligation secured, this may cause a greater amount of tax to be paid than if there was an allocation using Form MT-15.

Also, under Tax Law Section 260, when a mortgage encumbers real property inside and outside of New York State, the tax is computed on the portion of the principal indebtedness which is computed by taking the net value of the mortgaged property within New York State over the net value of all of the property mortgaged. The mortgage can only be enforced in New York to the extent of the tax paid.

Underpayment of Tax

A mortgage cannot be received in evidence in any action or proceeding, and cannot be released, discharged, assigned or modified or record if the proper amount of tax is not paid. [20] If it is determined that mortgage tax is due, the Department may direct the county recording office to record a notice of mortgage tax deficiency, often referred to as an "estoppel". Until the proper amount of tax, and any interest and penalties charged, is paid, and any such notice is released of record, the recording office will not record any instrument

relating to the mortgage. (At a point in time, recording offices would not record any instrument relating to the real property against which such a notice was recorded).

A mortgage cannot be foreclosed unless the proper amount of mortgage tax is paid. Even if the mortgage has not been recorded, case law, applying Tax Law Section 258, holds that the note cannot otherwise be enforced until mortgage tax has been paid. [21] Tax Law Section 258 states that "[n]o judgment or final order in any action or proceeding shall be made for the foreclosure or the enforcement of any mortgage which is subject to any tax imposed by this article or of any debt or obligation secured by any such mortgage, unless the taxes imposed by this article shall have been paid…." [22]

Interest and penalties are significant. For mortgages on real property located with New York City, for example, the interest rate for late payments and assessments of tax is set quarterly. [23] Penalties are charged in addition to interest. The maximum penalty is 25% of the tax due. Under Tax Law Section 258, the penalty can be waived by the Department if it finds that the mortgage was recorded in good faith. [24]

Often asked is whether a mortgage loses priority over other later arising liens when a deficiency in tax is paid. A case on point is First Niagara Bank decided by the Supreme Court, Albany County, in 2008. [25] According to the Court, "…any failure…to pay mortgage tax …would not affect the validity of the mortgage. It simply would mean that [the lender] would have to satisfy its tax obligation prior to obtaining a final judgment enforcing its mortgage interest". Therefore, pay the tax, and the mortgage's priority should not be impaired.

Note that mortgage tax is due on recording and is only payable though the recording process.

Title Insurance

Why is this important to a title insurer? One of the Covered Risks under the ALTA Loan Policy is loss or damage sustained by the insured mortgagee if the lien of its mortgage is held to be unenforceable. If the insured mortgage cannot be foreclosed because the proper amount of mortgage tax has not been paid, this Covered Risk will apply.

To further confirm the coverage of the Loan policy, lenders typically obtain a $25 Title Insurance Rate Service Association ("TIRSA") Mortgage Tax Endorsement, stating the coverage even more clearly. The endorsement "insures the owner of the indebtedness secured by the insured mortgage(s) against loss or damage which may be sustained by reason that all mortgage recording taxes required to be paid on the insured mortgage(s) have not been paid." [26]

It is suggested that counsel provide draft mortgage documents to the assigned underwriter at the title company or its agent in advance of closing to enable review for compliance with mortgage tax requirements. Obtaining an enforceability opinion from counsel on a transaction should not be considered a substitute for title counsel review.

Mortgages

What is subject to tax as a "mortgage?" A mortgage, of course, but a mortgage, for purposes of the tax, includes other types of instruments, such as an agreement reflecting a re-advance which is intended to be secured, an executory contract for the sale of real property under which the purchaser is in possession prior to delivery of the deed, and a so-called "negative pledge." [27]

A negative pledge is the borrower's agreement not to transfer, sell, convey or encumber real property while a loan is outstanding. It was used in the 1980s by some lenders in lieu of recording a mortgage since a negative pledge was not then considered taxable. That is no longer the case. A negative pledge is taxable as a mortgage. [28]

An Assignment of Rents recorded in New York City and an Assignment of Leases and Rents, generally, are taxable as mortgages when they are not recorded as additional collateral security for an obligation secured by a mortgage on which mortgage tax has been paid.

Dormant Mortgages

A "dormant" mortgage can be taxable as a new mortgage. According to Real Property Law Section 275, as amended in 1989, a mortgage no longer securing a bona fide obligation is "dormant." [29] If dormant, mortgage tax is due on the further transaction of the mortgage. To confirm that a mortgage being assigned continues to secure a bona fide obligation, Section 275 requires that the assignment of a mortgage include, or be accompanied by, a statement signed under oath, known as a Section 275 affidavit, affirming that the assignee is not acting as a nominee of the mortgagor and that the mortgage continues to secure a bona fide obligation. Alternatively, if applicable, the assignment can state that "the assignment is not subject to the requirements of RPL Section 275 because it is an assignment within the secondary mortgage market". [30]

Mortgages on commercial property are often assigned between lenders in a seemingly never-ending chain of assignments to obtain the benefit of mortgage tax already paid on still outstanding principal indebtedness. However, Real Property Law Section 275 was amended in 1989 to end a practice of assigning an otherwise paid-off, and therefore dormant, mortgage to an entity related to the borrower, the mortgage typically later being assigned to a bona fide, unrelated lender to secure a new loan. [31] Credit for mortgage tax paid on the so-called "warehoused" mortgage would be claimed. [32]

The question often arises as to whether a mortgage is dormant when it is assigned to an entity related to the borrower if the obligation secured continues to be serviced as a real debt. There is no definitive guidance on this issue. However, the Department stated in a 1989 Memorandum that "[n]ew section 275 therefore includes within the substantive prohibition on…an assignment to any person or entity acting at the direction or control or influence, of the mortgagor where the mortgage so assigned no longer serves as security for a bona fide debt." [33]

When is a mortgage clearly dormant? The Department has taken the position, in a Tax Bulletin issued in January of 2014, [34] that a mortgage no longer secures a bona fide debt and is dormant when the mortgagor delivers a deed-in-lieu of foreclosure to the holder of the mortgage, its nominee or designee, even when the deed contains non-merger language and the mortgagee gives a covenant not to sue instead of discharging the debt.

According to the 2014 Tax Bulletin, after delivery of a deed-in-lieu the mortgage can only be foreclosed. Recording an instrument purporting to assign, modify or consolidate a mortgage after a deed-in-lieu requires payment of mortgage tax. It is uncertain whether tax will be due on the entire face amount of the mortgage or on its outstanding balance when tax is due. The Bulletin only states that tax will be due on the "full amount of the debt secured." [35]

Exemptions

No mortgage tax is payable when an exemption from tax is provided by law. An affidavit executed by the exempt entity claiming the exemption must be submitted with the mortgage to the recording office. Based on a 1956 Opinion of New York State's Attorney General, it is technically required that the exempt entity present the document for recording, and the mortgage should recite that it will do so. [36]

Mortgages made under a Chapter XI Plan of Reorganization are exempt under Bankruptcy Code Section 1146(c). [37] A mortgage made under a different Chapter of the Code, and a mortgage securing debtor-in-possession financing are not exempt. [38] To obtain the exemption for a mortgage made pursuant to a confirmed Chapter XI Plan, the mortg age must be made by the Debtor, not by an entity related to the Debtor or by a purchaser under a Plan of Reorganization, [39] even if the Plan and Bankruptcy Court Order recite that the mortgage to be made by other than the Debtor is exempt from mortgage tax. Advice has been received that the Department will not allow an exemption in such a case.

When either the mortgagor or the mortgagee is the United States, or the State of New York, or any of their agencies, instrumentalities or political subdivisions, the mortgage is exempt from mortgage tax. Mortgages made by Industrial Development Agencies are exempt, provided, according to conversations with the Department, the loan proceeds are to be used solely within the county in which the IDA is formed.

Mortgages made by certain entities formed under the Private Housing Finance Law, such as limited dividend housing companies, housing development fund companies, and limited profit housing companies and redevelopment companies are exempt.

Reverse mortgages complying with the requirements of Real Property Law Sections 280 or 280-a are exempt. The affidavit claiming exemption for a reverse mortgage must set forth the ages of the mortgagors, the type of real property being mortgaged, and affirm that the mortgage complies with the requirements of either Section 280 or 280-a. [40]

Mortgages made by Voluntary Not-for-Profit Hospitals are exempt, [41] although the City of New York requires the submission of certain proofs in addition to the affidavit claiming exemption. A Interdepartmental Memorandum of the New York City Register dated October 21, 1980, requires that the affidavit requesting exemption under Tax Law Section 253-3, signed by an officer of the hospital, be accompanied by a copy of the hospital's certificate of incorporation, its operating certificate from the Department of Health, and a certificate from the Public Health Counsel. It is believed that, the latter requirement no longer applies.

While not an exemption, there is a credit afforded under the Section 339-ee(2) of Real Property Law Article 9-B (the "Condominium Act") for an individual unit mortgage on the first sale of a condominium unit for part of the tax that was paid on recording a construction mortgage or another form of blanket mortgage on the property. To obtain the credit, the proceeds of the mortgage must have been used for either construction of the condominium, for capital expenses for the development or operation of the condominium, or for the purchase of the land or buildings, provided that the purchase occurred no more than two years prior to the recording of the Declaration. In addition, to obtain the credit, a unit, any unit, must be sold within two years following recording of the construction or blanket mortgage. The affidavit to claim the credit, which does not include a credit for the Special Additional Tax, is complex. Title underwriters can assist in preparing the form. In practice, the benefit of the credit has often gone to the condominium's Sponsor.

It is often asked whether an exempt mortgage, fully funded, if assigned and modified, remains exempt. The applicable aphorism is "once exempt, always exempt." [42]

It is also often asked whether a mortgage to an exempt entity can be assigned and funded by a non-exempt entity. Advisory Opinions issued by the Department indicate that the exempt mortgage can be funded by the assignee so long as the mortgage states that the exempt entity will record the mortgage. [43]

There is an exception, however, to the general rule that a mortgage "once exempt [is] always exempt." The exception may apply when later advances are made on a mortgage executed pursuant to a confirmed Chapter XI plan of reorganization. According to a 2011 Tax Bulletin issued by the Department, "…advances through the date of the final decree closing the bankruptcy case are presumed to be [necessary for the completion of the Plan and] exempt. [44] Unless it can be shown that [advances made after the final decree] are necessary for the completion of the confirmed plan of bankruptcy, [those advances] are subject to the mortgage recording tax…." [45]

It has been suggested that a mortgage securing advances to be made after the case is closed, to be executed pursuant to a confirmed Plan, be brought to the Department's attention before the mortgage is executed to consider whether the later advances will be exempt.

Supplemental Mortgages

Under Tax Law Section 255, the recording of a "supplemental instrument or mortgage" is exempt from mortgage tax, except to the extent that an obligation is also being secured on which tax has not been paid. A so-called "Section 255 Affidavit," executed by "the mortgagor, the mortgagee, or any other person who has knowledge of the facts," is submitted with the Supplemental Instrument to claim exemption. The affidavit will recite, among other things, that there is no further indebtedness or obligation being secured by the supplemental mortgage. [46]

A document is supplemental if it is being recorded to correct or perfect a recorded mortgage. A mortgage severance agreement and its resulting substitute mortgages, if the original mortgage provides for severance, are also supplemental. (If text allowing for a mortgage to be severed is not set forth in the mortgage, the mortgage must be modified prior to severance to allow it to be severed into substitute mortgages.) Other common supplemental instruments include a modification agreement and a consolidation agreement, to the extent of outstanding principal secured on which tax was already paid, and a mortgage or an assignment of leases and rents given as additional collateral security for an obligation secured by a mortgage on which tax was paid. Types of instruments considered supplemental are listed at 20 NYCRR 645.1.

If supplemental, and there is no new indebtedness being secured, mortgage tax will only be due if the rate of tax in the jurisdiction in which the additional collateral security instrument is being recorded is greater than the tax rate in the county in which the primary mortgage, the mortgage for which the new instrument is being given as additional security, was recorded. Tax is payable based on the spread between the rates if the rate of tax is greater in the location where the collateral security instrument is being recorded. [47]

Spreader Agreements

An agreement spreading the lien of a mortgage to other real property when both parcels are outside of New York City is treated as a supplemental instrument provided that the rate of tax in the jurisdiction to which the mortgage is to be spread is no greater that the rate of tax that applied where the primary mortgage was recorded. If the mortgage tax rate in the jurisdiction to which the mortgage is being spread is higher, payment of the difference in tax must be submitted with a Section 255 Affidavit to record the spreader agreement.

However, Tax Law Section 255 was amended in 2004 to limit the spreading of mortgages involving real property located in New York City. The change was effective as to mortgages recorded in New York City on and after January 17, 2005. Tax Law Section 255 allows the Department to "disregard such transfers" if a spreading agreement has "been undertaken for the purpose of avoiding or evading [the payment of mortgage tax] rather than solely for an independent business or financial purpose."

A Technical Memorandum ("Memorandum") was issued by the Department in November 2004 to explain how Tax Law Section 255 is to be applied to agreements spreading the lien

of mortgages which encumber real property in New York City. As noted in the Memorandum, [48] the Section 255 Affidavit submitted to the recording office with the agreement spreading the lien of the mortgage should state, "the independent business or financial purpose for undertaking the spreading agreement" and that "the ortgagor/obligor named under the primary recorded mortgage will not be released from the evidence of the indebtedness (e.g. the note) secured by the mortgage…." [49]

Unfortunately, a number of issues were not clearly addressed. For example, is there a period of title, a safe harbor, after which the original obligor may be released? Can a spread mortgage be released in any instance from the real property originally encumbered? If not, is there a safe harbor following which the release of that property will be allowed? Is mortgage tax, when imposed on the recording of an agreement spreading the lien of the mortgage, computed on the amount of the outstanding principal balance of the mortgage when the spreader agreement is executed or on its original face amount? What constitutes an "independent business or financial purpose"? Is a mortgage spread from real property outside of New York City to real property within New York City, and a mortgage spread from real property within New York City to real property outside New York City, subject to these spreader rules?

A mortgage can be spread to an interest in real property owned by a natural person or an entity "related" (defined in Tax Law Section 253-a-2(b), as modified in Tax Law Section 255-1(a)(ii)) to the original mortgagor, which includes an entity which has beneficial interests of 25% or more in common with the mortgagor. [50] However, as stated in the Memorandum, there is a rebuttable presumption that "the transfer of a property to a related party…is for a tax avoidance purpose if the transfer occurs within 12 months prior to the recording of the mortgage spreader." In such a case, if the presumption is not satisfactorily "rebutted by clear and convincing evidence that the transfer of the property to the related party is not for a tax avoidance or evasion purpose", mortgage tax will be due on the recording of the spreader agreement.
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A further statement in writing from the Department setting forth the rules for spreader agreements with examples would be helpful.

Taxable Amount

Under Tax Law Section 253, mortgage recording tax is computed based on the "principal debt or obligation which is, or under any contingency, may be secured at the date of execution thereof or at any time thereafter by a mortgage on real property." [51] New York's mortgage tax would not have been paid on the out-of-state recording. If a mortgage secures an indeterminate amount, mortgage tax is computed on the fair market value of the mortgaged real property when the mortgage is recorded. [52] Such a mortgage is referred to as an "Indefinite" or a "Dragnet" mortgage. Reciting that the mortgage secures other debt which may later be owed by the mortgagor to the mortgagee renders a mortgage indefinite, even if the amount to be secured at any one time will be no greater than the amount of the mortgage. An example of such problematic text can be as simple as "this Mortgage is intended to secure any more debts now and/or in the future owed by the Mortgagor to the Mortgagee".

A mortgage may secure other amounts relating to the ongoing administration of the loan and the maintenance of the property. To prevent any such recitals, or a future advance clause, from rendering a mortgage indefinite, at least at the time of recording, and to set forth the amount on which tax will be computed on recording, it is standard practice for a mortgage to include a so-called maximum amount clause. [53] An abbreviated form of such clause is the following: "Notwithstanding anything contained herein to the contrary the maximum amount or principal indebtedness secured by this Mortgage at the time of execution hereof or which under any contingency may become secured by this Mortgage at any time hereafter is $[the amount on which mortgage tax is being paid]". [54]

State regulations, and forms of maximum amount clauses approved by the Department, indicate that certain types of expenses incurred by the lender can be secured without rendering a mortgage indefinite. These are often referred to as "incidental amounts". [55] Payments by a mortgagee which can be secured without additional tax include its payment of real estate taxes and insurance premiums on the mortgaged property subsequent to an event of default and expenses incurred by a mortgagee in litigation to uphold the lien of the mortgage. [56] Unpaid interest, so long as not added to or otherwise deemed principal indebtedness can also be secured. Expenses incurred by the mortgagee for capital improvements at the mortgaged property are not incidental amounts. [57]

Unpaid interest added to principal, also referred to as negative amortization or capitalized interest, is subject to tax. If the amount of unpaid interest which may be added to principal indebtedness is not expressly capped the mortgage will be rendered indefinite. Mortgage tax is therefore typically also paid on an additional, and expressly capped, amount of negatively amortized interest. The charging of interest on unpaid mortgage loan interest may be treated the same as adding interest to principal.

Certain other rights of a mortgage lender can be secured without rendering a mortgage indefinite, such as shared appreciation and other equity kickers, and breakage costs under a SWAP Agreement, provided these rights are secured as Additional Interest, and not as additional principal indebtedness.

Swap Agreements

Under a January 2012 Tax Bulletin issued by the Department, breakage costs under a so-called SWAP Agreement when secured are considered incidental, provided that they are not secured as principal and certain conditions are met. [58] First, breakage costs must be secured as Additional Interest. Second, the SWAP agreement must relate only to the related mortgage loan. Third, the notional amount of principal under the SWAP Agreement must be no greater than the principal amount secured by the mortgage. (As discussed with the Department, the Tax Bulletin states in error "the same as" the principal amount secured.)

The Tax Bulletin also states that the SWAP provider must be the same as the mortgagee. From conversations with the Department, the SWAP provider can be an affiliate of the mortgagee.

Partial Security

An issue that frequently arises is the application of mortgage tax to a mortgage which partially secures a single obligation larger than the amount secured, whether it is a term loan being partially secured or a mortgage securing a revolving line of credit that does not receive the benefits of Tax Law Section 253-b, which will be discussed below.

On which dollars is mortgage tax paid? To enforce a mortgage as to all amounts intended to be secured, mortgage tax is required to be paid on all such amounts. In 1993, the State resolved this issue for a mortgage partially securing a single obligation in its Advisory Opinion regarding the application of BT Commercial Corporation. [59]

The Opinion sets forth what is required when securing part of a single, larger obligation. First, the mortgage must contain a maximum amount clause, setting forth the maximum amount to be secured at any one time, on which amount mortgage tax is paid at recording. Second, the mortgage must identify the part of the loan which is being secured. The mortgage needs to recite, for example, that it secures the first dollars advanced, or a portion thereof, and the last dollars repaid. This is set forth in what is known as a "last dollar" clause.

The "last dollar" clause effectively renders a mortgage securing part of a revolving line of credit security for a term loan. The amounts secured are generally identified as the first amounts advanced or a portion thereof and the last repaid; the credit line is not paid down below the cap until the loan is to be repaid in full. [60]

This issue does not exist when the protection of Tax Law Section 253-b applies.

Credit Line Mortgages

Under Tax Law Section 253-b ("Credit line mortgages"), all advances and re-advances under a revolving credit mortgage are secured and the mortgage is enforceable as to those advances and re-advances, up to the stated maximum amount secured at any one time, without payment of further mortgage tax, when the mortgaged real property is principally improved or to be improved by a 1-6 family owner-occupied residence regardless of the mortgage amount, or the mortgage, often referred to known as a commercial credit line mortgage, "secures less than $3,000,000", regardless of the type of real property mortgaged. [61]

For a credit line mortgage on an owner-occupied 1-6 family residence, the original mortgagor must be a natural person. If the real property is transferred to a person or persons not related to the original obligor by blood, marriage or adoption, or to a trust in which fifty percent or more of the beneficial interests are not held by the transferor, mortgage tax will be payable as if there is a new mortgage. That is the reason that New York State's transfer tax return, the TP-584, includes a Credit Line Mortgage Certificate asking if the real

property is being transferred subject to a credit line mortgage and, if so, whether it is being transferred to a related party.

Unfortunately, in going beyond the four corners of Section 253-b, the Department, particularly in a Memorandum issued in 1999, has limited application of the statute. [62] For example, the mortgagor and the obligor must be the same to obtain the benefits of Section 253-b. If the mortgage is given by a guarantor, Section 253-b does not apply, and the mortgage must contain a last dollar clause, as previously discussed.

To receive the benefits of Section 253-b a mortgage must have originally been a credit line mortgage. A term loan cannot be converted to a credit line to obtain the benefits of the statute. For Section 253-b to be applied to a commercial credit line mortgage, the aggregate amount outstanding at any one time under the credit line must be less than $3,000,000, regardless of whether the mortgage sets forth that such amount is the maximum amount secured at any one time.

In addition, if there is another mortgage on the same real property the principal amounts of the mortgages may be aggregated if the loans are not "separate and distinct." If the aggregated amount outstanding at any one time may be $3,000,000 or more, the credit line mortgage, even if its maximum amount clause is less than $3,000,000, will not receive the commercial credit line benefits of Section 253-b. What is separate and distinct?

There is little guidance. What if there is also a term loan secured by a separate mortgage? Are the credit line and term loan mortgages separate and distinct if there are separate loan agreements? They probably are, but each case will turn on its unique facts.

What is clear, however, from the 1999 Memorandum, and from discussions with the Department, is that cross-defaulted or cross-collateralized mortgages are not "separate and distinct". Section 253-b does not apply when a credit line mortgage otherwise entitled to the benefits of Section 253-b and another mortgage are cross-defaulted or cross-collateralized.

If a mortgage securing a revolving line of credit does not receive the benefits of Section 253-b, to limit the amount of tax payable to the amount set forth in the maximum amount clause, the mortgage must include a "last dollar" clause, identifying the loan proceeds secured, such as those amounts being the first dollars advanced or a portion thereof, and stating that the last amounts to be repaid are those secured by the mortgage. [63]

Guarantee Mortgages

There was a time when a mortgage securing a guarantee of a revolving line of credit could recite that the amount secured was the guaranteed amount, a fixed sum. Mortgage tax would be charged only on that amount, not on re-advances under the underlying loan. [64] That has not, however, been the case for a number of years. A mortgage securing a guarantee is subject to mortgage tax in the same manner as if the mortgage was made by the obligor under the credit line. The benefits of Tax Law Section 253-b are not available to a mortgage

securing a guarantee of a revolving line of credit since the obligor and the mortgagor are not the same. [65]

Accordingly, for a mortgage securing a guarantee of a revolving line of credit, mortgage tax is payable on re-advances when recording a supplemental instrument evidencing a re-advance, unless the mortgage contains maximum amount secured and last dollar clauses. Further, the requirements applicable to a mortgage partially securing a single, larger obligation apply.

Partially Securing Multiple Obligations

In a Tax Bulletin dated the January 7, 2013, [66] the Department addressed "Mortgages Partially Securing Multiple Debts or Obligations." Before this Bulletin was issued, there was no written guidance on how to apply mortgage tax to a mortgage securing multiple obligations the sum of which is greater than the mortgage's maximum amount clause. A mortgage may secure, for example, a combination of term and revolving credit loans, an agreement to reimburse lenders issuing letters of credit, and guarantees of loans made to an entity other than the mortgagor. As noted above, mortgage tax is required to be paid on each obligation secured by a mortgage for all of the obligations secured to be enforced.

The Tax Bulletin states that, yes, a mortgage partially securing multiple obligations must contain a maximum amount clause to set the amount of tax payable on recording. However, the maximum amount secured, or the "cap", is to be allocated amongst the obligations. If the allocation is not set forth in the mortgage, the cap will be prorated.

For example, a mortgage has a maximum amount clause of $10,000,000; mortgage tax is paid at recording on $10,000,000. The mortgage states that it secures a term loan of $20,000,000 and a revolving line of credit of $20,000,000. If the $10,000,000 cap is not allocated in the mortgage, the mortgage is deemed to secure, for application of mortgage tax, $5,000,000 of the term loan and $5,000,000 of the revolving loan and is enforceable on recording only to that extent. Since the mortgage secures each loan for $5,000,000, each of the term loan and the revolving loan secures and is enforceable without the payment of additional mortgage tax up to $5,000,000.

According to the Tax Bulletin, when there is a pay down of a partially secured obligation, mortgage tax can be paid on an additional portion of the obligation to secure and render enforceable all or part of that further amount, up to the amount of the allocated cap. Tax is payable on recording a supplemental instrument.

In the above example, $10,000,000 of the $20,000,000 term loan is advanced at closing, and then $3,000,000 of the term loan is repaid. Assuming the mortgage states that the amounts secured are the first sums advanced or a portion thereof, the $3,000,000 repayment is applied against the amount on which mortgage tax was paid. The amount under the allocated cap of $5,000,000 is therefore reduced by $3,000,000 to $2,000,000. After the $3,000,000 re-payment there is still $7,000,000 of the term loan outstanding since $10,000,000 was advanced. Mortgage tax can be paid on an additional $3,000,000 of that $7,000,000 since there is

$3,000,000 outstanding of the amount on which tax was paid under the $5,000,000 allocated cap. On payment of mortgage tax on the additional $3,000,000, the mortgage again secures, for application of the mortgage tax, and is enforceable as to the term obligation, to the extent of $5,000,000, the amount of the cap allocated to the term loan.

As to the $20,000,000 revolving obligation, again, the allocated cap is $5,000,000. $10,000,000 of the revolving amount is advanced at closing and then $3,000,000 is repaid. Assuming the mortgage states that the amounts secured are the first sums advanced or a portion thereof, the $3,000,000 repayment is applied against the amount on which mortgage tax was paid. The amount under the allocated cap of $5,000,000 is therefore reduced by $3,000,000 to $2,000,000. After the $3,000,000 re-payment there is still $7,000,000 of the revolving loan outstanding since $10,000,000 was advanced. Tax can be paid on an additional $3,000,000 of that $7,000,000 since there is still $2,000,000 outstanding of the amount on which tax was paid under the $5,000,000 allocated cap. On payment of mortgage tax on the additional $3,000,000, the mortgage again secures, for application of the mortgage tax, and is enforceable as to the revolving obligation, to the extent of $5,000,000, the amount of the cap allocated to the revolving loan.

As a further example, when the allocation of the cap takes a bit more math, a mortgage purports to secure a term loan of $6,000,000 and a revolving loan as to which the maximum amount advanced at one any time is $10,000,000. The maximum amount at any one time secured by the mortgage, the "Cap", is $6,000,000. Two obligations are therefore partially secured by the mortgage. Assuming that the Mortgage does not expressly allocate the Cap between the obligations, the Cap is allocated by applying the formula Loan/Total Debt X Cap. As to the Term Loan, the Mortgage is deemed to secure, for application of the mortgage tax, and is enforceable, to the extent of $2,250,000, which results from application of the formula to allocate the cap as follows: $6,000,000 Term Loan/Total Debt of $16,000,000 ($6,000,000 Term Loan and the $10,000,000 maximum amount outstanding at any one time under the revolver) X $6,000,000 Cap. As to the Revolving Line of Credit, the Mortgage is deemed to secure, for application of the mortgage tax, and is enforceable, to the extent of $3,750,000, which results from application of the formula to allocate the cap as follows: $10,000,000 maximum amount outstanding at any time under the revolving line of credit/Total Debt of $16,000,000 X $6,000,000 Cap.

Applying the Bulletin to the revolving line of credit, assume that $4,000,000 of the revolving loan is advanced at closing and then $1,400,000 is repaid. Assuming further that the mortgage states that the amount secured is the first sums advanced or a portion thereof, the $1,400,000 payment is applied against the amount on which mortgage tax was paid. The cap of $3,750,000 is deemed reduced by $1,400,000 to $2,350,000. Assume that another $5,000,000 is re-advanced under the revolver such that there is $7,600,000 outstanding under the revolving obligation. Of that amount, an additional $1,400,000, up to the $3,750,000 allocated cap, can be secured on the payment of additional mortgage tax. On paying mortgage tax on that additional $1,400,000, tax will have again been paid up to the cap of $3,750,000. The mortgage as to the revolving obligation again secures, for application of the tax, and is enforceable as to the revolver, to the extent of $3,750,000, the amount of the cap allocated to the revolving loan.

To summarize, when a mortgage partially secures more than one obligation, that is, when mortgage tax is not paid on the aggregate amount of all advances intended to be secured or when there is not a separate maximum amount clause and "last dollar" provision as to each obligation, the Tax Bulletin requires that the mortgage (i) contain a maximum amount secured provision on which mortgage tax will be paid on recording; (ii) identify the portion of each obligation that may be enforced under the maximum amount provision or there will be a deemed allocation, and (iii) include a statement that the mortgage secures an identifiable portion of the loan, such as the first sums advanced or a portion thereof. The Tax Bulletin a states that the mortgage must include "last dollar" text, which, again, is to the effect that the last and final payments will be applied to reduce and satisfy the secured portion of the mortgage debt. Applying the "last dollar" concept to a mortgage partially securing multiple obligations may be an anomaly, but the Department appears to have issued the Tax Bulletin relying, in part, on its BT Commercial Advisory Opinion.

The rules set forth in the Tax Bulletin may apply when one of multiple obligations intended to be secured is already secured by a separate mortgage on which mortgage tax has been paid. To avoid this issue, a mortgage securing a primary obligation, on which tax is due, should not also collaterally secure such a different debt as additional collateral security. A separate mortgage should be executed to secure only the collateral obligation; as a supplemental instrument it will be exempt from tax as having been given as additional collateral security for an obligation on which mortgage tax was already paid.

While the Tax Bulletin may not be applied to mortgages partially securing multiple obligations which were recorded before the Bulletin was issued, it is believed that the Bulletin will be applied to such mortgages when they are later modified so as to add to or otherwise change the obligations secured.

Other Issues

There are other mortgage recording tax related issues beyond the scope of this article, such as the application of mortgage tax to a wrap-around mortgage, [67] to the refinancing of a wrap-around mortgage, [68] and to the defeasance of a secured obligation when a note and mortgage are being assigned. [69] An experienced New York title underwriter should be consulted when such a transaction is being structured.

Resources

Information on mortgage recording tax can be found in State regulations at 20 NYCRR Part 640. In addition, the Department, which administers the tax, has posted to its web site (currently at https://www.tax.ny.gov/pubs_and_bulls/default.htm) a number of Advisory Opinions, Notices, Tax Bulletins and Technical Memoranda, some of which have been cited in this article. Most of the Tax Bulletins on mortgage recording tax, and on the state's transfer tax, have been issued in response to questions posed by the New York State Land Title Association.

1 Matter of S.S. Silberblatt, Inc. v. Tax Comm'n, 5 N.Y.2d 635, 159 N.E.2d 195, 186 N.Y.S.2d 646 (1959).
2 Major fraction means that there is rounding. If the mortgage amount is $1,050, tax is payable on $1,000; if the mortgage amount is $1,050.01, tax is payable on $1,100.
3 Mortgage tax rates are set forth on Form MT-15 ("Mortgage Recording Tax Return") posted by the Department at http://www.tax.ny.gov/pdf/current_forms/mortgage/mt15.pdf.
4 Annual Statistical Report of New York State Tax Collections, Office of Tax Policy Analysis, NYS Department of Taxation and Finance http://www.tax.ny.gov/research/stats/statistics/new_reports.htm.
5 N.Y. Dep't Tax & Fin. Adv. Op., TSB-A-14 (1) R (July 2, 2014), 2014 WL 3676456. Endnotes with TSB and TB refer to guidance issued by the Department, posted at http://www.tax.ny.gov/pubs_and_bulls/.
6 N.Y. TAX LAW § 253-a (1) (McKinney 2014).
7 20 N.Y. COMP. RULES & REGS. § 642.4(c)(3) (1994); See also, Michael J. Berey, Tax Aggregation Rules: Traps for the Unwary, N.Y. L.J., Sept. 30, 2002 at 5.
8 N.Y. TAX LAW § 253(1) (McKinney 2014).
9 § 253(1-a)(a).
10 § 253(2)(a).
11 § 253(1-a)(b).
12 Dime Savings Bank v. State, 174 A.D.2d 173, 579 N.Y.S.2d 679 (2nd Dept 1992).
13 Hudson Valley Fed. Credit Union v. Dep't of Taxation and Fin., 28 Misc.3d 1001, 906 N.Y.S.2d 680 (Sup. Ct. NY County 2010).
14 N.Y. Tax. App. Trib. Technical Memorandum, TSB-M-12 (1) R (December 6, 2012) WL 6218357.
15 N.Y. Dep't Tax & Fin. Memorandum, TSB-M-10 (1) R (March 30, 2010) WL 1280302.
16 20 N.Y. COMP. RULES & REGS. § 642.3 (2014).
17 20 N.Y. COMP. RULES & REGS. § 642.2 (2014); See Tax Bulletin MR-5 (TB-MR-5), July 5, 2012.
18. Chapter 394 of the Laws of 2016. See https://www.tax.ny.gov/pdf/memos/mortgage/m16_1r.pdf (listing the counties as to which the additional tax applies) and https://www.tax.ny.gov/pdf/memos/mortgage/m17_1r.pdf
19 http://www.tax.ny.gov/pdf/current_forms/mortgage/mt15.pdf.
20 N.Y. TAX LAW § 258 (McKinney 2014).
21 Commonwealth v. Lituchy, 555 N.Y.S.2d 786 (1st Dept., 1990).
22 N.Y. TAX LAW § 258 (McKinney 2014).
23 http://www.tax.ny.gov/pay/all/int_curr.htm.
24 N.Y. TAX LAW § 258 (McKinney 2014).
25 First Niagara Bank v. Aspen Hills II, LLC, 862 NYS 2d 814, 19 Misc. 3d 1121(A) (Sup. Ct. 2008).
26 http://www.tirsa.org/TIRSA_Rate_Manual_070111_copyrighted.pdf.
27 N.Y. TAX LAW § 250; 20 N.Y. COMP. RULES & REGS. § 641.6.
28 TSB-M-95(1)-R (August 9, 1995).
29 TSB-M-89 (6.1)R (August 3, 1989).

30 N.Y. REAL PROP. LAW § 275 (McKinney 2014).
31 TSB-M-89 (6.1)R (August 3, 1989).
32 Id.
33 TSB-M-89 (6.1)R (August 3, 1989).
34 MR-575 (TB-MR-575), January 6, 2014.
35 Id.
36 1956 Att. Gen (Inf. Opns.) 27. See also TSB-A-95(15)-R , December 18, 1995.
37 20 N.Y. COMP. RULES & REGS. § 644.1 (2011).
38 TB-MR-165, November 18, 2011.
39 In Re Amsterdam Development Associates, 103 B.R. 454 (Bankr. S.D.N.Y., 1989).
40 N.Y. TAX LAW §§ 252, 252-a; 20 N.Y. COMP. RULES & REGS. § 644.1 (2011).
41 N.Y. TAX LAW § 253.3.
42 TSB-A-95(6)-R, July 6, 1995.
43 TSB-A-97(4)R, March 28, 1997; TSB-A-95(16)R, December 22, 1995.
44 TB-MR-15, November 18, 2011.
45 Id.
46 20 N.Y. COMP. RULES & REGS. § 645.3 (2014).
47 20 N.Y. COMP. RULES & REGS. § 645.2 (2014).
48 TSB-M-04(9)R, November 22, 2004; the Technical Memorandum also dealt with "Amendments to Section 250 of the Tax Law related to wraparound mortgages." See also Berey, "New Law Requires Added Payment for Spreader Agreements", NYLJ March 9, 2005. Based on Tax Bulletin Question and Answer "3" as to spreading agreements, and information then received from the Department, the article states that a spreader "may be" subject to tax "if the original mortgagor is released from the obligation or its property is released from the lien of the mortgage at any time after the spreader is recorded."
49 TSB-M-04(9) R (November 22, 2004).
50 See N.Y. TAX LAW § 253-a(2)(b); N.Y. TAX LAW § 255(1)(a)(ii). Example (e) in the Answer to Question "9" in TSB-M-04(9)R references "a 50% test of ownership" which merits an explanation since Section 255(ii) sets forth a 25% common interest standard to be applied in determining if there is a related party.
51 N.Y. TAX LAW § 253 (McKinney 2010).
52 See N.Y. TAX LAW § 256 (McKinney); See also State Bank of Albany v. Fioravanti, 51 N.Y.2d 638, 650 n.1, 417 N.E.2d 60, 66 n.1, 435 N.Y.S.2d 947, 953 n.1 (1980).
53 See Nat'l Bank of Stamford v. Recreational Acreage Exch. Ltd., 223 A.D.2d 153, 155, 644 N.Y.S.2d 600, 601-02 (3d Dep't 1996).
54 20 N.Y. Comp. Rules & Regs. § 648.2(a)(2)(ii).
55 See 20 N.Y. Comp. Rules & Regs. § 648.2(a)(2).
56 See New York ex rel. Title Guarantee & Trust Co. v. Grifenhagen, 156 A.D. 854, 856, 141 N.Y.S. 1044, 1045 (1st Dep't 1913), aff'd 209 N.Y. 569 (1913).
57 Rockefeller Center v. State Tax Commission, 8 A.D.2d 657, 657, 185 N.Y.S.2d 82, 84 (3d Dep't 1959). The mortgage provided that the mortgagee could install a separate refrigeration plant if the mortgagor failed to do so; the cost incurred was to be secured by the mortgage.
58 See TB-MR-30 (June 5, 2012).
59 TSB-A-93(15) R (September 3, 1993).
60 See Michael J. Berey, The Last Dollar Endorsement and Capping the New York Mortgage, N.Y. L.J., Oct. 11, 1995, http://www.firstamny.com/doc/614.pdf. The discussion

of the Last Dollar endorsement to a 1992 ALTA Loan Policy does not apply to a 2006 ALTA Loan Policy.
61 N.Y. TAX LAW § 253-b.
62 TSB-M-99(1) R (June 25, 1999).
63 See Michael J. Berey, Commercial Credit Line Mortgages and Mortgage Recording Tax, N.Y. L.J., July 27, 2011, http://www.newyorklawjournal.com/id=1202508332073/Commercial-Credit-Line-Mortgages-and-Mortgage-Recording-Tax?slreturn=20150022202442; Michael J. Berey, Department of Taxation and Finance Rulings on Commercial Credit Line Mortgages, N.Y. R.P.L.J., Fall 1999, http://www.firstamny.com/doc/605.pdf; and Michael J. Berey, Credit Line Mortgages in New York, N.Y. L.J., Feb. 17, 1999, http://www.firstamny.com/doc/604.pdf.
64 TSB-A-95(13) R (October 3, 1995).
65 TB-MR-570 (January 6, 2014).
66 TB-MR-570 (January 6, 2014); see also Michael J. Berey, New York's Mortgage Tax - Partially Securing Multiple Obligations, N.Y. R.P.L.J. Spring/Summer 2013, available at LEXIS, 41 NYRPLJ 7.
67 First Fiscal Fund Corp. v. State Tax Commission, 49 A.D.2d 408, 375 N.Y.S.2d 433 (3rd Dep't., 1975), aff'd 40 N.Y.2d 940, 390 N.Y.S.2d 412, 358 N.E.2d 1037, (1976).
68 TSB-M-04(9) R (November 22, 2004).
69 TSB-A-00(1) R (February 25, 2000).

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