NEW YORK'S MORTGAGE TAX
PARTIALLY SECURING MULTIPLE OBLIGATIONS

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New York State's Department of Taxation and Finance (the "Department") has issued a Bulletin on applying the State's mortgage recording tax to a mortgage partially securing multiple obligations, [FN1] A commercial mortgage may secure term loans, revolving credit loans, agreements to reimburse lenders issuing letters of credit, and guarantees of loans made to someone other than the mortgagor.

Mortgage recording tax is payable in New York on the amount of principal indebtedness which is, or under any contingency may be, secured on the execution of a mortgage or at any time thereafter, unless a mortgage is exempt from imposition of the tax. The applicable mortgage tax rate, as much as $2.80 for each $100.00 of principal indebtedness in The City of New York, is the rate in effect in the county [FN2] in which the mortgage is to be recorded. If less than the proper amount of mortgage recording tax due is paid, the mortgage and the note it secures, even if the mortgage is not recorded, cannot be enforced. [FN3] Mortgage tax is payable only through the recording process.

In 1993, the Department issued an Advisory Opinion on the imposition of mortgage recording tax on a mortgage securing a portion of a single, larger obligation. [FN4] In such a case, mortgage recording tax can be limited by stating the maximum amount secured, or "cap", [FN5] by providing that the mortgage partially secures a large obligation, and by adding a so-called "last dollar" clause, stating that the secured amount is the last dollars of the loan to be repaid. [FN6] If the loan is revolving credit, the last dollar provision will also provide that only the amount above the cap will revolve, in effect rendering the secured portion of the loan a term obligation. [FN7] The Department has informally advised that it interprets the 1993 Advisory Opinion, setting forth mortgage text that the "Secured Amount represents only a portion of the first sums advanced..", as requiring that such a mortgage also identify the first sums advanced, or a portion thereof, as the amounts to be secured. The partial securing of multiple obligations by a single mortgage has not previously been addressed.

When a mortgage secures more than one obligation, and the stated maximum amount to be secured on which mortgage recording tax is paid is less than the sum of the obligations or, alternatively, the mortgage does not contain a distinct maximum amount clause and separate "last dollar" text for each obligation, mortgage tax will be payable on the stated maximum amount secured when the mortgage is recorded. However, under the Bulletin, the maximum amount secured, absent an express allocation of the cap amongst the obligations partially secured, is to be deemed allocated amongst the various obligations.

Further, if an obligation, which is one of multiple obligations partially secured by a mortgage, is paid down below its allocated portion of the cap, additional mortgage recording tax can be paid to enable the mortgage to be enforced as to an additional portion of that obligation up to the amount of the allocated cap.

As stated in the Bulletin:

"Unless the mortgage provides otherwise, when different notes or bonds are secured by the same mortgage, the holders of the various notes or bonds share proportionately in the proceeds of the mortgage security in any foreclosure action. Thus, when a mortgage given as security for multiple debts or obligations contains a maximum-amount-secured provision, the mortgage must identify the fraction of the cap that applies to each debt. Otherwise, the cap will be prorated based on the balance of each debt over the total balance of all debts at the time the mortgage is executed."

"This approach also ensures that the proper mortgage recording taxes related to each secured debt are paid when the mortgage is recorded, and that the mortgage is enforceable against each debt. It is also necessary to determine the portion of the cap that applies to each debt in order to determine if one or more of the secured debts is paid down below the secured amount, and a supplemental instrument is recorded reflecting further advances subject to mortgage recording tax."

The following are drawn from examples in the Tax Bulletin.

ABC Bank and XYZ Bank each makes a separate $10,000,000 term loan to the mortgagor. A mortgage, under which the lenders are co-mortgagees, is recorded with a maximum amount clause of $10,000,000 on which amount mortgage tax is paid. The mortgage recites that it secures the first sums advanced and the last and final amounts repaid. The mortgage does not identify the amount of the cap that applies to each loan. Accordingly, the mortgage secures and is enforceable only as to $5,000,000 of the loan made by ABC Bank and $5,000,000 of the loan made by XYZ Bank.

A mortgagor obtains a term loan of $6,000,000 and a revolving line of credit for $4,000,000 with the same lender, both loans being secured by a single mortgage. The maximum amount secured, on which amount mortgage tax is paid, is $6,000,000. The mortgage recites that it secures the first sums advanced and the last and final amounts repaid. The mortgage does not identify the amount of the cap that applies to each loan. The maximum amount secured is therefore allocated. $3,600,000 of the cap applies to the term loan ($6,000,000 cap X $6,000,000 term loan/$10,000,000 total loans), and $2,400,000 applies to the revolving line of credit ($6,000,000 cap X $4,000,000 credit line/$10,000,000 total loans). The mortgage is enforceable as to the term loan up to $3,600,000, the amount of the $6,000,000 cap allocated to that obligation. The mortgage is enforceable as to the revolving credit loan up to $2,400,000, the amount of the $6,000,000 cap allocated to that obligation.

If the outstanding balance of the term loan falls below $3,600,000, to enforce the mortgage as to additional amounts advanced under the term loan, mortgage tax must be paid on the difference between the cap and the outstanding balance of the term loan. The term loan will then again be enforceable up to the amount of the cap. If, for example, the term loan is paid down to $2,000,000 and the lender has or is to advance additional amounts under the term loan which it wishes to enforce under the mortgage, mortgage tax is payable on $1,600,000 (the $3,600,000 cap less $2,000,000, the outstanding balance of the term loan), and the mortgage would again be enforceable up to $3,600,000.

A mortgage is executed to secure a guarantee of a term loan of $45,000,000 and a guarantee of the borrower's obligations under a revolving credit facility under which $15,000,000 can be outstanding at any one time. The maximum amount secured under the mortgage, on which amount mortgage tax is paid, is $50,000,000. The mortgage secures the first $50,000,000 of the guaranteed obligations advanced and the last and final amounts to be repaid. The guarantee of the term loan is secured and the mortgage is enforceable as to that obligation up to $37,500,000 ($50,000,000 cap X $45,000,000 term loan/$60,000,000 total loans). The guarantee of the revolving line of credit is secured and the mortgage is enforceable as to that obligation up to $12,500,000 ($50,000,000 cap X $15,000,000 line of credit/$60,000,000 total loans).

If the guaranteed revolving line of credit is paid down below the allocated cap of $12,500,000, to enforce the guarantee mortgage as to additional advances, further mortgage tax computed on the difference between the allocated cap and the outstanding amount of the credit line is payable. Once paid, the mortgage will again be enforceable as to advances made under the credit line up to the amount of the cap. To secure additional amounts under the mortgage as to the guaranteed term loan when a payment on the term loan is made, additional mortgage tax is payable computed on the difference between the allocated cap of $37,500,000 and the outstanding amount of the term loan. Once paid, the mortgage will again be enforceable as to the term obligation up to the amount of the cap.

Accordingly, when a mortgage partially secures more than one obligation, that is, when mortgage tax is not paid on the entire amount of all obligations intended to be secured or when there is not a separate maximum amount clause and "last dollar" provision as to each debt, the Department requires that the mortgage (a) contain a maximum amount secured provision on which mortgage tax will be paid on recording, (b) identify the portion of each obligation that may be enforced under the maximum amount provision (or there will be a deemed allocation), (c) include a statement that the mortgage secures the first sums advanced or a portion thereof, and (d) include "last dollar" text stating that the mortgage secures the last amounts to be repaid.

The Bulletin cannot address all situations. When a mortgage secures both a direct obligation of the mortgagor and an obligation which is primarily secured by a separate mortgage on which mortgage tax was paid, will the Department allocate the cap between the obligation primarily secured by the new mortgage and the obligation which is collaterally secured, notwithstanding that the mortgage tax was previously paid on the collateral obligation? Absent formal guidance on this issue, it will be prudent to separately secure the collateral obligation by a different mortgage executed for that purpose, claiming in a Tax Law Section 255 affidavit, that the collateral mortgage is exempt from mortgage tax as a "supplemental" instrument.

The Bulletin needs to be reviewed when a mortgage will be executed to partially secure multiple obligations. An experienced title insurance underwriter will be able to assist in its application.

Endnotes:

1. N.Y. Dep't Tax & Fin. Taxpayer Guidance Div. Tax Bull. MR-580 (TB-MR-580) (January 7, 2013), available at http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/mrt/multiple_obligations.htm (one of the series of Bulletins being issued by the Department mortgage recording tax, the state's transfer tax and Mansion Tax); see e.g., Tax Bulletin TB-MR-30 (June 5, 2012), ("Application of the Mortgage Recording Tax to Breakage Costs Secured Under Interest Rate SWAP Agreements." The Bulletins are posted at www.tax.ny.gov/pubs_and_bulls/tg_bulletins/default.htm).

2. Except in the City of Yonkers, in which mortgage tax is imposed at the rate of $1.80 per $100, a rate greater than the rate of $1.30 per $100 otherwise imposed In Westchester County.

3. Commonwealth Land Title Ins. Co. v. Lituchy, 161 A.D.2d 517, 518, 555 NYS 2d 786 (1st Department, 1990)

4. BT Commercial Corp., N.Y. Dep't Tax & Fin. Tech. Servs Bur. Adv. Op., TSB-A-93(15)R (September 3, 1993), available at http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a93_15r.pdf

5. 20 N.Y. Comp. Codes Rules & Regs. §648.2(a)(2)(1994).

6. See Michael J. Berey, "The Last Dollar Endorsement and Capping the New York Mortgage", N.Y.L.J., October 11, 2005.

7. See Tax Law §253-b (McKinney 2013)(exempting certain revolving credit mortgages from mortgage tax on re-advances); see also Michael J. Berey, Berey, "Commercial Credit Line Mortgages and Mortgage Recording Tax", N.Y.L.J. July 27, 2011, at 4; Michael J. Berey, "Credit Line Mortgages in New York", N.Y.L.J. February 17, 1999.

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