

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LONG ISLAND LIGHTING COMPANY	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 809930
of Mortgage Recording Tax under Article 11 of	:	
the Tax Law.	:	

Petitioner Long Island Lighting Company, 175 East Old Country Road, Hicksville, New York 11801, filed an exception to the determination of the Administrative Law Judge issued on June 9, 1994. Petitioner appeared by Herbert M. Leiman and Stephen W. McCaffrey, Esqs. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply which was received on October 3, 1994 and began the six-month period for the the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether a mortgage offered for recording on October 26, 1989 was exempt from mortgage recording tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The parties, by their respective representatives, executed a Stipulation of Facts. The stipulation is reproduced here in its entirety as Findings of Fact "1" through "25" with minor

editing. For clarification, the footnotes and portions of certain documents have been added to the stipulated facts.

Petitioner, Long Island Lighting Company ("LILCO"), is a corporation incorporated under the laws of the State of New York and having its principal place of business at 175 East Old Country Road, Hicksville, New York 11801.

On December 31, 1985, LILCO entered into certain agreements, as described below, with Bankers Trust Company ("Bankers Trust"), Citibank, N.A. ("Citibank"), the New York State Energy Research & Development Authority ("NYSERDA") and The Connecticut National Bank (the "Trustee") in connection with the issuance of the 1985 Series A Adjustable Rate Pollution Control Revenue Bonds in the principal amount of \$100,000,000.00 and the 1985 Series B Adjustable Rate Pollution Control Revenue Bonds in the principal amount of \$50,000,000.00.

On September 22, 1975, LILCO entered into an agreement with Niagara Mohawk Power Corporation ("NMPC") to fund its 18% share of all costs required to construct the Nine Mile Point Nuclear Power Station, Unit 2 in Oswego, New York.

On August 22, 1984, LILCO and Citibank executed a mortgage in the amount of \$1,295,000.00. This instrument was recorded in the Office of the County Clerk of Nassau County on August 30, 1984 in Liber 10929 of Mortgages, Page 1 (the "Old Third Mortgage").

On October 30, 1985 and later amended on December 4, 1985 and June 25, 1986, the Public Service Commission of the State of New York (the "PSC") issued an order authorizing the initial issuance of the debt contemplated by the issuance of the 1985 Series A and 1985 Series B Adjustable Rate Pollution Control Revenue Bonds.

On December 31, 1985, LILCO and Bankers Trust entered into an agreement, pursuant to which Bankers Trust provided, in favor of the Trustee, its Irrevocable Letter of Credit No. A-97817-S in the amount of \$108,875,000.00. This letter of credit expired on March 16, 1989.

On December 31, 1985, LILCO and Citibank entered into an agreement, pursuant to which Citibank provided, in favor of the Trustee, its Irrevocable Letter of Credit No. NABG-E20337H in the amount of \$54,437,500.00. This letter of credit expired on March 16, 1989.

On December 31, 1985, Guaranty Agreements each dated December 1, 1985 and later amended as of June 15, 1987, July 15, 1988, February 1, 1989 and August 1, 1989 were entered into between NMPC and Bankers Trust and NMPC and Citibank (collectively referred to as the "Guaranty Agreements").

On December 31, 1985, LILCO and NMPC entered into an agreement which set forth the company's obligations to NMPC in exchange for execution of the Guaranty Agreements (the "LILCO/NMPC Agreement"). Pursuant to this agreement, the company executed a promissory note to NMPC in the amount of \$165,000,000.00 (the "Note"), as evidence of the company's obligation to NMPC.

On March 27, 1986, LILCO and NMPC executed a mortgage in the amount of \$85,000,000.00 to partially secure the Note. This instrument was recorded in the Office of the County Clerk of Nassau County on March 31, 1986 in Liber 11461 of Mortgages, Page 441 (the "Old Fourth Mortgage").

The Old Fourth Mortgage contained provisions which stated:

"WHEREAS, in consideration of the execution and delivery by NMPC of the Guaranty Agreements, the Company has agreed to secure hereunder its obligations to NMPC as provided in the LILCO/NMPC Agreement up to an aggregate total amount, whether for principal, interest, fees or otherwise, of \$85,000,000 (eighty-five million dollars) (such obligations in such aggregate amount being the "NMPC Reimbursement Obligations");

"NOW, THEREFORE, THIS MORTGAGE WITNESSETH, that to secure the payment of and the performance by the Company of the NMPC Reimbursement Obligations and the performance of the covenants herein contained and in consideration of the premises and of the covenants herein contained and of the sum of \$1 paid to the Company by NMPC at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, the Company by these presents does . . . mortgage . . . unto NMPC the following property"

On March 31, 1986, LILCO paid the full amount of the mortgage tax, as calculated on New York State Form MT-15 NYC, to the Clerk of Nassau County in the amount of \$928,776.00 for the recording of the Old Fourth Mortgage.

On April 22, 1986, LILCO, Citibank, as mortgage agent, and NMPC entered into an Agreement of Spreader, Consolidation and Modification. This instrument was recorded in the Office of the County Clerk of Nassau County on April 22, 1986 in Liber 11487 of Mortgages, Page 149 (the "Spreader").¹

On June 30, 1986, NMPC, Bankers Trust and Citibank executed an Assignment of Mortgage, Security Interest and Right to Proceeds. This instrument was recorded in the Office of the County Clerk of Nassau County on August 11, 1987 in Liber 9834 of Deeds, Page 851 (the "1986 Assignment").²

On February 3, 1989, LILCO negotiated an extension of the original letters of credit until March 1991.

On February 3, 1989, LILCO and NMPC executed an agreement extending NMPC's guaranties (the "Consent and Agreement").

On May 31, 1989, LILCO filed a petition dated May 30, 1989 under N.Y. Pub. Serv. Law § 69 seeking authority to replace the existing letters of credit with substitute letters of credit.

In a letter dated August 11, 1989, the Secretary of the PSC informed LILCO that PSC approval was not required for this transaction.

As part of the negotiations for the replacement of Letter of Credit bank, Citibank required LILCO (i) to deliver an \$85,000,000.00 mortgage which was pari passu to the Third Mortgage, (ii) to have NMPC assign the Note to Citibank, and (iii) to have mortgage title insurance issued on behalf of Citibank.

On October 26, 1989, LILCO and Citibank entered into two separate Amended and Restated Reimbursement Agreements each dated as of October 13, 1989 which provided for

¹This agreement, among other things, consolidated the Old Third Mortgage with the Old Fourth Mortgage.

²By this document, NMPC assigned its right, title and interest in (1) the Old Fourth Mortgage, (2) the Consolidation Agreement, (3) following the consolidation date, the Third Mortgage (as defined in the Consolidation Agreement), (4) the Collateral Agreement (as defined in the Consolidation Agreement) and (5) the NMPC Reimbursement Obligations (as defined the Fourth Mortgage).

letters of credit which were intended to replace the original Citibank and Bankers Trust letters of credit.

On October 26, 1989, the Note was modified by LILCO and Citibank and then executed as the Amended and Restated Promissory Note in the amount of \$165,000,000.00.

On October 26, 1989, LILCO and Citibank executed a mortgage dated as of October 13, 1989 in the amount of \$85,000,000.00. This instrument was recorded in the Office of the County Clerk of Nassau County on October 26, 1989 in Liber 13253 of Mortgages, Page 1 (the "Fourth Mortgage").

Among the paragraphs included in the Fourth Mortgage were the following:

"WHEREAS, to induce the Bank [Citibank] to provide the Letters of Credit and in consideration of the execution and delivery by the Bank of the Letters of Credit, the Company [LILCO] has agreed to secure hereunder its obligations to the Bank first as provided in the \$54 Million Reimbursement Agreement and then as provided in the \$108 Million Reimbursement Agreement, up to an aggregate total amount, whether for principal, interest, fees or otherwise, of \$85,000,000 (such obligations in such order, and in the aggregate amount of \$85,000,000, whether for principal, interest, fees or otherwise, being the "Bank Reimbursement Obligations");

"WHEREAS, it is the intent of the parties hereto not to cancel or extinguish the BT [Bankers Trust] Letter of Credit Obligations, the Citibank Letter of Credit Obligations or the Company's Bond Obligations, but to continue and confirm them as modified by the terms of the Reimbursement Agreements;

"NOW, THEREFORE, THIS MORTGAGE WITNESSETH, that to secure the payment of and the performance by the Company of the Bank Reimbursement Obligations, and as a condition precedent to the obligation of the Bank to issue the Letters of Credit, and in consideration of the premises and of the covenants herein contained and of the sum of \$1 paid to the Company by the Bank at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, the Company by these presents does . . . mortgage . . . , unto the Bank, the following property"

On October 26, 1989, the company, Citibank, as Mortgage Agent, and Citibank, as Letter of Credit bank, executed an Intercreditor Agreement dated as of October 13, 1989, which evidenced the Letter of Credit banks' pari passu position with the Third Mortgage banks.

The Intercreditor Agreement contained a paragraph which stated:

"WHEREAS, the parties have been advised by the Company that it is the intention of the Company to continue and confirm, by the execution and delivery of

the Termination Agreement, the Surrender Agreement and the Fourth Mortgage . . . , the security, which has remained unchanged since the issuance of the Bonds . . . previously provided to the Letter of Credit Banks"

On October 26, 1989, an Assignment and Transfer of Mortgage, Interest, Security Interest and Right to Proceeds dated as of October 13, 1989 from Bankers Trust and Citibank to NMPC was executed. This instrument was recorded in the Office of the County Clerk of Nassau County on October 26, 1989 in Liber 13253 of Mortgages, Page 204 (the "1989 Assignment").

The Assignment and Transfer of Mortgage Interest, Security Interest and Right to Proceeds stated, in pertinent part:

"NOW THEREFORE, in consideration of \$10 and other good and valuable consideration, the adequacy of which is hereby acknowledged, the Assignors [Bankers Trust and Citibank] hereby assign, transfer and set over unto the Assignee [NMPC] all right, title and interest in (i) the Fourth Mortgage, (ii) the Consolidation Agreement, (iii) the Third Mortgage (as defined in the Consolidation Agreement), (iv) the Collateral Agreement (as defined in the Consolidation Agreement) and (v) the NMPC Reimbursement Obligations (as defined in the Fourth Mortgage and Consolidation Agreement) that was originally assigned by the Assignee to the Assignors pursuant to the Assignment Agreement; provided that nothing contained herein shall be deemed to affect any rights of assignors to any of the foregoing under the Amended and Restated Restructuring Credit Agreement dated as of June 27, 1989 between LILCO, the banks party thereto and Citibank, The Chase Manhattan Bank, N.A. and Chemical Bank as Co-Agents for such banks.

"This Assignment and Transfer does not alter in any manner any other relationships which exist between Assignors, Assignee, LILCO or any other party."

On October 26, 1989, NMPC and LILCO entered into a Surrender of Mortgage Interest, Security Interest and Right to Proceeds dated as of October 13, 1989. This instrument was recorded in the Office of the County Clerk of Nassau County on October 26, 1989 in Liber 13253 of Mortgages, Page 232 (the "Surrender").

The Surrender of Mortgage Interest, Security Interest and Right to Proceeds from NMPC to LILCO provided, in part:

"WHEREAS, Bankers Trust and Citibank have executed and delivered releases which release NMPC from its obligations as guarantor under the Guaranties; and

"WHEREAS, pursuant to an Assignment and Transfer of Mortgage Interest, Security Interest and Right to Proceeds dated the date hereof which Bankers Trust, Citibank and NMPC have executed, delivered and caused to be recorded, Bankers

Trust and Citibank assigned, transferred and set over unto NMPC all of their collective rights, title and interest in (i) the Fourth Mortgage, (ii) the Consolidation Agreement, (iii) the Third Mortgage (as defined in the Consolidation Agreement), (iv) the Collateral Agreement (as defined in the Consolidation Agreement) and (v) the NMPC Reimbursement Obligations (as defined in the fourth Mortgage and Consolidation Agreement).

"NOW, THEREFORE, in consideration of the release by Citibank and Bankers Trust of NMPC's obligations under the Guaranties the receipt and adequacy of which is hereby acknowledged, NMPC and LILCO agree that the NMPC Reimbursement Obligations (as defined in the Fourth Mortgage and Consolidation Agreement) are irrevocably extinguished and NMPC hereby surrenders and releases all of its right, title and interest in (i) the Fourth Mortgage, (ii) the Consolidation Agreement, (iii) the Third Mortgage (as defined in the Consolidation Agreement), (iv) the Collateral Agreement (as defined in the Consolidation Agreement) and (v) the NMPC Reimbursement Obligations (as defined in the Fourth Mortgage and Consolidation Agreement), and, also in consideration of the aforesaid release of NMPC by Citibank and Bankers Trust NMPC hereby releases the Mortgage Agent (as defined in the Third Mortgage and Consolidation Agreement) from any liability under the Third Mortgage, the Fourth Mortgage and the Consolidation Agreement.

"This Surrender concerns only the relationships detailed herein and does not alter in any manner the relationships between LILCO and any other party in any of the above referenced documents or agreements or any other relationship between NMPC and LILCO."

On October 26, 1989, LILCO paid the full amount of the mortgage tax, as calculated on New York State Form MT-15 NYC to the Clerk of Nassau County in the amount of \$921,124.00. This amount was paid by a certified check which reflected the notation that this tax was paid under protest.

In addition to the facts set forth in the stipulation, the following facts are found.

In a letter dated June 5, 1991, the Division denied petitioner's application for a refund of mortgage recording tax. The denial was based on the Division's position that "in order to be exempt from mortgage recording tax, the original indebtedness must remain undischarged and the original mortgage lien must be continued in force". The Division concluded that mortgage recording tax was properly imposed because the mortgage in issue replaced and superseded the prior mortgage. This proceeding ensued.

In support of its position, petitioner submitted affidavits from a George Sideris who, from March 1984 until January 1992, served as Vice President-Finance and then as Senior Vice President-Finance of LILCO. Between 1984 and 1990, Mr. Sideris was responsible for all of LILCO's financial and securities transactions and negotiated all of the significant terms.

In his affidavit, Mr. Sideris explained that, in December 1985, NYSERDA agreed to issue on LILCO's behalf \$150,000,000.00 of tax-exempt Pollution Control Revenue Bonds ("bonds"). As a condition, NYSERDA required LILCO to obtain letters of credit support in the amount of approximately \$163,000,000.00.

Mr. Sideris negotiated with Citibank and Bankers Trust ("Banks") and they agreed to provide LILCO with two letters of credit in the amount of approximately \$163,000,000.00 with an expiration date of March 1989. Mr. Sideris explains that because of LILCO's precarious financial condition, the Banks would not issue the letters of credit without additional security. Therefore, NMPC agreed to guarantee the letters of credit through a Guaranty Agreement dated December 1, 1985, as amended as of June 15, 1987, July 15, 1988, February 1, 1989 and August 1, 1989. In exchange for its guarantee, NMPC insisted that LILCO provide a \$165,000,000.00 Promissory Note dated December 31, 1985 ("Note") and an \$85,000,000.00 Fourth Mortgage dated March 27, 1986 ("Fourth Mortgage") on LILCO properties. NMPC also insisted that LILCO grant NMPC pari passu rights in an outstanding Third Mortgage dated August 22, 1984, which was granted to Citibank and other lending banks.

Mr. Sideris continues that, in early 1989, prior to the March 16, 1989 expiration of the letters of credit, he addressed with the Banks and NMPC the need for an extension of the letters of credit and the NMPC guaranty until March 1991. During these negotiations, NMPC agreed to return a major portion of the fees already paid to it if NMPC was removed as guarantor before March 1990. Beginning in February 1989, Mr. Sideris monitored the transaction to determine when the company could remove NMPC and renegotiate the deal. In June 1989, LILCO commenced discussions with Citibank to remove NMPC.

According to Mr. Sideris, in October 1989, LILCO negotiated with Citibank for new letters of credit, at a lower cost, to support the Bonds for an additional three years and to substitute for the letters of credit that had been issued by Citibank and Bankers Trust in 1985. Under the new arrangement, Bankers Trust was to be released from its support obligation and NMPC was to be removed as guarantor. In connection with these letters of credit, Citibank

required the assignment to it of the Note, which had been initially issued to NMPC. Additionally, Citibank made it a condition of the issuance of its letter of credit that it be provided with the same security that had been provided to NMPC, namely, an \$85,000,000.00 mortgage that would be pari passu with LILCO's existing Third Mortgage. Citibank also required LILCO to obtain title insurance to insure that no liens intervened between the time that NMPC was named as mortgagee under the Fourth Mortgage and the time Citibank was named as successor under the new arrangements.

Mr. Sideris explains that, during these negotiations, he informed Citibank that LILCO wanted to minimize any costs associated with this transaction, specifically, that LILCO wanted to avoid a new mortgage tax and title insurance. LILCO's attorneys informed Mr. Sideris that by exchanging a new instrument naming Citibank as mortgagee for the existing Fourth Mortgage and by specifically providing for such exchange in the closing documentation, a new mortgage tax could be avoided. LILCO's attorneys and Citibank's attorneys worked together to structure the transaction so that no new mortgage tax would be required. At the direction of LILCO's attorneys and with Citibank's consent, the documentation was drafted to reflect LILCO's desire to avoid the mortgage tax. Mr. Sideris further explained that in order to continue the lien of the Fourth Mortgage, the instrument naming Citibank as mortgagee would be exchanged and recorded before the existing Fourth Mortgage was satisfied of record. LILCO also agreed to give Citibank a title report evidencing the continuation of the lien without any intervening liens between the new instrument and the existing Fourth Mortgage.

Mr. Sideris avers that Citibank wanted to be protected from any possible tax liability and gave the company several options to close the transaction. Because of the ongoing significant daily costs and the expenses associated with the February 1989 transaction, the company wanted to close the transaction quickly. According to Mr. Sideris, to eliminate the costs and close the transaction, LILCO consented at Citibank's insistence to the only timely option, namely, to pay the mortgage tax and thereafter to seek a refund. Upon payment of the tax, Mr. Sideris directed LILCO's counsel to file the application for a refund.

Petitioner also presented the affidavit of a Robert S. Lyle, who was a vice president in the Utility Department of Citibank during the periods relevant to the matters herein and between 1980 and 1990 was Citibank's principal representative in negotiations with LILCO on a substantial number of its finance transactions with its banks. To the extent not repetitious of that presented by Mr. Sideris, Mr. Lyle states that during the negotiations for the \$165,000,000.00 Promissory Note and the \$85,000,000.00 mortgage that would be pari passu with LILCO's existing Third Mortgage, he was keenly aware that LILCO wanted to structure the transaction in such a way that it did not require a new mortgage tax. Mr. Lyle asserts that Citibank's attorneys were directed to assist LILCO's counsel in structuring the transaction so that no additional mortgage tax would be required.

Mr. Lyle explained that to protect Citibank if the structure of this transaction resulted in an additional mortgage tax, he insisted that LILCO either obtain an advisory opinion from the Division that no additional mortgage recording tax was required or pay the mortgage recording tax and seek a refund.

Mr. Lyle maintains that because of the ongoing expense associated with the existing Citibank and Bankers Trust letters of credit and the NMPC guaranty arrangement, and the time required to get an advisory opinion, the parties agreed to close the transaction on the basis that LILCO would exchange a Fourth Mortgage dated October 13, 1989 for the existing Fourth Mortgage in order to provide Citibank with an \$85,000,000.00 mortgage lien. Through an Intercreditor Agreement dated October 13, 1989, the new instrument was given the pari passu position with the holders of the Third Mortgage formerly held by NMPC. Additionally, because the cost to LILCO of title insurance would have been prohibitive, Citibank agreed to accept a title report from LILCO evidencing the absence of any lien intervening between the replacement Fourth Mortgage naming Citibank as mortgagee and the existing Fourth Mortgage naming NMPC as mortgagee.

Mr. Lyle further submits that it was also agreed that the Fourth Mortgage dated October 13, 1989 in favor of Citibank and the Intercreditor Agreement were to be recorded

before recording a satisfaction of the existing NMPC Fourth Mortgage; that the mortgage tax would be paid; and that LILCO would file an application for a refund. Although Citibank insisted on LILCO paying a mortgage tax, Citibank indicated that it had no objection if LILCO sought the refund on the ground that no additional mortgage tax was due on the transaction as long as such determination would not affect the validity of the mortgage.

OPINION

The Administrative Law Judge determined that the recording of the Fourth Mortgage was subject to mortgage recording tax because it secured a new or further indebtedness. The Administrative Law Judge stated that:

"[i]n this case, the original debt was kept alive through an assignment. However, the original lien for the benefit of NMPC was extinguished by its surrender to LILCO and a new lien for the benefit of Citibank was imposed in its place. Under these circumstances, a mortgage securing a new lien was presented for recording and mortgage recording tax was due (Determination, conclusion of law "G").

The Administrative Law Judge rejected petitioner's contention that the timing of the transaction preserved the lien, concluding that "[t]he timing in this instance has no bearing on the point that the transactions in 1989 resulted in the release of one lien and the creation of a new lien" (Determination, conclusion of law "I").

On exception, petitioner argues that the critical question is whether "when exchanging the 1986 instrument with a 1989 instrument, a lien was imposed on LILCO's properties" (Brief in support, p. 5). We agree with petitioner's assessment of what the issue is, for under section 253 of the Tax Law tax is imposed upon the recording of a mortgage and under section 250(2) of the Tax Law a mortgage is defined to be an instrument that imposes a lien on real property. Thus, we see the issue before us as whether the lien imposed by the Old Fourth Mortgage was still in existence at the time of the recording of the Fourth Mortgage so that the latter did not impose a lien, but merely continued the existing lien.

We affirm the determination of the Administrative Law Judge.

The central conclusion of the Administrative Law Judge's determination was that the surrender by NMPC to LILCO of NMPC's interest in the mortgage caused the mortgage to be extinguished. Our research indicates that this conclusion is in accord with the applicable law.

"It is a general rule, subject to exceptions, in actions at law, that when different estates coincide and meet in the same person the lesser is merged in the greater. [citation omitted] The doctrine of merger has never been favored in equity, and there the estates will be held to be separate when justice requires it, and such was the intention of the parties" (Dunkum v. Maceck Bldg. Corp., 256 NY 275, 281; see also, Matter of 200 East 64th St. Corp. v. Manley, 37 NY2d 744, 374 NYS2d 621, modifying 44 AD2d 11, 352 NYS2d 694 based on the dissenting opinion of Presiding Justice Staley).

Thus, when NMPC surrendered its interest in the mortgage to LILCO, the owner of the fee interest in the property, the mortgage interest ceased to exist, along with the lien it secured, unless we can find that justice precludes this merger and the parties did not intend the merger.

First, we do not see that justice requires that we find that the lien did not merge in LILCO's fee interest. Petitioner has not asserted that any interest of petitioner in the property is in any way impaired by merger. The only apparent interest of petitioner at stake is the Article 11 taxes, which we find is not a sufficient basis for justice to require that the lien not merge in the fee.

With respect to the parties' intent, petitioner argues that the documents surrounding the 1989 transaction indicate that the parties intended to preserve the existing lien. Specifically, petitioner refers to the Fourth Mortgage and the Intercreditor Agreement described in findings of fact "21" and "22." Neither of these documents explicitly state that the lien will not merge in the fee. In the document that accomplished the transfer of the mortgage to LILCO, the Surrender, there is no mention of the continuation of the lien of the mortgage. An express declaration in the Surrender that the lien would not merge with the fee would have been a clear indication that this was the intent of the parties (see, Miles Home Div. of Insilco Corp. v. Green, 134 AD2d 817, 522 NYS2d 262; Matter of Woltman v. Murdock, 6 AD2d 877, 177 NYS2d 650; see also, Matter of DeLorenzo, State Tax Commn., December 8, 1976 [where the Commission held that such a statement prevented merger of the lien and precluded imposition

of the mortgage recording tax on a subsequent mortgage]). Without such a statement, we conclude that the evidence does not establish that the lien survived the surrender of the mortgage to LILCO. Therefore, we agree with the Administrative Law Judge that the Fourth Mortgage did impose a lien and was subject to the mortgage recording taxes.

The cases relied on by petitioner, Matter of Fifth Ave. & 46th St. Corp. v. Bragalini (4 AD2d 387, 165 NYS2d 312) and Matter of Bay View Towers Apts. v. State Tax Commn. (48 AD2d 86, 367 NYS2d 856, affd 40 NY2d 856, 387 NYS2d 1002), do not involve facts where the mortgage was transferred to the holder of the fee and, thus, we do not see what bearing these cases have on the issue of merger. In contrast to supporting petitioner's position, the facts in Fifth Ave. & 46th St. Corp. indicate how an existing financing structure could be altered by changing the lender and increasing the amount of the indebtedness without surrendering the original mortgage to the mortgagor.

Contrary to petitioner's arguments, we conclude that the cases relied on by the Administrative Law Judge, Matter of Citibank, N.A. v. State Tax Commn. (98 AD2d 929, 470 NYS2d 920) and Sverdlow v. Bates (283 App Div 487, 129 NYS2d 88), have more relevance to this case than the cases relied on by petitioner. In both Citibank and Sverdlow, the initial mortgage was discharged before the new mortgage was recorded and as a result the Court held in each case that the new mortgage was not a supplemental mortgage within the meaning of section 255 of the Tax Law. Petitioner asserts that these cases are not relevant because here the lien was never extinguished. Petitioner contends that the timing of the recordation of the documents avoided extinguishing the lien. We disagree.

Although the Fourth Mortgage was recorded prior to the recordation of the Surrender, it appears from the facts that the Surrender was executed prior to the time that the Fourth Mortgage was recorded. As a result, we conclude that the lien of the Old Fourth Mortgage was extinguished prior to the recordation of the Fourth Mortgage and, therefore, that this recordation was subject to tax.

We are aware that this result places great weight on the form of the transaction; however, as the Court in Sverdlow noted:

"much of the law of taxation, as of real property, depends upon form. Tax liability attaches when a transaction is entered into in a form which falls within the statute. Judge Learned Hand's comment in his dissenting opinion in Commissioner of Internal Revenue v. City Bank Farmers' Trust Co., 2 Cir., 74 F2d 242, 247, is apropos here: 'I am quite aware that this is all largely matter of words, but so is much of the law of property; and unless we treat such formal distinctions as real, that law will melt away and leave not a rack behind'" (Sverdlow v. Bates, supra, 129 NYS2d 88, 91).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Long Island Lighting Company is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Long Island Lighting Company is denied.

DATED: Troy, New York
March 23, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner