STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TEDDY DAVID AND PAMELA RUTH WEISS	:	DECISION DTA No. 810401
for Revision of a Determination or for Refund of Mortgage Recording Tax under Article 11 of the Tax Law with Reference to an Instrument Recorded on March 5, 1991.	:	

Petitioners Teddy David and Pamela Ruth Weiss, One Seaforth Lane, Lloyd Neck, New York 11743, filed an exception to the Administrative Law Judge's determination issued on July 29, 1993. Petitioners appeared by Tabner, Laudato and Ryan, Esqs. (John W. Tabner, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners did not file a reply brief. Oral argument was heard on April 21, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether, when the Division of Taxation required that petitioners pay mortgage recording tax upon recordation of a three million dollar mortgage, it subjected petitioners to an inappropriate double tax and should refund a portion of the mortgage recording tax they paid.

FINDINGS OF FACT

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

Petitioners, Teddy David and Pamela Ruth Weiss, were developers of an office building on Long Island in Huntington, Suffolk County, New York. Their acquisition of the land and the financing of the building's construction was a five-year process which began in 1986.

On April 11, 1986,[1] petitioner Teddy David Weiss purchased land in Huntington, Suffolk County, from an individual named Felix Silvestri. Mr. Weiss assumed liability for a mortgage in the amount of $600,000.00, which Mr. Silvestri had previously executed and delivered to Union Savings Bank on February 14, 1985. At the time of the recording of Mr. Silvestri's mortgage, mortgage recording tax in the sum of $6,000.00 had been paid to the Suffolk County Clerk. On April 11, 1986, Mr. Weiss also executed and delivered to Union Savings Bank a mortgage in the sum of $57,000.00, which covered the same property in Huntington, Suffolk County. At the time of the recording, mortgage recording tax of $570.00 was paid. The two mortgages were consolidated to make one single lien in the sum of $657,000.00.

Petitioners owned other properties on Long Island, at 569 Broadway and 585 Broadway in Massapequa, Nassau County, New York. It appears that Union Savings Bank required further security for its loan to petitioners, and the two mortgages were spread upon these Massapequa, Nassau County properties by a spreading agreement, which was recorded in the office of the Suffolk County Clerk on May 29, 1986 and also in the office of the Nassau County Clerk on August 22, 1986.

About six months later, petitioners obtained additional financing for their project from Union Savings Bank, and on December 8, 1986, they executed and delivered to the bank an additional mortgage in the sum of $1,250,000.00, which was recorded in the office of the Suffolk County Clerk on January 7, 1987 and in the office of the Nassau County Clerk on April 17, 1987.

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[1]Petitioners and the Division of Taxation executed a "Stipulated Statement of Facts," dated November 19, 1992 by the Division of Taxation's representative, which is incorporated into this determination. References to dates in the stipulation were qualified by the phrase "on or about." As a result, the dates used in the Findings of Fact are to be similarly qualified.

This additional mortgage covered the properties in Suffolk County and Nassau County. At the time of the recording, mortgage recording tax in the amount of $12,500.00 was paid.

Another year later, petitioners obtained further financing for their project from Union Savings Bank, and on December 11, 1987, they executed and delivered to the bank a mortgage in the amount of $500,000.00, which was recorded in the office of the Suffolk County Clerk on December 16, 1987. At the time of the recording of this mortgage, mortgage recording tax of $5,000.00 was paid. This mortgage covered the Suffolk County property only.

On December 11, 1987, a consolidation agreement (also known as an "Affidavit of No Mortgage Tax") was also entered into, which resulted in a single mortgage lien in the principal sum of $2,400,000.00.[2] The consolidation agreement, which was secured by the Suffolk County property only, was recorded in the Suffolk County Clerk's office on December 16, 1987.

At petitioners' request, Union Savings Bank agreed to release the Nassau County properties from the coverage of the lien of the mortgages as consolidated, or in the language of the bank's "Release of Part of Mortgaged Premises", the bank "agreed to give up and surrender the lands hereinafter described" to petitioners. According to the testimony of Mr. Weiss, the construction of the office building had been completed and there was enough equity in the building to cover the bank's "exposure" on the mortgage loans so that petitioners' Nassau County properties could be released. As a result, on December 11, 1987, at the closing for the mortgage of $500,000.00 and the consolidation agreement of $2,400,000.00, a release, also dated December 11, 1987, was executed by Edward J. Krug, Union Savings Bank's vice-president. An attorney, Donald Keegan, who represented the title company (Title USA Insurance Corporation of New York) at the closing, testified that a release was prepared that referenced the release of the properties in Nassau County only as the parties intended. A bill on the letterhead of the title company which

[2]The stipulation references this amount. However, the sum of the mortgages noted above ($600,000.00, $57,000.00, $1,250,000.00 and $500,000.00) is $2,407,000.00. Perhaps the difference is the result of some principal having been paid off on one of the mortgages. The record does not provide an explanation for the slight variance.

shows a fee for the recording of only one release (in Nassau County) bolsters Mr. Keegan's testimony. Furthermore, a review of petitioners' Exhibit "12", which is a photocopy of the release, as prepared for the closing on December 11, 1987, references for release in its Schedule A the Nassau County properties only. However, the release, as recorded, was not the same document as prepared for the closing on December 11, 1987 (Exhibit "12"). Instead, an additional page was added to the release, as recorded, which described the Suffolk County property, and changed the intended partial release into a total release. Mr. Keegan testified as follows with reference to how this error occurred:

> ADMINISTRATIVE LAW JUDGE: "Now, this closing occurred in December of 1987."
>
> ATTORNEY KEEGAN: "That is correct."
>
> ADMINISTRATIVE LAW JUDGE: "And in listening to your testimony it appears that the error occurred (and by error I mean the inclusion of the description of the Suffolk premises as part of the release that was actually recorded) in the title company's office by a recording clerk."
>
> ATTORNEY KEEGAN: "I have to presume that. I don't know that but I presume so."
>
> ADMINISTRATIVE LAW JUDGE: "In looking back, that's your best guess in terms of what happened?"
>
> ATTORNEY KEEGAN: "That's right."
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> ADMINISTRATIVE LAW JUDGE: "Was this a particularly busy time of year, do you recall, December 1987?"
>
> ATTORNEY KEEGAN: "Just a lot of partying going on at Christmas time, so, who knows."

However, it would seem that someone had to unstaple an executed document to add an additional page, an action that would not appear to be in the routine course for preparing documents for recording or something that a clerk would do without direction from someone with higher authority. Nonetheless, a finding may be made that the total release, as recorded,

was not what the parties intended, and, in fact, conflicts with the very title of the document, "Release of Part of Mortgaged Premises" (emphasis added).

As a result of the recording of the release in the Suffolk County Clerk's Office, the consolidated mortgages held by Union Savings Bank covered no real property.[3] Nevertheless, petitioners continued to make payments and the mortgagee, Union Savings Bank, continued to receive and apply the payments to the mortgaged indebtedness.

Petitioners did not uncover the mistake made by the title company until nearly three years later. Mr. Weiss testified that in 1991, he had the option of renewing the three-year note petitioners had with Union Savings Bank but at a much higher interest rate:

> "So, we went for a new mortgage through FGH Holding Corporation which is known as Friesch [Friesch-Groningsche Hypotheebank Realty Credit Corporation] . . . . And the mortgage was in the amount of three million dollars. And at that time . . . we found out that the property really had no mortgage on it."

Petitioners had intended to assign the existing mortgages held by Union Savings Bank, which had a total balance due of $2,263.914.92, to Friesch. An additional mortgage in the amount of $736,085.08 would be executed to Friesch and consolidated with the assigned Union Savings Bank mortgages to form a consolidated indebtedness of $3,000,000.00.

It appears that Security Title and Guaranty Company, a title company hired for the planned transaction with Friesch, uncovered the mistake. This title company, by its vice-president and counsel, Amelia J. Kelly, sought advice from the Division's Technical Services Bureau by a letter dated February 6, 1991. The question posed was:

> "[I]f the parties record a corrected release, eliminating the Suffolk parcel as a released parcel, can the mortgages be properly assigned in that they continue to secure an ongoing obligation without incurring mortgage tax liability?"

The Technical Services Bureau responded by a letter dated March 6, 1991 as follows:

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[3]The consolidation agreement was recorded two minutes after the release was recorded in the Suffolk County Clerk's Office.

> "It is our opinion that upon release of all of the premises from the liens of the mortgages, the mortgages ceased to continue as perfected prior liens. An instrument that does not impose a lien on or affect title to real property cannot be considered a mortgage within the taxing statute.
>
> "At the time the consolidation agreement was recorded the parties requested exemption from tax, relying on section 255 of the Tax Law as a basis for exemption. This exemption was erroneously granted by the recording officer of Suffolk County as the liens of the prior mortgages no longer continued to exist. The consolidation agreement was not supplemental to the prior mortgages, but rather superceeded [sic] or replaced such prior mortgages. The consolidation agreement constitutes a new mortgage creating a new lien which gives rise to a new tax.
>
> "Therefore, as the proper tax was not paid on the recording of the consolidation agreement, an assignment of these mortgages, as consolidated, may not, pursuant to section 258 of the Tax Law, be recorded."

As a result of the above opinion of the Technical Services Bureau, Friesch demanded that, for the refinancing and loan transaction to proceed, petitioners execute a new mortgage loan in the sum of $3,000,000.00 instead of the assignment of the Union Savings Bank mortgages with total principal outstanding of $2,263,914.92 and a new mortgage loan in the lesser sum of $736,085.08 (together totalling $3,000,000.00).

Petitioners went forward with the refinancing and loan transaction with Friesch and executed a mortgage in the amount of $3,000,000.00 to Friesch. They paid a mortgage recording tax of $30,000.00 under protest to record the mortgage in the Suffolk County Clerk's Office on March 5, 1991.

Mr. Weiss testified that petitioners did not attempt to rectify the error in the recorded release prior to their closing with Friesch for the following reason:

> "My back was against the wall. We had no time. It was time of the essence and quite frankly if we didn't close we could have lost the building. So, the thing was get it done, pay, and we have been waiting now for close to two years [to obtain a refund]."

Petitioners requested a refund of mortgage recording tax in the amount of $22,847.55 contending that only $7,152.45 was due on "the additional or 'fresh' money" of $715,245.06. By a letter dated December 2, 1991, petitioners' refund claim was denied for the following reason:

> "Although it may have been the intention of the parties for the new mortgagee to take by assignment the mortgages held by Union Savings Bank, this in fact did not happen. As stated in the response of the Technical Services Bureau, such assignment was prohibited by Section 258 of the Tax Law since the proper amount of tax was not paid at the time the 1987 Consolidation Agreement was recorded.
>
> "Also, it is indicated that the mortgagors complied with the new mortgagee's request that a new mortgage be executed in the full amount of $3,000,000.
>
> "Accordingly, this new mortgage is clearly not a supplemental mortgage which would fall within the ambit of Section 255 and therefore the Suffolk County Clerk properly collected the tax of $30,000 when the mortgage was recorded."

The parties stipulated that, in addition to the Division's denial of petitioners' refund claim, the Division:

> "held that upon the recording of the consolidation agreement [described in Finding of Fact '4'] the sum of $24,000.00 in mortgage tax should have been paid rather than the sum already paid, $5,000.00 and this has resulted in a demand for payment of an additional mortgage tax of $19,000.00 to be paid."

However, at the hearing, the Division's representative noted:

> "To my knowledge, there is no demand for this $19,000 amount, that is apparently being held in escrow by the title company, although in one of the exhibits that has been introduced, perhaps in two exhibits, there is a reference to the fact that the department intended to make such a demand.[4] To my knowledge no such demand has been made. If it has, I don't believe that particular demand is before this tribunal."

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[4]A review of the exhibits discloses a reference to a demand for additional mortgage tax of $19,000.00 in the stipulation of facts only as detailed above. The petition and the answer do not address as an issue this so-called "demand" by the Division of Taxation for additional mortgage tax of $19,000.00. At the hearing, petitioners' representative in his opening statement stated that "that claim [for $19,000.00] was forthcoming and we had included relief from that claim in our petition." However, as noted, the petition did not explicitly address the issue of any additional liability on the part of the taxpayers.

OPINION

Petitioners appear before the Tax Appeals Tribunal because the Administrative Law Judge who heard their case found they were not entitled to a refund for any portion of the mortgage recording tax they paid when recording the three million dollar mortgage executed to Friesch.

The Administrative Law Judge arrived at his decision by analyzing whether any portion of petitioners' mortgage to Friesch qualified as a supplemental mortgage exempt from the tax pursuant to section 255 of the Tax Law. The Administrative Law Judge determined that since petitioners, in effect, discharged the original mortgages with Union Savings Bank before recording their Friesch mortgage, they were not entitled to exempt from tax their recordation of the three million dollar Friesch mortgage (conclusions of law "C" and "D").

On exception, petitioners argue that the Division of Taxation (hereinafter the "Division") erred when it informed Security Title and Guaranty Company petitioners could not record an assignment of the consolidated mortgages. The Division counters that:

> "[o]nce the release was recorded, the mortgages sought to be consolidated did not impose a lien or affect title to the Suffolk parcel. Therefore, the 1987 consolidation agreement was a new mortgage and subject to mortgage tax" (Division's brief on exception, pp. 8-9).

The Division asserts petitioners could not later record an assignment of their consolidated mortgages since they did not pay mortgage recording tax when they recorded the subsequent consolidation agreement with Union Savings Bank.

On exception, petitioners argue that their payment of the tax on the entire three million dollars in financing constitutes an inappropriate double tax because they had already paid the tax on their prior mortgages that secured debt of $2.4 million. The Administrative Law Judge did not expressly analyze this issue. Also, the Division does not specifically respond to it on exception.

On exception, petitioners assert that their intent to qualify the subsequent mortgages as supplemental mortgages to their original Union Savings Bank mortgages exempts them from

paying the recording tax on the mortgage amounts already subjected to the tax. The Division contends that intent does not matter for mortgage recording tax purposes. Instead, it argues the fact that the liens of the prior mortgages ceased to exist when petitioners filed the release controls. Thus, the Division asserts petitioners properly paid the tax when recording their Friesch mortgage. The Administrative Law Judge stated that though a different outcome may have been possible, the way petitioners structured the transactions subjected the entire three million dollar mortgage to the tax (conclusion of law "E").

In order to analyze this controversy, we consider the mechanics of the mortgage recording tax. Tax Law § 250(2) defines a mortgage as

> "every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby . . . . A contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mortgage of real property for the purpose of this article, and shall be taxable as such upon the amount of such increase or addition."

Secondly, Tax Law §§ 253, 253(a) and 257 impose a tax on the act of recording a mortgage. Thirdly, Tax Law § 258 provides the State with enforcement powers regarding non-payment of the mortgage recording tax. In part, Tax Law § 258(1) states:

> "[n]o mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the taxes imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article [emphasis added]."

Finally, Tax Law § 255 provides taxpayers with an exemption to the mortgage recording tax for supplemental mortgages "recorded for the purpose of correcting or perfecting any recorded mortgage . . . such additional instrument or mortgage shall not be subject to taxation under this article . . . unless it creates or secures a new or further indebtedness."

Next, we examine the applicable case law.

In Sverdlow v. Bates (283 App Div 487, 129 NYS2d 88), the Court addressed the operation of Tax Law § 255; specifically, what mortgages qualified for the section 255 supplemental mortgage exemption. In Sverdlow, the Court stated that:

> "the mortgage tax was payable merely because of the fact that the old mortgages had been discharged and new mortgages had been given . . . [i]t is true that the total amount of the new mortgages was identical with the total amount of the discharged mortgages, but this fact does not relieve the petitioners of liability for the mortgage recording tax" (Sverdlow v. Bates, supra, 129 NYS2d 88, 90).

In Matter of Citibank, N.A. v. State Tax Commn. (98 AD2d 929, 470 NYS2d 920), the Court further defined the operation of section 255. In Citibank, the Court stated:

> "[t]he use of the present tense for the requirement that both mortgages secure the same original indebtedness similarly presumes the present, and not previous, existence of the original mortgage at the time of recordation of the subsequent one" (Matter of Citibank, N.A. v. State Tax Commn., supra, 470 NYS2d 920, 921).

We understand this to mean that in order for a subsequently recorded mortgage to qualify for the section 255 supplemental mortgage exemption, the taxpayer must have recorded it prior to discharging the lien of the original mortgage even if the subsequent mortgage secured the same debt as the original mortgage. Additionally, when addressing circumstances analogous to those of petitioners, the Court stated:

> "[a]lthough petitioner and the other parties to the agreement intended by the terms of the spreading agreement to add the Ambassador property to the mortgage before releasing the Astor property from its lien, in actuality they failed to do so . . . . While the time element was short, there was a period of time when the Astor was free of the lien. The spreading agreement, in effect, substituted the Ambassador for the Astor as security for the mortgage. It was, in fact, a new mortgage creating and imposing a lien on a new piece of property. Consequently, we conclude . . . that the transaction was subject to the recording tax [emphasis added]" (Matter of Sheraton Corp. of America v. Murphy, 35 AD2d 294, 315 NYS2d 986, 987-988).

As a whole, the Tax Law and the case law indicate that even if the underlying debt remains the same, when a lien securing payment of the debt is discharged prior to the recordation of a subsequent mortgage securing payment of the same debt, the taxpayer must pay mortgage recording tax when recording the subsequent mortgage. Thus, for mortgage recording tax purposes, the status of the underlying indebtedness does not prove determinative. Instead, the controlling consideration is whether the taxpayer recorded the subsequent mortgage before discharging the lien of the prior mortgage. If not, the subsequent mortgage imposes a new lien subject to the Article 11 tax (see, Matter of Fifth Ave. & 46th St. Corp. v. Bragalini, 4 AD2d 387, 165 NYS2d 312, 319).

As the record shows, petitioners intended to (1) record an agreement consolidating the mortgages held by Union Savings Bank and (2) release all but one property from the liens imposed by these mortgages. Due to a mistake in the release agreement, the filed release document released all of the properties from the lien which had secured petitioners' debt to Union Savings Bank. This occurred prior to the filing of petitioners' consolidation agreement (Determination, footnote 3). Consequently, when the title company filed the release agreement, the liens of the original mortgages to Union Savings Bank were extinguished.

Because the prior liens had been discharged when petitioners recorded the consolidation agreement, the consolidation agreement imposed a new lien to secure payment of the entire $2.4 million debt and was subject to the mortgage recording tax on this amount. Again, we note that to qualify for the section 255 exemption, the lien of the original mortgage must not have been discharged prior to the recordation of the subsequent mortgage (see, Sverdlow v. Bates, supra, 129 NYS2d 88, 90). Therefore, the consolidation agreement was not exempt from the mortgage recording tax pursuant to section 255.

In support of their refund claim, petitioners argue that: (1) the Division erred when it advised them they would not be able to record an assignment of their consolidated mortgages; (2) the Division subjected them to an inappropriate double tax when it required them to pay

mortgage recording tax upon recordation of their three million dollar Friesch mortgage; and (3) their intent to qualify the consolidation agreement as a supplemental mortgage should allow them to exempt the principal portions of their mortgages on which they have already paid the recording tax. We address these issues as follows.

Though petitioners assert the contrary, the Division correctly advised petitioners they would not be able to record an assignment of their consolidated mortgages to Friesch per Tax Law § 258. Since petitioners failed to pay the appropriate tax when they filed the consolidation agreement, specifically, tax on the entire principal amount, they could not later record an assignment of the consolidated mortgages without first paying the recording tax (see, Tax Law § 258). While petitioners may not have wanted to release all properties from the lien securing payment of their Union Savings Bank debt, they cannot overcome the fact that the release filing released all the properties. Accordingly, no prior mortgages, which could serve as a basis for the section 255 exemption, existed when they recorded their consolidation agreement with Union Savings Bank. Therefore, petitioners owed mortgage recording tax when they recorded the consolidation agreement (see, Sverdlow v. Bates, supra). Since petitioners failed to pay the appropriate tax when they recorded their consolidation agreement with Union Savings Bank, the Division properly advised petitioners they could not record an assignment of the consolidation agreement to Friesch.

Again, we note that taxpayers must pay mortgage recording tax when recording a mortgage (see, Tax Law § 257). In petitioners' case, so long as the Division did not improperly deny them a section 255 exemption, no inappropriate double taxation occurred. Courts have delineated transactions triggering the mortgage recording tax. Specifically, if a taxpayer discharges the lien of an original mortgage prior to recording a subsequent mortgage, mortgage recording tax is due on the subsequent recording (see, Sverdlow v. Bates, supra). While petitioners argue that the Division's assessment of tax on their Friesch mortgage constitutes an inappropriate double tax, the series of transactions they engaged in clearly subjected the Friesch mortgage to tax. Though

they did not intend to, petitioners discharged the lien of the Union Savings Bank mortgages before recording the consolidation agreement. Furthermore, at Friesch's request, petitioners executed and recorded an entirely new mortgage with Friesch after discharging their Union Savings Bank mortgages. Due to their failure to pay the appropriate tax when they recorded their consolidation agreement with Union Savings Bank, petitioners could not record an assignment of the consolidation agreement. Therefore, no inappropriate double taxation occurred because petitioners merely paid the tax due when they recorded the Friesch mortgage.

Addressing petitioners' final assertion, we note that taxpayers claiming an exemption from the taxing statute must prove their entitlement to the exemption (see, Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, 718, lv denied 37 NY2d 708, 375 NYS2d 1027). While petitioners argue intent matters for purposes of the section 255 exemption, they have not directed us to any cases which support this assertion. Moreover, in the course of our research, we have not found any cases supporting their position. Due to petitioners' failure to show that their intent to qualify the subsequent mortgages as supplemental mortgages entitles them to the section 255 exemption, we disallow their claim to the exemption on this basis.

Since the Division properly informed petitioners that they could not record the assignment of the consolidated mortgages to Friesch and petitioners had not previously paid the tax on the Friesch mortgage nor qualified for an exemption to the tax, the Division properly denied petitioners' request for a refund.

We affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Teddy David and Pamela Ruth Weiss is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The Division of Taxation's denial of petitioners' refund claim is sustained.

DATED: Troy, New York
October 13, 1994

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

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