

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
11814 HOMES CORPORATION :
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 July 11, 1991. :

In the Matter of the Petition :
of :
ROCKINGHAM TENANTS CORPORATION :
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 July 11, 1991. :

DECISION
DTA Nos. 811902,
811903 and 811904

In the Matter of the Petition :
of :
SHERRY PLAZA APARTMENT CORPORATION :
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 July 11, 1991. :

The City of New York filed exceptions to the determination of the Administrative Law Judge issued on February 2, 1995 with respect to the petitions of 11814 Homes Corporation, Rockingham Tenants Corporation and Sherry Plaza Apartment Corporation, P.O. Box 221, Williamsburg Station, Brooklyn, New York 11211. Petitioners appeared by Meyer M. Lieber, C.P.A. The Commissioner of Finance of the City of New York appeared by Paul A. Crotty, Esq. (Helene R. Jaffa and Robert J. Firestone, Esqs., of counsel).

The City of New York filed a brief in support of its exception, petitioners filed a brief in opposition and the City of New York filed a reply brief. Oral argument, at the City of New York's request, was heard on November 9, 1995 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Donald C. DeWitt took no part in the consideration of this decision.

ISSUE

Whether mortgage recording tax is due on the recordation of a mortgage under which a mortgagor borrows additional funds which are used to reduce the amount owed to the prior mortgagee, where the mortgagor's indebtedness was not increased or added to and the prior lien was preserved on recordation of the new mortgage.

FINDINGS OF FACT

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

Petitioners 11814 Homes Corporation ("11814"), Rockingham Tenants Corporation ("Rockingham") and Sherry Plaza Apartment Corporation ("Sherry Plaza") are cooperative housing corporations. The mortgage transactions which are the subject of this proceeding stem from the purchase of certain premises by each of the petitioners. In each instance, the cooperative housing corporation executed a purchase money wraparound mortgage in favor of the sponsor. At a later time, the cooperative housing corporation executed a mortgage in favor of Queens County Savings Banks ("Queens County"), the funds from which were used to pay down the debt owed to the sponsor on the wraparound mortgage. Petitioners each paid mortgage recording tax at the time of recordation of the Queens County mortgage and later applied for a refund. The refunds were denied and petitions for review of those denials were then filed.

11814 Homes Corporation

11814 is the owner of the premises known as 118-14 83rd Avenue, Kew Gardens, New York. The following summarizes the relevant mortgages recorded with respect to these premises up to the time of purchase by 11814.

(a) On June 3, 1940, a mortgage executed by Kew Drive Corp. in favor of Greenpoint Savings Bank was recorded securing a principal debt of \$240,000.00, and a mortgage recording tax of \$1,200.00 was paid on recordation.

(b) On August 28, 1941, a mortgage executed by Kew Drive Corp. in favor of The East New York Savings Bank was recorded which secured a principal debt of \$15,000.00, and a mortgage recording tax of \$75.00 was paid on recordation. On the same date, this mortgage was consolidated with the mortgage recorded on June 3, 1940, on which a balance of \$230,000.00 remained, resulting in a total outstanding recorded debt of \$245,000.00.

(c) On September 27, 1973, a mortgage in the amount of \$298,126.00, executed by Banart Realty, Inc. in favor of William and Leonard Lorberbaum and Sylvia Katz, was recorded, and the mortgage recording tax of \$3,726.25 was paid on recordation. This mortgage was assigned to Edward E. Berger by an assignment dated May 22, 1975, recorded on June 18, 1975. It was further assigned by Edward E. Berger to Union Dime Savings Bank, by assignment dated June 18, 1975.

(d) On June 18, 1975, a mortgage executed by Chamax Realty, Inc. in favor of Union Dime Savings Bank was recorded, securing a principal debt of \$61,960.00, and a mortgage recording tax of \$775.00 was paid on recordation. On that date, this mortgage was consolidated with the prior mortgages, on which a balance of \$368,040.00 remained, to form a single lien of \$430,000.00.

(e) On May 9, 1979, a mortgage executed by 63 Associates, Inc. in favor of Royal Realty Company was recorded. This mortgage secured a principal debt of \$242,543.78, and a mortgage recording tax of \$3,637.50 was paid on recordation. At the time of recording of this mortgage, there was an outstanding balance of \$404,286.40 remaining on the consolidated

mortgage recorded on June 18, 1975. After the amount of \$242,543.78 became secured, the total outstanding recorded indebtedness was \$646,830.18. This mortgage was extended by an agreement recorded on February 29, 1980.

(f) On October 22, 1980, a mortgage executed by J & M Realty Associates ("J & M Realty") in favor of Manufacturers Hanover Trust Co. was recorded. This mortgage secured a principal amount of \$37,500.00, and a mortgage recording tax of \$562.50 was paid on recordation. On that date, this mortgage was consolidated with the consolidated mortgage recorded on June 18, 1975, on which a balance of \$629,420.60 remained, for a total outstanding recorded debt of \$666,920.60.

(g) On February 18, 1983, a mortgage executed by J & M Realty in favor of Independence Savings Bank was recorded. This mortgage secured a principal debt of \$36,045.44, and a mortgage recording tax of \$540.00 was paid on recordation. On that date, this mortgage was consolidated with the consolidated mortgage recorded on June 18, 1975, on which a balance of \$600,462.56 remained, for a total outstanding recorded debt of \$636,508.00 (the "underlying mortgage").

On December 14, 1983, pursuant to a plan to convert the premises to cooperative ownership, 11814 acquired the premises from J & M Realty and executed a purchase money wraparound mortgage in the amount of \$850,000.00. Under the terms of the wraparound mortgage, 11814 assumed the underlying mortgage, with an outstanding debt at that time of \$625,372.00, and received a loan from J & M Realty in the amount of \$224,628.00. J & M Realty was given the power to refinance the wraparound mortgage. On February 22, 1984, this wraparound mortgage was recorded, and a mortgage recording tax was paid on the amount of the principal debt loaned, \$224,628.00.

On June 5, 1991, several related transactions took place which gave rise to the present dispute. (1) A mortgage was executed by 11814 in favor of J & M Realty, securing a principal debt of \$170,000.00. This mortgage was recorded on July 11, 1991, and a mortgage recording tax of \$3,400.00 was paid on recordation. At the time of recordation, there was a remaining

principal debt on the December 1983 wraparound mortgage of \$486,412.51. (2) The June 1991 mortgage was consolidated with the December 1983 wraparound mortgage by the terms of a Consolidation, Modification, Extension and Subordination Agreement between 11814 and J & M Realty which was recorded on July 11, 1991. This resulted in a single lien with a total indebtedness of \$1,020,000.00 ($\$850,000.00 + \$170,000.00 = \$1,020,000.00$). (3) 11814 executed a mortgage in favor of Queens County in the amount of \$513,587.49. This amount was loaned to 11814 and paid directly to J & M Realty. (4) An agreement was executed between 11814 and Queens County. By the terms of this agreement, seven mortgages were consolidated (see, above) to form a single lien of \$1,000,000.00 ($\$513,587.49 + \$486,412.51 = \$1,000,000.00$). The J & M Realty mortgage was subordinated to the Queens County mortgage.

The four transactions described above were recorded on July 11, 1991. At the time the Queens County mortgage of \$513,587.49 was recorded, 11814 paid a mortgage recording tax of \$14,123.66. 11814 filed a claim for the refund of the tax paid, dated December 21, 1992. The Division of Taxation ("Division") denied the refund by letter dated April 8, 1993.

Rockingham Tenants Corporation

The relevant facts regarding Rockingham's claim for refund are similar to those involving 11814. Rockingham is the owner of the premises known as 114-06 Queens Boulevard, Forest Hills, New York. The following summarizes the relevant mortgages recorded with respect to these premises up to the time of purchase by Rockingham.

(a) On July 27, 1939, a mortgage executed by Dorset Builders, Inc. in favor of Greenpoint Savings Bank was recorded. This mortgage secured a principal debt of \$175,600.00, and a mortgage recording tax of \$875.00 was paid on recordation.

(b) On December 1, 1939, a mortgage executed by Dorset Builders, Inc. in favor of Metropolitan Life Insurance Company was recorded securing a principal debt of \$14,000.00, and a mortgage recording tax of \$70.00 was paid on recordation. On that date, this mortgage was consolidated with the mortgage recorded on July 27, 1939, on which a balance of \$175,000.00 remained, for a total outstanding recorded debt of \$189,000.00.

(c) On October 7, 1949, a mortgage executed by Rockingham Apartments, Inc. in favor of The Bank of Savings in the City of New York was recorded securing a principal debt of \$48,820.00, and a mortgage recording tax of \$244.00 was paid on recordation. On that date, this mortgage was consolidated with the consolidated mortgage recorded on December 1, 1939, on which a balance of \$151,180.00 remained, for a total outstanding recorded debt of \$200,000.00.

(d) On May 21, 1958, a mortgage executed by Max Brickner in favor of Union Dime Savings Bank was recorded. This mortgage secured a principal debt of \$44,496.19, and a mortgage recording tax of \$222.50 was paid on recordation. On that date, this mortgage was consolidated with the consolidated mortgage recorded on October 7, 1949, on which a balance of \$160,503.81 remained, for a total outstanding recorded debt of \$205,000.00.

(e) On April 2, 1968, a mortgage executed by Elstar Realty Corp. in favor of Union Dime Savings Bank was recorded securing a principal debt of \$34,821.74, and a mortgage recording tax of \$174.00 was paid on recordation. On that date, this mortgage was consolidated with the consolidated mortgage recorded on May 21, 1958, on which a balance of \$170,178.26 remained, for a total outstanding recorded debt of \$205,000.00.

(f) On July 5, 1973, a mortgage executed by Felbert Realty Corp. in favor of South Brooklyn Savings Bank was recorded. This mortgage secured a principal debt of \$162,381.34, and a mortgage recording tax of \$2,030.00 was paid on recordation. On that date, this mortgage was consolidated with the consolidated mortgage recorded on April 2, 1968, on which a balance of \$187,618.66 remained, for a total outstanding recorded debt of \$350,000.00.

(g) On April 9, 1982, a mortgage executed by S. Dix, S. Miller and D. Lazar in favor of Rockingham Apartments, Inc. was recorded. This mortgage secured a principal debt of \$325,000.00, and a mortgage recording tax of \$4,875.00 was paid on recordation. On that date, this mortgage was consolidated with the consolidated mortgage recorded on July 17, 1973, on which a balance of \$350,000.00 remained, for a total outstanding recorded debt of \$675,000.00.

On September 11, 1984, pursuant to a plan to convert the premises to cooperative ownership, Rockingham acquired the premises from Shefa Realty Associates ("Shefa") and

executed a purchase money wraparound mortgage in favor of Shefa in the amount of \$1,000,000.00. Under the terms of the wraparound mortgage, Rockingham assumed the underlying mortgage, with an outstanding debt at that time of \$675,000.00. On September 11, 1984, this wraparound mortgage was recorded, and a mortgage recording tax was paid on the increase in outstanding recorded indebtedness, \$325,000.00. Shefa was given the power to refinance the underlying mortgage.

On or about September 22, 1987, a mortgage in the amount of \$25,000.00 was executed by Rockingham in favor of Independence Savings Bank. This mortgage was recorded on October 13, 1987 and mortgage recording tax of \$375.00 was paid. The outstanding balance of the prior mortgages at that time was \$675,000.00. By the terms of an agreement between Rockingham and Independence Savings Bank, the prior mortgages were consolidated with the September 1987 mortgage resulting in a total outstanding recorded indebtedness in the amount of \$700,000.00 (the underlying mortgage). The consolidation agreement was also recorded on October 13, 1987.

In June 1991, Shefa undertook the refinancing of the October 1987 wraparound mortgage through the following transactions. (1) A mortgage was executed by Rockingham in favor of Shefa, securing a principal debt of \$250,000.00. This mortgage was recorded on July 11, 1991, and a mortgage recording tax of \$5,000.00 was paid on recordation. (2) The June 1991 mortgage was consolidated with the prior wraparound mortgage by the terms of a Consolidation, Modification, Extension and Subordination Agreement between Rockingham and Shefa. This resulted in a single lien with a total outstanding recorded debt of \$1,250,000.00. Shefa's lien was subordinated to a first mortgage executed by Rockingham in favor of Queens County which was assumed by Shefa under the terms of its wraparound mortgage. (3) Rockingham executed a mortgage in favor of Queens County in the amount of \$528,930.30 which was loaned to Rockingham and paid directly to Shefa. This mortgage was recorded on July 11, 1991, and a mortgage recording tax of \$14,545.59 was paid on recordation. (4) On July 11, 1991, the Queens County mortgage was consolidated with the underlying mortgage, which now secured a principal

amount of \$671,069.70, and Queens County took back a first mortgage on the premises securing a principal amount of \$1,200,000.00. Queens County's consolidated first mortgage was recorded on July 11, 1991.

The four transactions described above were recorded on July 11, 1991. On or about December 21, 1992, Rockingham requested a refund of \$14,545.59, the amount of the mortgage recording tax paid on the recordation of the Queens County mortgage of \$528,930.30. The Division denied the refund by letter dated April 14, 1993.

Sherry Plaza Apartment Corporation

Sherry Plaza is the owner of the premises known as 142-20 84th Drive, Briarwood, New York. The following summarizes the relevant mortgages recorded with respect to these premises up to the time of purchase by Sherry Plaza.

(a) On September 28, 1959, a mortgage executed by Briarwood Oaks, Inc. in favor of Manufacturers Hanover Trust Co. ("Manufacturers Hanover") was recorded securing a principal debt of \$976,600.00, and a mortgage recording tax of \$4,883.00 was paid on recordation.

(b) On January 30, 1984, a mortgage executed by J & M Realty in favor of The Seaman's Bank For Savings ("Seaman's Bank") was recorded. This mortgage secured a principal debt of \$544,325.70, and a mortgage recording tax of \$4,883.00 was paid on recordation. On that date, this mortgage was consolidated with the mortgage recorded on September 28, 1959, on which a balance of \$455,674.30 remained, resulting in a total outstanding recorded debt of \$1,000,000.00.

On August 19, 1986, pursuant to a plan to convert the premises to cooperative ownership, Sherry Plaza acquired the premises from J & M Realty and executed a purchase money wraparound mortgage in the amount of \$1,800,000.00. At the time of execution of the wraparound mortgage, an outstanding debt of \$988,667.00 was due to Seaman's Bank, the holder of the first underlying mortgage. On September 15, 1986, this wraparound mortgage was recorded, and a mortgage recording tax of \$18,255.00 was paid on the amount of the increase in outstanding recorded indebtedness, \$811,333.00.

Sherry Plaza executed another mortgage in favor of J & M Realty on September 1, 1989 in the sum of \$109,000.00 (principal plus interest). This mortgage was recorded on December 12, 1990, and a mortgage recording tax of \$2,180.00 was paid at the time of recordation. On December 5, 1990, Sherry Plaza and J & M Realty executed a Mortgage Consolidation, Modification, Extension and Subordination Agreement. Under the terms of the agreement, the two mortgages executed by Sherry Plaza in favor of J & M Realty were consolidated into a single wraparound mortgage. The recorded combined amount of indebtedness on the premises under the two mortgages to J & M Realty was \$1,909,000.00.

On December 5, 1990, Sherry Plaza executed a mortgage in favor of Queens County in the amount of \$957,222.26. This amount was loaned to Sherry Plaza and was paid directly to J & M Realty, the holder of the wraparound mortgage. This mortgage was recorded on December 12, 1990, and a mortgage recording tax of \$26,323.62 was paid on recording. On December 15, 1990, this mortgage was consolidated with the underlying mortgage which on that date totalled \$942,777.00 and Queens County took back a first mortgage on the premises securing a principal amount of \$1,900,000.00. Queens County's consolidated first mortgage was recorded on December 12, 1990.

Under the terms of the December 5, 1990 agreement between Sherry Plaza and J & M Realty, J & M Realty's wraparound mortgage was subordinated to Queens County's \$1,900,000.00 first mortgage which was assumed by J & M Realty. In addition, Sherry Plaza was obligated to pay J & M Realty the debt service on the entire consolidated wrap, and J & M was obligated to pay the debt service on the underlying consolidated first lien of \$1,900,000.00.

On or about August 19, 1991, Sherry Plaza requested a refund of \$26,323.62 of mortgage recording tax paid on the recordation of the Queens County mortgage of \$957,222.26. The Division denied the refund by letter dated March 3, 1993.

Summary

As a result of each of the transactions described above, the equity interest of the cooperative housing corporation sponsor was reduced, without extinguishing the underlying

mortgage or adding to the mortgagor's debt. The 11814 transaction can serve as an example of all three of the transactions. As of June 5, 1991, J & M Realty (the sponsor and mortgagee) held a wraparound mortgage on the property securing a principal debt of \$1,020,000.00. Mortgage recording tax was paid calculated on the entire debt. The underlying first mortgage held by J & M Realty was refinanced as follows:

1) Outstanding debt on J&M mortgage	\$ 486,412.51
2) Plus: Queens County Mortgage	<u>513,587.49</u>
3) Queens County consolidated first mortgage	\$ 1,000,000.00

J & M Realty's wraparound mortgage was not extinguished, rather it was subordinated to Queens County's first mortgage. The total overall indebtedness remained at \$1,020,000.00. The issue presented is whether mortgage recording tax is due on the recording of the Queens County mortgage in the amount of \$513,587.49.

The letters issued by the Division denying petitioners' individual claims for refund of mortgage recording taxes were identical except for the mortgage amount recited in each letter.

The letter denying 11814's claim states as follows:

"On July 1, 1989, Chapter 241 of the Laws of 1989 was enacted amending Article 11 of the Tax Law (the mortgage recording tax).

"Section 250 of the Tax Law was further amended to codify, for purpose of the New York City mortgage recording taxes, a longstanding opinion of the Attorney General that a 'mortgage' includes a contract or agreement whereby 'new funds' are advanced or readvanced and such funds are secured by a mortgage (see 1953 Op. Atty. GEN. 198). 'New funds' are the amount by which the aggregate amount of funds advanced or readvanced exceed the amount upon which the mortgage recording tax has been paid. Therefore, a contract or agreement providing for such advances or readvances is a mortgage taxable upon recording whether within or outside New York City. It should also be noted that mortgages upon which a tax has not been paid may not be released or discharged or received in advance pursuant to Section 258 of the Tax Law.

"In our opinion, the refinancing in the amount of \$513,587.49 advanced new funds and was secured by a mortgage. The aggregate amount of funds advanced or readvanced exceeds the amount upon which mortgage recording tax has been paid. The recording officer collected the proper tax at recording.

"The amount secured of \$513,587.49 represents a readvancement of funds advanced by the wrap mortgage and the prior consolidated mortgage and as such is taxable. The fact that the amount secured by the wrap around mortgage remains the same does not alter the taxability of readvanced funds secured by a mortgage and recorded in the City Register's Office" (emphasis in original).

OPINION

The term "mortgage" is defined for purposes of the mortgage recording tax at section 250(2) of the Tax Law. This definition was amended by section 80 of Chapter 241 of the Laws of 1989 and this amendment is the center of this controversy. Section 250(2) provides, in relevant part, as follows (the language added by Chapter 241 is underlined):

"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. Where all or part of the indebtedness secured by a mortgage of real property within any city in the state having a population of one million or more has been paid and new funds are advanced or re-advanced which are to be secured by such mortgage, the contract or agreement by which such funds are advanced or re-advanced shall be deemed a mortgage of real property for purposes of this article, and shall be taxable as such upon the amount of such new funds, except as otherwise provided in section two hundred fifty-three-b of this chapter" (emphasis added).

The Administrative Law Judge noted that the instant facts were very similar to those in Matter of City of New York v. State Tax Commn. (130 AD2d 890, 516 NYS2d 132). The Administrative Law Judge summarized the facts of City of New York as follows:

"[T]he petitioner, Sixth Prince Associates ('Associates'), owned the premises known as 200 Prince Street. Associates sold the property to Prince Realty. At the time of sale, the property was encumbered by a consolidated first mortgage with an outstanding debt of \$270,052.22. Associates took back a \$1,000,000.00 wraparound mortgage creating a new indebtedness of \$729,947.78 and paid tax on that amount. The total debt encumbering the property now stood at \$1,000,000.00. Under the terms of the wraparound mortgage, Associates was given the power to refinance the mortgage up to a limit of \$350,000.00, which it did. As a result, Associates received a mortgage commitment of \$79,947.78 which was paid directly to Associates. This raised the underlying

consolidated mortgage debt to \$350,000.00 (\$270,052.22 + \$79,947.78)" (Determination, conclusion of law "A").

In City of New York, the Appellate Division held that the City erred in collecting tax on the \$79,947.78 mortgage because:

"[t]he Tax Law provides for the payment of a mortgage recording tax on a new or further indebtedness secured by a mortgage (Tax Law § 253; see, Matter of Park & 46th St. Corp. v. State Tax Commn., 295 NY 173, 177-178, 65 N.E.2d 763; Matter of Bay View Towers Apts. v. State Tax Commn., 48 AD2d 86, 89, 367 NYS2d 856, affd 40 NY2d 856, 387 NYS2d 1002, 356 N.E.2d 474). The mere substitution of one mortgage for another, which creates no additional indebtedness, does not create a new mortgage requiring the payment of a recording tax (see, Matter of Bay View Towers Apts. v. State Tax Commn., 40 NY2d 856, 857, 387 NYS2d 1002, 356 N.E.2d 474)" (Matter of City of New York v. State Tax Commn., supra, 516 NYS2d 132, 133).

The Administrative Law Judge resolved the instant cases by determining that the Queens County mortgages¹ were not subject to mortgage recording tax. The Administrative Law Judge reached this conclusion because, using the facts of 11814 to exemplify all three cases, "11814 did not pay down its debt and subsequently borrow new funds under an existing or another mortgage Essentially, it substituted one debt for another by using the funds borrowed from Queens County to reduce J & M Realty's equity position. Inasmuch as 11814's total debt remained at \$1,020,000.00, no new recording tax was due at the time of recording of the \$513,587.49 mortgage" (Determination, conclusion of law "C").

On exception, the City argues that the Administrative Law Judge's determination fails to take into account the language added to section 250(2). The City contends that "[u]nder the amendment, 'new funds' advanced under a mortgage instrument are taxable in the amount of the 'new funds'" (City's brief on exception, p. 9). The City defines "new funds" as "[t]he distinction between 'new' funds and 'old' funds is merely the distinction between 'paid' principal and 'unpaid' principal. Where the principal amount secured by a mortgage remains unpaid, mortgage

¹We will follow the format used by the Administrative Law Judge and refer to all of the mortgages which are the subject of petitioners' refund claims as the "Queens County mortgages."

recording tax has once been paid with respect to the funds advanced under the mortgage, and no further tax would apply to those funds" (City's brief on exception, p. 10). In the present case, the City asserts that the funds advanced under the Queens County mortgages cause these mortgages to be taxable because the funds were used to pay a part of the principal secured under J & M Realty's wraparound mortgage lien and, thus, were "new funds" under the City's definition of this term.

We find no basis for the City's definition of "new funds." This definition is in conflict with the fundamental principle of Article 11, articulated in City of New York, that the mere substitution of one mortgage for another, which does not secure repayment of any additional indebtedness, does not create a new mortgage subject to tax under Article 11. This principle applies even where a new mortgagee is substituted for an old mortgagee (see, Matter of City of New York v. Procaccino, 46 AD2d 594, 364 NYS2d 582; Matter of Fifth Ave. & 46th St. Corp. v. Bragalini, 4 AD2d 387, 165 NYS2d 312; Matter of Jeffrey Park, Ltd., Tax Appeals Tribunal, January 4, 1996). The City's interpretation of "new funds" would overturn this body of case law by holding that a substituted mortgage is taxable as a new mortgage whenever proceeds advanced under the new instrument are used to pay principal secured by the prior mortgage. We see nothing on the face of the amendment, nor in its legislative history, to suggest that it was intended to so drastically change the structure of the mortgage recording tax.²

²In its arguments before the Administrative Law Judge, the City sought to limit the application of the rule it is asserting by claiming that this rule would not apply in the case of an assignment of a mortgage from one mortgagee to another (City's brief before Administrative Law Judge, p. 8). In such a situation, the City states, the assignee pays the assignor consideration in the amount of the outstanding principal on the mortgage, plus any accrued interest. However, because this payment of principal is not made by the mortgagor, the City contends that an assignment of a mortgage would not fall within its interpretation of the amendment to section 250(2). We see nothing in the statute, nor in the City's interpretation of "new funds," to indicate that the principal must have been paid directly by the mortgagor to qualify as "new funds." In our view, the City is imposing a gloss on the statute (that "new funds" means funds that pay principal) and then imposing a gloss on this gloss (that the principal must be paid directly by the mortgagor to be "new funds"), and we see no basis in the statute for this elaborate structure. The need to create a second level of gloss suggests to us that the first level is erroneous.

As petitioners point out, the definition of "new funds" urged upon us by the City is inconsistent with the definition adopted by the Division of Taxation by regulation. At 20 NYCRR 641.9 it is stated that "[n]ew funds means the amount by which the aggregate amount of funds advanced or readvanced under a prior recorded mortgage exceeds the amount upon which the mortgage recording taxes were paid when such prior mortgage was recorded" (emphasis added). The use of the phrase "prior recorded mortgage" indicates to us that new funds are advanced pursuant to a mortgage already on record, not as here, under a new instrument. The City has not offered us an explanation to resolve this conflict. Instead, the City states that the funds at issue were advanced under the Queens County mortgages (City's brief on exception, p. 10), but then argues that this \$513,587.00 is included in the aggregate amount of funds advanced under the prior recorded mortgage (City's reply brief, p. 6). We cannot harmonize this use of words.

As petitioners also point out, the City's position in these cases is inconsistent with the Division's statements in TSB-M-89-(6.1)-R explaining the amendment made to section 250(2). In this memorandum, the Division stated that this change was made:

"to codify, for purposes of the New York City mortgage recording taxes, a longstanding opinion of the Attorney General that a 'mortgage' includes a contract or agreement whereby 'new funds' are advanced or readvanced and such funds are secured by a mortgage (see, 1953 Op. Atty. Gen. 198) This amendment to section 250 by Chapter 241 merely clarifies that this interpretation applies as well to the New York City mortgage recording taxes (L. 1971, C. 400, et seq.) enacted subsequent to the Attorney General's Opinion" (emphasis added).

In the present case, the City argues that the amendment to section 250(2) was intended to overrule the result of the City of New York case and we have concluded that the interpretation asserted by the City would be contrary to a substantial number of other cases. We do not see how the Division could have described the amendment as "merely clarifying" if it were intended to overrule the existing case law. Therefore, we, like the Administrative Law Judge, do not accept the City's description of the purpose of the amendment to section 250(2).

Nor do we find the legislative history relied on by the City to be instructive. Although the City cites material which states that the amendment was intended to increase the tax base and which suggests that it was intended to address certain techniques whereby "sophisticated participants in the real estate market are able to structure mortgage financing" to avoid mortgage recording tax (City's brief on exception, p. 21), this material does not give any hint as to what techniques were being targeted by the legislation. Because the legislative history is so general, it could support any interpretation that sought to tax transactions that were not previously taxed and, thus, we find it lends little support to any specific interpretation, including the City's in these cases.

To summarize, we reject the City's interpretation of the amendment to section 250(2) because it is not indicated on the face of the statute, it is inconsistent with the Division's explanation of, and regulations under, the amendment and it is not specifically supported by the legislative history. In contrast, the Administrative Law Judge adopted an interpretation of the amendment that is in accord with the statutory language as well as the Division's statements explaining and interpreting the statute. The Administrative Law Judge concluded that the amendment was intended to accomplish the result described in dicta in Matter of City Title Ins. Co. v. Orgel (2 AD2d 250, 154 NYS2d 751). In that case, a mortgage securing payment of a principal indebtedness of \$7,000.00 had been recorded and tax paid on the \$7,000.00 of indebtedness secured. Subsequently, when the principal debt had been reduced to \$3,298.71, the parties entered into an agreement modifying the mortgage so that it could secure advances and readvances up to the amount of the original principal indebtedness. At the time of this modification, the mortgagee advanced the mortgagor the additional sum of \$2,701.29. The court concluded that tax would be due on the amount of \$3,701.29, the difference between "the amount that had been unpaid on the original amount of the principal indebtedness when the readvance transaction was had, namely, \$3,298.71, and the maximum amount for which the mortgage could stand as security by virtue of the readvance instrument, that is, \$7,000" (Matter of City Title Ins.

Co. v. Orgel, supra, 154 NYS2d 751, 754). The conclusion in Orgel is consistent with the 1953 Opinion of the Attorney General referred to by the Division in TSB-M-89-(6.1)-R. As described by the Administrative Law Judge:

"[t]he mortgage under consideration in the 1953 Opinion of the Attorney General was a \$10,000.00 mortgage which provided for readvances and contained the further stipulation that the maximum amounts secured could not exceed the original principal amount of \$10,000.00. Tax was paid on recording of the \$10,000.00 mortgage. The Opinion states that if the mortgage were reduced to \$5,000.00 and an additional \$5,000.00 were readvanced, a tax would be imposable upon the amount of the increase of the outstanding debt or \$5,000.00" (Determination, conclusion of law "A").

The conclusion in Orgel is also consistent with the definition of "new funds" set forth at 20 NYCRR 641.9. As discussed earlier, the regulation defines "new funds" in terms of amounts advanced under a prior recorded mortgage. Similarly, Orgel and the Opinion of the Attorney General dealt with funds advanced under a mortgage already recorded, not, as here, funds being advanced under a new instrument.

Finally, the interpretation accepted by the Administrative Law Judge is also consistent with the Division's TSB-M-89-(6.1)-R. Both Orgel and the 1953 Attorney General Opinion were issued before the additional mortgage recording tax imposed in New York City pursuant to section 253-a of the Tax Law was authorized by Chapter 400 of the Laws of 1971. Thus, the TSB-M appears to be saying that the amendment to section 250(2) merely clarified that the conclusions stated in Orgel and the Attorney General Opinion applied to the tax imposed pursuant to section 253-a of the Tax Law as well as to the tax imposed statewide pursuant to section 253 of the Tax Law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the City of New York is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of 11814 Homes Corporation, Rockingham Tenants Corporation and Sherry Plaza Apartment Corporation are granted; and

4. Petitioners' claims for refund of mortgage recording taxes are granted.

DATED: Troy, New York
April 4, 1996

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner