

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JEFFREY PARK, LTD.	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 812183
of Mortgage Recording Tax under Article 11 of	:	
the Tax Law with Reference to an Instrument	:	
Recorded on October 22, 1992.	:	

Petitioner Jeffrey Park, Ltd., 60 Morrow Avenue, Scarsdale, New York 10583, filed an exception to the determination of the Administrative Law Judge issued on December 22, 1994. Petitioner appeared by Robinowitz, Cohan & Dubow (Seymour Robinowitz, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Donald C. DeWitt and Laura Witkowski, Esqs., of counsel).

Petitioner filed a brief on exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Petitioner's request for oral argument was withdrawn on July 10, 1995, which date began the six-month period for the issuance of this decision.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 a mortgage given by petitioner upon refinancing imposed a lien, and if so, was it exempt from the mortgage recording tax as a supplemental mortgage.

FINDINGS OF FACT

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

Petitioner, Jeffrey Park, Ltd., is a limited partnership which owns a housing complex known as Jeffrey Park on Morrow Avenue in Yonkers, New York, described by Alan Zaretzky, petitioner's sole general partner, as follows:

"The mortgaged property is approximately 464 residential units in two buildings, two wings per building. It's an elevator building. It encompasses approximately six acres of land with a pool. There are several offices on the complex, as well as my own real estate office" (tr., p. 29).

Petitioner by Alan Zaretzky, its general partner, executed a mortgage (more exactly, a "Multifamily Mortgage, Assignment of Rents and Security Agreement") dated January 6, 1988 to Bayside Federal Savings and Loan Association ("Bayside Federal") in the principal sum of \$4,388,436.81. A rider to this mortgage detailed petitioner's total indebtedness to Bayside Federal as follows:

"34. The indebtedness herein is evidenced by a Consolidated Note, together with a Demand Note¹ for \$4,388,436.81 (for a single total indebtedness of \$10,000,000.00), and is secured by this Mortgage and an Agreement of Consolidation, Modification, Extension and/or Spreading of Mortgages dated the date hereof, and reference is made thereto for rights as to acceleration of the indebtedness evidenced by such Notes. The Consolidated Note shall be the governing Note.

"35. This Mortgage, together with an Agreement of Consolidation, Modification, Extension and/or Spreading of Mortgages, are hereby made to secure a first mortgage lien on the premises in the amount of \$10,000,000.00. However, pursuant to the terms contained in the Consolidated Note executed this date, negative amortization may increase the principal resulting in an additional lien of \$1,500,000.00 for a total lien on the premises of \$11,500,000.00" (emphasis added).

The "Westchester County Recording and Endorsement Page", which was part of the mortgage described above, shows a mortgage amount of \$5,888,436.81 and total mortgage recording tax received of \$58,884.00. Mortgage recording tax was paid on not just the principal sum of the mortgage dated January 6, 1988 of \$4,388,436.81 but also on an additional \$1,500,000.00, representing an additional lien which might result from negative amortization. The principal sum of \$4,388,436.81 plus \$1,500,000.00 equals \$5,888,436.81, the mortgage amount shown for purposes of calculating tax. (Given the description of the mortgaged property set forth above as having 464 residential units, it was unexplained why the

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Neither such consolidated note nor the demand note were introduced into evidence.

endorsement page shows a check-off of the box indicating "1-6 units" instead of the box for "over 6 units".)

NEGATIVE AMORTIZATION

Mr. Zaretsky, who was a very articulate witness, testified that in early 1988, at the time of petitioner's financing with Bayside Federal, negative amortization "was a new concept" (tr., p. 31). He elaborated as follows on this new financing tool which allowed for a fixed monthly payment despite fluctuating interest rates:

Mr. Zaretsky: "As you are aware, interest rates at that time were fluctuating tremendously."

* * *

Administrative Law Judge: "And your interest rate . . . was an adjustable rate?"

Mr. Zaretsky: "Was adjustable, that's correct, with a constant payment. So there was the interest rate which determined what you paid in interest and then there was an amortization based on a schedule. As the interest rate changed, if it went up, the amortization shrunk; as the interest went down, the amortization would conversely increase. As we know, interest rates went up, the amortization did indeed shrink, and it shrunk to the point where the interest [due] exceeded the constant payment that was being made on behalf of this mortgage.

* * *

"That resulted in a negative amortization or additional money being put on the principal of the loan, okay, which then increased the interest again, because you're paying on a higher principal amount. And the mortgage allowed for this to a maximum of 15 percent of the base ten million, or an additional 1.5 million dollars, at which time if it ever reached that, then the new [higher] payment would have to be paid" (tr., pp. 31-32).

Petitioner's loan from Bayside Federal was made shortly after the Wall Street crash of October 13, 1987. Mr. Zaretsky explained:

"You have to remember that a mortgage of this size -- this is not a small loan, and there are not that many banks or institutions capable of making this particular size loan. And at the time, the market was very volatile and borrowers were subject to what was available There were only certain banks that were loaning and there were only certain formats that were available" (tr., pp. 33-34).

Approximately 4½ years later, in October 1992, Mr. Zaretsky was able to obtain refinancing in the form of a loan of \$11,400,000.00 from ARCS Mortgage, Inc. ("ARCS Mortgage") of Calabasas, California (a subsidiary of the Bank of New York) at an interest rate

of 8¾%, and which also "allowed for a true fixed payment" (tr., p. 33). \$10,363,170.45 of the principal sum of \$11,400,000.00 was used to pay off petitioner's outstanding indebtedness to Bayside Federal. This \$10,363,170.45 owed to Bayside Federal included the initial principal sum of \$10,000,000.00 plus an increase in such principal of \$363,170.45, representing negative amortization. The remaining \$1,036,829.55 of the principal sum borrowed from ARCS Mortgage of \$11,400,000.00 was apparently newly advanced money covered by a "Multifamily Mortgage" (Division's Ex. "J") dated October 22, 1992 between petitioner and ARCS Mortgage.

A "Consolidation, Extension and Modification Agreement" dated October 22, 1992 (Petitioner's Ex. "K") between petitioner and ARCS Mortgage noted that petitioner was indebted to ARCS Mortgage in the principal sum of \$11,400,000.00 and that petitioner "assumes all of the obligations and agreements of the notes . . . and mortgages . . . listed on Exhibit B hereto." This Exhibit B provided a detailed history of seven mortgages obtained by petitioner (and related predecessor entities) which over time evolved into petitioner's principal indebtedness of \$11,400,000.00 to ARCS Mortgage:

<u>Borrower</u>	<u>Lender</u>	<u>Date of Mortgage</u>	<u>Principal Amount</u>
1. Jeffrey Towers, Inc.	First National City Bank	August 1, 1967	\$3,000,000.00
2. Jeffrey Towers, Inc.	Long Island Savings Bank	December 19, 1967	200,000.00
3. Jeffrey Towers, Inc.	First National City Bank	August 5, 1968	3,250,000.00
4. I.Z. Equities, Inc.	The Brooklyn Savings Bank	January 12, 1973	250,000.00
5. Jeffrey Park II	Independence Savings Bank	August 17, 1983	45,051.21
6. Jeffrey Park, Ltd.	Bayside Federal Savings and Loan Association	January 6, 1988	4,388,436.81
7. Jeffrey Park, Ltd.	ARCS Mortgage	October 22, 1992	1,036,829.55

This Exhibit B to the "Consolidation, Extension and Modification Agreement" dated October 22, 1992 noted that the first six mortgages were consolidated by an earlier "Consolidation, Modification and Extension Agreement" dated January 6, 1988 by and between petitioner and Bayside Federal to form a single lien of \$10,000,000.00. These six mortgages as consolidated were then assigned by an "Assignment of Mortgage" dated October 22, 1992 (Division's Exhibit "I") from Bayside Federal to ARCS Mortgage in consideration of \$10,363,170.45. These assigned mortgages in the principal amount of \$10,363,170.54, together

with the principal amount of \$1,036,829.55 of the seventh mortgage listed above, total \$11,400,000.00, petitioner's principal indebtedness to ARCS Mortgage.

On October 23, 1992, petitioner recorded the Multifamily Mortgage dated October 22, 1992 and paid mortgage recording tax of \$10,368.00 based upon a mortgage amount of \$1,036,829.55. Subsequently, petitioner filed a Form MT-15.1, Mortgage Recording Tax Claim for Refund, dated December 11, 1992 seeking a refund of the \$10,368.00 paid a couple of months earlier. Petitioner provided the following explanation for its refund claim:

"It is claimant's contention that the mortgage assigned by [Bayside Federal] included the mortgage tax paid on the total principal amount of \$11,500,000 and therefore the mortgage tax having been fully paid, the payment made on October 23, 1992 for the consolidated mortgage included a duplication and overpayment of the mortgage tax in the amount of \$10,368 [I]t is submitted that the payment of \$10,368 required for the recording of the mortgage held by [ARCS Mortgage] and consolidated to constitute a single lien of \$11,500,000 was an erroneous overpayment of the mortgage tax since the mortgage tax had been previously fully paid on the mortgage lien of \$11,500,000 recorded on Jan. 15, 1988.

". . . [T]he recording of the mortgage with [ARCS Mortgage] should be exempt from the payment of a duplicate recording tax which had been previously paid.

"Since the mortgage lien assigned to [ARCS Mortgage] in the transaction on October 22, 1992 was in the amount of \$11,500,000,² the consolidated mortgage represented the same principal amount"

The Division, by a letter dated May 26, 1993 of Marjorie A. Kugler, Tax Technician, denied petitioner's refund claim dated December 11, 1992. Ms. Kugler explained that by reason of the execution and recording of the new mortgage dated October 22, 1992 between petitioner and ARCS Mortgage in the principal sum of \$1,036,829.55, mortgage recording tax was payable:

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A close review of the Division's Exhibit "I," "Assignment of Mortgage," dated October 22, 1992, shows the assignment of six mortgages by Bayside Federal to ARCS Mortgage in consideration of \$10,363,170.45. These six mortgages correlate with the six mortgages numbered one through six above. The mortgage in the amount of \$4,388,436.81, made by petitioner to Bayside Federal, was one of the six assigned. As noted above, mortgage recording tax was paid on such \$4,388,436.81 and on \$1,500,000.00, an additional lien which might result from negative amortization upon the recording of the \$4,388,436.81 mortgage.

"This is not a supplemental mortgage which is exempt Mortgage tax was payable because a new mortgage had been given.

"The taxpayer asks us to look to the substance rather than the form of the transaction. They state that this mortgage was a duplication. The choice of form did not rest with the tax authorities but with the taxpayer. If he unfortunately chose a form which was taxable instead of an equally available form which was non-taxable, he must bear the consequences."

OPINION

The Administrative Law Judge concluded that the ARCS Multifamily Mortgage was taxable because it was not exempt as a supplemental mortgage under Tax Law § 255(1). The Administrative Law Judge held that the potential for negative amortization is not the same as an existing indebtedness and, therefore, the Multifamily Mortgage in the amount of \$1,036,829.55 dated October 22, 1992 was a new indebtedness.

Petitioner, on exception, asserts that "the existing mortgage was a recorded mortgage lien for the amount of \$11,500,000 for which a mortgage recording tax had been paid when assigned to ARCS Mortgage, Inc. and the petitioner was entitled to the exemption" (Petitioner's brief on exception, p. 4). Petitioner argues that this matter is analogous to the payment of mortgage recording tax on funds that were not advanced. As a result, petitioner argues it should not be subject to double taxation.

The Division argues that, "[w]hile the 1988 consolidated mortgage provided for possible negative amortization to the extent of \$1,500,000, the actual indebtedness on that mortgage at the time of its assignment to ARCS Mortgage, Inc. was \$10,363,170.45" (Division's brief in opposition, p. 4). The Division, citing Matter of Sunset Nursing Home (Tax Appeals Tribunal, October 26, 1989), contends that the 1992 mortgage was an independent instrument and not a continuation or supplement to the Bayside mortgage.

We reverse the determination of the Administrative Law Judge.

Tax Law § 250(2) defines "mortgage" in pertinent part 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."

Tax Law § 253(1) states in part that:

"[a] tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state . . . is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article."

The mortgage recording tax is imposed on the privilege of recording a mortgage rather than on the lending of money (see, Matter of Citibank, N.A. v. State Tax Commn., 98 AD2d 929, 470 NYS2d 920, 922; see also, Matter of Silberblatt, Inc. v. Tax Commn. of the State of New York, 5 NY2d 635, 186 NYS2d 646, cert denied 361 US 912). In determining whether petitioner is responsible for the mortgage recording tax at issue, we find the Administrative Law Judge failed to adequately address the threshold inquiry, i.e., whether the subject instrument imposed a lien (Matter of Bay View Towers Apts. v. State Tax Commn., 48 AD2d 86, 367 NYS2d 856, affd 40 NY2d 856, 387 NYS2d 1002). The Administrative Law Judge, relying on Sverdlow v. Bates (283 App Div 487, 129 NYS2d 88), found the fact that the ARCS mortgage was executed to dispose of this issue. We disagree, as a proper analysis for mortgage recording tax purposes is not governed by the label an instrument bears (see, e.g., Matter of Drobner v. Chapman, 275 App Div 520, 90 NYS2d 302). Further, in Sverdlow, the Court while holding that the "form" of the subject transaction governed over substance reached that conclusion because the first mortgages were discharged and new ones were substituted in their stead. In this matter, the Bayside consolidated mortgage continued to exist, as it was assigned to ARCS and was further consolidated with the Multifamily Mortgage. As a result, the taxability of the subject mortgage will turn on whether the Multifamily Mortgage imposed a lien and not on the simple fact that a mortgage was recorded.

We find that the Multifamily Mortgage did not impose a lien, and we reach this conclusion based upon a review of the following relevant facts. The consolidated Bayside mortgage assigned to ARCS provided for a maximum lien of \$11,500,000.00, upon which the

mortgage recording tax was paid. At the time of the assignment, \$10,363,170.45 in principal was owed to Bayside of which \$363,170.45 represented negative amortization and the remainder was the initial principal of \$10,000,000.00. On the same date the Bayside mortgage was assigned, ARCS loaned additional funds in the amount of \$1,036,829.55 to petitioner and the Multifamily Mortgage was taken that was consolidated with the Bayside mortgage. The total amount advanced by ARCS under the consolidation agreement was \$11,400,000.00. What is controlling for mortgage recording tax purposes is that the lien imposed by the Bayside mortgage continued to exist pursuant to the assignment agreement and that the maximum potential amount of this lien had not been reduced (cf., Matter of Woodmere Knolls, Inc. v. Procaccino, 52 AD2d 979, 383 NYS2d 105 [where the mortgagor and mortgagee modified their original loan agreement to reduce the amount that would be advanced]; see, Rednow Realty Corp. v. Tully, 72 AD2d 621, 420 NYS2d 792, lv denied 48 NY2d 610, 425 NYS2d 1025 [where maximum amount loanable of \$12 million was reduced to \$10 million]). It is well recognized that the mere exchange of one party for another does not result in the imposition of the mortgage recording tax (Matter of Bay View Towers Apts. v. State Tax Commn., supra). Therefore, the fact that the Bayside Mortgages were assigned to ARCS Mortgages should not logically nor legally require the Multifamily Mortgage to be taxable. In other words, ARCS stands in the shoes of Bayside as mortgagee pursuant to the validly assigned Bayside Mortgage; therefore, mortgage recording tax is not due as a lien is not imposed by the Multifamily Mortgage since the instrument did not secure repayment of a debt in excess of the amount that was "under any contingency" (Tax Law § 253[1]) secured by the assigned Bayside Mortgage.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jeffrey Park, Ltd. is granted;
2. The determination of the Administrative Law Judge is reversed;

3. The petition of Jeffrey Park, Ltd. is granted; and

4. Petitioner's claim for refund dated December 11, 1992 is granted.

DATED: Troy, New York
January 4, 1996

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner