

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
EQUITY TITLE & CLOSING SERVICES, INC. : DECISION
for Revision of a Determination or for Refund of : DTA NO. 820205
Mortgage Recording Tax under Article 11 of the Tax :
Law with Reference to an Instrument Recorded on :
March 23, 2004. :

Petitioner Equity Title & Closing Services, Inc., 401 Wampanoag Trail, Suite 300, East Providence, Rhode Island 02915, filed an exception to the determination of the Administrative Law Judge issued on October 20, 2005. Petitioner appeared by Paul J. Dias, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Nesbitt took no part in the consideration of this decision.

ISSUE

Whether petitioner is entitled to a refund of the mortgage recording tax paid to the Broome County Clerk's Office pursuant to Tax Law § 263.

FINDINGS OF FACT

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

Michelle Knight and Douglas A. Luke owned and resided at 163 Frost Road, Windsor, New York. On March 20, 2004, Ms. Knight and Mr. Luke, as borrowers, and Advanced Financial Services, Inc., (“Advanced Financial”) as lender, executed a mortgage (“March 20, 2004 mortgage”) in the amount of \$130,000.00, encumbering property located at 163 Frost Road, Windsor, New York. A review of this 17-page mortgage indicates that Mortgage Electronic Registration, Inc. (“MERS”), solely as nominee for the lender and the lender’s successors and assigns, is the mortgagee of record for purposes of recording this mortgage. Further review of this document reveals that the borrowers also executed a note dated March 20, 2004 showing that they owed the lender \$130,000.00 “plus interest and other amounts that may be payable,” which debt is payable in full by March 25, 2034. The note dated March 20, 2004 is not part of the record. MERS, as nominee for Advanced Financial, assigned a number, MIN 100049700005433798, to this mortgage and listed same on the first page of the mortgage.

Petitioner, Equity Title & Closing Services, Inc., as closing agent of MERS, as nominee for Advanced Financial, filed the mortgage in the office of the Clerk of Broome County where it was recorded on March 23, 2004 in Book 2966 at page 681. A mortgage recording tax in the sum of \$1,300.00 was paid at the time of recordation.

On March 27, 2004, Ms. Knight and Mr. Luke, as borrowers, and Advanced Financial, as lender, executed a mortgage (“March 27, 2004 mortgage”) in the amount of \$130,000.00, encumbering the property located at 163 Frost Road, Windsor, New York. A review of this 17-page mortgage indicates that MERS, solely as nominee for the lender and the lender’s successors and assigns, is the mortgagee of record for purposes of recording this mortgage. Further review of this document reveals that the borrowers also executed a note dated March 27, 2004 showing

that they owed the lender \$130,000.00 “plus interest and other amounts that may be payable,” which debt is payable in full by April 1, 2034. The note dated March 27, 2004 is not part of the record. MERS, as nominee for Advanced Financial, assigned a number, MIN 100049700005433798, to this mortgage and listed same on its first page. On the same date, Ms. Knight and Mr. Luke, as borrowers, and Advanced Financial, as lender, executed a second mortgage (“March 27, 2004 second mortgage”) in the amount of \$19,500.00, encumbering the property located at 163 Frost Road, Windsor, New York. A review of this six-page second mortgage indicates that MERS, solely as nominee for the lender and the lender’s assigns, is the mortgagee of record for purposes of recording this mortgage. Further review of this document reveals that the borrowers executed a junior lien note dated March 27, 2004 showing that they owed the lender \$19,500.00 plus interest, which the borrowers promised to pay in full by April 1, 2014. The junior lien note dated March 27, 2004 is not part of the record. MERS, as nominee for Advanced Financial, assigned a number, MIN 100049700005523242, to this second mortgage and listed same on its first page.

The March 27, 2004 mortgage in the amount of \$130,000.00 was recorded in the office of the Clerk of Broome County on April 30, 2004 in Book 2976 at page 993 and a mortgage recording tax in the sum of \$1,300.00 was paid. On April 30, 2004, the March 27, 2004 second mortgage was also recorded in the office of the Clerk of Broome County in Book 2976 at page 1012 and a mortgage recording tax in the sum of \$195.00 was paid.

On April 13, 2004, the Division of Taxation (the “Division”) received a Mortgage Recording Tax Claim for Refund wherein petitioner requested a refund of \$1,300.00. In that refund claim, petitioner asserted that the borrowers cancelled the loan transaction memorialized

in the March 20, 2004 mortgage; however, their cancellation took place after the March 20, 2004 mortgage was recorded and the mortgage recording tax was paid on March 23, 2004. Petitioner further asserted that the March 20, 2004 mortgage was recorded during the rescission period. Petitioner also contended that it advanced the sum of \$1,300.00, the amount of the mortgage recording tax due. The only documentation submitted in support of petitioner's claim for refund was a copy of a Satisfaction of Mortgage dated March 30, 2004. There was no information submitted to indicate that the Satisfaction of Mortgage had been recorded in the office of the Clerk of Broome County. Petitioner did not submit a copy of the executed Right of Rescission.

On April 19, 2004, the Division sent a letter to petitioner explaining that the claim for refund could not be processed as filed. The letter requested petitioner to supply a notarized consent or assignment from the mortgagor and/or mortgagee consenting to the payment of the refund to the named recipient; a certified copy of the recorded mortgage including all data entered by the recording officer; a copy of the Discharge of Mortgage and a copy of the Right of Rescission.

On June 15, 2004, the Division sent a second letter to petitioner wherein the Division noted that petitioner had not responded to its April 19, 2004 request for certain additional information necessary to process the mortgage tax refund claim. The Division indicated that the refund would be denied if the requested information was not submitted within 30 days.

On June 29, 2004, the Division received a letter from petitioner's chief operating officer, Mark F. Comstock, Esq., accompanied by a notarized Consent and Affidavit of Facts executed by Jeffrey Cordeiro, vice president of Advanced Financial, as well as copies of the March 20,

2004 mortgage and the two mortgages dated March 27, 2004. Advanced Financial, as mortgagee, consented to the payment of the refund of the mortgage recording tax to petitioner.

On July 7, 2004, the Division denied petitioner's refund claim on the grounds that the mortgage recording tax was not erroneously paid and the mortgagors did not exercise their statutory right of rescission in accordance with Tax Law § 257-a.

On October 6, 2004, petitioner filed a petition challenging the denial of its refund claim. In this petition, petitioner asserts that it erroneously paid the mortgage recording tax because the March 20, 2004 mortgage was cancelled by the mortgagee (lender) prior to creating a debt or obligation.

MERS, as nominee for Advanced Financial, executed a Satisfaction of Mortgage on March 30, 2004, for the March 20, 2004 mortgage, which satisfaction was recorded on February 2, 2005 in the office of the Clerk of Broome County in Book 3043, Page 1126.

The record does not include a copy of either the Right of Rescission executed by the borrowers or any other document executed by the lender or the borrowers cancelling the March 20, 2004 transaction.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that where a refund claim is based on a mortgagor's exercise of the statutory right of rescission, in addition to the information and documentation otherwise required, the refund applicant must submit: (1) a copy of the recorded satisfaction or discharge of the mortgage; and (2) an executed copy of the "Notice of Right to Cancel" (*see*, 20 NYCRR 654.2[b]).

The regulations also require that where the refund is to be paid to the mortgagor or mortgagee's legal representative, a notarized consent or assignment be provided wherein the mortgagor and/or mortgagee consents to the payment of the refund to the named recipient. This notarized consent or assignment must be attached to the refund application (*see*, 20 NYCRR 654.2 [c]).

The Administrative Law Judge rejected petitioner's argument that the mortgage recording tax was erroneously paid because the March 20, 2004 mortgage was erroneously recorded during the federally mandated rescission period.¹ In this case, petitioner, as closing agent, presented the March 20, 2004 mortgage to the Broome County Clerk where it was recorded on March 23, 2004. This mortgage, the Administrative Law Judge pointed out, was perfected at the time of recording. The Administrative Law Judge observed that since the borrowers' home secured the loan, this credit transaction was governed by the Truth in Lending Act, and the borrowers had until midnight of the third business day after the transaction was consummated to rescind the transaction, i.e., until midnight of March 24, 2004. The Administrative Law Judge noted that although the lender is prohibited from disbursing the loan proceeds to the consumer other than in escrow until after the rescission period has expired, the lender can perfect its security interest

¹A "statutory right of rescission" means the right of a borrower (mortgagor) to cancel a consumer credit transaction in which a security interest, including a real property mortgage, is retained or acquired in any real property that is used, or is expected to be used, as a residence of the borrower as provided for in the Federal Truth in Lending Act ("TALA") (*see*, 15 USC § 1601 et seq.). (*see*, Tax Law § 257-a[1].) Under TALA, the right of rescission gives borrowers of certain types of loans the right to cancel their credit transaction by midnight of the third business day after delivery of one copy of the "material" TALA disclosures, i.e., the APR, the finance charge, the amount financed, the total payments, the payment schedule and, if applicable, "high cost mortgage" disclosures to each consumer; delivery of two copies of the notice of right to rescind to each consumer who has the right to rescind and consummation of the transaction, i.e., when the promissory note is signed (*see*, 15 USC § 1635[a], [d]; 12 CFR 226.23[a][5]; [b][1]). If the required notice or material disclosures are not delivered, the right of rescission shall expire three years after consummation of the transaction, upon transfer of all of the consumer's interest in the property, or upon the sale of the property, whichever occurs first (*see*, 15 USC § 1635[f]).

(*see*, 12 CFR 226.23[c]; *see also*, 12 CFR part 226 Supp. I para. 23[c]-1 and para. 23[c]-3). The Administrative Law Judge found that petitioner, as closing agent, intended to perfect the lender's security interest in the borrowers' home when petitioner recorded this mortgage. The Administrative Law Judge observed that the mortgage recording tax is not a tax on property but on the privilege of recording a mortgage, with the underlying debt providing the basis for computing the tax due (*see, Matter of S.S. Silberblatt, Inc. v. State Tax Commn.*, 5 NY2d 635, 186 NYS2d 646, *cert denied* 361 US 912, 4 L Ed 2d 183). Accordingly, the mortgage recording tax becomes due and payable at the time a mortgage is recorded.

Petitioner also claimed that it was entitled to a refund of the mortgage recording tax because the loan was cancelled by mutual agreement of the borrowers and the lender and that such cancellation has the same effect as a rescission by the mortgagors (borrowers). The Administrative Law Judge acknowledged that the Truth in Lending Act gives a borrower the right to cancel a transaction for any reason during the rescission period; however, the borrower must notify the lender in writing that he is canceling the contract before midnight of the third business day (*see*, 15 USC § 1635[a]; 12 CFR 226.23[a][2]).

In support of its contention that the March 20, 2004 mortgage was canceled, petitioner submitted a copy of the Satisfaction of Mortgage executed on March 30, 2004 and recorded in Broome County Clerk's office on February 2, 2005 and the affidavit of Jeffrey Cordeiro, vice president of Advanced Financial. The Administrative Law Judge found petitioner's documentation did not prove that the mortgagors exercised their statutory right of rescission. Mr. Cordeiro's affidavit did not allege that the borrowers executed a "Notice of Right to Cancel" or any other proof of written notification to the lender of their intention to cancel the transaction.

Nor, the Administrative Law Judge pointed out, is any such document attached to his affidavit. The Administrative Law Judge noted that when the basis of the claim for refund of the mortgage recording tax is the mortgagors' exercise of the statutory right of rescission, the Division's regulations require the submission of a copy of the recorded satisfaction of mortgage and an *executed copy of the "Notice of Right to Cancel"* (*see*, 20 NYCRR 654.2). Accordingly, the Administrative Law Judge concluded petitioner is not entitled to a refund of the mortgage recording tax.

The Administrative Law Judge also rejected petitioner's argument that because the March 20, 2004 mortgage was canceled by mutual agreement and the funds were never disbursed, no principal debt, lien or obligation was created, and the mortgage was erroneously recorded on March 23, 2004. The Administrative Law Judge pointed out that Tax Law § 253(1) imposes a mortgage recording tax "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" The Administrative Law Judge noted that on March 20, 2004, the borrowers and lender executed the mortgage that secured a mortgage indebtedness of \$130,000.00. Petitioner, as closing agent, recorded the mortgage on March 23, 2004. The tax became due and payable at the time the mortgage was recorded. Tax Law § 263 does not provide for a refund when the mortgage is canceled. The Administrative Law Judge found that the mortgage recording tax was properly imposed and collected upon recording of the March 20, 2004 mortgage and that petitioner failed to prove it is entitled to a refund of the mortgage recording tax.

ARGUMENTS ON EXCEPTION

Petitioner's sole argument on exception is that it is entitled to a refund of the subject mortgage recording tax even though no "Notice of Right to Cancel" executed by the mortgagors was placed in the record of this proceeding. Petitioner has submitted no brief in support of this position.

OPINION

When the basis of the claim for refund of the mortgage recording tax is the mortgagor's exercise of the statutory right of rescission, the Division's regulations require the submission of a copy of the recorded satisfaction of mortgage and an executed copy of the "Notice of Right to Cancel" be included in support of an application for refund (*see*, 20 NYCRR 654.2[b]). As noted earlier, the record here does not include a copy of any rescission documents. There is also no evidence to show that such documents were at any time provided to the Division in support of its application for refund despite repeated requests by Division personnel (*see*, Exhibits "J" and "K"). Accordingly, petitioner has failed to meet its burden of proving that it is entitled to a refund. Petitioner's attempt to offer evidence of the executed "Notice of Right to Cancel" for the first time on this exception must be rejected.² We have held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final (*see*, ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the

²Petitioner attempted to offer copies of certain documents as an attachment to their exception. Unfortunately, the record in this proceeding was closed by letter of the Administrative Law Judge dated May 17, 2005. We note that the Division moved that the Administrative Law Judge reopen the record for submission of additional documents. That motion was granted. Petitioner could have made a similar motion to the Administrative Law Judge if it wished to add additional evidence, e.g., rescission documents. Petitioner made no such motion and, unfortunately, our rules do not provide for receiving additional evidence at this stage of the proceedings.

hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (*see, Matter of Moore*, Tax Appeals Tribunal, June 28, 2001; *Matter of Emerson*, Tax Appeals Tribunal, May 10, 2001; *Matter of Schoonover, supra*).

Therefore, the determination of the Administrative Law Judge is affirmed. Petitioner offered no evidence below or argument on this exception which would justify our modifying the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Equity Title & Closing Services, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Equity Title & Closing Services, Inc. is denied; and
4. The Division of Taxation's denial of the refund dated July 7, 2004 is sustained.

DATED: Troy, New York
July 20, 2006

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner