

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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. :

DETERMINATION
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 December 12, 1990. :

Petitioner 11814 Homes Corporation, P.O. Box 221, Williamsburg Station, Brooklyn, New York 12211, filed a petition 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.

Petitioner Rockingham Tenants Corporation, P.O. Box 221, Williamsburg Station, Brooklyn, New York 12211, filed a petition for revision of adetermination or for refund of

mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on July 11, 1991.

Petitioner Sherry Plaza Apartments, P.O. Box 221, Williamsburg Station, Brooklyn, New York 12211, filed a petition 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 December 12, 1990.

Petitioners appeared by Meyer M. Lieber, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel). The Commissioner of Finance of the City of New York appeared by Paul A. Crotty, Esq. (Helene R. Jaffe, Esq., and Robert J. Firestone, Esq., of counsel).

Each of the parties executed consents waiving a hearing in these matters and consenting to have the controversies determined on submission. Documents and briefs were submitted by all parties. Petitioners filed reply briefs on August 5, 1994 which began the six-month period for the issuance of this determination.

Upon consideration of all documents and briefs submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

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

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, Finding of Fact "2") 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).

CONCLUSIONS OF LAW

A. The parties agree that before 1989 the mortgage recording tax was not imposed on the Queens County mortgages.¹ The facts surrounding each of these mortgages are very similar to those described in Matter of City of New York v. State Tax Commission (130 AD2d 890, 516 NYS2d 132). There, the 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). The New York City Finance Office required payment of mortgage recording tax on the \$79,947.78 mortgage. Associates paid the tax and then applied for a refund which was granted by the former State Tax Commission. In confirming that decision, the court

¹The mortgages which are the subject of petitioners' refund claims will be referred to collectively as the "Queens County mortgages".

stated that

the raising of the underlying consolidated debt to \$350,000.00 "did not increase the overall indebtedness but merely raised the consolidated first mortgage on the property to \$350,000.00 and reduced Associates' equity position on the wraparound mortgage to \$650,000.00." The court then summarized the applicable law stating:

"The 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 NE2d 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 NE2d 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 NE2d 474). Once a mortgage has been given and recorded, it may be changed by a supplemental mortgage and no additional recording tax will be due as long as the amount secured remains the same (Tax Law § 255; see, Matter of Rednow Realty Corp. v. Tully, 72 AD2d 621, 622, 420 NYS2d 792, lv denied 48 NY2d 610, 425 NYS2d 1025, 401 NE2d 221)." (Id., 516 NYS2d at 133.)

Based on the facts of the case, the court found that no additional indebtedness was created by the \$79,947.78 mortgage since the total indebtedness remained at \$1,000,000.00, and, therefore, no new mortgage recording tax was due.

Petitioners argue that the facts in each of their cases are indistinguishable from those in City of New York. In each case, the Queens City mortgage did not increase the overall indebtedness but rather reduced the sponsor's equity position on the wraparound mortgage. Petitioners state that since no new or additional indebtedness was created by the Queens County mortgages, no new mortgage recording tax was due.

It is the position of the Division and the City of New York ("City") that the holding in City of New York v. State Tax Commn. (supra) and the precedent cited by the court are inapposite because of an amendment to section 250 of the Tax Law, which became effective as of July 1, 1989. Tax Law § 250(2) provides, in relevant part:

"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" (emphasis added).

The underlined sentence was added to section 250 by chapter 241, section 80, of the Laws of 1989. The Division and the City take the position that the Queens County mortgages fall squarely within the amending language. According to the City's characterization of the transactions, each of the elements of the statute has been met: (1) the indebtedness secured by the wraparound mortgages was partially paid at the time the mortgages were refinanced; and (2) funds were advanced, or re-advanced, by Queens County under the terms of a second mortgage with the debt owed to each sponsor being paid out of the new funds. Therefore, argues the City, the mortgages from Queens County were "mortgages" within the meaning of Tax Law § 250(2) and taxable upon recording.

In response to the City's position, petitioners argue that the amendment of section 250 did not legislatively overturn the existing rule that tax is imposed only on a mortgage which creates or secures a new or further indebtedness. Petitioners rely on a memorandum of the Division which provides guidance to taxpayers in construing the new language -- TSB-M-89-(6.1)R. The bulk of that memorandum is quoted (without attribution) in the Division's letters denying the refund claims and need not be repeated here (see, Finding of Fact "18"). The memorandum states that the intent of the amendment was to codify an opinion of the Attorney General (1953 Op Atty Gen 198). It also states:

"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" (TSB-M-89-[6.1]R).

The 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.

In City Title Insurance Company v. Orgel (2 AD2d 250, 154 NYS2d 751), the Appellate Division, Second Department, considered the same issues. In that case, the underlying mortgage was entered into in 1944 and secured a principal debt of \$7,000.00. The proper amount of mortgage recording tax was paid on recording. By November 1953, the principal debt had been reduced to \$3,298.71. The creditor then advanced to the mortgagor an additional \$2,701.29, and they entered into an agreement which stated that the parties to the agreement wished to modify the mortgage and the underlying bond to make a provision for advances or readvances of the principal sum. The agreement also stated as follows:

"[I]t is agreed between the parties hereto that in addition to the bond or obligation above-mentioned, the aforesaid mortgage shall also secure any and all further loans or indebtedness owed or to be owed by the mortgagor to the mortgagee and it is stipulated that the maximum amount secured by the said mortgage at execution or which under any contingency may be secured thereby at any time in the future shall be the principal amount thereof. The obligation of the mortgagee to make further or future advances or re-advances shall be optional with the mortgagee, and such re-advances may be made under the provisions hereof to the present or to any future owner of the mortgaged premises" (id. at 753).

The parties to the controversy agreed that a mortgage recording tax was imposed upon the recording of the agreement, but each took a different view regarding the tax base. The plaintiff argued that the tax base should be the amount that was actually advanced at the time the agreement was entered into, \$2,701.29. It was the appellant's position that the tax was payable on the entire amount for which the mortgage could stand as security, \$7,000.00. The court stated that sections 250 and 255 of the Tax Law reflect a legislative intent that "the unpaid balance of the original mortgage, having previously been taxed, shall not be taxed again" (id. at 755). Reading these provisions together, the court held that "only the amount by which an indebtedness is increased should be taxed" (id.). Based on the provisions of sections 253 and 256, the court found "that the tax base shall be an amount up to the maximum for which the mortgage might become security" (id.). The court concluded that, upon recording of the modification agreement, the proper tax base was the difference between the maximum amount that the mortgage could stand for, \$7,000.00, and the amount that was unpaid on the original

debt, \$3,298.71, that difference being \$2,701.29.

It is petitioners' position that the provision amending section 250 was intended to codify the Opinion of the Attorney General and was intended to apply only to circumstances like those in City Title Insurance Company v. Orgel (supra).

B. Where, as here, resolution of the controversy raised by the parties depends on interpretation of a statute, a few cardinal rules apply. The primary function of statutory construction is to effectuate the intent of the Legislature; therefore, where the statutory language is clear and unambiguous, it should be construed so to give effect to the plain meaning of the words used (Patrolmen's Benevolent Assn. v. City of New York, 41 NY2d 205, 208, 391 NYS2d 544). The resort to "extrinsic matter" is not appropriate where the words of the statute are clear and unambiguous (Sega v. State of New York, 60 NY2d 183, 191, 469 NYS2d 51). However, when reasonable minds can differ as to the meaning of the words used, it is appropriate to refer to the objectives which the Legislature sought to achieve and "the contextual spirit and purpose of [the] enactment" (Matter of 1605 Bookstore v. Tax Appeals Tribunal, 83 NY2d 240, 609 NYS2d 144, cert denied ___ US ___, 130 L Ed 2d 19, citing Matter of Petterson v. Daystrom Corp., 17 NY2d 32, 268 NYS2d 1). Ambiguity in a taxing statute must be construed in favor of the taxpayer and against the taxing authority (Matter of American Cyanamid & Chem. v. Joseph, 308 NY 259). However, tax statutes must be construed to insure the collection of taxes where a supportable theory can be found (Matter of 1605 Bookstore v. Tax Appeals Tribunal, supra, 609 NYS2d at 147).

C. In my view, the amending language of section 250 does not require resort to extrinsic matter. Reducing the last sentence of section 250 to its critical language, it reads as follows:

"Where all or part of the indebtedness secured by a mortgage of real property . . . 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 . . . and shall be taxable as such upon the amount of such new funds. . ." (emphasis added).

The amending language encompasses facts similar to those of City Title Insurance Company v. Orgel (supra) and is apparently intended to address similar circumstances. The crucial elements

of a transaction covered by the amending language are these: (1) an indebtedness is secured by a mortgage; (2) full or partial payment of the indebtedness is made; and (3) there is a subsequent advance or readvance of new funds which are to be secured by such mortgage. The mortgages in issue here do not fall within this pattern.

The facts of 11814 again may be used to exemplify the circumstances of all three cases. In December 1983, 11814 purchased certain premises from J & M Realty and executed a purchase money wraparound mortgage in the amount of \$850,000.00. The mortgage gave J & M Realty the power to refinance the wraparound mortgage. On June 5, 1991, 11814 executed a second mortgage in favor of J & M Realty in the amount of \$170,000.00. This mortgage was recorded and the mortgage recording tax was paid on July 11, 1991. The \$850,000.00 mortgage was consolidated with the \$170,000.00 mortgage for a consolidated balance of \$1,020,000.00. At that point, the tax was paid on the full amount of the recorded indebtedness of \$1,020,000.00. J & M Realty then undertook refinancing of the consolidated wraparound mortgage. 11814 executed a supplemental mortgage in favor of Queens County on June 5, 1991 in the amount of \$513,587.49 which was paid directly to J & M Realty. The Queens County mortgage was consolidated with the underlying mortgage, which now totalled \$486,412.51, and Queens County took back a first mortgage in the amount of \$1,000,000.00. 11814 did not pay down its debt and subsequently borrow new funds under an existing or another mortgage as did the mortgagor in Orgel. 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.

D. Although resort to legislative history is unnecessary, I will briefly address petitioners' argument that the legislative history supports their position. My own review of the legislative history did not confirm that the amendment of Tax Law § 250 was intended to codify the Attorney General's Opinion (see, Memorandum of the Division [TSB-M-89-(6.1)R]). The legislative history is simply silent on this point. Sections 80-90 of chapter 241 (L 1989) which

amended article 11 of the Tax Law were part of a larger packet of amendments all relating to the imposition of taxes in the City of New York. The purpose of the legislation was to generate new revenues for the City which were needed to balance the City's budget. In a letter to the Honorable Mario M. Cuomo, the Office of the Mayor of the City of New York (June 30, 1989) recommended approval of the legislation stating:

"Sections 80-90 [of chapter 241 of the laws of 1989] clarify amendments to the mortgage recording tax in order to bring a wider range of mortgage financings into the tax base, making the tax more equitable. The mortgage recording tax was originally intended to be implemented on the act of registering a lien against real property located in New York City. With the evolution of complex real estate financing techniques, sophisticated participants in the real estate market are able to structure mortgage financings in ways that are not currently subject to the tax. For example, some people use old mortgage liens to obtain new loans and, therefore, escape the mortgage recording tax. The result of these techniques is unfair to the average home buyer, whose mortgage is subject to the tax. Revenue will increase by \$5 million annually in 1990 and 1991 under this proposal."

Although this letter argues for a very expansive reading of the language amending Tax Law § 250, I think there is good reason not to accept the City's position, as expressed in this letter and in the briefs filed in the instant proceeding. The primary reason is that the amendment itself does not reflect an intention to nullify prior law as it applies to the City.

The Legislature is assumed to have known of existing statutes and judicial decisions in enacting amendments to a statute and it may be presumed that the Legislature had such judicial construction in mind when adopting the amendment (People v. Keyes, 141 AD2d 227, 535 NYS2d 162, affd 75 NY2d 343, 553 NY2d 81 citing McKinney's Cons Laws of NY, Book 1, Statutes § 222). In accordance with general rules of construction, an amendment is to be construed together with the original statute, and the two may be read together as one law enacted at the same time. At the time of amendment, the courts had construed Tax Law §§ 250 and 255 as reflecting a legislative intent to not impose additional mortgage recording tax on a supplemental mortgage, as long as the amount secured remains the same and the underlying debt is not extinguished (see, Matter of City of New York v. State Tax Commn., supra, and the cases cited therein). The amending language left intact the language of Tax Law §§ 250 and 255 which the courts relied on in arriving at this construction of the statutory scheme. I cannot

find in the amending language evidence of an intent to depart from this settled interpretation of section 250.

E. The petitions of 11814 Homes Corporation, Rockingham Tenants Corporation and Sherry Plaza Apartment Corporation are granted, and their claims for refund of mortgage recording taxes are granted.

DATED: Troy, New York
February 2, 1995

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE