

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LIGHTHOUSE LANES, LLC : DETERMINATION
for a Refund of Mortgage Recording Tax Under Article 11 : DTA NO. 819725
of the Tax Law with Regard to an Instrument Recorded on :
August 22, 2002. :

Petitioner, Lighthouse Lanes, LLC, 295 East Albany Street, Oswego, New York 13126, filed a petition for refund of mortgage recording tax under Article 11 of the Tax Law with regard to an instrument recorded on August 22, 2002.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel), brought a motion, filed April 15, 2004, seeking summary determination in this matter pursuant to 20 NYCRR 3000.9(b). Petitioner, which appeared by its representative, Stephen C. Greene, Esq., timely answered the motion on May 10, 2004, which date commenced the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of mortgage recording tax.

FINDINGS OF FACT

1. Petitioner, Lighthouse Lanes, LLC, was a limited liability company organized and existing under the laws of the State of New York at all times relevant hereto.
2. On August 22, 2002, petitioner filed a mortgage, dated August 16, 2002, in the Oswego County Clerk's Office which listed the parties to the mortgage as Lighthouse Lanes, LLC, 295 East Albany Street, Oswego, New York, as mortgagor, and Cayuga Bank, 115 Genesee Street, Auburn, New York, as mortgagee. The mortgage secured an indebtedness in the sum of \$1,430,559.00. The receipt for the mortgage recording tax from the Oswego County Clerk's Office indicated that the mortgage was "commercial" and that mortgage recording tax in the sum of \$14,306.00 was paid.
3. The mortgage stated that petitioner warranted good and marketable title to a certain parcel of land, approximately 3.3 acres in size, located in the City of Oswego, New York and more specifically known as 295 East Albany Street. Petitioner received the land by deed from the City of Oswego on August 22, 2002. There is no evidence in the record of any other party having an interest in the property on the date the mortgage was recorded.
4. The mortgage incorporated by reference the terms contained in a certain 5th Revised Commitment Letter, dated August 15, 2002.¹ In addition, the parties to the mortgage stated at the end of the property description that the mortgage was a building loan mortgage "in connection with a Building Loan Agreement" entered into by the parties on August 16, 2002 and filed in the Oswego County Clerk's Office on August 22, 2002. However, this document was not included in the record.

¹Only the "4th" revised commitment letter was entered into evidence.

5. Previously, on March 22, 2002, the Oswego County Industrial Development Agency (“IDA”) adopted an Inducement Resolution whereby it agreed, in furtherance of its goal to promote the economic welfare of the State, to work with petitioner in undertaking a project whereby the agency would acquire a controlling interest in a certain parcel of land in the City of Oswego, construct a bowling center thereon, and acquire and install furnishings, fixtures and machinery therein. In addition, it agreed to grant financial assistance in the sum of \$125,000.00 from its revolving loan fund.

6. Section 5 of the Inducement Resolution stated:

Subject to . . . due execution and delivery by the Company [petitioner] of the Agreement, the Company is appointed the true and lawful agency [sic] of the Agency to proceed with the Project, all with the same powers and the same validity as if the Agency were acting in its own behalf, subject to the terms and conditions of the Agreement. The appointment made by this Section . . . shall not be effective until the Agreement . . . is duly executed and delivered by the Company.

7. The “Agreement” referred to in the Inducement Resolution was entered into by the IDA and petitioner on June 7, 2002. Article 2 of said Agreement provided that the IDA would use its “best efforts” to designate petitioner as its agent for completing the project, and that the IDA would authorize the execution of documents necessary for achieving the project goals, including the appointment of petitioner as its agent.

8. Section 2.03 of the Agreement described the proposed transfers of interests between the IDA and petitioner in furtherance of the project goals. It called for the IDA to lease the Project Facility to petitioner, which would then complete the project as its agent. In the Inducement Resolution, the IDA had elaborated on the plan, stating that the IDA would lease the facility from petitioner and then sublet it back to petitioner. In fact, this is what transpired. Petitioner, as owner of the property, leased the premises to the IDA pursuant to a lease filed in the Oswego

County Clerk's Office on November 22, 2002 and the premises were sublet by the IDA to petitioner on the same date, three months following the execution and filing of the mortgage by petitioner.

9. In a commitment letter (4th Revision) dated May 1, 2002, Cayuga Bank set forth certain contingencies for granting the loan, including the procurement of a commitment letter from the County IDA for financing in the amount of \$125,000.00, representing one part of the financing petitioner was receiving from several creditors. In addition, the commitment letter specifically provided that the mortgage and obligor were in the name of petitioner alone.

10. Petitioner filed a claim for refund, dated October 21, 2002, in the amount of \$14,306.00, claiming that it was exempt from tax as an agent of the IDA. On August 7, 2003, the Division denied the claim in full, contending that the IDA was not a party to the mortgage transaction.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). In this matter, the parties agree that there are no material issues of fact. Therefore, the Division's motion may succeed if it prevails on the underlying legal issue.

B. Section 253 of the Tax Law imposes a recording tax upon every mortgage at the rate of "fifty cents for each one hundred dollars and each remaining fraction thereof of principal debt or obligation which is . . . secured . . . by a mortgage on real property situated within the state." Mortgage is defined in Tax Law § 250(2) as "every mortgage or deed of trust which imposes a

lien 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.”

C. Tax Law § 258 provides for the enforcement and collection of the tax as follows:

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

It has been long established 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 Silberblatt v. State Tax Commn.*, 5 NY2d 635, 186 NYS2d 646, *cert denied* 361 US 912, 4 L Ed 2d 183.)

In this matter, when the mortgage in issue was recorded on August 22, 2002, the Oswego County Clerk imposed and collected mortgage recording tax in the sum of \$14,306.00. Apparently, the clerk determined that the document presented for filing was a commercial mortgage imposing a lien on real property and qualified for none of the exemptions from tax specified in Tax Law §§ 252 or 252-a.

D. Although petitioner qualified for none of the enumerated exemptions in Tax Law §§ 252 or 252-a, it seeks to reap the benefit of an exemption from mortgage recording tax afforded to the State and its agencies, in this case the Oswego County IDA. (*See, General Municipal Law § 874; Matter of City of New York v. Tully*, 88 AD2d 701, 451 NYS2d 265, *lv denied* 57 NY2d 606, 455 NYS2d 1025.) Since petitioner seeks the benefit of this exemption, which like all tax exemptions must be strictly and narrowly construed, it bears the burden of demonstrating that it comes within the reach of the exemption. (*See, Matter of Grace v. New York State Tax*

Commn., 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027.) Petitioner has not met its burden.

E. The arguments raised by petitioner in this matter are not novel. When the parties involved in the transaction at the time of recording the mortgage are private concerns the mortgage tax is due, notwithstanding the eventual ownership of the debts by a governmental instrumentality pursuant to a previous agreement. (*Matter of C.E. Towers v. New York State Tax Commn.*, 135 AD2d 976, 522 NYS2d 384, *lv denied* 71 NY2d 804, 528 NYS2d 829, citing *Matter of Silberblatt v. State Tax Commn.*, *supra*, [where the petitioner and Chase Manhattan Bank were both private entities and the only parties to the building loan mortgage when it was recorded]).

The instant matter is indistinguishable. Petitioner and Cayuga Bank were private concerns and the only parties to the construction mortgage recorded on August 22, 2002. Further, in the mortgage, petitioner warranted that it, not the IDA, had good and marketable title to the property and the commitment letter stated that petitioner, not the IDA, was the sole named mortgagor and obligor. In fact, the IDA did not acquire an interest in the property until November 22, 2002, when petitioner granted it a leasehold interest. In sum, petitioner has not demonstrated an entitlement to any of the express statutory exemptions and the mortgage tax was properly imposed, collected and paid, notwithstanding the Inducement Resolution and Agreement which expressed a contrary “intent.”

Secondarily, although petitioner argues that it was merely acting as an agent of the Oswego County IDA by virtue of the Inducement Resolution, dated March 22, 2002, and the subsequent Agreement, dated June 7, 2002, it never divulged the same to the Oswego County Clerk on any of the documents it presented upon recording the mortgage. “A person acting as

an agent for another is individually liable if, at the time of making the contract, he fails to disclose his agency, regardless of whether or not he was authorized to execute the contract.” (3 NY Jur 2d, Agency, § 309.) Therefore, petitioner’s agency argument is unconvincing.

F. Finally, petitioner’s argument that a refund must be allowed on equitable grounds is rejected. Given the precedent established by the *Towers* and *Silberblatt* cases, petitioner was on ample notice that its actions would result in the imposition of the mortgage recording tax. Therefore, it cannot now declare that the proper collection of the tax was unfair or inequitable.

As pointed out by the Division, petitioner bears the full responsibility for the form of the transaction it chose. (*See, Sverdlow v. Bates*, 283 App Div 487, 129 NYS2d 88, 91; *Matter of Gropper*, Tax Appeals Tribunal, December 19, 2002.)

G. The petition of Lighthouse Lanes, LLC is denied, the Division of Taxation’s denial of petitioner’s application for refund, dated August 7, 2003, is sustained and the Division of Taxation’s motion for summary determination is granted.

DATED: Troy, New York
July 15, 2004

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE