

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**BLUE WATER ABSTRACT, INC.** : SMALL CLAIMS  
 : DETERMINATION  
 : DTA NO. 820035  
for Revision of a Determination or for Refund of Mortgage :  
Recording Tax under Article 11 of the Tax Law with :  
Reference to a Mortgage Recorded on March 7, 2003. :

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Petitioner, Blue Water Abstract, Inc., 195 Mill Road, Westhampton Beach, New York 11978, 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 a mortgage recorded on March 7, 2003.

A small claims hearing was held before James Hofer, Presiding Officer, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York, on July 21, 2005 at 9:15 A.M. Petitioner appeared by its officers, David Ensler and Jolain Ensler. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Gail Cieszynski). Since neither party elected to reserve time to file a brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether \$2,023.85 of mortgage recording tax petitioner paid to the Suffolk County Clerk with respect to a mortgage recorded on March 7, 2003 constituted an erroneous payment within the meaning and intent of Tax Law § 263(1)(a) thereby entitling petitioner to a refund of the erroneous payment.

***FINDINGS OF FACT***

1. Petitioner, Blue Water Abstract, Inc., is a title company located in Suffolk County. David Ensler and Jolain Ensler, husband and wife, are petitioner's president and vice-president, respectively.

2. On January 24, 2003, Dana Dolan refinanced with Lehman Brothers Bank, FSB (“Lehman Brothers”) a mortgage she had previously given to Wall Street Mortgage Bankers, LTD., with respect to real property located at 33 Guernsey Lane, East Hampton, New York. Petitioner was the title company involved with Ms. Dolan’s refinancing and in connection therewith it issued a title insurance policy for Ms. Dolan to Lehman Brothers and was also responsible for having various documents, such as the mortgage, recorded in the Suffolk County Clerk’s office.

3. The title insurance policy issued by petitioner with respect to Ms. Dolan’s refinancing described the insured mortgage and assignments in the following manner:

Mortgage made by Dana Dolan a/k/a Dana N. Dolan to Wall Street Mortgage Bankers, LTD d/b/a Power Express in the amount of \$208,000.00 dated 10/18/2001 recorded 12/11/2001 in Liber 19988 Page 856. Mortgage is assigned to Aurora Loan Services by assignment dated 01/24/2003 and to be recorded. Mortgage is further assigned to Lehman Brothers Bank, FSB by assignment dated 01/24/2003 and to be recorded. Mortgage is now in the reduced amount of \$202,384.92. Mortgage made by Dana Dolan to Lehman Brothers Bank, FSB in the amount of \$108,315.08 dated 01/24/2003 and to be recorded. Mortgages are to be consolidated, extended and modified to form a single lien in the amount of \$310,700.00 by agreement dated 01/24/2003 to be recorded in the Suffolk County Clerk’s Office.

4. Although Ms. Dolan’s refinancing was structured as an assignment of her existing mortgage with Wall Street Mortgage Brokers, LTD., in the reduced amount of \$202,384.92 to Lehman Brothers and the execution of a new mortgage to Lehman Brothers for \$108,315.08, with both mortgages to be consolidated, extended and modified to form a single lien in the sum of \$310,700.00, the mortgage prepared by Lehman Brothers and executed at closing indicated that the transaction was a new mortgage for \$310,700.00. There was no language in the new mortgage dated January 24, 2003 which provided for the assignment and consolidation of the lien created by the earlier Wall Street Mortgage Brokers, LTD., mortgage dated October 18, 2003.

5. A closing statement prepared by petitioner with respect to Ms. Dolan’s refinancing shows charges for New York State mortgage recording tax of \$1,058.15, which amount was computed based solely on the \$108,315.08 of new funds advanced as the result of the

refinancing. The closing statement also reflects additional charges for consolidation agreement, assignment of mortgage and satisfaction.

6. In connection with Ms. Dolan's refinancing with Lehman Brothers on January 24, 2003, petitioner prepared two checks drawn on its corporate checking account. Both checks were made payable to the Suffolk County Clerk and both were dated February 10, 2003. Check number 1854, which bore the notation "mtg tax" in the memo section, was for \$1,058.15, the amount of New York State mortgage recording tax which petitioner determined would be due on the \$108,315.08 of new funds advanced as the result of Ms. Dolan's refinancing. The other check, number 1853, was signed by one of petitioner's officers, but was left blank as to the dollar amount. Check number 1853, which contained the notation "mtg recording" in the memo section, also contained a handwritten statement under the box where the numeric dollar amount of the check is entered that read "not to exceed \$149.00." Although petitioner estimated that the fees, exclusive of the mortgage recording tax, associated with recording the mortgage and related documents pertaining to Ms. Dolan's refinancing would total \$139.00, it was office policy to leave the dollar amount of the check for the fees blank and insert the "not to exceed" language on the face of the check for an amount \$10.00 greater than the anticipated fees.

7. It is customary for some title companies to use the services of an independent contractor to perform abstracting services at the County Clerk's office and to also record documents. Petitioner, when dealing with the Suffolk County Clerk's office, has, since its inception, utilized the services of a specific independent contractor; however, because of the volume of refinancing occurring at this time he was unable to continue performing services for petitioner. A second independent contractor, identified in the record only as a woman named "Winky," was recommended to petitioner and petitioner utilized Winky's services for approximately two months, from mid-January to mid-March of 2003, without any problems or disputes.

8. The mortgage, other pertinent documents and two checks described in detail in Finding of Fact "6", all relating to Ms. Dolan's January 24, 2003 refinancing with Lehman Brothers,

were given by petitioner to Winky for her to have recorded at the Suffolk County Clerk's office. On March 7, 2003, the Suffolk County Clerk recorded, in Liber 20326, Page 517, the mortgage given by Ms. Dolan to Lehman Brothers dated January 24, 2003. Upon review of the mortgage presented for recordation, the Suffolk County Clerk determined that it was a new mortgage in the sum of \$310,700.00 since it contained no language to support, or even suggest for that matter, that the January 24, 2003 mortgage was a consolidation, extension and modification of the existing \$202,384.92 mortgage to Wall Street Mortgage Bankers, LTD., which was assigned to Lehman Brothers, and the execution of a new mortgage to Lehman Brothers for \$108,315.08. Accordingly, the Suffolk County Clerk determined that \$3,082.00 of mortgage recording tax was due based on the mortgage amount of \$310,700.00 and that the fees associated with recording the mortgage totaled \$139.00, making for a total due of \$3,221.00 (\$3,082.00 + \$139.00).

9. When Winky, acting as petitioner's agent, was informed by the Suffolk County Clerk that she needed \$3,221.00 to record Ms. Dolan's mortgage to Lehman Brothers dated January 24, 2003, she took check number 1853, which had been left blank as to the dollar amount, and inserted the sum of \$2,162.85. Winky also changed the handwritten statement entered on check number 1853 from "not to exceed \$149.00" to "not to exceed \$2,162.85." The January 24, 2003 mortgage given by Ms. Dolan to Lehman Brothers was then able to be recorded since the total of check 1853 (\$2,162.85) and check number 1854 (\$1,058.15) equaled the \$3,221.00 amount required by the Suffolk County Clerk for recordation.

10. Petitioner first learned that Winky had altered the dollar limitation of check number 1853 when it reconciled its corporate checking account with the monthly statement it had received from the bank. Petitioner considered pressing criminal charges against Winky; however, all efforts to locate her proved fruitless and therefore no further action was taken by petitioner against her. Although the closing statement prepared by petitioner for this transaction reflects that it had collected only \$1,058.15 in mortgage recording tax at closing, petitioner did not seek or obtain reimbursement from either Ms. Dolan or Lehman Brothers for the \$2,023.85

of additional mortgage recording tax it had to pay in order to get the mortgage recorded on March 7, 2003.

11. After nearly one year of working with Lehman Brothers and its attorney, petitioner was finally able to obtain a corrected mortgage which reflected a mortgage amount of \$108,315.08. In March 2004, petitioner recorded the corrected mortgage and a consolidation, extension and modification agreement, which documents reflect that Ms. Dolan's refinancing was as an assignment of her existing \$202,384.92 mortgage to Lehman Brothers and the execution of a new mortgage to Lehman Brothers for \$108,315.08, with both mortgages to be consolidated, extended and modified to form a single lien in the sum of \$310,700.00.

12. In March 2004, petitioner filed a Mortgage Recording Tax Claim for Refund with the Division of Taxation ("Division") seeking a refund of the \$2,023.85 (\$3,082.00 - \$1,058.15) of additional mortgage recording tax which it claims was erroneously paid when the mortgage was recorded on March 7, 2003.

13. By letter dated March 19, 2004, the Division denied petitioner's claim for refund in full for the following reasons:

Section 253 of the Tax Law imposes tax based upon the principal debt or obligation which is, or under any contingency, may be secured at the date of execution thereof, or at any time thereafter. The fact that the face amount of the mortgage may have never been funded by the mortgagee does not alter or eliminate the fact that the mortgage tax is due upon the recording of a mortgage. Tax is imposed on the privilege of recording a mortgage; it is not a tax imposed on the privilege of lending money.

Section 263 of the New York State Tax Law governs the processing of mortgage recording tax refunds. Pursuant to this section, refunds may be granted under the following circumstances: (1) whenever a duly verified application for a refund of mortgage tax erroneously paid is made to the commissioner of taxation and finance. . . .

We do not believe that the tax was erroneously paid within the meaning of Section 263. Rather, it was paid in the usual manner, upon recording of the mortgage.

#### ***SUMMARY OF PETITIONER'S POSITION***

14. In the instant matter, petitioner does not dispute that the mortgage that was recorded on March 7, 2003 reflected a new mortgage in the amount of \$310,700.00. Petitioner notes that

it was Lehman Brothers who prepared the mortgage; that it had absolutely no control over the manner in which the mortgage was drawn up; and that it was obligated to record the mortgage as prepared by Lehman Brothers. Petitioner argues that when check number 1853 was altered it became the victim of a crime committed in front of a clerk at the Suffolk County Clerk's office. Petitioner believes that the Suffolk County Clerk's office should not have accepted the mortgage for recording given the specific manner in which it had issued the checks to pay the mortgage recording tax and fees associated with recording the mortgage, but instead, should have sent it back. Petitioner maintains that it is being penalized for a fraud, Winky's alteration of check number 1853, which it did not commit and that the Suffolk County Clerk's office witnessed the fraud and allowed it to take place.

### ***CONCLUSIONS OF LAW***

A. As relevant to this dispute, Tax Law § 263(1)(a) provides that "whenever a duly verified application for a refund of mortgage taxes erroneously paid is made to the commissioner of taxation and finance . . . it shall be the duty of such commissioner . . . to determine the amount that has been so (erroneously) paid. . . ." In the instant matter, the commissioner denied petitioner's application for refund on the basis that the \$3,082.00 of mortgage recording tax that petitioner paid when the mortgage dated January 24, 2003 was recorded on March 7, 2003 was due and owing and was not erroneously paid within the meaning and intent of Tax Law § 263(1)(a).

B. Petitioner's argument that a portion, i.e., \$2,023.85, of the mortgage recording tax it paid on March 7, 2003 was erroneously paid is essentially premised on the position that the Suffolk County Clerk incorrectly and erroneously accepted check number 1853, which check had apparently been illegally altered by Winky, in payment of the mortgage recording tax which the Clerk had determined to be due. This argument cannot be accepted for the following reasons.

First, it must be noted that the Suffolk County Clerk correctly determined that \$3,082.00 of mortgage recording tax was due on the mortgage dated January 24, 2003. While the parties to the mortgage dated January 24, 2003 may have intended to assign the existing \$202,384.92

mortgage from Wall Street Mortgage Bankers, LTD., to Lehman Brothers and then consolidate this mortgage with a new mortgage from Lehman Brothers in the sum of \$108,315.08 to form a single mortgage of \$310,700.00, it is clear that the mortgage actually executed by the parties on January 24, 2003 reflected a new mortgage to Lehman Brothers which created a new debt in the sum of \$310,700.00. The mortgage dated January 24, 2003, by its own terms, secured a separate indebtedness and did not affect the lien created by the Wall Street Mortgage Bankers, LTD., mortgage dated October 18, 2001. Since the documents are the most persuasive evidence of the parties' intent, petitioner has not established that the January 24, 2003 Lehman Brothers mortgage was a supplemental mortgage exempt from tax (*Matter of Sunset Nursing Home, Inc.*, Tax Appeals Tribunal, October 26, 1989). It is also noted that in *Matter of Sverdlow v. Bates* (283 App Div 487, 129 NYS2d 88), the court rejected the taxpayer's argument that "since the same result could have been obtained without the payment of a tax by use of an instrument of a different form, it is inequitable to require a payment of the tax" (*id.*, 129 NYS2d at 91). The court observed that "If a transaction comes within the form which the statute has made taxable, it is no answer to say that it is indistinguishable in substance from a transaction in a different form which could have accomplished the same result in a non-taxable manner" (*id.*). Accordingly, \$3,082.00 of mortgage recording tax was in fact due on the mortgage which petitioner presented for recordation on March 7, 2003.

Second, while petitioner suggests that the Suffolk County Clerk's office had a duty, because of the manner in which the checks were drawn, to reject the checks which its agent had presented to the Clerk in payment of mortgage recording tax due, I am unaware of, nor has petitioner pointed to, any authority or precedent which imposes such a responsibility. Petitioner maintains that the Suffolk County Clerk's office was fully aware of the fact that Winky had altered check number 1853 and allowed or permitted this unauthorized alteration. Unfortunately, there is no credible evidence in the record before me to support this contention. The testimony of petitioner's two officers as to what transpired at the Suffolk County Clerk's office is mere speculation as neither of them was actually present at the Clerk's office at the time check number 1853 was altered and presented to the Clerk. Without the testimony of Winky or the employee

who accepted the altered check, there is no way to determine with any degree of certainty what actually transpired at the Clerk's office and the level of knowledge or involvement, if any, that the Clerk may have had regarding the altered check.

Finally, I note that petitioner, as the abstract company in this transaction, had a responsibility to carefully review the documents, including the mortgage prepared by Lehman Brothers which was ultimately executed on January 24, 2003, to ascertain that they accurately reflected the nature of the transaction. A cursory review of the mortgage prepared by Lehman Brothers would have revealed that it was not consistent with the title insurance policy issued by petitioner and was not reflective of the transaction. Petitioner either did not catch the inconsistency in the documents or, in the alternative, knowingly presented a mortgage for recordation which was not representative of the transaction. In either event, petitioner cannot deflect blame and responsibility in this matter to the Suffolk County Clerk. In fact, it seems to me that the Suffolk County Clerk's office did exactly what it was required to do, that is, properly determine that \$3,082.00 of mortgage recording tax was due on the mortgage as presented for recordation and accept payment from petitioner's agent for the tax due.

C. The petition of Blue Water Abstract, Inc. is denied and the Division's refund denial dated March 19, 2004 is hereby sustained.

DATED: Troy, New York  
October 20, 2005

/s/ James Hoefler  
PRESIDING OFFICER