

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
EQUITY TITLE & CLOSING SERVICES, INC. : DETERMINATION
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 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 March 23, 2004.

On January 7, 2005 and January 25, 2005, respectively, petitioner, appearing by Mark Comstock, Esq., and the Division of Taxation appearing by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by June 16, 2005, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

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

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

CONCLUSIONS OF LAW

A. Article 11 of the Tax Law imposes taxes on the recording of a mortgage on real property situated in New York State. Tax Law §§ 253 and 253-e impose a tax on the recording of mortgages.¹ The tax is based upon the amount of the principal debt or obligation which is, or under any contingency, may be secured at the date of the execution of the mortgage or at any time thereafter (*see*, Tax Law § 253[1]). Tax Law § 257 provides that the tax is to be paid to the local recording officer at the time the mortgage is recorded. Mortgage is defined in Tax Law 250(2) 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."

¹ Tax Law §§ 253-a, 253-c and 253-d also impose such a tax but are not at issue in the present matter.

B. Tax Law § 263(1)(a) provides, in pertinent part, that:

Whenever a duly verified application for a refund of mortgage taxes erroneously paid is made to the commissioner of taxation and finance or where a discharge has been recorded in the case of a mortgagor exercising a statutory right of rescission in accordance with section two hundred fifty-seven-a of this article who has filed such application, it shall be the duty of such commissioner or the delegate duly authorized by him in writing, to determine the amount that has been so paid or which is refundable by reason of the exercise of the right of rescission .

...
Tax Law § 257-a pertains to the refund of mortgage recording tax after rescission of certain credit transactions. Tax Law § 257-a(2) provides that:

[a] person who has paid the taxes imposed upon the recording of a mortgage of real property has a right to a refund of the mortgage taxes if the mortgagor upon the mortgage exercises the statutory right of rescission² with respect to the mortgage and a discharge of the mortgage has been recorded.

Tax Law § 257-a(3) states that:

[t]he State Tax Commission shall provide by regulation how a person having a right to a refund of mortgage taxes pursuant to subsection two may obtain the refund and the cities, towns, villages or officers to which or to whom the mortgage tax moneys have been paid . . . shall refund such mortgage tax moneys to a person having a right to the refund thereof.

C. 20 NYCRR 654.2 provides as follows:

(a) In addition to the application for refund, the following information and documentation must be submitted when claiming a refund:

(1) a complete copy of the recorded mortgage which is subject of the refund claim; and

² A “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 (“TILA”) (15 USC § 1601 et seq.). (*See*, Tax Law § 257-a[1].) Under TILA, 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” TILA 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 (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 (15 USC § 1635[f]).

(2) such other information or documentation necessary to adequately support the grounds upon which the refund claim is based.

(b) Where the basis for a refund claim is the mortgagor's exercise of the statutory right of rescission, in addition to the information and documentation described in paragraphs (a)(1) and (2) of this section, there must be submitted:

(1) a copy of the recorded satisfaction or discharge of the mortgage;
and

(2) an executed copy of the "Notice of Right to Cancel."

(c) If the refund is to be paid to the mortgagor or mortgagee's legal representative, a notarized consent or assignment is required from the mortgagor and/or mortgagee consenting to the payment of the refund to the named recipient. Such notarized consent or assignment must be attached to the application for refund.

D. As noted in Conclusion of Law "B," Tax Law § 263(1)(a) provides that a refund of the mortgage recording tax may be granted when the mortgage taxes are erroneously paid or where a discharge is recorded in the case of a mortgagor exercising a statutory right of rescission. In the instant matter, as part of their credit transaction, the borrowers and the lender executed a mortgage on March 20, 2004. On March 23, 2004, petitioner, the closing agent, filed this mortgage in the Broome County Clerk's office where it was recorded. At that time, a mortgage recording tax in the sum of \$1,300.00 was imposed and paid. While petitioner admits that the mortgage recording tax is properly imposed upon the recording of a mortgage, it claims that when a mortgage is erroneously recorded prior to the termination of the rescission period, the mortgage recording tax erroneously paid should be refunded in accordance with Tax Law § 263. Petitioner also contends that the March 20, 2004 mortgage was canceled by mutual agreement of the lender and the borrowers during the federally mandated rescission period and that such cancellation has the same effect as a rescission by the borrowers. It further contends that the lender canceled the loan and did not disburse the funds. Petitioner claims that the lender's use of

the same loan and MIN numbers on both the March 20, 2004 and the March 27, 2004 mortgages clearly indicates that the lender treated the updated March 27, 2004 mortgage as if it were the original mortgage. In addition, petitioner argues 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 on March 20, 2004 and the mortgage was erroneously recorded on March 23, 2004. For all of the above reasons, petitioner requests a refund of the mortgage recording tax.

E. Petitioner's contention that the mortgage recording tax was erroneously paid because the March 20, 2004 mortgage was erroneously recorded during the federally mandated rescission period is without merit. 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 was perfected at the time it was recorded. Since the borrowers' home secured the loan, this credit transaction was governed by the Truth in Lending Act and the regulations issued by the Board of Governors of the Federal Reserve System (Regulation Z, 12 CFR 226). As such, 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. Although Regulation Z prohibits the lender from disbursing the loan proceeds to the consumer other than in escrow until after the rescission period has expired, the lender can perfect the security interest (*see*, 12 CFR 226.23[c]; *see also*, 12 CFR part 226 Supp. I para. 23[c]-1 and para. 23[c]-3). It is clear that petitioner, as closing agent, intended to perfect the lender's security interest in the borrowers' home when petitioner filed this mortgage in the Broome County Clerk's office for recordation on March 23, 2004. 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 S.S. Silberblatt, Inc. v. State Tax Commn.*, 5 NY2d 635, 640, 186 NYS2d 646, 649, *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. Since the March 20, 2004 mortgage was recorded in the Broome County Clerk's office on March 23, 2004, it was proper for the Broome County Clerk to impose and collect mortgage recording tax in the sum of \$1,300.00 from petitioner at that time.

F. It is also petitioner's position that it is entitled to a refund of the mortgage recording tax because the loan was cancelled by mutual agreement of the borrowers and the lender, and such cancellation, petitioner contends, has the same effect as a rescission by the mortgagors (borrowers). Petitioner is correct, the Truth in Lending Act does give the borrower the right to cancel the 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]). A borrower may use the form provided to the borrower by the creditor, i.e., the "Notice of Right to Cancel," a letter or a telegram to notify the creditor that he is exercising his right of rescission; however, it must be delivered, mailed or filed for telegraphic transmission before midnight of the third business day (*see*, 12 CFR 226.23[a][2]). When a borrower rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the borrower is not liable for any amount, including any finance charge (*see*, 15 USC § 1635[b]; 12 CFR 226.23[d][1]). Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest (*see*, 15 USC § 1635[b]; 12 CFR 226.23[d][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. Petitioner's documentation is insufficient to prove that the mortgagors exercised their statutory right of rescission. Although Mr. Cordeiro, in his affidavit, alleges that due to a title issue, the March 20, 2004 transaction was canceled and a discharge of mortgage was forwarded to the Broome County Clerk's office, he does not allege that the borrowers executed a "Notice of Right to Cancel" or any other written notification of their intention to cancel the transaction. Nor is any such document attached to his affidavit. 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). While petitioner did submit a copy of the recorded satisfaction of mortgage, it failed to submit a "Notice of Right to Cancel" executed by the borrowers in this matter. Since petitioner failed to submit the documentation required by the Division's regulations in 20 NYCRR 654.2, it has failed to prove that the satisfaction of mortgage was executed because the mortgagors exercised their statutory right of rescission. Accordingly, petitioner is not entitled to a refund of the mortgage recording tax.

G. As for 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 on March 20, 2004 and the mortgage was erroneously recorded on March 23, 2004, it is without merit. 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 statute is clear and unambiguous; the mortgage recording tax is to be computed based on the amount of principal debt which is secured or which may be secured on the date of the mortgage. On March 20, 2004, the borrowers and lender executed the mortgage that secured a mortgage indebtedness of \$130,000.00. Petitioner, as closing agent, filed the March 20, 2004 mortgage in the Broome County Clerk’s office where it was recorded on March 23, 2004. Subsequently, the borrowers and the lender canceled the March 20, 2004 mortgage. The mortgage recording tax is not a tax on the privilege of lending money but on the privilege of recording a mortgage; the debt is merely the basis for computation of the tax (*see, Matter of S.S. Silberblatt, Inc. v. State Tax Commn., supra; Matter of Citibank, N.A. v. State Tax Commn.*, 98 AD2d 929, 470 NYS2d 920, 922). 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. In *Matter of Fox Lane Corporation v. Loughman* (225 App Div 417, 233 NYS 277), the Court held that the term “erroneously collected” could not be construed to include a tax collected at the time of recording a mortgage that was subsequently canceled when the parties learned of a preexisting zoning ordinance which would not permit construction of the building the mortgagor intended. The Court noted that “though the equities may be with the petitioner,” the relief was not possible under the statute (*Matter of Fox Lane Corporation v. Loughman*, 225 App Div 417, 420, *supra*). The Broome County Clerk properly imposed and collected the sum of \$1,300.00 in mortgage recording tax from petitioner upon recordation of the March 20, 2004 mortgage on March 23, 2004. Accordingly, petitioner is not entitled to a refund of the mortgage recording tax.

H. The petition of Equity Title & Closing Services, Inc. is denied and the Division of Taxation's denial of the refund claim is sustained.

DATED: Troy, New York
October 20, 2005

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE