

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
MOHAMMED ABDUL HALIM	:	
AND SYEDA NASRIN LAILA	:	DETERMINATION
for Revision of Determinations or for Refund of	:	DTA NOS. 820323 AND
Mortgage Recording Tax under Article 11 of the Tax Law	:	820324
with Reference to Mortgages Recorded on April 14, 2004	:	
and October 7, 2004.	:	

Petitioners, Mohammed Abdul Halim and Syeda Nasrin Laila, 51-24 39th Avenue, Woodside, New York 11377, filed petitions for revision of determinations or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to mortgages recorded on April 14, 2004 and October 7, 2004.

On December 8, 2005, petitioners, by their representative, Paul E. Kerson, Esq., and on December 19, 2005, the Division of Taxation, by Mark F. Volk, Esq. (Michelle M. Helm, Esq.), waived a hearing and agreed to submit this matter for determination. All documents and briefs were to be submitted by the parties by May 1, 2006, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners' claims for refund of mortgage recording tax paid upon the recording of new mortgages, as a result of their decision to refinance older mortgages, were properly denied.

FINDINGS OF FACT

1. Petitioner Mohammed Abdul Halim made and executed a mortgage dated November 15, 2001 on his personal residence in the Woodside section of the borough of Queens, with the street address of 51-24 39th Avenue, to secure payment of the principal sum of \$311,500.00 owed to Option One Mortgage Corp. When this mortgage was recorded in the Queens County Office of the City Register of the City of New York on December 31, 2001, mortgage recording tax was paid.

2. Petitioner Halim refinanced his personal residence in Woodside by obtaining a new mortgage loan in the principal sum of \$498,000.00 from New Century Mortgage Corp. He utilized \$313,000.00 of this amount to pay off the older mortgage on the property detailed in Finding of Fact “1”, and a Satisfaction of Mortgage dated May 21, 2004 was duly recorded in the Queens County Office of the City Register of the City of New York on July 5, 2004. Upon recording of the new mortgage, mortgage recording tax of \$8,890.00 was paid. The record does not disclose the specific date of recording of the new mortgage although a settlement statement included in the record shows a “settlement date” of April 16, 2004 and itemizes an amount for State recording tax of \$8,890.00.

3. Petitioner Halim, by his representative, filed a claim dated November 5, 2004, seeking a refund of a mortgage tax of \$8,890.00 “wrongfully collected” since he “had earlier paid this mortgage tax in the sum of \$8,890.00¹ when his mortgage was held by Option One Mortgage Co.”

¹ Petitioners misstate since the mortgage recording tax would not have been in the same amount on the older mortgage, which was for a lesser principal sum than the new mortgage.

4. The Division of Taxation (“Division”) disallowed petitioner Halim’s refund claim by a letter dated November 18, 2004 which provided the following explanation for its denial:

Pursuant to the documents submitted, the original loan was paid off and satisfied at the time of the refinancing with New Century Mortgage Company. Therefore, in accordance with Tax Law, Article 11, Section 253, mortgage recording tax was due and owing when the mortgage entered into with New Century Mortgage Company was recorded, as this loan is considered to be a new mortgage and not supplemental to the original mortgage with Option One Mortgage Company.

5. Petitioner Halim made and executed a mortgage dated June 11, 2004 on another property located in the Woodside section of the borough of Queens, with the street address of 41-11 71st Street, to secure payment of the principal sum of \$408,800.00 owed to America’s Wholesale Lender. When this mortgage was recorded in the Queens County Office of the City Register of the City of New York on July 22, 2004, mortgage recording tax in the amount of \$7,281.75 was paid. Mr. Halim apparently utilized some of the proceeds from the refinancing detailed in Finding of Fact “2” of his personal residence to purchase this additional Queens real estate.

6. Petitioner Halim decided that he wanted to add the name of petitioner Syeda Nasrin Leila, who is Mr. Halim’s spouse, to the mortgage secured by the Queens property located at 41-11 71st Street.² As a result, petitioners refinanced this Queens property by obtaining a new mortgage loan from New Century Mortgage Company dated October 7, 2004. The loan proceeds were used to pay off the older mortgage on the property and a Satisfaction of Mortgage dated October 20, 2004 was duly recorded in the Queens County Office of the City Register of

² The record does not disclose the financial terms of either the new mortgage or the old mortgage so it is unknown whether petitioners’ new mortgage, in fact, had a lower interest rate than the older mortgage though it would not be unreasonable to so presume. If the interest rate on the new mortgage was higher, petitioners would have more than likely brought out that fact. Rather, petitioners did not submit any details concerning the refinancing.

the City of New York on November 17, 2004. Upon recording of the new mortgage, mortgage recording tax of \$7,129.00³ was paid.

7. Petitioners by their representative filed a claim dated November 5, 2004 seeking a refund of mortgage tax of \$7,129.00 “wrongfully collected” since they “had earlier paid this [sic] mortgage tax in the sum of \$7,281.75 when they originally purchased this property on June 11, 2004.”

8. The Division disallowed petitioners’ refund claim by a letter dated November 18, 2004 which provided the following explanation for its denial:

Pursuant to the documents submitted, the original loan was paid off and satisfied at the time of the refinancing with New Century Mortgage Company. Therefore, in accordance with Tax Law, Article 11, Section 253, mortgage recording tax was due and owing when the mortgage entered into with New Century Mortgage Company was recorded, as this loan is considered to be a new mortgage and not supplemental to the original mortgage with America’s Wholesale Lender.⁴

CONCLUSIONS OF LAW

A. Tax Law § 253(1) imposes a mortgage recording tax consisting of:

A tax of fifty cents for each one hundred dollars . . . 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 recorded on or after [July 1, 1906]

In addition, Tax Law § 253(2) imposes a supplemental mortgage recording tax consisting of “an additional tax of twenty-five cents for each one hundred dollars . . . excepting the first ten thousand dollars of such principal debt . . . in which the related mortgage is of real property principally improved . . . by a one or two family residence” Furthermore, pursuant to Tax

³ Since the mortgage recording tax paid on the recording of the new mortgage was slightly less, i.e. \$152.75, than the tax paid on the older mortgage (\$7,281.75 less \$7,129.00 equals \$152.75), the amount refinanced was presumably smaller. The record does not disclose the details of the refinancing.

⁴ Except for the substitution of “America’s Wholesale Lender” for “Option One Mortgage Company,” this explanation is verbatim when compared to the explanation detailed in Finding of Fact “4”.

Law § 253-a, the City of New York is authorized to impose an additional mortgage recording tax, and such additional mortgage recording tax has been imposed by Administrative Code of the City of New York § 11-2601.

B. The mortgage recording tax is not a tax on property but rather is imposed upon the privilege of recording a mortgage; the underlying debt is the basis for computation (*Matter of S.S. Silberblatt, Inc. v. State Tax Commn.*, 5 NY2d 635, 186 NYS2d 646, *cert denied* 361 US 912, 4 L Ed 2d 183).

C. Tax Law § 250 defines “mortgage” as “every mortgage or deed of trust which imposes a lien on or affects the title to real property”

D. Petitioner Halim’s mortgage with New Century Mortgage Company in the amount of \$498,000.00, as detailed in Finding of Fact “2”, and petitioner Halim’s and petitioner Laila’s mortgage, again with New Century Mortgage Company of approximately \$400,000.00, as detailed in Finding of Fact “6”, are clearly “mortgages” within the statutory definition of Tax Law § 250. Further, these mortgages were presented for recording, and there has been no allegation that mortgage recording tax was improperly computed. Therefore, the analysis turns to whether petitioners have established that they are entitled to a refund of tax pursuant to Tax Law § 263 based upon the supervisory power of the Commissioner of Taxation and Finance “over all recording officers in respect of the duties imposed by [Article 11, Tax on Mortgages]” to determine that mortgage tax was “erroneously paid” to the Queens County Office of the New York City Register.

E. It is observed that petitioners, with good reason, are not arguing that they are entitled to an exemption from tax under Tax Law § 255 on the basis that the New Century Mortgage Company mortgages were *supplemental* mortgages (*see, Matter of Weiss*, Tax Appeals Tribunal,

October 13, 1994). They simply cannot deny the pivotal fact in this matter that the New Century Mortgage Company mortgages were new mortgages. As noted in the Findings of Fact, the older mortgages, which were satisfied, were in different amounts and from different lenders. Further, the mortgage recorded on October 7, 2004 added an additional mortgagor, i.e., petitioner Syeda Nasrin Laila. In light of this fact that the mortgages at issue were clearly new mortgages, petitioners instead make an obscure argument that they have been improperly “double taxed” based upon the “interpretation” of the mortgage recording tax by the Court of Appeals in its 1939 decision in *Franklin Soc’y v. Bennett* (282 NY 79, *appeal dismissed* 309 US 640, 84 L Ed 995). A review of this decision discloses that the Court of Appeals upheld the mortgage recording tax against a challenge under both the New York State and United States Constitutions. The Court of Appeals affirmed the lower court’s decision that the mortgage recording tax was not violative of constitutional provisions prohibiting the levying of *ad valorem* taxes on intangible personalty and the levying of excise taxes solely because of the ownership or possession of intangible personalty. Petitioners’ reliance on certain dictum from this 1939 decision in support of their refund claims is mystifying, if not frivolous. In light of the fact that the New Century Mortgage Company mortgages were *new* mortgages, petitioners’ complaint that they were improperly double taxed is meritless. In conclusion, petitioners have failed to establish that mortgage tax was “erroneously paid” on the recording of the new mortgages.

F. The petitions of Mohammed Abud Halim and Syeda Nasrin Laila are denied, and the notices of disallowance, by letters each dated November 18, 2004, are sustained.

DATED: Troy, New York
October 30, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE