

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ROBERT CERCHIONE** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 820666  
Mortgage Recording Tax under Article 11 of the :  
Tax Law with Reference to an Instrument Recorded :  
on December 23, 2004. :  
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Petitioner, Robert Cerchione, 303 East 57<sup>th</sup> Street, Apt. 34E, New York, New York 10022, 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 23, 2004.

On March 7, 2006 and March 10, 2006, respectively, petitioner, appearing by Philip J. Leen, CPA, and the Division of Taxation, by Mark F. Volk, Esq. (Marvis A. Warren, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs to be submitted by August 11, 2006, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether a portion of the mortgage offered for recording on December 23, 2004 was exempt from the mortgage recording tax as a supplemental mortgage pursuant to Tax Law § 255.

## FINDINGS OF FACT

On February 20, 2006 and February 21, 2006, respectively, the representative of petitioner, Robert Cerchione, and the representative of the Division of Taxation entered into a stipulation of facts. The facts contained therein are set forth below. Additional Findings of Fact were also made.

1. Petitioner co-owned with Lori Cerchione a single residential condominium unit known as unit A, at Block 608, Lot 1301 (“the property”) with the address of 132 West 13 Street, New York, New York.

2. On April 22, 2004, petitioner and Lori Cerchione, as borrowers, and Washington Mutual Bank, FA, as lender, executed a mortgage (“the Washington Mutual mortgage”) encumbering the property in the amount of \$500,000.00. The Washington Mutual mortgage was recorded in the office of the Clerk of the City of New York on August 27, 2004.

3. On August 17, 2004, petitioner and Lori Cerchione, as borrowers, and the Wachovia Bank, National Association, as lender, executed a mortgage (“the Wachovia mortgage”) encumbering the property in the amount of \$1,200,000.00. This mortgage was recorded in the office of the Clerk of the City of New York on December 23, 2004. The only reference in the Wachovia mortgage to a prior mortgage appears in the paragraph which states:

Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property, and that the Property is unencumbered, except for encumbrances of record. Borrower covenants that Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to encumbrances of record.

4. The proceeds from the Wachovia mortgage were used to satisfy the Washington Mutual mortgage. In a document dated January 13, 2005, the Washington Mutual Bank acknowledged

that it received full payment and satisfaction of the Washington Mutual mortgage of the property in the amount of \$500,000.00 plus interest.

5. On or about June 13, 2005, petitioner filed a request for a refund in the amount of \$10,600.00. According to the claim:

I remortgaged the property (Block 608, Lot 1301) on August 17, 2004 in the amount of \$1,200,000. At the time, there was an existing mortgage of \$500,000 on the property which was then paid off from the proceeds . . . . I was advised at the time of the closing that the greater tax was paid [tax on \$1,200,000.00 versus \$700,000.00] because the existing mortgage was recorded at your office on August 27, 2004 which was seven days subsequent to the refinancing.

6. On June 28, 2005, the Division issued a letter which denied petitioner's request for a refund because the loan with the Wachovia Bank was considered a new mortgage and not supplemental to the original mortgage with Washington Mutual Bank, FA.

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

7. Petitioner states that the new lender, Wachovia Bank, normally takes an assignment of the previous mortgage and remits tax on the additional amount loaned. In this instance, it was not able to do so because:

The original mortgage was recorded on August 27, 2004, ten (10) days subsequent to the refinancing. The elapsed time between the preparation date, June 30, 2004 and the recording date, August 27, 2004, was 58 days. The elapsed time between preparation and recording the new mortgage was 41 days. Had the City Register recorded the first mortgage within the same time frame, Wachovia would have been able to, as it normally does, take assignment of the original mortgage and the resultant tax would be solely on the incremental funds.

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

A. Article 11 of the Tax Law imposes a tax on the privilege of recording a mortgage on real property in New York State (*see*, Tax Law § 253[1]; *Matter of Citibank v. State Tax Commn.*, 98 AD2d 929, 470 NYS2d 920, 922). The tax is imposed on the "*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 [New York State]” (Tax Law § 253[1]; emphasis added). In the case of a credit line mortgage, such principal debt or obligation means “the maximum principal amount specified in such mortgage” (Tax Law § 253-b[1]). The underlying debt serves as the basis for the computation (*see*, Tax Law 253[1]).

B. Tax Law § 255(1) affords an exemption from the mortgage recording tax. According to this section, a mortgage is exempt from mortgage recording tax if:

a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage . . . .

Thus, “a mortgage may be changed, corrected or perfected by a supplemental mortgage and no additional recording tax will be due unless it creates or secures a new debt” (*Matter of Sunset Nursing Home, Inc.*, Tax Appeals Tribunal, October 26, 1989).

C. An initial requirement of the forgoing exemption is that the first and second mortgages must coexist (*Matter of Citibank v. State Tax Commn.*, *supra*; *see, Matter of Sheraton Corp. of Amer. v. Murphy*, 35 AD2d 294, 315 NYS2d 986; *Matter of Sverdlow v. Bates*, 283 App Div 487, 129 NYS2d 88). That is, tax will not be incurred if the parties are careful not to extinguish the old debt so that a new debt will not be incurred (*Matter of Woodmere Knolls v. Procaccino*, 52 AD2d 979, 383 NYS2d 105, 107, quoting *Matter of Bay View Towers Apts. v. State Tax Commn.*, 48 AD2d 86, 367 NYS2d 856, 860, *affd* 40 NY2d 856, 387 NYS2d 1002; *see also, Matter of City of New York v. Tully*, 55 NY2d 960, 449 NYS2d 181, 182).

D. Here petitioner's refund claim clearly states that he paid off the original loan at the time of the refinancing with the Wachovia Bank. It follows that the Division correctly determined that when the mortgage with the Wachovia Bank was recorded, it was a new mortgage and not supplemental to the original mortgage with the Washington Mutual Bank, FA. (*See*, 20 NYCRR 645.1[a].)

E. The Division also correctly noted that to avoid mortgage recording tax on the full amount of a second or supplemental mortgage, a taxpayer must show that "the parties to the transaction intended to continue and confirm the original debt, not cancel or extinguish it" (*Matter of Sunset Nursing Home, Inc.*, Tax Appeals Tribunal, October 26, 1989, *supra*). In this case, the petition explains that the Wachovia Bank felt that it was unable to take an assignment and continue the first mortgage because of the delay in recording that mortgage. Accordingly it is evident that because of the circumstances presented, the parties did not intend to continue and confirm the original debt. The lack of intent to continue and confirm the original debt is also apparent from the absence of references to the first mortgage in the second mortgage. It is noted that the delay in the recording of the first mortgage is irrelevant. Petitioner has not pointed out any statutory exception to the imposition of mortgage recording tax because of a delay by the City Register in the recording of a mortgage.

F. In view of the forgoing, the remaining arguments presented by the Division are academic and will not be addressed.

G. The petition of Robert Cerchione is denied and the Division of Taxation's denial of petitioner's refund claim, dated June 13, 2005, is sustained.

DATED: Troy, New York  
January 25, 2007

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE