

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SAEID E. JALAYER** : DETERMINATION  
: DTA NO. 820742  
for Revision of a Determination or Refund of Mortgage :  
Recording Tax under Article 11 of the Tax Law with :  
Reference to an Instrument Recorded on June 4, 2004. :

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Petitioner, Saeid E. Jalayer, 34 Woodridge Lane, Sea Cliff, New York 11579, filed a petition for revision of a determination or refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on June 4, 2004.

On June 1, 2006, petitioner, appearing by A. Saam Jalayer, Esq., and the Division of Taxation, appearing by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were submitted by October 20, 2006, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation's denial of petitioner's refund claim was proper.

***FINDINGS OF FACT***

1. On November 7, 2002, petitioner<sup>1</sup> purchased property at 34 Woodridge Lane, Sea Cliff, New York and executed a mortgage with Washington Mutual Bank, FA (the "Bank") of 400

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<sup>1</sup>Although there is only one petitioner, all documents in the record indicate that the property was purchased and the mortgages were executed by two individuals, to wit: Saeid E. Jalayer and Jinous Atai. Hereinafter, all references to petitioner in the text will refer to Saeid E. Jalayer.

East Main Street, Stockton, California, which secured a note in the sum of \$825,000.00, which sum was to be repaid by petitioner to the Bank by December 1, 2032. This mortgage was recorded in the Nassau County Clerk's Office on November 25, 2002, and mortgage recording tax was paid in the sum of \$9,050.00.

2. On May 19, 2004, petitioner executed a second mortgage with the Bank which recited that said mortgage secured a note in the sum of \$1,200,000.00, which was to be repaid by petitioner to the Bank by June 1, 2034. This mortgage was recorded in the Nassau County Clerk's Office on June 4, 2004, and mortgage recording tax was paid in the sum of \$13,175.00.

3. On or about March 29, 2005, petitioner filed a claim for refund of mortgage recording tax in the sum of \$9,050.00. The claim for refund indicated that mortgage recording tax had been paid on May 19, 2004 in the sum of \$13,175.00 and that only \$4,125.00 was due.

4. In response to petitioner's claim, the Division sent him a letter, dated April 11, 2005, in which it acknowledged his claim and requested the following documents: the closing statement for the May 19, 2004 mortgage with proceeds distribution; a copy of the consolidation, modification and extension agreement and required affidavit, if any; and the discharge and/or satisfaction filed with respect to the November 7, 2002 mortgage in the amount of \$825,000.00.

5. By letter dated June 15, 2005 petitioner responded through his attorney, Evan Tanenbaum, Esq., enclosing a disbursement sheet prepared by the Bank for the May 19, 2004 closing and a title search summary from the Nassau County Clerk's Office, prepared by Robert S. Grabel, title searcher, which indicated that the mortgage, dated November 7, 2002, in the sum of \$825,000.00 had not been satisfied as of May 9, 2005.

6. The disbursement sheet from the Bank for the May 19, 2004 closing indicated the following checks authorized by petitioner from the proceeds of the loan:

<b>Check Number</b>	<b>Amount</b>	<b>Payable or Endorsed To</b>
135465	\$ 600.00	Golden, Wexler & Sarnese
135466	20,475.84	Horizon Land Services
135467	200.00	Therese Russo
135468	806,666.86	Washington Mutual Bank
135469	370,114.70	Saeid E. Jalayer/Jinous Atai

7. On the United States Department of Housing and Urban Development (“HUD”) Settlement Statement prepared for the closing on May 19, 2004, settlement charges listed included mortgage tax projected in the sum of \$9,875.00 and a satisfaction recording fee of \$90.00. The same form listed a disbursement of \$806,666.86 to Washington Mutual Bank.

8. By letter, dated June 20, 2005, the Division of Taxation disallowed the claim for refund, citing the following reason:

Pursuant to a Disbursement Sheet dated May 19, 2004 from Washington Mutual Bank, the original negative amortization mortgage, in the amount of \$907,500.00 was paid off. Therefore, the new negative amortization mortgage entered into with Washington Mutual Bank represents a new mortgage, which created a new indebtedness on which mortgage [recording] tax was properly paid.

9. In a letter from the law firm of Golden, Wexler & Sarnese, P.C., representing the Bank, dated June 8, 2005, to Evan Tanenbaum, Esq., petitioner’s representative at the time, it was disclosed that although the loan had originally been scheduled to close as a consolidation, extension and modification of the November 7, 2002 mortgage, it was closed as a standard refinance, and all fees pertaining to the closing were calculated based on a standard refinance closing. The author of the letter specifically stated that while it was not clear from the firm’s file why the form of the loan was changed at closing, petitioner was informed of the mortgage recording tax consequences of the change to a standard refinance and was apprised of the right to rescind the transaction. Petitioner received a “Notice of Right to Cancel” form at the closing.

10. At the closing which took place on May 19, 2004, the attorneys for the Bank, Golden, Wexler and Sarnese, P.C., issued a bill to petitioner for “receipt and review of file, preparation of consolidation, extension and modification agreement and closing of loan” for the fee of \$750.00. Although the form provided signature lines for petitioner and Jinous Atai, neither individual acknowledged receipt of the bill.

11. The consolidation, extension and modification agreement prepared by Golden, Wexler and Sarnese, P.C. was not entered into evidence.

### ***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.) 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.”

B. 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 tax becomes due and payable at the time a mortgage is recorded.

C. Tax Law § 255(1)(a)(i) provides:

If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, 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, such additional instrument or mortgage shall not be subject to taxation under this article, except as otherwise provided in paragraph [b] of this subdivision, unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred and fifty-three of this article on such new or further indebtedness or obligation.

Exemptions provided for under Tax Law § 255 must be claimed in the following manner:

If an exemption is claimed under this section, at any time after such instrument or additional mortgage is recorded and tax paid, there shall be filed with the tax commission, as part of the application for refund a statement under oath of the facts on which such claim for exemption is based. A copy of the order of refund of the tax commission shall likewise be filed with the recording officer and preserved in his office. (Tax Law § 255[2][b].)

The Division's regulations reiterate the definition of a supplemental mortgage, indicating that said instrument must make reference to the prior recorded primary mortgage and may be given to modify the primary mortgage by adjusting the terms of payment, interest rate or a change in the amount of the debt secured by the primary mortgage. (20 NYCRR 645.1.) The recording of a supplemental mortgage is subject to applicable mortgage recording taxes to the extent that such mortgage creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by the prior recorded primary mortgage. (20 NYCRR 645.2.)

Where an exemption is claimed upon the recording of a supplemental mortgage, an affidavit by the mortgagor, mortgagee or other person with knowledge of the facts, in duplicate, must be filed at the time of recording the supplemental mortgage. The affidavit shall set forth the basis upon which the exemption is claimed and contain specific information on the

mortgagors and mortgagees, the primary mortgage, the remaining principal balance and a description of the supplemental mortgage including why it constitutes a supplemental mortgage and the amount of further indebtedness. (20 NYCRR 645.3.) The regulations also require that this affidavit be submitted with any claim for refund.

D. The facts of the instant matter fail to establish that the May 19, 2004 mortgage was a supplemental mortgage that secured a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by the prior recorded primary mortgage. The May 19, 2004 mortgage made no reference to the prior mortgage of November 7, 2002 and the Bank's closing statement from the May 19, 2004 mortgage clearly indicated that a check was cut from the proceeds, payable to the Bank, in payment of the outstanding balance of the note underlying the November 2002 mortgage. The HUD settlement statement prepared for the May 19, 2004 mortgage closing also indicated the disbursement to the Bank of the outstanding balance of the note underlying the November 2002 mortgage and the new "loan amount" of \$1,200,000.00. The HUD statement also noted a charge for a "sat," indicating that it was anticipated a satisfaction of mortgage would be filed for the November 2002 mortgage. It is irrelevant to this proceeding, for purposes of the payment of mortgage recording tax on the May 19, 2004 mortgage, whether the satisfaction was filed with the Nassau County Clerk's office.

Petitioner was aware of the fact that the mortgage closing was not a consolidation, merger and extension of the November 2002 mortgage. The Bank's attorneys explained in their letter to petitioner's former attorney that the form of the loan changed from a consolidation, merger and extension of the earlier mortgage to a standard refinance at the closing for reasons not revealed in their file, but unequivocally stated that petitioner was informed of the increased mortgage tax consequences of the change in the form of the transaction and was apprised of his

legal right to rescind the transaction. Unfortunately, petitioner chose not to testify or submit an affidavit explaining the change in the form of the transaction, something uniquely within his personal knowledge.

Petitioner argues that he was not represented at the closing, but does not deny that he was apprised of the mortgage tax consequences and his right to rescind. For whatever reason, petitioner acquiesced in the change to a standard refinance at closing and it is by that choice that he must abide. “The choice of form did not rest with the tax authorities but with the taxpayer. If he unfortunately chose a form which was taxable instead of an equally available form which was non-taxable, he must bear the consequences.” (*Sverdlow v. Bates*, 283 App Div 487, 129 NYS2d 88, 91-92.)

It is not necessary to analyze petitioner’s failure to follow the requirements of the Tax Law or regulations with respect to properly requesting an exemption from the mortgage recording tax as set forth in Conclusion of Law “C” because it is concluded, given the letter from the Bank’s attorneys, that petitioner’s intent was not to create a supplemental mortgage but to refinance the entire debt with a new mortgage on which mortgage recording tax was properly calculated on the amount of the note secured by the May 19, 2004 mortgage, or \$1,200,000.00.

Finally, petitioner’s claim that he was not represented by counsel at the closing and therefore not able to make an informed decision is without merit. Petitioner did not and does not challenge the statement of the Bank’s attorneys that he was informed of the mortgage recording tax consequences of the change in the form of the transaction and his right to rescind. Further, petitioner could have halted the closing and requested the assistance of counsel or done so immediately thereafter, within his time frame for rescission and chose not to do so.

E. Petitioner's reliance on *City of New York v. Murphy* (36 AD2d 658, 318 NYS2d 103) is misplaced. In that case, pursuant to an agreement between the mortgagor and mortgagee, the newly created note merged the new and existing indebtedness. The Tax Commission determined that this was an extension of indebtedness and secured new or further indebtedness. The crucial issue in that case was whether the new note contained a cancellation of the indebtedness. That is distinguishable from the instant matter, where there was no agreement to merge the original debt with the new indebtedness, as evidenced by the documents in evidence, and petitioner was aware of the increased tax liability attendant to that choice. In fact, nothing in the documentation of the May 19, 2004 mortgage leads to a different conclusion. The first loan was actually paid off and a new indebtedness for \$1,200,000.00 was established. It was not merely a change in the form of the evidence of indebtedness as in *City of New York v. Murphy (supra)*.

Likewise, petitioner's reliance on *Matter of Park and 46<sup>th</sup> Street Corp. v. State Tax Commission* (295 NY 173), is in error. The new mortgage in that case was a third supplemental mortgage which, by the terms of a third supplemental indenture, specifically preserved the original indebtedness, modified maturities and interest rates and provided for new indebtedness. Once again, this is clearly distinguishable from the instant matter, where the new mortgage and indebtedness was devoid of any reference to the original debt and any intent to consolidate, merge or extend same.

F. The petition of Saeid E. Jalayer is denied, and the Division of Taxation's denial of petitioner's application for refund of mortgage recording tax, dated June 20, 2005, is sustained.

DATED: Troy, New York  
January 25, 2007

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