

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
PAULA A. VIAL CORPORATION	:	DETERMINATION
	:	
to Review a Determination that a Mortgage	:	
Recording Tax in the Sum of \$750.00 was	:	
Due on the Recording of a Deed, dated	:	
August 18, 1964, from Institution Service,	:	
Inc. to Paula A. Vial and Recorded in the	:	
Office of the City Register, Queens County	:	
on August 20, 1964, in Liber 7686 of Deeds	:	
at Page 164.	:	
	:	

Applicant, Paula A. Vial Corporation, has filed an application to review a determination that a mortgage recording tax in the sum of \$750.00 was due on the recording of a deed, dated August 18, 1964, from Institution Service, Inc. to Paula A. Vial and recorded in the Office of the City Register, Queens County on August 20, 1964, in Liber 7686 of Deeds at Page 164.

A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on July 18, 1973, at 1:15 P.M.

Applicant, appeared by Kepecs & Frischer, Esqs., (Milton Kepecs, Esq., of Counsel). The City Register, Queens County appeared by Norman Redlich, Esq., (Alex Weiss, Esq., of Counsel). The Miscellaneous Tax Bureau appeared by Saul Heckelman, Esq., (Francis X. Boylan, Esq., of Counsel).

ISSUE

Did the deed from Institution Service, Inc. to Paula A. Vial constitute a refunding subject to the mortgage recording tax of the

mortgage debt created by the mortgage from Carlyle Shopping Center, Inc. to Institution Service, Inc.?

FINDINGS OF FACT

1. On March 22, 1963, Carlyle Shopping Center, Inc. borrowed \$150,000.00 from Institution Service, Inc. The loan was secured by a mortgage on property located in Queens County, New York and known as Carlyle Shopping Center. The mortgage was recorded in the Office of the City Register, Queens County on March 26, 1963, in Liber 8146 of Mortgages at Page 285 and the full mortgage recording tax due was paid thereon.

2. On August 18, 1964, Carlyle Shopping Center, Inc. by warranty deed conveyed to Institution Service, Inc. the real property secured by the mortgage referred to in the preceding paragraph. The deed was recorded in the Office of the City Register, Queens County on August 20, 1964, in Liber 7686 of Deeds at Page 162. The deed contained the following provision:

"Subject to a secondary mortgage in the sum of \$150,000 with interest given to Institution Service, Inc., and said mortgage shall not in any event or in any respect be merged with this deed but each and every covenant, term and provision thereof shall survive this grant and remain in full force and effect."

3. On August 18, 1964, Institution Service, Inc. by warranty deed conveyed to Paula A. Vial, the real property secured by the mortgage referred to in paragraph "1". The deed was recorded in the Office of the City Register, Queens County, on August 20, 1964, in Liber 7686 of Deeds at Page 164. The deed contained the

following provision:

"Subject to a secondary mortgage in the sum of \$150,000 with interest given to Institution Service, Inc., and said mortgage shall not in any event or in any respect be merged with this deed but each and every covenant, term and provision thereof shall survive this grant and remain in full force and effect."

No mortgage recording tax was paid at the time of the recording of this deed.

4. On March 30, 1972, Paula A. Vial, by bargain and sale deed conveyed to Paula A. Vial Corporation, the real property secured by the mortgage referred to in paragraph "1". The deed was recorded in the Office of the City Register, Queens County on April 6, 1972, in Reel 561 at Page 1696.

5. On March 30, 1972, Institution Service, Inc. in consideration of the sum of \$115,390.76 assigned the mortgage referred to in paragraph "1" to Phoenix Mutual Life Insurance Co. by an assignment in writing. The assignment was recorded in the Office of the City Register, Queens County, on April 6, 1972, in Reel 561 at Page 1694. A mortgage tax in the sum of \$1,442.50 was demanded by the City Register in connection with the recording of said assignment and was paid under protest by applicant.

6. On May 25, 1972, applicant, Paula A. Vial Corporation, made an application to the State Tax Commission for a refund of the mortgage recording tax paid by it in the sum of \$1,442.50.

7. On October 24, 1972, the applicant, Paula A. Vial Corporation, was advised by the Miscellaneous Tax Bureau that no mortgage recording tax was due on the assignment of the

mortgage from Institution Service, Inc. to Phoenix Mutual Life Insurance Co. It, however, stated that a mortgage recording tax in the sum of \$750.00 should have been paid on the recording of the deed, dated August 18, 1964, from Institution Service, Inc. to Paula A. Vial, since this constituted a refunding of the mortgage referred to in paragraph "1". It further stated that the tax was considered paid on April 6, 1972, together with a penalty due of \$341.25, by virtue of the payment referred to in paragraph "5", and that applicant was therefore entitled to a refund of \$351.25.

CONCLUSIONS OF LAW

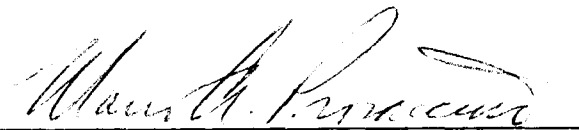
A. That since the deed, dated August 18, 1964, from Carlyle Shopping Center, Inc. to Institution Service, Inc. contained a specific provision that the mortgage from Carlyle Shopping Center, Inc. to Institution Service, Inc., dated March 22, 1963, should not merge with the deed, therefore, there was no merger of the mortgage with the fee, since an express recital in a deed from a mortgagor to a mortgagee that the mortgage is not to merge in the fee prevents a merger. 38 N.Y. Jur. §260; Jones On Mortgages (8th Ed.) §1089; American Savings & Loan Association v. Eidelberg 54 Misc. 2d 668, 283 N.Y.S. 2d 255, (Sup. Ct. Rockland Co, 1967). The original mortgage debt remained recoverable although the mortgagee would have had to first apply his interest in the premises to the payment of the debt secured by the mortgage by foreclosing the mortgage. The fact that the mortgagee held the title to the premises would not be an obstacle to foreclosing the mortgage. Egan v. Engeman, 125 App. Div. 743, 110 N.Y.S. 366 (1st Dept. 1908).

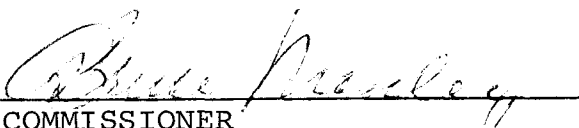
Therefore, when Institution Service, Inc. conveyed the premises to Paula A. Vial on August 18, 1964, a new debt or obligation was not created, since the debt which the mortgage of March 22, 1963 created was still recoverable. Thus the deed, dated August 18, 1964, from Institution Service, Inc. to Paula A. Vial did not create a new and further indebtedness other than the indebtedness secured by the mortgage of March 22, 1963, and hence was not subject to the mortgage recording tax imposed by section 253 of the Tax Law.

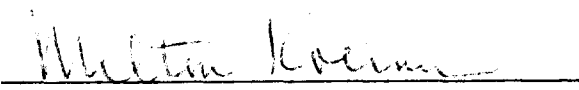
B. That the application of Paula A. Vial Corporation is granted and the City Register, Queens County is hereby directed to refund to said applicant the sum of \$1,442.50.

DATED: Albany, New York
November 27, 1973

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER