

STATE TAX COMMISSION

Upon notice to all interested parties, a formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 22, 1975, at 10:45 A.M. Applicant appeared by Brickner & Ralph, Esqs. (Herman L. Brickner, Esq. and Arthur A. Ralph, Esq. of counsel). The Miscellaneous Tax Bureau appeared by Saul Heckelman, Esq. (James A. Scott, Esq. of Counsel).

ISSUE

What portion of a "wrap around" mortgage recorded June 5, 1974, from First Fiscal Fund Corp., as mortgagor to Lawrence Kadish, as mortgagee was subject to the mortgage recording tax?

FINDINGS OF FACT

1. A mortgage on premises 45 Park Avenue, New York, New York, and a note in the original principal amount of \$1,200,000.00 dated November 15, 1972, was made by applicant, First Fiscal Fund Corp., to Broadway Savings Bank. The mortgage was recorded in the office of the Register of the City of New York in Reel 259 at Page 1242, on November 22, 1972, and the full mortgage tax due thereon was duly paid. The unpaid principal balance of said mortgage as of May 1, 1974, was \$1,200,000.00.

2. A second mortgage on premises 45 Park Avenue, New York, New York, and a note in the original principal amount of \$425,000.00 dated November 15, 1972, was made by applicant, First Fiscal Fund Corp., to Wilco Properties Corp. The mortgage was recorded in the office of the Register of the City of New York in Reel 259 at Page 1258, on November 22, 1972, and the full mortgage tax due thereon was duly paid. The unpaid principal balance of said mortgage as of May 1, 1974, was \$405,000.00.

3. On or about May 1, 1974, applicant, First Fiscal Fund Corp., as mortgagor executed a mortgage to Lawrence Kadish as mortgagee, mortgaging premises 45 Park Avenue, New York, New York. The mortgage provided that it secured a total indebtedness of \$2,700,000.00 consisting of a "new" indebtedness of \$1,095,000.00

and a "preexisting" indebtedness of \$1,605,000.00 as evidenced by the mortgage notes referred to in paragraphs "1" and "2" above.

4. The aforesaid mortgage and the mortgage note dated May 1, 1974, provided for interest payments of \$114,750.00 on June 30, 1974, and a like sum of \$114,750.00 semi-annually thereafter to and including December 30, 1979, and interest and amortization payments of \$55,000.00 on June 30, 1980, and a like sum of \$55,000.00 semi-annually thereafter to and including December 30, 1993.

Each of these \$55,000.00 payments, when received by the holder of the mortgage were to be applied first toward interest on unpaid balances at the rate of three and one-half per centum per annum, and the balance in reduction of principal. The entire unpaid principal became due and payable on June 30, 1994.

Commencing on June 30, 1980, in addition to the payments set forth above, the holder of the mortgage and the note secured thereby, was entitled to receive fifty per cent of any additional net rental income received by the owners of the premises (in excess of \$120,000.00 of annual rental income received from the tenant of the property covered by the mortgage after first deducting any increase in operating expenses, real estate taxes and reimbursement of costs, if any).

Any such additional payments made to the mortgagee which, together with the regular payments of interest set forth above, were to be first applied toward interest up to eight and one-half per centum per annum, and then additional amortization which, together with the regular payments of amortization as set forth above, up to three per centum per annum. Any remaining balance was to be retained by the owners.

5. The aforesaid mortgage dated May 1, 1974, between applicant, First Fiscal Fund Corp., and Lawrence Kadish further stated that it was a "wrap around" mortgage bearing the debt service of the preexisting "underlying" mortgages and notes referred to in paragraphs "1" and "2" above and that Lawrence Kadish, as mortgagee agreed to pay the debt service of the aforesaid "underlying" mortgages. It also provided that:

"4. The maximum principal indebtedness secured or which under any contingency may be secured by this "wrap around" mortgage is the newly created indebtedness of \$1,095,000.00 and the preexisting indebtednesses of \$1,605,000.00.

5. The only new indebtedness created by this instrument is the amount of \$1,095,000.00. In no event shall any owner of the mortgaged premises be obligated for an indebtedness of more than \$1,095,000.00 created hereby and the preexisting indebtedness of \$1,605,000.00."

6. On June 5, 1974, the mortgage, dated as of May 1, 1974, made by applicant, First Fiscal Fund Corp., as mortgagor, to Lawrence Kadish, as mortgagee, was presented for recording to the Register of the City of New York, County of New York, and a certified check in the amount of \$13,687.50 was tendered as payment

of the mortgage tax for the indebtedness of \$1,095,000.00 referred to in said mortgage.

7. The Register of the City of New York, County of New York, refused to accept the aforesaid mortgage for recording unless a mortgage tax on the face amount of the mortgage, \$2,700,000.00, was paid at the rate of \$1.25 per hundred, which tax amounted to \$33,750.00.

8. In compliance with the recording officer's ruling and under protest, applicant, First Fiscal Fund Corp., tendered a certified check in the amount of \$13,687.50 as payment of the mortgage tax on the indebtedness of \$1,095,000.00 and an additional certified check in the amount of \$20,062.50 mortgage tax on the indebtednesses of \$1,605,000.00, which certified check of \$20,062.50 was endorsed "Paid Under Protest". A statement that the additional mortgage tax of \$20,062.50 was "Paid Under Protest" was also endorsed on the mortgage that was recorded.

9. Upon payment of \$33,750.00 demanded by the Register of the City of New York, County of New York, the mortgage was recorded in the office of the Register of the City of New York, County of New York, in Reel 315, at Page 792, on June 5, 1974.

10. On June 24, 1974, applicant, First Fiscal Fund Corp., filed a claim for refund of the sum of \$20,062.50 and demanded a hearing.

CONCLUSIONS OF LAW

A. That the mortgage recording tax imposed by Section 253 of the Tax Law is to be measured by the total debt secured. The total debt secured by the mortgage dated May 1, 1974, from applicant, First Fiscal Fund Corp., to Lawrence Kadish was \$2,700,000.00, the consideration for which was \$1,095,000.00 advanced by Lawrence Kadish to applicant, First Fiscal Fund Corp., at the time of the execution of the mortgage and \$1,605,000.00 by Lawrence Kadish agreeing to make the payments due from applicant, First Fiscal Fund Corp., to Broadway Savings Bank pursuant to a first mortgage and note between said parties dated November 15, 1972, and to Wilco Properties Corp. pursuant to a second mortgage and note between said parties dated November 15, 1972. Furthermore, the debts from applicant, First Fiscal Fund Corp., to Lawrence Kadish and to Broadway Savings Bank and Wilco Properties Corp. were separate and distinct. Each debt ran to a different party and was secured by a separate mortgage which might be foreclosed independently of the other. Therefore, a mortgage recording tax in the sum of \$33,750.00 was due upon the sum of \$2,700,000.00, which latter sum constituted the total debt secured by the mortgage from applicant, First Fiscal Fund Corp., to Lawrence Kadish, unless said mortgage was otherwise exempt pursuant to Section 255 of the Tax Law.


B. That the mortgage dated May 1, 1974, from applicant, First Fiscal Fund Corp., to Lawrence Kadish did not come within the exemption provided by Section 255 of the Tax Law since said mortgage was not recorded to correct or perfect the mortgages dated November 15, 1972, from applicant, First Fiscal Fund Corp., to Broadway Savings Bank or Wilco Properties Corp. or pursuant to some provision or covenant therein or to impose an additional mortgage on property other than that covered by said mortgages as additional security for the original debts.

C. That the application of First Fiscal Fund Corp. is denied.

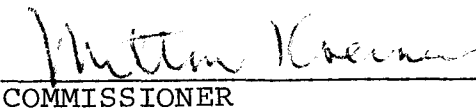
DATED: Albany, New York
March 11, 1975

STATE TAX COMMISSION

PRESIDENT



COMMISSIONER



COMMISSIONER