

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application :  
of :  
SOUTHAMPTON NURSERY SCHOOL, INC. : DETERMINATION

to Review a Determination under Article 11  
of the Tax Law with Reference to a Mortgage :  
Recorded January 25, 1974.

---

Applicant, Southampton Nursery School, Inc. having its principal  
place of business at Majors Path, Southampton, New York, has filed  
an application to review a determination under Article 11 of the  
Tax Law with reference to a mortgage recorded January 25, 1974.

A formal hearing was waived and the case submitted to the State  
Tax Commission upon the entire record contained in the file. The  
State Tax Commission renders the following determination after due  
consideration of said record.

ISSUE

Was a mortgage recorded January 25, 1974, from Southampton  
Nursery School, Inc., as mortgagor, to Pat Frank Nesci, William M.  
Peterson, David J. Gilmartin and Peter W. McGuinn, as mortgagees,  
given to secure their guarantee of an obligation from it to Suffolk  
County Federal Savings and Loan Association, subject to the mortgage  
recording tax?

FINDINGS OF FACT

1. On January 15, 1974, applicant, Southampton Nursery School, Inc., as obligor executed and delivered to Suffolk County Federal Savings and Loan Association, as obligee, its bond in the principal sum of \$38,000.00 payable with interest at 8 1/2 percent per annum at the rate of \$306.00 per month until the whole of said principal sum and interest thereon was paid. Simultaneously therewith and as security for the payment thereof, applicant, Southampton Nursery School, Inc., as mortgagor, executed and delivered to Suffolk County Federal Savings and Loan Association, as mortgagee, its mortgage dated January 15, 1974, covering a parcel of real property located on Majors Path in the Town of Southampton, Suffolk County, New York. The said mortgage was duly recorded in the office of the Suffolk County Clerk on January 25, 1974, in Volume 6980 at Page 203 and the full mortgage recording tax due thereon in the sum of \$285.00 was paid.

2. On January 15, 1974, David L. Gilmartin, Peter W. McGuinn, Pat Frank Nesci and William M. Peterson executed a guarantee in favor of Suffolk County Federal Savings and Loan Association of the bond and mortgage referred to in paragraph "1" wherein they undertook and assumed payment and performance of all of the terms and conditions

of the aforesaid bond and mortgage to the same extent as though they were the original obligor thereon.

3. On January 15, 1974, applicant, Southampton Nursery School, Inc., entered into an agreement in writing with Pat Frank Nesci, William M. Peterson, David J. Gilmartin and Peter W. McGuinn wherein the four individuals agreed to execute the guarantee to Suffolk County Federal Savings and Loan Association referred to in Paragraph "2". In consideration therefor applicant, Southampton Nursery School, Inc., agreed that in the event it defaulted on the mortgage referred to in paragraph "1" and the four individuals were required to cure the default, then it would pay to them any payment, cost or expense incurred by them in curing such default.

4. On January 15, 1974, applicant, Southampton Nursery School, Inc., as mortgagor, executed and delivered to Pat Frank Nesci, William M. Peterson, David J. Gilmartin and Peter W. McGuinn, as mortgagees, its mortgage dated January 15, 1974, securing an indebtedness of \$38,000.00 and covering the parcel of real property referred to in paragraph "1". The mortgage provided that it was given as security for its obligations to the four individuals as set forth in paragraph "3". It further provided that all sums paid by it to Suffolk County Federal Savings and Loan Association should be credited to and applied against the obligation secured by the mortgage, and that upon payment in full to

said Association a satisfaction of said mortgage would be delivered by the four individuals to it. In addition, it provided that it was subject and subordinate to the mortgage referred to in paragraph "1".

5. On January 25, 1974, the mortgage referred to in paragraph "4" together with an affidavit of Pamela C. Topping, President of applicant, Southampton Nursery School, Inc., sworn to on January 15, 1974, requesting that said mortgage be declared exempt from the mortgage recording tax pursuant to section 255 of the Tax Law was presented to the Suffolk County Clerk for recording. The said mortgage was duly recorded on said date in the office of the Suffolk County Clerk in Volume 6980 at Page 195 and no mortgage recording tax was paid thereon.

6. On February 4, 1974, the Miscellaneous Tax Bureau advised the Suffolk County Clerk that the exemption from the mortgage recording tax of the mortgage referred to in paragraph "4" was improper and that a mortgage recording tax in the sum of \$285.00 should be collected. On February 6, 1974, the Suffolk County Clerk placed an estoppel notice on the margin record of the aforesaid mortgage making it impossible for any further instruments to be recorded with reference to said mortgage until said tax and penalties thereon were paid.

7. On April 11, 1974, applicant, Southampton Nursery School, Inc. demanded a hearing.

CONCLUSIONS OF LAW

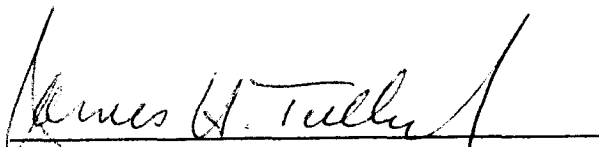
A. That the mortgage recording tax imposed by section 253 of the Tax Law is to be measured by the total debt or obligation secured. The obligation secured by the mortgage dated January 15, 1974, from applicant, Southampton Nursery School, Inc. to Pat Frank Nesci, William M. Peterson, David J. Gilmartin and Peter W. McGuinn was the obligation of the four individuals to make the payments due, not exceeding \$38,000.00 plus interest, pursuant to their guarantee of the mortgage dated January 15, 1974, from the applicant, Southampton Nursery School, Inc., to Suffolk County Federal Savings and Loan Association in the event that applicant, Southampton Nursery School, Inc., defaulted in said payments. The consideration for the obligations from applicant, Southampton Nursery School, Inc., to Suffolk County Federal Savings and Loan Association and to the four individuals were separate and distinct. Each obligation 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 \$285.00 was due upon the sum of \$38,000.00, which latter sum constituted the maximum obligation that could be secured by the mortgage from the applicant, Southampton Nursery School, Inc., to the four individuals, unless said mortgage was otherwise exempt pursuant to section 255 of the Tax Law.

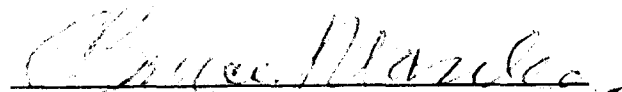
B. That the mortgage dated January 15, 1974, from applicant, Southampton Nursery School, Inc., to Pat Frank Nesci, William M. Peterson, David J. Gilmartin and Peter W. McGuinn did not come within the exemption provided by section 255 of the Tax Law since said mortgage was not recorded to correct or perfect the mortgage dated January 15, 1974, from applicant, Southampton Nursery School, Inc. to Suffolk County Federal Savings and Loan Association or pursuant to some provision or covenant therein or to impose an additional mortgage on property other than that covered by said mortgage as additional security for the original debt.

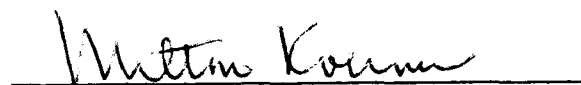
C. That the application of Southampton Nursery School, Inc. is denied.

DATED: Albany, New York  
August 14, 1975

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER