

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Citibank, N.A. :  
to Review a Determination under Article 11 of the :  
Tax Law with Reference to an Instrument Recorded :  
on January 19, 1979. :

AFFIDAVIT OF MAILING

\_\_\_\_\_  
State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of March, 1983, he served the within notice of Decision by certified mail upon Citibank, N.A., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Citibank, N.A.  
399 Park Ave.  
New York, NY 10043

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
18th day of March, 1983.

David Parchuck

Annie C. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Citibank, N.A. :  
to Review a Determination under Article 11 of the :  
Tax Law with Reference to an Instrument Recorded :  
on January 19, 1979. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of March, 1983, he served the within notice of Decision by certified mail upon Jesse A. Epstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jesse A. Epstein  
Weisman, Celler, Spett, Modlin & Wertheimer  
425 Park Ave.  
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
18th day of March, 1983.

David Parchuck

James J. O'Connell

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

March 18, 1983

Citibank, N.A.  
399 Park Ave.  
New York, NY 10043

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 251 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Jesse A. Epstein  
Weisman, Celler, Spett, Modlin & Wertheimer  
425 Park Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
CITIBANK, N.A.  
to Review a Determination under Article 11 of  
the Tax Law with Reference to an Instrument  
Recorded on January 19, 1979.

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DECISION

Petitioner, Citibank, N.A., 399 Park Avenue, New York, New York 10043, filed a petition for review of a determination under Article 11 of the Tax Law with reference to an instrument recorded on January 19, 1979 (File No. 28048).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 19, 1982 at 1:15 P.M. Petitioner appeared by Weisman, Celler, Spett, Modlin & Wertheimer, Esqs., (Jesse A. Epstein, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq., (Samuel Freund, Esq., of counsel). The City of New York appeared by Frederick A. O. Schwarz, Jr., Esq. (Arnold Fox, Esq., of counsel).

ISSUE

Whether a mortgage executed and delivered to petitioner, and recorded on January 19, 1979, is subject to Mortgage Recording Tax under Article 11 of the Tax Law.

FINDINGS OF FACT

1. In December, 1975, petitioner, Citibank, N.A. ("Citibank"), made a loan to Joseph Hirsch Sportswear, Inc. ("Hirsch") in the amount of \$388,800.00. This loan was guaranteed by the Small Business Administration ("SBA").

2. A condition of the above guaranty by the SBA was that Citibank also obtain a guaranty from Samuel and Blanka Lichtman, husband and wife, on the loan to Hirsch. The Lichtman's guaranty was to be secured by a mortgage on their home.

3. On December 29, 1975, Mr. and Mrs. Lichtman executed an agreement by which they guaranteed the obligations of Hirsch with respect to the loan from Citibank. On the same date the Lichtmans executed and delivered to Citibank, as security for their guaranty, a mortgage on property they owned located at 1231-35 51st Street, Brooklyn, New York. This mortgage was in the amount of \$72,200.00.

4. On December 31, 1975, the above mortgage was recorded in the office of the New York City Register, Kings County, New York, in reel 822, page 1662, and mortgage recording tax of \$877.50 was paid.

5. By a letter dated April 13, 1978, the Lichtmans advised Citibank that they were selling their 51st Street property and requested Citibank to execute and deliver to them a satisfaction piece pertaining to the mortgage Citibank held on the property. The Lichtmans also advised Citibank of their intent to purchase another home and to give Citibank a mortgage on that home in the same manner as the mortgage pertaining to the 51st Street property.

6. SBA authorized discharge of the mortgage pertaining to the 51st Street property on the condition that Citibank obtain a mortgage from the Lichtmans on property they intended to purchase which was located at 5604 14th Avenue, Brooklyn, New York.

7. On May 8, 1978, Citibank executed a satisfaction of the mortgage pertaining to the 51st Street property. This satisfaction piece stated, in part, that "...Citibank... does hereby certify that the ...mortgage is paid,

and does hereby consent that the same be discharged of record." This satisfaction piece was duly recorded on May 8, 1978, in the office of the New York City Register, Kings County, New York.

8. The Lichtmans thereafter purchased a residence located at 5604 14th Avenue, Brooklyn, New York, and on December 22, 1978, executed and delivered to Citibank a mortgage on this property in the amount of \$72,200.00 as security for their guaranty of the Hirsch loan.

9. The above mortgage on the Lichtmans' 14th Avenue property was recorded on January, 19, 1979, in the office of the New York City Register, Kings County, New York, in reel 1048, page 1270. At the time of recording, Citibank presented an "Affidavit for Exemption of Substitute Mortgage from Recording Tax", made by John R. Muranelli, an assistant vice president of Citibank, and no mortgage recording tax was imposed or paid.

10. The dollar amount of each of the two mortgages described herein is \$72,200.00, and each mortgage served as security not for monies loaned to the Lichtmans, but rather for the Lichtmans' guaranty on the loan made by Citibank to Hirsch. No additional money was loaned to Hirsch, nor were there changes in the parties, or the terms and conditions of the original loan and note, at the time of satisfaction of the mortgage on the 51st Street property or at the time of the subsequent execution and delivery of the mortgage on the 14th Avenue property. The note evidencing Hirsch's indebtedness to Citibank (which indebtedness was guaranteed by the Lichtmans) remained in effect at all times. Discharge of the mortgage on the 51st Street property was not in recognition of discharge of any portion of the loan to Hirsch.

11. By a letter dated February 21, 1979, the Audit Division advised the New York City Register, Kings County, New York, that a mortgage recording tax

was due upon the recording of the mortgage pertaining to the Lichtmans' 14th Avenue property. This letter instructed the City Register to collect the tax and penalty asserted as due, and to apply the provisions of section 258 of the Tax Law ("Effect of nonpayment of taxes") until payment was received.

12. By a letter dated February 26, 1979, the New York City Department of Finance (Office of the City Register) sought payment from Citibank of mortgage recording tax, plus penalty, in the total amount of \$929.50. This letter, stating that the mortgage on the 14th Avenue property was not a supplemental mortgage exempt from tax, referred to the Audit Division's letter of February 21, 1979, as the basis for the demand for payment.

13. On September 25, 1979, Citibank filed a petition contesting the above asserted tax and penalty (\$929.50). Citibank asserts the mortgage on the 14th Avenue property was merely in substitution of the mortgage on the 51st Street property, and thus should not be subject to mortgage recording tax.

#### CONCLUSIONS OF LAW

A. That section 253 of the Tax Law imposes a recording tax, measured by the amount of any principal debt or obligation secured by a mortgage on real property situated within New York State, upon mortgages recorded on or after certain specified dates.

B. That section 255 of the Tax Law, in pertinent part, provides:

"Supplemental mortgages. - 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, 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..."

C. That the mortgage recording tax does not constitute a tax upon property but is a tax upon the privilege of recording a mortgage. See, e.g., Matter of S. S. Silberblatt, Inc. v. Tax Commission, 5 N.Y.2d 635 (1959). It is the act of recordation which is taxed.

D. That both the original mortgage on the 51st Street property and the subsequent mortgage on the 14th Avenue property served as security for the same underlying obligation of the Lichtmans, namely, their guaranty of the loan made by petitioner, Citibank, to Hirsch. There was no difference in the amount of money (\$72,200.00) secured by either of the mortgages. No additional money was loaned to Hirsch, nor were there any changes in the parties, terms of the loan agreement, interest rate or maturity date of the loan. In short, only the collateral securing the guaranty of the loan was changed. However, the terms of the satisfaction piece expressly discharged the mortgage on the 51st Street property, and did so approximately eight (8) months prior to execution and recordation of the mortgage on the 14th Avenue property. It is significant that discharge of the original mortgage occurred before the Lichtman's guaranty was re-secured by the subsequent mortgage on the 14th Avenue property (See Matter of City of New York v. Tully, 55 N.Y.2d 960, 962). Accordingly, the mortgage on the 14th Avenue property is not a supplement or addition to the prior mortgage on the 51st Street property within the meaning of section 255 of the Tax Law, but rather is a separate and distinct mortgage and, as such, is subject to the mortgage recording tax.




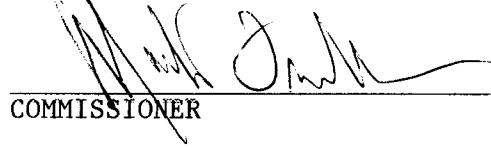
E. That the petition of Citibank, N.A. is hereby denied and the mortgage recording tax due, together with such penalty as may be lawfully owing, is sustained.

DATED: Albany, New York  
MAR 18 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER