

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
William Langfan :  
AFFIDAVIT OF MAILING  
for Refund of the Tax on Mortgages under Article 11 :  
of the Tax Law with reference to an instrument :  
recorded on 12/29/71 :

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

Jay Vredenburg, 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 1st day of May, 1981, he served the within notice of Decision by certified mail upon William Langfan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Langfan  
6 E. 45th St.  
New York, NY

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  
1st day of May, 1981.

*Connie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
William Langfan :

AFFIDAVIT OF MAILING

for Refund of the Tax on Mortgages under Article 11:  
of the Tax Law with reference to an instrument  
recorded on 12/29/71 :

State of New York  
County of Albany

Jay Vredenburg, 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 1st day of May, 1981, he served the within notice of Decision by certified mail upon Martin D. Schechter the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin D. Schechter  
Brodsky, Linett, Altman & Schechter  
888 7th Ave.  
New York, NY 10019

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  
1st day of May, 1981.

*Cornie A. Hagelund*

*Jay Vredenburg*

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

May 1, 1981

William Langfan  
6 E. 45th St.  
New York, NY

Dear Mr. Langfan:

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) 215 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Martin D. Schechter  
Brodsky, Linett, Altman & Schechter  
888 7th Ave.  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
WILLIAM LANGFAN	:	DECISION
to Review a Determination under Article 11 of		
the Tax Law with reference to an Instrument		
Recorded in the Office of the Register of the		
City of New York, Queens County, on December 30,		
1971, in Reel 537, Page 1241; an Instrument		
Recorded in the Office of the County Clerk,		
Suffolk County, on December 30, 1971, in Volume		
6243, Page 530; an Instrument Recorded in the		
Office of the County Clerk, Suffolk County, on		
December 30, 1971, in Volume 6243, Page 506; an		
Instrument Recorded in the Office of the County		
Clerk, Ontario County, on January 3, 1972, in		
Book 442, Page 41; and an Instrument Recorded		
in the Office of the County Clerk, Oneida		
County, on January 3, 1972 in Liber 1434, Page		
475.		

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Petitioner, William Langfan, 6 East 45th Street, New York, New York 10017, filed a petition to review a determination under Article 11 of the Tax Law with reference to an instrument recorded in the office of the Register of the City of New York, Queens County, on December 30, 1971, in Reel 537, Page 1241; an instrument recorded in the office of the County Clerk, Suffolk County, on December 30, 1971, in Volume 6243, Page 530; an instrument recorded in the office of the County Clerk, Suffolk County, on December 30, 1971, in Volume 6243, Page 506; an instrument recorded in the office of the County Clerk, Ontario County, on January 3, 1972, in Book 442, Page 41; and an instrument recorded in the office of the County Clerk, Oneida County, on January 3, 1972, in Liber 1434, Page 475 (File No. 20922).

A formal hearing was held before Melvin Barasch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New

York, on June 19, 1979 at 10:30 A.M. Petitioner appeared by Brodsky, Linett, Altman and Schechter, Esqs. (Jacob S. Linett, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Paul Lefebvre, Esq., of counsel). The City of New York appeared by Allen G. Schwartz, Corporation Counsel (Arnold Fox, Esq. and Isaac Donner, Esq., of counsel). The County of Suffolk appeared by John Prudenti, Esq.

#### ISSUE

Whether each of the subject instruments constituted a "supplemental mortgage" within the intendment of section 255 of the Tax Law, so that recording tax was due only upon the difference between the principal amount of said instruments and the principal amount of the first, institutional mortgages.

#### FINDINGS OF FACT

1. (a) On December 29, 1971, 63 Associates, Inc. executed and delivered to petitioner, William K. Langfan, a mortgage to secure the payment of an indebtedness in the amount of \$645,000.00, which mortgage constituted a lien upon premises situated at 138-02 Jamaica Avenue, Jamaica, Queens County ("Instrument A"). Upon recordation of this instrument, petitioner paid, by check, a mortgage tax of \$8,062.50, computed on the entire amount aforementioned. The check was marked, "Paid under protest."

(b) On December 29, 1971, 63 Associates, Inc. executed and delivered to petitioner a mortgage to secure the payment of an indebtedness in the amount \$531,912.00, which mortgage constituted a lien upon premises situated at 900 Broadway, Babylon, Suffolk County ("Instrument B"). Upon recordation of Instrument B on December 30, 1971, petitioner paid, by check, a mortgage tax of \$3,989.25, computed on the amount \$531,912.00. The check was similarly marked, "Paid under protest".

(c) On December 29, 1971, 63 Associates, Inc. executed and delivered to petitioner a mortgage to secure the payment of an indebtedness in the amount \$486,000.00, which mortgage constituted a lien upon premises situated at 313 Middle Country Road, Coram, Suffolk County ("Instrument C"). At the time of recordation of Instrument C, petitioner paid, by check marked "Paid under protest", a mortgage tax of \$3,645.00, computed on \$486,000.00.

(d) On December 29, 1971, 63 Associates, Inc. executed and delivered to petitioner a mortgage to secure the payment of an indebtedness in the amount \$438,000.00, which mortgage constituted a lien upon premises situated at 462-66 Hamilton Street, Geneva, Ontario County ("Instrument D"). Instrument D was recorded on January 3, 1972, and mortgage tax of \$2,190.00, computed on \$438,000.00, was paid by petitioner with a check marked, "Paid under protest".

(e) On December 29, 1971, 63 Associates, Inc. executed and delivered to petitioner a mortgage to secure the payment of an indebtedness in the amount of \$555,000.00, which mortgage constituted a lien upon premises situated at 247 Genesee Street, Utica, Oneida County ("Instrument E"). Upon recordation of Instrument E on January 3, 1972, petitioner paid, by check marked "Paid under protest," a mortgage tax of \$2,775.00, computed on \$555,000.00.

2. Each of the aforementioned instruments was executed on the same form and contained identical terms; each had appended thereto the same mortgage rider which provided in pertinent part:

"E. The holder of this mortgage may elect to obtain on behalf of the mortgagor or any subsequent owner of the premises, an 'institutional' first mortgage which shall be a first lien on the premises.

\* \* \*

"(c)... The holder of this mortgage will subordinate this mortgage to the lien of said first mortgage, and shall be required to make all payments of interest and principal, including any sum due upon maturity thereof, as such payments become due upon the first mortgage in accordance with the terms thereof.

"F. Notwithstanding that a first mortgage is obtained in accordance with 'E' above, the mortgagor shall make payments of interest and amortization as herein provided for directly to the mortgagee herein named or designee, and shall perform and comply with all of the other terms, covenants and conditions of this mortgage and the first mortgage obtained in accordance with 'E' above, except that the holder of this mortgage shall make all payments of interest and amortization and any principal balance remaining unpaid upon maturity in accordance with the terms of the first mortgage."

3. 63 Associates, Inc., a domestic corporation, was the nominee of a partnership of which petitioner was a member, and was the seller in each instance. 63 Associates, Inc. created each mortgage in an amount equal to the purchase price of the property and sold the property subject to such mortgage (to persons not herein involved).

4. An institutional mortgage was obtained in each instance and recorded prior to or simultaneously with the instruments which are the subject of the within proceeding. Also, in each instance, the particular institution paid over to petitioner the principal amount of the institutional mortgage.<sup>1</sup>

(a) Instrument A. The amount of the institutional mortgage obtained was \$260,000.00. Upon recordation, petitioner paid the tax due thereon in the sum \$3,250.00. By letter to the Audit Division dated December 16, 1977, petitioner sought refund of his claimed overpayment, averring that the mortgage tax paid upon the recording of Instrument A should have been calculated upon the amount \$385,000.00, the difference between the principal amount of Instrument A and that of the institutional mortgage, and not upon the full amount of Instrument A. Petitioner accordingly demanded a refund of \$3,250.00, citing as authority therefor the decision in First Fiscal Fund Corp. (infra).

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<sup>1</sup> At the hearing, petitioner made an evidentiary offering of his cancelled checks, used to pay tax on the five institutional mortgages; he did not offer the institutional mortgages.

(b) Instrument B. An institutional mortgage of \$218,000.00 was obtained, and a mortgage tax of \$1,635.00 was paid by petitioner. Petitioner sought a refund in the sum of \$1,635.00.

(c) Instrument C. Petitioner paid mortgage recording tax of \$1,462.50, computed on the institutional mortgage of \$195,000.00. Petitioner thereafter sought refund from the Audit Division of the amount of such tax for the reason that upon recording Instrument C, he paid tax in the amount \$2,190.00, computed on the full principal of Instrument C.

(d) Instrument D. The amount of the institutional mortgage obtained equalled \$185,000.00. Petitioner paid tax of \$925.00 when said instrument was offered for recording and subsequently sought refund of that amount for reasons above set forth.

(e) Instrument E. Petitioner paid tax of \$1,150.00 upon the recording of an institutional mortgage with a principal balance of \$230,000.00. By letter to the Audit Division, he demanded refund of the tax paid.

#### CONCLUSIONS OF LAW

A. That section 255 of the Tax Law provides in relevant part:

"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..., 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 ... the recorded primary mortgage, in which case, a tax is imposed ... on such new or further indebtedness or obligation ...".

B. That the instruments at issue do not fall within the definition of a "wrap-around" mortgage nor within the holding of First Fiscal Fund Corp. v. State Tax Commission, 49 A.D.2d 408, aff'd mem, 40 N.Y.2d 940. A recital of the facts presented to the Court in First Fiscal makes this conclusion abundantly



clear. First Fiscal executed a note and mortgage in the amount of \$1,200,000.00 to Broadway Savings Bank. On the same date, First Fiscal executed another note and mortgage for \$425,000.00 to Wilco Properties Corp. on the same premises. At the time of recordation, the full mortgage tax on these instruments was paid. On a subsequent date, at which point the unpaid principal balance on the two mortgages was \$1,605,000.00, First Fiscal executed a third mortgage on the premises to Kadish to secure a new indebtedness of \$1,095,000.00 and the previous indebtedness aforementioned. The third mortgage recited that it was a "wrap-around" mortgage and that First Fiscal was to pay the debt service on the entire \$2,700,000.00 and Kadish in turn was to pay the debt service on the two prior mortgages on First Fiscal's behalf. The Court determined that:

"the original mortgage debt was not extinguished and that under section 253 of the Tax Law, mortgage recording tax was only payable upon the \$1,095,000.00 increase, rather than upon the entire amount secured by the third mortgage [citations omitted]." First Fiscal, supra at 409.

C. That none of the subject instruments recited that they were wrap-around mortgages. While such a recital would not be sufficient by itself to so characterize the instruments, it would be an indicator of the parties' intent.

D. That the debt from petitioner to the institution and the debt from 63 Associates, Inc. to petitioner were separate and distinct.

"A debt is not merely a promise to pay money. It involves the relationship of debtor and creditor, of borrower and lender, and ordinarily signifies an exchange of cash for a promise to return it with an increment of interest." Park and 46th Street Corp. v. State Tax Commission, 295 N.Y. 173, 178-79.

In the case of each instrument and the institutional mortgage associated therewith, there were created two relationships, and two obligations.

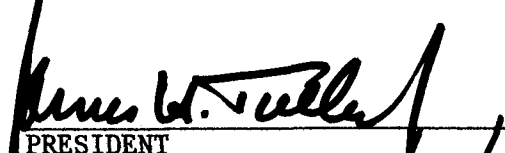
E. That the recording tax was correctly computed upon the principal amount of each mortgage at issue.

F. That the petition of William Langfan for refund of mortgage tax is hereby denied.

DATED: Albany, New York

MAY 01 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER