

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank S. Lopke and Barbara A. Lopke	:	
and F. S. Lopke Contracting, Inc.	:	AFFIDAVIT OF MAILING
	:	
to Review a Determination under Article 11 of the	:	
Tax Law with Reference to an Indenture of Mortgage	:	
and Deed of Trust Recorded on April 26, 1979.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Frank S. Lopke and Barbara A. Lopke and F. S. Lopke Contracting, Inc., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank S. Lopke and Barbara A. Lopke
and F. S. Lopke Contracting, Inc.
Lillie Hill Rd.
Apalachin, NY 13732

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
27th day of May, 1983.

David Parchuck

William A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank S. Lopke and Barbara A. Lopke	:	
and F. S. Lopke Contracting, Inc.	:	AFFIDAVIT OF MAILING
	:	
to Review a Determination under Article 11 of the	:	
Tax Law with Reference to an Indenture of	:	
Mortgage and Deed of Trust Recorded on April 26,	:	
1979.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Donald Walls the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Walls
1007 Press Bldg.
Binghamton, NY 13902

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
27th day of May, 1983.

David Parchuck

James A. England

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank S. Lopke and Barbara A. Lopke	:	
and F. S. Lopke Contracting, Inc.	:	AFFIDAVIT OF MAILING
	:	
to Review a Determination under Article 11 of the	:	
Tax Law with Reference to an Indenture of	:	
Mortgage and Deed of Trust Recorded on April 26,	:	
1979.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon ITT Thorp Corp. the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

ITT Thorp Corp.
Suite 1000, Shelard Tower
600 S. Country Rd. 18
Minneapolis, MN 55426

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
27th day of May, 1983.

David Parchuck

Connie A. Heyland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank S. Lopke and Barbara A. Lopke	:	
and F. S. Lopke Contracting, Inc.	:	AFFIDAVIT OF MAILING
	:	
to Review a Determination under Article 11 of the	:	
Tax Law with Reference to an Indenture of	:	
Mortgage and Deed of Trust Recorded on April 26,	:	
1979.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Carl Saddlemire the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl Saddlemire
Tioga County Treasurer
Owego, NY 13827

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
27th day of May, 1983.

David Parchuck

James A. Anglim

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank S. Lopke and Barbara A. Lopke	:	
and F. S. Lopke Contracting, Inc.	:	AFFIDAVIT OF MAILING
	:	
to Review a Determination under Article 11 of the	:	
Tax Law with Reference to an Indenture of	:	
Mortgage and Deed of Trust Recorded on April 26,	:	
1979.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Mr. Arthur Maxwell the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Arthur Maxwell
Mortgage & Real Estate Transfer Unit
Room 403, 4th Floor
Bldg. #9, State Campus
Albany, NY 12227

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
27th day of May, 1983.

David Parchuck

Annis A. Haglund
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Frank S. Lopke and Barbara A. Lopke
and F. S. Lopke Contracting, Inc.
Lillie Hill Rd.
Apalachin, NY 13732

Dear Mr. & Mrs. Lopke:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Donald Walls
1007 Press Bldg.
Binghamton, NY 13902

AND
ITT Thorp Corp.
Suite 1000, Shelard Tower
600 S. Country Rd. 18
Minneapolis, MN 55426

Taxing Bureau's Representative

Carl Saddlemire
Tioga County Treasurer
Owego, NY 13827
AND
Mr. Arthur Maxwell
Mortgage & Real Estate Transfer Unit
Room 403, 4th Floor
Bldg. #9, State Campus
Albany, NY 12227

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FRANK S. LOPKE and BARBARA A. LOPKE,	:	DECISION
and F. S. LOPKE CONTRACTING, INC.	:	
	:	
for Review of a Determination under Article 11	:	
of the Tax Law with Reference to an Indenture	:	
of Mortgage and Deed of Trust Recorded on	:	
April 26, 1979.	:	

Petitioners, Frank S. Lopke and Barbara A. Lopke, and F. S. Lopke Contracting, Inc., Lillie Hill Road, Apalachin, New York 13732, filed a petition for review of a determination under Article 11 of the Tax Law with reference to an indenture of mortgage and deed of trust recorded on April 26, 1979 (File No. 28384).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, State Office Annex, 164 Hawley Street, Binghamton, New York on January 11, 1983 at 1:15 P.M., with all briefs to be submitted by March 15, 1983. Petitioner appeared by Donald G. Walls, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether the stated dollar value of certain real property mortgaged by petitioners, rather than the total amount of indebtedness secured by the mortgage, is the proper amount against which mortgage recording tax should be imposed.

FINDINGS OF FACT

1. Petitioner F. S. Lopke Contracting, Inc. ("the Corporation") is engaged in the gravel business, including crushing, demolition and excavation.

Petitioners, Frank S. Lopke and Barbara A. Lopke, husband and wife, are the officers and stockholders of the Corporation.

2. On April 25, 1979, the Corporation borrowed \$850,000.00 from I.T.T. Thorp Corporation ("Thorp"), evidenced by a promissory note executed in this amount.

3. The above loan was secured in part by a security interest in construction and crushing equipment having an appraised value of \$976,650.00¹. The loan was further secured by a mortgage on commercial real property owned by the corporation (including 15.2 acres), and by a mortgage on the Lopkes' personal residence (including approximately 11.5 acres).

4. Each of the above mortgages stated that the corporation, and the Lopkes, respectively, as mortgators, were indebted to the mortgagee (Thorp) in the amount of \$850,000.00 (the Lopkes' mortgage was stated to be a guaranty of payment of this amount by the corporation). Each mortgage further stated that the total dollar value assigned to the real estate collateralizing the loan to the corporation was \$150,000.00, with the remaining portion of the loan being collateralized by the construction and crushing equipment.

5. When the mortgages were recorded, the corporation paid a mortgage recording tax of \$1,125.00, and the Lopkes did not pay any mortgage recording tax.

6. The Audit Division asserts that based upon the \$850,000.00 indebtedness recited in the mortgage, the corporation should have paid a mortgage recording tax of \$6,375.00, and that mortgage recording tax remains due from the corporation

¹ A Uniform Commercial Code financing statement covering the equipment was filed.

in the amount of \$5,250.00 (\$6,375.00 less \$1,125.00 paid at the time of recording).²

7. In accordance with Thorp's requirements prior to granting the loan, the real estate covered by the mortgages was appraised and a policy of title insurance with Thorp as the insured party was issued. The appraised value of the parcels involved totalled \$149,525.00, and the title insurance policy covering all parcels involved was issued in the amount of \$150,000.00.

8. Petitioners assert that notwithstanding the recitation of an \$850,000.00 indebtedness on the face of the mortgage, the mortgage lien created was actually only \$150,000.00, and that this is supported by the recitation in the mortgage that the value assigned the real property serving as collateral is \$150,000.00. Petitioners point out that the documents drawn in connection with the loan were prepared by Thorp's legal counsel from Milwaukee, Wisconsin, and that specific reference to the value of the real property (\$150,000.00) was included by Thorp's counsel in the mortgages for the purpose of determining the amount of mortgage recording tax payable.

9. In addition to the above recitations, the mortgage given to Thorp by the corporation contained clauses at paragraph 4, page 1, paragraph 6, pages 1 and 2, and paragraph 2, page 8, respectively, which provide as follows:

(Paragraph 4, page 1)

"WHEREAS, as a condition to the incurring indebtedness, Mortgagor agreed to execute and deliver this Mortgage to secure along

² Mortgage recording tax of \$6,375.00 was also originally asserted by the Audit Division as due from the Lopkes. However, the Lopkes' mortgage securing their guaranty has been accepted as a supplement to the corporate mortgage (with no new or further indebtedness created nor any funds flowing to the Lopkes individually), and the assertion of tax due from the Lopkes has been withdrawn by the Audit Division.

with the Personal Property Collateral the payment of the Note and the performance of the covenants and conditions in the Mortgage and any extension, renewal or modification of the Note and the Mortgage and all other debts of every kind and character now or hereafter owing by the Mortgagor to Mortgagee."

(Paragraph 6, pages 1 and 2)

"NOW THEREFORE, in order to secure the payment of the principal, interest and charges (if any) of the Note according to its terms and to secure all renewals, extensions and modifications of the Note, and to secure the performance and observance by the Mortgagor of all the covenants and conditions contained in the Note, and in this Mortgage, and any other agreement between Mortgagor and Mortgagee and to secure all future obligations, debts and liabilities and to secure all other contracts or loan agreements now or hereafter entered into between the Mortgagor and Mortgagee (hereinafter collectively referred to as "Obligations"), and for other good and valuable consideration the receipt of which is hereby acknowledged, the Mortgagor does hereby mortgage and warrant to the Mortgagee, the real estate described in the schedule attached hereto and made a part hereof (the "Mortgaged Property"),"

(Paragraph 2, page 8)

"This Mortgage shall be a lien on the Mortgaged Property as security for the full amount of said indebtedness, whether the principal amount of the Note, or any part thereof, is disbursed to the Mortgagor or to other obligors under the Note by the Mortgagee simultaneously with the execution of this Mortgage or subsequent thereto, in installments or otherwise."

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 which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within New York State.

B. That the security interest in the construction and crushing equipment together with the mortgage served as security for the entire indebtedness of \$850,000.00. The maximum amount of debt secured by the mortgage under any contingency also totalled \$850,000.00. While a specific dollar value was assigned to the real property mortgaged, this did not serve as a limitation on


the amount of the debt secured specifically by the mortgaged property, (see Finding of Fact "9"). In the event of foreclosure, Thorp was not limited to recovery of \$150,000.00 on the mortgaged property. Accordingly, the mortgage recording tax is to be measured against the indebtedness secured (\$850,000.00), and not against the stated value of the real property involved (Matter of Citizens National Bank v. State Tax Comm., 274 A.D. 722).

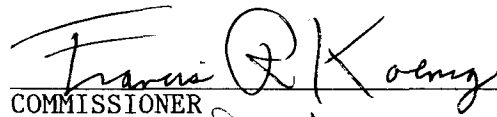
C. That the petition of Frank S. Lopke and Barbara A. Lopke is hereby granted (see Footnote No. "2"). The petition of F. S. Lopke Contracting, Inc. is denied, and the imposition of additional mortgage recording tax of \$5,250.00, together with such interest as may be lawfully owing, is sustained.

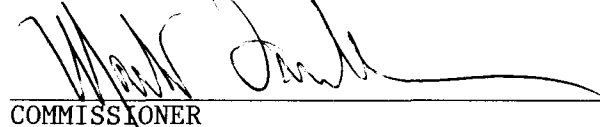
DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER