

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Plainview Associates : AFFIDAVIT OF MAILING
for a Refund of Mortgage Recording Taxes under :
Article 11 of the Tax Law for a Mortgage Recorded :
on 3/13/80. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon Plainview Associates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Plainview Associates
2001 Marcus Ave.
Lake Success, NY 11042

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
17th day of August, 1983.

Joan Q. Schutt

Connie A. Hagelund

STATE OF NEW YORK

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of :
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Article 11 of the Tax Law for a Mortgage Recorded :
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State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon David I. Rosenberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David I. Rosenberg
Wofsey, Certilman, Haft, Lebow & Balin
71 S. Central Ave.
Valley Stream, NY 11580

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
17th day of August, 1983.

Jean Q. Schultz

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Plainview Associates	:	AFFIDAVIT OF MAILING
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State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon K R Associates the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

K R Associates
103 S. Middle Neck Rd.
Great Neck, NY 11021

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
17th day of August, 1983.

Joan Q. Schutt

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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for a Refund of Mortgage Recording Taxes under :
Article 11 of the Tax Law for a Mortgage Recorded :
on 3/13/80. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon Massachusettes Mutual Life Ins. Co., the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Massachusettes Mutual Life Ins. Co.
1295 State St.
Springfield, MA 01111

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
17th day of August, 1983.

Jean A. Schultz

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Plainview Associates : AFFIDAVIT OF MAILING
for a Refund of Mortgage Recording Taxes under :
Article 11 of the Tax Law for a Mortgage Recorded :
on 3/13/80. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon Mr. John V. Scaduto, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. John V. Scaduto
Nassau County Treasurer
Old Country Rd.
Mineola, NY 11501

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
17th day of August, 1983.

Jean A. Schell

Connie R. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Plainview Associates : AFFIDAVIT OF MAILING
for a Refund of Mortgage Recording Taxes under :
Article 11 of the Tax Law for a Mortgage Recorded :
on 3/13/80. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon Mr. Arthur Maxwell, the representative of the petitioner 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 Tax Unit
Room 403, 4th Fl.
Building 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
17th day of August, 1983.

Jean Q. Schults

Connie Hagelund

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

August 17, 1983

Plainview Associates
2001 Marcus Ave.
Lake Success, NY 11042

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 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 Representatives:

David I. Rosenberg
Wofsey, Certilman, Haft, Lebow & Balin
71 S. Central Ave.
Valley Stream, NY 11580

AND
Massachusetts Mutual Life Ins. Co.
1295 State St.
Springfield, MA 01111

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

K R Associates
103 S. Middle Neck Rd.
Great Neck, NY 11021

Mr. John V. Scaduto
Nassau County Treasurer
Old Country Rd.
Mineola, NY 11501

Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
PLAINVIEW ASSOCIATES :
for a Refund of Mortgage Recording Tax under :
Article 11 of the Tax Law with Respect to a :
Mortgage Recorded on March 13, 1980. :

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 16, 1982 at 9:15 A.M. Petitioner appeared by Wofsey, Certilman, Haft, Lebow & Balin (David J. Rosenberg, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Samuel Freund, Esq., of counsel).

Whether the mortgage recorded on March 13, 1980 was encompassed by a previously executed wrap-around mortgage so as to entitle petitioner to a refund of mortgage recording tax in the amount of \$5,000.00.

1. On September 1, 1977 Plainview Associates ("Plainview"), as mortgagor, executed a consolidated mortgage to Massachusetts Mutual Life Insurance Company ("Massachusetts Mutual") in the amount of \$1,150,000.00. The total mortgage recording tax paid incident to the recording of the consolidated mortgage was \$11,575.00.

2. Following the execution of the foregoing mortgage, Plainview and KR Associates ("KR") made arrangements for KR's purchase of the property encumbered by the mortgage held by Massachusetts Mutual. The transaction planned by Plainview and KR contemplated the building of two additions to an existing building after the closing of title. KR was to pay for this transaction partially by cash at the time of execution of the contract, partially by cash at closing, and partially by giving back to Plainview a wrap-around mortgage which was to wrap-around the existing mortgage held by Massachusetts Mutual. It was a condition of the contract that Plainview obtain a commitment from Massachusetts Mutual to finance the construction of the addition which Plainview was going to build subsequent to the transfer of title with its own money and then be reimbursed by Massachusetts Mutual.

3. On or about April 11, 1979, Massachusetts Mutual approved Plainview's request to sell the property which was encumbered by the mortgage dated September 1, 1977. Massachusetts Mutual also approved Plainview's application for an additional note and accompanying mortgage of \$500,000.00 and a wrap-around mortgage which would become, in essence, a first mortgage around two mortgages held by Massachusetts Mutual; the one that was on record and one which would be placed on record based upon the proposed \$500,000.00 loan which Massachusetts Mutual would make to Plainview upon Plainview's completion of the additions to the building.

4. On August 28, 1979 KR, as mortgagor, executed a wrap-around mortgage to Plainview as mortgagee in the amount of \$1,940,000.00. This mortgage, which wrapped-around the prior consolidated mortgage held by Massachusetts Mutual, was recorded in the office of the Clerk of the County of Nassau on or about September 5, 1979. The amount secured by this mortgage represented the unpaid balance due to Massachusetts Mutual of \$1,125,330.88 and the amount of \$814,669.12

advanced to KR by Plainview. At the time this mortgage was presented for recording Plainview claimed an exemption equal to the amount due on the mortgage held by Massachusetts Mutual. This exemption was granted by the recording officer. Therefore, mortgage recording tax in the amount of \$8,147.00, representing the tax due upon the advance of \$814,669.12, was tendered by Plainview and accepted by the recording officer.

5. Paragraphs twenty-two and twenty-three of the mortgage executed on August 28, 1979 provided, in pertinent part:

"22. This Mortgage is and will be maintained as a valid wrap-around first mortgage lien on the Mortgaged Premises, wrapping around the Mortgage held by the MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY referred to in Paragraph "19" hereof.

23. The Mortgagee shall have the right to refinance the underlying mortgage by increasing the same in the amount of Five Hundred Thousand Dollars or by placing a new prior mortgage upon the premises in that amount, which mortgage shall be on a parity with the existing underlying mortgage, either of which transactions shall hereinafter be referred to as a new prior mortgage provided that:

* * *

Mortgagor agrees to execute, acknowledge and deliver upon request of the Mortgagee any and all documents necessary to effectuate such new prior mortgage.

At the time of the placing of such new prior mortgage, the Mortgagee hereunder shall subordinate this Mortgage to such new prior mortgage and this Mortgage shall be deemed to wrap around said mortgage in the same manner as this Mortgage wraps around the MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY first Mortgage lien. The proceeds of said additional mortgage shall be paid by the Mortgagor to the Mortgagee and all the costs and expenses of placing such new prior mortgage shall be borne by the Mortgagee."

6. On August 28, 1979 Plainview also assigned its committment for a loan from Massachusetts Mutual to KR so that as Plainview constructed the additions to the building, KR would have funds to pay Plainview.

7. The improvements which were to be constructed by Plainview were completed and leased or partially leased by March, 1980. This satisfied the conditions of Massachusetts Mutual's loan commitment. On March 7, 1980 KR and Plainview executed a mortgage to Massachusetts Mutual and the proceeds of the \$500,000.00 loan which KR obtained by assignment from Plainview were paid over to Plainview according to the August 28, 1979 mortgage.

8. As a result of the foregoing transaction the total indebtedness which was due Plainview remained the same. In addition, from KR's perspective neither the purchase price of the land nor KR's indebtedness to Plainview increased. However, Plainview's obligation to pay debt service to Massachusetts Mutual increased.

9. On March 13, 1980 the mortgage dated March 7, 1980 was presented for recording. In conjunction with the recording of this mortgage, an affidavit under section 255 of the Tax Law was submitted which asserted among other things, that additional mortgage tax was not due since the wrap-around mortgage dated August 28, 1979 provided for an additional mortgage of \$500,000.00 and that the wrap-around mortgage, by its terms, wrapped around the mortgage of March 7, 1980 resulting in the same total indebtedness of \$1,940,000.00.

10. The recording officer concluded that mortgage recording tax was due upon the recording of the \$500,000.00 mortgage. Therefore, Plainview paid \$5,000.00 of recording tax under protest. Upon review, the Audit Division agreed with the conclusion of the recording officer. This proceeding for a refund of the \$5,000.00 mortgage recording tax which was paid under protest ensued.

CONCLUSIONS OF LAW

A. That a mortgage recording tax is imposed upon "...the 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 the state..." (Tax Law §253). An instrument is a "mortgage" within the meaning of section 253 only if it imposes a lien on real property (See generally: Hacking a Path Through The New York State Mortgage Tax Jungle, 43 Albany Law Review 37). The instrument in question imposed a lien on real property and thus would be subject to tax unless otherwise exempted by statute.

B. That a supplemental instrument or mortgage is exempt from the mortgage recording tax if the "...supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some covenant or provision therein, or an additional mortgage is recorded imposing a 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..." (Tax Law §255). However, a supplemental mortgage is not exempt from the mortgage recording tax "...if it creates or secures a new or further indebtedness secured by or which under any contingency may be secured by the recorded primary mortgage..." (Tax Law §255). If the supplemental mortgage is not exempt from the recording tax, the tax is imposed on such new or further indebtedness or obligation (Tax Law §255).

C. That the mortgage at issue secures a new or further indebtedness and is not exempt under Tax Law section 255. While the mortgage dated March 7, 1980 appears to have been made pursuant to a provision or covenant in the

mortgage dated August 28, 1979 (Finding of Fact "5"), it secures an entirely different obligation. There were not only different liens, as evidenced by the separate mortgages, but entirely different loans, as evidenced by the separate notes and separate transfers of funds loaned thereunder. Moreover, the parties were different; the creditor in the August 28, 1979 transaction was petitioner and the debtor was KR, the creditor in the March 7, 1980 transaction was Massachusetts Mutual and the debtors were petitioner and KR. Thus, the March 7, 1980 loan was a new transaction and subject to new tax.

D. That the petition of Plainview Associates is hereby denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 17 1983


PRESIDENT


COMMISSIONER


COMMISSIONER