

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bella Vista Development Corp. :
for Review of a Determination under Article 11 of :
the Tax Law with Reference to a Mortgage Recorded :
on September 29, 1978. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 25th day of May, 1984, he served the within notice of Decision by certified mail upon James D. Chamberlain, et al, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James D. Chamberlain, et al as
Trustees of the Mader Corp.
Employees' Profit Sharing Trust
2730 Transit Road
West Seneca, NY 14224

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 25th day of May, 1984, he served the within notice of Decision by certified mail upon Thomas W. Owczarczak, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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

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State of New York }

ss.:

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David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 25th day of May, 1984, he served the within notice of Decision by certified mail upon 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:

Arthur Maxwell
Mortgage & Real Estate Transfer Tax Unit
Room 403, Building No. 9
State Campus
Albany, NY 12227

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

Bella Vista Development Corp.
Att: Richard M. Earne
6495 Transit Rd.
Bowmansville, NY 14026

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: James D. Chamberlain, et al as
Trustees of the Mader Corp.
Employee's Profit Sharing Trust
2730 Transit Road
West Seneca, NY 14224

Taxing Bureau's Representative

Thomas W. Owczarczak
Erie County Commission of Finance
Erie County Hall
Buffalo, NY 14202

AND

Arthur Maxwell
Mortgage & Real Estate Transfer
Tax Unit
Room 403, Building No. 9
State Campus
Albany, NY 12227

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BELLA VISTA DEVELOPMENT CORP.	:	DECISION
	:	
for Review of a Determination under Article 11	:	
of the Tax Law with Reference to a Mortgage	:	
Recorded on September 29, 1978.	:	

Petitioner, Bella Vista Development Corp., Attention: Richard M. Earne, Esq., 6495 Transit Road, Bowmansville, New York 14026, filed a petition to review a determination under Article 11 of the Tax Law with reference to a mortgage recorded on September 29, 1978 (File No. 38797).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on October 21, 1983 at 9:00 A.M., with additional evidence to be submitted by petitioner by November 18, 1983. Petitioner appeared by Richard M. Earne, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of mortgage tax on the basis that such tax was erroneously collected.

FINDINGS OF FACT

1. Petitioner, Bella Vista Development Corp.¹ (hereinafter, "Bella Vista"), filed an application for a refund of mortgage recording tax in the amount of

¹ Bella Vista Development Corp. is the former name of Bella Vista Development of Monroe County, Inc.

\$1,800.00, which it contended was mistakenly paid to and collected by the County Clerk of Erie County.

2. In August of 1978, petitioner entered into a contract with James D. Chamberlain, et al., as trustees of the Mader Corporation employees' profit sharing trust (hereinafter, "seller") for the purchase of two undeveloped parcels of land, one in Lackawanna, New York and the other in Lancaster, New York. Under the contract, Bella Vista was to give a mortgage to the seller in the amount of \$240,000.

3. On September 18, 1978, the petitioner executed a bond and mortgage to the seller, which was on a printed legal form entitled "N.Y. Bond and Mortgage Full Covenant and Lien" and which by its terms established a debt in the amount of \$240,000 from the petitioner to the seller and offered as security the two parcels of land described in Finding of Fact "2", supra. The bond and mortgage noted that the two parcels of land were "more fully described in Schedule 'A-2', attached hereto and made a part hereof". However, such schedule was not attached to the bond and mortgage as recorded.

4. The contract was subsequently rescinded, although petitioner failed to establish the specific date of rescission.

5. On September 29, 1978, the bond and mortgage was recorded in the Erie County Clerk's office and mortgage tax in the amount of \$1,800.00 paid. The affidavit of Vincent J. Lentini, a trustee of the trust described in Finding of Fact "2", supra, provides as follows:

"That, upon information and belief, an executed copy of the Bond and Mortgage was delivered inadvertently to James D. Chamberlain, a Trustee of the Trust, and that Mr. Chamberlain directed that the Bond and Mortgage be recorded in the Erie County Clerk's office, without being informed that the contract of sale had been rescinded and terminated, and being further unaware that no Deed or instrument of conveyance had been delivered to Bella Vista Development Corporation."

6. Petitioner is a real estate developer and in the past few years has bought and sold more than fifty pieces of property, including shopping plazas, apartments and undeveloped land.

7. Petitioner's representative at the hearing herein argued that the \$1800 mortgage tax was erroneously paid² and should be refunded for two reasons. First, he contended that the bond and mortgage as recorded was an incomplete document since the schedule, which described in detail the two parcels securing the mortgage, was not attached and the recording officer erred in recording an incomplete document. His second argument was that the bond and mortgage as recorded was not really a "mortgage" as defined in Tax Law §250 because the underlying contract was rescinded and the real property subject to the mortgage was never transferred to petitioner. Therefore, petitioner contended, no lien on real property was ever, in fact, created.

CONCLUSIONS OF LAW

A. That at the date at issue, Tax Law §263 provided, in part, as follows:

"Whenever a duly verified application for a refund of mortgage taxes, erroneously collected by a recording officer, ...is made to the tax commission it shall be the duty of such commission to determine the amount that has been so collected and, after audit thereof by the comptroller, shall make an order directing such recording officer to refund the amount so determined..."

B. That the authority of the State Tax Commission to order the refund of mortgage recording tax is based upon a determination that a recording officer erroneously collected mortgage tax. A provision that tax paid "through inadvertence or otherwise upon the recording of a mortgage which shall have been discharged without any advancement having been made or secured shall be deemed to have been erroneously collected..." was added to the statute at issue by

² Petitioner did not argue that it was erroneously collected.

L. 1915 c. 447 but subsequently deleted by L. 1916 c. 336 as noted in Matter of Commonwealth Land Title Insurance Company, State Tax Commission, January 2, 1980.

C. That petitioner's contention that it erroneously paid mortgage tax because the underlying contract for the sale of real property was rescinded is irrelevant in determining whether the recording officer "erroneously collected" the mortgage tax.

D. That although the bond and mortgage herein was invalid as to a subsequent purchaser or encumbrancer because the petitioner, as mortgagor, never obtained title to the land which it purported to mortgage (see generally 38 NY Jur, Mortgages and Deeds of Trust §87), such invalidity is irrelevant in determining whether the recording officer erroneously collected mortgage tax.

E. That when an instrument in proper form is presented to a county clerk for recording along with the proper fees and/or taxes, the clerk is required by law to record it. Real Property Law §291 and Matter of Commonwealth Land Title Insurance Company, supra. In this case, the recording officer was presented with a bond and mortgage in proper form for recording along with the proper fees and/or taxes. Therefore, it cannot be said that he erroneously collected mortgage tax which petitioner is now entitled to have refunded under Tax Law §263.

F. That the petition of Bella Vista Development Corp. is denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984

Roderica av Cln
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Judd
COMMISSIONER