

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Ming Tsun Chu : AFFIDAVIT OF MAILING  
to Review a Determination under Article 11 of :  
the Tax Law with Reference to Two Mortgages :  
Recorded on January 7, 1983. :

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State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 4th day of April, 1986, he/she served the within notice of Decision by certified mail upon Ming Tsun Chu the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ming Tsun Chu  
46 North King Street  
Malvern, New York 11565

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  
4th day of April, 1986.

David Parchuck

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

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David Parchuck/Connie Hagelund, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 4th day of April, 1986, he/she served the within notice of Decision by certified mail upon Robert Mensing, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Mensing  
Mortgage & Real Estate Transfer Tax Unit  
Room 403, Bldg. 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.

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David Parchuck/Connie Hagelund, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 4th day of April, 1986, he/she served the within notice of Decision by certified mail upon Frederick A. O. Schwarz, Jr., the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick A. O. Schwarz, Jr.  
Corporation Council, City of New York  
Municipal Bldg., 100 Church St., Rm. 589  
New York, NY 10007

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  
4th day of April, 1986.

David Parchuck

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

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State of New York :  
ss.:  
County of Albany :

David Parchuck/Connie Hagelund, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 4th day of April, 1986, he served the within notice of Decision by certified mail upon Edward H. Weinberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward H. Weinberg  
Simon, Wasserman & Weinberg  
107 Northern Blvd.  
Great Neck, NY 11021

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 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  
4th day of April, 1986.

David Parchuck

Janet M. Gray  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 4, 1986

Ming Tsun Chu  
46 North King Street  
Malvern, New York 11565

Dear Mr. Chu:

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: Taxing Bureau's Representative

Petitioner's Representative:

Edward H. Weinberg AND  
Simon, Wasserman & Weinberg  
107 Northern Blvd.  
Great Neck, NY 11021

AND

Robert Mensing  
Mortgage & Real Estate Transfer Tax Unit  
Room 403, Bldg. 9, State Campus  
Albany, NY 12227

Frederick A. O. Schwarz, Jr.  
Corporation Council, City of New York  
Municipal Bldg., 100 Church St., Rm. 589  
New York, NY 10007

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DECISION

Petitioner, Ming Tsun Chu, 46 North King Street, Malvern, New York 11565, filed a petition to review a determination under Article 11 of the Tax Law with reference to two mortgages recorded on January 7, 1983 (File No. 57854).

A 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 December 18, 1985 at 1:15 P.M. Petitioner appeared by Simon, Wasserman & Weinberg, Esqs. (Edward H. Weinberg, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel). The City of New York appeared by Frederick A. O. Schwarz, Jr., Esq. (Glenn Newman, Esq., of counsel).

ISSUE

Whether two mortgages executed on the same date by the same mortgagor, to two different mortgagees on the same parcel of real property, may be aggregated for purposes of the mortgage recording tax, thereby subjecting said mortgages to a higher tax rate.

FINDINGS OF FACT

1. On December 15, 1982, petitioner, Ming Tsun Chu, purchased in his own name premises located at 49 West 33rd Street, New York City, from Milo Kleinberg and Sheldon Hertz ("sellers"), for a total consideration of \$1,300,000.00. The

consideration for said purchase was attained via the payment of \$725,000.00 by certified check at closing, and by the execution of two mortgages by petitioner and his wife, as follows:

a) A wraparound mortgage, in the sum of \$775,000.00, in favor of the sellers (hereinafter referred to as "the Kleinberg and Hertz mortgage"). Since this mortgage was a wraparound mortgage including a prior mortgage in favor of Chemical Bank, which prior mortgage had been reduced to the sum of \$400,000.00, the net consideration insofar as the wraparound was concerned was \$375,000.00.

b) A subordinate mortgage in the sum of \$200,000.00 in favor of Raymond and Mary Mariani, both residing at 2809 Schurz Avenue, the Bronx, New York (hereinafter referred to as "the Mariani mortgage").

2. At the time of closing, petitioner's attorney provided two checks in the respective sums of \$5,625.00 and \$3,000.00, to cover what was believed to be the applicable mortgage tax rate of  $1\frac{1}{2}$  percent on both mortgages.

3. When the abstract company involved, Guardian Land Abstract Corp., attempted to record these mortgages, it was informed by the recording officer in New York County that since the aggregate total of the two mortgages was in excess of \$500,000.00, the tax rate applicable to the transaction was not  $1\frac{1}{2}$  percent but rather  $2\frac{1}{4}$  percent.

4. In turn, the abstract company made additional payments under protest of \$2,812.50 on the Kleinberg and Hertz mortgage and \$1,500.00 on the Mariani mortgage in order to effectuate recording, which amounts were reimbursed to the abstract company by petitioner. The mortgage instruments were duly recorded on January 7, 1983 under Reel 660, Page 117 with respect to the Kleinberg and Hertz mortgage and Reel 660, Page 132 with respect to the Mariani mortgage.

5. Petitioner asserts that the  $2\frac{1}{4}$  percent tax rate was incorrectly imposed in that such rate may only be statutorily levied under section 253.1 of the Tax Law against individual mortgages of \$500,000.00 or more and not against two or more mortgages, to different persons, even if simultaneously executed and aggregating \$500,000.00 or more. Accordingly, petitioner seeks refund of the \$4,312.50 paid under protest at the noted higher rate of  $2\frac{1}{4}$  percent, plus applicable interest.

6. The Audit Division of the Department of Taxation and Finance agrees with petitioner that, under the facts of this case, the mortgages should not have been aggregated. The City of New York contends, however, that aggregation was proper since each mortgage covered the same parcel of real property, was executed on the same date and was subsequently recorded on the same date.

#### CONCLUSIONS OF LAW

A. That section 253.1 of the Tax Law provides, in part, that:

"[a] tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of 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 recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage..."  
(Emphasis added).

Subdivisions 1-a(a) and 2(a) of section 253 impose additional taxes of twenty-five cents each on each \$100.00 of principal indebtedness, with certain exceptions not applicable herein.

B. That section 253-a of the Tax Law authorizes any city in New York having a population of one million or more to adopt local laws imposing, "with respect to real property security a principal debt or obligation of less than five hundred thousand dollars, a tax of fifty cents, with respect to one, two or three-family houses, individual cooperative apartments and individual residential condominium units securing a principal debt or obligation of five

hundred thousand dollars or more, a tax of sixty-two and one-half cents, and with respect to all other real property a tax of one dollar and twenty-five cents, for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is or under any contingency may be secured at the date of execution thereof, or at any time thereafter, by a mortgage on such real property...". Section W46-1.0 of Title W of the Administrative Code of the City of New York adopts the language of section 253 and imposes the tax authorized by section 253-a.

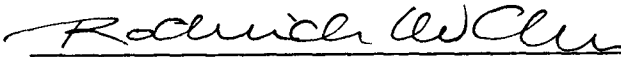
C. That the language of both section 253 of the Tax Law and section W46-1.0 of the Administrative Code of the City of New York expressly states that the tax is imposed on "each such mortgage". There is no provision for aggregating mortgages merely because they apply to the same property, or were executed and/or recorded on the same date. Here, in fact, there were two separate and distinct mortgages. There is, therefore, no statutory basis for the recording officer to aggregate the two mortgages and to impose the mortgage recording tax at the higher rate applicable to mortgages securing a principal debt or obligation of \$500,000.00 or more (Matter of Chelsea-19th Street Associates, State Tax Comm., January 31, 1984; Matter of Benson Green, State Tax Comm., November 7, 1985).

D. That the petition of Ming Tsun Chu is hereby granted and the sum of \$4,312.50 is to be refunded to petitioner, together with such interest as may be lawfully owing.

DATED: Albany, New York

APR 04 1986

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER