

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Colonial Transit, Inc. :
AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded on :
July 18, 1983. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Colonial Transit, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Colonial Transit, Inc.
6095 Strickland Avenue
Brooklyn, NY

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
21st day of August, 1985.

David Parchuck

Ann H. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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July 18, 1983. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Leonard M. Simon, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard M. Simon
108 Greenwich Street
New York, NY 10006

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
21st day of August, 1985.

David Parchuck

James A. Delaney
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
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Tax Law with Reference to a Mortgage Recorded on :
July 18, 1983. :

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 21st day of August, 1985, he 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:

Federick A.O. Schwarz, Jr.
Corporation Counsel City
Municipal Bldg.
100 Church St., Rm. 5H9
New York, NY 10007
Attn: Arnold Fox

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
21st day of August, 1985.

David Parchuck

Arnold Fox
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Colonial Transit, Inc. :
AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded on :
July 18, 1983. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Edward V. Regan, 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 V. Regan
Office of the State Comptroller
Alfred E. Smith Bldg.
Albany, NY 12236

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
21st day of August, 1985.

David Parchuck

Samuel A. Hagelind
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Colonial Transit, Inc. :
AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded on :
July 18, 1983. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Jay E. Grunfeld, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jay E. Grunfeld
Active City Register
Kings County Office
Room #1, Municipal Bldg.
Brooklyn, NY 11201

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
21st day of August, 1985.

David Parchuck

Annie A. Dayland
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Colonial Transit, Inc. :

AFFIDAVIT OF MAILING

to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded on :
July 18, 1983. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Cathy B. Connors, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cathy B. Connors
Director of Finance
Albany County
112 State St., Rm. 800
Albany, NY 12207

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
21st day of August, 1985.

David Parchuck

Ann W. Albano
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 21, 1985

Colonial Transit, Inc.
6095 Strickland Avenue
Brooklyn, NY

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: Petitioner's Representative

Leonard M. Simon
108 Greenwich Street
New York, NY 10006

AND

Federick A.O. Schwarz, Jr.
Corporation Counsel City
Municipal Building
100 Church St., Rm. 5H9
New York, NY 10007
Attn: Arnold Fox

AND

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

AND

Edward V. Regan
Office of the State Comptroller
Alfred E. Smith Building
Albany, NY 12236

AND

Jay E. Grunfeld
Active City Register
Kings County Office
Room #1, Municipal Bldg.
Brooklyn, NY 11201

AND

Cathy B. Connors
Director of Finance Albany Co.
112 State St., Rm. 800
Albany, NY 12207

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
COLONIAL TRANSIT, INC.	:	DECISION
for Redetermination of Mortgage Recording Tax	:	
under Article 11 of the Tax Law with Reference	:	
to a Mortgage Recorded on July 18, 1983.	:	

Petitioner, Colonial Transit, Inc., 6095 Strickland Avenue, Brooklyn, New York, filed a petition for redetermination of mortgage recording tax under Article 11 of the Tax Law with reference to a mortgage recorded on July 18, 1983 (File No. 52996).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 13, 1985 at 1:15 P.M. Petitioner appeared by Leonard M. Simon, Esq. (Edward Weiner, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of mortgage recording tax paid on the recording of a wraparound mortgage where no statement under oath claiming an exemption was filed with the recording officer at the time of recording.

FINDINGS OF FACT

1. Petitioner Colonial Transit, Inc. is the owner of certain premises known as 6093 Strickland Avenue, Brooklyn, Kings County, New York.

2. On June 29, 1983, petitioner purchased said premises from Strickland Avenue Realty. As a portion of the consideration for said transfer, petitioner gave to Strickland Avenue Realty a wraparound mortgage in the principal sum of

\$635,000.00, which mortgage supplemented and incorporated mortgages already existing on the premises as follows:

(a) Mortgage made by V.S.V.C. Corp. to Bushwick Savings Bank in the original principal sum of \$100,000.00;

(b) Mortgage made by Strickland Avenue Realty to Devco Local Development Corp. in the original amount of \$216,000.00, which mortgage was simultaneously assigned by Devco to the U.S. Small Business Administration;

(c) Mortgage made by Strickland Avenue Realty to V.S.V.C. Corp in the original principal amount of \$280,000.00.

3. There was owing on these three prior existing mortgages the sum of \$323,898.23 at the time of the execution of the wraparound mortgage, and therefore the wraparound mortgage represented the disbursement of \$311,101.77 in additional funds or new advancements.

4. Petitioner relied upon the expertise and advice of the title company which it had retained to ascertain the monies owed upon the recording of the subject wraparound mortgage, and in accordance with the instructions of the title company, remitted to said title company the sum of \$14,287.50 which was subsequently tendered by the title company to the recording officer at the time of recording on July 18, 1983.

5. Upon the return of the recorded mortgage and a further examination of circumstances of the closing of title, petitioner discovered that the amount tendered and accepted by the recording officer was in error and that the \$14,287.50 paid was based upon the principal amount of the wraparound mortgage without reflecting the fact that the prior mortgages incorporated therein did not represent an advance of the funds by the mortgagee. Petitioner determined that the mortgage tax paid should have been based upon the sum of \$311,101.77

which was the actual amount advanced by the mortgagee in the subject transaction. Accordingly, instead of the \$14,287.50 payment made to the City Register of Kings County as and for the mortgage tax, petitioner maintains that the sum of \$4,666.53 should have been paid as the appropriate tax, and that it overpaid the tax due by \$9,620.97.

6. Upon the discovery of the overpayment, petitioner, through its attorneys, made application to the State Tax Commission for the return of this overpayment by letter dated December 2, 1983. Included in the letter request was an affidavit made by the president of petitioner setting forth the circumstances of the wraparound mortgage transaction and the reason for the requested refund payment. Also included with the letter and the affidavit was a copy of the wraparound mortgage, as recorded.

7. The Audit Division denied petitioner's request for a refund by letter dated January 18, 1984, stating, in part:

"The requirement of an affidavit for a supplemental mortgage exemption is an essential element of the statutory scheme found in article 11 of the New York State Tax Law. All exemptions from tax must be claimed by verified statements given to the recording officer at the time the instrument is presented for recording.

Because Colonial Transit Inc. did not file an affidavit requesting partial exemptions simultaneously with the recording of the wraparound mortgage, Mr. Greenberg's application for a refund is denied."

CONCLUSIONS OF LAW

A. That section 255 of the Tax Law provides that where, after a mortgage has been recorded and the tax paid, a second instrument is presented for recording which merely supplements or amends the recorded mortgage, the new instrument is not subject to taxation unless it creates or secures a new or further indebtedness or obligation, other than the principal indebtedness or obligation secured by, or which under any contingency may be secured by, the

recorded primary mortgage, and the tax is imposed only upon the new or further indebtedness or obligation. "If, at the time of recording such instrument or additional mortgage, any exemption is claimed under this section, there shall be filed with the recording officer and preserved in his office a statement under oath of the facts on which such claim for exemption is based."

B. That petitioner failed to comply with the requirements of section 255 of the Tax Law in that it did not file an exemption statement under oath at the time of recording the mortgage. The failure to present such statement made it imperative for the recording officer to collect the tax if the mortgage was to be recorded. The recording officer, therefore, did not erroneously collect the tax on the wraparound mortgage recorded on July 18, 1983. Unless the exemption statement is filed at the time of recording pursuant to section 255, the State Tax Commission will not direct the recording officer to refund the tax. See Matter of Stevens, State Tax Commission, August 16, 1977. See also Metropolitan Trust Co. v. State Board of Tax Commissioners, 172 A.D. 653, rev'd on other grounds, 220 N.Y. 344. The provisions of section 255 with respect to filing a statement under oath are directory only in a case where the exemption is allowed by the recording officer. Metropolitan Trust Co., 172 A.D. at 657. Where the exemption is not allowed, the provisions are mandatory.

C. That the petition of Colonial Transit, Inc. is denied and the denial of refund issued January 18, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985

Roderick W. Allen
PRESIDENT

Francis P. Kelly
COMMISSIONER

[Signature]
COMMISSIONER