

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benson Green :
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded in :
the Year 1983. :

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Benson Green, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benson Green
121 E. 30th St.
New York, NY 100167302

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
7th day of November, 1985.

David Parchuck

Samuel D. Hadden
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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AFFIDAVIT OF MAILING

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Tax Law with Reference to a Mortgage Recorded in :
the Year 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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Ruth J. Witztum, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ruth J. Witztum
Phillips, Nizer, Benjamin, Krim and Ballon
40 W. 57th St.
New York, NY 10019

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
7th day of November, 1985.

David Parchuck

Cornie O'Bagh
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
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AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded in :
the Year 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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Citibank N.A. the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Citibank N.A.
330 Madison Ave.
New York, NY 10017

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
7th day of November, 1985.

David Parchuck

James P. DeAngelis
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benson Green :
AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded in :
the Year 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 7th day of November, 1985, he served the within notice of Decision by certified mail upon George Faith, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George Faith
City Register-New York County
31 Chambers St.
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 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
7th day of November, 1985.

David Parchuck

Annice A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benson Green :
AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded in :
the Year 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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Bernard W. Richland, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard W. Richland
Corporation Council-City of New York
Municipal Building
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 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
7th day of November, 1985.

David Parchuck

James A. Hagelmeier

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benson Green :
AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded in :
the Year 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 7th day of November, 1985, he 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
Building 9, Room 403, State Campus
Albany, NY 12227

*Hand
delivered*

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
7th day of November, 1985.

David Parchuck

James A. Stangeland

Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Benson Green
121 E. 30th St.
New York, NY 100167302

Dear Mr. Green:

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	AND	Bernard W. Richland
Ruth J. Witztum		Corporation Council-City of New York
Phillips, Nizer, Benjamin, Krim and Ballon		Municipal Building
40 W. 57th St.		New York, NY 10007
New York, NY 10019		AND
AND		Robert Mensing
Citibank N.A.		Mortgage & Real Estate Transfer Tax Unit
330 Madison Ave.		Building 9, Rm. 403, State Campus
New York, NY 10017		Albany, NY 12227
AND		AND
George Faith-Commissioner		Taxing Bureau's Representative
City Register-New York County		
31 Chambers St.		
New York, NY 10007		

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BENSON GREEN	:	DECISION
to Review a Determination under Article 11	:	
of the Tax Law with Reference to Mortgages	:	
Recorded in 1983 and 1984.	:	

Petitioner, Benson Green, 121 East 30th Street, New York, New York 10016, filed a petition to review a determination under Article 11 of the Tax Law with reference to mortgages recorded in 1983 and 1984 (File No. 56912).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 24, 1985 at 9:15 A.M. Petitioner appeared by Phillips, Nizer, Benjamin, Krim & Ballon, Esqs. (Ruth J. Witztum, Esq. and Steven J. Rabinowitz, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, 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 different dates by the same mortgagor to the same mortgagee 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 September 7, 1983, Benson Green (hereinafter "petitioner") purchased a parcel of real property at 121 East 30th Street, City, County and State of New York at a purchase price of \$545,000.00. In order to obtain sufficient

funds for the purchase of said property, petitioner borrowed the sum of \$436,000.00 from Citibank, N.A. (hereinafter "Citibank"). The purchase money loan was evidenced by a promissory note with a maturity date twenty years from the date of execution bearing interest at 250 basis points per annum in excess of the initial rate of Citibank's base rate on 90-day loans to responsible and substantial commercial borrowers with an option for the borrower, during the first year of the note, to change the interest rate to either a 30 or 60-month adjustable rate. Said note was secured by a mortgage executed by petitioner to Citibank which was recorded at the Office of the Register of New York County on September 7, 1983, at which time a mortgage recording tax of \$6,540.00 was paid. The Register imposed the mortgage recording tax at the rate of $1\frac{1}{2}$ percent of the principal debt or obligation, the rate applicable to mortgages of less than \$500,000.00.

2. On March 19, 1984, petitioner entered in to a building loan agreement with Citibank to borrow the sum of \$450,000.00 for the purpose of constructing improvements and converting the property to commercial use. The building loan was evidenced by a demand promissory note bearing interest at 1.5 percentage points over Citibank's loan rate. The note is due and payable on June 2, 1992 unless demand for payment in full is sooner made. Said note was secured by a second mortgage executed by petitioner to Citibank dated March 19, 1984. On March 21, 1984, an attempt was made to record the second mortgage at the Office of the Register of New York County with payment of a mortgage recording tax in the amount of \$6,750.00, calculated at $1\frac{1}{2}$ percent of the principal debt or obligation applicable to mortgages of less than \$500,000.00. The Register refused to record the building loan mortgage unless an additional mortgage tax of \$6,645.00 was paid, said amount representing what the Register claimed as

additional mortgage recording tax due on the aggregate principal amount of the purchase money mortgage and the building loan mortgage, computed at 2½ percent of the aggregate principal debts or obligations, the rate applicable to mortgages of \$500,000.00 or more. In accordance with the ruling of the Register, petitioner paid the additional mortgage recording tax of \$6,645.00 under protest and has requested a refund in said amount.

3. Petitioner maintains that the principal amounts of the two mortgages should not have been aggregated since each was a separate mortgage, with different repayment terms, for unrelated purposes. 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 to the same mortgagee and was recorded within approximately six months of the other. The City of New York further contends that petitioner's method of financing the purchase and renovation of the property was one comprehensive plan and that petitioner's choice of obtaining two mortgages, each in excess of \$400,000.00 was an attempt to avoid the imposition of the mortgage tax at the higher rate.

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 securing 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. In the instant case, the two mortgages were executed for separate and distinct purposes. The first mortgage was a purchase money mortgage securing a loan by Citibank to petitioner which provided petitioner with sufficient funds to purchase the property. The second mortgage was a building loan mortgage securing a loan by Citibank to petitioner which enabled petitioner to construct certain improvements and

alterations. There was, therefore, no basis for the Register 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 Commission, January 31, 1984).


D. That even assuming, arguendo, that petitioner knew that additional financing would be necessary to achieve the purposes for which he purchased the property and that a comprehensive plan existed for obtaining funds first for purchase of the property and later for building improvements and alterations, the mortgage recording tax was, nonetheless, improperly imposed and should have been imposed on each mortgage at the rate for mortgages of less than \$500,000.00. "The parties to the transaction here in controversy undoubtedly planned its execution in such a manner as to minimize their mortgage recording tax liability. This they had the right to do." (Citations omitted.) Matter of Fifth Ave. Corp. v. Bragalini, 4 A.D.2d 387, 393.


E. That the petition of Benson Green is granted and the sum of \$6,645.00 is to be refunded, together with such interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER