

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman I. Kraus :
and/or 236-1 Development Associates : AFFIDAVIT OF MAILING
:
for Review of a Determination under Article 11 of :
the Tax Law with Reference to an Indenture of :
Mortgage and Deed of Trust Recorded on January 8, :
1982. :

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 6th day of July, 1984, he served the within notice of Decision by certified mail upon Herman I. Kraus, and/or 236-1 Development Associates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herman I. Kraus
and/or 236-1 Development Associates
445 Park Avenue
New York, NY 10022

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
6th day of July, 1984.

David Parchuck

William A. Kowalski
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman I. Kraus :
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AFFIDAVIT OF MAILING :
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Mortgage and Deed of Trust Recorded on January 8, :
1982. :

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 6th day of July, 1984, he served the within notice of Decision by certified mail upon David M. Goldberg, 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 M. Goldberg
Olnick, Boxer, Blumberg, Lane & Troy
909 Third Avenue
New York, NY 10022

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
6th day of July, 1984.

David Parchuck

James J. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman I. Kraus :
and/or 236-1 Development Associates : AFFIDAVIT OF MAILING
:
for Review of a Determination under Article 11 of :
the Tax Law with Reference to an Indenture of :
Mortgage and Deed of Trust Recorded on January 8, :
1982. :

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

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 6th day of July, 1984, he served the within notice of Decision by certified mail upon W. Bernard 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:

W. Bernard Richland
Corporation Counsel
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
6th day of July, 1984.

David Parcluck

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

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman I. Kraus :
and/or 236-1 Development Associates : AFFIDAVIT OF MAILING
:
for Review of a Determination under Article 11 of :
the Tax Law with Reference to an Indenture of :
Mortgage and Deed of Trust Recorded on January 8, :
1982. :

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

George Faeth-Commissioner
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
6th day of July, 1984.

David Parbuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman I. Kraus :
and/or 236-1 Development Associates :
AFFIDAVIT OF MAILING :
for Review of a Determination under Article 11 of :
the Tax Law with Reference to an Indenture of :
Mortgage and Deed of Trust Recorded on January 8, :
1982. :

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 6th day of July, 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 #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 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
6th day of July, 1984.

David Parchuck

James R. Hawkins
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 6, 1984

Herman I. Kraus
and/or 236-1 Development Associates
445 Park Avenue
New York, NY 10022

Dear Mr. Kraus:

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) 279-a 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 90 days 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

David M. Goldberg
Olnick, Boxer, Blumberg, Lane & Troy
909 Third Avenue
New York, NY 10022

AND

W. Bernard Richland
Corporation Counsel
City of New York
Municipal Building
New York, NY 10007
Taxing Bureau's Representative

AND

George Faeth-Cimmissioner
City Register-New York County
31 Chambers St.
New York, NY 10007

AND

Arthur Maxwell
Mortgage & Real Estate Transfer
Tax Unit
Room 403, Building #9
State Campus
Albany, NY 12227

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HERMAN KRAUS	:	DECISION
and/or 236-1 DEVELOPMENT ASSOCIATES	:	
for Review of a Determination under Article 11	:	
of the Tax Law with Reference to an Indenture	:	
of Mortgage and Deed of Trust Recorded on	:	
January 8, 1982.	:	

Petitioner, Herman Kraus and/or 236-1 Development Associates, 445 Park Avenue, New York, New York 10022, filed a petition for review of a determination under Article 11 of the Tax Law with reference to an indenture of mortgage and deed of trust recorded on January 8, 1982 (File No. 40362).

A formal 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 June 17, 1983 at 9:35 A.M., with all briefs to be submitted by September 23, 1983. Petitioner appeared by Olnick, Boxer, Blumberg, Lane & Troy, Esqs. (Kevin L. Smith and David M. Goldberg, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel). The City of New York appeared by Frederick A. O. Schwarz, Jr., Esq., (Arnold Fox, Esq., of counsel).

ISSUE

Whether an executory contract for the sale of real property is taxable under Article 11 of the Tax Law based on the full purchase price recited therein as of the date of execution of the contract, or whether deductions may be allowed for a later "initial purchase price payment" of \$2,330,000, and for the balance of \$4,408,196.81 due on a prior mortgage on the property.

FINDINGS OF FACT

1. On January 26, 1982, Herman I. Kraus, as trustee under a January 26, 1982 trust agreement made by 236-1 Development Associates (a partnership), seller, entered into a contract for deed with Herman I. Kraus, individually, purchaser, with respect to certain premises and assets relating thereto located in Brooklyn, New York. Page one of the contract for deed ("the contract") indicated that as of the January 26, 1982 contract date, the partnership was the owner of the subject premises, that consents had been obtained from the partners authorizing the liquidation of the partnership and the acquisition of its assets by the seller (Herman Kraus as Trustee), and that the seller expected to acquire title to the subject premises from the partnership on or before the possession date as such was defined in the contract.

2. The contract recited, at clause 1.4, a purchase price of \$13,755,000.00, payable as follows:

"1.4-1 \$2,330,000 (the "Initial Purchase Price Payment") on the Possession Date by Purchaser delivering to Seller, as Purchaser in Purchaser's sole and absolute discretion determines, either of the following:

* * *

1.4-2 \$11,425,000 after the Possession Date payable as hereafter provided in this contract..."¹

The contract defined possession date, at clause 1.8 as follows:

"1.8 Initial Purchase Price Payment on Possession Date. If the Initial Purchase Price Payment is not made by Purchaser on the Contract Date, the Initial Purchase Price Payment shall be made by Purchaser on (a) the date designated by

¹ The initial purchase price payment was made by the purchaser in the form of a note in the amount of \$2,330,000.00 (plus interest at 14.875%) secured by purchaser's assets and by a letter of credit from Citibank, N.A. This was one of two acceptable alternative means of making the initial purchase price payment as set forth under the terms of the contract.

Purchaser in a notice to Seller, which date, unless Seller in writing consents to less notice, shall be at least seven days from the giving of such notice and in no event shall be later than six months from the Contract Date (the "Outside Date") or (b), if Purchaser does not designate a date in accordance with this section 1.8, on the Outside Date (the date for the making of the Initial Purchase Price Payment as determined pursuant to this section 1.8 being called in this contract the "Possession Date*")."

"* If the Initial Purchase Price Payment is made by Purchaser on the Contract Date, the Possession Date will be the Contract Date, notice of the Possession Date shall not be given and all references in this contract to the Possession Date (other than the references in this footnote) shall be deemed to be references to the Contract Date."

3. On January 28, 1982, the rights of the purchaser (Herman Kraus, individually) under the contract were assigned by the purchaser to Development Associates, a limited partnership.

4. On January 28, 1982, by written notice, the assignee-purchaser designated and the seller consented to January 28, 1982 as the date for the purchaser's payment of the \$2,330,000.00 initial purchase price amount. On the same date this amount was paid by the purchaser's delivery of its note for \$2,330,000.00 (plus interest) to the trustee-seller, and the purchaser took possession of the premises simultaneously with the delivery of its note.

5. As of the January 26, 1982 date of execution of the contract, the premises were subject to a consolidated first mortgage held by the City of New York ("the City Mortgage"). This consolidated mortgage had an unpaid principal balance, as of January 28, 1982, of \$4,808,196.81. All mortgage recording tax due in connection with this consolidated city mortgage had previously been paid in full. Clauses 1.4, 1.5-1, 1.11-1 and 2.9 of the contract, taken together, specified in relevant part that the purchase price (\$13,755,000.00) was inclusive

of the City mortgage, that the seller was (and is) obligated to pay the indebtedness under the City mortgage and that the seller is to convey the premises to the purchaser free of the City mortgage.

6. Closing of title on the subject premises under the terms of the contract is to occur approximately thirty-five years from the January 26, 1982 contract date.

7. On January 29, 1982, a memorandum of executory contract was recorded with the City Register, Kings County, New York, and Development Associates, as purchaser, paid a mortgage recording tax of \$99,252.00. This tax was computed upon the net amount of \$6,616,803.19 (\$13,755,000.00 less the initial payment of \$2,230,000.00, less the City mortgage of \$4,808,196.81).

8. By a letter dated March 22, 1982, the Audit Division advised petitioners, after reviewing the contract for deed, that the mortgage recording tax should have been computed upon the entire \$13,755,000.00 price recited in the contract with no reduction for the initial \$2,230,000.00 payment or the \$4,808,196.81 City mortgage, and thus additional tax in the amount of \$107,073.00, plus penalty pursuant to section 258 of the Tax Law, was asserted as due. The Audit Division bases its position on the fact that at the date of execution of the contract the entire \$13,755,000.00 sales price was unpaid and, further, that the City mortgage should not be excluded from the tax base because "the vendee does not assume the unpaid balance of the consolidated mortgage."

9. Petitioner asserts, by contrast, that the proper amount of mortgage recording tax was paid. Petitioner maintains that since the purchaser was not entitled to possession of the premises until payment of the \$2,330,000.00 initial purchase price payment such amount was properly excluded from the tax base. Furthermore, petitioner asserts that the unpaid balance on the City

mortgage was, although to be paid by the seller, included in the purchase price under the contract, and thus was properly excluded from the base upon which the tax, as paid, was computed.

CONCLUSIONS OF LAW

A. That sections 253 and 253-a of the Tax Law impose a recording tax, at specified rates, upon mortgages recorded on or after certain dates. This tax is measured by "...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...". It is not disputed that the instant contract for deed is subject to the imposition of mortgage recording tax, pursuant to section 250 of the Tax Law, which provides as follows:

"Executory contracts for the sale of real property under which the vendee has or is entitled to possession shall be deemed to be mortgages for purposes of this article [Article 11] and shall be taxable at the amount unpaid on such contracts." (emphasis added).

B. That under the terms of the contract for deed, the purchaser did not have and was not entitled to possession of the premises until payment of the \$2,330,000.00 initial purchase price amount. Tax Law sections 253 and 253-a impose the tax upon the amount of debt secured by a mortgage at the time of execution. Here, the contract for deed is deemed to be the mortgage pursuant to Tax Law section 250. However, to impose the tax upon the \$13,755,000.00 contract price ignores the fact that the purchaser was not entitled to possession under the contract until payment of the \$2,330,000.00. The difference between these two amounts (\$11,425,000.00) was the amount payable after the purchaser became entitled to possession (see Finding of Fact "2"; contract clause 1.4-2). Without possession, or entitlement to possession, the contract would not be

subject to the tax (Real Property Law section 294.2). Accordingly, the tax should not be imposed upon a basis which includes the \$2,330,000.00 initial purchase price payment, inasmuch as this amount had to be paid prior to the maturation of purchaser's entitlement to possession [see Matter of Sunrise Plaza Associates, State Tax Comm., May 27, 1982; cf. Matter of Downtown A. Club v. State Tax Comm., 280 App. Div. 363 (Third Dep't., 1952); Miller, Hacking a Path Through the New York State Mortgage Tax Jungle, 43 Alb. L. Rev. 37, 62-63 (1978)].

C. That the terms of the contract for deed required the seller and not the purchaser to pay the principal and interest on the City mortgage and to transfer title to the premises free of such indebtedness at the time of closing. The City mortgage, with its lien, was not extinguished upon execution of the contract for deed but remained an obligation of the seller. The purchaser was not a party to the City mortgage nor did the purchaser assume the responsibility for its payment. A separate obligation was created under the contract between the seller and the purchaser, which debt was different from that of the seller to the City of New York. In short, two different relationships and obligations existed. Accordingly, the mortgage recording tax base should have included this \$4,808,196.81 portion of the contract price, and mortgage recording tax remains due on this amount (see Matter of William Langfan, State Tax Comm., May 1, 1981).

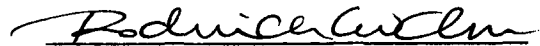
D. That the petition of Herman Kraus and/or 236-1 Development Associates is granted in part and denied in part, with additional mortgage recording tax due on the \$4,808,196.81 indebtedness as described in Conclusion of Law "C",

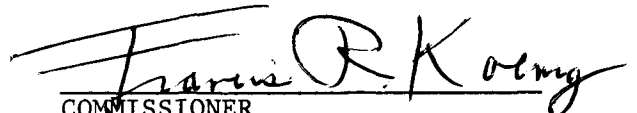
but with no mortgage recording tax due on the \$2,330,000.00 initial purchase price payment as described in Conclusion of Law "B".


DATED: Albany, New York

STATE TAX COMMISSION

JUL 06 1984


PRESIDENT


COMMISSIONER


COMMISSIONER