

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Frank & Carole Salluzzo : AFFIDAVIT OF MAILING
to Review a Determination under Article 11 of the :
with Reference to a Mortgage Recorded on :
January 25, 1984. :

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Frank & Carole Salluzzo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank & Carole Salluzzo
48 Bayberry Drive
Schenectady, NY 12306

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
3rd day of January, 1986.

David Parchuck

Bruno A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Frank & Carole Salluzzo

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AFFIDAVIT OF MAILING

to Review a Determination under Article 11 of the :
Tax Law with Reference to a Mortgage Recorded on :
January 25, 1984. :

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Caren Z Schindel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Caren Z Schindel
786 Huntington Dr.
Schenectady, NY 12309

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
3rd day of January, 1986.

David Parchuck

Carmine A. Schindel
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 3, 1986

Frank & Carole Salluzzo
48 Bayberry Drive
Schenectady, NY 12306

Dear Mr. & Mrs. Salluzzo:

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
Caren Z Schindel
786 Huntington Dr.
Schenectady, NY 12309
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FRANK SALLUZZO and CAROLE SALLUZZO	:	DECISION
	:	
to Review a Determination under Article 11	:	
of the Tax Law with Reference to a Mortgage	:	
Recorded on January 25, 1984.	:	

Petitioners, Frank Salluzzo and Carole Salluzzo, 48 Bayberry Drive, Schenectady, New York 12306, filed a petition to review a determination under Article 11 of the Tax Law with reference to a mortgage recorded on January 25, 1984 (File No. 56036).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on July 23, 1985 at 9:15 A.M. Petitioners appeared by Caren Z. Schindel, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioners are entitled to a refund of mortgage recording tax on the basis that such tax was erroneously collected.

FINDINGS OF FACT

1. During the fall of 1983, Frank Salluzzo and Carole Salluzzo (hereinafter "petitioners"), spoke with certain officials at the Fulton County National Bank and Trust Company (hereinafter "Bank") concerning the possibility of obtaining a second mortgage on real property located at 2331-33 Niskayuna Drive in the Town of Niskayuna, County of Schenectady, State of New York, which is owned by petitioners. Said property was commercially zoned by the Town of Niskayuna Assessment Office.

At the same time, petitioners discussed with the Bank the possibility of obtaining a second mortgage on other real property located in the County of Schenectady which was also owned by petitioners.

2. The Bank informed petitioners that, in order to further process their application for a second mortgage on the real property located at 2331-33 Niskayuna Drive, they would have to execute a collateral security mortgage. On December 31, 1983, petitioners executed said mortgage, although both petitioners and the Bank agreed that the mortgage would not be recorded until a firm agreement between the parties was reached and until petitioners received the mortgage monies from the Bank.

3. On January 25, 1984, petitioners' attorney recorded the mortgage at the Office of the Schenectady County Clerk and paid a mortgage recording tax in the amount of \$675.00. On February 7, 1984, approximately two weeks after the mortgage had been recorded, the Bank sent a letter to petitioners which outlined the procedures for closing the loan. However, petitioners decided not to close the loan. As of the date of said letter, neither petitioners nor the Bank had knowledge that the mortgage had been recorded.

4. When the Bank was subsequently informed that the mortgage had been recorded, said Bank, on March 30, 1984, executed a Discharge of Mortgage which was recorded at the Office of the Schenectady County Clerk on April 7, 1984.

5. Pursuant to the provisions of section 263 of the Tax Law, petitioners, on June 14, 1984, submitted a duly verified application for refund of mortgage recording tax in the amount of \$675.00. The said application for refund of mortgage recording tax was denied by the Mortgage and Real Estate Transfer Tax Unit by letter dated July 11, 1984. Petitioners contend that the Schenectady County Clerk erred in recording the mortgage. In support of their said contention,

petitioners claim that the Schenectady County Clerk did not properly examine the mortgage when it was presented for recording and improperly permitted petitioners a mortgage recording tax deduction pursuant to section 253(2)(a) of the Tax Law for property principally improved by a one or two family residence or dwelling when, in fact, the property was commercial property improved by an apartment building. It is petitioners' position that the provisions of 20 NYCRR 403.1(c), which require that, for purposes of claiming the aforesaid deduction, there be submitted either in the mortgage instrument or by separate affidavit a statement that the real property covered by the mortgage is or will be improved by a one or two family residence or dwelling, imposed a duty upon the recording officer to ascertain whether or not the property qualified for this deduction and, had the recording officer performed said duty, the mortgage would not have been erroneously recorded.

6. It is the Audit Division's position that the recording officer was not in error in determining that the mortgage was subject to the mortgage recording tax, even though petitioners should not have been permitted the deduction for property improved by a one or two family residence or dwelling.

CONCLUSIONS OF LAW

A. That the instrument recorded on January 25, 1984 was a collateral security mortgage which clearly falls within the definition of the term "mortgage" as defined in section 250 of the Tax Law.

B. That when an instrument in proper form is presented to a county clerk or register along with the proper fees and/or taxes, the clerk or register is required to record the said instrument [Real Property Law §291]. Section 258 of the Tax Law prohibits the county clerk or register from recording a mortgage unless the taxes imposed by Article 11 of the Tax Law have been paid.

C. That section 263 of the Tax Law provides, in pertinent part:

"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..."

D. 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 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.

E. That petitioners' contentions that the mortgage was mistakenly recorded since no final agreement had been reached with the Bank and that, had the recording officer properly ascertained whether or not petitioners were entitled to a tax deduction authorized by section 253(2)(a), the mortgage would not have been erroneously recorded, are irrelevant in determining whether the recording officer erroneously collected the mortgage recording tax. The mortgage herein contained the statement "Your property is or will be improved principally by a one or two family dwelling" which satisfies the requirement of 20 NYCRR 403.1(c) and no further duty is imposed upon the recording officer, by statute or regulation, to make further inquiry. Even had the recording officer required additional proof that the mortgage qualified for the said deduction and even if he had determined that petitioners were not entitled to the deduction, the result would have been the payment of a greater amount of mortgage recording

tax. In this case, the recording officer was presented with a mortgage in proper form for recording and, based upon the aforesaid statement contained in the mortgage, was presented with the proper amount of mortgage recording tax. Therefore, he did not erroneously collect the mortgage recording tax which petitioners seek to have refunded under the provisions of section 263 of the Tax Law.

F. That the petition of Frank Salluzzo and Carole Salluzzo for a refund of mortgage recording tax is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 03 1986

Richard W. Clev
PRESIDENT

Francis P. Koenig
COMMISSIONER

Mark J. [unclear]
COMMISSIONER