

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ronald Schaffer :
Partner of Sixth Prince Associates : AFFIDAVIT OF MAILING
:
to Review a Determination under Article 11 of the :
Tax Law with Reference to an Instrument Recorded :
on April 12, 1984. :
:

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 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon Ronald Schaffer, Partner of Sixth Prince Associates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ronald Schaffer
Partner of Sixth Prince Associates
171 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
28th day of January, 1986.

David Parchuck

Anna M. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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Joseph Gaier
299 Broadway
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
28th day of January, 1986.

David Parchuck

Connie A. Hagelund
Authorized to administer oaths
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Frederick A. O. Schwarz, Jr.
Corporation Council, City of New York
Municipal Bldg., 100 Church St., Rm. 589
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.

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Connie Hagelund

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Corporation Council, City of New York
Municipal Bldg., 100 Church St., Rm. 589
New York, NY 10017

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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 28th day of January, 1986, 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
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
28th day of January, 1986.

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

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Sworn to before me this
28th day of January, 1986.

David Parchuck

Connie Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 28, 1986

Ronald Schaffer
Partner of Sixth Prince Associates
171 Madison Ave.
New York, NY 10017

Dear Mr. Schaffer:

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

Joseph Gaier
299 Broadway
New York, NY 10007

AND

Taxing Bureau's Representative

AND

Frederick A. O. Schwarz, Jr.
Corporation Council, City of New York
Municipal Bldg., 100 Church St., Rm. 589
New York, NY 10017

AND

Robert Mensing
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 | : | |
| RONALD SCHAFFER, | : | DECISION |
| PARTNER OF SIXTH PRINCE ASSOCIATES | : | |
| to Review a Determination under Article 11 of | : | |
| the Tax Law with Reference to an Instrument | : | |
| Recorded on April 12, 1984. | : | |

Petitioner, Ronald Schaffer, Partner of Sixth Prince Associates, 171 Madison Avenue, New York, New York 10017, filed a petition to review a determination under Article 11 of the Tax Law with reference to an instrument recorded on April 12, 1984 (File No. 56848).

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 September 10, 1985 at 10:45 A.M., with all briefs to be submitted by November 4, 1985. Petitioner appeared by Joseph Gaier, Esq. 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 a mortgage made by 200 Prince Realty Co. (a partnership) on April 12, 1984 in the amount of \$79,947.78 was properly subject to mortgage recording tax and, if so, whether the appropriate rate of such tax should have been 1.5 percent rather than the 2.25 percent rate which was imposed.

FINDINGS OF FACT

1. Petitioner is the mortgagee and holder of a ten year \$1,000,000.00 wraparound mortgage on premises known as 202 Sixth Avenue and also known as 200 Prince Street ("the property"). This mortgage was made by 200 Prince Street Realty Co. ("Prince") as owner of the property, was dated March 22, 1984 and was recorded April 11, 1984.

2. At the time the above-noted wraparound mortgage was placed on the property, there was also an existing consolidated first mortgage held by Troy Savings Bank encumbering the property in the unpaid principal amount of \$270,052.22.

3. Pursuant to the terms of the wraparound mortgage, the wraparound mortgagee (petitioner herein) was to refinance, extend, assign or satisfy any underlying mortgages when such mortgages became due. An aggregate cap of \$350,000.00 was imposed on underlying mortgages (as refinanced), thus setting the wraparound mortgagee's minimum equity in the premises at \$650,000.00 (See Finding of Fact "12", infra.).

4. Upon recording the wraparound mortgage, a mortgage recording tax of \$16,425.00 was paid. This tax was calculated as due upon the amount of \$729,947.78, such being the difference between the amount of the wraparound mortgage (\$1,000,000.00) and the pre-existing consolidated first mortgage (\$270,052.22).

5. On April 12, 1984, the consolidated first mortgage was refinanced and accepted by assignment by The East New York Savings Bank. Simultaneously therewith, Prince, as owner of the premises, also executed a mortgage in favor of The East New York Savings Bank in the amount of \$79,947.78. Upon presentation for recording, notwithstanding inclusion of an affidavit for exemption via Tax Law section 255, the Register of the City of New York required payment of

mortgage recording tax upon such \$79,947.78 mortgage at the rate of 2.25 percent per \$100.00. Accordingly, mortgage recording tax of \$1,797.75 was paid under protest by petitioner.

6. The above mortgages to The East New York Savings Bank were, according to their terms, consolidated at execution to form a single first lien on the property in the amount of \$350,000.00.

7. The rate of interest on the consolidated \$350,000.00 amount was set at 12-3/4 percent per annum. The rate of interest on the wraparound mortgage was an escalating rate commencing at 8 percent per annum and increasing, at stated intervals, to 11 percent per annum. The rate of interest on the consolidated mortgage held by Troy Savings Bank prior to the aforementioned refinancing is not specified in the record.

8. Under the terms of the wraparound mortgage, Prince pays to petitioner the debt service on the \$1,000,000.00 amount and petitioner, in turn, pays the debt service on the underlying consolidated first lien of \$350,000.00.

9. By a commitment letter dated January 31, 1984, The East New York Savings Bank had agreed to make a loan in the amount of \$350,000.00 secured by a first mortgage on the subject premises. Such loan by The East New York Savings Bank was effected via acceptance of the existing Troy Savings Bank mortgage plus the \$79,947.78 mortgage, consolidated as noted.

10. No explanation was advanced as to why the \$350,000.00 loan transaction did not close prior to the March 22, 1984 fee closing and execution of the \$1,000,000.00 mortgage by Prince in favor of petitioner.

11. Paragraph VIII of the wraparound mortgage provides as follows:

"VIII. This mortgage is a wrap-around mortgage and includes the balances due under prior mortgage(s), and is subject to the following prior mortgage(s):

a. A consolidated first mortgage held by The Troy Savings Bank and having an unpaid principal balance of approximately \$270,052.22 and last consolidated in reel 583, page 1808 and all extensions, replacements, and refinancings thereof, increases thereto, consolidations therewith made in accordance with the terms of this mortgage and all new additional prior mortgages placed on the premises in compliance with the terms of this mortgage (herein collectively referred to as the 'prior mortgages')."

12. In fact, after consolidation, the wraparound mortgage incurred by Prince included all underlying mortgages (to a limit, herein met, of \$350,000.00), such that petitioner's equity via the wraparound mortgage, after satisfying its obligation to pay the debt service on such underlying mortgage(s), was \$650,000.00.

13. Pursuant to the terms of the wraparound mortgage, all costs associated with refinancing the underlying mortgage(s), including mortgage recording tax, were to be paid by the wraparound mortgagee. The proceeds from the described refinancing (\$350,000.00 less \$270,052.22 equals proceeds of \$79,947.78) went directly to petitioner, the wraparound mortgagee, with no part of such proceeds going to Prince as the owner/mortgagor.

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 section 255 of the Tax Law, in pertinent part, provides:

"Supplemental mortgages. -- If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article, 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...".

D. That "[b]oth sections 253 and 255 of the Tax Law require that only a mortgage on the principal debt or obligation, or a new or further indebtedness other than the principal obligation should be subject to the recording tax (Matter of Park and 46th St. Corp. v. State Tax Commission, 295 N.Y. 173, 197)." Matter of Bay View Towers Apts., Inc. v. State Tax Commission, 48 A.D.2d 86, aff'd. 40 N.Y.2d 856 (emphasis added).

E. That, generally, a wraparound mortgage is one wherein the wraparound mortgagee assumes the responsibility of paying off the debt secured by the lien of a prior mortgage. Here, pursuant to the terms of the wraparound mortgage, the debt encumbering the property totalled one million dollars, consisting of the consolidated first lien (the "prior mortgage") of \$350,000.00 plus the wraparound mortgagee's equity thereafter of \$650,000.00. The proceeds of refinancing from \$270,052.22 to \$350,000.00 went to the wraparound mortgagee, its equity interest under the wraparound mortgage was thus reduced to \$650,000.00 and the total debt encumbering the property remained at \$1,000,000.00, upon which mortgage recording tax had been paid. In effect, the \$79,947.78 mortgage proceeds which went directly to petitioner as the wraparound mortgagee did not represent new or further indebtedness, but rather supplanted such amount of equity in the wraparound mortgage held by petitioner, with total debt remaining at \$1,000,000.00 (\$350,000.00 to the East New York Savings Bank and \$650,000.00 to petitioner). Since no new or further indebtedness was created, tax should not have been imposed. Finally, in view of the foregoing, that portion of the issue pertaining to the appropriate rate of tax is rendered moot.


F. That the petition of Ronald Schaffer, Partner of Sixth Prince Associates is hereby granted and the sum of \$1,797.75 is to be refunded, together with such interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER