

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
Taba Enterprises, Inc.	:	
AFFIDAVIT OF MAILING		
to Review a Determination under Article 11 of the	:	
Tax Law with Reference to Mortgages Recorded on	:	
December 20, 1982 and March 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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Taba Enterprises, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Taba Enterprises, Inc.  
c/o Robert Tischler  
225 Park Ave. S.  
New York, NY 10003

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

James 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 :  
Taba Enterprises, Inc. :  
to Review a Determination under Article 11 of the :  
Tax Law with Reference to Mortgages Recorded on :  
December 20, 1982 and March 18, 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 Silver & Tischler, Esqs., the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Silver & Tischler, Esqs.  
225 Park Ave. S.  
New York, NY 10003

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

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

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Taba Enterprises, Inc. :  
to Review a Determination under Article 11 of the :  
Tax Law with Reference to Mortgages Recorded on :  
December 20, 1982 and March 18, 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 Bank Leumi Trust Company of New York, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bank Leumi Trust Company of New York  
605 Third Ave.  
New York, NY 10158

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

Comptroller of the Treasury  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Taba Enterprises, Inc. :  
to Review a Determination under Article 11 of the :  
Tax Law with Reference to Mortgages Recorded on :  
December 20, 1982 and March 18, 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 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 J. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Taba Enterprises, Inc. :  
AFFIDAVIT OF MAILING  
to Review a Determination under Article 11 of the :  
Tax Law with Reference to Mortgages Recorded on :  
December 20, 1982 and March 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 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  
Room 403, Building 9, 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*

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



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

November 7, 1985

Taba Enterprises, Inc.  
c/o Robert Tischler  
225 Park Ave. S.  
New York, NY 10003

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	AND	Robert Mensing
Silver & Tischler, Esqs.		Mortgage & Real Estate Transfer Tax Unit
225 Park Ave. S.		Room 403, Building 9, State Campus
New York, NY 10003		Albany, NY 12227
AND		AND
Bank Leumi Trust Company of New York		George Faith-Commissioner
605 Third Ave.		City Register-New York County
New York, NY 10158		31 Chambers St.
AND		New York, NY 10007
Bernard W. Richland		AND
Corporation Council-City of New York		Taxing Bureau's Representative
Municipal Building		
New York, NY 10007		

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
TABA ENTERPRISES, INC.	:	DECISION
	:	
to Review a Determination under Article 11	:	
of the Tax Law with Reference to Mortgages	:	
Recorded on December 20, 1982 and March 18,	:	
1983.	:	

---

Petitioner, Taba Enterprises, Inc., 311 West 76th Street, New York, New York 10023, filed a petition to review a determination under Article 11 of the Tax Law with reference to mortgages recorded on December 20, 1982 and March 18, 1983 (File No. 53082).

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 25, 1985 at 10:45 A.M. Petitioner appeared by Silver and Tischler (Robert G. Tischler, 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 by the same mortgagor to different mortgagees 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 December 14, 1982, Taba Enterprises, Inc. (hereinafter "petitioner") purchased from A & A Realty Corp. (hereinafter "A & A") a parcel of real property known as No. 311 West 76th Street, City, County and State of New York at a purchase price of \$490,000.00. The seller, A & A, took back a purchase

money first mortgage in the principal amount of \$290,000.00. Said mortgage was recorded in the Office of the City Register, New York County on December 20, 1982. A mortgage recording tax of \$4,350.00, computed at the rate of  $1\frac{1}{2}$  percent of the principal debt or obligation, was paid by petitioner at the time of the recording of said mortgage.

2. On March 15, 1983, petitioner entered into a building loan agreement with Bank Leumi Trust Co. of New York (hereinafter "Bank Leumi") which took back a building loan mortgage in the principal amount of \$250,000.00. The \$250,000.00 obtained from Bank Leumi was used by petitioner to finance the construction of certain improvements and structural alterations on the building located on the parcel of real property purchased from A & A. Said mortgage was presented for recording at the Office of the City Register, New York County and a check for mortgage recording tax was tendered in the amount of \$3,750.00, computed at the rate of  $1\frac{1}{2}$  percent, since the principal debt or obligation secured by the mortgage was less than \$500,000.00. The Register of the City of New York refused to accept the mortgage for recording unless a mortgage recording tax of \$5,625.00 was paid. The Register took the position that the Bank Leumi mortgage had to be aggregated with the A & A mortgage recorded on December 20, 1982 and, therefore, that the mortgage recording tax rate of  $2\frac{1}{4}$  percent was applicable as the principal debt or obligation secured by the two mortgages, in the aggregate, exceeded \$500,000.00. In accordance with the ruling of the Register, petitioner paid a mortgage recording tax of \$5,625.00 and has requested a refund of \$1,875.00, the difference between the mortgage recording tax paid and \$3,750.00, the amount of mortgage recording tax which would have been due had the mortgages not been aggregated.

3. Petitioner maintains that the principal amounts of the two mortgages should not have been aggregated since each was a separate unrelated mortgage,

for separate purposes, albeit for the same parcel of real property. 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, however, contends that petitioner knew, at the time of purchase of this parcel of real property, that additional financing would be necessary to complete the improvements and alterations contemplated by petitioner, that preliminary conversations regarding this additional financing may have taken place on or before purchase of the property and, as such, was a comprehensive plan with financing coming in stages. The City of New York argues, therefore, that the two mortgages were essential parts of this comprehensive plan covering the same parcel of real property and that they were properly aggregated and taxed at a higher rate applicable to mortgages securing a principal debt or obligation of \$500,000.00 or more.

#### 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 held by separate and unrelated mortgagees. The A & A mortgage was a purchase money mortgage executed by petitioner to obtain funds which, when combined with petitioner's own funds, would enable it to purchase the property. The Bank Leumi mortgage was executed by petitioner to finance the construction of certain improvements and alterations on the building already erected on the property previously purchased by petitioner. The A & A mortgage was executed and recorded approximately three months prior to the Bank Loumi mortgage. There was, therefore, no basis for the recording officer to aggregate the two mortgages and 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 at the time of purchase that additional financing would be necessary to achieve the purposes for which it purchased the property, that it had discussed possible financing with Bank Leumi on or before purchase of the property from A & A and that a comprehensive plan existed for obtaining funds first for purchase of the property and then 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.

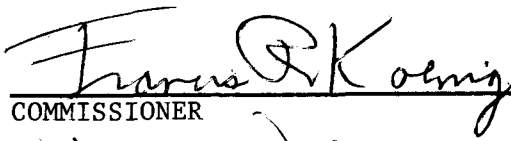
E. That the petition of Taba Enterprises, Inc. is granted and the sum of \$1,875.00 is to be refunded, together with such interest as may be lawfully owing.



DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

   
\_\_\_\_\_  
COMMISSIONER