STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SCOTT AND KRYSTYNA KATZ	:	DECISION DTA NO. 826511
for Revision of a Determination or for Refund of Mortgage Recording Tax under Article 11 of the Tax Law with Reference to an Instrument Recorded on November 21, 2012.	:	

Petitioners, Scott and Krystyna Katz, filed an exception to the determination of the Administrative Law Judge issued on January 14, 2016. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Tobias Lake, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Petitioners' request for oral argument was denied. The six-month period for issuance of this decision began on April 1, 2015, the date petitioners' letter brief in reply was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for a refund of mortgage recording tax paid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 6 to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. Petitioners, Scott and Krystyna Katz, have owned a one-family dwelling located on 222nd Street, Hollis Hills, New York (the property) since its purchase on January 13, 1998. At that time, petitioners, as borrowers, and Republic Consumer Lending Group, Inc., as lender, entered into a mortgage (mortgage #1) encumbering the property and securing a debt in the amount of $280,000.00. Mortgage #1 was recorded on February 9, 1998. Mortgage recording tax in the amount of $5,575.00 was paid on the $280,000.00 amount.

2. In 2002, HSBC Mortgage Corporation (USA) became a successor by merger to Republic Consumer Lending Group, Inc., and petitioners' note was modified to reflect this change. Thereafter, in 2011, HSBC Mortgage Corporation (USA) assigned the note to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for HSBC Bank USA, NA (HSBC Bank).

3. According to a mortgage payoff letter from HSBC Bank dated September 21, 2012, mortgage #1 had a balance in the amount of $93,205.99, and a loan payoff amount of $93,713.62.

4. Mortgage #1 carried an interest rate of 5.625%, and in the interest of borrowing at a lower rate, petitioners pursued alternative mortgage options. At the time, HSBC Bank did not offer an interest rate acceptable to petitioners, so petitioners chose to refinance with New York Community Bank (NYCB).

5. On September 24, 2012, petitioners executed a mortgage and note evidencing a mortgage loan in the amount of $175,000.00 from NYCB (mortgage #2) against the property.

MERS was acting as nominee for NYCB, and for purposes of recording the mortgage, MERS was listed as the mortgagee of record for this transaction.

6. The HUD-1 settlement statement dated September 24, 2012, evidencing the new loan, also showed petitioners borrowing $175,000.00 from NYCB. Disbursement of the funds was as follows: the $175,000.00 was used in part to pay off mortgage #1 to HSBC Bank ($93,713.62) and cover the net settlement charges of acquiring mortgage #2 ($9,682.93 - $436.50=$9,246.43), resulting in $72,039.95 to be remitted to petitioners, which they intended to use to repay multiple credit card debts. Mortgage recording tax in the amount of $3,557.50 was paid as a part of the settlement charges. The record indicates that the disbursement of funds as described occurred on September 28, 2012.

7. On October 11, 2012, a satisfaction of mortgage was executed by MERS, as nominee for HSBC Bank, concerning the mortgage indebtedness of $280,000.00 (mortgage #1), acknowledging that it had received full payment and satisfaction of the debt, and in consideration, satisfied the debt and discharged mortgage #1.

8. On November 21, 2012, mortgage #2 was recorded in the office of the city register of the city of New York, referencing the property, the parties (petitioners and MERS), and the mortgage amount of $175,000.00.

9. Mortgage #2 did not indicate that it was either a consolidation with or extension of mortgage #1, nor did mortgage #2 make any references to mortgage #1, i.e., the prior recorded primary mortgage.

10. Petitioners filed a Real Estate Transfer Tax Claim for Refund with the Division of Taxation (Division) seeking a refund in the amount of $1,905.07. The stated basis for petitioners' claim was that they paid $5,575.00 in mortgage recording tax when they recorded

mortgage #1. When they obtained a new loan from NYCB in the amount of $175,000.00, they were required to pay mortgage recording tax of $3,357.50.00. Petitioners, in their refund claim, asserted that mortgage recording tax was due only on the increased amount of the loan and not on the entire amount of the second loan. Therefore, petitioners maintained that tax was due only on the sum of $81,286.38, the amount by which mortgage #2 exceeded the payoff balance of mortgage #1, and thus they are entitled to a refund in the amount of $1,905.07.

11. The Division's Transaction Desk Audit Bureau issued a letter dated July 1, 2004, denying petitioners' refund claim. The letter stated, in relevant part, as follows:

> "In reference to your immediate concern, Tax Law Section 255 provides an avenue for exemption of additional mortgage recording tax applicable to a mortgage refinance. If subsequent to the recording of a mortgage on which all taxes were paid, specifically for the purpose of consolidating the lien and or a modification of such prior recorded mortgage, the resulting supplemental instrument is taxable only to the extent of any new and additional indebtedness. The process is commonly known in the mortgage industry as a consolidation, extension and modification agreement (CEMA).
>
> Your prior $280,000.00 mortgage with Republic Consumer Lending Group was presented and recorded on February 9, 1998 with the Office of the City Register in the normal and established manner. The mortgage was subsequently satisfied by way of a new and separate $175,000.00 mortgage with New York Community Bank which was recorded on November 21, 2012. Since this is a new mortgage and not a supplemental instrument, recording taxes would be due pursuant to section 253 of the New York State Tax Law. There is no erroneous payment of mortgage recording taxes and no refund would be possible under these circumstances."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The instant matter came before the Administrative Law Judge as a motion for summary determination brought by the Division. The Administrative Law Judge thus first reviewed the evidentiary standards for granting such a motion. Next, the Administrative Law Judge noted that

Article 11 of the Tax Law imposes a tax on the recording of mortgages of real property located in New York. The Administrative Law Judge then reviewed statutes, regulations and case law relevant to the exemption from mortgage recording tax for supplemental mortgages. Upon consideration of the record, the Administrative Law Judge concluded that petitioners did not qualify for the supplemental mortgage exemption because mortgage #2 was recorded after mortgage #1 was discharged and because mortgage #2 did not contain any reference to mortgage #1. The Administrative Law Judge found that the Division's regulations and case law make clear that these two conditions must be met for a taxpayer to obtain the supplemental mortgage exemption. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and denied the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioners continue to argue that mortgage #2 was executed on September 24, 2012 and that it was submitted for recording in a timely manner. Petitioners suggest that a backlog at the Office of the New York City Register delayed the recording of mortgage #2 and that such a delay should not be held against them. Petitioners also assert that mortgage #1 was not paid off on September 24, 2012, as stated in the determination. Petitioners contend that the payoff of mortgage #1 occurred after September 28, 2012. They also assert that the satisfaction of mortgage for mortgage #1 was dated October 9, 2012 and that its date of recording was October 24, 2012. In support of these factual claims regarding the satisfaction of mortgage #1, petitioners submitted a document with their exception that was not part of the record before the Administrative Law Judge. Petitioners also contend, contrary to the Administrative Law Judge's finding, that mortgage #2 does refer to mortgage #1. Petitioners find such reference in the HUD-1 settlement statement for mortgage #2 and a letter from the mortgage #2 mortgagee, both

indicating that a portion of the loan proceeds would be used to pay off mortgage #1. Accordingly, petitioners contend that mortgage #2 was a supplemental mortgage to the extent that its proceeds were used to pay off mortgage #1 and they request a reversal of the Administrative Law Judge's determination.

The Division argues that the evidence clearly shows that mortgage #2 did not supplement mortgage #1, but that it created a new debt that petitioners promised to pay to a new lender; that the mortgage #1 was paid off and ceased to exist before mortgage #2 was recorded; and that the parties thus extinguished the first mortgage debt and created a new debt with a separate mortgage to a different mortgagee. Accordingly, the Division asserts that the determination should be affirmed for the reasons stated therein.

OPINION

The Tax Appeals Tribunal's Rules of Practice and Procedure provide that any party may file a motion for summary determination (20 NYCRR 3000.9 [b]). Such a motion is properly granted:

> "if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9 [b] [1]).

As we have previously noted:

> "Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is 'arguable' (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see Gerard v. Inglese***, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (***Daliendo v. Johnson***, 147 AD2d 312 [1989])" (***Matter of United Water New York, Inc.***, Tax Appeals Tribunal, April 1, 2004).

Pursuant to the foregoing, resolution of a matter by summary determination requires a finding that the record contains no material issue of facts. Although not expressly stated therein, such a finding is implicit in the Administrative Law Judge's determination. Upon our review of the record, we also see no material facts in dispute and thus find that this matter is properly resolved by summary determination.

Article 11 of the Tax Law imposes excise taxes on the recording of mortgages on real property situated in New York State (***see*** Tax Law §§ 253-253-x). The tax is based upon the amount of the principal debt or obligation which is, or under any contingency may be, secured at the date of the execution of the mortgage or at any time thereafter (***see e.g.*** Tax Law § 253 [1]). The tax is imposed on the privilege of recording a mortgage; the underlying debt serves as the basis for computation of the tax (***see Matter of Citibank v State Tax Commn.***, 98 AD2d 929, 931 [1983]).

Tax Law § 255 contains an exemption from the mortgage recording tax for recording a supplemental mortgage. Specifically, Tax Law § 255 (1) (a) (i) provides as follows:

> "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, except as otherwise provided in paragraph (b) of this subdivision, 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, in which case, a tax is imposed as provided by section two hundred and fifty-three of this article on such new or further indebtedness or obligation."

The Division's regulations define a supplemental mortgage for purposes of the exemption under Tax Law § 255 as follows:

> "A supplemental mortgage is an additional instrument or mortgage which is *recorded subsequent to the recording and prior to the discharge or satisfaction of a prior primary mortgage* on which all taxes, if any, accrued under article 11 of the Tax Law have been paid, *the terms of which make reference to the prior recorded primary mortgage*, and which is given and recorded:
>
> (1) for the purpose of correcting or perfecting such prior recorded primary mortgage;
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> (2) pursuant to some provision or covenant in such prior recorded primary mortgage;
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> (3) for the purpose of providing additional or further security for the payment of the principal debt or obligation secured by the prior recorded primary mortgage by spreading the lien of the prior recorded primary mortgage to additional real property or by imposing a new lien on such additional real property . . . ; or
>
> (4) for the purpose of coordinating or consolidating the liens of prior recorded primary mortgages to form a single and coordinate equal lien; or
>
> (5) for the purpose of modifying a prior recorded primary mortgage, for reasons including but not limited to the following:
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> (i) adjusting the term for the payment of the debt secured by the prior recorded primary mortgage;
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> (ii) changing the interest rate on the debt secured by the prior recorded primary mortgage;
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> (iii) substituting a new mortgagor for the mortgagor;
>
> (iv) substituting a new mortgagee for the mortgagee due to an assignment of the mortgage;
>
> (v) evidencing a change in the amount of debt or obligation which is secured or which under any contingency may be secured by the prior recorded primary mortgage; or
>
> (6) for the purpose of severing the lien(s) of a prior recorded primary mortgage or mortgages into separate liens" (20 NYCRR 645.1 [a] [emphasis added]).

The case law is consistent with the regulation. "[T]he controlling consideration [in determining whether the supplemental mortgage exemption applies] is whether the taxpayer

recorded the subsequent mortgage before discharging the lien of the prior mortgage" (***Matter of David and Weiss***, Tax Appeals Tribunal, October 13, 1994). The language of Tax Law § 255 "presumes the present, and not previous, existence of the original mortgage at the time of recordation of the subsequent one" (***Matter of Citibank v State Tax Commn.***, 98 AD2d at 931). "To obtain the Tax Law § 255 exemption, petitioner must demonstrate that the parties to the transaction intended to continue and confirm the original debt, not cancel or extinguish it (citations omitted)" (***Matter of Sunset Nursing Home, Inc.***, Tax Appeals Tribunal, October 26, 1989). "As long as the parties are careful not to extinguish the original debt so as not to create a new indebtedness, no tax should be incurred" (***Matter of Bay View Towers Apts. v State Tax Commn.***, 48 AD2d 86, 90 [1975], ***affd*** 40 NY2d 856 [1976]).

In determining whether mortgage #2 qualifies for the exemption under Tax Law § 255, we are mindful that statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed against the taxpayer (***see Matter of International Bar Assn. v. Tax Appeals Trib. of State of N.Y.***, 210 AD2d 819 [1994], ***lv denied*** 85 NY2d 806 [1995]; ***Matter of Estate of Lever v New York State Tax Commn.***, 144 AD2d 751 [1988]). "Petitioner has the burden of showing a clear entitlement under a provision of the law plainly giving the exemption (citations omitted)" (***Matter of Old Nut Co. v New York State Tax Commn.***, 126 AD2d 869, 871 [1987], ***lv denied*** 69 NY2d 609 [1987]). Indeed, to prevail petitioner must show that his interpretation of the relevant statute and regulation is the only reasonable construction (***see Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.***, 83 NY2d 44 [1993]; ***Matter of CBS Corp. v Tax Appeals Tribunal***, 56 AD3d 908 [2008], ***lv denied*** 12 NY3d 703 [2009]). Unless determined to be irrational or erroneous, the Division's regulations have

"the force and effect of law" (***see Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals Tax Appeals Tribunal***, 2 NY3d 249, 254 [2004]).

Pursuant to the following discussion, we find that petitioners have failed to establish entitlement to the claimed exemption from mortgage recording tax under Tax Law § 255.

As indicated above, in order to gain the subject exemption, the regulations and the case law require that the supplemental mortgage be recorded prior to the discharge or satisfaction of the prior mortgage. Here, contrary to such requirement, mortgage #2 was recorded on November 21, 2012, while the satisfaction of mortgage concerning mortgage #1 was executed on October 11, 2012.

Petitioners' exemption claim also fails because mortgage #2 contains no language making reference to mortgage #1 as required for the exemption under the regulation (***see*** finding of fact 9). On this point, we reject petitioners' assertion that purported references to mortgage #1 in the HUD settlement statement and in a letter from the mortgage #2 mortgagee satisfy this requirement. The regulation plainly requires that the supplemental mortgage itself contain terms that refer to the prior mortgage.

We note that at least one of petitioners' goals in executing mortgage #2 and using the proceeds of the mortgage loan to pay off mortgage #1 was to gain the benefit of a lower interest rate (***see*** finding of fact 4). We note further that the cited regulation provides that changing the interest rate on the prior recorded mortgage is an acceptable purpose for an exempt supplemental mortgage (***see*** 20 NYCRR 645.1 [a] [5] [ii]). Moreover, the net result for petitioners in paying off mortgage #1 and in executing mortgage #2 was simply a lower monthly mortgage payment because of the lower interest rate. Petitioners did not, however, simply change the interest rate on their prior recorded mortgage. At the conclusion of the transactions at issue, petitioners were

not paying the same debt; nor was petitioners' debt secured by a continuation of the same mortgage. Rather, the record shows that the first debt was extinguished and the first mortgage satisfied. Petitioners acquired a new debt and a new, independent mortgage with a new mortgagor. It is well established that if a transaction is entered into in a form which falls within the mortgage recording tax statute, then it is taxable (***Sverdlow v. Bates***, 283 App Div 487, 491 [1954]). That petitioners might have achieved the same result through a different (nontaxable) form is immaterial (***id***.).

As noted, petitioners claim that a backlog at the Office of the New York City Register delayed the recording of mortgage #2. There is no evidence in the record supporting this assertion. Even if this unsubstantiated claim was proven, however, the outcome of the present matter would remain unchanged, given the clear requirement that the supplemental mortgage be recorded prior to the discharge or satisfaction of the first mortgage.

Finally, as indicated previously, petitioners submitted a document with their exception that was not part of the record below. As we have consistently held, we do not consider evidence offered with an exception if such evidence was not part of the record before the Administrative Law Judge (***see e.g. Matter of Jacobi***, Tax Appeals Tribunal, May 12, 2016).[1]

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Scott and Krystyna Katz is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Scott and Krystyna Katz is denied; and

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[1] The document offered by petitioners on exception would not have affected the outcome of the present matter even if we had considered it. That document indicates that the satisfaction of mortgage for mortgage #1 was filed on October 24, 2012. The record indicates that the satisfaction was executed on October 11, 2012. Both dates are prior to the recording of mortgage #2. Hence, the use of either date means that petitioners fail to qualify for the claimed exemption.

4. The Division's denial of petitioners' refund claim is sustained.

DATED: Albany, New York
September 29, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner