

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
METROPOLITAN AND FRESH POND ASSOCIATES, LLC	:	DETERMINATION DTA NO. 825001
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 January 13, 2012.	:	

Petitioner, Metropolitan and Fresh Pond Associates, LLC, filed a petition 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 January 13, 2012.¹

On June 21, 2013 and June 26, 2013, respectively, petitioner, appearing by Kaplin Stewart Meloff Reiter & Stein, PC (Barry A. Furman, Esq., of counsel) and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were submitted by January 16, 2014, which date began the six-month period for issuance of this determination. After due consideration of the record, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's gap mortgage was exempt from mortgage recording tax as a supplemental mortgage pursuant to Tax Law § 255.

¹The captions on the pleadings in this matter identify the tax year at issue as 2011. The evidence, on the other hand, shows that the date of recordation of the instrument in question, although executed in 2011, was actually January 13, 2012.

FINDINGS OF FACT

1. Petitioner, Metropolitan and Fresh Pond Associates, LLC, is a New York limited liability company located in Bayside, New York. At all relevant times, its managing member was Matthew Scherr.

2. On July 6, 2011, petitioner purchased an automobile dealership, which included real property, on Metropolitan Avenue in Middle Village, New York. In order to facilitate the purchase, petitioner performed a series of transactions with State Bank of Long Island.

3. First, on that date, petitioner entered into a mortgage agreement with State Bank of Long Island that secured an acquisition loan in the amount of \$3,908,000.00 (Acquisition Loan Mortgage). The Acquisition Loan Mortgage consolidated an existing loan between State Bank of Long Island and the seller of the dealership with an outstanding principal balance of \$2,096,433.77, and a new loan in the amount of \$1,811,566.23 that was secured by a separate mortgage with State Bank of Long Island of that date. The Acquisition Loan Mortgage was recorded in the Queens County Office of the City Register of the City of New York (City Registry) on July 15, 2011, and mortgage recording tax of \$50,724.80 was paid on the mortgage securing the new funds.

4. An additional mortgage granted by petitioner to State Bank of Long Island on July 6, 2011 was a Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, which secured a loan in the maximum principal amount of \$3,817,000.00 (Building Loan Mortgage). The Building Loan Mortgage was recorded in the City Registry on July 15, 2011, and mortgage recording tax was paid in the sum of \$106,876.00.

5. On October 28, 2011, State Bank of Long Island assigned both the Acquisition Loan Mortgage and the Building Loan Mortgage to People's United Bank. This assignment was not recorded in the City Registry, however, until January 13, 2012.

6. On November 16, 2011, petitioner closed on a loan from People's United Bank in the amount of \$8,796,826.29 in order to refinance the construction and leasing costs associated with development of the property. This loan was secured by an Amended, Restated and Consolidated Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement (Consolidation Loan Mortgage). The stated purpose of the Consolidation Loan Mortgage was to consolidate petitioner's outstanding indebtedness to People's United Bank and the existing mortgages into one lien.

7. Under the terms of the Consolidation Loan Mortgage, petitioner owed People's United Bank \$4,315,961.55, expressly broken into the following amounts pursuant to existing notes secured by the Acquisition Loan Mortgage and Building Loan Mortgage:

- a. \$3,908,000.00 pursuant to the terms of the Acquisition Loan Mortgage; and
- b. \$407,961.55, which represented the unpaid principal balance on the \$3,817,000.00 available under the Building Loan Mortgage.

8. The Consolidation Loan Mortgage included an additional note and mortgage, also dated November 16, 2011, in the amount of \$4,480,859.74 between petitioner and People's United Bank (Gap Mortgage). Although the Gap Mortgage was identified as an additional "existing" note to be included in the Consolidation Loan Mortgage, the former was executed on the same date (November 16, 2011) and, as of that date, had not been recorded in the City Registry. Thus, no mortgage recording tax had been paid on the Gap Mortgage when the Consolidation Loan Mortgage closed.

9. The Gap Mortgage did not directly reference or otherwise indicate in its terms that it was intended to supplement or be linked to the Building Loan Mortgage.

10. The Gap Mortgage contained a provision wherein petitioner represents and warrants that it owns the mortgaged property “free and clear of all liens . . . except for those exceptions shown in the title insurance policy” insuring the Gap Mortgage. The Building Loan Mortgage was not identified as an exception in the provision. A copy of the referenced title insurance policy is not included in the record.

11. The Consolidation Loan Mortgage listed in an attached schedule all of the existing mortgages that were to be consolidated into a single lien under its terms. These included the Acquisition Loan Mortgage, Building Loan Mortgage, and Gap Mortgage, each of which were separately and distinctly listed in the schedule. The Building Loan Mortgage was identified as having an outstanding balance of \$407,961.55.

12. As part of the November 16, 2011 closing, petitioner was issued a loan payoff statement dated November 15, 2011 indicating that the principal payoff amount for the Building Loan Mortgage was \$407,961.55 through that date.

13. In sum, the combined remaining balances on the Acquisition Loan Mortgage, Building Loan Mortgage, and Gap Mortgage totaled \$8,796,826.29, or the amount of the Consolidation Loan Mortgage.

14. The closing of the Consolidation Loan Mortgage and Gap Mortgage took place on November 16, 2011, at which petitioner was informed that it owed \$125,465.21 in mortgage recording tax in order to record the Gap Mortgage. Mr. Scherr attended the closing in his capacity as managing member of petitioner and objected to the imposition of this tax, claiming

that it had already been paid with the recording of the Building Loan Mortgage. Nevertheless, petitioner paid the tax under protest.

15. The Consolidation Loan Mortgage and Gap Mortgage were both recorded in the City Registry on January 13, 2012, and mortgage recording tax was paid in the sum of \$125,465.21 based on the amount of the Gap Mortgage. At that time, petitioner filed an affidavit seeking exemption from the tax pursuant to section 255 of the Tax Law for the Consolidation Loan Mortgage but did not file a similar affidavit for the Gap Mortgage. No mortgage recording tax was requested or paid upon recordation of the Consolidation Loan Mortgage.

16. Section 3.10 of the Building Loan Mortgage, entitled “Substitute Mortgages,” authorized petitioner and its mortgagee to “execute such documents as may be necessary in order to effectuate the modification” of the Building Loan Mortgage, “including the execution of substitute mortgages.”

17. The Building Loan Mortgage remained of record as of the date the Gap Mortgage was recorded.

18. On February 14, 2012, petitioner filed a claim for refund of mortgage recording tax in the sum of \$95,484.80. The claim for refund indicated that mortgage recording tax on the outstanding principal balance of the Building Loan Mortgage had been paid twice, once upon the recording of the Building Loan Mortgage on July 15, 2011, and again on the recording of the Gap Mortgage on January 13, 2012.

19. In response to petitioner’s claim, the Division of Taxation (Division) sent it a letter, dated April 17, 2012, denying the requested refund.

20. On September 19, 2013, more than a year after the petition was filed in the instant case, petitioner submitted for filing with the City Registry an Affidavit to Correct Mortgage

Recording Tax pursuant to Tax Law § 255. The affiant, Clifford Schwartz, stated in the affidavit that he was an attorney who represented petitioner in the Building Loan Mortgage and Gap Mortgage transactions. Mr. Schwartz further averred that the Gap Mortgage secured the same indebtedness as did the Building Loan Mortgage, the principal amount remaining available for construction on November 16, 2011 was \$3,409,333.45, and the Gap Mortgage was a building mortgage to the extent of that amount. Also submitted was an edited cover page to the Gap Mortgage that included new language stating that the document was intended to supplement the Building Loan Mortgage. This edited cover page was neither signed nor accompanied by an amended signature page.

21. Petitioner submitted 27 proposed findings of fact. In accordance with State Administrative Procedure Act (SAPA) § 307(1), petitioner's proposed findings of fact 1 through 8, 10, 14, the first sentence in 16, and 17 through 26 have been substantially adopted and incorporated herein. Proposed findings of fact 9, 11 through 13, 15, and the second sentence in 16 do not conform to the record. Proposed finding of fact 27 is a conclusion of law, and is not required to be ruled upon by SAPA.

SUMMARY OF THE PARTIES' POSITIONS

22. Petitioner argues that the Gap Mortgage granted on November 16, 2011 was a supplemental mortgage to the Building Loan Mortgage and, therefore, the mortgage recording tax should have been assessed only on the amount of new indebtedness secured by the Gap Mortgage. Petitioner asserts that the amount of new indebtedness was not \$4,480,859.74, but only \$1,071,526.29, which represented the difference between the Gap Mortgage and the unused \$3,407,204.53 balance of the Building Loan Mortgage. Hence, according to petitioner, the

Division's actions resulted in impermissible double taxation, and a refund of the previously paid mortgage recording tax in the amount of \$95,454.80 is proper.

23. The Division maintains that petitioner's refund claim was properly denied as the Gap Mortgage in question secured a new, separate indebtedness in the amount of \$4,480,859.74, which was subsequently included in the Consolidated Loan Mortgage. Therefore, the Gap Mortgage does not qualify for an exemption of mortgage recording tax as a supplemental mortgage.

CONCLUSIONS OF LAW

A. Article 11 of the Tax Law imposes taxes on the recording of a mortgage on real property situated in New York State (Tax Law § 253). 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* Tax Law § 253[1]). "Mortgage" is defined in Tax Law § 250(2) as "every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby."

B. It is well settled that the mortgage recording tax is not a tax on property but on the privilege of recording a mortgage, with the underlying debt providing the basis for computing the tax due (*see Matter of S.S. Silberblatt, Inc. v. State Tax Commn.*, 5 NY2d 635 [1959], *cert denied* 361 US 912 [1959]). Tax Law § 257 provides that the mortgage recording tax becomes due and payable to the local recording officer at the time a mortgage is recorded.

C. Tax Law § 255(1)(a)(i) provides:

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.

If an exemption is claimed under Tax Law § 255 at the time of recording of the supplemental mortgage, “there shall be filed with the recording officer . . . a statement under oath of the facts on which such claim for exemption is based” (Tax Law § 255[2][a]). On the other hand, if an exemption is claimed after recording of the subject mortgage and payment of the mortgage recording tax, such an affidavit must be filed with the Division, as part of a refund claim, as well as the local registry (Tax Law § 255[2][b]).

D. The Division’s regulations reiterate the definition of a supplemental mortgage, indicating that said instrument must make reference to the prior recorded primary mortgage and may be given to modify the primary mortgage by adjusting the terms of payment, interest rate or a change in the amount of the debt secured by the primary mortgage (20 NYCRR 645.1). The recording of a supplemental mortgage is subject to applicable mortgage recording taxes to the extent that such mortgage creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by the prior recorded primary mortgage (20 NYCRR 645.2[a]).

E. In the instant case, the central issue is whether the Gap Mortgage secured a new indebtedness or obligation from the Building Loan Mortgage. Generally, in order to avoid recording tax on the full amount of a second or supplemental mortgage, a taxpayer must show that “the parties to the transaction intended to continue and confirm the original debt, not cancel

or extinguish it” (*Matter of Sunset Nursing Home, Inc.*, Tax Appeals Tribunal, October 26, 1989). Based on the record here, petitioner fails to meet that burden. First, the Gap Mortgage made no direct reference whatsoever to the Building Loan Mortgage, thereby evidencing their independence from each other (*id.*; *see also Matter of Emerson*, Tax Appeals Tribunal, May 10, 2001). Such a provision could have easily been included, as demonstrated by the additional language in petitioner’s attempted corrective measures in September 2013 (*see* Finding of Fact 20). Instead, the Gap Mortgage failed to contain any provision at all for the continuation of the original indebtedness or lien of the Building Loan Mortgage. This absence certainly does not suggest an attempt to confirm the Building Loan Mortgage debt through the Gap Mortgage.

In fact, the language of the Consolidation Loan Mortgage expressly disconnects the Gap Mortgage and Building Loan Mortgage. The Consolidation Loan Mortgage specifically listed the mortgages to be included in the consolidation, breaking them down into two distinct categories. The first category totaled \$4,315,961.55 in outstanding liability, and was comprised of the Acquisition Loan Mortgage and Building Loan Mortgage. Tellingly, all mortgage recording taxes had been paid on these previously recorded mortgages. Meanwhile, the second category totaled \$4,480,859.74 in liability, and only included the newly-created Gap Mortgage, upon which mortgage recording tax had not been paid. That indebtedness, created on the same date as the Consolidation Loan Mortgage, raised the amount secured by the latter to \$8,796,826.29. Thus, the very terms of the Consolidation Loan Mortgage differentiated the Building Loan Mortgage from the Gap Mortgage rather than cross-referencing the two, and it is clear from the language of the consolidation itself that they were not created to secure the same original indebtedness (*see Matter of Citibank v. State Tax Commn.*, 98 AD2d 929 [1983]).

The example given in 20 NYCRR 645.2 further supports the Division's position:

(b) For purposes of this subdivision, the principal indebtedness or obligation secured by or which under any contingency may be secured by the prior recorded primary mortgage is equal to the remaining principal indebtedness secured or which under any contingency may be secured by such mortgage at the time that the supplemental mortgage is executed or at any time thereafter.

Example 1: On January 1, 1990, Mr. Jones gives XYZ Bank a mortgage securing a principal debt of \$100,000 and the proper mortgage recording taxes are paid. On January 1, 1991, at a time when the remaining principal indebtedness secured by such prior recorded mortgage totals \$90,000, Mr. Jones gives XYZ Bank another mortgage which secures an additional \$30,000. When the mortgage was presented for recording the proper taxes computed upon the \$30,000 amount were paid. Simultaneously, Mr. Jones and the bank enter into an agreement which by its terms and conditions consolidates the liens of the two mortgages into one lien securing a total principal debt of \$120,000. The consolidation agreement makes proper reference to the prior recorded mortgages. Therefore, the consolidation agreement constitutes a supplemental mortgage which may be recorded tax free since it does not secure any new or further indebtedness other than that secured by the prior recorded primary mortgages.

If the new \$30,000 mortgage had by its terms consolidated the liens of the two mortgages into one lien securing a total principal debt of \$120,000, the new mortgage itself would have constituted a supplemental mortgage. The applicable mortgage recording taxes would apply to its recording and taxes would be imposed and computed based upon the \$30,000 of new or further indebtedness secured by such mortgage.

In essence, consistent with the example above, the evidence points out that the \$4,315,961.55 component of the Consolidation Loan Mortgage served to extinguish the debts secured by the Acquisition Loan Mortgage and Building Loan Mortgage, both which predated November 16, 2011, while the \$4,480,859.74 component involved new indebtedness, created on that date, and secured by the Gap Mortgage. Even though the Building Loan Mortgage involved the same parties and mortgaged premises as the Gap Mortgage, the latter functioned as an independent instrument and was not a continuation of or supplement to the former (*see Matter of Sunset Nursing Home, Inc.*; *see also* 20 NYCRR 645.2, ex. 1). Therefore, the mortgage

recording tax in the amount of \$125,465.21, as determined by the Division, was due upon recordation of the Gap Mortgage.

F. Petitioner's arguments in support of its petition are not supported by the evidence or case law. First, petitioner makes much of the fact that the Building Loan Mortgage remained of record when the Gap Mortgage was recorded. The existence of an original mortgage at the time of the recording of the subsequent one, however, is not dispositive of the issue in this case, but simply a threshold requirement for the exemption, which really hinges on whether and to what extent the two successive mortgages secured the same original indebtedness (*see Matter of Citibank v. State Tax Commn.*). The record here demonstrates that, similar to *Matter of Emerson*, the Building Loan Mortgage was paid in full at the November 16, 2011 closing. This payment was well in advance of the January 13, 2012 recordation of the Gap Mortgage. Meanwhile, the Gap Mortgage created a whole new indebtedness on November 16, 2011, separately and independently secured.

Moreover, petitioner insists that the two mortgages are linked by the language in section 3.10 of the Building Loan Mortgage. This boilerplate language, however, simply gave the parties to the Building Loan Mortgage the general ability to modify that document, or execute substitute mortgages. The clause had no specificity to it. Fatally for petitioner, there is no reciprocal language in the Gap Mortgage identifying it as a substitute mortgage as contemplated by section 3.10 of the Building Loan Mortgage (*see* 20 NYCRR 645.2). Such language could have easily been added but is noticeably absent. Hence, the two mortgages at issue, by their plain language, do not secure the same original indebtedness (*see Matter of Sunset Nursing Home, Inc.*).

Petitioner's reliance on *Matter of First Fiscal Fund Corp. v. State Tax Commn.*

(49 AD2d 408 [1975]) is curious as that case actually supports the Division's argument. In *Matter of First Fiscal Fund Corp.*, the taxpayer had an existing balance of \$1,605,000.00 on two mortgages in the original amount of \$1,625,000.00. Subsequently, the taxpayer executed a new mortgage in the amount of \$2,700,000.00, which, in effect was a consolidation mortgage, consisting of two components - a payoff of the aforementioned existing debt of \$1,605,000.00 upon which mortgage recording tax had been paid, and a new indebtedness of \$1,095,000.00. The Appellate Division, in reversing the determination of the Tax Commission, held that it was clear that of the \$2,700,000.00 total indebtedness secured by the new mortgage, only \$1,095,000.00 constituted new indebtedness. Likewise, in the instant matter, of the \$8,796,826.29 in the Consolidation Loan Mortgage, the mortgage securing the payoff of the existing \$4,315,961.55 dealt with existing indebtedness upon which mortgage recording tax had already been paid, and the \$4,480,859.74 secured by the newly created Gap Mortgage constituted new indebtedness subject to the tax.

Similarly, petitioner's reliance on *Matter of City of New York v. State Tax Commn.* (130 Ad2d 890 [1987]) is misplaced. In *Matter of City of New York*, the mortgagor was given the power to refinance the underlying mortgage up to a certain limit under the terms of a wraparound mortgage, which it did. Hence, the mortgagor merely raised the amount owed under the first mortgage pursuant to that instrument's own terms, thereby reducing the mortgagee's equity position under the existing wraparound mortgage. Conversely, in the instant case, the petitioner's overall existing indebtedness of \$4,315,961.55 was raised to \$8,796,826.29 by the amount of the newly created Gap Mortgage under that instrument's terms, and not pursuant to the terms of the previously recorded Building Loan Mortgage. The Consolidation Loan Mortgage,

which eventually secured all of petitioner's debt on this project, did not control the creation of the Gap Mortgage.

G. Furthermore, as the Division correctly points out, the underlying mathematics of petitioner's position do not work. If, as petitioner maintains, the \$8,796,826.29 Consolidation Loan Agreement included the entire \$3,817,000.00 of the Building Loan Mortgage, along with the \$3,908,000.00 Acquisition Loan Mortgage, the separately created Gap Mortgage could only have been \$1,071,826.29 for the debt to have been fully secured. The record in this case demonstrates, however, that the amount of the Gap Mortgage, by its own independent terms, was \$4,480,859.74. Meanwhile, the first component of the Consolidation Loan Mortgage, which combined the Acquisition Loan Mortgage and Building Loan Mortgage, was actually the remaining \$4,315,961.55, and specifically included the payoff of the \$407,961.55 balance on the Building Loan Mortgage. Carried to its logical extreme, petitioner's interpretation would result in over \$12 million in debt service secured by a consolidated mortgage of only \$8,796,821.29, a result clearly not intended by the parties (or at least the lender). It is of no moment that petitioner paid mortgage recording tax on an indebtedness under the Building Loan Mortgage that never actually came into existence (*see Matter of Woodmere Knolls v. Procaccino*, 52 AD2d 979 [1976]).

H. Finally, petitioner's attempt to bolster its stance by the mere filing of a tardy affidavit under Tax Law § 255 must fail (*see Matter of Sunset Nursing Home, Inc.*). The statements in Mr. Schwartz's affidavit regarding intent run contrary to the unambiguous language in the Gap Mortgage. At the same time, petitioner's contention that the substance of a transaction should be determinative of its taxability under Article 11 runs contrary to the well established principal that the mortgage recording tax law places great weight on the form of the transaction (*see Matter of*

Long Island Lighting Company, Tax Appeals Tribunal, March 23, 1995). That is, if a transaction is entered into in a form which falls within the statute, then it is taxable (*Matter of Sverdlow v. Bates*, 283 App Div 487 [1954]). In this transaction, the Gap Mortgage was separately created, and subsequently consolidated with two other mortgages (the remnants of the Building Loan Mortgage and Acquisition Loan Mortgage) into one lien (the Construction Loan Mortgage). Petitioner could have, but did not, cross-reference the Gap Mortgage and Building Loan Mortgage. Consequently, the form of the transaction in this case dictates the imposition of mortgage recording tax on the full amount of the Gap Mortgage.

I. The petition of Metropolitan and Fresh Pond Associates, LLC is denied, and the Division of Taxation's denial of petitioner's refund claim, dated April 17, 2012, is sustained.

DATED: Albany, New York
June 19, 2014

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE