

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(4)R
Mortgage Recording Tax
May 23, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M001030A

On October 30, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from the New York State Title Attorneys Bar Association, 260 Christopher Lane, Staten Island, New York 10314.

The issues raised by Petitioner, the New York State Title Attorneys Bar Association, are:

- (1) Whether an exemption from the payment of the mortgage recording tax is applicable by virtue of Section 255 of the Tax Law, where a recorded construction loan mortgage given by a housing development fund company (HDFC) is severed to cover different portions of the originally mortgaged premises and the HDFC executes two or more substitute mortgages in favor of the original mortgagee, and the original construction loan mortgage did not expressly contemplate or describe the severance of the mortgage and the execution of replacement mortgages.
- (2) Whether an exemption from the payment of the mortgage recording tax is applicable by virtue of Section 255 of the Tax Law, assuming the same facts as set forth in issue (1) above, except the original construction loan mortgage expressly contemplates and provides for the severance of the mortgage and the execution of replacement mortgages.
- (3) Whether such exemption under Section 255 of the Tax Law will be allowed where title to the portion of the premises subject to the substitute mortgage is transferred by an HDFC to an individual purchaser and the purchaser simultaneously enters into an extension and modification agreement with the HDFC's mortgagee or its affiliate whereby the purchaser assumes the obligation to repay the debt secured by the substitute mortgage, in the form of a permanent loan, at a different interest rate and terms of repayment.
- (4) Whether such exemption under Section 255 of the Tax Law will be allowed where the substitute mortgage is first assigned to a third party lender and then the premises is transferred and the purchaser enters into an extension and modification agreement with the third party lender, whereby the purchaser assumes the obligation to repay the debt secured by the substitute mortgage, in the form of a permanent loan, at a different interest rate and terms of repayment.

Petitioner submits the following facts as the basis of this Advisory Opinion.

TSB-A-01(4)R
Mortgage Recording Tax
May 23, 2001

HDFCs are organized pursuant to the provisions of Article XI of the Private Housing Finance Law of the State of New York and Section 402 of the Not-For-Profit Corporation Law for the primary purpose of assisting in and promoting the development of affordable housing, on a non-profit basis, for persons and families of limited income, in areas where no adequate housing exists for such persons and families, most often with the assistance, in the form of subsidies, from federal, state and municipal governmental entities.

HDFCs often use the following program in order to secure financing for a government-aided housing development project. The HDFC, as fee owner of the property, will subject its fee interest in the project to a construction loan mortgage obtained by the project's developer from an institutional lender. There is no mortgage recording tax paid on this construction loan mortgage because, pursuant to Section 577(2) of Article XI of the Private Housing Finance Law, the recording of mortgages of an HDFC are exempt from the mortgage recording taxes imposed by and pursuant to the authority of Article 11 of the Tax Law of the State of New York.

It is the intention of the HDFC and the project's developer to make an arrangement with the project construction lender to sever the construction loan mortgage into two or more substitute mortgages executed by the HDFC in favor of the same original mortgagee. Accordingly, HDFC and the original construction loan mortgagee will enter into a mortgage modification and severance agreement. Pursuant to the terms of this agreement, the original construction loan mortgage will not be satisfied of record. Rather, as each substitute mortgage is recorded, this agreement provides that the premises described in the substitute mortgage will be deemed released from the lien of the original construction loan mortgage. Further, as individual houses and lots are sold, the parties will either:

1. Transfer title to the portion of the premises subject to the substitute mortgage to an individual purchaser and the purchaser will enter into an extension and modification agreement with HDFC's construction loan lender or its affiliate whereby the purchaser assumes the obligation to repay the debt secured by the substitute mortgage, in the form of a permanent loan, at a different interest rate and terms of repayment; or
2. Assign the substitute mortgage to a third party lender and then transfer title to the portion of the premises subject to the substitute mortgage to an individual purchaser who will simultaneously enter into an extension and modification agreement with the third party lender, whereby the purchaser assumes the obligation to repay the debt secured by the substitute mortgage, in the form of a permanent loan, at a different interest rate and terms or repayment.

With respect to both of the above scenarios, the aggregate amount of principal debt or obligation secured or to be secured under any contingency by such substitute mortgages will equal the unpaid balance of the amount secured by the construction loan mortgage.

Applicable Law and Regulations

Section 253 of the Tax Law imposes taxes on the recording of a mortgage of real property in the State measured by the 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.

Section 255.1(a) of the Tax Law 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 chapter on such new or further indebtedness or obligation.

Paragraph (9) of subdivision (b) of section 644.1 of the Mortgage Recording Tax Regulations (20 NYCRR) provides that mortgages of housing development fund companies formed pursuant to Article XI of the Private Housing Finance Law (Section 577(2) of the Private Housing Finance Law), are exempt from the mortgage recording tax.

Section 645.1(a) of the Mortgage Recording Tax Regulations provides:

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:

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TSB-A-01(4)R
Mortgage Recording Tax
May 23, 2001

(5) for the purpose of modifying a prior recorded primary mortgage, for reasons including but not limited to the following:

(i) adjusting the term for the payment of the debt secured by the prior recorded primary mortgage;

(ii) changing the interest rate on the debt secured by the prior recorded primary mortgage;

(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.

Paragraph (b) of Section 645.1 of the Mortgage Recording Tax Regulations provides examples of supplemental mortgages. Example 6 provides as follows:

Example 6: In 1985, a mortgage is given to Bank X by Mr. Smith. The note secured by the mortgage provides for an adjustable rate of interest. In 1991 the terms of the note are amended to provide a fixed rate of interest and the mortgage is modified accordingly. Such agreement is a supplemental mortgage.

Opinion

Petitioner appropriately notes that mortgages of housing development fund companies formed pursuant to Article XI of the Private Housing Finance Law are exempt pursuant to Section 577(2) of such law from payment of the mortgage recording tax (see Habitat for Humanity Housing Development Fund Company, Inc., Adv Op Comm T&F, November 20, 2000, TSB-A-00(4)R). Thus, with respect to issues (1) and (2) raised by Petitioner, it is concluded that the substitute mortgages to be executed by HDFC to the original construction loan mortgagee are exempt from payment of the mortgage recording tax. As a result, it is not necessary to determine whether the provisions of Section 255 of the Tax Law would otherwise apply to the recording of the substitute mortgages.

With respect to issues (3) and (4), it is noted that the substitute mortgages described by Petitioner in issues (1) and (2) will be treated as the “recorded primary mortgage” upon which the

TSB-A-01(4)R
Mortgage Recording Tax
May 23, 2001

proper tax, if any, has been paid, for purposes of Section 255 of the Tax Law. The agreements to extend and modify the recorded primary mortgages as described by Petitioner clearly meet the criteria for treatment as supplemental mortgages set forth in paragraph (5) of Section 645.1(a) of the Mortgage Recording Tax Regulations. This conclusion is the same, whether the extension and modification agreements are executed by the individual purchasers and the original construction loan mortgagee or executed by the individual purchasers and the third party lender assignee of the original construction loan mortgagee. In either situation, the assumption of the mortgage by the individual purchasers, and extension and modification agreements will not be taxable, since the agreements do not create or secure a new or further indebtedness.

DATED: May 23, 2001

/s/
Jonathan Pessen
Tax Regulations Specialist III
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.