

New York State Department of Taxation and Finance  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-81 (1) M  
Mortgage Tax  
October 7, 1981

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M801222A

On December 17, 1980, a Petition for Advisory Opinion was received from Lawrence Harper, 16 Monell Street, Greene, New York 13778.

The issue raised is whether the mortgagor (purchaser) or the mortgagee (seller) is liable for the special additional mortgage tax, under the circumstances described below. This tax is imposed, under section 253.1-a of the Tax Law, upon the recording of a mortgage, at the rate of 25 cents for each \$100 and each remaining major fraction thereof of principal indebtedness secured by such mortgage.

Under contract dated April 22, 1980, seller, Lawrence Harper, agreed to sell and convey to Johnson C. Burrows and Donald F. Burrows as purchasers, certain real and personal property located in the village of Greene, Chenango County, New York. The real property is improved with a structure containing a tavern, an adjacent room with a pool table, a room with tables and some dining facilities, a kitchen and rest rooms. Also on the ground floor level is a one car garage, near the rear entrance. The two upper floors of the building consist of two apartments with kitchen facilities and twelve rooms without cooking facilities. As part of the transaction, the seller took back from the purchasers a purchase money mortgage in the amount of \$60,000, on June 26, 1980.

Section 253.1-a of the Tax Law imposes the special additional mortgage tax on "each mortgage of real property situated within the state recorded on or after the first day of January, nineteen hundred seventy-nine, . . . "and provides that the ". . . tax imposed by this subdivision shall in cases of real property improved by a structure containing six residential dwelling units or less with separate cooking facilities be paid by the party making the loan secured by such mortgage, and such tax shall not be paid or payable, directly or indirectly by the borrower except as otherwise provided in sections two hundred fifty-eight and two hundred fifty-nine of this article . . . ." (emphasis added). Section 258 of the Tax Law relates to tax payments necessary to obtain a release or discharge of record, and section 259 relates to corporate trust mortgages.

In the present instance the special additional mortgage tax is due on the recording of a mortgage of real property "improved by a structure containing six residential units or less with separate cooking facilities . . . ." The statute provides that in such cases it is "the party making the loan" who is obligated to pay the tax, rather than "the borrower." A purchase money mortgage does not involve a "loan" in the usual sense of the word. However, the statute imposes a tax on every recorded mortgage, which category includes purchase money mortgages. Within the meaning and intent of the statute, thus, the mortgagor in a purchase money mortgage is the borrower, and the

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mortgagee is deemed to be "the party making the loan," for purposes of determining which party to the mortgage is responsible for paying the tax. This construction of the applicable statutory language is necessary in order to effective the legislative purposes underlying the statute.

Accordingly, in the present instance, since there are fewer than six residential dwellings with separate cooking facilities located on the mortgaged property, the mortgagee is required to pay the special additional mortgage tax.

DATED: March 10, 1981

s/LOUIS ETLINGER  
Deputy Director  
Technical Services Bureau