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

TSB-A-92(9)-R
Mortgage
Recording Tax
November 6, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M920915A

On September 15, 1992, a Petition for Advisory Opinion was received from Cuddy and Feder, 90 Maple Avenue, White Plains, New York 10601.

The issues raised by Petitioner, Cuddy and Feder, are:

1. Whether any statutory or regulatory provisions enforced by the Department of Taxation and Finance prevent a mortgagee from "passing through" or contractually reassigning to the mortgagor the obligation to pay the special additional mortgage recording tax imposed by Section 253.1-a(a) of the Tax Law, when the mortgage is not on property improved or to be improved by a structure containing six residential dwelling units or less and the mortgagor is exempt pursuant to Section 253.1-a(b) of the Tax Law.

2. Whether the mortgagee must pay the special additional mortgage recording tax first and then be reimbursed by the mortgagor or whether the mortgagee can require the mortgagor to pay the tax if it is concluded that the tax can be "passed through" in issue "1" above.

Petitioner's client, a mortgage lender, and an exempt borrower (hereinafter the "mortgagor") signed a commitment letter in which the mortgagor agreed to pay all of Petitioner's client's costs and expenses in connection with a mortgage loan, including but not limited to, the mortgage recording tax. At the closing, Petitioner's client looked to the mortgagor to pay the entire mortgage recording tax, including the special additional tax imposed by Section 253.1-a(a) of the Tax Law. The mortgagor in refusing to pay the special additional tax contended that the statute requires the special additional tax to be paid by the mortgagee in instances where the mortgagor is an exempt organization and, therefore, cannot be "passed through". Petitioner's client paid the special additional tax and is seeking reimbursement from the mortgagor pursuant to the terms of the commitment letter, the terms of which were specifically stated to survive the closing.

Section 253 of the Tax Law provides, in part, as follows:

> Sec. 253. Recording tax.- - 1. 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, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred

and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article.

1-a. (a) In addition to the tax imposed by subdivision one of this section, there shall be imposed on each mortgage of real property situated within the state, except mortgages wherein the mortgagee is a natural person or persons and the mortgaged premises consist of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities, <u>a special additional tax</u> of 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 anytime thereafter by such mortgage. The tax, if any, imposed by this subdivision shall in cases of real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each dwelling unit having its own separate cooking facilities, be paid by the mortgagee, and such tax shall not be paid or payable, directly or indirectly, by the mortgagor except as otherwise provided in sections two hundred fifty-eight and two hundred fifty-nine of this article and except such tax shall be paid in such cases by the mortgagor where the mortgagee is an exempt organization described in paragraph (b) of this subdivision. <u>In all other cases, such tax shall be paid by the mortgagor except that the tax shall be paid by the mortgagee where the mortgagor is an exempt organization described in paragraph (b) of this subdivision.</u> All of the provisions of this article shall apply with respect to the special additional tax imposed by this subdivision to the same extent as if it were imposed by said subdivision one of this section, except as otherwise expressly provided in this article.

(b) An organization organized other than for profit which is operated on a non-profit basis no part of the net earnings of which inures to the benefit of any officer, director or member and which is exempt from federal income taxation pursuant to subsection (a) of section five hundred one of the internal, revenue code <u>shall be exempt from the special additional tax</u> imposed by this subdivision. (emphasis added)

In interpreting Section 253.1-a(a) of the Tax Law, the Court in <u>State v Intercounty Mortgagee Corp.</u>, 1982, 87 A.D.2d 748, 448 N.Y.S.2d 675, appeal dismissed 57 N.Y.2d 954, 457 N.Y.S.2d 1028, 443 N.E.2d 496, appeal denied 61 N.Y.2d 601, 471 N.Y.S.2d 1029, 459 N.E.2d 1291 held that the special additional mortgage recording tax with respect to improved real property must be paid by lender and cannot be passed on to the seller, real estate broker or other third person.

Concerning issue "1", in the case of a mortgage where the mortgagor is an exempt organization as described in Section 253.1-a(b) of the Tax Law, the special additional mortgage recording tax shall be paid by the mortgagee and cannot be passed on to the mortgagor or any other party in accordance with Section 253.1-a(a) of the Tax Law and the reasoning of the Court in State v. Intercounty Mortgagee Corp., supra. Therefore in the instant case Petitioner's client cannot pass through to the mortgagor the special additional tax imposed by Section 233.1-a(a) of the Tax Law.

With respect to issue "2", in accordance with the opinion reached in issue "1" above, the special additional mortgage recording tax due on mortgages where the mortgagor is an exempt organization cannot be passed on and must be paid by the mortgagee. Therefore, Petitioner's client is not entitled to reimbursement from the mortgagor.

DATED: November 6, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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