

New York State Department of Taxation and Finance  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-10(3)R  
Real Estate Transfer Tax  
Mortgage Recording Tax  
June 16, 2010

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M100218B

The petition asks whether a deed recorded as security for the repayment of debt, can be assigned to another lender, without payment of additional real estate transfer tax (RETT) or mortgage recording tax (MRT). We conclude that it can. The petition also asks whether such an assigned deed can be treated as a mortgage and modified by increasing the amount of the debt that is secured and by changing the form of the security instrument to a mortgage. We conclude that this is permissible, subject to payment of RETT and/or MRT. Further, the petition asks if the mortgage recording tax upon the assignment is limited to the additional or new debt secured by the modified mortgage. We conclude that the tax is so limited.

**Facts**

The following is a summary of facts submitted by Petitioner as the basis for this Advisory Opinion. In 2001, [REDACTED] conveyed real estate in Queens County to [REDACTED] (YR). RETT was paid upon recording the deed. The real estate in question is designated as [REDACTED] (the Premises).

*2006 Agreements:* In 2006, YR conveyed the Premises via deed to [REDACTED] (DB202). According to the petitioner, DB 202 is a special purpose entity owned by [REDACTED] (Bank 1), a financial institution that lends money to entities and obtains security for these loans in a manner that does not violate Islamic law. YR did not pay RETT, but instead paid MRT to secure a debt of \$4,900,000. Simultaneously with the delivery of the deed to DB202, YR and DB202 entered into two agreements.

The first agreement, entitled "Operating Ijara Agreement" is in the form of a lease. The agreement obligated YR to pay rent to DB202 equivalent to payments that would be due to a lender under a mortgage loan. YR agreed to maintain the premises, keep it insured and pay all costs relating to operating the property. A memorandum of lease was recorded summarizing this agreement. An assignment of leases and rents was also recorded to secure payment of the indebtedness and "performance of any and all obligations of grantor under the Ijara agreements, this assignment and the related documents."

The parties also entered into a purchase agreement whereby DB202 agreed to reconvey the property to YR upon payment of a \$4,900,000 purchase price, and YR was obligated to pay the purchase price in installments over 25 years. The installment payments were the rent payments owed under the Operating Ijara Agreement.

*2009 Agreement:* In November, 2009, [REDACTED] (Petitioner) entered into a purchase and sale contract with YR. Petitioner agreed to purchase the premises for \$8,200,000. RETT will be paid on this amount.

To finance the purchase, Petitioner will borrow \$6,000,000 from [REDACTED] (Bank 2) as evidenced by a promissory note and secured by a first mortgage on the premises. As security, DB202 will assign the deed to Bank 2. Petitioner will secure the note with an additional mortgage of \$1,100,000 on the Premises. Petitioner will sign an agreement that consolidates the assigned deed with the additional mortgage to form a new mortgage securing a debt of \$6,000,000.

## Analysis

In *Ahli United Bank (UK) PLC*, TSB-A-08(2)R, the Department provided advice concerning facts and agreements similar to the 2006 agreements described in this Petition. The Department advised that, pursuant to Tax Law §1405(b)(2), conveyances that are or were used to secure a debt are exempt from RETT. In a manner similar to the *Ahli* matter, the 2006 agreements make it clear that the grantor did not intend to relinquish its control of the property and continued to enjoy the benefits and responsibilities of ownership. The monthly lease payment is equivalent to a principal and interest payment in a conventional mortgage loan. At the end of the lease or when the principal is repaid, whichever occurs first, the property is deeded back to the original grantor. In this case, the conveyance of the fee interest at the end of the lease represents the satisfaction of the instrument securing the debt or obligation. These transactions are entered into solely to effect and secure DB202's financing of the real property. Petitioner now has signed a contract to purchase the premises by assignment of deed, together with financing consisting of consolidation of the assigned deed with an additional mortgage securing the debt.

Petitioner asks whether a deed recorded as security for the repayment of debt can be assigned to another lender, without payment of additional real estate transfer tax (RETT) or mortgage recording tax (MRT). Before and immediately after the assignment of the deed to the new lender, the deed serves solely to secure a bona fide indebtedness. The facts of this Petition demonstrate that the deed, serving as a financing agreement, and the associated debt have not become due and payable and paid in full so as to prevent the recording of the assignment to the new lender under §275 of the Real Property Law. Under the unique facts presented in this Petition, the deed remains, before and immediately after the assignment of the deed to the new lender, a financing agreement upon which the proper taxes had been paid, free of the enforcement provisions of §258 of the Tax Law.

Section 275 of the Real Property Law and §258 of the Tax Law would not prevent the recording of the assignment of the mortgage and the underlying note to the new lender. Once the assignment is recorded, an instrument that is considered a supplemental mortgage with respect to the mortgage, as set forth in §255.1(a) of the Tax Law and as defined in §645.1(a) of the Mortgage Recording Taxes Regulations, can be recorded without further payment of mortgage recording taxes, unless that instrument creates or secures a new or further indebtedness other than the indebtedness secured by the mortgage. Based upon the facts set forth in this Petition, we conclude that the mortgage, as assigned to the new lender (i.e., Bank 2), at all times continues to secure the same principal debt or obligation as secured immediately before the consummation of the transactional steps described in this Petition. Because the mortgage continues to secure the same principal debt or obligation, the recording of a supplemental mortgage, either simultaneously with or subsequent to the recording of the assignment of the mortgage, as described in this Petition, would be taxable only to the extent the supplemental mortgage secures an amount in addition to the unpaid principal debt or obligation secured by the mortgage that is assigned to the new lender.

The Petition also asks whether the assigned deed can be treated as a mortgage and modified by increasing the amount of the debt that is secured and by changing the form of the security instrument to a mortgage. We are limiting our response to the question whether mortgage recording tax is due here. Once a mortgage has been given and recorded, the recorded primary mortgage may be changed by a supplemental mortgage and no additional mortgage recording taxes will be due as long as the amount secured remains the same. See *City of New York v. State Tax Commission*, 130 A.D. 2d 890, 891 (3d Dept., 1987). If the indebtedness secured by a lien is reduced or the lien terminated for any reason, tax would be due on any increase on the new obligation. See *Matter of Rednow Realty Corp. v. Tully*, 72 A.D. 2d 621, 622 (3<sup>rd</sup> Dept., 1979). In *City of New York v. Procaccino*, 46 AD2d 594, 364 NYS2d 582 (3d Dept 1975) the Court held that a supplemental mortgage will be exempt from any additional mortgage recording tax if it involves no

