

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

TSB-M-83 (10)M
Mortgage Recording Tax
December 1, 1983

Subject: Mortgage Recording Tax on Re-advances

There have been several inquiries concerning the policy of the Tax Department concerning the mortgage recording tax on re-advances of principal.

The Attorney General of this State previously rendered an opinion with respect to re-advances made under a prior recorded mortgage containing provision for such advances. (1953 Opns Atty Gen 198.) Such opinion, in conformity with section 253 of the Tax Law, concludes that the mortgage recording tax is payable on the recording of the instrument evidencing such re-advance.

In the circumstances of the opinion of the Attorney General, a mortgage had been recorded which stated that it was to secure "any and all further loans" to be owed by the mortgagor and the recording tax was paid based on the original principal amount secured thereunder and lent in full. The mortgage provided that in no event will the total of outstanding principal at any time exceed than particular sum. The question was asked, if one-half of the principal secured by the mortgage is paid by the mortgagor and the mortgagor is then lent the sum of one-half of the principal, whether a tax is imposed on the recording of the instrument evidencing the re-advance. The Attorney General stated that the agreement which evidenced the re-advance fell within the definition of a mortgage under Section 255 of the Tax Law. His opinion goes on to state that "further re-advances will be taxable upon recording the instruments evidencing them."

Although the Attorney General also added that the tax is on the recording of the mortgage, and not on the mortgage itself, section 258 of the Tax Law imposes a severe limitation of the mortgagee's rights when an unrecorded mortgage is sought to be enforced.

Also, it should be noted that Counsel to the Department recently applied to an inquiry about a loan participant agreement. In the facts of the inquiry, the borrower (mortgagor) will have the right to buy from the lender participation interest in his loan, and he also has the subsequent right to sell back such interest to the lender. Counsel Stated that a participation interest is separate and distinct from the underlying mortgage and that the existing definition of mortgage in section 250 of the Tax Law does not generally include a participation interest.

The above paragraphs sets forth the following three salient points:

1. The mortgage recording tax is not payable unless and until the mortgage is recorded.
2. A re-advance after the borrower has paid off part of his loan is taxable if the instrument evidencing the same is then recorded.
3. If a re-advance agreement is not recorded it cannot be received in evidence in any action or proceeding prior to payment of the recording tax.