

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

TSB-M-89 (6.1)R  
Tax on Mortgages  
August 3, 1989

This memorandum supersedes memorandum TSB-M-89-(6)-R, issued July 14, 1989, which should be destroyed.

AMENDMENTS TO ARTICLE 11 OF THE TAX LAW AND SECTIONS 275 AND  
339-ee OF THE REAL PROPERTY LAW BY CHAPTER 241  
OF THE LAWS OF 1989

TAX ON MORTGAGES

On July 1, 1989, Chapter 241 of the Laws of 1989 was enacted amending Article 11 of the Tax Law, (the mortgage recording tax), section 275 of the Real Property Law and various provisions of the Administrative Code of the City of New York. This Chapter was enacted at the request of the City of New York. Recording officers, representatives of title insurance companies, the New York State Land Title Association and others have indicated that expedited guidance is needed with respect to select questions raised by the changes made by Chapter 241 insofar as they affect the administration of the mortgage recording tax. The Commissioner of Taxation and Finance is charged with general supervisory power over all recording officers in respect of the duties imposed by Article 11 of the Tax Law. (Tax Law, § 263, subd. 1).

The purpose of this memorandum is to provide guidance to resolve the specific issues raised. The specific concerns raised relate to the provisions of the new law amending section 250 of the Tax Law with respect to the assignments of rents, with respect to advances and readvances and with respect to the repeal of former section 275 of the Real Property Law and the addition of a new section 275 of that Law insofar as such amendment affects the administration of the mortgage recording tax, and, lastly to the "condominium credit" provisions of section 339-ee of the Real Property Law.

Tax Law, § 250

The definition of "mortgage" in section 250 has been amended by Chapter 241 to include an "assignment of rents" given as security for an indebtedness, with respect to real property located in the City of New York. Wherever the term "mortgage" is used in Article 11 of the Tax Law, therefore, it will now include

an assignment of rents with respect to real property located within the City of New York. Thus, the opinion in Albee Fuel Corp. v. Gallman, 42 AD 2d 323 (3d Dept. 1973) that such an assignment is not a mortgage is no longer applicable where the real property to which the assignment of rents relates is located in the City of New York.

We have been asked whether a second mortgage recording tax would be due upon an assignment of rents which is recorded in conjunction with the recording of a mortgage upon which the full amount of tax is or has been paid. It is our opinion that if such an assignment is merely additional security for the indebtedness otherwise secured by the mortgage on real property no further mortgage recording tax is due pursuant to section 255 of the Tax Law if the procedures thereunder are followed. However, if the assignment is given as security for "new" or further indebtedness other than the indebtedness or obligation secured by the recorded primary mortgage, a tax would be due upon the recording of such assignment to the extent of the new or further indebtedness (Tax Law, § 255). The tax is imposed on the full amount of indebtedness secured by the assignment of rents, unless a section 255 affidavit is filed.

Section 250 of the Tax Law was further amended to codify, for purposes of the New York City mortgage recording taxes, a longstanding opinion of the Attorney General that a "mortgage" includes a contract or agreement whereby "new funds" are advanced or readvanced and such funds are secured by a mortgage (*see*, 1953 Op. Atty. Gen. 198). "New funds" are the amount by which the aggregate amount of funds advanced or readvanced exceeds the amount upon which the mortgage recording tax has been paid. Therefore, a contract or agreement providing for such advances or readvances is a mortgage taxable upon recording whether within or outside New York City. (See, however, section 253-b of the Tax Law with respect to certain credit line mortgages.) It should be noted that mortgages upon which a tax has not been paid may not be released or discharged or received in evidence pursuant to section 258 of the Tax Law. This amendment to section 250 by Chapter 241 merely clarifies that this interpretation applies as well to the New York City mortgage recording taxes (L. 1971, C. 400, et seq.) enacted subsequent to the Attorney General's Opinion.

#### Real Property Law, § 275

Chapter 241 of the Laws of 1989 also amended the Real Property Law by repealing section 275 and adding a new section 275 in its place.

Upon payment or tender of payment of the principal and interest due upon a mortgage, a mortgagee must execute and acknowledge a satisfaction piece therefor upon the request of the mortgagor or of any other person interested in the mortgaged premises (Real Property Actions and Proceedings Law, § 1921.1; added by L. 1911, C. 574 as section 333 of the Real Property Law). In lieu of such satisfaction (or certificate of discharge), former section 275 of the Real Property Law (as added by L. 1914, C. 408) authorized the owner of the land, upon which a mortgage was a lien, to demand an assignment of the mortgage from the mortgagee.

New section 275 requires the issuance of a certificate of discharge of mortgage to the mortgagor or the designee of such mortgagor when:

- (1) a mortgage is "due and payable"; and
- (2) the full amount of principal and interest due on the mortgage is paid.

Both of these conditions must be met in order for section 275 to apply.

Within 10 days thereafter, the person signing the certificate of discharge must present for recording a duplicate original of the certificate to the county recording officer and pay the fee(s) applicable to such recording. New section 275 has no application to mortgages granted to or made by the State or its political subdivisions, or any agencies or instrumentalities thereof. New section 275 only applies to mortgages which, on or after July 1, 1989, become due and payable and with respect to which principal and interest is paid in full on or after such date.

Former section 275 of the Real Property Law enabled a mortgagor to avoid the mortgage recording tax by reusing a "dormant" mortgage as security for another loan or obligation without payment of any mortgage recording tax. A "dormant" mortgage is a mortgage that no longer secures any bona fide debt because it has been assigned to the mortgagor or a nominee of the mortgagor.

Logically, upon assignment to the mortgagor or the mortgagor's nominee the mortgage lien has ceased to secure any bona fide obligation, and therefore, the mortgage lien should be considered to have ceased to exist for mortgage recording tax purposes. Thus, the dormant mortgage should not be able to be used to secure a new obligation without payment of the mortgage recording tax.

We believe that it was this type of tax avoidance scheme that the Legislature targeted when it repealed former section 275 and added new section 275 of the Real Property Law. The memorandum in support of the bill before the Legislature stated that "some people use old mortgage liens to obtain new loans and, therefore, escape the mortgage recording tax"

Accordingly, it is our opinion that new section 275 terminates the past practice whereby a mortgagor demanded that a fully paid mortgage be assigned to such mortgagor, or to a nominee of the mortgagor, who later "sold" that mortgage to another mortgagee for "new" money, and borrowed such new money on the "old" mortgage without paying a new mortgage recording tax. (New section 275 therefore includes within the substantive prohibition on assignments to a mortgagor an assignment to any person or entity acting at the direction, or under the control or influence, of the mortgagor where the mortgage so assigned no longer serves as security for a bona fide debt. For example, this would include a corporation which accepts an assignment on behalf of the mortgagor, but which does not reflect the "debt owed" on its books).

Clearly falling within this category would be a mortgage paid in full by the mortgagor on its original maturity date and assigned to the mortgagor or a nominee. In that situation, although the mortgage remains technically outstanding, it no longer serves as security for any bona fide indebtedness of the mortgagor. Accordingly, the mortgage will be considered to have been paid in full and will be subject to new section 275.

Also included would be a mortgage prepaid pursuant to the mortgagor's exercise of a right of prepayment provided in the mortgage, which mortgage is thereupon assigned to the borrower or a nominee of the borrower. (See, e.g., Rosenfeld v. Savings Bank of Utica, 173 Misc. 667 (Sup. Ct., Queens County 1940), which held that the mortgagor's exercise of a right of prepayment rendered the mortgage "due and payable" within the meaning of former section 275.)

By way of contrast, the amount of principal and interest on a mortgage will not be considered to be paid in full within the meaning of section 275 in cases in which the mortgaged property continues at all times to serve as security for a bona fide debt. Thus, the consideration given by an assignee to an assignor of a mortgage, although it may be equal in value to the amount of the unpaid principal and interest on that mortgage, does not require a

discharge or satisfaction of the mortgage provided the mortgage continues at all times to secure a bona fide debt and that at all times there exists an enforceable lien (cf., Citibank v. State Tax Comm., 98 AD 2d 929 (3d Dept. 1983)).

In the examples which follow, the application of the second condition of new section 275, that the full amount of the principal and interest on the mortgage be paid, is illustrated in five fairly typical lending transactions. (Assume in each case that the first condition of section 275, that the mortgage is "due and payable", has been met).

1. Sales of mortgages by lenders. The commercial practice of lenders trading or selling mortgages on the "secondary" market between and among themselves does not fall within the terms of section 275 of the Real Property Law since such mortgages continue at all times to serve as security for a bona fide debt.

2. Construction loan/Permanent financing. A builder finances construction by obtaining a short-term construction loan. The builder arranges or has arranged permanent financing to replace the construction loan. The terms of the permanent loan (its interest rate, due date, etc.) differ from those of the construction loan. The construction lender now assigns the note and the mortgage securing its payment to the permanent lender. As a result, the builder's obligation to the construction lender is replaced with an obligation to the permanent lender. The property continues to be security for the debt.

The replacement of a construction loan with permanent financing will not be subject to section 275 because the mortgaged property continues at all times to serve as collateral for a bona fide debt (first to the construction lender, and then to the permanent lender). The fact that the obligor under the mortgage may change (e.g., a purchaser of the newly constructed building is substituted for the builder) would not alter this conclusion. (See, Suffolk County Federal Savings & Loan Assn. v. Bragalini, 5 NY 2d 579 (1959); Bay View Towers v. State Tax Comm., 40 NY 2d 856 (1976)).

3. Common refinancing transactions. A mortgagor desires to replace existing financing with new financing, and initiates a refinancing transaction which involves the following steps: (a) The first lender assigns the note and the mortgage securing its payment to the new lender and receives consideration which may be equal in value to the full amount of principal and interest due on the original loan. (b) The mortgagor and the new lender amend and restate the original loan documents to conform to their new deal.

This may be done in connection with the consolidation referred to in step (d). (c) The new lender also advances "new" money and receives an additional mortgage securing the new advance. (d) The new lender consolidates the original mortgage and his new mortgage into a single mortgage on the property. Throughout this chain of events the property remains subject to the lien of the original mortgage, which collateralizes the debt that is owed first to the old lender and then to the new lender.

The common refinancing transaction will not be subject to section 275 because the mortgaged property continues at all times to serve as collateral for a bona fide debt (first to the original lender, and then to the new lender/assignee). Mortgage recording tax will be imposed, however, on any additional mortgage that secures the "new" money advanced (but no further tax will be imposed on the unpaid principal carried over from the old mortgage and included in the principal debt secured by a consolidated mortgage).

4. Workouts of defaulted mortgages. A mortgagor is in default under the terms of the mortgage and is attempting to avoid foreclosure by working out new terms with the existing lender, or by finding new financing.

The mortgagor may agree with the existing lender to amend the terms of the loan, so that the debt remains outstanding with the same lender but is payable over a longer term and at a different interest rate. Alternatively, a new lender may buy the original note and mortgage from the old lender, and thereafter modify the loan terms. The loan might be purchased for the principal amount then outstanding, or the new lender may buy the loan for less than the principal amount outstanding, reflecting a discount for the risks of collection or the costs of foreclosure proceedings.

A workout of the defaulted mortgage, whether with the original lender or with a new lender, will not be subject to section 275 because the mortgaged property continues at all times to serve as collateral for a bona fide debt.

5. Refinancings that occur in conjunction with sales. These situations generally involve a seller of property, who has previously borrowed and mortgaged the property to the original lender, and a buyer who is obtaining mortgage financing in order to purchase the property. The seller's mortgage provides that on a sale or other disposition of the property the mortgagee can accelerate the mortgage. The original lender exercises this right, with the result that the mortgage becomes due and payable on the date of sale. On the date of sale the following things

happen: The seller conveys the property to the buyer subject to the lien of the mortgage; and the original lender assigns the note and the mortgage securing its payment to the buyer's lender.

These transactions will not be subject to section 275 because the mortgaged property continues at all times to serve as collateral for a bona fide debt (first the debt of the original owner to his original lender, and then the debt of the new owner to his new lender). If the buyer's lender advances any new funds mortgage recording tax will be imposed on any additional mortgage that secures the new money (but no further tax will be imposed on the unpaid principal carried over from the old mortgage and included in the principal debt secured by a consolidated mortgage).

NOTE:

In order to record an assignment of a mortgage there must be set forth in the assignment document or attached thereto and recorded as part thereof a statement under oath signed by the mortgagor or any other party to the transaction having knowledge of the facts (provided he asserts such knowledge), that the assignee is not acting as a nominee of the mortgagor and that the mortgage continues to secure a bona fide obligation.

This requirement is not applicable to assignments of the type described in example one of this memorandum, and such assignments shall contain the statement: "This assignment is not subject to the requirements of section 275 of the Real Property Law because it is an assignment within the secondary mortgage market."

Real Property Law, § 339-ee

Finally, Chapter 241 amended section 339-ee to provide that the mortgage recording tax credit available to condominium construction or conversion is limited by two factors.

First, the law now requires that the proceeds of a blanket mortgage be applied exclusively to payment of the construction mortgage or to capital expenditures or expenses for the development or operation of the condominium, or if applied to the purchase of land or buildings, that the purchase be no more than two years prior to the recording of the declaration of condominium. Second, the law requires that the first condominium unit be sold no more than two years after the blanket or construction mortgage was recorded.

These limitations "apply to credits for taxes paid on construction or blanket mortgages recorded on or after July 1, 1989" (L. 1989, C. 241, § 110.(6)(c)). Thus, these limitations do not affect such mortgages recorded prior to July 1, 1989.