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

TSB-M-91 (1) R
Mortgage Recording Tax
March 18, 1991

This memorandum is being issued to address some general questions regarding the Tax on Mortgages (mortgage recording tax) imposed by and pursuant to Article 11 of the Tax Law.

1) Question: For purposes of Article 11, what is a mortgage?

Answer: In general terms, a mortgage is an instrument in writing that imposes a lien on or affects the title to real property with such property being used as security for the payment of money or the performance of an obligation. A mortgage includes certain deeds of trust and executory contracts for the sale of real property.

2) Question: What is the mortgage recording tax?

Answer: The mortgage recording tax is an excise tax on the privilege of recording a mortgage in the real property records of a recording officer.

The mortgage recording tax is comprised of four separate taxes imposed on the recording of mortgages on real property situated in New York State. The amount of tax depends upon which taxes are in effect in the county or counties where the real property is located.

The four separate taxes vary from $.25 to $1.75 for each $100 and each remaining major fraction thereof of principal debt or obligation that is, or under any contingency may be, secured at the date of execution thereof, or at any time thereafter, by a mortgage on real property.

The four taxes are (i) the basic tax imposed pursuant to section 253(1) of the Tax Law, (ii) the special additional tax imposed pursuant to section 253(1-a) of the Tax Law, (iii) the additional tax imposed pursuant to section 253(2)(a) of the Tax Law and (iv) the New York City Tax that is authorized to be imposed pursuant to section 253-a of the Tax Law for cities having a population of one million or more. The amount of the mortgage recording tax imposed in each county is based upon the taxes the county is required to collect and varies from a total tax rate of a minimum of $.75 to a maximum of $2.75 for each $100 of the amount secured by the mortgage.

The rate of the mortgage recording tax imposed in each county is listed on the back of Form MT-15 Mortgage Recording Tax Return. Also, information with respect to the rate of tax imposed in a specific county may be obtained by:

(1) calling the Taxpayer Assistance Bureau at 1 800 CALL TAX (from New York State only) or (518) 438-8581 (from areas outside New York State); or

(2) calling the recording officer of the county where the real property, subject to the mortgage, is located.

3) Question: Is an "executory contract" for the sale of real property or both real and personal property considered a mortgage?

Answer: Yes, but only where the purchaser has or is entitled to possession of the real property prior to the delivery of the deed from the seller to the purchaser. The principal debt or obligation which is used as the basis for computing the taxes imposed by Article 11 of the Tax Law, is that portion of the purchase price under the contract that remains unpaid as of the time that the purchaser has or is entitled to possession of the real property under the contract.

Example: Corporation X entered into an executory contract to sell a 10 unit apartment building located in Flushing, Queens County, New York City to Y for a purchase price of $600,000. On October 1, 1990 the contract was executed and pursuant to its terms Y was required to make a $60,000 down payment. The contract also provided that an additional payment of $100,000 was required on December 1, 1990 at which time Y was entitled to possession of the premises. The agreement between Corporation X and Y also requires that the contract be recorded. Y will be required to make 10 semi-annual payments over a 5 year period to Corporation X to pay the remaining balance due under the contract, with the final payment due on December 1, 1995. Upon receipt of the final payment, Corporation X will deliver a deed conveying the subject premises to Y.

Since the executory contract between Corporation X and Y grants the purchaser possession of the real property prior to the delivery of the deed such contract is a mortgage, the recording of which is subject to tax.

The taxes due upon the recording of this contract are computed as follows:

Purchase price under the contract		$600,000
Less: Down payment - October 1, 1990	$ 60,000	
Additional payment - December 1, 1990	$100,000	
Total Subtractions		$160,000
Total amount remaining unpaid at the time Y is entitled to possession - December 1, 1990		$ 440,000
Basic tax due (($440,000 + $100) x $.50)		$ 2,200

Additional tax due (($440,000 • $100) x $.25)	$ 1,100
Special additional tax due	
(($440,000 • $100) x $.25)	$ 1,100
New York City Tax due @ $1.00 rate	
(($440,000 . $100) x $1.00)	$ 4,400
Total taxes due	$ 8,800

4) Question: Is a mortgage given pursuant to a confirmed plan of reorganization under Chapter 11 of the Bankruptcy Code subject to the mortgage recording tax?

Answer: No. Section 1146(c) of Chapter XI of the Bankruptcy Code (11 USC §1146(c)) provides that the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of Chapter XI of the Bankruptcy Code, may not be taxed under any law imposing a stamp tax or similar tax.

5) Question: In the case of a mortgage given to a lender who is a natural person, is an exemption from the special additional mortgage recording tax allowed? (Note: See question and answer number six for the definition of "natural person".)

Answer: Yes, if the mortgaged premises consist of real property improved by a structure containing six or fewer residential dwelling units each with separate cooking facilities.

6) Question: How is the term "natural person" defined for purposes of the special additional tax?

Answer: "Natural person" means a human being, as opposed to an artificial person, who is the beneficial owner of a mortgage (mortgagee). An artificial person includes a corporation or partnership; natural person(s) operating a business under a "dba" (doing business as); an estate, such as the estate of a bankrupt or deceased person, or a trust.

7) Question: Is the natural person exemption from the special additional tax allowed where the mortgagee (lender) is the executor or executrix of an estate, a trustee of a trust, a partner of a partnership or a shareholder or officer of a corporation, with such entities being the beneficial owner of the mortgage, and the mortgaged premises consist of real property improved by a structure containing six or fewer residential dwelling units, each with separate cooking facilities?

Answer: No. A person who is acting in a fiduciary capacity for a mortgagee who is not a natural person does not qualify for the exemption and, therefore, the special additional tax is imposed.

8) Question: Is a voluntary, nonprofit hospital corporation subject to the mortgage recording tax?

Answer: No. Subdivision 3 of section 253 of the Tax Law states in part that the mortgage recording'tax shall not'be imposed upon any mortgage executed by a voluntary, nonprofit hospital corporation. (See question and answer number 17 for procedure to follow in order to claim an exemption.)

9) Question: Which not-for-profit organizations are exempt from the special additional mortgage recording tax?

Answer: Not-for-profit organizations organized other than for profit, which are operated on a nonprofit basis and no part of the net earnings of which inures to the benefit of any officer, director or members and which are exempt from federal income taxation pursuant to section 501(a) of the Internal Revenue Code, are exempt from the special additional tax. However, where either the mortgagor or mortgagee is a not-for-profit organization, the mortgagor or mortgagee who is not the not-for-profit organization must pay the special additional tax. In cases where such not-for-profit organizations are both the mortgagor and mortgagee the recording of the mortgage shall be exempt from the special additional mortgage recording tax.

10) Question: Are there instances where not-for-profit organizations are exempt from all four mortgage recording taxes imposed pursuant to Article 11 of the Tax Law?

Answer: Yes, if the statute under which a particular not-for-profit organization is formed provides a tax exemption that is interpreted to apply to the entire mortgage recording tax, a total exemption would be allowed.

11) Question: Is an "assignment of rents" given as security for the payment of a debt deemed to be a mortgage subject to the mortgage recording tax?

Answer: Effective July 1, 1989, an "assignment of rents" given as security for an indebtedness, where such rents are to accrue from the rental or lease of real property located in the City of New York, is deemed to be a mortgage for purposes of the mortgage recording tax. Where such real property is located outside New York City, the assignment of a lessor's or sublessor's right to receive rents as security for an indebtedness is not deemed to be a mortgage.

12) Question: If I have one mortgage that covers property in more than one county, how can I record the same mortgage in each county without paying tax in each county?

Answer: Pursuant to section 257 of the Tax Law, the mortgage recording taxes due in each county where the real property, or any part thereof, is situated are paid to the recording officer of the county where the mortgage is first recorded. The recording officer Will then indorse upon the mortgage a receipt for the amount of the taxes paid and the indorsed mortgage may be recorded in the other counties where the real property, or any part thereof covered by the mortgage, is located, without further payment of the taxes. The taxes paid to the recording officer of the county where the mortgage was first recorded will be apportioned by the Commissioner of Taxation and Finance between the respective tax districts in each county. The taxes will be apportioned between the relative tax districts based upon the relative assessed value of the real property in each county over the relative assessed value of all the real property subject to the mortgage, as the same appears on the last assessment-rolls. If, however, the whole or any part of the property covered by such a mortgage is not assessed upon the last assessment-roll or rolls of the tax district or districts in which it is situated, or is so assessed as a part of a larger tract, so that the assessed value cannot be determined, or if improvements have been made to such an extent as to materially change the value of the property so assessed, the Commissioner of Taxation and Finance may require the local assessors in the respective tax districts, or the mortgagor or mortgagee, to furnish sworn appraisals of the property in each tax district, and upon such appraisals shall determine the apportionment.

13) Question: If a mortgage covers real property located in more than one county, and one or more but not all of the counties have suspended the imposition of the additional tax, or a portion of the property is located in New York City, what is the procedure that must be followed for purposes of the mortgage recording tax?

Answer: One of the following procedures must be followed:

1) The taxpayer may compute the tax as if the property were located entirely in any one of such counties that is authorized to collect the greatest amount of tax. Such amount is then paid to the recording officer of the county where the mortgage is first recorded. Such recording officer indorses upon the mortgage the tax so paid. Also, at the time the taxpayer presents the mortgage for recording and pays the tax, he or she should present to the recording officer a completed Form MT-15.1 - Mortgage Recording Tax Claim for Refund. The taxpayer then can proceed to record the mortgage in any other county where the property or any part thereof is located.

The recording officer will submit information to the Tax Department with respect to the relative assessed value of the property located in each county, along with Form MT-15.1, for the purpose of determining the proper total tax due and the amount of such tax to be apportioned to each county. If it is determined that the tax was overpaid, the Commissioner of Taxation and Finance, or a duly authorized delegate, will direct the appropriate recording officer to refund the amount of the overpayment to the taxpayer or his duly authorized representative.

If the taxpayer fails to present a completed refund claim form (Form MT-15.1) to the recording officer at the time the mortgage was first recorded, the taxpayer may file for a refund directly with the Tax Department. The refund application must be filed with the Tax Department within two years from the time that the erroneous payment of tax occurred.

2) At the time the mortgage is presented for recording, the taxpayer may file a completed Form MT-15, Mortgage Recording Tax Return. The taxpayer will pay the amount of tax computed to be due on Form MT-15 to the recording officer of the county where the mortgage is first recorded. The recording officer will indorse the payment of the tax upon the mortgage so that the mortgage can be recorded without further payment of tax in the other county or counties. The recording officer must submit the original of the return (Form MT-15), along with the information described in procedure number one, to the Tax Department.

The return filed pursuant to this procedure shall be subject to audit by the Tax Department and also by the recording officer where the mortgage was first recorded and the tax paid. If there is an underpayment of the tax, the Commissioner of Taxation and Finance will direct the recording officer where the mortgage was first recorded and the tax paid to notify the parties to the mortgage of such underpayment. If there is an overpayment of the tax, the Commissioner of Taxation and Finance shall direct the appropriate recording officer to refund the amount of the overpayment to the taxpayer or his duly authorized representative.

14) Question: When a mortgage is recorded that covers real property located partly within and partly without New York State, must tax be paid on the entire amount secured?

Answer: No. When real property or real and tangible personal property covered by a mortgage is located partly in the state and partly outside the state, only that portion of the mortgage attributable to the real and tangible personal property within New York State is subject to tax. The determination of the taxable portion of the mortgage or of advancements thereon will be made by the Commissioner of Taxation and Finance.

To record such a mortgage, one of the following procedures may be used:

Procedure 1.

The determination of the taxable portion of the mortgage may be made prior to the taxpayer presenting the mortgage for recording if the following information, as set forth in the Mortgage Tax Regulations, is submitted to the Tax Department:

(1) An affidavit made by the taxpayer or his authorized representative setting forth;

- (a) book values, assessed values, and appraised values of the property covered by the mortgage, separated into the following categories:

  (i) real property in the state;
  (ii) real property outside the state;
  (iii) tangible personal property in the state, if required;
  (iv) tangible personal property outside the state, if required.

- (b) A brief description of each parcel of real property, including both the location of and its value and the page of the mortgage where described.

- (c) Assessed values of the real property in the state listed y tax district.

- (d) If required, the classification of the tangible personal property by appropriate general class at each location and the value of each class.

- (e) A statement of all prior encumbrances upon the property covered by the mortgage, including a description of each encumbrance, and the amount outstanding.

(2) Copies of appraisals of the real and tangible property covered by the mortgage, made by at least two qualified, competent, disinterested persons or an approved appraisal company, must be submitted along with the taxpayer's affidavit.

(3) A copy of the mortgage.

Note: The information regarding tangible property need only be submitted if the mortgage covers both real property and tangible personal property.

The above information will be reviewed by the Tax Department and a letter will be issued to the taxpayer or his authorized representative stating the amount of the mortgage which is subject to tax. The letter and the mortgage must be given to the recording officer when such mortgage is presented for recordation.

The taxable amount of the mortgage within New York State is determined by the Tax Department in the following manner:

(1) Determine the net value of the property within and without the state by determining the respective values of the property within and without the State and deducting from such amounts any prior existing mortgage liens, except liens that are to be replaced by prior advancements and the advancement under consideration.

(2) Find the ratio that the net value of the mortgaged property within the state bears to the net value of the entire mortgaged property.

(3) Determine the portion of the mortgage or of advancements thereon that shall be taxable by multiplying the ratio by the principal indebtedness secured by the mortgage or the sum advanced pursuant to a corporate trust mortgage.

Procedure 2.

When the mortgage is presented for recording, a statement in affidavit form, executed by the mortgagor or his authorized representative, may be presented to the recording officer. Such statement must be filed in duplicate and contain the names and addresses of the parties to the mortgage, and it must specify the net value of the property covered by the mortgage within the state and the net value of the property without the state covered by such mortgage. The tax payable when the mortgage is recorded is then computed by the taxpayer upon such portion of the principal indebtedness secured by the mortgage, or the sum advanced pursuant to a corporate trust mortgage, as the net value of the mortgaged property within the state bears to the net value of the entire mortgaged property as set forth in such statement.

The recording officer transmits one of the duplicate statements to the Tax Department, together with a statement of facts requesting apportionment. The Tax Department will then proceed to determine the taxable amount of the mortgage within New York State in the manner described in Procedure 1.

The Tax Department may require that additional information be submitted.

Where it is determined that the tax was underpaid, the Tax Department will notify the mortgagor and mortgagee of the balance due and such balance due shall be paid within ten days to the recording officer of the county where the mortgage was first recorded.

Where it is determined that the tax was overpaid, the Tax Department will order the appropriate recording officer to refund such overpayment.

Example: A mortgage is given where the principal obligation secured is $100,000. The mortgage is secured by real property located in the states of New York and Vermont. The New York real property is located in a county where the mortgage recording tax rate is $1.00 per $100 of principal debt or obligation or major fraction thereof.

Net value of the New York property is $800,000.

Net value of the Vermont property is $200,000.
Net value of all the property covered by the mortgage is $1,000,000 ($800,000 + $200,000).

New York property	$ 800,000	=
All property covered by the mortgage	$1,000,000	.8000

.8000 x $100,000 (amount secured by the mortgage) =

$80,000 (amount subject to mortgage recording tax)

$80,000 + $100 = 800 x $1.00 (mortgage recording tax rate) =

$800 mortgage recording tax due

15) Question: In computing the additional tax, pursuant to section 253(2)(a) of the Tax Law, is the first $10,000 of principal debt or obligation excluded from taxation if the mortgage is on real property improved by <u>two or more</u> one- or two- family residences?

Answer: No. The first $10,000 of principal debt or obligation is excluded only if the mortgage is on real property that is or will be principally improved by <u>a</u> one- or two- family residence or dwelling. Thus if the mortgage covers real property improved by two or more one- or two- family residences or dwellings the $10,000 exclusion does not apply.

16) Question: Can a supplemental instrument or mortgage be recorded without the payment of mortgage tax, where the proper tax had been paid upon the recording of the prior mortgage, and such supplemental instrument or mortgage secures no new or further indebtedness?

Answer: Generally, yes. Pursuant to section 255 of the Tax Law, a supplemental instrument or mortgage may be recorded without payment of mortgage tax provided that such instrument or mortgage is recorded:

1) for the purpose of correcting or perfecting the prior recorded mortgage; or

2) pursuant to some provision or covenant in the prior recorded mortgage; or

3) for the purpose of imposing a lien upon property not originally covered by or not described in such recorded primary mortgage. However, pursuant to section 255(1)(b) of the Tax Law, if the supplemental instrument or mortgage is recorded in a county that imposes the additional tax and the recorded primary mortgage was recorded in a county that suspended the imposition of the additional tax, the recording officer of the county where the supplemental instrument or mortgage is recorded will collect the additional tax upon the principal indebtedness or obligation secured by the primary mortgage. In addition, pursuant to section 11-2601(f) of the Administrative Code of the City of New York, if the supplemental instrument or mortgage is recorded in any of the New York City counties and the recorded primary mortgage was recorded in a county other than a New York City county, the recording officer of the New York City county where the supplemental instrument or mortgage is recorded will collect the New York City mortgage recording tax upon the principal indebtedness or obligation secured by the primary mortgage.

Listed below are some examples of supplemental instruments or mortgages.

Example 1 - The correct tax is paid on a mortgage containing an error in the description of the property covered. A supplemental mortgage correcting the description may be recorded tax free.

Example 2 - The correct tax was paid upon recording of an executory contract for the sale of real property wherein the contract vendor (seller) agreed to convey title at a later date and take back a mortgage to secure the then unpaid balance of the purchase price. The mortgage given pursuant to the terms of the contract is a supplemental instrument within the meaning of section 255 Of the Tax Law.

Example 3 - A mortgage for $10,000 is recorded covering parcel A and the correct tax was paid. A supplemental mortgage or instrument spreading the lien of the original mortgage to Parcel B, so that the mortgage will cover both parcels A and B may be recorded tax free, subject to the provisions of section 255(1)(b) of the Tax Law and section 11-2601 of the Administrative Code of the City of New York as outlined in item number 3 above.

A supplemental instrument or mortgage is taxable to the extent of any new or further indebtedness or obligation secured.

17) Question: When a mortgage is presented for recording and an exemption from the mortgage recording tax is requested, are there any additional documents that must be filed with the recording officer?

Answer: At the time the mortgage is presented for recording, an affidavit, in duplicate, containing the facts on which the claim for exemption is based, must be filed with the recording officer. The affidavit may be made by the mortgagor or mortgagee or by a person who has knowledge of the facts. Provided, however, in cases where an exemption is claimed by a voluntary nonprofit hospital corporation, pursuant to section 253(3) of the Tax Law, the affidavit must be made by a duly authorized officer of the corporation and there shall be attached to the affidavit a certified copy of the certificate of incorporation and a copy of the certificate of the Public Health Council authorizing the corporation to operate as a hospital.

The Commissioner of Taxation and Finance and the recording officer reserve the right to request additional information to substantiate the right to claim an exemption.

18) Question: If the mortgage recording tax was erroneously paid, or if the mortgagor exercises a "statutory right of rescission" in accordance with section 257-a of the Tax Law, how is a refund obtained?

Answer: A refund may be obtained by filing with the Tax Department Form MT-15.1 - Mortgage Recording Tax Claim for Refund. The refund claim form (Form MT-15.1) shall contain the following information:

1) a description of the mortgage instrument;

2) the party or parties who paid the tax; and

3) the facts upon which the refund claim is based.

A complete copy of the recorded mortgage should be filed with Form MT-15.1.

If the basis for a refund claim is the exercise of a "statutory right of rescission" there shall be filed with the refund claim form a copy of the recorded satisfaction or discharge of the mortgage and an executed copy of the "Notice of Right to Cancel", in addition to the information and documents outlined in the preceding paragraph.

Form 15.1 must be filed within two years of the date of the erroneous payment of the tax or, in the case of a refund resulting from the exercise of a "statutory right of rescission", within two years of the date of the erroneous payment of the tax or one year from the date the mortgage was discharged.

Form MT 15.1 and copies of the required supporting documentation shall be mailed to the following address:

New York State Tax Department
Transfer and Gains Tax Section
Mortgage Recording Tax Unit
W. A. Harriman Campus, Building 9
Albany, NY 12227

If a refund is to be paid to the taxpayer's legal representative, a notarized consent or assignment is required from the mortgagor and/or mortgagee, if appropriate, consenting to the payment of the refund to the named recipient and such notarized consent or assignment shall be attached to Form MT 15.1.

Note: A "statutory right of rescission" means the right of a borrower (mortgagor) to rescind a consumer credit transaction in which a security interest, including a real property mortgage, is retained or acquired in any real property that is used, or is expected to be used, as a residence of the borrower.

FORMS REQUEST

If you need forms pertaining to the mortgage recording taxes call toll free (from New York State only) 1 800 462-8100. From areas outside New York State call (518) 438-1073.