

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

TSB-M-99(3)R
Mortgage Recording Tax
November 10, 1999

Declaratory Ruling Relating to Credit Line Mortgages

Reproduced below is Declaratory Ruling # 99-1, issued by Arthur Roth, Commissioner of Taxation and Finance, on November 9, 1999. This declaratory ruling, made pursuant to section 204 of the State Administrative Procedures Act, addresses the issue of whether a mortgage recording tax is due on the recording of a modification and extension agreement relating to a previously recorded credit line mortgage.

Department of Taxation and Finance
Declaratory Ruling #99-1
Tax Law Article 11, Section 253-b

A request has been received, pursuant to section 204 of the State Administrative Procedure Act, for a declaratory ruling on the issue of whether a mortgage recording tax is due on the recording of a modification and extension agreement relating to a previously recorded credit line mortgage. The Petitioner is an attorney who represents a lender who offers credit line mortgages to its customers.

Section 253-b of the Tax Law concerns credit line mortgages. Credit line mortgages of residential real property are commonly known as home equity lines of credit. Under subdivision one of section 253-b, when a credit line mortgage of real property principally improved or to be improved by a one to six family owner-occupied residence is recorded, a recording tax is paid on the maximum principal amount of the debt secured by the lien of the mortgage. Thereafter, no further tax is required to be paid on advances or readvances secured by the lien of that recorded credit line mortgage, provided that the advances or readvances are made to the original obligor or obligors in an amount not exceeding the maximum principal amount secured by the lien of the credit line mortgage. In the event that the maximum principal amount secured by the lien of a credit line mortgage is increased, a recording tax is required to be paid on that new or further indebtedness when the instrument evidencing that new or further indebtedness is recorded. Subdivision two of section 253-b defines a credit line mortgage as

... any mortgage or deed of trust, other than a mortgage or deed of trust made pursuant to a building loan contract as defined in subdivision thirteen of section two of the lien law, which states that it secured indebtedness under a note, credit agreement or other financing agreement that reflects the fact that the parties reasonably contemplate entering into a series of advances, or advances, payments and readvances, and that limits the aggregate amount at any time outstanding to a maximum amount specified in such mortgage or deed of trust.

Typically, a home equity line of credit agreement provides that the borrower may obtain loan advances up to the specified maximum principal amount for a period of time, e.g., 10 years. This period of time is commonly described as the "draw period". During the draw period, the borrower

is generally required to make certain minimum monthly payments on this loan. If the borrower has not borrowed the maximum principal amount, or if the lender has advanced the maximum amount but the borrower has reduced or paid off the outstanding balance of the loan, the borrower may obtain additional advances. In no event may the total principal amount of the loan outstanding at any one time exceed the maximum principal amount. The line of credit may or may not provide an option for the lender to extend this draw period. After the draw period ends, the repayment period begins. During the repayment period, the borrower is no longer able to obtain additional loan advances or readvances and is making principal and interest payments on the outstanding balance of the loan.

The issue raised in this declaratory ruling is whether the recording of an agreement which modifies and extends the draw period and allows the borrower to obtain additional advances and readvances for another period of time, e.g., an additional ten years, (hereinafter referred to as the "modification and extension agreement") is subject to the mortgage recording tax. The answer to that issue is dependent on several circumstances.

If the draw period is concluded or otherwise terminates before the modification and extension agreement is executed, so that the borrower no longer has the right to obtain advances and readvances, the modification and extension agreement will be treated as evidencing a new or further debt or obligation. A mortgage recording tax will be required to be paid on the recording of that modification and extension agreement, based on the maximum principal amount that may be advanced to the borrower under the terms of that agreement. If the modification and extension agreement is executed but not recorded, the provisions of section 258 of the Tax Law (regarding the effect of nonpayment of taxes) would be applicable.

The terms of the original recorded credit line mortgage and/or underlying loan documentation may explicitly provide for an extension of the draw period. In the alternative, the credit line mortgage and/or underlying loan documentation may authorize the lender and borrower to agree in writing to a change in the terms of the agreement. Such a change may include an extension of the draw period. If the draw period has not concluded and the terms of the original recorded credit line mortgage and/or the underlying loan documentation provided that the draw period may be extended (either explicitly or through a "change in terms" provision described above), the modification and extension agreement will be considered to be a supplemental mortgage. The modification and extension agreement is a supplemental mortgage because it is entered into and executed pursuant to the provision of the original recorded mortgage and secures no new or further debt or obligation. Instead, the modification and extension agreement simply recasts the existing draw period over an extended period of time. As a supplemental mortgage, pursuant to section 255 of the Tax Law, no mortgage recording tax will be due when the modification and extension agreement is recorded, provided that the maximum principal amount secured by the lien of the credit line mortgage is not increased.

If the draw period has not concluded, but the terms of the original recorded credit line mortgage and the underlying loan documentation (either explicitly or through a "change in terms"

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provision described in the paragraph above) did not provide for a possible extension of the draw period, the modification and extension agreement will be treated as evidencing a new or further debt or obligation. The original credit line mortgage contemplated a series of advances and readvances for a defined finite period of time. The modification and extension agreement provides for advances and readvances over a newly defined period of time which were not contemplated or secured by the original credit line mortgage at the time it was recorded. As such, the modification and extension agreement is a new agreement which evidences a new or further indebtedness or obligation to be secured by the lien of the credit line mortgage, as modified and extended. A mortgage recording tax will be required to be paid on the recording of the modification and extension agreement, based on the maximum principal amount that may be advanced to the borrower under the terms of that agreement.

This declaratory ruling concerns a legal issue of first impression which has not been addressed previously by the Department of Taxation and Finance. Consequently, lenders were not provided with any guidance on how to structure their credit line mortgage transactions so that a new or further indebtedness or obligation would not be created upon the extension of the draw period. In light of the uncertainty that has existed with regard to the legal issues addressed in this declaratory ruling, and the consequent administrative difficulties experienced by lenders, the Department of Taxation will apply this declaratory ruling only to credit line mortgages first recorded on or after April 1, 2000. Modification and extension agreements relating to credit line mortgages which were recorded before April 1, 2000 may be recorded without the payment of any additional mortgage recording taxes, provided that the maximum principal amount secured by the lien of the credit line mortgage is not increased. If the maximum principal amount is increased, additional tax will be due upon the recording of the modification and extension agreement.

Dated: Albany, New York
November 9, 1999

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Arthur Roth
Commissioner of Taxation and Finance