New York State
Department of
Taxation and Finance
Taxpayer Guidance Division

Tax Bulletin
Mortgage Recording Tax
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Mortgage Recording Tax on Mortgage Transactions After a Deed in Lieu of Foreclosure

Introduction

This bulletin explains that mortgages assigned, modified, or otherwise transacted after the mortgaged property has been transferred by a deed in lieu of foreclosure are treated as new mortgages. Mortgage recording tax must be paid on the full amount of the debt secured when the new mortgage is recorded.

Summary of tax provisions

Mortgage recording tax is imposed and must be paid when a mortgage is recorded. The tax is based on the principal amount of debt or obligation that is secured, or that may be secured, by the mortgage when it is executed. Once a mortgage is recorded and the proper tax has been paid, a supplemental instrument may be recorded for the purposes described in section 255.1(a)(i) of the Tax Law without payment of additional mortgage recording taxes, unless it creates or secures a new or further indebtedness or obligation.

Discussion

When a mortgage debt is in default, a mortgagee (lender) may enforce its lien by pursuing a foreclosure action. Under this process, upon the sale of the property by the referee in the mortgage foreclosure action, the property is transferred to the successful bidder (which may or may not be the lender) and the mortgage lien is extinguished.

In certain circumstances, the parties may mutually agree that the mortgagor (borrower) will transfer the mortgaged property to the mortgagee by a deed in lieu of foreclosure. Sometimes, instead of the mortgagee taking title to the property, it is transferred to the mortgagee's nominee.

As consideration for the deed in lieu of foreclosure, the mortgagee may forgive the mortgage debt. In many instances, the lender will not cancel the note, but will instead give the borrower a covenant not to sue and will keep the mortgage alive and not discharge or release it until the property is subsequently resold.

Logically, when a mortgagee (or nominee) takes title to the property by deed in lieu of foreclosure, and either discharges the mortgage or agrees not to sue for the collection of the mortgage debt, the mortgage ceases to secure a bona fide debt. For mortgage recording tax purposes, there is no longer any bona fide debt to assign, modify, or otherwise transact. Accordingly, when a mortgage ceases to secure a bona fide debt, a subsequent instrument that purports to assign, modify, or consolidate the mortgage may not be treated as a supplemental mortgage pursuant to Section 255 of the Tax Law, and may not be recorded without payment of mortgage recording taxes on the full amount of the debt secured.

Note: A Tax Bulletin is an informational document designed to provide general guidance in simplified language on a topic of interest to taxpayers. They are accurate as of the date issued. However, taxpayers should be aware that subsequent changes in the Tax Law or its interpretation may affect the accuracy of a Tax Bulletin.

References and other useful information

Tax Law: Sections 253 and 255

Real Property Law: Section 275

Regulations: Sections 642 and 645

Memoranda:

TSB-M-89(6.1)R, *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*