

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-00(1)R  
Mortgage Recording Tax  
February 25, 2000

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M991230A

On December 30, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Joseph Philip Forte, Esq., on behalf of the New York State Bar Association-Real Property Law Section, One Elk Street, Albany, New York 12207-1096. On January 13, 2000, Petitioner, Joseph Philip Forte, Esq., submitted a Petition for Advisory Opinion, and requested that the subsequent Petition replace the one received on December 30, 1999.

The issues raised by Petitioner, based on the facts described in this Petition, are:

(1) whether mortgage recording taxes imposed or authorized to be imposed by Article 11 of the Tax Law would be applicable in connection with a refinancing of a debt, evidenced by an existing note and secured by a primary recorded mortgage where the existing note and mortgage were assigned by a Trustee under a Commercial Mortgage Backed Securities Trust (the "REMIC" Trust) to a new lender in exchange for a Defeasance Note and Security Agreement (the "Defeasance"); and

(2) whether the assignment of the mortgage as described in issue (1) would result in a finding that a supplemental instrument or mortgage (as defined in Section 255 of the Tax Law and Section 645.1 of the Mortgage Recording Taxes Regulations) recorded either simultaneously with, or subsequent to, the recording of the assignment of the mortgage is entitled to be recorded without payment of further mortgage recording taxes.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

An original borrower ("Original Borrower") currently owes a balance due under a note secured by the lien of a recorded mortgage (the "Mortgage") upon which the proper amount of mortgage recording taxes had been paid. Immediately prior to the consummation of the transactions described in this Petition, the Mortgage is owned by a REMIC Trust. Original Borrower executes a new note (the "Defeasance Note"), dated as of the date of the defeasance, payable to the lender providing the new financing (the "New Lender"), in an amount equal to the outstanding principal balance of the note secured by the Mortgage. The new financing will be used to purchase U.S. Treasury Securities. The Defeasance Note is otherwise identical to the note secured by the Mortgage (e.g., interest rate, maturity, etc.) except that it states that it is secured by U.S. Treasury securities as the defeasance collateral and the security agreement required under the existing loan documents (the "Security Agreement"). The Security Agreement names the New Lender as secured party and creates a perfected first priority security interest in the defeasance collateral. A new entity will be created which must be a newly formed special purpose entity that is not susceptible to substantive

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consolidation with Original Borrower in the event of bankruptcy of Original Borrower. Upon transfer of the U.S. Treasury Securities to this new entity, referred to as "Successor Borrower", it will agree to assume the Defeasance Note and the Security Agreement.

The Defeasance Note, endorsed to the Trustee of a REMIC Trust, the Security Agreement (and any related UCC filings), an assignment of each to the Trustee of the REMIC Trust, an assumption of the Defeasance Note and the Security Agreement (the "Assumption") by the Successor Borrower as permitted in the existing loan documents and the defeasance collateral (together with the appropriate transfer documentation for the defeasance collateral to the Successor Borrower) would be delivered to a title insurance company acceptable to the Trustee and the New Lender (the "Title Company"), in escrow. The note secured by the Mortgage, (the "Mortgage Note") endorsed to the New Lender, together with such Mortgage and an assignment thereof to the New Lender would be delivered by the Trustee of the REMIC Trust to the title company, to be held in escrow.

Upon compliance with the conditions to (a) release of escrow, (b) the closing of the new Loan, and (c) the defeasance pursuant to the existing loan documents, the title company would deliver (i) the Defeasance Note, the Security Agreement, the Assumption and the related transfer and assignment documents to the Trustee of the REMIC Trust, (ii) the defeasance collateral to the Successor Borrower, subject to the REMIC Trust's security interest, and (iii) the Mortgage Note, Mortgage and assignments to the New Lender, and the assignment (and other loan documents in connection with the new Loan) would be recorded.

After the release of escrow, (a) Original Borrower will continue to be liable under the Mortgage Note and Mortgage but this liability will now run to the New Lender; (b) the Successor Borrower will have assumed liability under the Defeasance Note and Security Agreement and (c) Original Borrower would be released from liability under the Defeasance Note and the Security Agreement. Thus, Original Borrower under the Mortgage Note would continue to be liable for only one loan that is evidenced by the Mortgage Note secured by the Mortgage, while the Successor Borrower would be liable only under the Defeasance Note and the Security Agreement. At no time in the sequence of the steps to accomplish this transaction will the amount secured under the Mortgage include the amount due under the Defeasance Note.

### **Applicable Law and Regulations**

Subdivisions 1, 1-a and 2 of Section 253 of the Tax Law impose taxes on the recording of a mortgage of real property in the State measured by the principal debt or obligation, which is, or under any contingency, may be secured at the date of the execution thereof or at any time thereafter.

Section 255.1(a) of the Tax Law provides, in part:

If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article, except as otherwise provided in paragraph (b) of this subdivision, unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided in section two hundred and fifty-three of this chapter on such new or further indebtedness or obligation.

Section 258 of the Tax Law provides, in part:

1. No mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the taxes imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article.....

Section 645.1(a) of the Mortgage Recording Taxes Regulations provides:

A supplemental mortgage is an additional instrument or mortgage which is recorded subsequent to the recording and prior to the discharge or satisfaction of a prior primary mortgage on which all taxes, if any, accrued under article 11 of the Tax Law have been paid, the terms of which make reference to the prior recorded primary mortgage, and which is given and recorded:

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

(2) pursuant to some provision or covenant in such prior recorded primary mortgage;

(3) for the purpose of providing additional or further security for the payment of the principal debt or obligation secured by the prior recorded primary mortgage by

spreading the lien of the prior recorded primary mortgage to additional real property or by imposing a new lien on such additional real property (see section 645.2(c), (d), (e) or (f) of this Part); or

(4) for the purpose of coordinating or consolidating the liens of prior recorded primary mortgages to form a single and coordinate equal lien; or

(5) for the purpose of modifying a prior recorded primary mortgage, for reasons including but not limited to the following:

(i) adjusting the term for the payment of the debt secured by the prior recorded primary mortgage;

(ii) changing the interest rate on the debt secured by the prior recorded primary mortgage;

(iii) substituting a new mortgagor for the mortgagor;

(iv) substituting a new mortgagee for the mortgagee due to an assignment of the mortgage;

(v) evidencing a change in the amount of debt or obligation which is secured or which under any contingency may be secured by the prior recorded primary mortgage; or

(6) for the purpose of severing the lien(s) of a prior recorded primary mortgage or mortgages into separate liens.

Section 275 of the Real Property Law provides as follows:

#### Certificate of discharge of mortgage required

1. Whenever a mortgage upon real property is due and payable, and the full amount of principal and interest due on the mortgage is paid, a certificate of discharge of mortgage shall be given to the mortgagor or person designated by him, signed by the person or persons specified in section three hundred twenty-one of this chapter. The person signing the certificate shall within thirty days thereafter, arrange to have the certificate presented for recording to the officer of the county where the mortgage is recorded. The provisions of this section shall not apply to any mortgage granted or made by the State of New York, or any agency or instrumentality thereof or any political subdivision of the state, or any agency or instrumentality thereof.

2. For purposes of this section, the full amount of principal and interest due on a mortgage shall not be considered to be paid whenever such mortgage continues to secure a bona fide debt and an enforceable lien continues to exist, such as may occur in the following situations:

(a) the commercial practice of lenders trading or selling mortgages on the secondary market;

(b) the replacement of a construction loan with permanent financing;

(c) the refinancing of an existing loan with a new lender, such as where the original lender assigns a note and the mortgage securing its payment to another lender in return for consideration and such mortgage is consolidated with another mortgage which secures any funds advanced by the new lender to the mortgagor;

(d) the modification of the terms of a loan by a mortgagor and mortgagee in order to avoid foreclosure; and

(e) a refinancing that occurs in conjunction with the sale of property such that the seller conveys property to the purchaser subject to the lien of the mortgage and the original lender assigns its note and mortgage on the property to the purchaser's lender.

3. Except with respect to the assignment of a mortgage in connection with a transaction described in paragraph (a) of subdivision two of this section, 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 such other party 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. With respect to the assignment of a mortgage in connection with a transaction described in paragraph (a) of subdivision two of this section, such assignment shall contain the following statement: "This assignment is not subject to the requirements of section two hundred seventy-five of the Real Property Law because it is an assignment within the secondary mortgage market.

### **Opinion**

Once a mortgage has been given and recorded, the recorded primary mortgage may be changed by a supplemental mortgage and, ... no additional mortgage recording taxes will be due as long as the amount secured remains the same. See City of New York v. State Tax Commission, 130

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A.D. 2d 890, 891. Were the indebtedness secured by a lien to be reduced or the lien terminated for any reason, tax would be due on any increase on the new obligation. See Matter of Rednow Realty Corp. v. Tully, 72 A.D. 2d 621, 622.

In City of New York v. Procaccino, 46 AD2d 594, 364 NYS2d 582 (3d Dept 1975) the Court held that a supplemental mortgage will be exempt from any additional mortgage recording tax if it involves no new principal obligation or mortgage debt but merely consolidates an existing secured debt.

The recording of an assignment of a note and mortgage is not subject to the mortgage recording taxes since an assignment, in and of itself, does not constitute a mortgage within the meaning and intent of Article 11 of the Tax Law. See Matter of the Application of Joseph A. DeLorenzo, Decision of the State Tax Commission, December 8, 1976 and The City University of New York, Adv Op Comm T&F, August 22, 1986, TSB-A-86(1)M.

### **Issue 1**

Prior and immediately subsequent to the assignment of the Mortgage to the New Lender, such Mortgage secures a bona fide indebtedness. The facts of this Petition demonstrate that the Mortgage and its underlying note have not become due and payable and paid in full so as to prevent the recording of the assignment to the New Lender under Section 275 of the Real Property Law. This result is not affected by the fact the New Lender pays consideration for the assignment of the Mortgage in the form of the Defeasance Note and Security Agreement rather than the more traditional cash consideration. More generally, a mortgage can be assigned either for cash or any other bona fide consideration and, provided the mortgage continues to secure a bona fide indebtedness, the mortgage may be assigned in conformity with Section 275 of the Real Property Law. Furthermore, under the facts as presented in this Petition, the Mortgage remains, prior and immediately subsequent to the assignment of the Mortgage to the New Lender, a mortgage upon which the proper taxes had been paid, free of the enforcement provisions of Section 258 of the Tax Law. Also, as set forth in Matter of the Application of Joseph A. DeLorenzo and The City University of New York, *supra*, the recording of an assignment of a mortgage, in and of itself, is not subject to the mortgage recording taxes.

### **Issue 2**

As set forth in the opinion at Issue 1, Section 275 of the Real Property Law and Section 258 of the Tax Law would not prevent the recording of the assignment of the Mortgage and the underlying note to the New Lender. In following, once the assignment is recorded, an instrument which is considered a supplemental mortgage with respect to the Mortgage, as set forth in Section 255.1(a) of the Tax Law and as defined in Section 645.1(a) of the Mortgage Recording Taxes Regulations, can be recorded without further payment of mortgage recording taxes unless such

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instrument creates or secures a new or further indebtedness other than the indebtedness secured by the Mortgage. Based upon the facts as set forth in this Petition, it is concluded that the Mortgage, as assigned to the New Lender, at all times, continues to secure the same principal debt or obligation as secured immediately prior to the consummation of the transactional steps described in this Petition. As the Mortgage continues to secure the same principal debt or obligation, the recording of a supplemental mortgage, either simultaneously with, or subsequent to, the recording of the assignment of the mortgage, as described in this Petition, would be taxable only to the extent the supplemental mortgage secured an amount in addition to the unpaid principal debt or obligation secured by the Mortgage as assigned to the New Lender.

DATED: February 25, 2000

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions  
are limited to the facts set forth therein.