



## Advisory Opinion: TSB-A-20(1)R

The Department of Taxation and Finance received a Petition for Advisory Opinion from [ REDACTED ] ("Petitioner"). Petitioner asks whether the mortgage recording tax (MRT) must be paid to record an Agreement for Modification, Re-Amortization, or Extension of a Mortgage ("the Agreement") which was intended to replace a previously recorded mortgage (the prior mortgage) that was erroneously discharged.

We conclude that the recording taxes must be paid when the Agreement is filed because the prior mortgage was discharged before the Agreement was recorded.

## Facts

Petitioner is a federal credit union that, due to a clerical error, submitted an erroneous Discharge of Mortgage to the County Clerk for recording. The prior mortgage was stamped paid on September 30, 2016. The discharge was signed by the Assistant Treasurer of the Credit Union on October 4, 2016, and recorded on October 12, 2016. To correct the error, the Petitioner prepared the Agreement, which incorporates all the terms of the discharged prior mortgage (with slight alterations removing references to the "paid" nature of the instrument). A copy of the discharged mortgage is attached to the Agreement. The Agreement secures the same amount of indebtedness as the debt originally secured by the prior mortgage signed on July 6, 2015. The Agreement further states that it is "a substitute and/or supplemental mortgage with the meaning of the New York Tax Law Section 255." To date, Petitioner has not recorded the Agreement. Petitioner asks whether MRT is due when the Agreement is recorded.

## Analysis

Tax Law § 253 imposes a MRT on the recording of a mortgage on real property located in New York State. The amount of the tax is based on the amount of principal debt or obligation that is or may be secured by the property. When a mortgage is recorded, it becomes a part of the public record. After a discharge, the mortgage would no longer be enforceable by a New York court action or proceeding.

Petitioner asserts that the Agreement is a supplemental mortgage under Tax Law § 255. Section 255 provides in part that if, subsequent to the recording of a mortgage on which all taxes accrued have been paid, a supplemental mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, such additional mortgage will not be subject to taxation unless it creates or secures new debt or further indebtedness. Department of Taxation and Finance regulation 20 NYCRR 645.1(a) provides the following: "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..." (*Emphasis added.*)

The regulatory requirement that the supplemental mortgage be recorded prior to the discharge of the prior primary mortgage is consistent with judicial decisions interpreting Tax Law §255. In *Sverdlow v Bates* (283 AD 487 (3d Dept. 1954)), the Court held that mortgage recording tax was due “...merely because of the fact that the old mortgages had been discharged and new mortgages had been given...” (283 AD at 490). Further, in *Citibank N.A. v State Tax Commission*, 98 AD2d 929 (3d Dept. 1983), the Court stated that

“...the statute requires that in order to be exempt from a further recording tax, an additional mortgage must be ‘for the purpose of securing the principal indebtedness which *is* ...secured by such recorded mortgage...’ (Tax Law §255 [emphasis added]). The use of the present tense for the requirement that both mortgages secure the same original indebtedness similarly presumes the present, and not previous, existence of the original mortgage at the time of recordation of the subsequent one.” 98 AD2d at 930-931.

Because the Agreement would be recorded after the discharge of the original mortgage, it does not qualify as a “supplemental mortgage” and mortgage recording tax must be paid when it is recorded.

DATED: December 1, 2020

/s/

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**Note:** An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.