

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

TSB-A-99(2)R
Mortgage Recording Tax
April 7, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M981215A

On December 15, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Michael J. Berey, Senior Vice-President and Senior Underwriting Counsel, First American Title Insurance Company of New York, 228 East 45th Street, New York, NY 10017. Additional information related to the Petition was received on February 12, 1999.

The issues raised by Petitioner, Michael J. Berey, are:

(1) Whether a mortgage, in the principal amount of less than \$3 million, executed to secure the repayment of advances and re-advances made to reimburse the borrower for expenses incurred in making improvements upon real property and without the execution of a building loan agreement would qualify as a credit line mortgage;

(2) Whether a mortgage, in the principal amount of less than \$3 million, executed to secure the repayment of advances and re-advances made to fund – but not reimburse the borrower for – the making of improvements upon real property and without the execution of a building loan agreement would qualify as a credit line mortgage;

(3) If the answer in issue (2) is that such a mortgage would qualify as a credit line mortgage, whether such mortgage would still qualify if the mortgage or other loan documents contains an express promise to make an improvement upon real property.

Petitioner presents the following facts. Counsel to First American are often asked for guidance on the application of the mortgage recording tax imposed pursuant to Article 11 of the Tax Law. Inquiries have been made as to the application of Section 253-b of Article 11, concerning credit line mortgages, to mortgages securing advances and re-advances of funds made in connection with the making of improvements on one or more parcels of real property where no "building loan agreement" is executed under the Lien Law.

Petitioner states that a mortgage loan will be executed and that the mortgage or the documents related to such mortgage will recite that the funds are to be advanced and re-advanced either:

(i) to reimburse the borrower for expenses incurred in making improvements upon real property; or

(ii) to fund the making of improvements upon real property.

Petitioner states that, in either case, no formal building loan agreement will be executed.

Applicable Law

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

Subdivision (1) of section 253-b of the Tax Law provides, in part:

In the case of a mortgage which is a credit line mortgage . . . of real property principally improved or to be improved by a one to six family owner-occupied residence or dwelling, the principal debt or obligation which is or under any contingency may be secured at the date of execution of such mortgage or at any time thereafter within the meaning of this article shall mean the maximum principal amount specified in such mortgage. If the tax imposed by and pursuant to the authority of this article is paid on such maximum principal amount, no further tax shall be payable on advances or readvances by the lender pursuant to the recorded primary mortgage, provided such advances or readvances are made to the original obligor or obligors named in such recorded primary mortgage. . . .

Subdivision (1-a) of such section 253-b provides:

In the case of a mortgage which is a credit line mortgage, as defined in subdivision two of this section, of property other than real property principally improved or to be improved by a one to six family owner-occupied residence or dwelling, and where such mortgage is of an amount less than three million dollars, the tax imposed by and pursuant to the authority of this article shall be imposed and paid pursuant to the provisions of subdivision one of this section.

Subdivision (2) of such section 253-b provides, in part:

For the purposes of this section, a 'credit line mortgage' shall mean 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 secures 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. . . .

Subdivision (13) of section 2 of the Lien Law provides, in part:

The term 'building loan contract' . . . means a contract whereby a party thereto, in this chapter termed 'lender,' in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property. . . .

Conclusions

With regard to issue (1) raised by Petitioner, a mortgage executed to secure the repayment of advances and re-advances made to reimburse the borrower for expenses incurred in making improvements upon real property would not qualify as a credit line mortgage because such mortgage would be made pursuant to a "building loan contract." Also, because the mortgage in question is not a credit line mortgage, whether the principal amount of the mortgage is greater or less than \$3 million is not relevant.

In the situation described by Petitioner, the mortgage, or the documents related to such mortgage, will recite that the funds are to be advanced and re-advanced to reimburse the borrower for expenses incurred in making improvements upon real property. The limiting conditions of the mortgage, or the documents related to such mortgage, regarding the advance and re-advance of funds constitute an "express promise" of the borrower to make improvements to real property; *i.e.*, the mortgage funds will not be advanced, nor may the funds be used, for any purpose other than to reimburse the borrower for making such improvements. Therefore, the mortgage is made pursuant to a "building loan contract," as defined by section 2(13) of the Lien Law, and does not qualify as a credit line mortgage under section 253-b of the Tax Law.

With regard to issue (2) raised by Petitioner, a mortgage executed to secure the repayment of advances and re-advances made to fund the making of improvements upon real property would not qualify as a credit line mortgage because such mortgage would be made pursuant to a "building loan contract." Also, because the mortgage in question is not a credit line mortgage, whether the principal amount of the mortgage is greater or less than \$3 million is not relevant.

Similar to the conclusions reached regarding issue (1), the limiting conditions of the mortgage, or the documents related to such mortgage, regarding the advance and re-advance of funds constitute an "express promise" of the borrower to make improvements to real property. Because the mortgage funds will not be advanced, nor may the funds be used, for any purpose other than to fund the making of improvements upon real property, the mortgage is made pursuant to a building loan contract and does not qualify as a credit line mortgage.

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Issue (3) raised by Petitioner is moot, since the mortgage described in issue (2) does not qualify as a credit line mortgage. It should be noted that section 253-b(2) of the Tax Law looks only to the Lien Law definition of "building loan contract." The mortgage recording tax does not look to any further provisions of the Lien Law, or to any actions taken thereunder (*e.g.*, the execution of a formal building loan agreement), to determine if a given mortgage qualifies as a credit line mortgage. If a mortgage is made pursuant to a building loan contract, it cannot qualify as a credit line mortgage; if a mortgage is not made pursuant to a building loan contract, it may qualify as a credit line mortgage as long as such mortgage meets the other requirements of section 253-b of the Tax Law.

DATED: April 7, 1999

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

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