

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

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Tax on Mortgages  
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Liability for Payment of the Special Additional Mortgage  
Recording Tax Imposed by Section 253.1-a of the Tax Law

Article 11 of the Tax Law imposes certain taxes on the recording of a mortgage. With the exception of the special additional mortgage recording tax imposed by section 253.1-a of the Tax Law, the law does not specify who must pay the tax.

Generally, section 253.1-a provides that the special additional mortgage recording tax is payable by the mortgagee (lender) and that it shall not be paid or payable either directly or indirectly by the mortgagor (borrower) in cases where the real property covered by the mortgage is principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each unit having its own cooking facilities, unless the mortgagee is exempt under paragraph (b) of section 253.1-a (this provision is referred to as the "anti-pass through" provision). Existing case law makes it clear that this tax must be paid by the lender and cannot be passed on in the case of the recording of a mortgage on the type of real property described above. In State v. Intercounty Mortgagee Corp., 87 AD2d 748, appeal dismissed, 57 NY2d 954, motion for leave to appeal denied, 61 NY2d 601, the court required the mortgagees to make restitution to any party who had paid the tax.

On January 15, 1992, the Appellate Division, Second Department, in The Dime Savings Bank of New York, FSB, v. The State of New York, 174 AD2d 173, held that the anti-pass through provision of the special additional mortgage recording tax was in conflict with a federal regulation (12 CFR 545.32 (b)(5)) and was thus unenforceable against federal savings associations (including federal savings banks). The regulation at issue permitted federal savings institutions to require the borrower "to pay necessary initial charges connected with making a loan, including the actual costs of title examination, appraisal, credit report, survey, drawing of papers, loan closing and other necessary incidental services and costs." The court further stated that the plaintiff, Dime Savings Bank, was entitled to a judgment enjoining enforcement of the anti-pass through provision against it.

Procedurally, in Dime Savings Bank, the Appellate Division remitted the case to State Supreme Court for trial on other issues. The State is thus precluded from appealing the order at this time pending determination by the Supreme Court of these other issues. However, the Department will appeal the Appellate Division's 3-2 decision after the State Supreme Court has concluded its proceedings.

It should be emphasized that the total amount of tax due remains unchanged. Each recorded mortgage made to a federal savings association (including federal savings banks) continues to be subject to the special additional mortgage recording tax, as well as the other applicable taxes, imposed by and pursuant to the authority of Article 11 of the Tax Law unless the recording of the mortgage is exempt from the taxes pursuant to an exemption provided by Article 11 or some other statute.

If the Appellate Division's decision is reversed, the only remedy available to compensate borrowers, sellers or other parties who paid the special additional mortgage recording tax will be restitution from the lenders. Refund applications for the special additional mortgage recording taxes paid will be denied by the Department.