

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

TSB-M-81 (4)M  
Stock Transfer Tax  
October 29, 1981

SUBJECT: Interest on Refunds  
TO: State Tax Commission OFFICE: Bureau of Law  
FROM: Ralph J. Vecchio, Deputy Commissioner & Counsel DATE: July 30, 1980

Attached is a copy of an April 25, 1980 decision of Justice Denman, Supreme Court, Erie County which held that interest should be paid on the refund of mortgage recording tax ordered by the State Tax Commission in its March 17, 1978 decision.

The Attorney General has filed a Notice of Appeal in this matter on behalf of the Commission. The Erie County Clerk has also appealed and has filed Notice of Cross Appeal.

On June 27, 1969, as mortgagor, presented a mortgage with a national bank, to the Erie County Clerk for recording. The clerk refused to record without payment of \$200,000 in mortgage recording tax which amount was then paid under protest and the mortgage recorded. Review by the Commission was applied for on October 24, 1969 but no decision was issued until March 17, 1978.

Article 11 of the Tax Law which imposes the Tax on Mortgages provides for refund of tax erroneously collected but is silent with respect to the payment of interest on refunds. The Commission in accordance therewith did not order payment of interest.

Justice Denman determined that the case at hand was not one of erroneous collection but rather a case of an unconstitutional application of a tax statute. Accordingly, the Court's equity powers were invoked and payment of 3% interest was ordered. She relied on the eight-year period of retention of the tax, the delay in the rendering of the Commission's determination and the Commission's knowledge of the then unconstitutionality of applying the tax to a national bank.

The Justice cites First National City Bank v. City of New York 43 AD 2d 823, aff'd., mod'f'd., 36NY2d87, which involved the payment under protest by a national bank of the New York City commercial occupancy tax, for the proposition that where the tax, as applied to the bank, is unconstitutional there can be no reliance on refund provisions denying interest. Accordingly, the court ordered payment of 3% interest, for periods not barred by the statute of limitations.

In that case, Brodsky v. Murphy 25NY2d518 and Matter of O'Berry 179NY285 are cited. In Brodsky the Commission was sustained where it was determined that the taxpayer was due no interest on mortgage recording taxes collected under a valid statute erroneously interpreted.

It is my opinion that First National City Bank, read conjunction with other Court of Appeals decisions, indicates that the Court will award interest, despite the absence of provisions therefor, where statutes are either determined to be unconstitutional or unconstitutionally applied. Such circumstances are viewed as being outside "erroneously collected" tax on which interest will not be due. In concert with the surrounding factual situation and the limited instances in which this situation will arise, it is my recommendation that no appeal be taken.

s/ Ralph J. Vecchio  
Deputy Commissioner and Counsel

s/James H. Tully, Jr.  
Commissioner Tully

Appeal \_\_\_\_\_ No Appeal   X  

s/Thomas H. Lynch  
Commissioner Lynch

Appeal \_\_\_\_\_ No Appeal   X  

s/Francis R. Koenig  
Commissioner Koenig

Appeal \_\_\_\_\_ No Appeal   X