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## **Advances Secured by a Mortgage Executed Under a Confirmed Plan of Reorganization in Bankruptcy**

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Mortgages made pursuant to a confirmed plan under section 1129 of Chapter 11 of the Bankruptcy Code are exempt from the mortgage recording tax. This tax bulletin addresses whether readvances secured by a mortgage executed under a confirmed plan of reorganization in bankruptcy may be made after the debtor is discharged without those readvances being subject to the mortgage recording tax.

To understand how the exemption applies, it is necessary to review when the mortgage recording tax is imposed. In general, mortgage recording tax is paid at the time of recording based on the principal amount of debt or obligation secured or that may be secured by the mortgage. In the case of a mortgage securing a debt that provides for future advances, payments, and readvances, the mortgage recording tax is based on the maximum principal amount that may be secured by the mortgage on or after the date of execution. Except for certain mortgages described in section 253-b of the Tax Law, further mortgage recording tax must be paid upon the recording or filing of any instrument evidencing amounts advanced or readvanced when the aggregate amount advanced or readvanced exceeds the maximum principal amount used to compute the tax.

The bankruptcy exemption applies upon the recording of a mortgage approved under a confirmed plan, and also applies to the recording of any instruments evidencing advances secured by the mortgage that are necessary for the completion of the plan. Whether advances are necessary for the completion of the plan depends on the facts and circumstances in each case. As a general rule, advances made through the date of the final decree closing the bankruptcy case are presumed to be exempt. Unless it can be shown that they are necessary for the completion of the confirmed plan of bankruptcy, advances made after the final decree are subject to the mortgage recording tax upon the recording or filing of any instrument evidencing the amounts advanced or readvanced.

*Example: As part of a confirmed plan of reorganization under section 1129 of Chapter 11 of the Bankruptcy Code, a debtor enters into a mortgage with a lender securing a revolving loan with a credit limit of \$20 million. The revolving credit line is intended to cover continuing operating expenses such as payroll, accounts payable, and other expenditures. The mortgage is properly recorded without the payment of mortgage recording tax. After the closing, funds are advanced, paid down, and readvanced several times but the balance outstanding at any one time never exceeds the credit limit of \$20 million. As of the date of the final decree closing the bankruptcy case, the aggregate advances and readvances equal \$55 million. Since all of these advances are made prior to the final decree, they are presumed to be exempt from mortgage recording tax. After the date of the final decree, the debtor has emerged from bankruptcy and all advances under the revolving loan agreement are subject to mortgage recording tax.*

### **Unrecorded advances that are not exempt under section 1129 of Chapter 11 of the Bankruptcy Code**

Mortgage recording tax is not payable until an instrument evidencing a taxable advance is recorded. However, the proper mortgage recording tax must be paid on advances that are not exempt under section 1129 of Chapter 11 of the bankruptcy code. If the proper tax is not paid, the provisions of section 258 of the Tax Law would apply. Specifically,

section 258 provides that if the proper mortgage recording tax has not been paid on any mortgage that is subject to tax, the mortgage may not be released, discharged, received into evidence, extended, or assigned.

Note: A Tax Bulletin is an informational document designed to provide general guidance in simplified language on a topic of interest to taxpayers. It is accurate as of the date issued. However, taxpayers should be aware that subsequent changes in the Tax Law or its interpretation may affect the accuracy of a Tax Bulletin. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

**References and other useful information**

**Tax Law:** Sections 250(2)(b); 252; 253-b; and 258

**Regulations:** Sections 644.1(b)(3); 647.1; 647.2; 647.3; and 647.4

**Memoranda:**

[TSB-M-89\(6.1\)R](#), *Amendments to Article 11 of the Tax Law and sections 275 and 339-ee of the Real Property Law by Chapter 241 of the Laws of 1989*

**US Code:** Sections 1129 and 1146(a)