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Mortgage Recording Tax
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Mortgages Partially Securing Multiple Debts or Obligations

This tax bulletin explains how the mortgage recording tax is applied to mortgages partially securing multiple debts or obligations when the amounts secured by those mortgages are subject to a cap, a provision specifying the maximum amount that may be secured.

Summary of tax provisions

Mortgage recording tax is imposed and must be paid when a mortgage is recorded. The tax is based on the principal amount of debt or obligation that is secured, or that may be secured, by the mortgage when it is executed.

In addition, when all or part of the indebtedness secured by a mortgage has been paid, and new funds on which mortgage recording tax has not been paid are advanced or re-advanced and will be secured by the mortgage, additional mortgage recording tax must be paid on the recording of an instrument evidencing those new amounts.

In the case of a revolving credit line mortgage (a mortgage securing a debt that provides for future advances, payments, and re-advances), 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. If the aggregate amounts advanced or re-advanced exceed the maximum principal amount used to compute the tax, additional mortgage recording tax must be paid when any instrument evidencing those amounts is recorded or filed (except for certain credit line mortgages described in section 253-b of the Tax Law).

Generally, a mortgage is not enforceable unless the proper mortgage recording tax is paid. Accordingly:

- The mortgage may not be released, discharged of record, or received into evidence in any action or proceeding.
- An assignment or extension agreement may not be recorded.
- No judgment or final order in any action or proceeding will be made for the foreclosure or the enforcement of the mortgage.

Maximum-amount-secured provision

When the terms of the mortgage do not specifically identify the amount secured, the mortgage may be considered indefinite. In this case, the tax is based on the value of the real property covered by the mortgage, unless a sworn statement of the maximum amount secured is filed with the mortgage. The sworn statement may be a separate document or may be contained in the mortgage instrument itself.

The maximum principal amount secured by a revolving credit line mortgage is generally equal to the maximum amount that may be advanced under the credit line agreement at any one time – the credit limit. In certain cases, the parties may choose to secure an amount that is less than the full credit limit. For example, a credit line may be secured by real property located within and outside New York State, and the amount secured by the New York property is less than the full amount of the credit line.

When an otherwise indefinite mortgage or mortgage securing a revolving credit line is capped by a maximum-amount-secured provision, mortgage recording tax is paid on the maximum amount secured (cap). If the cap is subsequently increased to secure new or further indebtedness, mortgage recording tax must be paid when an instrument evidencing the increase is recorded.

Advances up to the cap are secured by the mortgage and are enforceable. Advances and re-advances in excess of the cap are not secured by the mortgage and are not enforceable until an instrument evidencing the advances and re-advances is recorded and the mortgage recording tax is paid.

Accordingly, advances and re-advances in excess of the cap are not taxable as long as the mortgage includes language indicating all of the following:

- The mortgage secures the first sums to be advanced by the lender.
- As long as the balance of the mortgage debt remains above the cap, the secured portion of the mortgage debt will equal the cap.
- Only the last and final payments will be used to reduce and satisfy the secured portion of the mortgage debt.

If the overall loan balance goes below the cap, and new funds are subsequently advanced or re-advanced, mortgage recording tax will be imposed on the new funds up to the cap, on the recording of a supplemental instrument reflecting the advance or re-advance of new funds.

Mortgage securing multiple debts

Unless the mortgage provides otherwise, when different notes or bonds are secured by the same mortgage, the holders of the various notes or bonds share proportionately in the proceeds of the mortgage security in any potential foreclosure action. Thus, when a mortgage given as partial security for multiple debts or obligations contains a maximum-amount-secured provision, the mortgage must identify the fraction of the cap that applies to each debt. Otherwise, the cap will be prorated based on the balance of each debt over the total balance of all debts at the time the mortgage is executed.

This approach also ensures that the proper mortgage recording tax related to each secured debt is paid when the mortgage is recorded, and that the mortgage is enforceable against each debt. It is also necessary to determine the portion of the cap that applies to each debt in order to determine if one or more of the secured debts is paid down below the secured amount, and a supplemental instrument is recorded reflecting further advances subject to mortgage recording tax.

Mortgage of a guarantee

A *guarantee* means an instrument that is pledged as security for another party's debt. The terms of a guarantee usually provide that the amount secured by the guarantee is limited to a fixed amount stated in the guarantee, which can be less than the total outstanding balance of the guaranteed debt. If the balance of the debt falls below the fixed amount, the guarantee secures only the outstanding balance. If this happens and additional funds are advanced or re-advanced, the guarantee secures the additional funds up to the fixed amount.

When a guarantee is secured by a mortgage, the mortgage secures the guarantor's obligation to repay the funds advanced related to the other party's debt, up to the guarantee amount. Mortgage recording tax must be paid on the maximum amount secured, as expressed in the guarantee, when the mortgage is recorded. If principal of the debt is advanced up to or exceeding the guarantee amount, and the balance of the guaranteed debt subsequently falls below the amount initially secured by the guarantee and mortgage, mortgage recording tax is imposed upon the recording of any instrument evidencing advances and re-advances, up to the guarantee amount.

All of the provisions explained under *Maximum-amount-secured provision* above apply to a mortgage given as security for a guarantee, and provisions related to advances and readvances are deemed to refer to the guaranteed debt. As noted above, when a mortgage partially secures a guarantee given as security for multiple debts or obligations, the mortgage must identify the fraction of the cap secured by the guarantee that applies to each debt or obligation. This ensures that the proper tax is paid when the mortgage is recorded, and when an instrument is recorded that reflects further advances and re-advances secured by the guarantee.

Scenarios and examples

1. **A mortgage partially secures multiple loans made to the mortgagor.**

   Mortgage recording tax must be paid on the maximum amount secured when the mortgage is recorded. The mortgage must identify the portion of the secured amount that applies to each debt. Otherwise, the cap will be prorated. No mortgage recording tax is due as the loans are paid down. However, if:

   - one or more of the loans is paid down below the allocated cap, and
   - new funds relating to the same loan are advanced or may be advanced and secured by the mortgage,

   mortgage recording tax will be imposed on the amount advanced up to the allocated cap when the instrument evidencing the new funds is recorded.

   Example 1(a): *Green Corp (borrower) enters into a term loan agreement with ABC bank in the principal amount of $10 million, and enters into a term loan agreement with XYZ bank in the principal amount of $10 million. The parties agree that the total debt of $20 million will be secured by liens on most or all of Green Corp's assets, including a building in New York with a fair market value of $10 million.*

   Accordingly, Green Corp grants a mortgage on the New York property to ABC and XYZ as co-mortgagees. The mortgage expressly provides that:

   - *The maximum amount secured, or which under any contingency may be secured, by the mortgage may not exceed $10 million.*
   - *The secured amount represents $10 million of the first sums advanced, and will be reduced only by the last and final payments made by the borrower.*
   - *The secured amount represents $5 million of the ABC debt and $5 million of the XYZ debt.*

   Mortgage recording tax must be paid on $10 million.

   Example 1(b): *Same facts as example 1(a). At a point after the closing, the balance of the ABC loan has been paid in full, and the balance of the XYZ loan remains $10 million. Under terms of the mortgage, since there is no longer any debt on the ABC loan, the mortgage now secures only the outstanding debt on the XYZ loan limited to the cap of $5 million.*

   ABC bank agrees to advance Green Corp an additional $2 million, and the parties agree that the advance will be secured by the mortgage, subject to the previously existing cap of $5 million on the ABC loan. Since the original amount of the ABC debt secured by the mortgage was reduced below the cap of $5 million, mortgage *recording tax must be paid on the new funds of $2 million when an instrument evidencing the advance is recorded.*

(Note: If the new funds advanced exceeded $5 million, mortgage recording tax would be limited by the cap on the ABC loan and imposed only on $5 million.)

2. **A mortgage partially secures multiple loans, one of which is a revolving line of credit, made to the mortgagor.**

   Mortgage recording tax must be paid on the maximum amount secured when the mortgage is recorded. The mortgage must identify the portion of the secured amount that applies to each debt. Otherwise, the cap will be prorated. As long as the mortgage provides that the balance of the revolving loan remains above the maximum amount secured applicable to that loan, no further mortgage recording tax will be due until the outstanding balance of the loan is reduced below the cap, and an instrument evidencing any further advances or re-advances is recorded.

   Example 2*: Charles LLC enters into a term loan with Lender L in the principal amount of $6 million. Charles LLC also enters into a revolving credit agreement with Lender L with a maximum principal amount of $4 million.*

   Charles LLC gives Lender L a mortgage on its New York property (valued at $6 million) as partial security for these debts. The mortgage expressly provides that:

   - *The maximum amount secured, or which under any contingency may be secured, by the mortgage may not exceed $6 million.*
   - *The mortgage secures the first sums advanced under the term loan and the revolving loan agreement up to the cap amount.*
   - *Only the last and final payments will be used to reduce and satisfy the secured portion of the mortgage debt.*

   Mortgage recording tax must be paid on $6 million when the mortgage is recorded.

   Since the mortgage does not identify the fraction of the cap that applies to each debt, the cap will be prorated based on the balance of each debt over the total balance of all debts at the time the mortgage is executed. Accordingly, $3.6 million of the cap applies to the term loan ($6 million cap x $6 million balance of the term loan / $10 million total debt), and $2.4 million of the cap applies to the revolving credit line ($6 million cap x $4 million credit line debt / $10 million total debt).

   As allocated, the mortgage secures the first $3.6 million advanced under the term loan, and the first $2.4 million advanced under the revolving credit line agreement. If the balance of the credit line debt falls below $2.4 million, mortgage recording tax is imposed when any instrument evidencing advances and re-advances up to $2.4 million is recorded.

   In addition, if the balance of the guaranteed term loan falls below $3.6 million and new funds are re-advanced to be secured by the mortgage, mortgage recording tax will be imposed when any instrument evidencing the re-advance is recorded based on the amount of the new funds, limited to the $3.6 million cap.

3. **The proper mortgage recording tax was paid on the maximum amount secured (cap) by a mortgage securing a term loan. At a point after the closing, the mortgage is amended and restated to also secure an additional debt, and the cap is increased.**

Mortgage recording tax must be paid to the extent the cap is increased.

Example 3: *A term loan of $7 million is secured by a mortgage on New York real property with a fair market value of $7 million. The mortgage contains a statement that the maximum amount secured is $7 million. The proper mortgage recording tax is paid when the mortgage is recorded.*

One year later, the balance of the term loan is still $7 million, and the fair market value of the mortgaged property has increased to be $10 million. The borrower obtains additional financing from a new lender in the amount of $3 million. The parties agree that the mortgage will be amended and restated to secure the original term loan and a new debt for $3 million.

The mortgage now secures $7 million related to the term loan and $3 million related to the new debt.

Since the cap has been increased, mortgage recording tax must be paid on $3 million related to the new debt when an instrument evidencing the amended and restated mortgage is recorded.

4. A mortgage partially secures a term loan made to the mortgagor, and also a guarantee made by the mortgagor of a term loan made to another entity.

Mortgage recording tax must be paid on the maximum amount secured when the mortgage is recorded. No mortgage recording tax is due as the loans are paid down. However, if the mortgage provides that it may secure new funds, mortgage recording tax will be due when the instrument evidencing the new funds is recorded.

Example 4(a): *Parent Corp enters into a term loan with Lender L in the principal amount of $5 million. Sub A, a subsidiary of Parent Corp, enters into a term loan with Lender L in the principal amount of $6 million. Parent Corp agrees to guarantee $2.5 million of Sub A's debt. The total of $11 million is advanced at closing.*

Parent Corp gives a mortgage to Lender L on New York property as security for Parent Corp's loan and partial security for Parent Corp's guarantee obligation related to Sub A's loan. The mortgage expressly provides that:

- *The maximum amount secured, or which under any contingency may be secured, by the mortgage may not exceed $7.5 million.*
- *The mortgage secures the first sums advanced, up to the $7.5 million cap, and it secures the last $7.5 million repaid.*
- *Only the last and final payments will be used to reduce and satisfy the secured portion of the mortgage debt.*
- *The secured portion of Parent Corp's loan is $5 million, and the secured portion of Parent Corp's guarantee obligation related to Sub A's loan is $2.5 million.*

Mortgage recording tax must be paid on $7.5 million when the mortgage is recorded.

Example 4(b): *Same facts as example 4(a). At a point after the closing, the balance of Parent Corp's loan has been paid down to $3 million, and the balance of Sub A's loan is still $6 million. The mortgage now secures $3 million outstanding on Parent Corp's loan, and $2.5 million of Parent Corp's guarantee obligation related to Sub A's loan.*

Lender L agrees to advance Parent Corp an additional $2.5 million. The parties agree that the mortgage will secure the new funds, up to the cap provided in the original mortgage ($5 million allocated to Parent Corp's loan, and $2.5 million allocated to Parent Corp's guarantee of Sub A's loan).

Mortgage recording tax must be paid on the recording of an instrument evidencing the new funds advanced. Although $2.5 million in new funds were advanced, the cap limits the taxable amount and the amount of the new funds loaned to Parent Corp. enforceable under the mortgage, to $2 million ($5 million cap - $3 million balance).

Example 4(c): *Same facts as example 4(a). At a point after the closing, the balance of Parent Corp's loan is still $5 million, and the balance of Sub A's loan is paid down to $1 million. The mortgage now secures $5 million outstanding on Parent Corp's loan, and $1 million of Parent Corp's guarantee of Sub A's loan.*

Lender L agrees to advance an additional $1 million to Sub A. The parties agree that the mortgage will secure Parent Corp's guarantee of the new funds, up to the cap provided in the original mortgage ($5 million allocated to Parent Corp's loan, and $2.5 million allocated to Parent Corp's guarantee obligation related to Sub A's loan).

Mortgage recording tax must be paid on the recording of an instrument evidencing the $1 million new funds advanced.

5. **A mortgage partially secures a guarantee made by the mortgagor of both a term loan and a revolving credit loan made to another entity.**

Mortgage recording tax must be paid on the maximum amount secured, as expressed in the guarantee. As long as the mortgage provides that the balance of the guaranteed debt remains above the maximum amount secured by the guarantee, no further mortgage recording tax will be due until the guaranteed amount is reduced below the cap, and an instrument evidencing any further advances or re-advances is recorded.

Example 5(a): *Mr. Smith enters into a term loan with lender XYZ in the principal amount of $45 million. Mr. Smith also enters into a revolving credit line agreement with lender XYZ that limits the maximum principal amount outstanding at any one time to $15 million. Mr. Jones agrees to guarantee Mr. Smith's term loan and credit line agreement with lender XYZ.*

Mr. Jones gives a mortgage to Lender XYZ on New York property as partial security for Mr. Jones' guarantee obligation. The mortgage expressly provides that:

- *The maximum amount secured, or which under any contingency may be secured, by the mortgage may not exceed $50 million.*
- *The mortgage secures the guarantee of the $45 million term loan.*
- *The mortgage also secures the guarantee of the first $5 million advanced under the revolving credit line agreement.*
- *Only the last and final payments will be used to reduce and satisfy the secured portion of the mortgage obligation.*

Mortgage recording tax must be paid on $50 million when the mortgage is recorded. By its terms, the mortgage secures the guarantee related to the $45 million advanced under the term loan and first $5 million advanced under the revolving credit line agreement. If $5 million or more is advanced under the guaranteed credit line debt, and the balance subsequently falls below $5 million, *mortgage recording tax is imposed when any instrument evidencing advances and re-advances up to the cap attributable to the credit line is recorded.*

Example 5(b): *Same facts as example 5(a), except the mortgage provides that:*

- *The maximum amount secured, or which under any contingency may be secured, by the mortgage may not exceed $50 million.*
- *The mortgage secures the guarantee of the first $50 million advanced of the total guaranteed debts.*
- *Only the last and final payments will be used to reduce and satisfy the secured portion of the mortgage debt.*

Since the mortgage does not identify the amount of the guarantee and mortgage that secures each debt, the $50 million guarantee amount is allocated proportionately. Accordingly, the term loan is secured up to $37.5 million (($45 million / $60 million) x $50 million), and the revolving credit line debt is secured up to $12.5 million (($15 million / $60 million) x $50 million).

Mortgage recording tax must be paid on $50 million when the mortgage is recorded. As allocated, the mortgage secures the first $37.5 million advanced under the term loan, and the first $12.5 million advanced under the revolving credit line agreement.

If the balance of the guaranteed credit line debt falls below $12.5 million, mortgage recording tax is imposed when any instrument evidencing advances and re-advances up to $12.5 million is recorded. In addition, if the balance of the guaranteed term loan falls below $37.5 million and new funds are re-advanced to be secured by the mortgage, mortgage recording tax will be imposed when any instrument evidencing the re-advance is recorded based on the amount of the new funds, limited to the $37.5 million cap.

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References and other useful information

Tax Law: Sections 250(2)(b), 253, 253-b, 256, 258

Regulations: Section 647

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*
TSB-M-99(1)R*, Application of the Mortgage Recording Tax to Commercial Credit Line Mortgages*

Advisory Opinions:

TSB-A-93(15)R, *BT Commercial Corporation*
TSB-A-95(13)R, *Fifth Win, Inc.*

Other:

New York Jur 2d, § 229