

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

TSB-A-90(2)R
Miscellaneous Tax
February 7, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M890519A

On May 5, 1989, a petition for Advisory Opinion was received from Sugar Maple Farm, Inc., c/o Carol Management, 600 Madison Avenue, New York, New York 10022.

The issue raised by Petitioner, Sugar Maple Farm, Inc., is whether the recording of a supplemental mortgage for the purposes of adding a new obligor and correcting the mortgage to conform to its default provision by providing that the mortgage also secures the note, is exempt from the imposition of additional mortgage recording tax pursuant to Section 255 of the Tax Law.

The following are the facts as stated by the Petitioner. On June 4, 1987 Carol Management Corporation (the "Borrower") borrowed \$6,000,000.00 from Citizens Fidelity Bank & Trust Company d/b/a Citizens Fidelity Equine Company (the "Lender"). As evidence of such loan, Borrower executed and delivered to Lender a note in the amount of \$6,000,000.00. In order to induce the Lender to execute the Note and make such loan, Howard Kaskel ("Kaskel") executed and delivered a guaranty, (the "Guaranty"), guaranteeing the payment of the Note to the maximum aggregate amount of \$6,114,000.00 (which amount includes the entire principal balance of the Note and interest for a 2-year period at 9 1/2% per annum) plus all fees incurred by Lender with respect to the Note, the Guaranty and any other security instrument.

In order to secure all obligations of Kaskel to the Lender under the Guaranty and the Mortgage, Kaskel executed and delivered a mortgage and security agreement, (the "Mortgage") encumbering the premises known as Sugar Maple Farm, Poughquag, New York (the "Premises"). The maximum amount of principal to be secured by the Mortgage is \$6,114,000.00 (the "Original Mortgage Indebtedness"). Under section 18 of the Mortgage, a default under the Note constitutes a default under the Mortgage.

On September 16, 1987, the Mortgage was recorded in the office of the Clerk of Dutchess County and a mortgage recording tax of \$60,000 was paid.

By deed dated October 1, 1987 Kaskel transferred title to the Premises to Sugar Maple Farm, Inc. (the "New Owner"), a New York corporation whose sole shareholder is Kaskel. This transaction was permitted under the Mortgage without the Lender's prior consent. In the deed affecting the transfer of the Premises, the New Owner assumed the obligations under the Guaranty and the Mortgage.

At present, the Borrower desires to remove the liability under the Note from its books. The Lender is agreeable to releasing Borrower from its obligations under the Note provided that (a) New Owner assumes all of Borrower's obligations under the Note and assumes the obligation under the Guaranty and Mortgage and (b) New Owner agrees to correct the Mortgage to conform to its default provision by providing that the Mortgage also secures the obligations under the Note.

Specifically, the Lender requires that a supplemental mortgage be recorded to add New Owner as an obligor and to correct the Mortgage to secure the New Owner's obligation under the Note (the "Supplemental Mortgage").

At all relevant times, a default under the Note triggered a default under the Mortgage. Moreover, no additional funds are being loaned or advanced by the Lender to the Borrower, New Owner, Kaskel or any other person, and the Supplemental Mortgage will not create or secure any new or further indebtedness, other than the Original Mortgage Indebtedness.

Furthermore, the June 1987 mortgage has not been nor is it intended to be satisfied of record as part of the overall transaction.

Section 255.1 of the Tax Law relating to Supplemental Mortgages provides:

1. If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article, unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred fifty-three of this chapter on such new or further indebtedness or obligation, and shall be paid to the proper recording officer at the time such instrument or additional mortgage is recorded.

Section 253 of the Tax Law imposes a recording tax on every mortgage of real property situated within New York when it is recorded.

Under Section 255 of the Tax Law, the recording of a supplemental mortgage is exempt from the recording tax if (1) the mortgage corrects or perfects a prior recorded mortgage, (2) the mortgage is pursuant to some provision or covenant providing for modification of the prior recorded mortgage, or (3) the mortgage imposes an additional mortgage on property other than that covered by the prior recorded mortgage as additional security for the original indebtedness; unless the supplemental mortgage creates or secures new or further indebtedness other than the principal indebtedness secured by the recorded primary mortgage.

Generally, an agreement relating to a mortgage which does not increase the original indebtedness is not subject to taxation even if the original term of the mortgage is extended. Matter of Irving Brodsky v Murphy, 26 A.D.2d 255 (1966). The mere substitution of one mortgage agreement for another, even in combination with the release of the original obligors and the assumption of the debt by new obligors is insufficient to create a new mortgage for purposes of

Section 253 of the Tax Law. Matter of Irving Brodsky, supra; Suffolk County Federal Sav. and Loan Assoc. v. Bragalini, 5 N.Y.2d 579 (1959); Bay View Towers v. State Tax Commission, 40 N.Y.2d 856 (1976).

In the instant case, the New Owner has assumed obligations under the Note, Mortgage and the Guaranty. The Lender requires that the Supplemental Mortgage be recorded to reflect the New Owner as a new obligor and to correct the Mortgage to secure the obligations under the Note in conformity with section 18 of the Mortgage (under which a default under the Note always constituted a default under the Mortgage). No new funds are being loaned or advanced by the Lender to any party and the Supplemental Mortgage will not create or secure any new debt or further obligation, other than the Original Mortgage Indebtedness secured by the Mortgage. Accordingly, the recording of the Supplemental Mortgage, merely for the purposes of adding the New Owner as the Mortgagor and merely correcting the Mortgage to also secure the Note, is not subject to additional mortgage recording tax.

DATED: February 7, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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