

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(1)R
Mortgage Recording Tax
May 30, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M051201A

On December 1, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Hudson River Community Credit Union, 321 Palmer Avenue, Corinth, NY 12822.

The issue raised by Petitioner, Hudson River Community Credit Union, is whether a New York State-chartered credit union, incorporated under Article XI of the Banking Law, is exempt from the special additional tax on mortgages imposed under Article 11 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a New York State-chartered credit union incorporated under Article XI of the Banking Law. Petitioner is a not-for-profit financial cooperative whose operations include making residential first mortgage loans to its members.

Applicable law

Section 253(1-a) of the Tax Law provides:

(a) In addition to the tax imposed by subdivision one of this section, there shall be imposed on each mortgage of real property situated within the state, except mortgages wherein the mortgagee is a natural person or persons and the mortgaged premises consist of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities, a special additional tax of twenty-five cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof or at anytime thereafter by such mortgage. The tax, if any, imposed by this subdivision shall in cases of real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each dwelling unit having its own separate cooking facilities, be paid by the mortgagee, and such tax shall not be paid or payable, directly or indirectly, by the mortgagor except as otherwise provided in sections two hundred fifty-eight and two hundred fifty-nine of this article and except such tax shall be paid in such cases by the mortgagor where the mortgagee is an exempt organization described in paragraph (b) of this subdivision. In all other cases, such tax shall be paid by the mortgagor except that the tax shall be paid by the mortgagee where the mortgagor is an exempt organization

described in paragraph (b) of this subdivision. All of the provisions of this article shall apply with respect to the special additional tax imposed by this subdivision to the same extent as if it were imposed by said subdivision one of this section, except as otherwise expressly provided in this article.

(b) An organization organized other than for profit which is operated on a nonprofit basis no part of the net earnings of which inures to the benefit of any officer, director or member and which is exempt from federal income taxation pursuant to subsection (a) of section five hundred one of the internal revenue code shall be exempt from the special additional tax imposed by this subdivision.

Section 460(1) of the Banking Law provides:

The board of directors of any credit union may declare a dividend from the credit union's undivided profits calculated as provided in this article for any period determined by the board of directors.

Section 479 of the Banking Law provides:

Any credit union subject to the provisions of this article shall be deemed an institution for savings within the meaning of the law which exempts such institutions from taxation. No law which taxes corporations in any form, or the shares thereof or the accumulations therein, shall apply to corporations doing business in accordance with the provisions of this article, unless such corporations are specifically named in said law.

Opinion

Section 253(1-a)(a) of the Tax Law provides that, in cases of real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, with each dwelling unit having its own separate cooking facilities, the special additional mortgage recording tax imposed by such section is paid by the mortgagee. However, if the mortgagee is an exempt organization described in section 253(1-a)(b), then the liability for payment of the tax shifts to the mortgagor.

Section 253(1-a)(b) of the Tax Law provides a two-part test to determine an organization's exemption from the special additional tax and the shifting of the liability for payment of such tax. First, the organization must be organized other than for profit with no part

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of its earnings inuring to the benefit of any member. Second, the organization must be exempt from federal income taxation pursuant to section 501(a) of the Internal Revenue Code. Although a State-chartered credit union might satisfy the second part of this test, it is clear that it would not satisfy the first part since, under section 460(1) of the Banking Law, a State-chartered credit union may pay earnings to its members.

It has been well established that the taxes imposed under Article 11 of the Tax Law, including the special additional tax imposed by section 253(1-a), are taxes on the privilege of recording a mortgage (*Matter of Citibank v State Tax Commission*, 98 AD2d 929, 931). The special additional tax on mortgages is not a tax on a corporation but on the act of recording a mortgage and applies not only to corporations, but also to individuals, partnerships, and other unincorporated entities. Accordingly, the exemption provided under section 479 of the Banking Law clearly does not apply to the special additional tax on mortgages.

Therefore, based on the conclusions above, Petitioner is not exempt from the special additional tax on mortgages and the tax burden may not be shifted to the mortgagor.

DATED: May 30, 2006

/s/
Jonathan Pessen
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Technical Services Division

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