

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-07(5)R
Mortgage Recording Tax
October 18, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M070326A

On March 26, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jason Jerozal – Primary Land Services, LLC, 368 Veterans Memorial Highway, Commack, NY 11725. Petitioner, Jason Jerozal – Primary Land Services, LLC, submitted additional information pertaining to the Petition on May 1, 2007.

The issue raised by Petitioner is whether the recording of a reverse mortgage placed on certain real property is exempt from the mortgage recording tax (Article 11 of the Tax Law) based on the exemption provided in section 252-a.2 of the Tax Law.

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

Ms. M, age 62, borrowed amounts from an authorized lender (“Lender”) under a Home Equity Conversion Loan Agreement and executed a reverse mortgage secured by her single family residence located in New York State. The reverse mortgage in question was executed under the United States Department of Housing and Urban Development (“HUD”) Home Equity Conversion Mortgage (“HECM”) reverse mortgage loan program. As required by the HUD/HECM program, a first mortgage was executed naming Lender as mortgagee to secure payments advanced by Lender under the reverse mortgage, and a second mortgage was executed naming the Secretary of Housing and Urban Development as mortgagee to secure any payments made by HUD to Ms. M. As part of this Petition, Petitioner has submitted copies of the relevant mortgage documents that were executed.

Some time ago, Ms. M deeded her real property to members of her family who are under the age of 62 and retained a life estate in the property. Ms. M and her family members were co-mortgagors in the closing of the reverse mortgage transaction. Ms. M is the sole borrower, but because title to the property is held by others, the other owners also signed the mortgage documents.

Applicable law and regulations

Section 252-a.2 of the Tax Law provides the following exemption for reverse mortgages:

Reverse mortgages conforming to the provisions of section two hundred eighty or two hundred eighty-a of the real property law securing obligations of mortgagors or exempted therefrom pursuant to subdivision four of section two hundred eighty or subdivision four of section two hundred eighty-a of the real property law shall be exempt from any tax or fee imposed by this article. In each case where an exemption is claimed under this subdivision, the lender shall provide documentation in a format approved by

the commissioner of taxation and finance to enable recording officers to affirmatively determine when a mortgage being presented for recording is a reverse mortgage conforming to such provisions of the real property law and entitled to an exemption under this subdivision. Where such documentation is not furnished, the maximum principal debt or obligation which shall be the measure of the tax imposed by and pursuant to the authority of this article in the case of a reverse mortgage shall be the proceeds of the loan which the authorized lender is obligated to lend the borrower at the execution of such mortgage or at any time thereafter but determined without regard to any contingency relating to the addition of any unpaid interest to principal or relating to any percentage of the future appreciation of the property securing the loan as consideration or additional consideration for the making of the loan. Provided, however, if subsequent to the recording of such mortgage, the proceeds which the authorized lender is obligated to lend the borrower are increased at any time, such new or further indebtedness or obligation shall be the measure of the tax at such time unless at that time an exemption is applicable under the first sentence of this subdivision or otherwise.

Section 280(4) of the Real Property Law deals with reverse mortgage loans for persons 60 years of age or older and provides, in part:

The banking board shall adopt those rules or regulations as it considers appropriate to govern reverse mortgage loans made pursuant to this section. No reverse mortgage loan shall be made unless it conforms to the requirements of this section and such rules and regulations as the banking board may adopt except those reverse mortgage loans made pursuant to section two hundred eighty-a of this article. A reverse mortgage loan made by any authorized lender, national banking association, federal savings and loan association or federal credit union in conformity with applicable federal laws and regulations specifically regulating reverse mortgage loans shall be deemed to conform to the requirements of this section unless such reverse mortgage loan fails to conform to such rules and regulations as the banking board has expressly declared to be neither preempted by, nor otherwise inconsistent with such federal laws or regulations.

Section 644.1(b) of the Mortgage Recording Tax Regulations (the "Regulations") provides, in part:

The recording of the following mortgages is exempt from the taxes described in Part 642 of this Title by reason of express statutory provision relating to such taxes.

* * *

(17) reverse mortgages recorded on or after December 2, 1993, which conform to the provisions of section 280 or section 280-a of the Real Property Law.

Section 644.1(c)(2) of the Regulations provides:

Whenever an exemption is claimed pursuant to the provisions of paragraph (b)(17) of this section, at the time the mortgage is presented for recording, the following documentation must be submitted to the recording officer:

(i) for a reverse mortgage made pursuant to the provisions of section 280 of the Real Property Law, an affidavit, made in duplicate, signed by the mortgagee, setting forth the following:

(a) the mortgage is a reverse mortgage given by a mortgagor who is or mortgagors all of whom are at least 60 years of age;

(b) the reverse mortgage is of real property improved by a one- to four-family residence or condominium unit that is the residence of the mortgagor or mortgagors; and

(c) the reverse mortgage conforms to all other provisions of section 280 of the Real Property Law; and

(ii) for a reverse mortgage made pursuant to the provisions of section 280-a of the Real Property Law, an affidavit, made in duplicate, signed by the mortgagee, setting forth the following:

(a) the mortgage is a reverse mortgage given by a mortgagor who is or mortgagors all of whom are at least seventy years of age;

(b) the reverse mortgage is of real property improved by a one- to four-family residence or condominium unit that is the residence of the mortgagor or mortgagors; and

(c) the reverse mortgage conforms to all other provisions of section 280-a of the Real Property Law.

Section 654.1 of the Regulations provides, in part:

(a) (1) A mortgagor or mortgagee may claim a refund of any of the mortgage recording taxes paid by them where:

(i) taxes were erroneously paid;...

(2) refund can be claimed by filing an application for refund with the appropriate documentation attached to such refund claim as described in section 654.2 of this Part. Such application for refund must be filed within the times set forth below:

(i) where a refund is claimed for taxes erroneously paid, within two years of the date the erroneous payment was received by the recording officer ; ...

Section 79.1(b) of the General Regulations of the Banking Board (3 NYCRR Part 79), which governs reverse mortgages, provides:

Neither this Part nor Parts 38, 39, 80 or 82 shall apply to any loan which conforms to the requirements of the Demonstration Program of Insurance of Home Equity Conversion Mortgages for Elderly Homeowners, also known as the "HUD/HECM" reverse mortgage loan program, 12 USC §1715z-20.

12 USC §1715z-20 provides, in part:

Insurance of home equity conversion mortgages for elderly homeowners

(a) Purpose. The purpose of this section is to authorize the Secretary to carry out a program of mortgage insurance designed—

(1) to meet the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income, through the insurance of home equity conversion mortgages to permit the conversion of a portion of accumulated home equity into liquid assets; and

(2) to encourage and increase the involvement of mortgagees and participants in the mortgage markets in the making and servicing of home equity conversion mortgages for elderly homeowners.

* * *

(c) Insurance authority. The Secretary may, upon application by a mortgagee, insure any home equity conversion mortgage eligible for insurance under this section and, upon such terms and conditions as the Secretary may prescribe, make commitments for the insurance of such mortgages prior to the date of their execution or disbursement to the extent that the Secretary determines such mortgages—

(1) have promise for improving the financial situation or otherwise meeting the special needs of elderly homeowners;

(2) will include appropriate safeguards for mortgagors to offset the special risks of such mortgages; and

(3) have a potential for acceptance in the mortgage market.

Paragraph 4-4A of section 4235.1 of the HUD Handbook-Revision No. 1 (the "Handbook"), which covers the HUD approved Reverse Mortgage Program, provides:

A. The borrower's age. All borrowers must be at least 62 years old when they sign the Uniform Residential Loan Application (URLA) and the HUD/VA Addendum (Form HUD 92900-A). The lender should request evidence of the ages of all borrowers, and accept all reasonable forms of evidence.

Paragraph 4-4C of the Handbook provides, in part:

C. The borrower's principal residence. The property must be the principal residence of each borrower, as defined in Paragraph 4-7A of this chapter....

Paragraph 6-6 of the Handbook provides, in part:

Preparation of Security Instruments. The lender must prepare the following legal instruments (see appendices at the end of this Handbook for mandatory model forms), as needed for a particular case:

A. Mortgage and note. The lender must provide a copy of the first mortgage and the appropriate first note (fixed or adjustable rate) for review by the borrower during the application process (see Paragraph 4-7), but not later than when the borrower signs the Uniform Residential Loan Application (URLA).

B. Second mortgage and note. The lender must complete a second mortgage and second note (fixed or adjustable rate) to secure any payments made by HUD to the borrower. . . . The second mortgage and second note secure any mortgage payment which might be made by HUD to the borrower in the event that the lender fails to make the payments under the loan Agreement.

Paragraph 6-10 of the Handbook provides, in part:

Post-Closing Responsibilities. After closing, the lender must:

1. The lender is responsible for ensuring that the first and second mortgages are the first and second liens of record, and that other liens do not intervene between the first and second mortgage.

2. The second mortgage is not subject to any State or local recording taxes, or stamp taxes, because the second mortgage is a mortgage to the Federal government.

Taxation of the property of the Federal government violates the supremacy clause of the U. S. Constitution.

However, fees are distinguished from taxes. Recording fees, which are a charge for a service, may be imposed by the local recording office. Customary and reasonable fees to record the second mortgage may be collected from the borrower by the mortgagee.

Opinion

As provided by section 252-a.2 of the Tax Law, reverse mortgages that conform to the provisions of section 280 or 280-a of the Real Property Law that secure obligations of mortgagors or are exempt from those provisions pursuant to section 280(4) or 280-a(4) of the Real Property Law are exempt from the mortgage recording taxes imposed by Article 11 of the Tax Law.

The Edna Huff Trust, Adv Op Comm T&F, May 22, 1996, TSB-A-96(4)R, addressed the reverse mortgage exemption pursuant to section 252-a.2 of the Tax Law related to the provisions of section 280-a of the Real Property Law. The relevant provisions of section 280-a are substantively the same as section 280, but cover reverse mortgages by persons at least 70 rather than 60 years of age.

The Edna Huff Trust opinion concluded that, if a mortgage was in conformity with federal law and regulations addressing reverse mortgages and not inconsistent with any regulations of the Banking Board, it would be deemed to conform with the requirements of section 280-a of the Real Property Law and be exempt from the mortgage recording tax under section 252-a.2 of the Tax Law.

William H. Bradt, Adv Op Comm T&F, July 19, 2004, TSB-A-04(2)R, addressed the reverse mortgage exemption pursuant to section 252-a.2 of the Tax Law related to the provisions of section 280 of the Real Property Law. As in the present case, the *William H. Bradt* opinion dealt with a reverse mortgage borrower over the age of 60, who deeded the property to her two children, who were under the age of 60, and retained a life estate in the property. The advisory opinion found that based on the facts provided, the reverse mortgage did not appear to meet the federal HUD requirements and it concluded:

Unless it can be demonstrated that the mortgage in this case does actually qualify under the HUD/HECM reverse mortgage loan program, it would not appear to comply with section 280 of the Real Property Law. Moreover, since the statements required under clauses (a) and (c) on the affidavit required by section 644.1(c)(2)(i) of the Regulations would not be satisfied, the reverse mortgage exemption provided under section 252-a.2 of the Tax Law would not be available.

In the present case, the facts and supporting documents submitted by Petitioner demonstrate that the mortgage does qualify under the HUD/HECM reverse mortgage loan program. In addition to the first mortgage executed to secure payments advanced by Lender under the reverse mortgage, a second mortgage was executed referencing the Home Equity Conversion Loan Agreement and naming the Secretary of Housing and Urban Development as mortgagee to secure any payments that may be made by HUD to Ms. M. The second mortgage confirms that the reverse mortgage in question is covered under the HUD/HECM reverse mortgage loan program pursuant to 12 USC §1715z-20. Since the reverse mortgage is in conformity with federal law and regulations addressing reverse mortgages and not inconsistent with any regulations of the Banking Board, it is deemed to conform with the requirements of section 280 of the Real Property Law and is exempt from the mortgage recording tax under section 252-a.2 of the Tax Law.

Section 252-a.2 of the Tax Law provides that to claim this exemption the lender should provide documentation to enable recording officers to affirmatively determine when a mortgage being presented for recording is a reverse mortgage conforming to section 280 or section 280-a of the Real Property Law and entitled to an exemption. Section 644.1(c)(2) of the Regulations outlines the contents required for an affidavit for a mortgage when an exemption is claimed pursuant to regulation section 644.1(b)(17) and applies to reverse mortgages "which **conform to the provisions** of section 280 or section 280-a of the Real Property Law." Therefore, to record a reverse mortgage that qualifies for exemption because it conforms to the provisions of section 280 or 280-a of the Real Property Law, the affidavits described in section 644.1(c)(2)(i) must be presented at the time the mortgage is recorded.

However, the provisions of section 644.1(b)(17) and 644.1(c)(2) of the Regulations are silent with regard to a reverse mortgage that qualifies for exemption because it meets the federal requirements and is exempt from the provisions of section 280 or 280-a of the Real Property Law pursuant to section 280(4) or 280-a(4) of the Real Property Law. Accordingly, pursuant to section 252-a.2 of the Tax Law, other documentation should be submitted to the recording officer to establish the exemption for a reverse mortgage that is exempt because it meets the federal requirements. In general, the following documentation is sufficient to establish the exemption:

- 1) an affidavit, signed by the mortgagee, affirming that the mortgage is a reverse mortgage that conforms to the applicable federal law and regulations under 12 USC §1715z-20 and, therefore, is exempt pursuant to section 280(4) (or, if applicable, section 280-a(4)) of the Real Property Law and exempt from the mortgage recording taxes pursuant to section 252-a.2 of the Tax Law, and

- 2) a second mortgage referencing the Home Equity Conversion Loan Agreement and naming the Secretary of Housing and Urban Development as mortgagee should be recorded at the same time the reverse mortgage is recorded.

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If this documentation is not submitted at the time of recording, the appropriate mortgage recording taxes are based on the proceeds of the loan that Lender is obligated to lend the borrower at the execution of the mortgage plus the amount Lender is obligated to lend the borrower at any time thereafter as determined pursuant to section 252-a.2 of the Tax Law. As provided by section 654.1 of the Regulations, a claim for refund of the actual mortgage recording taxes paid may be submitted to the Tax Department, along with the documentation necessary to establish the exemption described above, within two years from the date the mortgage recording taxes were paid to the recording officer.

DATED: October 18, 2007

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.