

MORTGAGE RECORDING TAX AMENDMENTS

This memorandum is to serve notice that recently there have been statutory amendments to the special additional mortgage recording tax imposed by subdivision 1-a of section 253 of Article 11 of the Tax Law.

In addition, sections 255 and 263 of Article 11 have been amended to modernize the mortgage recording tax with respect to refund procedures and the allowance of interest on refunds.

The amendments with respect to the special additional mortgage recording tax are as follows:

- I. Chapter 638 of the Laws of 1986, enacted on July 26, 1986, amended section 253.1-a(a) to:
  - (a) Correct and broaden language in the provision relating to the type of residential property which requires the mortgagee to pay the tax;
  - (b) Correct language in the provision to be consistent with the other provisions of the law. Thus, references to "mortgagee", "mortgagor", and the "special additional tax" are added.
  - (c) Provide that where the liability is on the mortgagee (as in the case of the described type of residential property) and the mortgagee is an exempt organization as described in section 253.1-a(b), then the tax shall be paid by the mortgagor.

These amendments were effective July 26, 1986 and apply to mortgages recorded on or after such date.

- II. Chapter 751 of the Laws of 1986, enacted August 2, 1986, amended section 253.1-a(a) to:
  - S** exempt certain mortgages from the special additional mortgage tax where the mortgagee (lender) or mortgagees are natural persons and where the mortgage is on premises consisting of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities.

This amendment is effective for mortgages recorded on or after January 1, 1987.

Based on the Chapter 638 and 751 amendments, section 253.1-a(a) now reads as follows (the underlined matter is new language, the bracketed matter is law being deleted):

"(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 [recorded on or after the first day of January, nineteen hundred seventy-nine], 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 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 [a structure] one or more structures containing in the aggregate not more than six residential dwelling units [or less with], each dwelling unit having its own separate cooking facilities, be paid by the [party making the loan secured by such mortgage] mortgagee, and such tax shall not be paid or payable, directly or indirectly, by the [borrower] 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."

The substance of the Chapter 638 amendments is that if there is or will be a structure or structures on the real property and such structure or structures, in the aggregate, have a total of no more than six residential dwelling units, each with its own cooking facilities, then a determination must be made as to whether the property is or will be principally improved by the residential units. If the residential units constitute or will constitute the principal improvement, then the mortgagee must pay the tax, unless the mortgagee is an exempt organization, in which case the mortgagor must pay the tax.

While "principally improved" is not defined in the amended statute, it is a term defined in the mortgage tax regulations (Part 403 of Title 20 of NYCRR) under another section of the law (§ 253.2(a) of the Tax Law) and this definition would apply to the amended statute. Basically, these regulations provide that if the cost or fair market value of the residential units is not exceeded by the cost or fair market value of any other improvements that are or will be made to the property, then the property is principally improved by the residential units.

Please note that Chapter 638 also made amendments with respect to the special additional mortgage recording tax credit or deduction allowed for purposes of New York State Corporation Tax, New York State Personal Income Tax, and New York City Personal Income Tax. Technical Service Bureau Memoranda explaining these amendments in detail will be issued soon.

With respect to the Chapter 751 amendment, the mortgages which will be exempt will normally involve an individual or individuals selling premises consisting of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities and taking back a purchase money mortgage. However, the mortgages exempt under the amendment could also include a mortgage taken by an individual on real property he does not own but which is improved as described above.

#### IMPORTANT

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Inconsistent descriptions were used by Chapters 638 and 751 to describe the improvements that require the mortgagee to pay the special additional mortgage recording tax (Chapter 638) compared to the improvements that will qualify a mortgage for exemption (Chapter 751).

The Department recognizes that this will result in some inconsistent applications of the provisions of section 253.1-a(a) of the Tax Law. For example, on or after January 1, 1987, due to Chapter 751, the recording of a mortgage made to a natural person on real property improved by a structure containing six residential units or less, each with separate cooking facilities, will be exempt from the special additional tax. However, a mortgage made to a natural person on real property improved by two or more structures containing six residential units or less, each with separate cooking facilities, will not be exempt under Chapter 751, since the real

property is improved by more than one residential structure. The liability for the special additional tax will be on the mortgagee in this case under the provisions of Chapter 638.

Another example involves the recording of a mortgage made to a natural person on real property improved with one residential unit and one commercial unit. Such a mortgage will be exempt from the special additional tax under the provisions of Chapter 751, since there is no requirement that the property be "principally" improved by the residential unit.

The Department of Taxation and Finance will draft legislation to correct the inconsistencies between Chapters 638 and 751. However, unless such legislation is enacted before January 1, 1987, the effective date of Chapter 751, which is very unlikely, the inconsistent provisions of section 253.1-a(a) of the Tax Law must be applied as written.

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The amendments with respect to the refund procedures and the allowance of interest were made by Chapter 409, enacted July 21, 1986, and are as follows:

- (1) Section 1 of the bill amended section 255 of the Tax Law to permit an application for refund to be filed where tax has been paid on the recording of a supplemental instrument or mortgage and the claim for exemption provided for in such section was not filed at the time of the recording of such supplemental instrument or mortgage.
- (2) Section 2 of the bill amended section 263 of the Tax Law to allow refunds whenever a tax was erroneously paid regardless of whether the recording officer could have determined that a mistake was being made at the time the mortgage was recorded. The section is also amended to provide for a period of limitation for filing an application for all refunds allowable under the article. The period of limitation for filing the application is within two years from the time the erroneous payment of tax was received or, in the case of a refund arising out of the exercise of the statutory right of rescission, as provided by section 257-a of the article, within two years from the time of payment of tax or one year from the date of discharge of the mortgage which is subject to such exercise, whichever is later.

- (3) Section 2 of the bill also amended section 263 of the Tax Law to allow interest to be paid on all refunds. The rate of interest is one-half of one percent a month payable from the date the application for refund in processible form is received to a date preceding the date of the refund check by not more than thirty days. However, no interest will be allowed if the refund check is issued within 90 days of the date the refund application, in processible form, is received nor if interest would amount to less than one dollar. Under section 263, this interest, like the tax itself, will be charged back to the local tax district or other recipient which received the tax moneys which are the subject of the refund.
- (4) Section 263 of the Tax Law is also amended by section 2 of the bill to allow the Tax Commission to delegate its duty in connection with determining the amount of refund allowable under this section.
- (5) Section 3 of the bill provided that the act is effective immediately (i.e., July 21, 1986). However, where a right of refund exists on the date of enactment of this bill an application for refund must be made within the unexpired refund period allowed under prior law or within two years of the date of enactment of this bill, whichever is less.