

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

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Tax on Mortgages
July 14, 1989

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

TAX ON MORTGAGES

On July 1, 1989, Chapter 241 of the Laws of 1989 was enacted amending Article 11 of the Tax Law, (the mortgage recording tax), section 275 of the Real Property Law and various provisions of the Administrative Code of the City of New York. This Chapter was enacted at the request of the City of New York. Recording officers, representatives of title insurance companies, the New York State Land Title Association and others have indicated that expedited guidance is needed with respect to select questions raised by the changes made by Chapter 241 insofar as they affect the administration of the mortgage recording tax. The Commissioner of Taxation and Finance is charged with general supervisory power over all recording officers in respect of the duties imposed by Article 11 of the Tax Law. (Tax Law, § 263, subd. 1).

The purpose of this memorandum is to provide guidance to resolve the specific issues raised. The specific concerns raised relate to the provisions of the new law amending section 250 of the Tax Law with respect to the assignments of rents, with respect to advances and readvances and with respect to the repeal of former section 275 of the Real Property Law and the addition of a new section 275 of that Law insofar as such amendment affects the administration of the mortgage recording tax, and, lastly to the "condominium credit" provisions of section 339-ee of the Real Property Law.

Tax Law, § 250

The definition of "mortgage" in section 250 has been amended by Chapter 241 to include an "assignment of rents" given as security for an indebtedness, with respect to real property located in the City of New York. Wherever the term "mortgage" is used in Article 11 of the Tax Law, therefore, it will now include an assignment of rents with respect to real property located within the City of New York. Thus, the opinion in Albee Fuel Cor-P. v. Gallman, 42 AD 2d 323 (3d Dept. 1973) that such an assignment is not a mortgage is no longer applicable where the real property to which the assignment of rents relates is located in the City of New York.

We have been asked whether a second mortgage recording tax would be due upon an assignment of rents which is recorded in conjunction with the recording of a mortgage upon which the full amount of tax is or has been paid. It is our opinion that if such an assignment is merely additional security for the indebtedness otherwise secured by the mortgage on real property no further mortgage recording tax is due pursuant to section 255 of the Tax Law if the procedures thereunder are followed. However, if the assignment is given as security for "new" or further indebtedness other than the indebtedness or obligation secured by the recorded primary mortgage, a tax would be due upon the recording: of such assignment to the extent of the new or further indebtedness (Tax Law, § 255). The tax is imposed on the full amount of indebtedness secured by the assignment of rents, unless a section 255 affidavit is filed.

Section 250 of the Tax Law was further amended to codify, for purposes of the New York City mortgage recording taxes, a longstanding opinion of the Attorney General that a "mortgage" includes a contract or agreement whereby "new funds" are advanced or readvanced and such funds are secured by a mortgage (see, 1953 Op. Atty. Gen. 198). "New funds" are the amount by which the aggregate amount of funds advanced or readvanced exceeds the amount upon which the mortgage recording tax has been paid. Therefore, a contract or agreement providing for such advances or readvances is a mortgage taxable upon recording whether within or outside New York City. (See, however, section 253-b of the Tax Law with respect to certain credit line mortgages.) It should be noted that mortgages upon which a tax has not been paid may not be released or discharged or received in evidence pursuant to section 258 of the Tax Law. This amendment to section 250 by Chapter 241 merely clarifies that this interpretation applies as well to the New York City mortgage recording taxes (L. 1971, C. 400, et seq.) enacted subsequent to the Attorney General's Opinion.

Real Property Law, § 275

Chapter 241 of the Laws of 1989 also amended the Real Property Law by repealing section 275 and adding a new section 275 in its place.

Upon payment or tender of payment of the principal and interest due upon a mortgage, a mortgagee must execute and acknowledge a satisfaction piece therefor upon the request of the mortgagor or of any other person interested in the mortgaged premises (Real Property Actions and Proceedings Law, § 1921.1; added by L. 1911, C. 574 as section 333 of the Real Property Law). In lieu of such satisfaction (or certificate of discharge), former section 275 of the Real Property Law (as added by L. 1914, C. 408) authorized the owner of the land, upon which a mortgage was a lien, to demand an assignment of the mortgage from the mortgagee.

New section 275 requires the issuance of a certificate of discharge of mortgage to the mortgagor or the designee of such mortgagor when:

- (1) a mortgage is "due and payable"; and
- (2) the full amount of principal and interest due on the mortgage is paid.

Within 10 days thereafter, the person signing the certificate of discharge must present for recording a duplicate original of the certificate to the county recording officer and pay the fee(s) applicable to such recording. New section 275 has no application to mortgages granted to or made by the State or its political subdivisions, or any agencies or instrumentalities thereof. New section 275 applies to mortgages on which principal and interest is paid in full on or after July 1, 1989.

Former section 275 of the Real Property Law enabled a mortgagor to avoid the mortgage recording tax by obtaining assignment of a mortgage which secured debts that had been fully paid. That mortgage could then be "re-used" as security for another loan or obligation (generally from another mortgagee) without payment of any mortgage recording tax. (These have been described as "dormant" mortgages).

Logically, upon assignment to the borrower or the borrower's nominee after satisfaction of the mortgage debt, the mortgage lien ceased to secure any obligation. Thus, when the mortgage lien was "reinstated" after the assignment for consideration, it secured a new obligation and, therefore, should have been subject to the mortgage recording tax.

We believe that it was this type of tax avoidance scheme that the Legislature targeted when it repealed former section 275 and added new section 275 of the Real Property Law. The memorandum in support of the bill before the Legislature stated that "some people use old mortgage liens to obtain new loans and, therefore, escape the mortgage recording tax".

Accordingly, it is our opinion that new section 275 terminates the past practice of mortgagors demanding an assignment of a fully paid mortgage and then "selling" that mortgage to another mortgagee for "new" money on the "old" mortgage - without payment of the mortgage recording tax. Clearly falling within this category would be a mortgage paid in full according to its terms. Also included would be a mortgage "due and payable" upon the mortgagor's exercise of a right of prepayment provided in the mortgage and which is then fully paid (see, e.g., Rosenfeld v. Savings Bank of Utica, 173 Misc. 667 (Sup. Ct., Queens County 1940)). The source of the funds used to enable the mortgagor to prepay the debt would be irrelevant.

By way of contrast, for example, the commercial practice of lenders trading or selling mortgages on the "secondary" market between and among themselves does not, in our opinion, fall within the terms of new section 275 of the Real Property Law since such mortgages are not "due and payable".

A second exception would be the case of property subject to a mortgage containing a "due on sale" provision, which may be invoked at the option of the mortgagee, where the property is sold subject to the mortgage and the mortgagee elects not to invoke the "due on sale" clause. In this circumstance, although the mortgage debt may be "due and payable" within the meaning of section 275, since the mortgagee has allowed the property to be sold subject to the mortgage, the second condition of section 275 - that the full amount of the debt is paid - has not been satisfied. Therefore, section 275 would not prohibit the assignment of such mortgage. (If the "due on sale" provision is not waived and payment of the principal and interest made, a certificate of discharge must be given.)

Real Property Law, § 339-ee

Finally, Chapter 241 amended section 339-ee to provide that the mortgage recording tax credit available to condominium construction or conversion is limited by two factors.

First, the law now requires that the proceeds of a blanket mortgage be applied exclusively to payment of the construction mortgage or to capital expenditures or expenses for the development or operation of the condominium, or if applied to the purchase of land or buildings, that the purchase be no more than two years prior to the recording of the declaration of condominium. Second, the law requires that the first condominium unit be sold no more than two years after the blanket or construction mortgage was recorded.

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These limitations "apply to credits for taxes paid on construction or blanket mortgages recorded on or after July 1, 1989" (L. 1989, C. 241, § 110.(6)(c)). Thus, these limitations do not affect such mortgages recorded prior to July 1, 1989.