STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUNSET NURSING HOME, INC.	:	DECISION
for Redetermination of Mortgage Recording Tax under Article 11 of the Tax Law with Reference to a Mortgage Recorded on August 26, 1986.	:	

Petitioner, Sunset Nursing Home, Inc., Academy Street, Booneville, New York, filed an exception to the determination of the Administrative Law Judge issued on March 30, 1989 with respect to its petition for redetermination of mortgage recording tax under Article 11 of the Tax Law with reference to a mortgage recorded on August 26, 1986 (File No. 804070). Petitioner appeared by Daniel S. Cohen, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation submitted a letter in lieu of a brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the mortgage offered for recording on August 26, 1986 was exempt from the mortgage recording tax as a supplemental mortgage pursuant to Tax Law § 255.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner, Sunset Nursing Home, Inc., is a New York corporation having its principal office and place of business at Academy Street, Booneville, New York. Petitioner, as mortgagor, made, executed and delivered its note (the "Original Note") dated October 4, 1984 and its

mortgage (the "Original Mortgage") dated October 4, 1984 to Continental Securities Corporation ("Mortgagee"). The Original Mortgage was recorded October 5, 1984 in the Oneida County Clerk's Office in Liber 1662 of Mortgages at Page 245. The Original Mortgage was given to secure the Original Note which evidenced a loan of $3,058,200.00 to be made pursuant to a building loan agreement between petitioner and the Mortgagee also dated October 4, 1984. The Original Mortgage covered premises ("the Original Mortgaged Premises") owned by petitioner in Booneville, Oneida County, New York and more particularlydescribed in the Original Mortgage. The interest rate under the Original Note was 14.45 percent.

Subsequent to the execution and delivery of the Original Note and the Original Mortgage, and subsequent to the recording of the Original Mortgage, petitioner, as mortgagor, and the Mortgagee executed an agreement (the "Modification Agreement") dated March 31, 1986, modifying the Original Note and the Original Mortgage by reducing the amount of the Original Note from $3,058,200.00 to $3,049,100.00, and including in the Mortgaged Premises an additional small parcel of land owned by the Mortgagor. On the same date as the Modification Agreement was made, the entire principal amount of the Original Note, as modified by the Modification Agreement, was fully advanced and became fully secured by the Original Mortgage, as modified by the Modification Agreement. Since said amount was loaned and became secured, no reloans or readvances were made and no additional amounts have or will become secured under the Original Mortgage, as so modified.

Petitioner subsequently was able to obtain a reduction from 14.45 percent to 10.2 percent in the interest rate which the Mortgagee was charging on the loan evidenced by the Original Note, as modified, and secured by the Original Mortgage, as modified. However, because of arrangements which it had made, the Mortgagee insisted that instead of simply executing and recording an agreement modifying the interest rate and the monthly payments of principal and interest due and payable under the Original Note, as modified, and Original Mortgage, as modified, it would be necessary for petitioner, as Mortgagor, to execute a new note and new

mortgage containing all of the same terms and conditions as the Original Note, as modified, and Original Mortgage, as modified, except for the aforesaid reduction in the interest rate and the monthly payments of principal and interest due thereunder.

As a result of the foregoing, petitioner made, executed and delivered another Note (the "Additional Note") and an additional Mortgage (the "Additional Mortgage"), to the Mortgagee dated August 25, 1986. The Additional Note secured by the Additional Mortgage is in the same principal amount of $3,049,100.00 as the Original Note, as modified, and no new or further monies were or will be advanced by the Mortgagee to the Mortgagor thereunder. The mortgaged premises under the Additional Mortgage are the same as the Mortgaged Premises under the Original Mortgage, as so modified. The Additional Mortgage is, by its own terms, a "Mortgage" and makes no reference to the Original Mortgage. The only differences in the terms of the Additional Note and Additional Mortgage from the terms of the Original Note, as modified, and the Original Mortgage, as modified, are the interest rate being charged thereunder and the reduced payments of principal and interest payable thereunder.

Included among the provisions of both the Original Mortgage and the Additional Mortgage was the following:

> "The Mortgagor covenants that it will not voluntarily create or permit to be created against the property subject to this Mortgage any lien or liens inferior or superior to the lien of this Mortgage".

The Additional Mortgage became a lien on the Mortgaged Premises, as modified, immediately on the execution and delivery of the Additional Mortgage by the Mortgagor to the Mortgagee which took place at the Offices of the United States Department of Housing and Urban Development in Buffalo, New York on August 25, 1986. At the time of delivery of the Additional Note and Mortgage, the Original Note, as modified, and the Original Mortgage, as so modified, including the lien thereof on the Mortgaged Premises, as modified, were still in existence and held by the Mortgagee. The Additional Mortgage was recorded in the Oneida County Clerk's Office on August 26, 1986. Upon its recording, or simultaneously therewith, a satisfaction of the Original Mortgage, as modified, was recorded in the Oneida County Clerk's

Office and the Original Note returned to petitioner. Then, and only then, was the lien of the Original Mortgage, as modified, extinguished. As a consequence of the foregoing, at no time was the indebtedness owed by petitioner-Mortgagor to the Mortgagee extinguished and the liens created by the Original Mortgage, as modified, and the Additional Mortgage, coexisted, however briefly.

At the time of recording the Additional Mortgage, Daniel S. Cohen, on behalf of petitioner, presented an affidavit to the Oneida County Clerk requesting that the Additional Mortgage be exempted from payment of mortgage recording tax pursuant to the provisions of section 255 of the Tax Law on the ground that it was, in effect, a supplemental instrument or mortgage modifying the Original Mortgage, as modified, and not creating any new or additional indebtedness, and that the Oneida County Clerk accept the Additional Mortgage for recording without the payment of any additional or further mortgage recording tax. The Oneida County Clerk refused to do so and, as a result, petitioner paid the mortgage recording tax requested by the Oneida County Clerk in the amount of $22,869.75, under protest, which protest was noted on the check given for such payment to the Oneida County Clerk. Petitioner subsequently made application to the Division of Taxation for a refund of the mortgage recording tax in the amount of $22,869.75. By letter from the Division of Taxation dated September 23, 1986, the refund application was denied.

OPINION

In the determination below, the Administrative Law Judge rejected petitioner's argument that the Additional Mortgage could be construed as a supplemental mortgage and concluded that the Tax Law § 255 exemption from the mortgage recording tax was inapplicable to the instant transaction. While noting that petitioner could have structured the transaction so as to avoid taxation, the Administrative Law Judge nonetheless ruled that the Additional Mortgage, by its own terms, secured a separate indebtedness and did operate as a continuation of the lien created by the Original Mortgage as modified ("Original Modified Mortgage"). Accordingly, the Administrative Law Judge sustained the Division's denial of the refund.

On exception, petitioner urges that the Administrative Law Judge erred in failing to apply the Tax Law § 255 exemption to the subject transaction. Petitioner notes that the Additional Mortgage merely repeats the terms of the Original Modified Mortgage and in addition, provides for a reduced interest rate. In asking us to look to the substance rather than the form of the transaction, petitioner contends that in substance the Additional Mortgage is a correction of the prior mortgage and therefore falls within the ambit of Tax Law § 255. While acknowledging that the weight of the case law indicates that satisfaction of a prior mortgage and creation of a new mortgage does not preserve the exemption, petitioner nonetheless argues that substance over form should govern here, where the lender required the execution of an additional note and mortgage rather than a second modification agreement. Lastly, petitioner asserts that it was prevented from using a nontaxable form of restructuring the transaction because the lender insisted upon the execution of a new "clean" mortgage document.

In response the Division of Taxation asserts that the Additional Mortgage is not a supplemental mortgage within the meaning of Tax Law § 255 but rather functions as a replacement for the prior mortgage. As such, it is argued that the § 255 exemption is inapplicable here and the denial of the refund was properly sustained.

We affirm the determination of the Administrative Law Judge.

Article 11 of the Tax Law imposes a tax on the recording of mortgages on real property located in the State of New York (see, Tax Law § 253[1]). The mortgage recording tax is viewed not as a tax on the privilege of lending money, but rather upon the privilege of recording a mortgage (see, Matter of Citibank v. State Tax Commn., 98 AD2d 929, 470 NYS2d 920, 922; see also, Matter of Silberblatt, Inc. v. State Tax Commn., 5 NY2d 635, 186 NYS2d 646, cert denied 361 US 912). The mortgage debt functions merely as the basis for computation of the tax (Matter of Citibank v. State Tax Commn., supra; see, Tax Law § 253[1]).

An exemption to the mortgage recording tax is afforded by Tax Law § 255. Specifically, Tax Law § 255(1) provides that a mortgage is exempt from the recording tax if:

> " . . . 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 . . . ."

Hence, once a mortgage has been recorded, it may be changed, corrected or perfected by a supplemental mortgage and no additional recording tax will be due unless it creates or secures a new debt (see, Matter of City of New York v. State Tax Commn., 130 AD2d 890, 516 NYS2d 132, 133; Matter of Rednow Realty Corp. v. Tully, 72 AD2d 621, 420 NYS2d 792).

As a threshold requirement, the coexistence of the first and the subsequent mortgages is necessary in order to qualify for a Tax Law § 255(1) exemption (Matter of Citibank v. State Tax Commn., supra, 470 NYS2d 920, 922; see, Matter of Sheraton Corp. of Amer. v. Murphy, 35 AD2d 294, 315 NYS2d 986; Matter of Sverdlow v. Bates, 283 App Div 487, 129 NYS2d 88). It has been observed that the language of Tax Law § 255 presumes "the present, and not previous, existence of the original mortgage at the time of the recordation of the subsequent one" (Matter of Citibank v. State Tax Commn., supra, 470 NYS2d 920, 921; see, Matter of Woodmere Knolls v. Procaccino, 52 AD2d 979, 383 NYS2d 105, 107). Thus, as long as the parties are careful not to extinguish the original debt so as not to create a new indebtedness no tax shall be incurred (Matter of Woodmere Knolls v. Procaccino, supra, 383 NYS2d 105, 107, quoting Matter of Bay View Towers Apts. v. State Tax Commn., 48 AD2d 86, 367 NYS2d 856, 860, affd 40 NY2d 856, 387 NYS2d 1002; see also, Matter of City of New York v. Tully, 55 NY2d 960, 449 NYS2d 181, 182).

Preliminarily, it is noted that the threshold requirement of the simultaneous existence of the Original Modified Mortgage and the Additional Mortgage has been satisfied here. The facts as found by the Administrative Law Judge establish that upon the recordation of the Additional Mortgage, a satisfaction of the Original Modified Mortgage was recorded and then, the lien of the Original Modified Mortgage was extinguished. Hence, it is clear that the requirement of at least initial coexistence of the earlier and subsequent mortgages for the purposes of a Tax Law § 255 exemption was met here.

We now turn to the issue raised by petitioner of whether the Additional Mortgage, which lowered the interest rate to 10.2% but otherwise contained the same terms as the Original Modified Mortgage, constitutes a supplemental mortgage within the meaning of Tax Law § 255. The Administrative Law Judge determined that although petitioner may have met the initial requirement of the coexistence of the two instruments at issue, it failed to structure the transaction in such a form as would avoid the mortgage recording tax. Focusing primarily upon the absence of any language in the Additional Mortgage providing for the continuation of the lien created by the Original Modified Mortgage, the Administrative Law Judge concluded that petitioner must bear the consequences of structuring the transaction in a taxable rather than nontaxable form.

To obtain the Tax Law § 255 exemption, petitioner must demonstrate that the parties to the transaction intended to continue and confirm the original debt, not cancel or extinguish it (see, e.g., Matter of Citibank v. State Tax Commn., supra; Matter of Fifth Ave. & 46th St. Corp. v. Bragalini, 4 AD2d 387, 165 NYS2d 312). Upon the record, we cannot find sufficient evidence to establish such an intent. Rather, the documentary evidence establishes that the original indebtedness was cancelled and a new debt was created. Specifically, the Additional Mortgage failed to provide for a continuation of the $3,049,100.00 debt secured by the Original Modified Mortgage. While the Additional Mortgage involved the same parties, principal amount and mortgaged premises as under the Original Modified Mortgage, the Additional Mortgage and note do not contain any reference to the original mortgage or note, as modified, and do not contain any language to the effect that the Additional Mortgage was to operate to continue or incorporate the original indebtedness or lien. Indeed, the Additional Mortgage contains a covenant expressly providing that the lien created therein is to be exclusive. It appears that the exclusivity of that lien was thereafter preserved by the satisfaction of the Original Modified Mortgage and note, thereby extinguishing the original lien. Consequently, the Additional Mortgage, by its own terms, functioned as an independent instrument creating a new mortgage and cannot be reasonably construed as a continuation of or supplement to the previous documents (see, e.g.,

Matter of Bay View Towers Apts. v. State Tax Commn., supra, 367 NYS2d 856, 860-861; Matter of East 64th St. Corp. v. Manley, 44 AD2d 11, 352 NYS2d 694, 699, mod 37 NY2d 744, 374 NYS2d 621). Thus, petitioner's claim that the Additional Mortgage was intended to operate as a correction of the original documents is not supported by any documentary evidence before us in the record. Further, the Additional Mortgage expressly creates a new lien in place of the one created under the Original Modified Mortgage and, by its own terms, operates as a distinct and severable instrument. Therefore, because the Original Modified Mortgage is not supplemented, but rather is superseded and replaced by the Additional Mortgage, we are compelled to conclude that the instrument at issue does not constitute a supplemental mortgage within the meaning of Tax Law § 255.

Petitioner's argument that it is entitled to the exemption because the lender insisted upon the execution of a new "clean" mortgage instrument does not warrant a different result. That claim in fact supports the view that the intent of the parties was to create a new debt secured by the Additional Mortgage and therefore is subject to tax upon recordation.

Petitioner argues that although the Additional Mortgage does not appear to be a supplemental mortgage it was intended as such by the parties and this intent should determine the exemption. As proof of the parties' intention, petitioner offered affidavits of its representative. We find this evidence inconsistent with the documents of the transaction which contain no language indicating that the parties intended to continue or confirm the original indebtedness (cf., Matter of Ford Motor Credit Co., Tax Appeals Tribunal, October 26, 1989 [replacement note constitutes a continuation of the debt evidenced by the original note where an agreement provided that the original note was to be exchanged for the subsequent note]; see, e.g., Matter of Fifth Ave. & 46th St. Corp. v. Bragalini, supra, 165 NYS2d 312, 315-316). As the documents are the most persuasive evidence of the parties' intent, petitioner has not established that the Additional Mortgage was a supplemental mortgage. As noted by the Administrative Law Judge, where, as here, petitioner has structured the transaction in a taxable rather than nontaxable form,

petitioner must bear the consequences (see, Sverdlow v. Bates, supra, 129 NYS2d 88; see also, Matter of Fifth Ave. & 46th St. Corp. v. Bragalini, supra, 165 NYS2d 312, 319).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sunset Nursing Home, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Sunset Nursing Home is denied; and

4. The Division of Taxation's denial of the refund claim is sustained.

DATED: Troy, New York
October 26, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner