

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JIRINA EMERSON	:	DECISION
	:	DTA NO. 817153
for Revision of a Determination or for Refund of	:	
Mortgage Recording Tax under Article 11 of the	:	
Tax Law with Reference to an Instrument Recorded	:	
on February 27, 1998.	:	

Petitioner Jirina Emerson, 550 Route 164, Brewster, New York 10509, filed an exception to the determination of the Administrative Law Judge issued on August 3, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

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

ISSUE

Whether mortgage recording tax was properly payable on the maximum principal amount of a credit line mortgage where a portion of the proceeds of such mortgage loan was used to pay off a prior credit line mortgage on the same property.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On September 19, 1997, petitioner, Jirina Emerson, as mortgagor, executed a credit line mortgage in favor of Personal Mortgage Corporation, as mortgagee, on property located at 550 Route 164, Brewster, New York 10509 (“the first mortgage”). This first mortgage was given to secure a credit line of \$145,800.00. Petitioner executed a Credit Line Account Agreement with Personal Mortgage Corporation on the same date. The first mortgage was recorded in the office of the Putnam County Clerk on September 24, 1997 and, upon recording, petitioner paid \$1,433.00 in mortgage recording tax on the maximum credit line of \$145,800.00.

The first mortgage was assigned to Beneficial Mortgage Corporation on or about September 24, 1997.

On February 21, 1998, petitioner, as mortgagor, executed a second credit line mortgage in favor of Personal Mortgage Corporation on the same real property (“the second mortgage”). The second mortgage was given to secure a credit line of \$210,000.00. Petitioner executed a Credit Line Account Agreement with Personal Mortgage Corporation on the same date. Petitioner paid \$2,075.00 in mortgage recording tax upon the recording of the second mortgage in the Putnam County Clerk’s office on February 27, 1998. Petitioner paid mortgage recording tax on the maximum credit line of \$210,000.00.

The initial advance at the closing of the second mortgage on February 21, 1998 was \$174,384.49. Of this advance, \$147,400.49 was paid to Beneficial Mortgage Corporation to pay off the first mortgage.

The first mortgage was assigned account number 40835646 by Beneficial Mortgage Corporation. A Beneficial Mortgage statement dated February 24, 1998 indicates a principal balance on this account of \$144,900.93. A Beneficial Mortgage statement dated March 24, 1998 indicates that the principal amount of this account was paid in full on February 26, 1998.

Petitioner's purpose in obtaining the second mortgage was to increase the line of credit available to her from \$145,800.00 to \$210,000.00. The mortgagee chose to accomplish this by paying off the first mortgage with a portion of the proceeds of the second mortgage.

The second mortgage contains a provision wherein petitioner represents and warrants that she owns the mortgaged property "free and clear of any rights of anyone else except the lien identified below." The first mortgage is not identified as a prior mortgage in the space provided. Nor is there any reference to the first mortgage in any other part of the second mortgage.

The first mortgage bears the identification "Loan ID: 0002174502." The second mortgage bears the identification "Loan ID: 0002451557."

Petitioner filed a claim for refund of \$1,433.00 in mortgage recording tax paid in connection with the first and second mortgages. Petitioner took the position that the \$145,800.00 mortgage was increased to \$210,000.00 and that mortgage recording tax should have been paid on the increased amount of the indebtedness only.

By letter dated March 3, 1999, the Division of Taxation ("Division") denied petitioner's refund claim. The Division took the position that the indebtedness secured by the first mortgage was satisfied and that therefore mortgage recording tax was properly paid on the full amount of the second mortgage.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that Article 11 of the Tax Law imposes a tax on the recording of mortgages on real property located in the State of New York and that the tax is specifically imposed on the principal debt or obligation which is secured at the date of execution by a mortgage on real property situated in New York State. Tax Law § 253-b(1) specifies that, for purposes of a credit line mortgage, the principal debt or obligation means the maximum principal amount specified in the mortgage. Where the maximum principal amount of the debt of a credit line mortgage is increased, a tax is imposed on the new or further indebtedness when the instrument is recorded (Tax Law § 253-b[1]). The facts of this matter indicated that a second line of credit was used to pay the loan secured by the first mortgage in full on February 26, 1998. Subsequently, a new mortgage was recorded the following day, February 27, 1998. The Administrative Law Judge concluded that the first mortgage ceased to exist as of February 26, 1998 and the provisions of Tax Law § 253-b(1) do not apply. Therefore, petitioner owes the mortgage recording tax on the maximum principal amount specified in the second mortgage.

The Administrative Law Judge also noted that the subject mortgage does not qualify for an exemption from the mortgage recording tax pursuant to Tax Law § 255(1)(a), because that section provides an exemption from tax only for supplemental instruments: (a) filed for the purpose of correcting or perfecting a recorded mortgage or (b) adding property against which the lien will be extended for the purpose of securing the principal indebtedness.

The Administrative Law Judge stated that the parties to the transaction must establish an intent to avoid the recording tax on the full amount of the second or supplemental mortgage (*Matter of Sunset Nursing Home*, Tax Appeals Tribunal, October 26, 1989) and that no tax

would have been incurred if the parties had not extinguished the original debt, so as not to create new indebtedness (*Matter of Bay View Towers Apts. v. State Tax Commn.*, 48 AD2d 86, 367 NYS2d 856, *affd* 40 NY2d 856, 387 NYS2d 1002). The Administrative Law Judge said that the threshold requirement for entitlement to the exemption was that the original mortgage must be in existence at the time of the recording of the subsequent one (*Matter of Citibank v. State Tax Commn.*, 98 AD2d 929, 470 NYS2d 920).

In applying the law to the facts, the Administrative Law Judge found that the documentation clearly established that the first indebtedness had been extinguished on February 26, 1998 and that the second mortgage was not recorded until February 27, 1998. In addition, neither the second mortgage nor the second line of credit provided for the continuation of the original indebtedness and neither mentioned or referenced the first indebtedness. Thus, concluded the Administrative Law Judge, the instruments were independent of each other and the second was not a continuation of or supplement to the first mortgage.

The Administrative Law Judge rejected petitioner's argument that she should not be bound to the form of the transaction and noted that this Tribunal has iterated that mortgage recording tax law places great weight on the form of the transaction (*Matter of Long Island Lighting Co.*, Tax Appeals Tribunal, March 23, 1995)¹ and that if a transaction is entered into in a form which

¹We note that the Long Island Lighting Company case was annulled by the Appellate Division in *Long Island Lighting Co. v. Commissioner of Taxation & Finance* (235 AD2d 637, 652 NYS2d 640, *lv denied* 90 NY2d 801, 660 NYS2d 554). Although the Court rejected the Tribunal's interpretation of the doctrine of merger with regard to equitable and legal title, it found the parties' *intent* as manifested in the documentation of the transaction in issue to be determinative. In *Long Island Lighting Co.*, the parties specifically recited in more than one document that it was not their intent to extinguish the prior security and obligation but to continue and confirm them. The Administrative Law Judge found that proof of intent to continue the prior indebtedness was lacking in the instant matter. In fact, he found that the documentation specifically stated that the first indebtedness had been extinguished and there was no provision for the continuation of the original indebtedness.

falls within the statute, then it is taxable (*Sverdlow v. Bates*, 283 App Div 487, 129 NYS2d 88).

Consistent with this reasoning, the Administrative Law Judge found his construction of Tax Law § 253-b to be justified in light of the form of the transactions in this matter.

ARGUMENTS ON EXCEPTION

On exception, petitioner submitted new documents in support of her case. However, the two exhibits were returned and not accepted into evidence.

Petitioner's arguments on exception continue to urge that Tax Law § 253-b(1) cannot require that the two liens overlap since it leads to an absurd situation where the underlying property is burdened by a lien which is the sum of the two mortgage amounts and may not have enough value to support the double burden. Therefore, it is petitioner's position that the liens should not have existed at the same time. Petitioner contends that the earlier lien was folded into and included in the new lien simultaneously with the execution of the second credit line mortgage. Petitioner also argues that there should be a careful examination of the underlying facts to establish whether a lien continued or a new lien was created, believing that the old lien continued. Finally, petitioner maintains that she is not liable for the additional mortgage recording tax based on the reasoning in *Matter of Jeffrey Park, Ltd.* (Tax Appeals Tribunal, January 4, 1996), where we held that the "form over substance" argument did not apply to a transaction where a consolidated mortgage continued to exist, having been assigned and further consolidated with another existing mortgage. We held that the taxability of the mortgage in issue there turned on whether the new mortgage imposed a lien and not on the simple fact that a mortgage was recorded.

OPINION

In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (*Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). For this reason, the exhibits attached to petitioner's exception were returned to her and not placed in evidence or considered by us in this decision.

On the central issue of whether the mortgage recording tax was properly imposed on the maximum amount of a credit line mortgage where a portion of the proceeds was used to pay off a prior credit line mortgage on the same property, we affirm the Administrative Law Judge based upon his reasoning.

Petitioner has not advanced any arguments which would entitle her to any of the benefits provided for in Tax Law § 253-b(1), i.e., once mortgage recording tax has been paid on the maximum principal amount, additional tax will only be due on the increase (new or further indebtedness) in the maximum. The evidence established that there was no simple increase in the maximum principal amount of the first credit line mortgage. Instead, petitioner chose to expunge the first lien and replace it with another, new credit line mortgage obligation. We do not believe that petitioner's characterization of her transaction as a "folding" of the first credit line mortgage into the second at the time of the execution of the second mortgage is consistent with any rational reading of the statute. The first mortgage was paid off and ceased to exist. The maximum principal amount was not increased and petitioner is not entitled to benefit from the

provisions of Tax Law § 253-b(1). As noted in the facts, the parties extinguished the first mortgage debt and created a new indebtedness with a separate mortgage. Neither the second mortgage nor credit line agreement contained provisions for the continuation of the original indebtedness or lien and neither of the documents even make reference to the first credit line agreement or mortgage. This is entirely different from the facts in *Matter of Jeffrey Park, Ltd.*, (*supra*), on which petitioner relied. In *Park*, an assignment and consolidation agreement specifically preserved the pre-existing indebtedness and we concluded that the mere recording of the instrument was not enough to entail mortgage recording tax liability, since the instrument did not secure repayment of a debt in excess of the amount that was “under any contingency” secured by the assigned mortgage. In the instant matter, there was no showing that the parties intended to continue or confirm the prior mortgage. Rather, the evidence demonstrates two distinct and independent transactions, the second of which incurred mortgage recording tax on the maximum credit line amount.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jirina Emerson is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jirina Emerson is denied; and

4. The Division of Taxation's denial of petitioner's refund claim, dated March 3, 1999, is sustained.

DATED: Troy, New York
May 10, 2001

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner