

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SAEID E. JALAYER : DECISION
 : DTA NO. 820742
for Revision of a Determination or Refund of Mortgage :
Recording Tax under Article 11 of the Tax Law with :
Reference to an Instrument Recorded on June 4, 2004. :

Petitioner, Saeid E. Jalayer, filed an exception to the determination of the Administrative Law Judge issued on January 25, 2007. Petitioner appeared by A. Saam Jalayer, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Margaret T. Neri, Esq., of counsel) .

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter in lieu of a formal brief. Oral argument, at petitioner's request, was held on November 19, 2007 in New York, New York.

ISSUE

Whether the Division of Taxation's denial of petitioner's refund claim was proper.

FINDINGS OF FACT

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

On November 7, 2002, petitioner¹ purchased property at 34 Woodridge Lane, Sea Cliff, New York and executed a mortgage with Washington Mutual Bank, FA (the "Bank") of 400 East Main Street, Stockton, California, which secured a note in the sum of \$825,000.00, which sum

¹Although there is only one petitioner, all documents in the record indicate that the property was purchased and the mortgages were executed by two individuals, to wit: Saeid E. Jalayer and Jinous Atai. Hereinafter, all references to petitioner in the text will refer to Saeid E. Jalayer.

was to be repaid by petitioner to the Bank by December 1, 2032. This mortgage was recorded in the Nassau County Clerk's Office on November 25, 2002, and mortgage recording tax was paid in the sum of \$9,050.00.

On May 19, 2004, petitioner executed a second mortgage with the Bank which recited that said mortgage secured a note in the sum of \$1,200,000.00, which was to be repaid by petitioner to the Bank by June 1, 2034. This mortgage was recorded in the Nassau County Clerk's Office on June 4, 2004, and mortgage recording tax was paid in the sum of \$13,175.00.

On or about March 29, 2005, petitioner filed a claim for refund of mortgage recording tax in the sum of \$9,050.00. The claim for refund indicated that mortgage recording tax had been paid on May 19, 2004 in the sum of \$13,175.00 and that only \$4,125.00 was due.

In response to petitioner's claim, the Division sent him a letter, dated April 11, 2005, in which it acknowledged his claim and requested the following documents: the closing statement for the May 19, 2004 mortgage with proceeds distribution; a copy of the consolidation, modification and extension agreement and required affidavit, if any; and the discharge and/or satisfaction filed with respect to the November 7, 2002 mortgage in the amount of \$825,000.00.

By letter dated June 15, 2005 petitioner responded through his attorney, Evan Tanenbaum, Esq., enclosing a disbursement sheet prepared by the Bank for the May 19, 2004 closing and a title search summary from the Nassau County Clerk's Office, prepared by Robert S. Grabel, title searcher, which indicated that the mortgage, dated November 7, 2002, in the sum of \$825,000.00 had not been satisfied as of May 9, 2005.

The disbursement sheet from the Bank for the May 19, 2004 closing indicated the following checks authorized by petitioner from the proceeds of the loan:

Check Number	Amount	Payable or Endorsed To
135465	\$ 600.00	Golden, Wexler & Sarnese
135466	20,475.84	Horizon Land Services
135467	200.00	Therese Russo
135468	806,666.86	Washington Mutual Bank
135469	370,114.70	Saeid E. Jalayer/Jinous Atai

On the United States Department of Housing and Urban Development (“HUD”) Settlement Statement prepared for the closing on May 19, 2004, settlement charges listed included mortgage tax projected in the sum of \$9,875.00 and a satisfaction recording fee of \$90.00. The same form listed a disbursement of \$806,666.86 to Washington Mutual Bank.

By letter, dated June 20, 2005, the Division of Taxation disallowed the claim for refund, citing the following reason:

Pursuant to a Disbursement Sheet dated May 19, 2004 from Washington Mutual Bank, the original negative amortization mortgage, in the amount of \$907,500.00 was paid off. Therefore, the new negative amortization mortgage entered into with Washington Mutual Bank represents a new mortgage, which created a new indebtedness on which mortgage [recording] tax was properly paid.

In a letter from the law firm of Golden, Wexler & Sarnese, P.C., representing the Bank, dated June 8, 2005, to Evan Tanenbaum, Esq., petitioner’s representative at the time, it was disclosed that although the loan had originally been scheduled to close as a consolidation, extension and modification of the November 7, 2002 mortgage, it was closed as a standard refinance, and all fees pertaining to the closing were calculated based on a standard refinance closing. The author of the letter specifically stated that while it was not clear from the firm’s file why the form of the loan was changed at closing, petitioner was informed of the mortgage recording tax consequences of the change to a standard refinance and was apprised of the right to rescind the transaction. Petitioner received a “Notice of Right to Cancel” form at the closing.

At the closing, which took place on May 19, 2004, the attorneys for the Bank, Golden, Wexler and Sarnese, P.C., issued a bill to petitioner for “receipt and review of file, preparation of consolidation, extension and modification agreement and closing of loan” for the fee of \$750.00. Although the form provided signature lines for petitioner and Jinous Atai, neither individual acknowledged receipt of the bill.

The consolidation, extension and modification agreement prepared by Golden, Wexler and Sarnese, P.C. was not entered into evidence.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The issue presented to the Administrative Law Judge was whether the mortgage executed on May 19, 2004 represented a new mortgage or whether the mortgage was simply a consolidation, extension or modification of an existing mortgage. The Administrative Law Judge concluded that it was indeed a new mortgage that was subject to mortgage recording tax pursuant to Tax Law § 253. The Administrative Law Judge emphasized that petitioner was aware of the fact that the mortgage closing was not a consolidation, merger and extension of his previous mortgage and that petitioner was expressly aware of the increased mortgage tax consequences by the Bank’s attorney and of his legal right to cancel the transaction. The Administrative Law Judge noted that petitioner’s failure to testify or explain the change in the form of his mortgage transaction weighed heavily against him in carrying his burden of proof in this matter. Thus, the Administrative Law Judge sustained the denial of the refund letter issued by the Division.

ARGUMENTS ON EXCEPTION

In his exception, petitioner acknowledges that the Bank, in fact, did change the form of the mortgage transaction at the closing, yet he argues that the Bank should have to explain its actions. Petitioner states that: “the question as to why the form of the transaction changed [at]

the closing table so abruptly and why the Bank attorneys did not have a reason for such an abrupt change at the very least need[s] to be explored” (Exception, p. 2).

Moreover, petitioner claims that he should have the ability to file an affidavit with the Tax Appeals Tribunal or have the ability to remand the case to the Administrative Law Judge to submit an affidavit to address certain factual questions that it failed to address at the hearing in this case.

Petitioner states that he does not need to demonstrate that the mortgage falls within Tax Law § 255 in order to be exempt from the mortgage recording tax. Petitioner asserts that an agreement increasing the amount of a mortgage to secure an additional loan is exempt from tax to the extent of the pre-existing indebtedness under Tax Law § 250. Petitioner claims that there was merely an exchange of the form of the new indebtedness, that there was not a new relationship created and that the parties intended to simply increase the existing loan. Thus, petitioner argues that the facts indicate that he should only be required to pay mortgage recording tax on the increased indebtedness amount.

The Division relies on the facts and theories of law set forth in its brief submitted to the Administrative Law Judge below. The Division states that the Administrative Law Judge properly held that the May 19, 2004 mortgage was not a supplemental mortgage and that there was not an agreement to merge the original debt with the new indebtedness. Thus, the Division respectfully requests that the determination be sustained.

OPINION

Article 11 of the Tax Law imposes taxes on the recording of a mortgage on real property situated in New York State (Tax Law § 253). The tax is based upon the amount of the principal debt or obligation which is, or under any contingency may be, secured at the date of the

execution of the mortgage or at any time thereafter (*see*, Tax Law § 253[1]). Tax Law § 257 provides that the tax is to be paid to the local recording officer at the time the mortgage is recorded. “Mortgage” is defined in Tax Law § 250(2) as “every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby.”

It has been long established that the mortgage recording tax is not a tax on property but on the privilege of recording a mortgage, with the underlying debt providing the basis for computing the tax due (*see, Matter of S.S. Silberblatt, Inc. v. State Tax Commn.*, 5 NY2d 635 [1959], *cert denied* 361 US 912 [1959], 4 L Ed 2d 183 [1959]). Accordingly, the mortgage tax becomes due and payable at the time a mortgage is recorded.

Tax Law § 255(1)(a)(I) provides:

If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, 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, such additional instrument or mortgage shall not be subject to taxation under this article, except as otherwise provided in paragraph [b] of this subdivision, unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred and fifty-three of this article on such new or further indebtedness or obligation.

Exemptions provided for under Tax Law § 255 must be claimed in the following manner:

If an exemption is claimed under this section, at any time after such instrument or additional mortgage is recorded and tax paid, there shall be filed with the tax commission, as part of the application for refund a statement under oath of the facts on which such claim for exemption is based. A copy of the order of refund of the tax commission shall likewise be filed with the recording officer and preserved in his office (Tax Law § 255[2][b]).

The Division's regulations reiterate the definition of a supplemental mortgage, indicating that said instrument must make reference to the prior recorded primary mortgage and may be given to modify the primary mortgage by adjusting the terms of payment, interest rate or a change in the amount of the debt secured by the primary mortgage (20 NYCRR 645.1). The recording of a supplemental mortgage is subject to applicable mortgage recording taxes to the extent that such mortgage creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by the prior recorded primary mortgage (20 NYCRR 645.2).

Where an exemption is claimed upon the recording of a supplemental mortgage, an affidavit by the mortgagor, mortgagee or other person with knowledge of the facts, in duplicate, must be filed at the time of recording the supplemental mortgage. The affidavit shall set forth the basis upon which the exemption is claimed and contain specific information on the mortgagors and mortgagees, the primary mortgage, the remaining principal balance and a description of the supplemental mortgage including why it constitutes a supplemental mortgage and the amount of further indebtedness (20 NYCRR 645.3). The regulations also require that this affidavit be submitted with any claim for refund.

Petitioner emphasizes on exception that he need not demonstrate an entitlement to an exemption by following the strict criteria pursuant to Tax Law § 255. Rather, petitioner relies on Tax Law § 250(2)(a) which states, in pertinent part that:

[a] contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mortgage of real property for the purpose of this article, and shall be taxable as such upon the amount of such increase or addition.

It is clear from the facts, as detailed in the Bank's attorney's letter to petitioner and petitioner agrees, that the terms of the loan changed at some point before closing. The mortgage created on May 19, 2004 was not a consolidation, extension or modification such that the new indebtedness would be entitled to an exemption as set forth above under Tax Law § 255.

At this point in the proceeding, petitioner is now asking to introduce additional evidence or, in the alternative, requests a remand to the Administrative Law Judge in order to fully develop the record and articulate his theory concerning why the entire amount of the May 19, 2004 mortgage should not be taxed. We reject this proposition.

Although the Tax Law and our regulations permit us to remand cases to the Administrative Law Judge for "additional proceedings" (Tax Law § 2006[7]; 20 NYCRR 3000.11[e][2]), remanding this case is not the appropriate course of action. We have held that special circumstances need be demonstrated in order to remand a case for further fact finding by the Administrative Law Judge (*Matter of Great Eastern Printing Co.*, Tax Appeals Tribunal, February 20, 1992).

In this case, petitioner has not demonstrated any special circumstances that would require us to remand this case back to the Administrative Law Judge. In fact, this case establishes a "failure of proof by petitioner and a desire for a second bite of the apple" (*see, Matter of Feldman*, Tax Appeals Tribunal, May 23, 2002 [wherein the petitioner asked for a remand in order to re-examine evidence and dig deeper into how such evidence evolved]). The submission of an affidavit by petitioner or any further

submission of evidence to further develop the record at this point is contrary to our mission to provide a fair and efficient hearing system which requires such process to be both defined and final. As set forth in *Matter of Schoonover* (Tax Appeals Tribunal, August 15, 1991), “[i]f the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing.” Thus, based on the record before us, we agree that petitioner’s May 19, 2004 mortgage was properly subject to mortgage recording tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Saeid E. Jalayer is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Saeid E. Jalayer is denied; and
4. The Division of Taxation’s denial of petitioner’s application for refund of

mortgage recording tax, dated June 20, 2005, is sustained.

DATED: Troy, New York
May 15, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner