

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SHERYL HAWKINS : SMALL CLAIMS
 : DETERMINATION
 : DTA NO. 820409
for Revision of a Determination or for Refund of Mortgage :
Recording Tax under Article 11 of the Tax Law with :
Reference to a Mortgage Recorded on July 18, 2002. :

Petitioner, Sheryl Hawkins, 101 Sumner Place, Staten Island, New York 10301, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to a mortgage recorded on July 18, 2002.

On April 3, 2006 and April 28, 2006, respectively, petitioner, appearing *pro se*, and the Division of Taxation, appearing by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), waived a small claims hearing and agreed to submit this matter for determination based upon documents and briefs. The final brief in this matter was due by June 30, 2006, and it is this date that triggers the three-month period for issuance of this determination. After due consideration of the evidence and arguments submitted, James Hoefler, Presiding Officer, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of mortgage recording tax on the basis that such claim was filed beyond the two-year statute of limitations for refund as set forth in Tax Law § 263.

FINDINGS OF FACT

1. Petitioner, Sheryl Hawkins, purchased her home, a one or two-family dwelling, located at 101 Sumner Place, Staten Island, New York in July 2002. To finance the purchase of the home, petitioner, on July 1, 2002, executed two mortgages, a “First Purchase Money Mortgage” to JP Morgan Chase Bank in the sum of \$84,333.00 and a “Subordinate Mortgage” to the U.S. Department of Housing and Urban Development (“HUD”) in the sum of \$85,000.00. Both mortgages were presented to the Richmond County Clerk on July 18, 2002, and mortgage recording tax was paid to the clerk in the amounts of \$1,661.00, on the mortgage given to JP Morgan Chase Bank, and \$1,675.00, on the subordinate mortgage given to HUD.

2. On December 1, 2004, petitioner filed a Claim for Refund with the Division of Taxation (“Division”) seeking a refund of the \$1,675.00 of mortgage recording tax paid on the HUD subordinate mortgage. The Claim for Refund contained the following explanation of the basis for the claim:

On July 1, 2002, I purchased a home under the Officer Next Door program. This program is sponsored by HUD and allows officers to purchase homes at a fifty percent discount. I signed a subordinate mortgage contract for the fifty percent discount. This second mortgage which is a “silent second” mortgage has no real monetary value and no interest or payments are due to HUD, and I must only reside at my residence for a period of three years. After this time the subordinate mortgage is no longer in effect. At the closing I was told by my attorney and HUD’s attorney that if I did not pay the subordinate mortgage tax, I would be unable to purchase my home. Since this is not an actual mortgage, I was not obligated to pay the subordinate mortgage tax in order to purchase my home.

3. On December 7, 2004, the Division, citing the two-year statute of limitations for refund contained in Tax Law § 263, denied petitioner’s Claim for Refund stating that “[R]egardless of

the basis on which your refund claim has been submitted, it was not timely filed. For this reason, your request for a refund of the tax paid is hereby denied.”

4. Petitioner disagreed with the Division’s denial of her Claim for Refund, and on March 3, 2005 she filed a petition for refund of the \$1,675.00 of mortgage recording tax on the grounds that “[t]here are no payments made to the seller, and no interest is accrued. This subordinate mortgage does not have any real monetary value.” The petition does not address the issue of timeliness nor did petitioner file a brief or other written argument taking a position in this proceeding concerning the timeliness of her claim for refund.

CONCLUSIONS OF LAW

A. Article 11 of the Tax Law imposes taxes on the recording of a mortgage on real property located within New York State. Tax Law § 250 defines “mortgage” as “every mortgage or deed of trust which imposes a lien on or affects the title to real property.” As relevant to this dispute, Tax Law § 263(1)(a) provides that “[N]o refund of tax paid under [Article 11] shall be allowed unless the application for refund is filed within two years from the time the erroneous payment of tax was received. . . .” In the instant matter, the parties do not dispute that the \$1,675.00 mortgage recording tax payment on the subordinate mortgage given to HUD was made on July 18, 2002. Thus, it is clear that petitioner’s December 1, 2004 Claim for Refund was filed more than two years from the time the mortgage recording tax was paid.

B. In *Matter of Nierenstein* (Tax Appeals Tribunal, April 21, 1988), the Tribunal opined that:

There is no authority for the Division of Taxation to approve the claim in a manner inconsistent with the Tax Law. Statutes of limitations are matters of law, enacted by the State Legislature for the purpose of guiding all persons who are, or may become parties to a legal proceeding, with respect to the timely filing of the various documents necessary to the particular program or proceeding involved.

The statute of limitations here is three years. Its purpose is to allow a reasonable time for taxpayers who have erroneously filed or paid taxes to realize their error and make application for refund. The State is thus put on notice that there is this three year period during which it may be liable for such claims. At the end of the period, the matter is settled. Anything less than this degree of certainty would make the financial operation of government difficult, if not impossible. In short, the statute of limitations at issue here is a balance between the needs of the State with regard to the protection of its financial resources and the rights of taxpayers to correct their errors.

The rationale set forth in *Nierenstein* is equally applicable to the case at hand.

Accordingly, the Division is correct in its assertion that regardless of the merits of petitioner's claim for refund it must be denied as not timely filed.

B. The petition of Sheryl Hawkins is denied and the Division's refund denial dated December 7, 2004 is hereby sustained.

DATED: Troy, New York
September 28, 2006

/s/ James Hoefler
PRESIDING OFFICER