

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KENNETH D. PARRIS : DETERMINATION
 : DTA NO. 821253
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 December 6, :
2004. :
:

Petitioner, Kenneth D. Parris, 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 an instrument recorded on December 6, 2004.

On March 29, 2007 and April 3, 2007, respectively, petitioner, appearing pro se, and the Division of Taxation, by Daniel Smirlock, Esq. (Marvis A. Warren, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs to be submitted by August 30, 2007, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for a refund of mortgage recording tax paid.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Kenneth D. Parris (petitioner) co-owned along with his daughter, Jasmine Parris Tate, a one-family dwelling located at 225-11 147th Avenue, Rosedale, New York (hereinafter the property).

2. On December 20, 2003, petitioner and Jasmine Parris Tate, as borrowers, and IndyMac Bank, F.S.B., as lender, entered into a mortgage (IndyMac mortgage) encumbering the property and securing a debt in the amount of \$240,000.00. The IndyMac mortgage was recorded in the Office of the City Register of the City of New York on July 14, 2004. At the time of the recording, mortgage recording tax in the amount of \$4,775.00 was paid.

On August 17, 2004, the IndyMac mortgage was paid and a Satisfaction of Mortgage was executed by IndyMac. The Satisfaction of Mortgage was recorded in the Office of the City Register of the City of New York on October 4, 2004.

3. On June 29, 2004, petitioner, Jasmine Parris Tate, Howard Tate and Brenda Tate, as borrowers, and Wells Fargo Financial Credit Services New York, Inc. (Wells Fargo), as lender, entered into a mortgage (the Wells Fargo mortgage) encumbering the property and securing a debt in the amount of \$354,304.77. The Wells Fargo mortgage was recorded in the Office of the City Register of the City of New York on December 6, 2004. At the time of the recording, mortgage recording tax in the amount of \$7,061.00 was paid.

On September 27, 2005, the Wells Fargo mortgage was paid and a Satisfaction of Mortgage was executed by Wells Fargo. The Satisfaction of Mortgage was recorded in the Office of the Register of the City of New York on October 11, 2005.

4. On April 5, 2006, petitioner filed a Claim for Refund of Mortgage Recording Tax (form MT-15.1) seeking a refund in the amount of \$5,950.00. The stated basis for petitioner's claim

was that he paid \$5,950.00¹ in mortgage recording tax when he originally purchased the home for \$300,000.00. When he obtained a new loan from Wells Fargo in the amount of \$354,304.77, he was required to pay mortgage recording tax of \$7,061.00. Petitioner, in the refund claim, asserted that mortgage recording tax was due only on the increased amount of the loan and not on the entire amount of the second loan. Therefore, petitioner maintained that tax was due only on the sum of \$54,304.77.

5. On April 24, 2006, the Division of Taxation's Transaction and Transfer Tax Bureau issued a letter denying petitioner's refund claim. The letter stated, in relevant part, as follows:

Since the IndyMac Bank mortgage was discharged of record, when the Wells Fargo mortgage was recorded, there was no mortgage on record on which to be supplemental to. As a result of the discharge of the IndyMac mortgage, prior to the recording of the Wells Fargo mortgage, the Wells Fargo mortgage is considered to be a new mortgage on which mortgage recording tax is due.

6. The Wells Fargo mortgage did not indicate that it was a consolidation with the IndyMac mortgage, nor did it contain any references to the IndyMac mortgage. On the Wells Fargo mortgage, a handwritten line was drawn through the language and computation pertaining to a Consolidation Agreement.

CONCLUSIONS OF LAW

A. 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). The tax is imposed on the "principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state." (Tax Law § 253[1].) The tax under section 253 is imposed on the privilege of recording a mortgage;

¹ As previously noted, petitioner actually paid mortgage recording tax in the sum of \$4,775.00 and not \$5,950.00 as asserted in the refund claim.

the underlying debt serves as the basis for computation of the tax (*see Matter of Citibank, N.A. v. State Tax Commn.*, 98 AD2d 929, 931, 470 NYS2d 920, 922 [3d Dept 1983]).

B. Tax Law § 255 sets forth an exemption from the mortgage recording tax for recording a supplemental mortgage. More specifically, Tax Law § 255(1)(a)(i) provides, in pertinent part, as follows:

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.

C. 20 NYCRR 645.1 (a) provides that a supplemental mortgage is given and recorded:

(1) for the purpose of correcting or perfecting such prior recorded primary mortgage;

(2) pursuant to some provision or covenant in such prior recorded primary mortgage;

(3) for the purpose of providing additional or further security for the payment of the principal debt or obligation secured by the prior recorded primary mortgage by spreading the lien of the prior recorded primary mortgage to additional real property or by imposing a new lien on such additional real property . . . ; or

(4) for the purpose of coordinating or consolidating the liens of prior recorded primary mortgages to form a single and coordinate equal lien;

(5) for the purpose of modifying a prior recorded primary mortgage . . . ; or

(6) for the purpose of severing the lien(s) of a prior recorded primary mortgage or mortgages into separate liens.

D. In *Matter of David and Weiss* (Tax Appeals Tribunal, October 13, 1994), the Tribunal, after examining the Courts' decisions in *Sverdlow v. Bates* (283 App Div 487, 129 NYS2d 88 [3d Dept 1954]) and *Matter of Citibank, N.A. v. State Tax Commn. (supra)*, stated as follows:

We understand this to mean that in order for a subsequently recorded mortgage to qualify for the section 255 supplemental mortgage exemption, the taxpayer must have recorded it prior to discharging the lien of the original mortgage even if the subsequent mortgage secured the same debt as the original mortgage.

* * *

As a whole, the Tax Law and the case law indicate that even if the underlying debt remains the same, when a lien securing payment of the debt is discharged prior to the recordation of a subsequent mortgage securing payment of the same debt, the taxpayer must pay mortgage recording tax when recording the subsequent mortgage. Thus, for mortgage recording tax purposes, the status of the underlying indebtedness does not prove determinative. Instead, the controlling consideration is whether the taxpayer recorded the subsequent mortgage before discharging the lien of the prior mortgage. If not, the subsequent mortgage imposes a new lien subject to the Article 11 tax (*see Matter of Fifth Ave. & 46th St. Corp. v. qBragalini*, 4 AD2d 387, 165 NYS2d 312, 319).

E. The supplemental mortgage exemption was also addressed in *Matter of Emerson* (Tax Appeals Tribunal, May 10, 2001) wherein the Tribunal, in deciding that mortgage recording tax was properly imposed upon the recording of the second mortgage, stated:

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. . . . The first mortgage was paid off and ceased to exist. . . . 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. . . . 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.

F. In the present matter, the evidence in the record clearly indicates that the Wells Fargo mortgage did not supplement the IndyMac mortgage. On August 17, 2004, the IndyMac mortgage was paid and a Satisfaction of Mortgage was recorded on October 4, 2004. While the Wells Fargo mortgage was executed on June 29, 2004, it was not recorded until December 6, 2004, a date which was approximately two months after the Satisfaction of Mortgage for the IndyMac mortgage was recorded.

There is nothing in the Wells Fargo mortgage to indicate that it corrected or perfected the IndyMac mortgage, that it provided additional or further security for the payment of the IndyMac mortgage, that it in any way coordinated or consolidated the IndyMac mortgage with the Wells Fargo mortgage, that it modified the IndyMac mortgage or that it severed the lien of the IndyMac mortgage into a separate lien (*see* Conclusion of Law “C”).

The Wells Fargo mortgage created a new debt which petitioner and the other borrowers (Jasmine Parris Tate, Howard Tate and Brenda Tate) promised to pay to a new lender, Wells Fargo. The Wells Fargo mortgage contained no reference to the previous mortgage with IndyMac, and it is noteworthy that a line was drawn through the section pertaining to a Consolidation Agreement.

Moreover, pursuant to the mandate of the Tax Appeals Tribunal in *Matter of David and Weiss (supra)*, it is clear that in order to qualify for the supplemental mortgage exemption set forth in Tax Law § 255(1)(a)(i), petitioner had to have recorded the second mortgage (the Wells Fargo mortgage) prior to discharging the lien of the original mortgage (the IndyMac mortgage).

Since the Wells Fargo mortgage was recorded on December 6, 2004 and the IndyMac mortgage was paid on August 17, 2004 and the Satisfaction of Mortgage recorded on October 4, 2004, it is clear that the Wells Fargo mortgage was not recorded before the IndyMac mortgage was discharged. While the Wells Fargo mortgage was executed on June 29, 2004, a date which was prior to the discharge of the IndyMac mortgage, the Tribunal's language in *Matter of David and Weiss* is unambiguous that in order to qualify for the supplemental mortgage exemption, the taxpayer had to have *recorded* the subsequent mortgage prior to discharging the lien of the original mortgage which, in the present matter, was not the case. Accordingly, the Division's denial of petitioner's claim for refund of mortgage recording tax was proper.

G. The petition of Kenneth D. Parris is denied.

DATED: Troy, New York
January 24, 2008

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE