

New York



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An information bulletin for the agents of the Commonwealth/Transnation companies

TO: ALL AGENTS, COUNSEL, MANAGERS, CLEARANCE
PERSONNEL AND CLOSERS

FROM: LAWRENCE B. LIPSCHITZ, VICE PRESIDENT and COUNSEL

SUBJECT: **NEW YORK CITY – MORTGAGE TAX AGGREGATION**

DATE: April 11, 2005

New York City is enforcing its Mortgage Tax Aggregation rule in a manner not anticipated.

Under the state statute imposing the New York City portion of the mortgage tax (Tax Law section 253-a), mortgages affecting property in New York City **recorded** within one (1) year of each other and made by the same or related mortgagors, are aggregated for purposes of determining the appropriate mortgage tax rate on both the earlier and current mortgage. This is based on a rebuttable presumption that the mortgages were made as part of a single transaction, and that the making of the loan and mortgages in two stages was made in an attempt to avoid the higher tax rate.

For example, John Jones makes a mortgage in the amount of \$300,000 and it is recorded July 1, 2004. The property is improved by a single family house. The proper mortgage tax rate is 2%, and mortgage tax in the amount of \$5,975 is paid at the time of recording of the mortgage (2% of \$300,000 less \$25 [.25% on the first \$10,000 of mortgage debt]).

In March of 2005, John Jones makes a second mortgage in the amount of \$400,000 affecting the same property. The two mortgages are consolidated (Note that the same mortgage tax consequence results even if the mortgages are not consolidated). Since this new mortgage will be recorded within one year of the recording of the earlier mortgage, the mortgage tax now due on the two mortgages is based on the total amount of \$700,000, and the mortgage tax rate on the two mortgages is now 2.125%. (Note that the higher tax rate of 2.75% would apply if the property was other than a 1-3 family dwelling or a single residential condominium unit.) As a result of the aggregation rule, the total mortgage tax due on the recording of the \$400,000 mortgage is \$8,875. This is calculated as follows: \$14,850 (2.125% of the total aggregated

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amount of \$700,000 less \$25 [.25% on the first \$10,000 of mortgage debt], less the amount paid on the recording of the \$300,000 mortgage(\$5,975) = \$8,875. **Upon the recording of the \$400,000 mortgage, not only is mortgage tax calculated on the \$400,000 at the higher rate, but the increased mortgage tax of .125% on the \$300,000 mortgage also needs to be paid.**

It seems to be clear to many of us that if a prior mortgage that was recorded within one year prior to the date of the recording of a new mortgage is being satisfied by the proceeds of the new mortgage, the rebuttable presumption that the new mortgage and the previously recorded mortgage were made as part of the same transaction is rebutted.

Notwithstanding what appears to be a logical conclusion, New York City is currently taking the position that the previously recorded mortgage and the new mortgage must be aggregated for the purpose of calculating the appropriate mortgage recording tax in New York City, **even though the previously recorded mortgage is being satisfied with the proceeds of the new mortgage.**

Thus, if at your closing you are taking a mortgage for recording that will be recorded within one year of a previously recorded mortgage, the two mortgages must be aggregated for purpose of determining the appropriate mortgage tax even though the earlier recorded mortgage is being paid off with the proceeds of the new mortgage. The aggregation rule applies to all of the mortgages recorded within 12 months of each other. It is the recording date of the previously recorded mortgage that controls and not the dated date of the mortgage.

Currently, New York City will not accept an affidavit at the time of the recording of the new mortgage in an attempt to rebut the presumption created by the statute. Even if the prior mortgage is being paid off at the closing of the second mortgage, New York City is insisting that the mortgage tax be paid in accordance with the above discussion. **Only** if a satisfaction of the earlier mortgage is being submitted for recording **simultaneously** with the recording of the new mortgage, will the aggregation rule not be enforced.

In those situations in which the earlier mortgage is being satisfied with the proceeds of the new mortgage, you may want to suggest to the parties that they may want to apply for a refund of the excess mortgage tax. If they are able to show that the mortgages were not made as part of a single transaction, they may be entitled to a return of the excess mortgage tax. We make no assurances as to the outcome of their application for a refund of any part of the mortgage tax paid.

If you have any questions on this topic, please call Mike Kelly, Stacey Krone or myself, your counsel at Commonwealth Land Title Insurance Company and Transnation Title Insurance Company of New York.