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New York Mortgage Recording Tax on Revolving Loans: The Problem and a New Solution for Multistate Transactions

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New York Mortgage Recording Tax on Revolving Loans: The Problem and a New Solution For Multistate Transactions

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New York State's mortgage recording tax makes it difficult to use New York real property as collateral for a commercial revolving loan. The New York State Department of Taxation & Finance (the "Department"[1]) recently issued an advisory opinion that offers some commercial borrowers and lenders a new way to avoid this problem, at least for a commercial revolving loan secured primarily by out-of-state property.[2]

The New York mortgage recording tax is as high as 2.75% of the amount of any mortgage recorded in New York State. 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 [of the mortgage] or at any time thereafter."[3]

When the parties modify an existing mortgage to change the interest rate or other terms without increasing the principal amount of secured debt, they can avoid incurring additional mortgage recording tax if they remember to document the transaction in a way that modifies an existing mortgage rather than creates a new mortgage.[4]

The Peculiar Repertoire of Mortgage Modifications

The statute that permits tax-free mortgage modifications, Section 255 of the New York Tax Law (the "Tax Law"), has led New York real estate practitioners and title companies to create a small repertoire of one-act plays to qualify mortgage refinance transactions for exemption from recording tax.

When New York borrowers refinance their mortgages, they rarely, if ever, pay them off. Instead, the existing lender "assigns" the existing mortgage and secured notes to the new lender. This requires the parties to prepare a "mortgage chain" document, correctly describing the history of all existing mortgages, as well as a "Section 275 affidavit," in which the borrower certifies that the new lender is not really the borrower in disguise.[5] The existing lender brings to the closing a pile of old notes and mortgages,and transfers them to the new lender.[6]

The borrower and the new lender often prepare and sign a "gap note" and a taxable "gap mortgage" to evidence any increase in the total principal amount of mortgage debt on the property. They prepare and sign a "consolidated note" and a "mortgage consolidation and modification agreement." These two documents combine all prior mortgages and the gap mortgage into one, sometimes increase the principal amount of debt, and then restate completely the terms of the loan and the mortgage. To record the mortgage consolidation and modification agreement, the parties must prepare and sign two originals of the affidavit required by Tax Law § 255 (a "255 Affidavit").

If the new financing is being provided by two separate lenders instead of one, the parties may need to amend the existing mortgage to add a clause permitting it to be "severed." Then they prepare and sign a "mortgage severance agreement." To record that document, the parties prepare and sign two more 255 Affidavits. They then prepare two "substitute mortgages," each of which may require the parties to prepare and sign still more 255 Affidavits. Sometimes a transaction will also require the parties to prepare and sign a "mortgage spreader" agreement.

These devices to save mortgage recording tax often represent, by number, the majority of documents executed and delivered at a New York commercial mortgage closing, and certainly a majority of the documents recorded. Not one of these documents would be necessary if New York did not have a mortgage recording tax and Tax Law § 255. Borrowers and lenders who refinance New York mortgages without following the script may find, to their surprise, that they owe a second mortgage recording tax.[7]

Once a borrower has paid tax on the principal amount of a mortgage (the "tax-paid" amount of such mortgage), the borrower might later borrow more money from the same lender. If the parties record an instrument to increase the amount of the original mortgage, then the state will collect an additional mortgage recording tax based on the amount of additional funds advanced.[8]

Problems With Revolving Loans

If a borrower repays an existing tax-paid mortgage, and reborrows the same funds from the lender, a typical revolving loan transaction, then the problems begin. If the parties ever record a document that gives notice of the repayment and reborrowing, then they owe a new mortgage recording tax on the reborrowed funds, even if the parties might intuitively believe this money is the same as the money on which the parties had previously paid mortgage recording tax.[9]

In effect, when a borrower repays a tax-paid mortgage, the mortgage loses its tax-paid status. Mortgage recording tax previously paid on that mortgage is of no further value. It goes to waste. The subsequent re-advance is a new loan. If the parties record anything to evidence the re-advance, the State may tax the new recording as a new mortgage.

The basic rationale for this proposition appears in an opinion issued by the New York State Attorney General in 1953.[10] Under the facts described in that 1953 opinion, the borrower first recorded a mortgage securing a loan of $10,000. By its terms, this mortgage also secured any other

(Continued on Page 14)

(Continued from Page 13)

loans the lender might make to the borrower, subject always to a cap of $10,000. Later, when the borrower had paid the initial loan down to $5,000, the lender agreed to re-advance the $5,000 that had been repaid. The lender's agreement to this effect was recorded. The Attorney General concluded:

> The amount of the increase [$5,000] is taxable. Clearly here we have a "new or further indebtedness or obligation" to the extent of $5,000. Even though such re-advances are provided for by the original mortgage they create a further debt than the original principal amount . . . . Under such circumstances the amount which may be secured is always determinable and the re-advance agreement is a taxable supplemental instrument.[11]

The Attorney General went on to note that the tax is due when the "re-advance agreement" is recorded. If the parties did not record the agreement, they would owe no more tax. This is, however, not a practical way to avoid mortgage recording tax on a re-advance agreement. If such an agreement were never recorded, the Attorney General noted, it could not be enforced in court or foreclosed.[12] Thus a mortgage lender that wishes to be secured (which is why it obtained a mortgage) does not have the option to avoid mortgage recording tax on a re-advance merely by not recording an agreement that evidences the re-advance.

The reasoning of this Attorney General's opinion can be generalized to any revolving debt as follows. If a mortgage secures revolving debt, it secures such debt only until the debt has been paid down once. Any subsequent re-advance cannot be the basis for a foreclosure action (*i.e.*, it is unsecured) until the parties pay new mortgage recording tax on the re-advance. Even if they never record an agreement giving notice of the re-advance, the mortgage loses its tax-paid (and hence foreclosable) status as soon as it is paid down.

The Department has indicated that its views are consistent with the foregoing analysis. Moreover, informal communications indicate the Department believes that when a lender forecloses a revolving mortgage, the lender must go back and pay mortgage recording tax on all previous re-advances made by the lender — even if the parties never recorded any further document modifying, amending or otherwise affecting the original mortgage. Thus, a New York mortgage purportedly securing a revolving loan may, at best, fail of its essential purpose because it does not secure future re-advances and cannot be foreclosed, absent payment of a huge tax.

Future Shock

Even if the loan never goes into default, the parties may have other surprises in store. At some point the borrower will inevitably want to repay or refinance the revolving loan or the parties will agree to amend the mortgage in some way. At that point, they will want to record further documentation assigning or amending (or both) the original mortgage.

The Department has repeatedly asserted in informal communications that any instrument amending, modifying, assigning, satisfying or supplementing a mortgage that secured revolving debt cannot be recorded without retroactively paying mortgage recording tax on all previous re-advances of the loan, going back retroactively to the first time the lender ever re-advanced any funds. The theory seems to be that when the parties record a new mortgage instrument, this is the same as recording evidence of all previous re-advances of the revolving loan.

If the parties record this instrument without paying enough mortgage recording tax, *i.e.*, the recording clerk did not stop them, and the Department later discovers the recording, then the Department can retroactively collect unpaid mortgage recording tax. If the borrower fails to pay it, then the lender must.[13]

The Department's position on revolving loans is not of merely theoretical interest. It can create practical problems whenever a borrower and lender try to close any transaction that modifies, assigns, or otherwise affects a previously recorded mortgage that secured a revolving loan. If, in one of these closings, the parties want to record any documentation that affects the mortgage, they will want to avoid paying new mortgage recording tax — *i.e.*, they will want to claim the benefits of Tax Law § 255.

To claim the benefits of Tax Law § 255, the parties must prepare and submit a 255 Affidavit explaining why their transaction does not incur mortgage recording tax. A 255 Affidavit normally requires the affiant, usually a principal of the borrower, to state, among other things, that no portion of the original loan has been repaid or re-advanced. While the statute does not expressly require this statement in a 255 Affidavit, it is understood that recording clerks expect to see it, and may reject mortgage documents whose accompanying 255 Affidavit lacks the statement about reloans and re-advances. Thus title insurance companies routinely require a 255 Affidavit to state that no portion of the secured debt has been repaid or re-advanced.

If the affiant cannot truthfully state that no funds have been reloaned or re-advanced, but wants to close the transaction, then the parties may, in effect, be forced to go back and record documentation describing past repayments and re-advances. This would, according to the Department, require the parties to pay mortgage recording tax on all previous repayments and re-advances. The borrower's only other option might be to leave the mortgage in place, unmodified, unassigned, and unsatisfied, as a permanent wart on the borrower's title, waiting until the Legislature decides to amend the mortgage recording tax to solve the "revolving loan" problem.

To avoid the risk of being placed in this position, a borrower who anticipates needing to sign a truthful 255 Affidavit at some future date will hesitate to mortgage its New York real estate to secure revolving debt, so as to

(Continued on Page 15)

(Continued from Page 14)

avoid the issues created by repayments and re-advances.

As another alternative, of course, the parties can accept the Department's point of view and pay mortgage recording tax every time the revolving lender re-advances new funds. If a revolving loan of $1,000,000 were fully repaid and fully reborrowed once a week, the New York mortgage would in a year incur more than $1,000,000 of mortgage recording tax — enough to have fully repaid the entire loan.[14]

"Participation Agreements"

Borrowers and lenders have also sometimes tried to solve the "revolving debt" problem in New York by scripting a very creative and complex multi-act operatic performance that makes the one-act plays spawned by Tax Law § 255, as described earlier in this article, look like nursery school skits.

Under this scheme, the borrower and lender enter into a "participation agreement." The parties agree that every time the borrower pays money to the lender, that payment does not reduce the borrower's indebtedness, but instead constitutes the "purchase price" for a subordinated "participation" in the lender's loan.

Later, when the lender gives the borrower money again, the participation agreement characterizes this payment as not a "re-advance" but rather the lender's "repurchase" of a piece of the loan that the borrower previously purchased. The participation agreement goes on to address the relative priorities of the "participation interests" of the parties, what happens upon default, "merger" prevention, and miscellaneous rights and obligations — all as if the transaction were a real loan participation. The exercise is motivated solely and totally by the need to avoid mortgage recording taxes on future re-advances.

Although this structure has been used, it may introduce legal and practical concerns such as creation of an extra class of debt in bankruptcy, "merger" issues, administrative problems and so on. More generally, lenders and their attorneys are often suspicious of extra complexity, particularly gratuitous complexity, because it increases the likelihood that something will go wrong. The structure may simply be perceived as too "weird" or contrived, particularly by clients and by non-real-estate attorneys not already familiar with the subtle pleasures of the New York mortgage recording tax.[15]

No reported New York case has directly considered the effectiveness of a "participation agreement" or any other mortgage recording tax implications of a revolving loan. This little corner of the law is instead governed by an oral legal tradition, passed on through conversations with title companies, state tax officials and New York real estate lawyers.[16]

Thus far, to the author's knowledge, the Department has not actually tried to tax retroactively any re-advances made on revolving mortgages that were later assigned, amended, satisfied or otherwise affected by later recorded instruments, or foreclosed upon. This could in theory change at any time. During some future year's budget crisis, someone might decide to "plug" this "enforcement loophole" by directing the Department to look for mortgages that secured revolving loans (not characterized as "participation agreements") and were later modified, assigned, satisfied or foreclosed upon.[17] Given this possibility, however remote, and given the Department's position on revolving loans, cautious borrowers and lenders are well advised not to secure revolving debt with a New York mortgage, unless they are comfortable using the "participation agreement" mechanism described above.[18]

It Didn't Have to Be This Way

The overly sophisticated body of law that has built up over mortgage modifications and re-advances in New York State was by no means inescapable. The State could easily choose instead to interpret Tax Law § 253 slightly differently — in a way that would (a) remove the mortgage recording tax impediment to modern financial transactions, thus (b) facilitate the use of New York real property as mortgage collateral and thus, indirectly, (c) increase the value of New York real property.

This reinterpretation might begin by noting that the mortgage recording 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 [New York] mortgage."[19] The State could interpret this language to mean that as long as there is a possibility the lender will re-advance funds — *i.e.*, a contingency of a future advance rather than an actual present advance outstanding — the mortgage retains its tax-paid status as to the full tax-paid amount, including contingent future advances or re-advances, whether advanced, repaid or re-advanced at any time.[20]

If contingent indebtedness incurs tax when the possibility of such indebtedness first arises, then contingent indebtedness could remain "tax-paid" as it switched back and forth between being "contingent" (*i.e.*, having been repaid for the time being) and "actual" (*i.e.*, having been re-advanced). The contingent future re-advances would lose their tax-paid status only if the funds were repaid and it became certain that under no contingency would the lender ever be required to re-advance them.

Under this analysis, the parties would need to pay only one mortgage recording tax on a revolving loan. They would never need to resort to "participation agreements" or worry about how far the Department might take its positions on imposing multiple mortgage recording taxes on multiple re-advances. So far the State has missed an opportunity in this area and has instead made it difficult to use New York real property to secure revolving loans.[21]

Multistate Transactions

The practical problems in using New York real property

(Continued on Page 16)

(Continued from Page 15)

as security for revolving loans are especially troublesome for loans secured by dozens of sites in dozens of states.

The parties to multistate transactions cannot understand why New York is so inhospitable to a garden-variety financial structure that is utterly standard almost anywhere else. Even when the New York practitioner tries to explain the mortgage recording tax and the interpretations of the tax (as described above) adhered to by the New York courts and tax officials, or the workings of a "participation agreement," the parties often still do not understand.

As the easiest and most direct way to solve the problem, the parties can sometimes structure their loan so the New York real property secures only the "term" portion of the loan facility — *i.e.*, the portion of the loan facility that is not repaid until maturity — rather than the "revolving" portion. Some secured corporate loans do not, however, have a "term" component, or the business structure of the deal requires that the real estate secure all elements of the loan.

Advisory Opinion: Special Allocation of Revolving Debt

In a recent advisory opinion (the "Advisory Opinion") obtained by the New York office of Latham & Watkins,[22] the Department endorsed use of an "allocation" structure that makes it possible for New York real property to secure a purely revolving loan without using a "participation agreement," when the New York real property is part of a security package that also contains other real property in other states.

The Advisory Opinion related to a single revolving line of credit with no designated "term" component and no "participation agreement." The parties were confident that until maturity the outstanding balance of the line would probably never fall below an amount equal to the total loan value of the New York real property.

The entire loan was designated as a revolver. The parties agreed, however, and the New York mortgage provided, that the entire "revolving" element of the loan would be shifted out of New York State and would affect only the amount of the loan secured by the out-of-state mortgages. The New York mortgage provided, among other things, that it secured only the first dollars the lender disbursed — which would also be the last dollars the borrower would repay.

As long as the total balance of the loan stayed above the tax-paid amount of the New York mortgage, which the parties anticipated would be the case until loan maturity, no portion of the New York mortgage would ever be repaid or re-advanced. Thus the "revolving" element of the loan would create no New York mortgage recording tax problems.

In previous multi-state "revolver" transactions, the author had informally proposed this structure to the Department, but had been advised that the Department would look beyond the out-of-state allocation and reallocate some portion of the repayments and re-advances to the New York real property. Based on this advice from the Department, the parties involved in past transactions decided not to record any New York mortgages. By insisting on (possibly) collecting multiple mortgage recording taxes in these previous transactions, the Department collected none.

In the transaction that produced the Advisory Opinion, the author and the Department pursued the discussion much further and negotiated several paragraphs of language having the effect described above. This language is quoted in the Advisory Opinion and set forth as an Appendix to this article.[23]

In the Advisory Opinion, the Department accepted the language that shifted the "revolver" feature to the out-of-state property and accepted the author's position that this arrangement should be effective and prevent the imposition of multiple mortgage recording taxes. The Advisory Opinion concluded by stating: "all repayments and readvances of the Overall Loan can be allocated to non-New York real property security as set forth in the New York Mortgage, and such allocation will be respected and honored by the Department for purposes of computing the mortgage recording taxes due."[24]

A Few Caveats

The structure endorsed in the Advisory Opinion should allow lenders and borrowers to use New York mortgages as part of a multi-state package to secure revolving loans, subject however to the following caveats:

A. The Advisory Opinion involved a "revolver" whose balance was expected never to fall below the loan value of the New York real property, which was only a small portion of the security package. This was essential so as to shift the entire revolving feature of the loan to out-of-state real property. If New York real property represented most of the loan value in the security package, or the "revolver" was likely to be paid down to zero (or to any level below the New York loan value) at any time(s) before maturity, the structure endorsed in the Advisory Opinion might not work, because the New York portion of the loan might be repaid and reborrowed.

B. Facts and expectations can change. Even if the parties anticipate that until maturity the loan will never be paid down to a point below the loan value of the New York real property, such a paydown might still occur because of changed circumstances. The parties might then face the risks and problems of mortgage recording tax on revolving loans in New York.

C. Advisory Opinions bind the Department "only with respect to the person requesting the opinion and to the specific facts contained in the opinion."[25]

Notwithstanding these caveats, the Advisory Opinion does provide a roadmap to solve the New York mortgage recording tax problem for certain multi-state revolving

(Continued on Page 17)

(Continued from Page 16)

loans.[26] The Advisory Opinion is a step in the right direction. New York still has a long way to go, however, to make its mortgage recording tax compatible with modern financial transactions.

Endnotes

1. References to the "Department" also include references to the Commissioner of Taxation and Finance.
2. Residential mortgage loans are, except where expressly addressed, outside the scope of this article.
3. New York Tax Law (the "Tax Law") §§ 253, 253-a, 253-c. The tax ranges from 2.75% within New York City to .75% in rural areas of the state. Only about a dozen other states, primarily in the South, impose tax on the secured borrowing of money that must, at least in theory, eventually be repaid in full. Mortgage taxes in these states range from a low of one-tenth of one percent in Oklahoma to a high of about two-thirds of one percent in Maryland. New York's mortgage recording tax anywhere in the State is therefore higher than any other State's mortgage recording tax. In New York City the tax is more than four times as high as the highest mortgage tax imposed anywhere else in the United States outside New York State. It often exceeds all other transaction costs combined, including the lender's loan fee, in a New York mortgage closing.
4. Tax Law § 255. Park and 46th Street Corporation v. State Tax Commission, 295 N.Y. 171, 178 (1946) (no tax imposed on instrument modifying rate and maturity; tax imposed only to extent of funds newly advanced).
5. This affidavit is required by Real Property Law § 275, which was enacted effective in 1989 to end the process, regarded as abusive, by which a borrower would pay off a tax-paid mortgage and then "warehouse" that mortgage by assigning it to the borrower's affiliate so it could be re-used for mortgage recording tax savings on some future transaction.
6. If an existing noninstitutional lender cannot locate an existing note, this creates major mechanical problems and issues for the closing — which would be os much less, or no, significance in most other states.
7. *See, e.g.*, In Re Sunset Nursing Home, Inc., Tax Appeals Tribunal, 1989 (1989 N.Y. Tax Cases T-735) (to benefit from § 255, parties must be "careful not to extinguish the original debt so as not to create a new indebtedness," although they can change the terms and conditions of the original debt); *see also* In re New York, New Haven & Hartford R.R. Co., 42 N.Y. S.2d 676 (App. Div. 1943) (tax imposed when borrower recorded mortgage to secure "refunding" bonds issued to pay off debt secured by pre-existing mortgage, but borrower failed to characterize new mortgage as modification of pre-existing mortgage).
8. Tax Law § 250 (definition of mortgage includes amount of such increase); Rednow Realty Corp. v. Tully, 420 N.Y.S.2d 792 (App. Div. 1979). The mortgage recording tax can therefore be considered as a tax on appreciation of real estate, imposed over time as the loan value of the real estate increases. Thus, as a matter of fairness and tax policy, when an owner ultimately sells the real estate or loses it through foreclosure, perhaps the transferor should be entitled to a credit, against transfer tax, to reflect mortgage recording tax previously paid. Of course no such credit exists. As a result, even after the state and New York City have collected a 2.75% mortgage recording tax on unrealized appreciation, the state and New York City will then collect an additional 3.025% of value (or in many cases loan amount) when the owner sells the property or loses it to the lender. Sometimes the state will even collect a "real property transfer gains tax" on top of the transfer taxes. Particularly in today's weak real estate market, these various taxes are often the primary consideration in structuring any real estate transaction. Even in a steady market, they can amount to an astonishingly high percentage of the owner's equity in a typical debt-financed real estate acquisition and disposition. Because of these taxes, it is difficult or impossible for New York real property owners to benefit from the current boom in securitization of real estate, which often requires some form of transfer.
9. Woodmere Knolls, Inc. v. Procaccino, 383 N.Y.S.2d 105 (App. Div. 1976).
10. 1953 Opin. Att'y Gen. 198 (December 28, 1953). *See also* Memorandum issued by Department on August 3, 1989 (TSB-M-89), 1989 WL 386908 (N.Y. Dept. Tax. Fin.) (describing 1953 ruling as a "longstanding opinion of the Attorney General," codified in Tax Law § 250).
11. *Id.* at 200.
12. *Id.* Tax Law § 258 (mortgage cannot "be received in evidence in any action or proceeding" unless taxes paid).
13. Tax Law § 266 (attorney-general may enforce mortgage recording tax by bringing an action "against the mortgagee or his assignee or successor in interest personally"). Although the lender's loan documents would require the borrower to reimburse the lender for any mortgage recording tax paid by the lender, the problem is likely to arise at a time when the borrower is out of the picture, bankrupt, or otherwise unable or unwilling to make the lender whole. Moreover, if the loan is "nonrecourse," the lender could look only to the property, but the state's claim for underpaid mortgage recording tax could exceed the amount of the borrower's equity, if any.
14. This is also the potential measure of mortgage recording tax that might be retroactively assessed by the Department if it uncovered a recorded mortgage document that modified, amended, assigned, or satisfied the same mortgage. The lender would be personally liable for this tax. Tax Law § 266.
15. The Department has issued a memorandum indicating that the Department regards a "participation interest" as being "separate and distinct from the underlying mortgage," suggesting that it would not be taxable as a mortgage. TSB-M-83(10)M (Dec. 1, 1983). The "participation agreement" scheme would also probably pass muster under Tax Law § 275, see footnote 5. Tax Law § 275 refers by its terms to a recorded "assignment" of a mortgage securing a loan that has become "due and payable." Neither of these conditions should apply when a borrower and a lender buy and sell "participation interests" in a mortgage. No court has considered the taxability under mortgage recording tax of the "participation agreement" structure.
16. Wherever this article states that "it is understood" a particular result applies, such understanding is based on the oral law of New York mortgage recording tax.
17. There is, of course, nothing to stop revolving lenders from trying to convince the Legislature or even the Department itself that the State's treatment of revolving loans is unwise or worse.
18. Because the tax is imposed on the recording of a mortgage-related document, the borrower may not be able to solve the problem later by recording some other document to "unrecord" the prior mortgage. *But see* Tax Law § 256 (allowing under certain circumstances subsequent filing of a statement clarifying maximum amount of an "indefinite" mortgage in the event of "honest misconception").
19. Tax Law § 253(1).
20. The Legislature enacted Tax Law § 253-b effective in 1985 to establish exactly this regime for certain residential mortgages securing revolving credit lines. But the Legislature's dispensation did not apply to commercial revolvers.
21. If the State decided to modify the mortgage recording tax to facilitate commercial revolving loans, this would also be a good time to eliminate the complex documentation and closing procedures (and expense, confusion and spurious issues) currently engendered by Tax Law § 255. The State could simply require that the cover of every mortgage provide a three-line legend (a "Tax Certification") giving the following three pieces of information: (1) the total tax-paid amount for all mortgages previously recorded against the property in question (without artificial adjustment because of repayments and re-advances); (2) the increase in indebtedness to be evidenced by the current mortgage, and on which new tax would be paid; and (3) the new aggregate tax-paid amount for the property in question. Such a procedure would eliminate the repertoire of one-act plays currently inspired by Tax Law § 255 and described in the text accompanying footnotes 5 through 7. Existing incentives should assure that title companies and lenders would police the accuracy

(Continued on Page 18)

(Continued from Page 17)

of the Tax Certification. The State could enhance those incentives by making it harder (and/or more expensive) than under existing law for the parties to correct underpayments of mortgage recording tax after the fact.

22. Advisory Opinion No. M930430C (reprinted as TSB-A-93(15)-R).
23. The language also incidentally contains a useful "maximum amount" paragraph that sets forth what items, in addition to principal, may be secured by the mortgage without incurring additional tax. Although this language has become quite standard, the Advisory Opinion provides additional comfort that the Department will honor it. In addition to the language from the mortgage quoted in the Advisory Opinion and the appendix to this article, the loan agreement for the transaction contained further provisions along similar lines. This additional language is available upon request from the author.
24. Advisory Opinion, at 3.
25. U-Need-a-Roll Off Corporation, 1984 N.Y. Tax Lexis 469 (1984); Tax Law § 171, subdivision "Twenty-fourth."
26. The process of obtaining the Advisory Opinion proved to be quicker and simpler than initially expected. The application form, which was only two pages accompanied by a power of attorney and copies of documentation, was filed on April 30. After the Department requested minimal additional information, the Department issued the Advisory Opinion on September 3. The real estate bar would be well advised to make greater use of this process to clarify the problems and issues created by the mortgage recording tax, at least where timing permits. (Where timing does not permit an advisory opinion, one can sometimes instead pay the tax and apply for a refund, but this process is somehow not as appealing. One can also try to obtain a letter from the Department concurring in one's interpretation of the tax. Although such letters may not be legally binding on the Department, it is commonly understood that the Department has never disavowed such a letter.) None of which is to suggest that a simple tax on mortgages should generate as many issues, or as much complexity, as it currently does.

***Joshua Stein is a partner in the New York office of Latham & Watkins. His partner, John C. Hart, Esq., also participated in preparing the petition for the Advisory Opinion described in this article. John B. Duer, Esq., an associate in the New York office of Latham & Watkins, assisted with research for this article.**

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APPENDIX

Revolving Loan Language Quoted In Advisory Opinion

17.5 MAXIMUM AMOUNT OF INDEBTEDNESS. Notwithstanding anything to the contrary in this Mortgage, the maximum aggregate principal amount of indebtedness that is, or under any contingency may be, secured by this Mortgage (including Borrower's obligation to reimburse advances made by Lender), either at execution or at any time thereafter (the "*Secured Amount*"), is $1,400,000, plus amounts that Lender expends after a declaration of default under this Mortgage to the extent that any such amounts shall constitute payment of (i) taxes, charges or assessments that may be imposed by law upon any Mortgaged Property; (ii) premiums on insurance policies covering any Mortgaged Property; (iii) expenses incurred in upholding the lien of this Mortgage, including the expenses of any litigation to prosecute or defend the rights and lien created by this Mortgage; or (iv) any amount, cost or change to which Lender becomes subrogated, upon payment, whether under recognized principles of law or equity, or under express statutory authority; then, and in each such event, such amounts or costs, together with interest thereon, shall be added to the indebtedness secured hereby and shall be secured by this Mortgage.

17.6 TREATMENT OF BORROWINGS AND REPAYMENTS. Pursuant to the [Credit Agreement], the amount of the Secured Obligations may increase and decrease from time to time as Lender advances, Borrower repays, and Lender readvances sums on account of the Loan, all as more fully described in the Credit Agreement. For purposes of this Mortgage, so long as the balance of the Loan equals or exceeds the Secured Amount, the amount of the Loan secured by this Mortgage shall at all times equal only the Secured Amount as more fully described in Section 17.5 hereof. Such Secured Amount represents only a portion of the first sums advanced by Lender with respect to the Loan.

17.7 REDUCTION OF SECURED AMOUNT. The Secured Amount shall be reduced only by the last and final sums that Borrower repays with respect to the Loan and shall not be reduced by any intervening repayments of the Loan by Borrower. As of the Closing Date, the total amount of the Loan exceeds the Secured Amount, so that the Secured Amount represents only a portion of the Secured Obligations actually outstanding.

17.8 APPLICATION OF PAYMENTS AND REPAYMENTS. So long as the balance of the Loan exceeds the Secured Amount, any payments and repayments of the Loan by Borrower shall not be deemed to be applied against, or to reduce, the portion of the Secured Obligations secured by this Mortgage, as more fully described in Section 17.5 hereof. Such payments shall instead be deemed to reduce only such portions of the Secured Obligations as are secured by mortgages encumbering real property located outside the State of New York, which mortgages secure the entire Secured Obligations (except to the extent, if any, that specific mortgages in such states contain specific limitations on the amount secured).