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Limitations of Section 253-b or commercial line of credit

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Section 253-b of the New York State Tax Law is relied upon by many commercial lenders and their counsel as a safe haven exempting re-advances from the payment of additional mortgage tax under commercial credit line mortgages made for a face amount of less than $3 million. That reliance is often misplaced as the benefits under Section 253-b of the tax law are actually very limited in its application.

As a general rule, Section 253-b applies favorable treatment for mortgage recording tax on a commercial line of credit mortgage and the note or obligation secured thereby that is less than $3million. However, if the commercial credit line mortgage is structured in a way that does not meet the criteria of Section 253-b and the interpretation of the statute by the NYS Dept. of Taxation and Finance, mortgage tax may need to be paid on not only the face amount of the mortgage, but also on each draw to the extent that draws would exceed the total face amount of the mortgage, after taking into account the aggregate of all of the draws. This unfavorable treatment includes the payment of mortgage tax on re-advances of monies that have been re-paid. Some often-misunderstood facts and circumstances that will remove a credit line mortgage from protection of Section 253-b are outlined below:

1. Identity of Mortgagor and Obligor: The statute limits the benefit to the original obligor only. If the property was to be sold subject to the mortgage, the purchaser would not receive the benefits for future re-loans or re-advances. Likewise, a collateral mortgage securing the guaranty of a revolving credit line does not receive the benefit; the mortgagor must also be the obligor under the note for the mortgage to receive the benefit of the statute. Failure to satisfy this requirement will result in the requirement to pay additional mortgage tax on re-advances even if the revolving line and mortgage is less than $3 million.

2. Securing a Term Loan and Revolving Credit: The statute defines credit line mortgage as: *"Any mortgage or deed of trust…which states that it secures indebtedness under a note, credit agreement or other financing agreement that reflects the fact that the parties reasonably contemplate entering into a series of advances…and that limits the aggregate amount at any time outstanding to a maximum amount specified in such mortgage or deed of trust."* Thus, the statute is only applicable to a mortgage securing a revolving line of credit. If the mortgage was to secure both a revolving line of credit note and a term note, the mortgage would not receive the benefit of 253-b of the tax law.

3. Related Transactions and Aggregation: Mortgages may not be split into amounts of less than $3 million to receive the benefit. The NYS Dept. of Taxation and Finance's aggregation rules apply to any mortgages that are part of the same or related transactions with the same obligor. Thus, an intended $5 million mortgage cannot be split into two separate mortgages, each under the $3 million threshold and receive the tax benefit. There is a presumption that mortgages recorded within a 12-month period are related and will be aggregated unless there is clear and convincing evidence that was not the intent. Even after the 12-month presumption period has run, loans may still fall under the aggregation presumption if consolidated, cross-defaulted or cross-collateralized with the current loan receiving the benefit. Thus, if the aggregation results in a combined obligation which is not less than the $3 million threshold, the benefits of the statute will not apply.

4. Capped Mortgages Securing Obligations Exceeding Threshold: To determine whether a loan qualifies for the 253-b benefits, not only should the face amount of the mortgage be less than $3 million, but also the amount of the note or obligation is crucial. A mortgage which is less than $3 million, but secures a note or obligation of $3 million or more, is subject to additional mortgage tax on re-advances to the extent the re-advances are secured by the mortgage. To avoid, to the greatest extent possible, additional mortgage tax on advances due to the loan not qualifying for the 253-b benefits under the above scenario, a "last dollar" provision should be included in the mortgage. This provision bifurcates the loan structure by stating

(1) that the line of credit mortgage on the property only secures a portion of the total debt and

(2) the parties agree that any payment or repayment shall be first applied to the indebtedness not secured by the mortgage.

For example, if a line of credit is given for $5 million, but the maximum amount secured by the mortgage is capped at $2.999 million, the "last dollar" provision ensures that payments are first applied to the unsecured portion of the loan. This then avoids additional mortgage tax on re-advances to the extent the amount outstanding exceeds the face amount of the mortgage, and has the added benefit of preserving the total mortgage amount so as not to reduce the lender's security in the collateral.

Since the ability to receive the benefit of Section 253-b is limited, it is important that lenders and their counsel understand the limitations at the outset of considering a loan structure to ensure that line of credit mortgage fits all the criteria of the statute resulting in mortgage tax being payable only on the face amount of the initial mortgage and not on re-advances.

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