New York State Bar Association

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NYSBA

February 25, 1999

Re: Draft Technical Services Bureau Memorandum on Application of Mortgage Recording Tax to Commercial Credit Line Mortgages

Mr. Robert Mensing
New York State Department of
Taxation and Finance
Taxpayer Services Division
Technical Services Bureau
Building 9, Room 146
W.A. Harriman Campus
Albany, New York 12227

Dear Mr. Mensing:

We appreciate the opportunity to comment on the draft of the TSB-M regarding the application of the mortgage recording tax to commercial credit line mortgages. We have the following comments:[1]

1. To reflect the delayed effective date, the second sentence should add at the end ", effective for credit line mortgages recorded on or after November 6, 1996."

1/ This letter was drafted by Alan J. Tarr, Co-Chair of our Real Property Committee with helpful comments by Lary S. Wolf and Harold R. Handler.

2. For ease of reference, the questions and answers should be numbered.

3. The facts in the second question should be changed so that the amounts of the mortgages aggregate less than $3 million so as to preclude any issue regarding aggregation. In addition, we do not believe that the fact that one note does not call for a series of advances and repayments should cause the mortgage to fail to qualify as a credit line mortgage. Nothing in the statute or regulations prevents a credit line mortgage from securing both a revolving note and a term note. The definition merely requires it to secure a note which contemplates multiple advances, which it does. If the mortgages are required to be aggregated, then the note should be treated as a single note which contemplates multiple advances. If the notes are not subject to aggregation, the note that contemplates the series of advances and repayments should qualify.

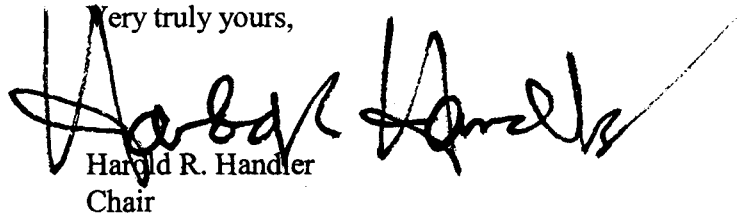
4. The fifth question is a variation of the third question, showing the right and wrong way to partially secure a debt in excess of $3 million. Accordingly, we suggest they be parts (I) and (II) of a single question.

5. In part (II) of the seventh question, the mortgages should not be considered related merely because the mortgages are on the same property. The second mortgage on the property to cover the second loan does not give the lender any greater rights than it would have if the loans were made by different lenders as under part (I). There is no reason such loans should automatically be considered related. It is not the same as loans that are spread and consolidated or loans with cross-default or cross-collateralization provisions.

While we recognize that many of the answers to these questions are required by the statutory language, we believe some constitute a trap for the unwary. For example, there should not be any reason to impose the formalistic distinction between the third and fifth questions. Similarly, the distinction drawn in question two (if the answer is not changed as suggested above) is also a matter of form governing over substance which should be eliminated. In addition, since a tax is imposed on the maximum potential mortgage upon a sale of property subject to a credit line mortgage, there should not be any difference between obtaining a new credit line mortgage and assuming an existing one.[2] Accordingly, the buyer should be treated as the "original obligor" for purposes of being able to receive readvances without paying an additional tax. Finally, since credit line mortgages are a benefit to New Yorkers, we think the $3,000,000 limit for commercial credit line mortgages should be raised, or better yet, eliminated. The imposition of a full tax upon the initial recording and upon transfer should eliminate much of the revenue impact. We hope the Department would endorse a bill to make such needed changes to the mortgage recording tax statute.

We would be pleased to discuss these comments with you at your convenience.

Very truly yours,



Harold R. Handler
Chair

2/ Although we believe the tax upon a sale of property subject to a credit line mortgage may also be a trap, we understand that it was enacted at the behest of New York City to eliminate a perceived potential for abuse, and accordingly, our comments assume that such provision will continue to be the law.