



First American Title Insurance Company of New York

635 Third Avenue, New York, New York 10017 Toll Free (800) 437-1234 Facsimile (646) 865-1660

*UNDERWRITING
BULLETIN*

TO: ALL NEW YORK STATE AGENTS

CC: HELEN POWELL

FROM: JOHN CRUZ, MICHAEL ALFEERI & JAMES THANASULES

RE: CURRENT DEVELOPMENTS - NEW STATE LEGISLATION

DATE: August 30, 2004

Please review the attached special edition of Current Developments regarding RP-5217 filing fees, non-resident income tax on cooperatives and mortgage recording tax on spreader agreements and wraparound mortgages.

Please call us with any questions or comments.



First American Title Insurance Company of New York
CURRENT DEVELOPMENTS
SPECIAL EDITION
NEW STATE LEGISLATION

This Bulletin is an update on certain legislation reported in Current Developments issued on July 9, 2004 as being considered by the New York State Legislature.

Equalization and Assessment Form - A Budget Bill enacted as Chapter 57 of the Laws of 2004 provides for an increase in the filing fee for the State Board of Real Property Services Real Property Transfer Form, generally known as the Equalization and Assessment Form. The increased fees are required for all deeds submitted for recording on and after September 1, 2004. When the property being transferred is a "Qualifying residential property" or a "Qualifying farm property" the filing fee has increased to \$75.00. The filing fee for the transfer of any other type of property has increased to \$165.00. The filing fee had been \$50.00, regardless of the property type.

"Qualified residential property" is defined as property that satisfies at least one of the following conditions:

1. The property classification code assigned to the property on the latest final assessment roll, as reported on the transfer report form, indicates that the property is a one, two, or three family home or a rural residence, or
2. The transfer report (Equalization and Assessment) form indicates that the property is a one, two or three family residential property that has been newly constructed on vacant land, or
3. The transfer report (Equalization and Assessment) form indicates that the property is a residential condominium.

"Qualifying farm property" is defined as property for which the property classification code on the latest final assessment roll, as reported of the transfer report (Equalization and Assessment) form is in the agricultural category.

Non-Resident Estimated Income Tax - Part H of Chapter 60 of the Laws of 2004, signed into law on August 20 has amended Tax Law Section 631 ("New York source income of a nonresident individual") and 633 (Estimated tax on sale or transfer of real property by nonresident") to require the payment of estimated income tax on the gain, if any, realized by the non-resident transferor of a cooperative unit. The estimated tax is to be payable no later than fifteen days after the date of delivery of the instrument of transfer with the date of the instrument presumed to be the date of delivery. This change will take effect on November 18, 2004, the ninetieth day after enactment of Chapter 60, and it will apply to

transfers of cooperative units occurring on and after that date. The transfer of the transferor's principal residence will be exempt.

Mortgage Recording Tax/Spreader Agreements and Additional Mortgages - Part Q of Chapter 60 of the Laws of 2004, signed into law August 20, has amended paragraph (a) of Subdivision 1 of Tax Law Section 255 ("Supplemental Mortgages") to provide that mortgage recording tax will be applied to a "spreading agreement or additional mortgage" recorded in the City of New York which imposes the lien of a mortgage on property not originally covered by a recorded primary mortgage unless that additional property is owned by the mortgagor of the real property subject to the recorded primary mortgage. This change will apply to mortgages *recorded* on and after November 18, 2004, the ninetieth day after enactment of Chapter 60.

The Chapter provides that transfers of one or both of the properties involved in a spreading agreement or in the recording of an additional mortgage which are determined by the Commissioner of the State Department of Taxation and Finance to have been undertaken to avoid payment of the mortgage recording tax, instead of for an independent business or financial purpose, may be disregarded.

It also provides for a presumption that transfers of one or both properties to "related" parties (as defined in Subdivision 2(b) of Tax Law, Section 253-a, with 25% substituted for 50%) within the twelve months preceding recording of the spreading agreement or additional mortgage were undertaken for tax avoidance or evasion. Such presumption may be rebutted only by "clear and convincing evidence to the contrary".

Mortgage Recording Tax/Wrap Around Mortgages - Part Q of Chapter 60 of the Laws of 2004, signed into law August 20, has amended the Tax Law for mortgages of real property in the City of New York to eliminate the practice by which a wrap-around mortgage is utilized to refinance an underlying mortgage without increasing the amount of overall mortgage indebtedness. In such instances the courts have held that no mortgage recording tax is payable on what is the mere substitution of indebtedness. (See *City of New York v. State Tax Commission*, 516 N.Y.S. 2d 132 (3rd Department, 1987) and *City of New York v. New York State Tax Appeals Tribunal*, 660 N.Y.S. 2d 753 (3rd Department, 1997)). The definition of "mortgage" in Subdivision 2 of Tax Law Section 250 will now provide that "a contract or agreement whereby the proceeds of any indebtedness secured by a mortgage of real property [in New York City] are used to reduce all or part of a mortgagee's equity interest in a wraparound or similar mortgage of such real property shall be deemed a mortgage of real property...and shall be taxable as such to the extent of the amount of such proceeds so used, without regard to whether the aggregate amount of indebtedness secured by mortgages of such real property is increased or added to". This change will apply to mortgagee *recorded* on and after November 18, 2004, the ninetieth day after enactment of Chapter 60.

Presumably, guidance will be forthcoming from the State Tax Commission on application of the above changes to the Tax Law.

Michael J. Berrey
Senior Underwriting Counsel
No. 68, August 30, 2004
mberrey@firstam.com