

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-84 (2) M
Mortgage Tax
June 18, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M820517C

On May 17, 1982 a Petition for Advisory Opinion was filed by George and Alberta Smith, R.D. #2, Watkins Glen, New York.

The issue presented is whether a certain document constitutes a mortgage for purposes of the taxes on mortgages imposed under Article 11 of the Tax Law.

Petitioners were the vendors of a piece of real property sold to F. H. Simpson Enterprises, Inc. The deed was executed on December 13, 1977 and was recorded on or about that date. The deed made no reference to any mortgages of, or liens on, the property. Consideration for the conveyance was an amount equal to the sum of (1) a cash payment to Petitioners and (2) \$31,000. The purchaser gave Petitioners a promissory note for such \$31,000. The instrument containing such promissory note also contained an option to purchase the property, extended by F. H. Simpson Enterprises, Inc. to Ronald Simpson and Donald Simpson. This instrument was presented for recordation, on March 31, 1982, to the Schuyler County Clerk, who required payment of the applicable mortgage taxes. The issue raised herein is whether such payment was in fact due under the provisions of Article 11 of the Tax Law.

Section 253 of the Tax Law imposes taxes due upon the recordation of a mortgage and measured by the principal debt which is or may be secured thereby.

A mortgage, for purposes of Article 11 of the Tax Law, is a written instrument which imposes a lien on, or affects title to, real property and which constitutes security for the payment of money or the performance of an obligation. Included, thus, are a number of instruments not mortgages on their face. For example, an instrument in the form of an absolute deed which is in fact given merely for security is a mortgage for purposes of the tax. People v. Gass, 120 A.D. 147, aff'd 190 N.Y. 565. So, too, is a conveyance which shows, by its own terms or by reference to other instruments, that the purchase price has not been fully paid and that security therefor has not been given. Thus, it is well established that where "the vendor of land has conveyed title to his vendee without receiving the full consideration, there arises an equitable lien or mortgage in favor of the seller called a 'grantor's lien.'" Birnbaum v. Rollerama, 232 N.Y.S.2d 188, at 191; Hubbell v. Henrickson, 175 N.Y. 175; Zeiser v. Cobh, 207 N.Y. 407. Further, while such lien can be waived, the grantor does not waive his or her lien merely by reason of acceptance of the note of the grantee. Maroney v. Boyle, 141 N.Y. 462. Under such circumstances, the deed "is in effect an equitable mortgage and should be treated as a mortgage . . . under . . . [Article 11] of the Tax Law." 1917 Opinions of the Attorney General 280.

As to the instrument at issue herein, the mere lending of money to another for the purpose of financing a purchase of real property, absent circumstances indicating an abuse of confidence, does not of itself create a lien on the property which would be enforceable at equity. Rella v. Torrioni, 235 N.Y.S. 2d 462; Pritchard v. Pritchard, 134 A.D. 301; 51 Am Jur 2d, Liens § 33. However, a lien is created where such is the intention of the parties. The Petitioners' submissions indicate that the creation of a lien did in fact lie within the contemplation of the parties. Thus, the fifth numbered paragraph of the instrument provided as follows:

5. That this instrument shall not be a lien against said premise in respect to any mortgages that hereafter may be placed against said premises and the recording of said mortgage or mortgages shall have preference and precedence and be superior and prior in lien of this agreement, irrespective of the date of recording and the said F. H. SIMPSON ENTERPRISES, INC., agrees to execute any such instrument without cost, which may be deemed necessary or desirable to further effect the subordination of this agreement to any such mortgage or mortgages.

Further, this interpretation is consistent with the fact, set forth by Petitioners, that it was one of the vendors who presented the instrument for recordation, apparently in order to protect her lien.

In accordance with the foregoing, tax was due, under Article 11 of the Tax Law, upon the recordation of the instrument at issue.

DATED: June 8, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.