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The practical effect of mortgage assignments: The impact of state mortgage tax on buyers and sellers

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Commercial transactions, the practice of focusing on the ability to assign an existing mortgage made by the seller of a property, produces excellent results for the purchaser of that same property. The primary reason a purchaser of a commercial property will inquire as to the assignability of the existing mortgage is largely motivated by the desire to save a substantial amount of money on the NYS mortgage recording tax.

In connection with an existing mortgage on a commercial piece of property, if the purchaser is able to negotiate an assignment of the outstanding balance of that mortgage to its new lender, the state of N.Y. allows the purchaser to reap the benefits of the previously paid mortgage tax by the current seller at the time that seller made the mortgage. As an example, assume that the outstanding balance of the seller's mortgage is $2 million securing property in Westchester County. (This example is applicable no matter where in the state the property is located). At the time the current seller made that mortgage, the borrower paid a total of $26,000 in mortgage recording tax. In the event that the new purchaser is able to assign that outstanding balance to its new lender, the purchaser will not be required to repay the previously paid mortgage recording tax. The purchaser will, however, be required to pay mortgage recording tax on any new money that the purchaser will borrow over and above the existing transferred/assigned balance of the $2 million referred to above. Let's now assume that the purchaser will be making a mortgage of $3 million to finance the purchase of the Westchester County property. Based upon the mortgage tax law of the state of N.Y., the purchaser will only be required to pay $13,000 in mortgage recording tax on a total mortgage indebtedness of $3 million. Since the new lender must lend the borrower an additional $1 million of new money together with the assigned balance of $2 million in our example, only the additional $1 million will be assessed on the mortgage recording tax at the rate of $1.30 per $1,000 of the amount borrowed.

With reference to a residential transaction, both the seller and the purchaser will reap the benefits of saving money if the purchaser is able to negotiate an assignment of the existing mortgage to the purchaser's new lender. As outlined above in the commercial property scenario, the new purchaser will also be able to save the amount of money the seller paid in mortgage recording tax at the time that seller made the existing mortgage. However, the added benefit in the residential mortgage assignment transaction is that fact that the seller will also save some money due to the continuing lien deduction. This deduction can be found on the TP 584 or the combined real estate transfer tax return on page two in schedule B part 1. Section 1402 of the Tax Law indicates that the taxable consideration of the property shall exclude the value of any lien or encumbrance remaining therein at the time of the conveyance. We can use the same example we used for the commercial assignment for the residential transaction. If the residential purchaser is paying $3 million for the property and the existing mortgage balance is $2 million, the purchaser will be able to save the same $26,000 he was able to save on the commercial transaction if he is able to negotiate the mortgage assignment. In addition, the seller will be able to utilize the continuing lien deduction only up to the amount of $500,000 of taxable consideration, and thereby save the amount of $2,000 of state transfer tax he would otherwise be required to pay at the time of the closing.

It should also be noted here that not all lenders will agree to assign the existing mortgage to the purchaser's lender, or accept an assignment from the existing lender. If they do, the purchaser will be responsible for all assignment fees assessed by the assignor bank. Those fees could include both an arbitrary assignment fee imposed by the assignor bank (which varies greatly) as well as any legal fees the assignor bank would incur in connection with the preparation of the assignment document, as well as any other necessary documents. In addition, the borrower will also be responsible for some additional legal fees from the counsel to the assignee bank; the preparation of the consolidation, extension and modification agreement; the section 255 affidavits; as well as the review of the assignment and all of the underlying notes mortgages and other documents to be assigned to the new lender. Consequently, the new purchaser must analyze all of the fees associated with the mortgage assignment before attempting to facilitate the assignment, but generally speaking, it is an excellent way to save a substantial amount of money on the mortgage recording tax, payable by the buyer. Also, there may be an additional benefit to the buyer if he can negotiate a reduction of the purchase price by the amount the seller saves in transfer tax expenses by utilizing the continuing lien deduction together with the mortgage assignment. I would suggest that the issues surrounding the assignment of the sellers mortgage, including which party would be responsible for the assignment and legal fees, the timing of the assignment to the date of closing and any credit from the seller for the amount of the transfer tax paid, all be set forth and negotiated in the contract of sale.

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