Assignments Of Mortgage And Potential Mortgage Recording Tax Savings

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In New York State, the requirement to pay mortgage recording tax on the principal amount secured by a mortgage on real property located within the state can significantly increase the cost of an acquisition or refinance transaction. This is especially true for commercial properties in New York City, where mortgage tax rates are higher than all other counties in the state. The mortgage recording tax rate for such properties is 2.05% on any mortgage that is less than $500,000, and 2.80% on any mortgage that is $500,000 or more. So, for example, in a purchase transaction of a mixed-use building for $10,000,000 where the purchaser is financing 60% of the purchase price, the mortgage tax on a $6,000,000 mortgage would be $168,000. Of course, this tax is in addition to other closing costs and expenses that are associated with such a transaction.

The purchaser of such a property would potentially be able to realize a significant savings if the seller has an existing mortgage on the property and the seller's lender is willing to assign the mortgage to the purchaser's lender. This is referred to as a purchase CEMA (Consolidation, Extension and Modification Agreement). Since the seller already paid mortgage recording tax when it took out its mortgage, New York State does not require mortgage recording tax to be paid again on the amount of the outstanding principal balance of the existing mortgage to the extent it is assigned and continues to secure a bona fide indebtedness.

Continuing with the example above, if the outstanding principal balance of the seller's existing mortgage is $2,350,000, the purchaser will at closing execute a "gap" mortgage in the amount of $3,650,000 in favor of the purchaser's lender, and this "gap" mortgage will be consolidated with the lien of the seller's prior mortgage which is assigned to the purchaser's lender to form a single lien in the amount of $6,000,000. The purchaser will pay mortgage recording tax in the amount of $102,200 on the "new money" represented by the "gap" mortgage only, thereby saving a total of $65,800. Typically, the purchase agreement will provide that the purchaser will pay any fees of the seller's prior lender in connection with the assignment of mortgage, including its attorneys' fees, and sometimes the seller will only agree to permit the purchaser to negotiate such an assignment if the purchaser is willing to split the mortgage tax savings with the seller.

Such agreements to share the mortgage tax savings have even found their way to residential transactions, since purchase prices for luxury condominiums often exceed those of smaller multi-family, mixed-use and other commercial properties. This is also common in new development transactions where the developer will have negotiated in their construction mortgage a certain number of "splitter agreements" which they can use to assign a portion of their construction mortgage to their buyers in a purchase CEMA. The developer in this situation will certainly share in the majority of the savings of the buyer; however the buyer still obtains a benefit with little expense to them.

The practice of negotiating assignments of mortgage is equally applicable to refinance transactions where the borrower refinances a mortgage loan with another lender, and the concept of consolidating the liens of mortgages for the purpose of saving mortgage recording tax is similarly pertinent where the borrower refinances a mortgage loan with the same lender. Although the existing mortgage lender is not required by law to assign its existing mortgage to the new lender, and the new mortgage lender is not required to accept an assignment of an existing mortgage, many lenders often do agree to accommodate such a request to the extent possible because of the significant savings to the borrower.

Banks usually consider it good business to issue and accept assignment of mortgages. A bank benefits directly from a client of theirs saving in a significant expense such as mortgage recording tax. The reason a bank may not be willing to accept an assignment is that they do not trust the paperwork of other banks and do not want to assume any liability if there are any issues. During the subprime lending crisis, we experienced several banks not being able to properly demonstrate requisite loan documents or even proof that some loans had been extended. Although it is subject to the consent of both the existing lender and new lender, the purchase CEMA remains a viable mechanism for both commercial and residential purchasers to save substantial sums of money.

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