

# CROSS-BORDER FINANCE ALERT

## What Cross-Border Practitioners Need to Know about New York Mortgage Tax

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The quirks inherent in New York State's mortgage recording statutes often cause out-of-state practitioners some frustration, especially if they practice in a jurisdiction that does not have a mortgage recording tax. If your cross-border deal includes real estate collateral, then you should be aware of the below New York mortgage tax basics and peculiarities.

### 1. The Basics

New York State imposes a substantial mortgage tax on all mortgages recorded in the State. The rate differs by County, type of mortgage (i.e. residential vs. commercial), and mortgage principal amount. The most common rate for a commercial mortgage is 1% of the principal amount, and can range as high as 2.8% of principal for certain transactions in New York City. From a practical perspective, if you don't pay the tax you will not be able to record your mortgage. From a legal perspective, failure to pay the tax is a bar against enforcement, assignment, and discharge of the mortgage. The desire to save on the mortgage tax encourages the consolidation of existing mortgages rather than a discharge when a loan is refinanced, and contributes to substantial complexity in structuring and formality of otherwise straightforward mortgage lending transactions.

### 2. Mortgage Recording Tax – You Need to Cap the Principal Amount Secured

In New York you need to set the maximum amount of principal secured by the New York property within the mortgage. This will establish the mortgage tax liability. 'Last dollar' language should also be included in the mortgage. A typical last dollar clause states that so long as the aggregate amount of the secured obligations exceed the maximum secured amount under the mortgage, any payments of the secured obligations shall not reduce the maximum secured amount. In addition to the maximum principal amount secured, the mortgage may also secure interest payable on the indebtedness secured by the mortgage, and incidental amounts such as expenses incurred by the lender to preserve the value of the mortgage. No mortgage tax is paid to secure these items. Breakage costs associated with an interest rate swap agreement may also be included as incidental amounts if certain conditions are satisfied.

### 3. Mortgage Recording Tax – The Existing Mortgage Has Value

In New York, particularly in the context of a refinance, it is a benefit to the borrower for the existing mortgage to be assigned to the new lender. The assignment of an existing mortgage to the new lender allows the borrower to avoid paying mortgage tax on the existing amount of principal secured by the assigned mortgage, which is typically then consolidated with the new money portion of the refinance to form a new lien in the consolidated amount. The documentation necessary to assign, modify and consolidate a mortgage is formulaic and cumbersome, but will serve to save the borrower money. On a large transaction, the savings can be considerable. It is also important to negotiate with the lender a clause in the existing mortgage pursuant to which the lender commits to an assignment of the existing mortgage to a new lender. This way, the borrower is ensured the ability to take advantage of mortgage tax previously paid upon its refinance.



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### 4. Beware of Revolving Credit Mortgages

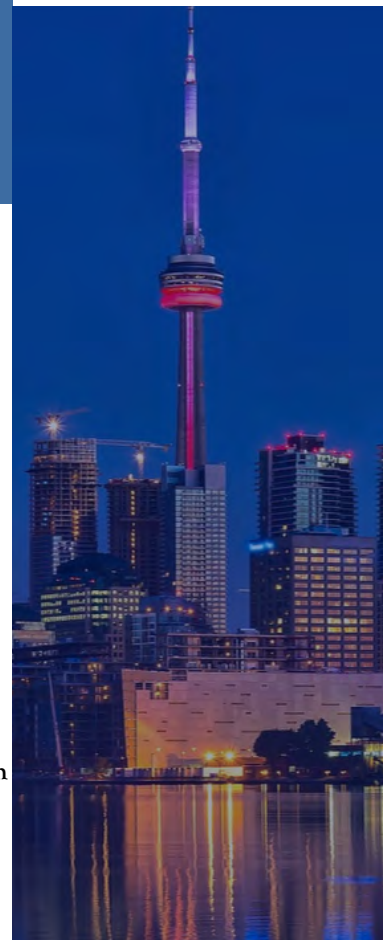
Securing a commercial revolving credit line in New York with a mortgage is difficult and fraught with risk. New York Tax Law does provide for a mechanism to secure commercial revolving loans under \$3,000,000. Securing commercial facilities in excess of that amount is feasible, but it requires significant structuring. The risks of securing revolving debt include mortgage tax assessed against amounts which have been repaid and re-borrowed, and the inability to assign, satisfy or enforce the underlying mortgage absent payment of such taxes.

Aside from the above, there are myriad other issues that may be encountered in the context of New York mortgage lending and mortgage tax, which will be covered in future installments. Overall, the peculiarities of the New York mortgage tax rules can be overcome and your deal can likely get done, but it is important to engage New York counsel in the structuring phase of the process.

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