February 2024



# Erie County Comptroller's Office
# Audit of the County Clerk's Office, Registrar Division
# Mortgage Tax Collection and Distribution
# January 1, 2022 through December 31, 2022

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February 5, 2024
Erie County Legislature
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Dear Honorable Members:

The Erie County Comptroller's Office has completed an audit of Mortgage Tax Revenue Collection and Distribution for the Erie County Clerk's Office, Registrar Division for the period January 1, 2022 through December 31, 2022.

While testing mortgage tax expenses in the prior Clerk's Office audit dated June 2023, the Auditor found variances between and among numerous reports throughout 2022 that the Clerk's Office uses to collect and distribute mortgage tax revenue. Because many aspects of the Clerk's mortgage tax procedures were outside the scope of the prior audit, the Auditor expanded and separated the collection and distribution of mortgage tax revenue into a second subsequent audit.

The Auditor's primary objective was to test and evaluate the internal controls relating to mortgage tax revenue collection and the distribution of funds to corresponding tax districts and proper New York State agencies. Secondary objectives included the evaluation and testing of documentation for accuracy, completeness, and timely filing along with assessing the recordkeeping and reporting practices which support mortgage tax collection and distribution, including review of the "Mortgage Tax", "Imprest" bank accounts and Escrow balances in the Concentration Account.

The scope of the audit included testing accounting transactions recorded in NewVision System, the electronic data processing system that is utilized by the Clerk's Office, and the County's accounting system. The Auditor used these systems to test and evaluate the collection and distribution of mortgage tax revenue to the relevant tax districts and state agencies[1].

The Clerk's Office is responsible for establishing and maintaining a system of internal controls. The objectives of such a system are to provide management with reasonable, but not absolute, assurance that transactions are executed in accordance with proper authorization and are recorded properly. In this instance, New York State Tax Law and regulations determined by the New York State Tax Commissioner explicitly govern these transactions and must be followed. Due to inherent limitations in the system of internal controls, errors or irregularities may nevertheless occur and not be detected.

The Auditor's consideration of the Auditee's internal controls was for the limited purpose described in the preceding paragraph and would not necessarily identify all deficiencies which could be deemed control deficiencies or material weaknesses. A control deficiency exists when the design or operation of a control

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[1] Specific areas of focus included Fund 110, Business Area 113, Cost Center 11310, General Ledger account 415160 Mortgage Tax, General Ledger account 220100 Mortgage Tax and Business Area 170, General Ledger account 445030 Interest and Earnings for mortgage tax.

does not allow management or employees, in the normal course of operations, to prevent or detect errors or malfeasance.

The responsibility of the Erie County Comptroller's Office, Division of Audit, is to express an opinion based on the objective findings of the audit. The Auditor conducted the review in accordance with Generally Accepted Government Auditing Standards (GAGAS). Those standards require the Audit Division to plan and perform the audit in a manner designed to obtain sufficient, appropriate evidence in line with the Auditor's objectives. That evidence permits the Auditor to develop findings and draw conclusions which can be reasonably supported by the evidence obtained. The evidence obtained by the Auditor during the course of this review provides a rational basis for the Auditor's findings, conclusions, and recommendations based on the audit objectives.

The Auditor must note that it did not receive the completed Internal and System Controls questionnaires (ISCQ) or Management Representation Letter from the Auditee. The ISCQ is used to aid the Auditor in assessing both internal and system controls and to assist with the development of testing procedures. As such, the ISCQ is the first fact-gathering step that the Auditor takes and is typically completed and returned by the Auditee prior to the initiation of fieldwork. Because the ISCQ forms the baseline of the audit, the Auditor took an unusual but necessary step and filled out the ISCQ based on walkthroughs, interviews, and observations made during fieldwork. The Auditor subsequently returned the ISCQ to the Auditee for review and signature. However, the Auditee did not respond to the request and no ISCQ has been returned to the Auditor. Because the Auditor's responsibility is to audit to the operating policy of the Auditee, the Auditor's policy-related findings are based on external rules binding the Clerk's Office such as laws, regulations, administrative guidance in addition to countywide accounting policies.

## I. Background

The Erie County Clerk's Office is organized into two divisions: (1) the Registrar's Office and the (2) Auto Bureau. The scope of this audit was limited to specific functions of the Registrar's Office. The Registrar is the official repository for public records relating to business and property ownership, such as land records. It is responsible for recording, filing and maintaining records related to real estate transactions, modifications, liens, payments, warrants, special licenses and certain corporation records. In New York State, County Clerks are considered "recording officers" for the purposes of securing property ownership.

**Basis of Mortgage Tax Collection by the County Clerk's Office:**

The mortgage tax in New York is imposed by Article XI of the Tax Law. The rules and procedures described in the law prescribe authorizations, exemptions, processes, and assignments in considerable detail. A legal opinion describing the statutory system in technical detail is attached to this report as Appendix B.

Per § 253 of the Tax Law, a tax of one percent will be applied to the value of the mortgage recorded unless one or both parties to the transaction are eligible for an exemption. That one percent is broken down into four separate categories, each with its own purpose and set of exemptions. The first category is known as Basic Tax. Half of all mortgage tax revenue is generally intended to benefit the cities, towns, and villages of the county in which the mortgaged properties sit. The second category is known as Additional Tax. Approximately one quarter of mortgage tax revenue is generally intended to benefit public transportation, which, in the case of Erie County, is represented by the NFTA. The remaining mortgage tax revenue categories are known as Special Tax and Assistance Tax. The former is paid to the State of New York Mortgage Agency (SONYMA), a public benefit corporation operating in the commercial mortgage market and is only collected on commercial mortgages. The latter is paid to the NFTA and is only collected on residential mortgages.

Per § 257 of the Tax Law, taxes are due at the time of recording and the "recording officer" is the proper person to pay. Erie County's recording officer is the County Clerk. Money transmitted by the Clerk's Office is held by the Erie County Comptroller and then disseminated. The Clerk is responsible for charging the relevant party at the time of recording, properly maintaining the amounts collected in separate trust accounts, and ensuring that the money is disbursed accurately and efficiently. New York State reimburses the Clerk's Office for the time, effort, and materials required to properly perform its responsibilities under the law.

Per § 261 of the Tax Law, New York's mortgage tax is considered an earmarked revenue source. The State Legislature has deliberately directed certain portions of mortgage tax funds to certain entities. The beneficiaries of mortgage tax include public transportation (NFTA), affordable housing (SONYMA) and local governments. The Clerk is responsible for ensuring that accurate amounts are transmitted to the NFTA and SONYMA each month. The Clerk is also responsible for working with the Comptroller to ensure that the cities, towns, and villages of Erie County receive their share of revenue. Mortgage tax revenue is not considered "County funds".

## II. Audit Results

**Auditor's Opinion**

In the Auditor's opinion, there are material weaknesses in the system of internal control s with regard to financial reporting and distribution of mortgage tax revenue. More accurately stated, the Clerk's Office has no system of internal controls. There are no written procedures or managerial review over mortgage tax revenue collection, reporting or distribution, and the Clerk's Office failed to segregate duties in performing critical fiscal functions. The reports generated by the Clerk's NewVision Cashiering System are routinely inconsistent and show discrepancies in the financial information being reported. There is no reconciliation process that relates to mortgage tax revenue collection, calculation, or distribution. Despite the use of several bank accounts used by the Clerk for mortgage tax purposes [2], none of the accounts that the Auditor reviewed had ever been properly reconciled. Until recently, the Comptroller was improperly denied the most basic form of access to the majority of accounts relevant to this audit. Furthermore, the Mortgage Tax and Imprest bank accounts are utilized ad hoc, and there are no established controls, segregation of duties, or managerial oversight pertaining to money transfers or check writing activities into or out of either account exists.

Many of the Auditor's primary concerns can be traced back to the Clerk's failure to reconcile the NewVision reports and segregate the mortgage tax funds. The Auditor found that the Clerk's Office did not keep Erie County funds separate from the mortgage tax revenue that it collects and stewards as a fiduciary. During testing, the Auditor found that the unapportioned mortgage tax revenue placed on hold, pending a determination from the New York State Tax Commissioner, was deposited with all other mortgage tax revenue. Compounding the issue, the Auditor found that the mortgage tax revenue collected was deposited with the Clerk's other funds in the "Concentration" Bank Account that the Clerk holds and maintains at M&T Bank[3]. As further described in Finding B-2, the Clerk periodically moved money from the Concentration account into the Mortgage Tax bank account for the purpose of writing apportionment checks to other counties as required[4].

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[2] These include the M&T Mortgage Tax Bank Account, the Imprest Account, the Concentration Account, and several Escrow Accounts.

[3] Erie County Policy requires the use of an "agency fund to account for assets held in a trustee or agency capacity for others." Therefore, since the County has no entitlement to mortgage tax revenues and maintains custody of them only for collection purposes as prescribed by Tax Law, those revenues should not have been comingled in the Concentration account.

[4] Pursuant to a process prescribed by the Tax Commission obligating the use of the "NYS Determination of Apportionment of Tax Among New York Counties" (AU-203).

From the outset of fieldwork, it was abundantly clear that the NewVision system is being utilized as a cashiering system only. The Audit Division made several critical findings highlighting the issues with NewVision in the previous audit. Those issues were further compounded during this audit of mortgage tax processes. The Audit Division has substantial reason to doubt the reliability and validity of financial data being generated from the NewVision Cashiering System. In addition, NewVision is not configured to communicate or transfer financial data to Erie County's accounting system. This is not a new problem. Issues with the NewVision system have been documented for over a decade. When the Audit Division performed a review of internal controls and operational procedures at the Clerk's Office in 2012, the incompatibility of NewVision with the County's accounting system was deemed a "significant control weakness."[5] The recommendation then was to "work with NewVision to ensure useful reporting is maintained." No action was taken to move that recommendation forward and the Erie County Clerk's Office remains the only Office in New York State that continues to use NewVision. Because the same failures of fiscal oversight and data reliability that were found in 2012 remain an issue for the Clerk's ten years later, it is the Auditor's ultimate opinion that the time has come to move on from the NewVision system and find a new provider. Since establishing a new provider is a time and effort-intensive process, recommendations contained in this report reference changes to the NewVision system that would allow data to be reconciled or transferred to the County's accounting system. These are short -term recommendations that will help the Clerk's Office rectify some accounting issues.

## III. Findings & Recommendations

The Auditor's findings have been ordered in a manner that begins with broad, fundamental issues that were noted during the audit. These are followed by a breakdown of mortgage tax process components that occur in chronological or sequential order.

### A. Internal Controls

**Material Weakness #1**: Control Deficiencies Exist Due to the Lack of Established Internal Controls Within the Clerk's Office Mortgage Tax Revenue Collection and Distribution Process and Procedures.

During fieldwork, the Auditor found that one individual was responsible for making bank transfers, executing checks, performing reconciliations, transferring money between various accounts, preparing statements, and initiating distributions. For mortgage tax purposes, this included completing the Statement of Mortgages Recorded (MT-4), performing bank transfers, issuing and signing checks for refunds, and paying required amounts to other counties. The employee who prepared financial documents in the Clerk's Office was the same person who signed off on their accuracy. This demonstrates a serious lapse within the system of internal controls and a failure to segregate critical fiscal functions. The lack of implementing internal controls and segregating fiscal duties has allowed multiple errors in the reporting, collection, and distribution of mortgage tax revenue to remain undetected.

Recommendations:
The Auditor recommends the Clerk's Office develop written procedures for mortgage tax collection and distribution that incorporate the County's internal control policy. Strong internal controls are necessary to ensure that collection and distribution of mortgage tax revenue is accurate, reported timely, and adequately supervised provides the proper oversight of reporting. Furthermore, the Clerk's Office management should review and approve the reconciliation of mortgage tax revenue to ensure that the figures are true and correct before transfers or payments are distributed. Per Erie County Policy [6], sufficient oversight of activities by management with relevant experience ensures that controls are functioning as intended and that any error

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[5] See *A Limited Review of Internal Controls and Operational Procedures at the Erie County Clerk's Office* at 6, Erie County Comptroller, published June 1, 2012.
[6] Erie County Accounting Policy – Internal Controls

or unauthorized activity is detected before the impact of errors or malfeasance become significant. This recommendation could be best implemented by adding accounting positions to the Clerk's Office and hiring an experienced Deputy County Clerk - Finance. The former will be able to properly reconcile accounts and prepare accurate financial reports while the latter will be able to provide meaningful oversight and impose accountability measures.

**Significant Finding #1:** The Clerk's Office Did Not Sign a Management Representation Letter.

Pursuant to GAGAS and Division of Audit Policy, an auditee is required to certify fundamental representations made to the Auditor during the course of the audit. This certification is known as the Management Representation Letter and, like the ISCQ, it is both foundational and a formality. The Management Representation Letter, in sum and substance, is the Auditee's guarantee that it has submitted all requested information, that information is accurate, and all material details have been disclosed to the Auditor.

The Auditee received the Management Representation Letter at the close of fieldwork. The Auditor followed up with the Auditee and requested the Management Representation Letter on October 12, 2023. To date, the Auditor has not received any response. Therefore, the Auditee has declined to vouch for the accuracy of data or truth of statements made to the Auditor.

**Finding #1:** A Counterfeit Check in the Amount $326,456.16 was Paid Out of the Erie County Clerk's Concentration Account.

Prior to the start of this audit, the counterfeit check referenced above was discovered during the first audit of the Clerk's operating expense. The Comptroller's Office turned the check over to the Erie County District Attorney's Office to investigate. Due to the nature of the investigation this matter was kept confidential at the request of the District Attorney's Office.

During the fieldwork of this audit, a confirmation letter was sent to SONYMA requesting the monthly payment amounts received from the Erie County Clerk's Office in 2022[7]. The Auditor obtained SONYMA's list of received payments on October 26, 2023. In addition, the Auditor also verified the payments by comparing the amounts on SONYMA's list to the amounts stated on the MT-4. The Auditor further compared the amounts from SONYMA's list to the copies of the checks that cleared the Clerk's Concentration Account. The Auditor found that each check matched the amount on SONYMA's list except for the check written for March 2022. The Auditor determined that the payment to SONYMA for March 2022 in the amount of $326,456.16 was never presented for payment. Instead, a counterfeit check, made payable to GET MOBILE LLC, with the identical amount, check number, date and memorandum line cleared the Clerk's Concentration Account[8]. The County never received credit for the payment with SONYMA. Furthermore, SONYMA never contacted the County to notify it of the missing payment and the Auditor received no indication that the Clerk was aware of the counterfeit check.

Recommendations:

The Auditor recommends that the Clerk's Office implement Positive Pay and/or issue ACH payments for large amounts unless it is prohibited from doing so by applicable law or regulation. "Positive Pay" is a system where the financial institution receives a file of payments issued from a bank account which enables the bank to verify the amount and check number. If the amount or check number is inconsistent, Positive Pay will not allow the payment to clear the bank. The Auditor is aware that Positive Pay would not have flagged the counterfeit check since the identifiers matched the original check. Nevertheless, Positive Pay is a useful

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[7] This request also included the payment received in January 2023 since the information thereon would reflect amounts collected by the Clerk in December 2022.

[8] It should be noted that security measures on the counterfeit check were different than the original and listed an incorrect zip code.

tool that would passively boost the Clerk's system of internal control by creating a low-cost dragnet for less sophisticated counterfeit instruments.

### B. **Reconciliation**

**Finding #1:** Mortgage Tax Bank Account Has Carried an Undistributed Balance of $24,340.32.

During the course of the audit, the Auditor reviewed the Clerk's Mortgage Tax Account. According to the Auditee, the only purpose for which the Clerk's Office uses the Mortgage Tax Account is to pay out ap portioned amounts that other counties are entitled to. These types of payments are necessary when mortgaged property is located in more than one county. When this type of mortgage is filed in Erie County, the Clerk's Office collects the entire taxable amount up front and pays the other counties at a later date. The Clerk's Office uses the Mortgage Tax Account to make those payments and initially claimed not to use it for any other purpose. On at least two occasions, the Auditor brought a pair of nonconforming payments to the Auditee's attention. The Auditee acknowledged that checks in question were written to refund mortgage tax, and the Auditee acknowledged that the checks were issued from the wrong account.

The Auditor found that the Clerk's Mortgage Tax Account has an undistributed balance of $24,340.32 that has not varied by more than fifty dollars since 2017. While the Clerk is correct to distribute apportioned mortgage tax amounts payable to other counties from a separate account, that account should not be carrying a balance[9]. When asked, the Auditee stated that it did not know what that balance represented and could not produce any documentation that could shed light on what the amount was for and why it was not distributed. Therefore, the Auditor concludes that the undistributed funds totaling $24,340.32 represent amounts that were likely intended for distribution to other counties but never were.

It is possible that this balance pre-dates the current Administration in the Clerk's Office but should be noted that the current Clerk took office in December of 2017. If that is the case, the presence and constancy of this balance in the Mortgage Tax Account is an indicator that the current Administration has never reconciled this account.

**Finding #2:** Transfer to Mortgage Tax Account Exceeded the Amount of the Distribution by $1,816.70.

During fieldwork the Auditor confirmed that the Mortgage Tax Account was used to pay mortgage tax apportionments to other counties. The Auditee acknowledged that monies transferred should equal the distributions paid out to other counties. Therefore, the account balance should reconcile to zero.

The Auditor compared bank statements covering January through December 2022 for the Mortgage Tax Account to transfer records from the Concentration Account. The statements showed that two out of the three amounts transferred from the Concentration Account to the Mortgage Tax Account matched the amount paid out of the Mortgage Tax Account via check and cashed by other counties. However, the third amount transferred to the Mortgage Tax Account on October 20, 2022, exceeded the amount distributed to other counties by $1,816.70. The amount was never transferred back to the Concentration Account at the end of the year. This error increased the undistributed balance of $24,290.32 found in the Mortgage Tax Account at the end of 2021 to $26,107.02 at the end of 2022.

Recommendations:

The Auditor recommends that the Clerk's Office create written procedures providing for the monthly transfer, payment and reconciliation of the Mortgage Tax Account to ensure that all funds have been accurately distributed. The Mortgage Tax Account should be properly labeled to reflect its proper purpose and distinguished from other accounts related to the mortgage tax process that the Clerk must create.

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[9] If writing multi-jurisdictional checks is the sole purpose of the account, any funds moved to the account should be subsequently paid out.

The current Clerk's Administration may not be responsible for the mistake(s) that resulted in the carried balance found in the Mortgage Tax Account, but it does have a responsibility to fix it. To address the carried balance, the Auditor recommends that the Clerk's Office attempt to locate the intended recipient of the undistributed $26,107.02 to determine how it should be disbursed. If the Clerk's Office cannot identify the proper recipient, the Clerk should inquire with the County Legislature about remitting the balance to the County's General Fund.

To ensure that carried balances do not occur in the future, the Auditor recommends that transfers to the Mortgage Tax Account be made prior to issuing the checks. The amount transferred should be no greater than necessary to distribute the precise amount of apportioned revenue payable to other counties in that particular month. This will ensure that the exact amount is transferred and disbursed in a routine manner.

**Finding #3:** M&T Imprest Account Has Carried an Undistributed Balance of $69,962.34 since 2021.

The Auditor reviewed the Clerk's Imprest Account to reconcile its monthly statements related to activities of the Registrar's Division. The Auditee disclosed that the Imprest Account was used to issue refund checks, not solely for mortgage tax purposes, but in connection with any of the several functions performed by the Registrar's Division. After reconciling the Imprest Account, the Auditor determined that the account was carrying an undistributed balance of $69,962.34.

As with the Mortgage Tax Account, the monthly reconciled balance of the Imprest Account should be zero. In reviewing the deposits and checks, the Auditor found that dates and deposit amounts did not correspond with the checks issued from the Imprest Account. Supporting documentation was not made available to show what checks were included in the deposit calculations and the ISCQ was not returned to offer a meaningful review of the Clerk's actual processes or procedures. Therefore, the Auditor is unable to determine how the Clerk's Office reached decisions on deposit totals and when to make them.

Comments:
The Auditor reviewed the checks paid from the Imprest Account in 2022 related to escrow refunds. Per the Clerk's Office, there was an issue with "fraud review" at the bank in April 2022 in which multiple checks were reversed out of the bank account. Of the reversals, five were for escrow-related refunds. For two of those five checks, new checks were cut for the same amount following the reversal. For the other three checks, new checks were cut for amounts differing from the original following the reversal. The Daily Recap Report and GL Escrow Refund totals on the Cash Code Summary Report were reviewed as part of this testing. Only the original transaction is included on the Daily Recap Report. It is not unreasonable for a returned check to be reissued at the original amount. However, the reissued checks deviating from the original value concerned the Auditor because no explanation was provided by the Auditee and the Auditor was unable to determine such a cause independently. The Auditor found no adjustments in the Daily Recap Report, making it difficult to determine what the difference between the amounts of each returned check and the corresponding reissued check represent. These discrepancies can also lead to inaccurate reports if the changes are not well documented.

It should be noted that if the difference represents a returned check fee, the Clerk does not maintain funds intended to reimburse such fees.

Recommendations:
The Auditor recommends that the Clerk maintain the Imprest Account activity in the County's accounting system and implement a process to reconcile the Imprest Account each month. Such a process must ensure that transfers are timely and accurate prior to issuing checks. The Auditor further recommends that the present undistributed balance be reviewed, and attempts be made to determine where those funds should be disbursed. If the Clerk's Office cannot identify the proper recipient, the Cler k should remit the undistributed balance to the County's General Fund via Legislative resolution.

The Auditor further recommends that the Auditee develop an internal retention policy pertaining to any documentation related to the refunds, especially when such changes are not recorded in the NewVision

System. Because the Clerk's Office is an agent of the New York State Tax Commission when performing its mortgage tax responsibilities, the Clerk must adhere to the State's document retention policy, which requires documents to be maintained for a minimum of seven years[10]. Without documentation, it is difficult or impossible to conclusively determine whether the reports that the Clerk's Office pulls from the Daily Recap Report are accurate, incorrect, or incomplete.

**Finding #4:** Monthly Escrow Reports Do Not Reconcile to Daily Escrow Reports.

The Clerk allows customers, typically attorneys, who do frequent business with the Clerk's Office to establish an escrow account to pay for services provided by the Registrar's Division on a more convenient basis[11]. Becoming a registered user requires a $250 deposit to open a non-interest-bearing escrow account. The Escrow balances were included as part of the audit due mainly to the fact that all funds are co-mingled in the M&T Bank Concentration account and in the Auditors attempt to reconcile mortgage tax revenue all monies in the bank account needed to be verified.

The Auditor evaluated the Registrar's Division Escrow Account activity using several reports generated by the Clerk's Office in the normal course of business. These reports are referred to herein as "Monthly Detail", "Escrow Summary" and "Daily Recap" reports[12]. Also included in testing was the Cash Code Summary Report, which is generated by the NewVision system and accounts for all revenue taken in by the Clerk's Office during that particular month[13]. The daily transactions were analyzed and used to determine the monthly escrow deposit transaction totals. During testing, the Auditor took the totals from the last page of the Monthly Detail Report and compared it to the Cash Code Summary Report. These amounts were then verified against the Escrow Summary Report to confirm whether all deposit transactions were included in the ending balance each month. The Auditor reviewed reports between January 2022 and December 2022. The Auditor's findings pertaining to the Clerk's escrow accounts are described below:

- The Escrow Summary balances do not appear to be reconciled monthly. The total beginning balance for all accounts did not agree with the total ending balance from each prior month for the audit period. A reconciliation of the various escrow accounts and any variances between the accounts were not provided to the Auditor.
- The Escrow balances are comingled with other funds in the Concentration Account. The Auditee disclosed that there is no reconciliation process in place and monthly activity is not maintained on the County's accounting system, thus inhibiting the detection of errors. This was confirmed in the first audit report filed in June 2023.
- The Auditor identified dozens of overdrawn balances among the various escrow accounts. In total, there were 65 accounts that reported a negative ending balance for all 12 months in 2022. This contradicted the Auditee's assertion that the escrow accounts cannot be overdrawn.
- There is one account[14] labeled "Tender CPLR 3219" that was carrying a balance of exactly $194,579.35 for the entirety of 2022. If the account was used for its stated purpose, no amounts should have been held there for longer than 10 days.

[10] Local Government Schedule (LGS-1) at 309-319.
[11] The Audit Division noted in the previous audit that the Clerk's Office does not have the authority to enter these agreements on its own and does not appear to have legislative permission to do so.
[12] Monthly Detail refers to the Escrow and Charge Activity by Day Report, which shows daily transactions for the various escrow accounts, including deposit and withdrawal information, along with transaction, receipt, and account numbers. This report is run monthly. Escrow Summary refers to the Agent Escrow Summary Report, which shows monthly ending balances for all escrow accounts. It includes account number, name, deposit and withdrawal information, and is necessary to determine the total ending balance that should be in the accounts. Daily Recap Report includes the details of all the transactions that make up the Cash Code Summary Report totals.
[13] When revenue is receipted in NewVision, the cashier making the entry inputs a "cash code". This is the equivalent of labeling a transaction.
[14] Account No. 9434.

- Variances were identified between the Daily Recap Report and the Escrow Summary for the period between February 2022 and November 2022.
  - Over those ten months, 4,256 accounts were verified against the Daily Recap Report; 93 discrepancies in deposit totals were identified.
  - Nine discrepancies were due to e-file charges which were included on the Daily Recap Report but were not included on the Escrow Summary. These fees made up a large portion of the discrepancy totals each month.
  - The Auditor identified 29 instances where an escrow deposit transaction was included on the Daily Recap Report, but the Escrow Summary showed no activity for that particular account.
  - Seven discrepancies were due to the inclusion of a deposit on the Daily Recap Report where the account was omitted from the Escrow Summary.
  - The remaining 45 discrepancies could be traced back to transactions labeled as "Code C" on the Daily Recap Report, which are correcting entries and are not included in the deposit balance on the Escrow Summary.
- The Cash Code Summary did not agree to the Monthly Detail totals for three months[15]. In each of those months, the amounts indicated below were included in the Cash Code Summary total but were not in the" Increase" totals on the Escrow Summary.
- The January variance amounted to $1,028.75 but the number of transactions could not be determined because the Auditor did not have the Daily Recap Report for that month.
- The March variance resulted from 16 transactions for a total of $2,433.50.
- The June variance resulted from four transactions for a total of $387.25.

Recommendations:
The Auditor recommends that the Auditee implement a written process to reconcile escrow activity and balances monthly while working with NewVision to develop a report that can be used to reconcile the Cash Code Summary activity totals to the Escrow Summary totals. This reconciliation is necessary to determine the actual balance of and properly reconcile the Concentration account. Per Erie County policy, the Auditor recommends that the Clerk's Office open a separate bank account for the escrow balances and properly record the activity in the County's accounting system. It should be noted that the escrow agreement states that a non-interest- bearing account would be opened. Because separate accounts are not established and funds submitted for escrow purposes are comingled in the concentration account, the Clerk's Office is violating its own Escrow Agreement. This recommendation was also noted in the prior audit of the Clerk's Office dated June 2023.

The Auditor further recommends that the beginning balances for each account be reviewed and compared against the ending balances of the prior month. Any variances or negative ending balances should be reviewed and reported. The balance in the Tender CPLR 3219 Account must also be reviewed. If the money was received pursuant to tender offer under CPLR § 3219, the amount should have been turned over to the Comptroller's Office. If the money is no longer being held there, the account needs to be corrected so that the correct amount is reflected in the reports.

The Auditor recommends that the Auditee implement a written process to reconcile the Monthly Detail and balances showing in the Cash Code Summary. Any variances should be promptly reviewed. The Cash Code

[15] Those months were January, March, and June of 2022.

Summary and the Daily Recap Report can be used to determine whether any transactions are missing from the Monthly Detail.

**Finding #5:** The Mortgage Tax Revenue Reported as the Amount Collected on the MT-4 Does Not Reconcile to the Amount Reported on the Cash Code Summary.

The Clerk's Office generates multiple reports that should be used to perform its obligations related to mortgage tax reconciliation and reporting functions. Those reports include the (1) MT -4, the (2) Cash Code Summary described in the previous finding, the (3) Hold Report, the (4) Release Report, and the (5) Basic Tax Summary C Report (BSC). The MT-4 is a monthly statement that every county clerk across New York State must complete to report mortgage tax revenue, among other things. The Hold Report identifies mortgages that have been put on hold that month along with existing holds representing an accumulated total; they will remain on hold until the Tax Commission apportions the proper amounts, at which time the Clerk's Office releases them from the hold. The Release Report identifies mortgages that have been released by the Clerk's Office after the Tax Commission issues a breakdown of the applicable taxes and recipients to the Clerk. Once released, the revenue is ready for distribution. The Basic Tax Summary C Report (BSC), also a NewVision report, takes the monthly revenue numbers and breaks that information down into the proper amounts payable to all proper recipients[16]. The BSC also takes into account released holds receipted in prior months. The information generated for the BSC is used by the Clerk to report revenue subtotals on the MT -4.

Because the Auditee has no written procedures, the Auditor was required to reconstruct the Clerk's procedures based on information obtained during fieldwork. Over the course of several interviews during this period, the Auditee stated that the Clerk's Office used the BSC to populate the revenue subtotals on the MT -4 rather than using the appropriate general ledger (GL) numbers from the Cash Code Summary which constitute actual monthly revenue totals[17]. Eventually, after the Auditor found that the Cash Code Summary totals did not reconcile to the totals reported on the MT-4, the Auditee informed the Auditor that the Cash Code Summary included mortgages placed on hold.

The Auditor found that mortgage tax revenue recorded on the Cash Code Summary did not reconcile to the amount stated on the MT-4 even after accounting for the hold amounts. As demonstrated in the table below, 11 out of 12 months in 2022 contained variances. December 2022 was the only month in the audit period where the Clerk's reporting numbers matched the amount it collected. In total, the amount remitted to the Tax Commission per the MT-4 statements was overstated by $214,950.83 in 2022.

Variances in Mortgage Tax Revenue Reported

| 2022 | Original Cash Code Summary minus new holds | Statement of Mortgages Recorded Collected (top) | Variance of Statement of Mortgage vs. Cash Code Summary |
|---|---|---|---|
| January | $6,173,004.50 | $6,505,835.98 | $332,831.48 |
| February | $3,939,172.25 | $3,932,721.25 | ($6,451.00) |
| March | $4,458,447.50 | $4,454,705.50 | ($3,742.00) |
| April | $3,817,300.25 | $3,933,825.25 | $116,525.00 |
| May | $4,178,056.01 | $4,208,678.57 | $30,622.56 |
| June | $5,156,872.06 | $5,154,809.00 | ($2,063.06) |
| July | $4,236,268.05 | $4,235,208.00 | ($1,060.05) |
| August | $5,736,990.10 | $5,561,326.70 | ($175,663.40) |
| September | $4,866,562.24 | $4,841,435.50 | ($25,126.74) |
| October | $3,793,657.14 | $3,781,185.51 | ($12,471.63) |
| November | $3,496,134.18 | $3,457,683.85 | ($38,450.33) |
| December | $3,149,195.75 | $3,149,195.75 | $0.00 |
| **Totals:** | $53,001,660.03 | $53,216,610.86 | $214,950.83 |

[16] This includes the tax districts receiving basic tax, which are all assigned a number known as a SWIS code, as well as SONYMA and the NFTA.
[17] The four GLs are MT ADDL, MT BASIC, MT NFTA, and MT SONYMA.

The variances are likely attributable to the manner in which the Clerk's Office arrived at its numbers used to report on the MT-4. The Auditor found that the Clerk's Office has been inappropriately using its BSC report to populate the MT-4. Per the Auditee, totals are taken from the BSC for Basic, Additional, SONYMA and Special taxes, which are then used to populate the MT-4 subtotal. The Tax Commissioner's apportionment determinations are subsequently used to subtract apportioned amounts from the subtotal and arrive at the amount collected.

By using this calculation method to arrive at its reporting numbers, the Clerk's Office effectively bypasses the reconciliation stage. The Clerk's Office starts with its bottom-line number and works its way upward to reach the top line. In doing so, the Clerk's Office forces itself to balance every month without reconciling the amount reported (BSC) to the amount of tax collected (Cash Code Summary). The Clerk's Office does not conduct a formal account reconciliation, thereby limiting its own ability to detect errors or omissions during processing or reporting.

Recommendations:
The Auditor recommends that the Clerk's Office stop using the BSC to populate the MT -4. Rather, the Clerk should use the BSC to confirm the monthly revenue amounts collected to the monthly revenue amounts being distributed. The Clerk should be starting with the Cash Code Summary totals, subtracting new holds amounts using the Hold Report, adding releases using the Release Report, and checking those numbers against the BSC. Only then can the Clerk's Office be sure that the amounts broken down on the BSC are accurate and reportable.

The Auditor further recommends that the Clerk's Office direct NewVision to update current tools to ensure that mortgage tax revenue collected and reported on NewVision reports, specifically the Cash Code Summary and BSC, are accurate and can be properly reconciled. The Auditor further recommends that the Clerk's Office work with NewVision and the Erie County Comptroller's Office to ensure that this information is deliverable to the Comptroller. The most intuitive way to do this is to direct NewVision to develop a tool or process that facilitates daily uploads of mortgage tax transactions into the County's accounting software. This will assist in conducting and ensuring the accuracy of the month-end reconciliation process. The Clerk's Office should also have a written procedure describing the proper reconciliation process and managerial oversight for the reporting process.

**Finding #6a:** Seven Mortgages on Hold were Never Released in NewVision Between 2019 and 2022

During fieldwork, the Auditor reviewed Hold Reports generated by NewVision throughout the course of the year. The Auditor found that seven mortgage tax transactions, totaling $20,797.00, were placed on hold, dating as far back as August 2019, and remain on hold as of December 31, 2022. The Auditee acknowledged that all holds should eventually be released. The Auditee also noted that it could not recall an instance where the Tax Commission took an entire year to apportion a mortgage[18]. When asked, the Auditee could not explain to the Auditor why these seven transactions remained on hold in the NewVision system. The Auditor could not find any evidence demonstrating that those amounts were distributed to the appropriate tax districts.

[18] A representative of the Tax Commission informed the Auditor that the average turnaround time for an apportionment to be returned to a County recording officer was approximately three months.

| Summary of Mortgages on Hold - as of 12/31/22 | | | | | | |
|---|---|---|---|---|---|---|
| Placed on Hold | Serial # | Case # | Mortgagor | Recorded on MT-4 as Released | Total Tax Collected | Tax Amount Reported on MT-4 |
| 2019 | MTDK2019010900 | No case # assigned | Smith, Justin | | $ 1,723.00 | |
| 2019 | MTDK2019020316 | 314635 | 400 International Drive Assoc. | | $ 4,572.00 | |
| 2020 | MTDL2020019535 | No case # assigned | Violante, Timothy | | $ 3,735.00 | |
| 2021 | MTDM2021002542 | No case # assigned | Harpst, Ethan | | $ 1,695.00 | |
| 2021 | MTDM2021011997 | No case # assigned | Naughton, Jeffrey | | $ 1,375.00 | |
| 2021 | MTDM2021021376 | 317739 | Corp Robert MacWilliam | Mar-22 | $ 5,457.00 | $ 5,457.00 |
| 2022 | MTDN2022000955 | No case # assigned | SJR Four LLC | | $ 2,240.00 | |
| | | | | Totals | $ 20,797.00 | $ 5,457.00 |

To investigate these holds further, the Auditor contacted the Tax Commission and inquired about impending apportionments regarding these mortgages. The Tax Commission informed the Auditor that a mortgage, on average, only remains on hold for two to three months. If a mortgage is on hold longer than that, it typically indicates that the Clerk's Office did not submit the "Statement of Facts" necessary to issue a case number and conduct the apportionment procedure. With regard to the seven specific cases described in the table above, the Auditor sought additional detail from the Tax Commission. The Auditor concluded that in five of the cases, the Clerk's Office likely placed the revenue on hold but did not perform the next step of sending the "Statement of Facts" to the Tax Commission. If the Tax Commission cannot apportion the mortgage, the revenue will remain on hold indefinitely. In the remaining two cases, the mortgage tax was placed on hold, the "Statement of Facts" was sent to the Tax Commission, and a case number was assigned. The Tax Commission completed and sent a Determination to the Clerk's Office which allows for the mortgage tax to be released and distributed, however the Clerk's Office could not explain why those two mortgages remain on hold. It is apparent regardless of the circumstance, none of the mortgage tax described in the above table was released from hold in NewVision and it is unclear whether the tax revenue was paid out.

**Finding #6b:** One Mortgage on Hold from Finding #6a was Reported on the MT-4 but Never Taken Off Hold.

The Auditor continued to investigate the holds and found that one of the seven mortgages described in Finding #6a, totaling $5,457.00 and highlighted in the table above, received a New York State Apportionment case number and was reported on the MT-4 in March 2022. Somehow, the hold was reported as released on the MT-4 but never taken off hold in NewVision. Therefore, even though the Clerk's Office reported the amount to the Tax Commission via the MT-4, indicating that it had been released, it was determined that Case No. 317739 was not actually distributed to the tax districts. When asked, the Auditee could not explain to the Auditor why or how this transaction was reportedly released but never removed from hold or distributed to the proper tax districts or state agencies.

Recommendations:
The Auditor recommends that the Clerk's Office review the cases described in these findings to determine whether the revenue generated was properly reported to the Tax Commission, and whether the cases that received a Determination of Apportionment were released and distributed accurately. The Clerk should implement written procedures to reconcile the monthly Hold Report to the monthly Release Report in the NewVision system to detect any inconsistencies between NewVision and MT -4 reports. The Auditor further recommends that the Clerk implement a written managerial review policy that includes monthly approval of account reconciliation and quarterly checks on the Hold and Release Reports. These changes will ensure that all mortgage tax revenue is accurately recorded in NewVision and included in the releases reported on the MT-4. Managerial review also increases the likelihood that errors and omitted revenue are caught.

C. **Collection:**

Mortgage taxes are collected by the Clerk at the time a mortgage is recorded and are receipted in NewVision. This transaction generates a Recording Page which includes the basic details of the transaction along with the liber and page number where the documents can be found within the Clerk's Office. According to the Auditee, formulas built into the NewVision system calculate the appropriate amount of tax owed based on inputs from the cashier. Exemptions can be claimed only by filing a sworn affidavit claiming the relevant exemption[19]. Because the applicability of exemptions will affect the mortgage tax total, affidavits claiming them must also be registered at the time of recording.

**Finding #1:** Mortgage Tax Revenue Calculated on Five Transactions Did Not Reconcile to the Fees Established in NewVision.

During fieldwork the Auditor tested the mortgage tax calculations programmed in NewVision. The Auditee stated that mortgage tax revenue was calculated based on the consideration amount, tax rate, and exemption applicability of taxes and fees set within NewVision. The calculation method and fee schedule were provided to the Auditor at that time.

Through systematic sampling of mortgage tax transactions in NewVision, the Auditor evaluated the Clerk's mortgage tax revenue calculations. Using the Clerk's Recording Page, which represents the amount collected, the Auditor compared the amounts on the page against the calculations programmed in NewVision. Five out of 73 transactions evaluated did not reconcile based on the consideration amount from the Clerk's Recording Page.

In an effort to further investigate those findings, the Auditor reviewed recording documents and inquired whether the amounts were related to apportionment mortgages. The Auditor ultimately determined that the five transactions represented apportioned mortgage tax revenue that Erie County received from other counties and that the amount collected was not based on the consideration amount recorded on the Recording Page.

Summary of Mortgage Tax Calculations

| 2022 | Tax Type | Consideration Amount | Calculated | Collected | Variance |
|---|---|---|---|---|---|
| MTDN2022002505 James Renaldo Case # 317936 | Consideration Amount: | $ 500,000.00 | | | |
| | Basic: | | $ 2,500.00 | $ 657.38 | $ 1,842.62 |
| | SONYMA: | | $ 1,250.00 | $ 328.69 | $ 921.31 |
| | Additional: | | $ 1,250.00 | $ 328.69 | $ 921.31 |
| | **Total:** | | **$ 5,000.00** | **$ 1,314.76** | **$ 3,685.24** |
| MTDN2022009736 Jennifer Zeitler Case # 318634 | Consideration Amount: | $ 70,000.00 | | | |
| | Basic: | | $ 350.00 | $ 282.11 | $ 67.89 |
| | SONYMA: | | $ 175.00 | $ 141.06 | $ 33.94 |
| | Additional: | | $ 175.00 | $ 141.06 | $ 33.94 |
| | **Total:** | | **$ 700.00** | **$ 564.23** | **$ 135.77** |
| MTDN2022011976 Lineage AFS Master RE LLC Case # 318670 | Consideration Amount: | $ 12,973,740.00 | | | |
| | Basic: | | $ 64,868.50 | $ 20,887.30 | $ 43,981.20 |
| | SONYMA: | | $ 32,434.25 | $ 10,443.65 | $ 21,990.60 |
| | Additional: | | $ 32,434.25 | $ 10,443.65 | $ 21,990.60 |
| | **Total:** | | **$ 129,737.00** | **$ 41,774.60** | **$ 87,962.40** |
| MTDN2022015664 E21 Lockport Properties LLC Case # 318964* | Consideration Amount: | $ 1,103,845.54 | | | |
| | Basic: | | $ 5,519.00 | $ 264.99 | $ 5,254.01 |
| | SONYMA: | | $ 2,759.50 | $ - | $ 2,759.50 |
| | Additional: | | $ 2,759.50 | $ - | $ 2,759.50 |
| | **Total:** | | **$ 11,038.00** | **$ 264.99** | **$ 10,773.01** |
| MTDN2022018314 Peter Todenhagen, Jr Case # 318535 | Consideration Amount: | $ 316,000.00 | | | |
| | Basic: | | $ 1,580.00 | $ 622.71 | $ 957.29 |
| | SONYMA: | | $ 790.00 | $ 311.36 | $ 478.64 |
| | Additional: | | $ 790.00 | $ 311.36 | $ 478.64 |
| | **Total:** | | **$ 3,160.00** | **$ 1,245.43** | **$ 1,914.57** |
| *Case # 318964 apportioned to two tax districts, only one is included in the testing. | | | | | |

[19] For greater detail on mortgage tax exemptions and eligibility, see Baseline Opinion §§ II, II(E).

The Auditor then took steps to compare the amounts recorded in the five relevant transactions to the State determination and the MT-4. The Auditor found that one transaction[20], in the amount of $1,314.76, was missing from the MT-4 and the Clerk's Office had not provided a copy of the state determination to the Auditor. The Auditor contacted the Tax Commission to determine whether the State issued a determination of apportionment. The Tax Commission confirmed the determination and the Auditor was able to verify that the correct amount was collected. However, the Auditor could not determine whether the amount was distributed properly because that transaction was not included in the Auditor's test sample.

Recommendations:
The Auditor recommends that the Clerk's Office review this transaction to confirm that it was distributed properly. Management should examine all mortgage tax revenue reports on a monthly basis to verify that they contain accurate revenue amounts and can be reconciled to one another. The Auditor further recommends that the Auditee examine and test the mortgage tax calculations within its cashiering system on an annual basis to confirm formulaic accuracy.

**Comment #1:** Documents Suggest that Only Recording Fees Were Collected.

During the randomized testing of mortgage tax calculations, the Auditor noted that one mortgage appeared to be recorded without taxes or an affidavit fee. Typically, this would indicate that an exemption was granted[21]. The consideration amount for the subject property was $2,540,000.00. The Auditor attempted to retrieve more information on this transaction, but no additional detail was available and the Auditee provided no explanation for the lack of collection.

If a property is eligible for an exemption, an affidavit must be filed with the Clerk at the time of recording[22]. The Clerk's Office charges a five-dollar recording fee to file an affidavit. If the property at issue here was exempt, the Clerk should have charged an affidavit recording fee. If the property was not exempt, taxes should have been collected. The document receipt associated with this property demonstrated that Ontario County collected $12,700.00 in Basic Tax. If this property was subject to apportionment, Erie County should have received some portion of that amount. However, no documentation indicating receipt of any funds related to the property was provided to the Auditor.

While the Auditor was provided access to NewVision to pull fieldwork data of recording pages and all documents filed with each mortgage sampled, there was limited opportunity for the Auditor to review and ask questions regarding the test samples pulled. As a result, the Auditor was unable to develop a sufficiently clear understanding of the multiple transaction types necessary to issue a formal finding for this particular transaction.

Recommendations:
The Auditor recommends the Clerk review the above-described receipt to ensure that the appropriate amount was received and that the revenue was distributed to the proper tax districts, NFTA and SONYMA.

C. **Distribution:**

The mortgage tax distribution process technically begins at the time of recording. Most mortgages will be calculated by NewVision and separated into different SWIS codes pending the monthly transfer. Others, however, must be apportioned by the Tax Commission prior to being distributed[23].

When a mortgage is recorded describing one or more properties that cover multiple jurisdictions, the tax amount is placed on hold[24]. The Hold Report generated by NewVision will reflect this. The amount will remain on hold

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[20] Case No. 317936 in the above table.
[21] Transaction No.: 22007435; Document Sequence Number MTDM2021028929; Dated January 14, 2022.
[22] See NYTL § 255. For more information on exemptions, see Baseline Legal Opinion § II(E).
[23] For a detailed description of the statutory distribution process, see Baseline Legal Opinion § III(A).
[24] Any state or municipal boundaries trigger an apportionment – state, county, city, town, and village.

until the Tax Commission apportions the mortgage and remits the values back to the Clerk's Office, which is done in the form of apportionment determinations. These documents assign apportionment case numbers, which state the amounts of taxes and proper jurisdictions to be paid. After a case is returned, the Clerk releases the proper tax amounts to the appropriate tax district, which can be found on the Release Report generated by NewVision.

The mortgage tax amounts that have been apportioned and released are listed individually on the MT-4. The Clerk prepares and sends the MT-4 to the Tax Commissioner and the Erie County Comptroller each month. The MT-4 is used to facilitate the Clerk's obligations under Article XI[25], serving as a reporting mechanism that details the amount of mortgage tax revenue collected by the Clerk's Office in the preceding month. The NFTA and SONYMA are supposed to receive their portion prior to the 10th of each month[26]. The Clerk submits the MT-4 along with Basic Tax revenues to the Comptroller. The Comptroller signs the MT-4 report attesting to the receipt of the municipality's portion of the tax collected.

The Clerk currently prepares the New York State Mortgage Tax Semi-Annual Report (AU-202) for taxes collected showing the amounts to be distributed to each tax district for the Basic Tax revenue collected during the preceding six-month period. The Comptroller and Clerk should jointly complete the AU-202 and submit one copy each to the Tax Commission and the County Legislature. Once the County Legislature Chair signs the "warrant", which must be done prior to the 15th of June and December, the Basic Tax can be distributed to the tax districts.

**Finding #1:** The MT-4 Reported Incorrect Amounts Totaling $156,340.04.

The Auditor found that mortgage tax revenue recorded on the MT -4 had 14 missing releases in April for a total of $120,545.76. In May, four releases were missing for a total of $35,794.28. The breakdown and detail of monthly apportionment totals, variances, and releases on the MT-4 are demonstrated on the next page.

NYS Apportionments Received vs. Amounts Released on MT-4

| 2022 | NYS Apportionments Received by Clerk | Total Releases (Apportionments) Reported on MT-4 | Variance | |
|---|---|---|---|---|
| January | $1,500.02 | $1,500.02 | $0.00 | |
| February | $61,469.31 | $61,469.31 | $0.00 | |
| March | $195,526.01 | $195,526.01 | $0.00 | |
| April | $211,047.93 | $91,816.93 | ($120,545.76) | * |
| May | $114,090.12 | $78,295.84 | ($35,794.28) | |
| June | $25,506.33 | $25,506.33 | $0.00 | |
| July | $31,653.68 | $31,653.68 | $0.00 | |
| August | $240,942.15 | $240,942.15 | $0.00 | |
| September | $24,161.23 | $24,161.23 | $0.00 | |
| October | $143,270.24 | $143,270.24 | $0.00 | |
| November | $68,283.16 | $68,283.16 | $0.00 | |
| December | $12,387.00 | $12,387.00 | $0.00 | |
| Totals: | $1,129,837.18 | $974,811.90 | ($156,340.04) | |

*Auditor had to adjust the original variance amount of $119,231.00 to add an additional case that was not provided by the Auditee. After further investigation case #317936 in the amount of $1,314.76 was provided by the Tax Commission, therefore the variance was adjusted to include that case.

After finding that 18 releases were not included on the MT-4 in April and May, the Auditor investigated each portion of tax revenue related to the missing releases to determine whether the amounts were properly distributed. The Auditor confirmed that a total of 39 apportioned amounts were connected to the missing releases. Of that total, 17 amounts were included in the Daily Transaction Detail and distributed to the appropriate

[25] Specifically NYTL § 261. For more information on the MT-4 and its proper use, see MT-4 Opinion, attached as Appendix C.
[26] Current practice is to wire an ACH payment to the NFTA while SONYMA is sent a check.

tax districts. The Auditor confirmed that three amounts, highlighted on the table below, had not been distributed. The Auditor was unable to reach a conclusion on the remaining 19 amounts because they were not included in the test sample.

Breakdown of Releases by Tax District

| Transactions to be Reviewed | NYS Case | Tax District | NYS Amount | Month Processed by Clerk's Office |
|---|---|---|---|---|
| 1 | 317936 | North Collins | $657.38 | April |
| 2 | 317992 | Lancaster | $1,375.77 | April |
| 3 | 317993 | Boston | $0.13 | April |
| 4 | 317994 | T/ Tonawanda | $521.20 | April |
| 5 | | Holland | $1,633.80 | April |
| 6 | 317996 | Hamburg | $1,492.35 | April |
| 7 | 317997* | Cheektowaga | $74.71 | April |
| 8 | | Buffalo | $956.29 | April |
| 9 | 317998 | Hamburg | $7,983.01 | April |
| 10 | 317999 | Cheektowaga | $585.41 | April |
| 11 | 318015 | West Seneca | $466.88 | April |
| 12 | 318016 | C/ Tonawanda | $636.86 | April |
| 13 | | Cheektowaga | $2,451.59 | April |
| 14 | | West Seneca | $168.46 | April |
| 15 | 318019 | T/ Tonawanda | $343.27 | April |
| 16 | 318334* | Grand Island | $1,051.72 | May |
| 17 | | Buffalo | $2,734.48 | May |
| 18 | | C/ Tonawanda | $856.96 | May |
| 19 | 318352 | Aurora | $2,192.64 | May |
| 20 | | Holland | $1,307.36 | May |
| 21 | 318353 | Aurora | $3,091.62 | May |
| 22 | | Holland | $1,843.38 | May |

* NYS case 317997 was not distributed and needs to be reviewed.
* NYS case 318334, Buffalo's apportionment was missing and needs to be reviewed.

Recommendations:
The Auditor recommends that all 22 transactions be reviewed by the Clerk's Office to ensure that each amount was properly distributed. It should be noted that SONYMA and NFTA apportionments were not included in the test sample and need to be reviewed for accuracy.

i. **Holds & Releases**

The greatest number of individual issues appeared in the context of holds and releases. Navigating the apportionment process for multi-jurisdictional mortgages is admittedly complex. The likelihood of accurate reporting and distribution increases dramatically when reports reconcile to one another. During the course of fieldwork, the Auditor performed numerous tests designed to determine whether the Clerk's use of reports facilitated the correct distribution of mortgage tax revenue. These tests were done in a progressive manner and the results of those tests are described in Findings 2, 3, and 4 below. While performing those tests, the Auditor determined that the common thread leading to practical consequence s[27] turned out to be presence on or absence from the BSC Report. This discovery led the Auditor to perform an additional test to compare the amounts on the BSC Report to amounts received by tax districts. As testing developed, the Auditor found that each step at which the hold and release process was examined resulted in a different category of error. The Auditor determined that a total of $33,001.86 was not distributed to tax districts and state agencies, while $12,060.14 was overpaid to tax districts and state agencies during the audit period.

The Auditor found that the Clerk uses the BSC Report as the sole source of information by which it populates the subtotal lines on the MT-4. This includes all four tax categories[28]. The Auditor further determined that the

[27] i.e., Tax Districts not receiving Basic Tax revenue.
[28] Basic, Additional, Special, Assistance.

BSC Report was the definitive signal indicating whether revenue had been distributed. Therefore, all amounts that were absent from the BSC Report were never distributed. The Auditor was unable to determine where those amounts presently unaccounted for were ultimately diverted to.

General Recommendation:
The Auditor recommends that mortgage tax revenue be segregated into separate, single -purpose accounts. At minimum, there should be one account for single -jurisdiction mortgages and Erie County's share of apportionments and a second account for mortgage tax revenue on hold from which other counties can be paid where appropriate[29]. Kept separate, revenue totals can be easily reconciled to reports and errors affecting mortgage tax payments along with other financial reporting can be identified. Comingling mortgage tax revenue with County funds or other agency amounts opens the door to misallocation and misrepresentation of financial data. Furthermore, comingling funds to this extent renders fraud detection practically impossible.

**Finding #2:** A Variance of $17,660.79 between the Hold Report and Release Report Indicates that the Variance Amount was Not Distributed.

During testing, the Auditor found that mortgage tax revenue recorded on the Release Report did not reconcile to the corresponding amounts taken off the Hold Report. This variance indicates the presence of distribution errors to the tax districts and state agencies.

These distribution errors were determined by taking the monthly releases from the Hold Report (Column A) and subtracting the sum of actual amounts released and distributed (Column B) and amounts paid to other counties (Column D). These calculations should net to zero. However, testing found that only two months were entirely free from distribution errors.

**Summary of Variances Between the Holds Released (Unapportioned) and Total Amount Released (Apportioned)**

| 2022 | A<br>NewVision Unapportioned/Hold Report (Net Holds Released) | B<br>NewVision Apportioned/Released Report (Total Released) | C<br>Variance (Column A minus B) | D<br>Amount Paid to other counties Per State Determinations | E<br>Sum of NewVision Released Report & Paid to other Co. (Sum of B + D) | F<br>Variance between Holds Released and Total Amount Released (Column A and E should Equal) |
|---|---|---|---|---|---|---|
| January | $0.00 | $87.50 | ($87.50) | | $87.50 | ($87.50) |
| February | $0.00 | $56,733.31 | ($56.733.31) | $1.242.69 | $57,976.00 | ($57,976.00) |
| March | $241,925.00 | $190,069.01 | $51,855.99 | | $190,069.01 | $51.855.99 |
| April | $175,167.00 | $209,010.93 | ($33,843.93) | $15,975.07 | $224,986.00 | ($49.819.00) |
| May | $153,130.00 | $115,667.92 | $37,462.08 | $15,644.88 | $131,312.80 | $21,817.20 |
| June | $3,936.00 | $23,793.27 | ($19,857.27) | $3,292.73 | $27.086.00 | ($23.150.00) |
| July | $33,479.00 | $30,593.63 | $2,885.37 | $2,885.37 | $33,479.00 | $0.00 |
| August | $79,165.00 | $65.278.75 | $13,886.25 | $12.511.25 | $77,790.00 | $1.375.00 |
| September | $1,200.00 | $759.49 | $440.51 | $440.51 | $1.200.00 | $0.00 |
| October | $146,040.00 | $136,105.23 | $9,934.77 | $8.812.15 | $144.917.38 | $1.122.62 |
| November | $94,638.79 | $59,490.83 | $35,147.96 | $15.214.06 | $74.704.89 | $19,933.90 |
| December | $29,654.00 | $12,387.00 | $17,267.00 | | $12.387.00 | $17.267.00 |
| **Totals:** | **$958,334.79** | **$899,976.87** | **$58,357.92** | **$76,018.71** | **$975,995.58** | **($17,660.79)** |

*Note: Unapportioned should be the sum of Apportions Released and Paid to other counties.*

Recommendations:
The Auditor recommends that the Clerk's Office reconcile the Hold Report against the Release Report on a monthly basis and verify that the apportionment amounts are accurately distributed in the manner designated by the Tax Commission.

29 In particular, a separate account for holds is required by the MT-16, a guidance document issued by the Tax Commission to instruct recording officers on mortgage tax processes.

**Finding #3:** Seven Mortgages That Received State Determinations Were Incorrectly Reported on the MT-4 and Not Distributed to Tax Districts, SONYMA or NFTA.

In 2022, the Auditor found seven mortgages that were included on the Hold Report, corroborated by a State Determination, and received by the Clerk's Office but were not distributed to the proper tax districts or outside agencies. These amounts were incorrectly reported on the MT-4.

During fieldwork, primarily based on interviews with the Auditee and observing procedures, the Auditor determined that if a mortgage on hold received a State Determination, it was released in the NewVision System, and it would be reported on the Release Report which identifies the tax districts and the amounts they would receive, along with NFTA and SONYMA apportionments. Through testing it was determined that if the mortgage was released from hold but did not appear on the Release Report, the tax district or outside agencies did not receive the funds. A breakdown of undistributed payment amounts found by the Auditor that were not received by tax districts, SONYMA, and the NFTA are described on the table below.

Summary of Missing Cases

| Tax District & Case # | Missing from NewVision Released Report | |
|---|---|---|
| T/ Aurora | | |
| *317739 | $ | 2,735.92 |
| *Total:* | $ | 2,735.92 |
| Elma | | |
| *317739 | $ | 5.08 |
| *Total:* | $ | 5.08 |
| Cheektowaga | | |
| 317997 | $ | 74.71 |
| 318219 | $ | 164.01 |
| 318473 | $ | 1.03 |
| *Total:* | $ | 239.75 |
| Buffalo | | |
| 317997 | $ | 956.29 |
| 318219 | $ | 170.99 |
| 318473 | $ | 178.97 |
| 319254 | $ | 3,567.39 |
| 318014 | $ | 206.05 |
| *Total:* | $ | 5,079.69 |
| Lackawanna | | |
| 318929 | $ | 99.30 |
| *Total:* | $ | 99.30 |
| West Seneca | | |
| 318929 | $ | 600.70 |
| *Total:* | $ | 600.70 |
| ***Town Total:*** | **$** | **8,760.44** |

| Outside Agency & Case # | Missing from NewVision Released Report | |
|---|---|---|
| SONYMA | | |
| 318219 | $ | 167.50 |
| 319254 | $ | 1,783.70 |
| 318014 | $ | 103.03 |
| *Total:* | $ | 2,054.23 |
| Special Assistance (NFTA) | | |
| *317739 | $ | 1,370.50 |
| 317997 | $ | 515.50 |
| 318929 | $ | 350.00 |
| *Total:* | $ | 2,236.00 |
| Additional (NFTA) | | |
| *317739 | $ | 1,345.50 |
| 317997 | $ | 490.50 |
| 318219 | $ | 167.50 |
| 318473 | $ | 65.00 |
| 318929 | $ | 325.00 |
| 319254 | $ | 1,783.70 |
| 318014 | $ | 103.03 |
| *Total:* | $ | 4,280.23 |
| | | |
| ***SONYMA/NFTA Total:*** | **$** | **8,570.46** |
| | | |
| | | |
| | | |
| **Grand Total** | **$** | **17,330.90** |

*Note: NYS Case 317739 was reported on MT-4 as released; however, was still on the Hold Report as of Dec. 31, 2022 and remains undistributed.

All other cases listed above were removed from the Hold Report but were not distributed.

More concerning to the Auditor is that the revenue totals relating to six [30] of those seven cases were removed from the Hold Report without being moved to the Release Report. The Auditor confirmed that those amounts were never distributed, even though they were listed as released on a MT-4, as described in table below. All seven amounts are presently unaccounted for[31].

[30] NYS Case 317739 remained on the Hold Report from December 2021through December 2022.

[31] The mortgage associated with CaseNumber 317739 was placed on hold in October 2021 and remains there.

Cases Reported Incorrectly on MT-4

| NYS Case Number | Amount missing from NewVision Released & BSC Reports | Month Reported on MT-4 | Comments: |
|---|---|---|---|
| 317739 | $ 5,457.00 | Mar-24 | on the MT-4 but not distributed, remains on hold |
| 317997 | $ 2,037.00 | Apr-22 | missing from the MT-4, not distributed |
| 318219 | $ 670.00 | May-22 | on the MT-4 but not distributed |
| 318473 | $ 245.00 | Jun-22 | on the MT-4 but not distributed |
| 318929 | $ 1,375.00 | Aug-22 | on the MT-4 but not distributed |
| 319254 | $ 7,134.79 | Nov-22 | on the MT-4 but not distributed |
| 318014 | $ 412.11 | Nov-22 | on the MT-4 but not distributed |
| *Total:* | $ 17,330.90 | | |

Recommendations:
This finding exemplifies the false sense of confidence that the MT-4 can provide. Because the Clerk's Office bypasses the reconciliation process when completing the MT-4, using only the apportionment documents received from the Tax Commission to populate its release totals, apportionment mortgages can be reported as released without having actually been. Therefore, an assumption that MT-4 releases have been distributed without reconciling the necessary reports allows such errors to go undetected. The Auditor recommends that the Clerk's Office reconcile the Release Report to the Hold Report and the State Determinations for each month prior to recording released mortgages on the MT-4. This will ensure that all amounts apportioned by the Tax Commissioner are distributed to the tax districts and agency recipients.

**Finding #4:** Five Mortgages Apportioned by New York State were Released and Distributed Incorrectly.

During fieldwork, the Auditor reviewed the State's Determinations of the Basi c Tax revenue that was distributed by the Clerk's Office to the tax districts. As demonstrated by the table below, the Auditor found that five amounts released in the months of May and October were distributed in an erroneous manner. Ultimately, seven tax districts received more or less revenue than they were entitled to, and certain portions are presently unaccounted for.

For example, in one such case, three tax districts should have received a portion of mortgage tax related to the property. The Auditor found that the Town of Hamburg was paid double the amount to which it was entitled, and the Town of Cheektowaga and the Town of Tonawanda received no Basic Tax revenue whatsoever for mortgages associated with case numbers 319113 and 319114. Even though Hamburg's portion was doubled, the total amount that was due to the three tax districts was not fully disbursed. The remainder of that amount is presently unaccounted for. Double payments of this nature occurred in four of five cases described here. There was no double payment in the remaining case; instead, there was only one tax district that received any revenue at all.

The issues did not end here. When double payments were first detected, the Auditor reviewed the BSC Reports and MT-4s. The Auditor found that for each case, the Clerk had copied the correct release amount from the State's Determination directly to the MT-4. However, because the amounts were incorrectly stated on the Release Report, the BSC Report totals were incorrect. Because the Clerk uses the BSC Report to fill in the subtotal on the MT-4, the subtotals reported to the Tax Commission were incorrect. Thus, all other totals on the MT-4 calculated using the subtotals were similarly incorrect.

Breakdown of Payment Discrepancies by Tax District

| Tax District | Amount Overpaid (doubled) | Amount Underpaid (missing) |
|---|---|---|
| Buffalo | | |
| 318289 | $ - | $ 369.99 |
| 318334 | $ - | $ 2,734.48 |
| 319117 | $ - | $ 3,552.86 |
| *Total:* | $ - | $ 6,657.33 |
| Lancaster | | |
| 318289 | $ - | $ 345.53 |
| *Total:* | $ - | $ 345.53 |
| T/ Tonawanda | | |
| 318289 | $ 266.94 | |
| 319113 | $ - | $ 79.47 |
| 319114 | $ - | $ 124.52 |
| *Total:* | $ 266.94 | $ 203.99 |
| C/ Tonawanda | | |
| 318334 | $ 856.96 | $ - |
| *Total:* | $ 856.96 | $ - |
| Grand Island | | |
| 318334 | $ - | $ 1,051.72 |
| *Total:* | $ - | $ 1,051.72 |
| Cheektowaga | | |
| 319113 | $ - | $ 1,042.65 |
| 319114 | $ - | $ 1,633.74 |
| *Total:* | $ - | $ 2,676.39 |
| Hamburg | | |
| 319113 | $ 473.38 | $ - |
| 319114 | $ 741.74 | $ - |
| *Total:* | $ 1,215.12 | $ - |
| ***Tax District Totals*** | $ 2,339.02 | $ 10,934.96 |

The Auditor also found that Additional, Special, and Assistance tax amounts were doubled in four of five transactions. When asked, the Auditee had no explanation for how the discrepancies occurred, or where the remaining funds ended up. The state agencies were only double paid when a tax district was double paid. In case number 319117 one tax district received its distribution and the other tax districts apportionment was missing, the state agencies were paid the correct amount.

Breakdown of Payment Discrepancies to Outside Agencies

| Tax District | Amount Overpaid (doubled) | Amount Underpaid (missing) |
|---|---|---|
| SONYMA | | |
| 318289 | $ 491.23 | $ - |
| 318334 | $ 2,321.58 | $ - |
| 319113 | $ 797.75 | $ - |
| 319114 | $ 1,250.00 | $ - |
| *Total:* | $ 4,860.56 | $ - |
| Additional (NFTA) | | |
| 318289 | $ 491.23 | $ - |
| 318334 | $ 2,321.58 | $ - |
| 319113 | $ 797.75 | $ - |
| 319114 | $ 1,250.00 | $ - |
| *Total:* | $ 4,860.56 | $ - |
| ***NFTA/SONYMA Totals*** | $ 9,721.12 | $ - |

Recommendations:

The Auditor recommends the Clerk's Office reconcile the Release Report to the State 's Determinations in order to verify that the mortgage tax revenue on hold was released properly and accurately to the tax districts and outside agencies.

As stated in multiple findings, the Clerk's Office needs to reconcile mortgage tax revenue collected to accurately complete the MT-4 instead of bypassing the reconciliation process that is allowing multiple errors to go undetected.

**Finding #5:** One Apportioned Mortgage Was Never Distributed.

When reviewing State's Determinations for 2022, the Auditor found one mortgage with a Tax Commission case number[32] totaling $4,736.00 was reported by the Clerk's Office on the MT-4. However, no record of this mortgage could be located on any other reports maintained by the Clerk, including the Daily Transaction Report.

The Auditor was unable to determine where this mortgage came from or whether tax revenue had actually been collected. According to the Tax Commission, this mortgage was recorded in October 2021 and returned to the Clerk's Office in February 2022. However, the mortgage was not included on the Hold Report from the prior year, and it was not included on the Release Report for any of the months in 2022. The Auditor determined that because the amount was not reported on the Release Report, the amount was not distributed. Because the Clerk's Office bypasses the reconciliation process when completing the MT-4, the releases were subtracted from the subtotal which did not include these amounts to start. Therefore, the mortgage tax collected that is recorded on the MT-4 was understated by nearly $5,000.00 due to this case alone.

The Auditee had no explanation for how this apportionment materialized and could provide no documentation indicating that revenue was ever collected.

Breakdown of Undistributed Mortgage Tax Revenue

| NYS Case #: | Tax District: | NYS Apportionments: | Undistributed amount |
|---|---|---|---|
| 317586 | Hamburg | $1,000.56 | $1,000.56 |
| | Eden | $1,367.44 | $1,367.44 |
| | SONYMA | $1,184.00 | $1,184.00 |
| | Additional (NFTA) | $1,184.00 | $1,184.00 |
| | ***Total*** | $4,736.00 | $4,736.00 |

Recommendations:
The Auditor recommends that the Clerk direct NewVision to create separate reports that reflect the monthly mortgage tax revenue placed on hold and apportioned revenue released so the Clerk's Office can reliably compare those reports against the State's Determinations.

It must be noted that the Auditee stated the Release Report is used as a tool to verify the State Determinations monthly against the MT-4, but it is apparent that is not taking place. As a result, errors and omissions are not being detected. This finding provides additional evidence that the Clerk's Office is only using the State's Determinations to record the releases on the MT-4, not what has actually been processed and distributed in the NewVision System. If the Auditee had referenced the Hold and Release Reports and compared them to the State's Determinations, it would have detected the mistake. Thus, the Auditor recommends that the Clerk's Office perform monthly reconciliations of actual mortgage tax revenue collected to complete the MT-4.

**Finding #6:** Mortgage Tax Revenue in the Amount of $29,654.00 was Unaccounted For.

While reconciling the Hold and Release Reports for the relevant audit period, the Auditor discovered that in one instance, a mortgage amount was placed on hold, but was never released or reported on the MT-4. When the

[32] 317586 (February 2022).

mortgage was recorded, the Clerk collected and receipted $29,654.00[33]. The transaction was placed on hold in November 2022 but had been removed from the Hold Report by December 2022.

Typically, when a mortgage is on the Hold Report one month and gone the next, it may indicate that the hold was released, and the amount was distributed. The amount should be found on the Release Report. In this instance, the Auditor evaluated the Release Reports, MT-4s and State Determinations for November and December 2022 but could find no indication that the amount had been released or distributed.

In an effort to investigate further, the Auditor reached out to the Tax Commission to confirm whether the Clerk's Office sent a Statement of Facts pertaining to this hold. The Tax Commission confirmed that a case number was assigned to the mortgage and a determination of apportionment was sent to the Clerk's Office. However, the amounts associated with this mortgage are presently unaccounted for.

Hold Report for November 2022

**MTG on Hold Sum. - Unapport- Erie County, New York**

Page :1 of 1
ALL LOCATIONS
ALL USERS
ORNY.15.072005

Through 11/30/2022 Report Date: 12/19/2022 12:47:32 PM

| Serial Number | Mortgagor | Total Tax |
|---|---|---|
| MTDK2019010900 | SMITH JUSTIN J | 1,723.00 |
| MTDK2019020316 | 400 INTERNATIONAL DRIVE ASSOCIATES LLC | 4,572.00 |
| MTDL2020016245 | TAFELSKI ERIE | 0.00 |
| MTDL2020019535 | VIOLANTE TIMOTHY | 3,735.00 |
| MTDM2021002542 | HARPST ETHAN | 1,695.00 |
| MTDM2021011997 | NAUGHTON JEFFREY J | 1,375.00 |
| MTDM2021021376 | CORP ROBERT MACWILLIAMS | 5,457.00 |
| MTDN2022000955 | SJR FOUR LLC | 2,240.00 |
| MTDN2022010704 | JOMEDA PROPERTIES LLC | 2,712.50 |
| MTDN2022015068 | INCT HOLDINGS LLC | 110,080.00 |
| MTDN2022016238 | MILE&A HALF TO GO LLC | 11,842.00 |
| MTDN2022016775 | LET HOLDINGS LLC | 6,208.00 |
| MTDN2022017044 | CJS DEVELOPMENT SINGLE LLC | 7,504.00 |
| MTDN2022017053 | MARTIN JAMES | 11,200.00 |
| MTDN2022017591 | SILVER LINING HOMES LLC | 10,200.00 |
| MTDN2022018605 | 3095 HARLEM ROAD INC | 29,654.00 |
| MTDN2022019076 | ROLLING MEADOWS FARM LLC | 27,900.00 |
| MTDN2022019145 | SCHILLING STEPHANIE LEE | 775.00 |
| MTDN2022019221 | DELEVAN PROPERTY HOLDINGS LLC | 3,750.00 |
| | | **242,622.50** |

Recommendation:
The Auditor recommends that this transaction be reviewed by the Clerk's Office to determine whether the mortgage tax was distributed properly to the appropriate tax districts and state agencies.

**Finding #7:** Five Mortgages Apportioned by New York State Were Not Placed on Hold in NewVision.

A multi-jurisdictional mortgage that is filed with the Clerk's Office requires the Tax Commission to determine the apportionment amounts to be distributed to appropriate tax districts. Upon receipt and recording at the Clerk's Office, the full amount of mortgage tax collected is placed on hold and the proper paperwork is forwarded to the Tax Commission for apportionment. Once received, the Tax Commission assigns a case number, determines the apportionment values, and ultimately notifies the Clerk's Office.

During testing, the Auditor found five mortgages that were assigned case numbers by the Tax Commission but were not on the Hold Report. The Auditor could not verify the original amount received by the Clerk relying solely

[33] Serial Number: MTDN2022018605. A commercial mortgage was recorded for 3095 Harlem Road in Cheektowaga.

on the State Determinations. To further test these transactions, the Auditor evaluated the Release Reports to verify whether the apportioned amounts were distributed. In each instance, the correct amounts were located on the Release Report and correctly distributed according to the State's Determination. However, the Auditor could not verify that the amount released was the amount collected.

Together the five cases represented in the table below amount to $58,063.50 in mortgage tax revenue. The Auditor found that each case had been apportioned and was included on the Release Report. The Auditor also found that none of those five cases were ever included on the Hold Report – a necessary and concurrent step in the receipting process. Thus, the Auditor found that all five cases were released and distributed but never placed on hold. The Auditor asked the Auditee about these particular cases and what impact the cases would have on revenue totals in the month they were collected and not placed on hold. The Auditor was never given an answer.

Recording a mortgage on the Release Report without recording the same on the Hold Report is inconsistent with the process described by the Auditee and observed during fieldwork. This deviation from the stated procedure raises a number of questions regarding the integrity of the financial data, none of which the Auditor was able to concretely answer with the information provided.

As a result of this procedural departure, the mortgage amounts for the five cases could be paid out twice. If a mortgage is not placed on hold, there is nothing distinguishing that particular amount from the larger pool of mortgage tax revenue. The amount could end up in the revenue total for the month that the mortgage was originally recorded and paid out. Later, when the mortgage is apportioned by the Tax Commission and subsequently included in the Release Report, the apportioned amount would be included as a release on the MT-4 in the month the case was released and paid out a second time. Ultimately, the Clerk's Office would remit a greater amount of mortgage tax than it collected, causing the Clerk's bank account to be short of funds and would require of use of County funds to pay obligations that should have occurred only once.

Summary of Cases Not Found on Hold Report

| NYS Case Number | NewVision Released Report - Amt. Dist. | Month Released & Distributed |
|---|---|---|
| 317509 | $ 87.50 | Jan-22 |
| 317584 | $ 750.00 | Feb-22 |
| 317585 | $ 12,030.00 | Feb-22 |
| 317587 | $ 4,000.00 | Feb-22 |
| 317588 | $ 41,196.00 | Feb-22 |
| ***Total:*** | $ 58,063.50 | |

Recommendations:
To address the immediate issue, the Auditor recommends that the Clerk's Office promptly review these five cases to ensure that all money was properly accounted for and distributed accurately as determined by the Tax Commission. This includes reporting all misallocations to the Tax Commission as required by Article XI[34]. All undistributed funds that can be located should be included in the next semi-annual distribution.

To avoid preventable issues such as these in the future, the Clerk must address their Office's failure to reconcile accounts and keep funds segregated. The Auditor recommends that the Clerk's Office reconcile the Hold Report to the Release Report on a monthly basis in order to verify that the amounts placed on hold were released and distributed based on the State Determinations. This will allow the Clerk's Office to detect errors in the NewVision system prior to remitting the funds to the County and outside agencies.

Furthermore, the Auditor recommends that the Clerk take immediate steps to discontinue the practice of depositing mortgage tax revenue into the Concentration Account and create a separate Trust and Agency

[34] See NY TAX § 261.

Account to maintain mortgage tax revenue. The Concentration Account holds all monies processed through the Registrar Division. Comingling agency funds with County funds is a fiduciary breach, but the lack of a reconciliation process all but ensures that errors in cash handling and reporting will not be detected. The MT-16 document provides further guidance in this area and the Auditor recommends that the Clerk take advantage of that resource[35].

**ii. Basic Tax Interest**

Because Basic Tax is only distributed semi-annually, the amounts collected under that specific statutory authority are held by the Comptroller's Office until the semi-annual distribution occurs in June and December. While the Comptroller is not legally obligated to invest Basic Tax revenue, it does so on behalf of Erie County's cities, towns, and villages. Once Basic Tax revenue is invested, its treatment is governed by applicable legal principles[36]. Interest is not reported until the month following the end of the relevant principal recording period. Therefore, there were three semi-annual distributions pertaining to the audit period that the Auditor reviewed. The Cash Management Unit within the Comptroller's Office Division of Accounting invests Basic Tax and ultimately completes a three-step process pertaining to interest revenue generated thereon. First, interest is earned; second, interest is posted; and finally, the interest earnings are transferred from revenue-generating accounts to cash accounts, which enables distribution.

During two six-month recording periods – ending in April and October according to Cash Management – spreadsheets were maintained listing the principal and associated interest earning calculations applicable to the relevant six-month interval. When Cash Management receives each monthly Basic Tax distribution from the Clerk, it is promptly invested. At the end of the principal recording period, the Comptroller's Trust Unit sends the principal and interest figures to the Clerk's Office to prepare the AU-202.

There are a number of reasons why variances could occur in this context, but two causes are the most likely. First, categorization mistakes could occur between CD investments and money market investments. The former generates interest on a 360-day cycle, while the latter generates interest on a 365-day cycle. If Cash Management were to incorrectly categorize the investment in the County's accounting system, the calculations would use the wrong denominator and the totals would be affected. Second, the bank could have failed to process the transaction in a timely manner and neglected to backdate it. If Cash Management does not carefully review the transaction detail and contact the bank when backdating does not occur, fewer days of interest earnings would be remitted back, and the totals would be lower.

**Finding #8a:** Interest Amounts Were Incomplete.

Summary of Incomplete Interest Payments

| Semi-Annual Distribution Date | Interest Paid-Out | Interest that should have been paid-out | Variance |
|---|---|---|---|
| 6/13/2022 | $ 1,225.90 | $ 1,286.59 | $ (60.69) |
| 12/8/2022 | $ 12,006.33 | $ 12,165.19 | $ (158.86) |
| 6/13/2023 | $ 88,810.03 | $ 94,654.54 | $ (5,844.51) |
| **Totals:** | **$ 102,042.26** | **$ 108,106.32** | **$ (6,064.06)** |

In evaluating and testing the processes of the Comptroller's Cash Management and Trust Units for handling interest, the Auditor found that the interest paid out to tax districts in the June 2022 semi -annual distribution was underpaid by $60.69. This variance was the result of several errors that were discovered during testing. Money market interest was accounted for twice, once as prior interest and once as an adjustment. In addition, money market interest was not transferred to the proper GL account for distribution.

35 MT-16, Ch. 11.1-4, 11.3-a.

36 See Baseline Opinion § IV(A).

The interest paid out to tax districts in the December 2022 semi-annual distribution was underpaid by $158.69, which was also the result of several errors. First, the Trust Unit included incorrect prior interest of $192.57 which was later adjusted to reflect the correct amount of $96.28. Next, $2,518.16 of money market interest was not transferred to the proper GL account but was distributed. Finally, $351.43 of money market interest was not transferred to the proper GL account or included in the Trust Unit's reconciliation for mortgage tax distribution.

Finally, the interest paid out to tax districts in the June 2023 semi-annual distribution period was underpaid by $5,844.51. In an interview with the Cash Management and Trust Units, the Auditor was informed that the discrepancy was the result of a failure to include money market interest in the distribution total. Additionally, $2,533.94 of the variance total was not transferred to the proper GL account for payout. There was a lack of communication between the Cash Management and Trust Units regarding adjustments to the interest amounts from previous months, which lagged due to the cut-off date used. The most concerning example of this practice of making adjustments to the following distribution occurred in the June 2023 distribution. In this case, all the interest attributed to the final month of principal collection was omitted from the June 2023 distribution. To test the Auditor's theory that the interest was delayed, the Auditor reviewed the AU -202 for the December 2023 distribution and found that the entire amount, exceeding $40,000.00, was recorded as an adjustment to be distributed at the end of 2023.

**Finding #8b:** Money Market Interest was Not Distributed on Time

If interest amounts were reported to the Clerk's Office and included in the semi-annual distribution totals, those amounts will be paid out to the tax districts. However, during testing, the Auditor determined that on several occasions Cash Management neglected to transfer the reported interest amounts to the GL account prior to distribution. While these errors do not affect the payouts to the tax districts, they cause the GL account to register an insufficient balance.

During the audit period, the interest rates for CD and money market investments were virtually identical. As a result, Cash Management only returned to CDs when interest rates began to meaningfully climb in late 2022 and early 2023. The calculation issues discussed in Finding #8a also contributed to the delay noted here. The logical resolution to the variance described in the table above would be to make an adjustment and apply it to the following distribution.

This is problematic for two reasons. First, a core tenet of property law wherein the interest must follow the principal is not adhered to. Because the accounts maintaining Basic Tax should be zeroed out every six months, interest is not following principal in the short term. Second, and more importantly, an adjustment applied to the next distribution results in incorrect amounts being paid to local governments. Since interest is prorated to the amount of principal that each municipality generates during a six-month period, and no two six-month periods will be proportionally identical, an adjustment made to a current period referring back to the previous period will alter the totals that each municipality receives.

The Auditor found the correct principal amount was ultimately distributed to local governments. The discrepancies among interest amounts earned, paid and posted resulted in the variances described above.

Recommendations:

The Auditor recommends that the Comptroller's Accounting Division, which includes Cash Management, implement a policy to review and approve the Trust Unit's semi-annual mortgage tax reconciliations. Managerial review will ensure that all interest earned is recorded and transferred accurately and timely in the County's accounting system and included in the semi-annual mortgage tax disbursement to the tax districts in a timely manner. Per Erie County policy, adequate managerial oversight of accounting activities is necessary to ensure that controls are functioning as intended and that errors or unauthorized activity are detected. This allows management to intervene and prevent such issues or, at minimum, to promptly address them before the impact to the County becomes more significant.

The Auditor further recommends that interest earned on the Basic Tax revenue be paid to tax districts in the same semi-annual distribution as the principal amount, rather than adding it to the next distribution payments. Consolidating this process will increase the efficiency of Cash Management and Trust functions in this area and reduce the likelihood that interest payments are delayed or missed. Consolidation will also increase the likelihood that the treatment of interest revenue will adhere to applicable legal authority. If investments are scheduled to mature at the proper interval, there is no reason that interest payments should be delayed.

The Auditor must note that, following multiple meetings with the Trust and Cash Management Units, the Auditor was provided with revised mortgage tax cutoff calculations that confirmed the Auditor's findings. The Auditor was also informed that going forward, Cash Management will begin using a June 1st cutoff to post interest to the first semi-annual mortgage tax distribution and a December 1st cutoff for the second.

**Comment #1**: Comptroller's Office Comingled Mortgage Tax Funds with Other County Trust Funds.

Through evaluation of investments by the Comptroller's Office, the Auditor found that Basic Tax funds were comingled with other funds in the Comptroller's Trust Account.

Approximately a decade ago, the Comptroller's Office maintained a checking account with HSBC that was specifically used for Basic Tax revenue. Each month, the Clerk would deposit Basic Tax in the HSBC account. Once received, Cash Management would ascertain interest rates based on revenue collection to invest primarily in CDs. One of the primary reasons that CDs were the instrument of choice is the ability to segregate the Basic Tax revenue from other amounts by investing it in a different classification. The CDs would eventually mature in the HSBC account, where the money would be simply distributed once semi-annual distribution warrants were signed. Importantly, the distinction would prevent the Basic Tax CD investments from appearing in the money market totals.

Over the next five years, HSBC left the Buffalo market and its successor, First Niagara Bank, was acquired primarily by KeyBank. Also, during that time, the Comptroller's Office consolidated its holdings into one bank, M&T. At this point, there was no longer a separate checking account into which Basic Tax could be deposited. Instead, the Clerk would make monthly deposits into the Comptroller's Trust Account. The Comptroller continued to follow the same process it previously had, with one major difference. Instead of having CDs mature in a segregated checking account specifically for mortgage tax, the CDs matured in the Trust Account, which contained a litany of other funds.

Recommendations:
The Auditor recommends the Comptroller's office re-establish a separate account for mortgage tax funds. Erie County Policy requires the use of an "agency fund to account for assets held in a trustee or agency capacity for others." Therefore, since the County has no entitlement to mortgage tax revenues and maintains custody of them only for collection purposes as prescribed by Tax Law, those amounts should be held separately from County funds and other trust holdings.

The Auditor further recommends that Cash Management exclusively invest Basic Tax revenue in CDs during the accumulation period. After the maturation date, the principal and interest can be invested via money market for the period between the cutoff date and the statutory distribution date. This will standardize the process, allowing Cash Management to review the details of semi-annual transactions, substantially segregate funds, and reduce the likelihood of errors.

### iii. Semi-Annual Basic Tax Distribution

**Finding #9:** The Comptroller's Accounting Division Lacks Managerial Review over ACH and Check Disbursements Prior to the Semi-Annual Distribution.

When the time comes to remit Basic Tax amounts to the cities, towns, and villages, the Comptroller's Accounting Division sends each tax district a lump sum of revenue to which they are entitled. Most tax districts are paid by ACH, but six tax districts still receive paper checks. During interviews with the Trust Unit, the Auditor was informed that the same individual is responsible for the preparation and distribution aspects of Basic Tax transmittal. It was also stated that this individual creates ACH distributions and can create a vendor file which could lead to misallocation of mortgage tax revenue. The Auditee disclosed that there was no managerial oversight involved in the process. While the Auditor found no evidence of mistakes or misconduct in this part of the process, there is no segregation of duties as required by Erie County Policy.

Recommendation:
The Auditor recommends that the Accounting Division implement the system of separating the review that is already in place for most functions in the Comptroller's Office. Specifically, the Auditor recommends that one individual prepare the transmittals while a second individual in a managerial position review and release the payments.

**Comment #2:** Semi-Annual Distribution Process.

The Auditor found that the Comptroller's Accounting Division could take on a larger role in semi-annual distribution of mortgage tax revenue. Specific, granular guidance from the Tax Commission in this area is lacking, and the Auditor stipulates that both Offices executed the process in good faith. Nevertheless, the current allocation of duties between the two offices does not align with the text of Article XI and misses opportunities for the Clerk and Comptroller to cooperatively ensure the accuracy and reliability of mortgage tax distribution.

Each month, the Clerk's Office is supposed to deposit the prior month's mortgage tax revenue into an account held by the Comptroller's Office before the 10th. Once the money has been turned over, The Clerk sends a signed MT-4 to the Comptroller's Office listing the revenue turned over. If the amount stated on the MT -4 matches the amount in the Comptroller's Basic Tax account, the Comptroller or his designee signs the MT-4 and returns it to the Clerk. The Comptroller's Cash Management and Trust Units are responsible for maintaining and distributing Basic Tax revenues to the cities, towns and villages. Once received, Cash Management invests the Basic Tax revenue so that the maturity date will align closely with the semi-annual distribution dates.

Currently, the Trust Unit reconciles the mortgage tax principal and interest before notifying the Clerk's Office of the total semi-annual interest earnings amount to be added to the distribution totals. The Clerk's Office prepares the AU-202, a report breaking down the total amount of mortgage taxes to be distributed to the local governments and submits it to the Tax Commissioner for approval. Upon receiving State approval, the Clerk's Office will forward the approved report to the County's Department of Real Property Tax Services (RPT). Since villages do not receive mortgage tax revenue directly, their portions are taken from the share of the town in which the village sits. RPT currently prepares a spreadsheet showing the proper allocation of revenue between the two, based on assessment values and a statutory formula[37]. Once the values are calculated, RPT sends the spreadsheet and signed Tax Warrants to the Trust Unit for distribution.

Recommendation:
The Clerk's Office should consider transferring additional responsibilities related to calculating the Basic Tax amounts that are distributed to the local municipalities to the Comptroller's Accounting Division. Under New York Tax Law, the treasurer, not the recording officer, is responsible for ensuring that Basic Tax amounts are carved up proportionately and facilitating distribution to local governments. In order to accomplish this, the Clerk's Office would need to deliver sufficient information to allow the Comptroller to confirm that totals are accurate, and reports reconcile. At minimum, the Clerk will need to send the following documents to the Accounting Division each month alongside the MT-4:

- Monthly BSC
- Monthly Hold Report

[37] Once the town receives its distribution, it must forward the village's share.

- Monthly Release Report
- State Apportionments
- Daily Transaction Details by tax jurisdictions

In addition to legal compliance, successful completion of this recommendation will result in a greater degree of efficiency, fewer moving parts in a fiduciary process, and stronger safeguards against theft, fraud, errors, and misallocation. Furthermore, this collaborative arrangement would assist the Comptroller in discharging Charter-mandated oversight responsibility of "funds for which the County is responsible.[38]" The back and forth between the Clerk and Comptroller concerning interest amounts would no longer be necessary.

The Clerk and Comptroller's Accounting Division need not reinvent the wheel in this instance. Discussions with other counties have revealed a practical blueprint that should ensure the smooth transfer of information between offices as well as accurate reporting and distribution. One of the most impactful changes that can be made to affect the transfer is to reconfigure NewVision so that it can interface directly with the County's Accounting System. If NewVision cannot do that, the system should be replaced with a vendor who can. At minimum, any extension or renewal of the NewVision contract must include stronger language requiring compatibility of mortgage tax data with the County's accounting system. Furthermore, throughout this audit and the previous, it became apparent that the NewVision contract requires additional, plain language clarifying that the Clerk's Office is not a party to the contract, it is a beneficiary. Catalis, the company which owns and administers the New Vision system, is contracted by Erie County, and must be responsive to inquiries from the Comptroller and Administration, not just the Clerk.

Still, recommendations throughout Sections B and C noted above, describing how the Clerk can properly segregate mortgage tax amounts from its other funds and proper methods of reconciliation, are critical to creating an effective process that complies with Article XI. Once this is done, the Clerk need only add supplemental documentation to what it already provides.

The Clerk's Office already sends the Basic Tax amount to the Comptroller's Cash Management Unit each month as required by law. When the Clerk makes that monthly transfer, it should include daily and monthly reports that have been properly reconciled with the MT-4. The Comptroller's Accounting Division should review the Clerk's reports to verify the accuracy thereof. When preparing the semi-annual report to submit to the County Legislature, the Comptroller should use the MT-4 Statements and the information contained on the daily and monthly reports to arrive at its basic tax totals to be distributed to municipalities. The Comptroller should engage with the Clerk, the Department of Real Property Tax Services, and the State Tax Commissioner to obtain other relevant information such as formulas, guidance, and assessed property values. The Comptroller should explore whether available programs or software would be beneficial to the Accounting Division in completing this task.

### iv. Additional Distribution Comments

**Comment #3**: The Basic Tax Summary Report Incorrectly Labeled Mortgage Tax Revenue Categories.

The NFTA and SONYMA, the state agencies which are entitled to a portion of mortgage tax revenue generated in Erie County, heavily rely on these amounts for operating expenses. Both amounts exceed half a million dollars in any given month, and NFTA receives roughly twice the amount that SONYMA does. While testing mortgage tax revenue collected by the Clerk's Office, the Auditor found that Additional and Special Tax totals were mislabeled on the BSC Report. The baseline that the Auditor used for this observation was the categorical breakdown of revenues on the MT-4.

[38] Erie County Charter § 1802(4).

Report Provided by Auditee with Incorrect Labels and Descriptions

| BSC Report Labels Provided by Auditee (Not Correct according to MT-4): | | |
|---|---|---|
| County Portion | Total Basic Tax | 3,324,478.76 |
| NFTA | Total MTA Additional Tax | 721,791.63 |
| | Total Special Assis. Tax | 874,330.25 |
| SONYMA | Total Special Additional Tax | 1,644,898.15 |
| | Grand Total | 6,565,498.79 |

Sample testing - MT-4 Totals based on BSC Report Totals & Descriptions given by Auditee

| MT-4 Statement of Mortgage Recorded | MT-4 Statement of Mortgage Recorded | Basic Tax Summary C Report (NewVision) |
|---|---|---|
| Total Basic Tax | $ 3,324,478.76 | $ 3,324,478.76 |
| Total Special Additional Tax (NFTA) | $ 1,644,896.15 | $ 721,791.63 |
| Total Special Assis. Tax (NFTA) | $ 874,330.25 | $ 874,330.25 |
| Total MTA Additional Tax (SONYMA) | $ 721,791.63 | $ 1,644,896.15 |

When first reviewing documents provided by the Auditee, the Auditor was led to believe that the Clerk's Office had been sending to SONYMA the portion of mortgage tax revenue that the NFTA was entitled to, and vice versa. When this issue was raised with the Auditee, management in the Clerk's Office demonstrated that while the documentation was mislabeled, the correct amounts were ultimately paid to the correct recipients.

Recommendations:
The Auditor recommends that the Clerk's Office correct labels in NewVision and other documentation used for mortgage tax purposes to ensure that the correct amounts are reported on the MT-4 and distributed to the state agencies.

**Comment #4:** Five Apportioned Amounts Were Released Late on the MT-4.

Because the Hold and Release Reports generated by NewVision did not reconcile, the Auditor used the MT-8[39] and AU-203 forms to determine the accuracy of the mortgage tax revenue released and recorded on the MT-4. Due to the manner in which Erie County distributes Basic Taxes to local governments, delays of this nature could have the unintended effect of delaying the transmittal of funds to those governments by six months and throwing off the accuracy of proportional distribution.

**Summary of Late Releases:**

| 2022 | Case No. | Release Date NYS | Release Date MT-4 |
|---|---|---|---|
| January | 317255 | 11/17/21 | 1/21/22 |
| July | 318375 | 5/31/22 | 7/12/22 |
| November | 318014 | 4/22/22 | 11/29/22 |
| November | 318253 | 5/31/22 | 11/29/22 |
| November | 318535 | 6/16/22 | 11/16/22 |

39 The MT-8 is the New York State Tax document by which the Tax Commission issues apportionment orders.

During fieldwork, the Auditor was told that the Second Deputy Clerk compares the Release Report to the State's determination when recording releases on the MT-4. However, due to errors and omissions found on numerous MT-4 records throughout the audit period, the Auditor determined that there is no reconciliation or review process in place. This led the Auditor to conduct further evaluation and testing on apportionment mortgages throughout 2022, of which there were 114.

Recommendations:
The Auditor recommends that the Clerk's Office reconcile the mortgage tax revenue reported on the MT -4 to The Cash Code Summary before remitting Basic Tax to the County. Due to the Clerk's Office failure to reconcile the monthly mortgage tax collected, omitted releases were not detected.

The Clerk and the Comptroller need to alter how they conceptualize the MT -4. The Comptroller should not sign the MT-4 until it can be verified that the amount of Basic Tax listed on the form matches the amount of money that has been transferred from the Clerk to the Comptroller's mortgage tax trust account. Since the Tax Commissioner expects to receive MT-4 forms from counties on or before the 10th of each month, the Comptroller's Cash Management Department should diligently monitor the mortgage tax account for the monthly transfer. Once received and confirmed, the Comptroller should waste no time in signing and returning the form to the Clerk. However, the Clerk's transfer must come first. Regardless of the date, the Comptroller should not sign the MT-4 if the Clerk has not made the obligatory transfer.

The Clerk should not wait on the Comptroller's signature to make any of its monthly mortgage tax transfers. The NFTA and SONYMA rely on mortgage tax revenue being distributed in a timely manner, and there is no legal barrier keeping the Clerk from making payments on time. The Clerk must also ensure that the MT-4 is complete. For one, the Clerk should run a report reflecting the apportionment mortgages recorded each month and listing those transactions on the back side of the MT-4. Further, the Clerk must provide the Comptroller with sufficient data which would allow for the accurate distribution of Basic Tax to the cities, towns and villages. Compiling this information monthly will take time and effort, but the Clerk is entitled to deduct the costs incurred from the monthly basic tax total.

**Comment #5**: The Clerk's Office Did Not Have Written Procedures for Mortgage Tax Revenue Distribution.

The Auditor was not provided with any written procedures from the Auditee after multiple requests. The Comptroller's Office, which handles a portion of the distribution process of the mortgage tax revenue, provided a copy of their written procedures. These procedures only applied to the application of interest and semi -annual distribution. The Auditor reviewed these procedures with the Clerk's Office to gain an understanding of the complete process.

Recommendations:
The Auditor recommends that the Clerk's office develop written procedures for mortgage tax distribution to ensure mortgage tax revenue is accurately distributed to tax districts and outside agencies. Regimented processes will aid civil servants in the execution of their duties and increase the likelihood that all distributions are paid on a timely basis. Implementing written procedures will not only allow the Clerk's Office to continue functioning when someone is out of the office but will make segregation of duties easier going forward.

### D. **Other Findings, Comments & Recommendations:**

After reviewing previous audits of the Clerk's mortgage tax collection and distribution process, the Auditor noted that the only findings described therein pertained to the timeliness of distributions to state agencies[40]. The Auditor conducted additional testing to determine whether the findings from the previous audits had been adequately addressed.

**Finding #1:** Eight of Twelve Monthly Distributions to SONYMA Were Late in 2022.

[40] See *Audit of Mortgage Recording Tax – Niagara Frontier Transportation Authority*, Erie County Comptroller, published December 28, 2015.

Clerks must make payments to state agencies entitled to mortgage tax revenue collected in a particular month no later than the 10th day of the following month[41]. Eight of the twelve payments made to SONYMA in 2022 were issued after the 10th of the following month[42].

**Finding #2:** Four of Twelve Monthly Mortgage Tax Distributions to the NFTA were Late in 2022.

Four of the twelve ACH transmittals made to the NFTA were initiated after the 10th of the relevant succeeding month. Specifically, payments were late for January, February, April, and November of 2022.

The Auditor registered several other minor issues with payments to the NFTA. During testing, the Auditor noted that January and February ACH payment confirmation letters sent to NFTA by the Clerk's Office with the MT-4 were dated incorrectly. The Auditor also noted that the first two payment letters were signed by the Second Deputy Clerk while the remaining letters were signed by the Clerk personally.

The Auditor also found that the September ACH payment confirmation letter to NFTA erroneously referenced the month of August instead of September on the MT-4. The Auditor confirmed that the NFTA mortgage tax revenue distributed was for September's MT-4. The same mistake recurred in October, in which documentation also referenced the month of August.

Recommendations:
The Auditor recommends that the Clerk's Office take additional measures to ensure that payments to the NFTA and SONYMA are made by the 10th of the following month after mortgage tax is collected.

The Auditor must note that, during fieldwork, the Auditee stated that each month the Second Deputy presents the MT-4 to the Deputy Comptroller under the pretense that the Deputy Comptroller's signature is necessary to permit the Clerk to remit the entire amount of mortgage tax. The Comptroller's signature is confirmation of receipt of the basic mortgage tax ACH payment only[43]. Therefore, the Clerk's Office does not need to wait for the Deputy Comptroller to sign before issuing NFTA and SONYMA payments.

**Comment #1:** The Comptroller's Office Should Consider Deducting Its Expenses.

The Auditor found that the Comptroller's Office did not deduct the Treasurer's expense on the AU -202 for the audit period. "Recording officers *and* county treasurers shall severally be entitled to receive all their necessary expenses for the purposes of this article, including printing, hir[ing] of clerks and assistants . . .[44]" While the Comptroller's role in the mortgage tax distribution process has been leaner than it should have been during the audit period, staff in the Comptroller's Cash Management and Trust Unit have been expending time, effort, and resources to facilitate the semi-annual distribution. Therefore, the Comptroller's Office is entitled to keep a commensurate portion of funds to cover their expenses that are allowed by the State.

Recommendations:
The Comptroller's Office should consider tracking expenses incurred for its part in the mortgage tax process in order to properly determine if a MT-3 is warranted. This option will give the Comptroller time to accurately ascertain the costs during the receipt, apportionment, local distribution, and handling of interest related to Article XI. Further, the Comptroller should develop an internal policy facilitating the diligent and accurate tracking of expenditures related to mortgage tax, such as employee time studies, supply expense logs, and a pro rata determination of technological expenses. This step will assist the Comptroller's Office in determining if a MT-3 should be filed to reclaim the expenses for the services provided.

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41 See NYTL § 261. "The balance of all moneys paid to the recording officer of each county during each month upon account of the taxes imposed..., after deducting the necessary expenses..., shall be paid over by him on or before the tenth day of each succeeding month..."
42 Payments were late in January, February, March, April, May, July, August, and November.
43 See MT-4 Opinion.
44 NYTL § 262

## Audit Scope and Methodology

The Auditor's objectives in this audit were to evaluate and test mortgage tax revenue collection and the distribution processes to determine if the internal controls over the relevant period (January 1, 2022, through December 31, 2022) were adequate and whether the Clerk's Office Registrar Division, adhered to county policies, New York State Tax Law and regulations of the New York State Tax Commissioner.

The scope of the audit included evaluation and testing the collection and reconciliation of mortgage tax revenue, mortgage tax placed on hold, mortgage tax apportioned and released by NYS and mortgage tax revenue calculations within the NewVision Cashiering System. Testing and evaluating the monthly distribution of mortgage tax revenue to the county (MT-4) and outside agencies (SONYMA and NFTA), the reconciliation and reporting of semi-annual distributions including interest paid to tax districts (AU-202). In addition, an evaluation of the M&T Mortgage Tax and Imprest bank accounts were performed along with an analysis of the funds held in escrow. The escrow funds were evaluated because they are comingled with the Mortgage Tax revenue. The internal control surrounding these processes were reviewed, evaluated and tested for compliance to accuracy, completeness, timeliness and efficiency.

In addition, Internal and System Control Questionnaires (ISCQ) were issued to obtain a baseline, documented discussions and procedures related to policy and processes followed by the Clerk's Office Registrar Division and the Comptroller's Office Accounting Division.

As stated previously in the report, the Clerk's Office did not fill out or return the ISCQ. The Auditor documented discussions with the Clerk's Office personnel related to mortgage tax revenue collection and distribution on the ISCQ and asked the Auditee to review and approve the questionnaire. There was no response from the Auditee. The Comptroller's Office did not return the ISCQ as much of the activity for mortgage tax is done on the NewVision Cashiering System which the Comptroller does not have access to.

Written procedures were obtained from the Comptroller's Office that documented their process for distribution of mortgage tax revenue. No written procedures were obtained from the Clerk's Office as none existed.

To achieve the objectives, the Auditor had to determine the population for each test being performed on the collection and distribution of the mortgage tax revenue. All the reports and data were reviewed, and the following was determined:

1. It was determined the total population for 17 tests were less than 30. Due to the sample sizes being less than 30, the entire sample size was tested for the following:

    a. Reconciliation of M&T Mortgage Tax and Imprest bank accounts (12 monthly bank statements were received)
    b. Analysis of the Escrow Balances (12 monthly bank statement were received)
    c. Mortgage Tax Revenue Collected Verses Remitted (12 monthly Cash Code Summary NewVision reports were received)
    d. Reconciliation of mortgage tax revenue on hold and released on NewVision reports (12 monthly NewVision Hold Report Sum.-Unapport and Released Reports were received).
    e. Reconciliation of Mortgage Tax Apportioned by NYS and remitted on the Statement of Mortgages Recorded (12 monthly MT-4's was received and all NYS Apportionments for 2022).
    f. Mortgage Tax Expense (MT-3 received covers one year of expenses)
    g. Mortgage tax revenue placed on hold prior to release in NewVision (12 monthly NewVision Hold Report Sum.-Unapport and Released Reports were received).
    h. Mortgage tax revenue released in NewVision to the NYS apportionments (12 monthly NewVision Released Reports and all 114 NYS apportionments for 2022 were received).

i. Mortgage tax revenue released on the Statement of Mortgages Recorded for Disbursement (12 monthly Statement of Mortgages Recorded were received).

j. Apportionment of mortgage tax revenue released in NewVision (12 monthly NewVision Released Reports and all NYS apportionments for 2022 were received).

k. Distribution of mortgage tax revenue apportioned by NYS Department of Taxation and Finance (all NYS apportionments for 2022 were received).
l. Distribution of mortgage tax revenue to the County (12 monthly Statement of Mortgages Recorded were received).
m. Distribution of mortgage tax revenue to outside agencies (12 monthly bank statements and copies of checks were received).
n. Timeliness of mortgage tax revenue distribution to outside agencies (12 monthly bank statements and copies of checks were received).
o. Distribution of interest earned on mortgage tax revenue (18 months of mortgage tax interest earned in SAP and interest earned on Trust's semi-annual distribution).

p. Distribution of mortgage tax revenue to tax districts (18 months of bank statements and copies of checks were received).
q. Payments to tax districts (18 months of bank statements and copies of checks were received).

2. It was determined the total population for 2 tests were greater than 30 for the following:

   a. Mortgage tax apportioned/released in NewVision (90 apportioned/released mortgages to tax districts).
   b. It was determined a sample size of 41 out of 90 samples to test for Mortgage Tax Apportioned/Released in 2022 for 95% confidence level. The Random Selection audit methodology used for this test was documented.

3. Mortgages Tax Fee Collection Calculation (27,455 mortgage tax transactions recorded).

   a. It was determined a sample size of 73 out of 27,455 Mortgage Tax transactions to be tested for Mortgage Tax Fee Collection Calculation for a 95% confidence level. The Auditor determined to use a Systematic Selection methodology for testing the transactions and documenting the results.

Due to the inconsistencies in the NewVision reports provided by the Auditee, the Auditor reached out to the NYS Tax Commission Office to confirm the findings related to NYS Tax Determination of Apportionments.

The Clerk's Office utilizes NewVision Cashiering System to process their daily land record transactions. NewVision does not interface with the County's accounting software system (SAP), and the company which administers NewVision, Catalis, LLC, has not created a translation tool which would facilitate the transfer of financial data from NewVision to SAP.

This documentary evidence and conversations with relevant individuals within the Clerk's Office, Registrar Division, taken as a whole, were used to form an opinion based on our objectives.

## RESULTS OF EXIT CONFERENCE

An exit conference was held on January 24, 2024, with the Erie County Deputy Comptroller and members of his Cash Management and Trust Units. The draft audit report was reviewed and discussed resulting in minor changes for added clarification that did not alter or modify the findings or comments in this report. The Erie County Comptroller would like to thank the Erie County Deputy Comptroller and his respective participating staff members for the courtesy extended to the Division of Audit during the course of the review.

An exit conference was held on January 31, 2024 with the First Deputy County Clerk and the Deputy County Clerk – Legal. The draft audit report was reviewed and discussed resulting in a minor change that added clarification only and did not alter or modify Finding #1 under Section D. Distribution. The Auditee inquired about why the supporting documents that were used to determine the findings were not included in the report, the Auditor indicated to the Clerk's Representatives that the supporting documents in which they are referring to were the documents and reports provided by their office. The only other information that was utilized by the Auditor was obtained from the NYS Tax Commission to confirm the findings involving NYS Determination of Apportionments.

**ERIE COUNTY COMPTROLLER'S OFFICE**

cc: Michael P. Kearns, Erie County Clerk
Hon. Mark C. Poloncarz, Erie County Executive
Hon. Kevin R. Hardwick, Erie County Comptroller
Robert W. Keating, Director, Division of Budget and Management Erie County Fiscal Stability Authority

APPENDIX A

**To: Mary K. Nytz-Hosler, Deputy Comptroller for Audit**
**From: Eric J. Mikols, Esq., ADC**
**CC: Amy Barlow, Staff Auditor; Ashlee Pollinger, Accountant Auditor**
**Re: Mortgage Tax Baseline**
**Date: September 20, 2023 – Updated December 29, 2023**

## I. Introduction

Collecting mortgage taxes is a core obligation of the Registrar Division within the Erie County Clerk's Office. In early 2023, the Office of Erie County Comptroller, Division of Audit initiated a formal review of the general ledger (GL) accounts managed by the Registrar Division. During the course of the Registrar audit, completed in June 2023, the Division of Audit determined that the issues germane to Mortgage Tax collection were simply too voluminous and complex to include in an already unwieldy investigation. The Registrar audit, which included court fees, pistol permit transactions, and mortgage tax expense was already shaping up to far exceed the breadth and depth of audits conducted by the Erie County Comptroller's Office under previous administrations. In order to ensure compliance with Government Auditing Standards (GAGAS) and best present the audit findings to the public, the decision was made to break off the mortgage tax aspect of the Registrar's function from the other GL accounts.

An audit of mortgage tax collection is hardly as simple as verifying transaction values. Without an understanding of the system, the Division of Audit will have a difficult time adhering to GAGAS standards and providing the fiscal health maintenance function that the Division exists to serve. The purpose of this memorandum is to simplify an exceedingly complex taxation and distribution process. Part II will summarize the purpose and intent of the mortgage tax and introduce the various component taxes included therein. An accounting of applicable exemptions will also be included. Part III will address the mortgage tax distribution structure and how the Clerk's process aligns with that structure. Part IV will pinpoint remaining deficiencies and serve as a guide for future implementation. A brief conclusion will follow.

## II. Article XI Taxes & Exemptions

Article XI of the New York State Tax Law was introduced around the tum of the 20th century as a reform package and means of codifying the mortgage tax as a permanent staple of revenue. At its root, the mortgage tax is "a tax upon the privilege of recording a mortgage.[1]" While property had long been taxed under the traditional levy, the mortgage tax was able to reach intangible property interests in a way that the levy could not[2]. Such intent is further indicated by supplemental statutes passed when the legislature later determined that certain types of mortgages were inadequately covered by the original law[3]. The definition of real property was drastically expanded to cover all interests relating to land, not just at-grade but above and below as well[4]. While some exemptions exist, they are few and far between. Certain entities are uniformly exempt, so long as those entities are single purpose[5]. Other exemptions take the form of a senior citizen

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[1] *S.S. Silberblatt, Inc. v. Tax Commission of State of New York*, 5 N.Y.2d 635, 649 (1959).
[2] *Franklin v. Society for Home Building and Savings v. Bennett*, 282 N.Y. 79 (1939).
[3] See NYTL § 253-b (governing credit line mortgages); see 20 NYCRR 640.6 (expansively defining mortgage and including examples for reference).
[4] New York Tax Law § 250(1); see also 20 NYCRR 640.5. The few exceptions included state-owned mines and transient mobile homes – meaning present for fewer than 60 days.
[5] See § 253(3) (exempting nonprofit hospital corporations, fire companies, ambulance services, and the dormitory authority); see also *Church Charity Foundation of Long Island v. State Tax Commission*, 55 A.D.2d 484 (3d Dep't 1977) (holding that a nonprofit

discount[6]. Many exemptions were designed to encourage the actors in the mortgage system to participate in the new scheme[7]. Others are exempt to encourage (or discourage[8]) certain borrowing and lending behaviors[9]. At the end of the day, the primary actors in this legislative scheme – recording officers and treasurers – are answerable to the New York State Tax Commission and the Office of the New York State Comptroller, respectively[10].

The cornerstone of Article XI is § 253. Functioning as the imposition statute, § 253 created the obligation to pay a tax on a mortgage, and to pay it at the time of recording[11]. Basis is derived from the "principal debt or obligation" and pays no consideration to interest or maturity date[12]. The "mortgage tax" is actually an amalgamation of four separate taxes, each bearing its own character and set of exemptions[13]. As the recording officer of mortgages in Erie County, the Clerk is responsible for collecting and properly computing each of them on behalf of the State[14]. However, Erie County does not have its own recording tax[15]. While there is no obligation for the County to impose such a tax, the fact that Erie County does not assess one makes it an outlier in New York[16].

### A. Basic Tax

The single largest single chunk of the mortgage tax is colloquially known as the "basic tax". The basic or (1) tax is "a tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation . . .[17]" A "major fraction" for the purposes of the basic tax means "more than half.[18]" The basic tax is applicable across the board. The only exemptions to the basic tax are the carveouts specifically included elsewhere in Article XI or the applicable regulations[19]. In order to obtain an exemption, a tax must be paid up front and a petition sent to the State Tax Commission to argue qualification[20]. The barriers to recovery are exceptionally high, requiring a petitioner to navigate a series of administrative hearings and appeals before seeking judicial review[21]. Even if a petitioner manages to survive the procedural gauntlet, exemptions are granted judiciously[22].

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hospital corporation constructing a housing development for the elderly was not exempt from the mortgage tax because the entity did not exclusively function as such).

[6] NYTL § 252-a.

[7] See NYTL § 254; see also *Mutual Life Ins. Co of New York v. Nicholas*, 144 A.D.95 (1st Dep't 1911).

[8] See *Application of Erie R. Co.*, 260 A.D. 268 (3d Dep't 1940) (holding that a mortgage taken to pay off another mortgage was still taxable even though the total value of money borrowed did not increase).

[9] See NYTL § 252 (including Agricultural Credit Associations, the Federal Home Loan Bank, Railroad Corporations and Condos).

[10] NYTL § 263; see also *Brodsky v. Murphy*, 30 A.D.2d 904 (3d Dep't 1968) (holding that the Commission can order a recording officer to issue a refund because the recording officer is effectively an agent of the Commission for Article XI purposes).

[11] *Moore v. Lindsay*, 61 Misc. 176 (1908); 1953 N.Y. Op. Atty. Gen. No. 198. This is not to be confused with the time of execution.

[12] *Park and 46th Street Corporation v. State Tax Commission*, 295 N.Y. 173 (1946); *Cosmopolitan Broadcasting Corp. v. State Tax Commission of State of New York*, 78 A.D.2d 475 (3d Dep't 1981).

[13] See NYTL § 253.

[14] See 20 NYCRR 640.4.

[15] The tax is imposed by the state and inures to the benefit of state and local (cities, towns and villages) entities.

[16] See §§ NYTL 253-c to 253-y.

[17] NYTL § 253(1); 20 NYCRR 640.2(a)(1)..

[18] 20 NYCRR 642.1(a). For example, a mortgage of $50,049.00 would be taxed as $50,000.00 while a mortgage of $50,051 would be taxed as $50,100.00.

[19] See NYTL § 252; 20 NYCRR 640.2(b).

[20] NYTL § 251.

[21] *Id.*

[22] *C.E. Towers Co. v. State Tax Com'n of New York*, 135 A.D.2d 976 (3d Dep't 1987) (declining to grant an exemption to a mortgage where the end user was a non-profit hospital but the parties at the time of recording were both private).

### B. Additional Tax

The next, reasonably uncomplicated chunk of mortgage tax is colloquially known as the "additional tax". The additional tax or (2)(a) tax is "an additional tax of twenty-five cents . . . for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation[23]." The additional tax is the most clear-cut example of the compounding nature of Article XI's exemption structure. The exemptions applicable to the basic tax are explicitly built into the additional tax[24]. Beyond that baseline, the statute exempts from the additional tax the "first ten thousand dollars of such principal debt or obligation in any case in which the related mortgage is of real property principally improved or to be improved by a one or two family residence or dwelling.[25]" Furthermore, Industrial Development Agencies (IDA), and certain participants[26] in IDA-involved transactions are exempt entirely[27]. A unique aspect of the additional tax is the municipal power to suspend it. "The additional tax on mortgages recorded in a county . . . may be suspended for a specified period of time or without limitation as to time by a local law, ordinance or resolution duly adopted by the local legislative body of such county[28]." However, the power to suspend the tax is limited to certain counties. Erie County, being in the Niagara Frontier Transportation District, is one of the handful that may not[29].

### C. Special Tax

The final quarter-percent of mortgage tax is variably comprised of the special tax and the assistance tax. The "special" tax or 1-a tax is, on its face, "a special additional tax of twenty-five cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation[30]." What distinguishes the special tax from the additional tax is the former's exemption of "mortgages wherein the mortgagee is a natural person or persons, or is a credit union[31] . . . and in either case the mortgaged premises consist of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities.[32]" To simplify, the emphasis is on the lender, not the borrower. If a *lender* is a natural person or credit union, the mortgage is exempt. In addition to that requirement, the property mortgaged must also be small-scale residential in nature. The tax would still apply to a mortgage executed by a credit union for commercial property. Essentially, the special tax applies to all parcels – those not otherwise exempt by other provisions – that go through the mainstream lending process[33]. Further specifications applicable to the special tax are described in the following section (II)(D).

[23] NYTL § 253(2)(a); see also 20 NYCRR 640.2(a)(2).
[24] NYTL § 253(2)(a). "All the provisions of this article shall apply with respect to the additional tax imposed by this subdivision to the same extent as if it were imposed by the said subdivision one of this section, except as otherwise provided by this article.
[25] *Id.*
[26] The statute includes those receiving financial assistance from the IDA, defined as "the proceeds of bonds issued by an agency, straight-leases, or exemptions from taxation claimed by a project occupant as a result of an agency taking title, possession or control (by lease, license or otherwise) to the property or equipment of such project occupant or of such project occupant acting as an agent of an agency." GML § 854(14).
[27] NYTL § 253(2)(a).
[28] *Id.*; see also NYTL § 253(2)(b).
[29] NYTL § 253(2)(a).
[30] NYTL § 253(1-a)(a); see also 20 NYCRR 640.2(a)(3).
[31] NY BANK § 2(9) defines a 'credit union' as "any corporation organized under [Art. XI of ch. 689 of the laws of 1909] or [Art. XI of the Banking Law]. Every such corporation shall be a non-stock corporation."
[32] NYTL § 253(1-a)(a). Both conditions for exemption must be met.
[33] Other exemptions from the special tax include 501(c)(3) entities. § 253(1-a)(b).

### D. Assistance Tax

The assistance tax is a reflection of intent by the Legislature not to exempt all small residential properties. The assistance tax is also a 1-a tax, just sliced a different way. Corporate mortgagees, along with any other entity that is not a credit union or natural person, remain on the hook for the special tax[34]. The most common example of an assistance tax mortgage involves a bank and a private natural person taking out a mortgage on a single-family home.

In another indication that the State Legislature intended to cast as wide a net as possible, the distribution statute includes a detailed fee-shifting arrangement if exemptions apply to one party but not the other. This "rubber-glue" approach has led to one of the more peculiar specifications in tax law and a dramatic departure from the typical treatment of mortgage tax. Since the early 20th Century, the conventional wisdom held that Article XI left it up to the parties to the mortgage transaction to decide who paid the tax[35]. That changed substantially when the 1-a tax was adopted:

> The tax, if any, imposed by this subdivision shall in cases of real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each dwelling unit having its own separate cooking facilities, be paid by the mortgagee, and such tax shall not be paid or payable, directly or indirectly, by the mortgagor.[36]

Under these circumstances only does the law prescribe who is responsible for paying mortgage tax – a legislative determination that has been challenged and upheld by the courts[37]. Ultimately, the assistance tax is limited to mortgages of small-scale residential property made by non-human legal actors. Adding to its unique character, and for the reasons described in Part III, Erie County is the only county outside of New York City to which the assistance tax applies.

### E. Exemptions & Proof

Like most taxes in New York State, the mortgage tax is generally imposed with the broadest possible brush[38]. The drawback of sweeping general applicability is the need to enumerate and carefully prescribe any exemptions, often in painstaking detail. Aside from the longstanding common law doctrine of exempting governments from taxation[39], nearly all other exemptions are explicitly provided by statutory authority[40].

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[34] See NYTL § 253(1-a)(a).

[35] See *People v. Trust Co. of America*, 205 N.Y. 74 (1912); *Seamen's Bank for Savings in the City of New York*, 166 A.D. 271 (1st Dep't 1915).

[36] NYTL § 253(1-a)(a). Never letting a good opportunity to raise revenue go to waste, the burden to pay the tax shifts to the mortgagee if the mortgagor happens to be exempt. See also 20 NYCRR 641.6 & 20 NYCRR 641 .7 defining "mortgagor" and "mortgagee", respectively the person or entity who gives a mortgages and the person or entity to whom property is mortgaged.

[37] See *State by Abrams v. Intercounty Mortgagee Corp.*, 87 A.D.2d 748 (1st Dep't 1982) (holding that the tax cannot be passed from the lender to the seller, broker, or any third person).

[38] NYTL § 252(a). "No mortgage of real property situated within this state shall be exempt, and no person or corporation owning any debt or obligation secured by mortgage of real property situated within this state shall be exempt, from the taxes imposed by this article by reason of anything contained in any other statute, except . . ."

[39] See *Matter of City of New York v. Tully*, 88 A.D.2d 701 (exempting state and local entities); *Pittman v. Home Owners Loan Corporation*, 308 U.S. 21 (exempting federal entities).

[40] 20 NYCRR 644.1(b).

Many general exemptions are not going to be invoked with regularity. When they do, they typically pertain to a specific beneficial arrangement where exemption from taxation serves as an incentive. There are mortgagee exemptions for "agricultural credit associations" and "federal home loan banks"; there are mortgagor exemptions tied to Chapter XI bankruptcy and railroad redevelopment corporations; most exemptions touch upon some sort of congregate housing where the primary motive of the mortgagee is not profit-seeking[41].

Naturally, the officer responsible for recording the mortgage is also responsible for recording any applicable exemptions. As the supervisory authority over county recording officers for Article XI purposes, the New York State Commission of Taxation and Finance has promulgated regulations to govern the acceptance and rejection of exemption recordings[42]. In most instances, the requirements are simple. Anyone who has "knowledge of the facts", even a nonparty to the mortgage transaction, can file a sworn statement with the recording officer attesting eligibility for the specified exemption[43]. The affidavit must "[describe] the mortgage and [set] forth the basis for claiming the exemption.[44]" No further proof is needed.

## III. Distribution

Perhaps more complicated than the manner in which the mortgage tax is collected is the manner in which the mortgage tax is distributed. Each tax described above is paid over and distributed in a different way. The only commonality between the basic tax, the additional tax, the special tax, and the assistance tax, is that the recording officer is required to move the money on or before the 10th of each month[45]. For the most part, the Clerk's Office conducts its payment and distribution obligations correctly[46].

### A. Statutory Procedures

The State Legislature has provided how mortgage tax should be distributed in extraordinary detail, at times providing a county-by-county directive as to where revenue should be sent. Because mortgage tax is collected at the county level, a procedure is necessary to determine what amounts go where when a mortgaged property happens to straddle county lines.

Determination and apportionment is incontrovertibly the duty of the State Tax Commission[47]. When a county recording officer detects a property subject to apportionment (a mortgage that straddles two-plus counties or two-plus towns – the latter for distribution purposes), he or she must remove them from the monthly tally and notify the Commission. The Commission then makes the determination and may enlist local assessors to assist in this process[48]. Once the determination is made, the original recording officer (ROA) receives the total amount. ROA is then required to send the other county's portion to the recording officer of that county (ROB). When ROA cuts a check to ROB, ROA "shall forward with such tax a

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[41] See generally 20 NYCRR 644.1(b)(1)-(17).
[42] NYTL § 263(a). Duplicates are required.
[43] 20 NYCRR 644.1(c).
[44] 20 NYCRR 644.1(c)(1).
[45] See generally NYTL § 261.
[46] While the Clerk fails to adhere to the letter of the law, mislabels reports, and makes minor calculation and distribution errors, the vast majority of mortgage tax money reaches its intended destination.
[47] See NYTL §§ 260, 263(1).
[48] NYTL § 260 ¶ 1. Failure to comply can result in a $100 fine.

description sufficient to identify the mortgage on which the tax has been paid, and [ROB] shall note on the margin of the record of such mortgage the fact of such payment, attested by [ROB's] signature.[49]" In situations where the rules as set forth by the statute don't apply neatly to a particular property or situation, the Legislature has elevated equalization over strict adherence and authorized the Commission to improvise[50]. Most important for the purposes of this report, the mortgages subject to apportionment are to be removed from the monthly distribution totals; the Clerk's Office refers to these amounts as "mortgages on hold".

Furthermore, "recording officers and county treasurers shall severally be entitled to receive all their necessary expenses for the purposes of [mortgage tax collection and distribution], including printing, hiring of clerks and assistants, being first approved and allowed by the tax commission and, after audit by the comptroller, shall be retained by them out of the moneys coming into their hands.[51]" This is not a blank check by which counties can obtain reimbursement for every expense that is incidental to their Article XI duties[52]. It does, however, recognize that the state is effectively retaining the county bureaucracy to perform a service and compensating it accordingly[53]. Both "mortgages on hold" and expenses are deducted from the monthly distribution total[54].

The distribution statute prescribes the order in which mortgage taxes collected are to be delivered to their intended destinations. First, the additional tax, "with respect to those counties (Erie and Niagara) comprising the Niagara Frontier Transportation District[55], to the Niagara Frontier Transportation Authority.[56]" The Clerk is to send the full amount of additional tax to the NFTA directly[57]. If the NFTA receives more than it needs, it is supposed to issue a certified statement to that effect and return the excess to the State Comptroller, who reinvests the amount in local capital projects[58].

The distribution statute then directs the Clerk to distribute the special tax and the assistance tax. The special tax is paid "to the state of New York mortgage agency.[59]" Most counties do not have an assistance tax and pay the full amount of revenue generated from the 1-a tax to SONYMA. However, in Erie County, 1-a tax generated from the specific residential property transactions described in Part II-D above are also paid to the NFTA[60]. The Clerk must send the appropriate amounts to SONYMA and the NFTA directly[61].

What remains following the distribution of additional, special, and assistance tax is the basic tax. That amount, the statute dictates, is to be paid over to the "county treasurer.[62]" "Net balance" in hand, the

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[49] *Id.*
[50] NYTL § 260 ¶ 4; *Long Island Lighting Co. v. State Tax Commission*, 55 A.D.2d 79 (3d Dep't 1976).
[51] NYTL § 262.
[52] See *People v. Woodbury*, 213 N.Y. 51 (1914).
[53] See *Goodman v. Ralph*, 294 N.Y.169 (1949); 1949 N.Y. Op. Atty. Gen. No. 103, 1949 WL 49894.
[54] See NYTL §§ 261, 262.
[55] See NY Public Authorities Law § 1299-b.
[56] NYTL § 261(1). (NFTA). The current additional tax distribution statute is slated to expire on December 1, 2024. However, there are no differences between the expiring statute and the new statute which affect Erie County.
[57] *Id.*
[58] NYTL § 261(1) ¶ 2.
[59] NYTL § 261(2); see Title XVII or Article XIII of the Public Authorities Law. (SONYMA).
[60] NYTL § 261(2)(ii).
[61] NYTL § 261(2).
[62] NYTL § 261(3). In Erie County, the Comptroller is considered the Treasurer. See Erie County Charter § 1802(1); NY COUNTY § 550(1) (providing that the County CFO is the Treasurer).

Comptroller is required to allocate "to the tax districts of the county according to the location of the real property covered by the respective mortgages upon which the tax was collected.[63]" Twice a year, the Comptroller and Clerk are supposed to prepare a report "showing the amounts to be credited to each tax district of the county of the moneys collected.[64]" Within a month of receiving the joint report, the Legislature must issue a payment warrant authorizing the distribution of amounts.[65]"

### B. Clerk's Procedures

The County Charter requires the Clerk to fulfill all responsibilities "imposed upon him or her by any applicable law.[66]" Under that obligation, the Clerk must execute the role of recording officer as imposed by state law. For the most part, the end result of the Clerk's process tends to be accurate. However, when considering public funds, the accounting must be precise. Certain aspects of the Clerk's procedures result in proportionally small, yet meaningful deviations from the proper outcomes.

For approximately half of the mortgage tax amount collected by the Clerk's Office is done so properly, while the other half of the distribution process diverges substantially from the statutory and regulatory requirements. Amounts collected representing additional tax, special tax, and assistance tax are properly remitted by the Clerk's office directly to the NFTA and SONYMA. However, the Clerk's treatment of basic tax fails to adhere to legal standards.

Once the Clerk's Office calculates the basic tax amount, a "Statement of Mortgages Recorded" is sent over to the Deputy Comptroller to sign. This document, mailed to the Deputy on a monthly basis, represents the Clerk's accounting of the month's mortgage tax collection and is typically limited to a single page. In 2022, the Clerk represented this document to the Deputy Comptroller as a prerequisite for the Clerk's release of all mortgage tax amounts. Once the Statement was signed, the Clerk remitted the additional, special, and assistance tax, removed the mortgages subject to apportionment, and conducted its own distribution calculation of the basic tax going to cities and towns. Once the Clerk determined the breakdown, the amounts headed to towns containing villages are sent to the Department of Real Property Tax Services (RPTS)[67]. Once the breakdown is received, RPTS calculates what villages are entitled to and delivers that calculation to the Clerk. Complete breakdowns in hand, the Clerk finally remits the basic tax total to the Comptroller for the purposes of investing monthly amounts to generate interest until the six-month rollup is conducted in May and November of each year. There is no legal requirement to invest the basic tax amounts.

#### 1. Fiduciary Responsibility

Article XI does not explicitly provide that the relationship between the Clerk and the Tax Commission or the entities ultimately receiving mortgage tax revenues is a fiduciary one. Regardless, it does not have to. The

[63] *Id*; see also NYTL § 250(3) (defining a "tax district" as a "city or town" but not a village). See also 20 NYCRR 641.3.
[64] NYTL § 261(3).
[65] *Id.* Where there's an incorporated village within a town, the Legislature must "apportion to such village so much of the share credited to the town as the assessed value of said village or portion thereof bears to twice the total assessed valuation of the town." Distributions go into the general fund of municipalities.
[66] Erie County Charter § 1902.
[67] One likely reason that RPTS is asked to conduct this portion of the process is ready access to information. Since the village apportionment is based on assessed value, RPTS is will situation to perform that calculation.

structure of the relationship created by Article XI is indisputably defined by agency. Because the responsibilities imposed are substantively financial, fiduciary duties apply.

"A fiduciary relationship exists when one party is under a duty to act for . . . the benefit of another upon matters within the scope of the relationship.[68]" Under the terms of Article XI, the Tax Commission imposes a State recording tax on mortgages and requires the Clerk as recording officer to facilitate the transactions[69]. The revenue received never belongs to the County, but ultimately flows to a New York State agency, a public benefit corporation, and the cities, towns and villages of Erie County[70]. Article XI even provides for the compensation of county officials performing these functions on the State's behalf[71]. All these structural components indicate the existence of a fiduciary relationship.

It is not uncommon for a fiduciary relationship to be derived from context. Such a relationship "arises from a factual context that indicates the placement of trust or confidence in another.[72]" The Clerk may not have a choice in the matter, but the Tax Commission depends and relies on the various county clerks throughout New York State to collect, maintain, and distribute mortgage taxes on its behalf. Therefore, the fiduciary relationship and the duties that come with it are present in the Clerk's mortgage tax collection activities.

Among other duties, a fiduciary must not comingle the assets received – or in this case, collected – with its own property[73]. In addition to the fact that recording officers are paid for performing Article XI functions, two other indicators confirm that mortgage tax revenue does not belong to the county. First, Erie County may at any time ask the State Legislature for the power to impose its own recording tax; that it has yet to do so must be considered a decision by the County Legislature[74]. Second, the revenue collected by the County never remains there, leading the State Comptroller to reach the same conclusion articulated here[75]. Because the Erie County Clerk comingles mortgage tax revenue in the Clerk's Concentration Account, tens of millions of dollars that do not belong to the County are being mixed with what has become the Clerk's de facto operating fund. This represents an enormous fiduciary breach and creates substantial liability for the County. In addition, Erie County Policy and Tax Commission guidance require segregation of these funds[76].

### 2. Local Apportionment

This process is flawed for a number of reasons. First, the Clerk has no role in handling the basic tax distribution calculation. Per statute, "on or before the tenth day of each month the recording officer of each county shall pay over to the county treasurer of said county . . . the whole of the net amount of such balance.[77]" The net amount includes the gross basic tax collected minus mortgages subject to apportionment and the expenses of the Clerk in collecting the amount[78].

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[68] *Fox Paine & Co. v. Houston Cas. Co.*, 153 A.D.3d 673, 676 (2d Dep't 2017).
[69] NYTL § 257.
[70] See NYTL § 253.
[71] NYTL § 262.
[72] See Black's Law Dictionary, 11th Ed. (2019).
[73] See, i.e., NY EPTL § 11-1.6(a).
[74] See NYTL §§ 253-C through 253-Y.
[75] 25 Op. St. Compt. 87 (1969).
[76] Erie County Accounting Policy – Trust and Agency Accounts; MT-16, *Mortgage Recording Tax Manual*, Ch. 11, p. 1.
[77] NYTL § 261(3).
[78] NYTL § 261(1).

There are several indications found in the text of Article XI that provide for this result. The statute itself requires that, "after the deduction by the county treasurer of the necessary expenses of his or her office . . . shall be held by him or her and shall be allocated to the tax districts of the county according to the location of the real property covered by the respective mortgages upon which the tax was collected.[79]" The next sequential statute provides that "recording officers and county treasurers shall *severally* be entitled to receive all their necessary expenses for the purposes of this article.[80]" This language suggests that treasurers are imagined to have a substantive role in which expenses are meaningfully incurred. It is unlikely that the Legislature would have gone out of its way to specify that necessary expenses are received 'severally' if the treasurer was simply intended to receive and sit on the money[81]. Rather, it makes more sense that the local official whose duties are entirely fiscal in nature be charged with properly apportioning tax revenues, rather than the recording officer. Finally, the Clerk's own process demonstrates the incongruity of apportionment calculation with the statutory role of the recording officer. The formula for village entitlements is less straightforward than cities and towns:

> [I]n a county in which a town contains within its limits an incorporated village, or portion thereof, the board of supervisors shall apportion to such village so much of the share credited to the town as the assessed value of said village or portion thereof bears to twice the total assessed valuation of the town[82].

The Clerk's Office does not attempt to make the village calculation, and asks RPTS to assist instead. Inefficiency notwithstanding, the involvement of RPTS in the calculation process further suggests that the proper office for conducting such a breakdown is not the Office of the Clerk.

### 3. MT-4

The second issue in the Clerk's distribution process revolves around MT-4 tax form. Each month, the Second Deputy Clerk presents the MT-4 to the Deputy Comptroller under the pretense that the latter's signature is necessary to permit the Clerk to remit the entire amount of mortgage tax. For each month in 2022, the Clerk urged the Deputy Comptroller to sign the MT-4, ostensibly to authorize the remittance of funds prior to the statutory deadline. This routinely resulted in Erie County missing its monthly deadline to wire mortgage tax amounts. On one hand, the Comptroller's Office was hesitant to certify an amount that it lacked documentation to confirm, while the Clerk's Office felt constrained by its interpretation of the rules regarding the MT-4. This is not a novel problem[83]. Seemingly from time immemorial, the Comptroller's signature has been characterized as an authorization, when it's actually a confirmation of receipt. In other words, by signing the MT-4, the Comptroller isn't granting the Clerk permission, it's signing for a FedEx package.

The text of Article XI strongly supports the interpretation that the Comptroller's signature on the MT-4 is a simple confirmation that the basic tax has been received. First, the basic tax is the only pot of money that

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[79] NYTL § 261(3).
[80] NYTL § 262.
[81] *Id.* Even during the pre-war period when the statute was passed and amended, the expenses incurred by treasurers solely charged with holding tax amounts would have been negligible.
[82] *Id.*
[83] See *Audit of Mortgage Recording Tax – Niagara Frontier Transportation Authority*, Erie County Comptroller, published December 28, 2015. The principal finding of this audit was that the transfer of funds from the Clerk's Office to the NFTA was habitually late.

can be definitively connected to the treasurer[84]. The New York Legislature defined and specified each and every aspect of the mortgage tax distribution process in excruciating detail[85]. Amounts deliverable to the NFTA and SONYMA are sent directly from the Clerk to the agencies[86]. There is no mention of the treasurer. Second, under Article XI, there isn't a single instance which contemplates the possibility that the treasurer needs to authorize, direct, or approve any action of the recording officer. The treasurer's role is to receive collected funds from the recording officer and distribute the proceeds among the localities. It makes far more sense to conceptualize the MT-4 as memorializing the passage of a multi-million dollar baton, rather than the Comptroller granting permission for the Clerk to send money that the Comptroller is statutorily obligated to receive. Finally, the alternative interpretation renders the statutory mandate practically unworkable. Article XI directs the Clerk to send basic tax to the Comptroller "on or before" the 10th of each month, and requires the Clerk to wire amounts to the NFTA and SONYMA by the same deadline[87]. If treasurers were intended to verify the accuracy of the totals, they would need to review potentially thousands documents to ensure validity. Permitting the Clerk to make the transfer at the deadline and expecting the Comptroller to confidently certify those totals by close of business would be an absurd expectation. Furthermore, the Comptroller's Office wouldn't even be able to begin this task if it didn't have the funds and supporting documentation because the Clerk required permission to remit it in the first instance. Taken together, the MT-4 cannot represent more in this context than an acknowledgment that the basic tax had reached the next link in the chain of custody.

### 4. Handling of Apportionment Mortgages

Apportionments are one of the most complex and involved facets of the mortgage tax process. Apportionments become relevant when municipal boundaries conflict with the terms of a mortgage description. Many times, the cause is as simple as the front yard of a single-family home being in one municipality while the backyard exists in another. Other times, mortgages are taken on multiple properties located in different jurisdictions and rolled up into the same instrument. Whatever the case, the State Legislature has decided that determining what amount of tax is owed to whom is best left to the Tax Commissioner[88]. However, there is a lot more to handling apportionments than ascertaining value and performing a calculation, and those obligations fall mainly on the recording officer[89].

The premise of apportionment is simple: "when the real property covered by a mortgage is situated in more than one tax district, the state tax commission shall apportion the tax paid on such mortgage between the respective tax districts upon the basis of the relative assessments of such real property as the same appear on the last assessment rolls.[90]" The valuation only covers tangible property with a caveat for leases[91]. If the situation is more complex than a simple proportional split based on reliable valuation data, the Tax Commissioner can recruit local assessors to help out, and even imposes a $100 penalty for failure to comply[92]. As recently as 1976, the courts have noted that the process was never intended to be "inflexibly tied to raw assessment figures; acknowledging that property values do not remain static and that there is

[84] See NYTL § 261(3); see generally NYTL §§ 250 et seq.
[85] See NYTL § 261.
[86] NYTL §§ 261(1), (2).
[87] *Id.*; NYTL § 261(3).
[88] NYTL § 260.
[89] See generally MT-16, Ch. 10-11.
[90] NTYL § 260.
[91] *People ex. rel. Terminals and Transportation Corporation of America v. State Tax Commission*, 254 N.Y. 401 (1930).
[92] NYTL § 260; see also *People ex. rel. U.S. Rubber Co. v. Knapp*, 232 N.Y. 153 (1921).

value in including local assessors in the process to avoid unintended results[93]. There are two main apportionments that Erie County deals with, multi-county and multi-district. Each are prevalent enough to address in the audit.

When a parcel straddles two counties, or a more complex mortgage rolls up multiple properties in various counties, the mortgage is only filed with one recording officer – Recording Officer A (ROA)[94]. The Recording Officer in the other count(ies) – Recording Officer B (ROB) – is also entitled to some amount of tax for that mortgage. When the Tax Commission makes its apportionment determination, ROA receives the full amount[95]. ROA must then forward the other county's portion to ROB with a factual description of the mortgage[96]. ROB notes that he or she received payment in the margins of the description and signs off. The Tax Commissioner then files the official apportionment documentation with ROA and ROB. There is no specific authority providing the apportionment formula for multi-county mortgages, but the formula used to apportion multi-state mortgages can be instructive. That formula takes the principal debt obligation noted in the mortgage instrument and multiplies that amount by the net value of the property in New York divided by the total net value of all property included in the mortgage[97]. Net value is the total value of tangible property plus the value of any leasehold interests minus any existing mortgage liens[98]. The most common type of apportionment mortgage that the Clerk will run into is not multi-county and multi-state mortgages, but an apportionment of basic tax between local municipalities of Erie County.

Throughout Article XI, the State Legislature made it abundantly clear that apportionment mortgages were to be segregated from the general pots of money[99]. Before any distribution, and after deducting the expenses of the office, the recording officer is also obliged to pay over the remaining amounts "except taxes paid upon mortgages which . . . are first to be apportioned by the commissioner.[100]" The Tax Commissioner has provided specific guidance for recording multi-district mortgages[101]. Initially, multi-district mortgages are recorded in the same manner as single-district instruments[102]. Once the initial recording is complete, "all monies received [from a multi-district mortgage] must be deposited in a tax held for apportionment account.[103]" Those amounts are then supposed to be "listed on the reverse of the next monthly statement as funds held for apportionment by serial number, name of mortgagor, and amount.[104]" Once the process is initiated, Certificates of Valuation are supposed to be sent to local assessors, Statements of Facts are prepared by those assessors, and everything is submitted to the Tax Commissioner[105]. Once the Commissioner completes the apportionment, the order is returned to the recording officer(s) who are to

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[93] *Long Island Lighting Co. v. State Tax Commission*, 55 A.D.2d 79 (3d Dep't 1976).
[94] NYTL § 260.
[95] *Id.*
[96] *Id.*
[97] 20 NYCRR 649.1(a).
[98] 20 NYCRR 649.1(b).
[99] See, i.e., NYTL § 261(2).
[100] NYTL § 261(1).
[101] The process for recording multi-district mortgages within a county and multi-county mortgages is virtually identical.
[102] MT-16, Ch. 11, p. 1. Requiring the recording officer to review and rate the mortgage, assign a serial number, stamp and record the mortgage, enter the required information into the system and deposit tax amounts into the "County Clerk's mortgage tax bank account. Required information includes the serial number, liber and page number, parties to the mortgage, tax district, taxable amount, calculation of various taxes, and any exemption affidavits.
[103] MT-16, Ch. 11, p. 3.
[104] *Id.*
[105] *Id.* The Certificate and Statement are forms MT-11 and MT-9, respectively.

distribute the money accordingly out of the hold account[106]. The following month, these "releases" are to be included on the front of the MT-4 with the "Tax Department order number"[107].

The fundamental issue with the Clerk's process is comingled accounts. Not only are the various mortgage tax amounts, including holds, comingled together but those totals are further comingled with other pots of money that bear no relation to mortgage tax whatsoever. The list of apportionment mortgages that should be located on the back of the MT-4 is unaccounted for. Instead, the Clerk sends a summary report to the Tax Commissioner listing *all* mortgages on hold, regardless of when they were recorded. This flaw in the Clerk's process is by far the most problematic. If mortgage tax was segregated into different accounts – one for each of the four taxes and one for holds – the cash totals could easily be reconciled to the reports. Instead, egregious comingling of mortgage taxes open the door to misallocation and theft. Compounding the severity of this issue is the fact that mortgage taxes do not belong to the County. The Clerk acts solely as fiduciary for mortgage tax funds and is responsible to ensure that they collect and properly distribute the correct amounts to the state, NFTA, and Erie County municipalities.

## IV. Additional Issues

### A. Interest

Like other monetary assets which the Comptroller's Trust Division holds as fiduciary, basic tax received from the Clerk's Office each month is invested for the purpose of generating interest. There is no rule demanding amounts to be invested while awaiting the semi-annual distribution date, but conventional wisdom holds that allowing the money to sit idle is an opportunity missed.

If interest is being generated on basic tax principal without explicit statutes or regulations to govern its distribution, the question of entitlement to that interest is inevitable. The answer is determined by ownership. The sole authority to examine this question found that "a careful examination of [Article XI] reveals an intent, on the part of the Legislature, to treat this money as belonging not to the county but to the municipalities in which the mortgaged property is located and to compensate the county for its expense incurred in receiving and administering this money on behalf of those municipalities.[108]" If the basic tax principal is treated as belonging to municipalities, it follows that interest generated on that amount "must follow the principal.[109]" The most direct way of interpreting "interest follows principal" is proportional consistency. The percentage of interest that the Clerk allocates to each municipality should match the percentage of principal. It makes little sense to send the same amount of interest to a town generating $10,000 in tax revenue as a town generating $100,000 in revenue.

The distribution process that the Clerk has been executing correctly sends interest amounts to the municipalities, but reports the totals incorrectly. Once the Comptroller records the interest amount for the six-month period and reports the number to the Clerk's Office, the Clerk reports distributed interest as though the same amount of interest is being sent to each city and town in which mortgages were recorded alongside the principal. The underlying numbers show that this is not actually the case and that interest is being distributed to municipalities consistent with the proportion of principal.

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[106] *Id.* The documents returned are the MT-8 and AU-203.
[107] *Id.*
[108] 25 Op. St. Compt. 87 (1969).
[109] *Id.*

## B. Expenses

Given that the County receives no financial benefit from mortgage tax collection, the State Legislature has authorized recording officers and treasurers, the two officials involved in the process, to deduct expenses from collected totals[110]. The language has been interpreted to sweep relatively widely, so long as the expenses are limited to the effecting the substantive obligations of Article XI, and those expenses are "reasonable, useful, and proper.[111]" As mentioned in Section III(A) above, this is not to be conflated with a license to bill the State for every expense partially or tangentially related to mortgage tax collection[112]. Explicitly permitted expenses include "printing, [and] hir[ing] of clerks and assistants"[113]. The guidance from the NY Tax Commissioner more specifically describes computerized mortgage tax reports and human-performed eligible expenses to include "costs incurred in reviewing mortgages to determine the correct amount of tax, reviewing affidavits, recording tax receipts, in addition to depositing, accounting, and reporting functions. . .[114]" The Tax Commissioner encourages each county to "analyze their own time allocation.[115]"

As recording officer, the Clerk is required to have the Office's expenses approved by the Tax Commission and audited by the Comptroller[116]. Today, these expenses are approved in advance. The Clerk fills out an MT-3, *Mortgage Expense Request*, and sends it to the Tax Commissioner in and around the month January[117]. The submission must include the annual expense that the Legislature approves, how many installments the Clerk plans to break the amount into, and may include upward adjustments with an explanation[118]. The MT-3 must be accompanied by "a resolution signed and approved by" the Erie County Legislature, and "a breakdown of the expenses to be reimbursed.[119]" According to the Tax Commissioner, expenses not incurred during a given period should not be deducted from the totals, and expense carryover from one month to the next is not permitted[120].

Since at least 2011, the Erie County Clerk has been submitting B Book budget resolution language for the approval of expenses. Each year, the breakdown consists of two categories: labor and tech expense. No further breakdown for these costs has been provided and the Clerk has indicated that the amounts are increased by a certain percentage year over year. However, the numbers do not bear this out[121]. While the Clerk's performance of this aspect has been inadequate, the Comptroller has failed to perform the MT-3 process entirely. Both offices should take care to itemize expenses related to mortgage tax collection and distribution to ensure that the County is being fully reimbursed for its efforts.

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[110] See NY Tax § 262.
[111] *People ex. re. Frost v. Woodbury*, 213 N.Y. 51 (1914).
[112] See MT-16, Ch. 11, p. 4.
[113] NY Tax § 262.
[114] NY MT-16, Ch. 11, p. 5. The Tax Commissioner needs to approve any "computerized" reports as to form.
[115] NY MT-16. Ch. 11. P. 4.
[116] NY Tax § 262.
[117] NY MT-16, Ch. 11, p. 5. The form should be submitted 60 days prior to the start of the NY fiscal year, which starts April 1.
[118] *Id.* Expenses can be claimed monthly, quarterly, or annually. Upward adjustments need to be approved by a supplemental resolution of the Legislature.
[119] *Id.*
[120] NY MT-16. Ch. 11, p. 4. In 2022, the full amount of expenses initially approved were deducted each month.
[121] Starting in 2011 and proceeding sequentially the amounts are as follows: $450,000; $450,000; $450,000; $450,000; $509,868; $515,579; $515,579; $533,797; $552,480; $541,626; 557,451; $572,105; $589,268.15.

## V. Conclusion

Mortgage tax collection is a quintessential example of a funded mandate. Acting as agent of the Tax Commissioner, the County Clerk and County Comptroller are responsible for ensuring that taxes are collected at the time a mortgage is recorded and that the proceeds find their way to the correct recipients. Between the Offices of Clerk and Comptroller, there are several flaws in the Erie County mortgage tax collection system. Nevertheless, while it cannot be said with absolute certainty, these flaws do not appear to have caused any particular stakeholder significant harm, yet.

The extent to which the County Clerk comingles funds running through the Office is nothing short of astounding. The Clerk's practice of using the Concentration Account as an all-purpose repository represents an enormous liability. The Clerk has a fiduciary duty not to comingle funds as well as legal obligations to segregate certain components of mortgage tax into separate accounts. Mortgage tax amounts do not belong to the Erie County taxpayers, but it is those taxpayers who will be left holding the bag should the gross fiduciary breach of the Clerk's system be exploited, if it hasn't already.

The County Clerk should take immediate steps to properly establish separate mortgage tax accounts as Article XI, its interpretive regulations, and the Tax Commissioner's guidance requires. Mortgage tax amounts should begin flowing into those segregated accounts as soon as possible, and written procedures should be put in place with input from the Tax Commissioner. For its part, the County Comptroller should address the issues noted here as quickly as possible and serve as a resource to the Clerk as the procedural flaws are addressed. Given the deficiencies therein, it is a matter of when, not if, these issues are exploited and the consequences could be severe.

APPENDIX B

**To: Tim Callan, Deputy Comptroller; Alex McDougall, Second Deputy Clerk**
**From: Eric J. Mikols, Esq., ADC**
**CC: Kevin Hardwick, Erie County Comptroller; Michael Kearns, Erie County Clerk**
**Re: MT-4 Statement of Mortgages Recorded**
**Date: September 19, 2023**

## I. Introduction

The MT-4 is a standard form that the State of New York provides to the various county-level offices of recording officer and treasurer. The purpose of the form is to facilitate the proper collection, recording and distribution of mortgage taxes collected locally pursuant to Article XI of the New York Tax Law, and assist the State Department of Taxation and Finance in its oversight responsibilities. The use of the MT-4 in Erie County long pre-dates the terms of the current Clerk and Comptroller, who serve as recording officer and treasurer, respectively, for Article XI purposes. However, since the beginning of 2022, there has been some anxiety surrounding the monthly MT-4 process both on the part of the Comptroller's Office as well as the Clerk's. The resulting tension can be traced back to a bilateral misunderstanding of the MT-4 and the role each office plays in its use.

The purpose of this memorandum is to clarify precisely what the MT-4 requires, the purpose that it serves, and how those aspects work to effectuate the demands of Article XI. Part II describes the MT-4 and addresses the constructs and reservations that each office's staff has regarding it. Part III explains the relevant statutory obligations that Article XI places on county officers and opines on the actual purpose of the MT-4 based on that authority. A brief conclusion will follow.

## II. MT-4

The MT-4, or Statement of Mortgages Recorded, is a form generated by the New York State Department of Taxation and Finance pursuant to § 261 of the Tax Law. By and large, the contents of the form have remained unchanged for at least 25 years. The purpose of the form is to represent a compilation of the mortgage tax amounts collected over the course of the preceding month, guide their transmittal, and report the results to the state. The form includes sum totals of basic tax, additional tax, assistance tax, and special tax using formulae prescribed by statute[1]. Also included in the final calculation are amounts released following apportionment, which include any payments received from other counties, refunds and adjustments[2]. The Clerk's expenses are deducted from that grand total to arrive at the bottom line, so to speak[3]. Additional guidance at the bottom of the MT-4 helps ensure that the correct dollar amount is sent to the proper recipient.

The lefthand side of the MT-4 contains several blanks to be filled. There is a space to denote the relevant county, the total number of mortgages recorded in the county that month, and a couple of sworn statements. Further, there is space for two signatures: one for the recording officer (or his designee) and another for the finance director (or his designee). Both offices must sign the MT-4 before it is sent to the New York State Tax Commissioner[4].

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[1] See NY Tax § 253.
[2] See generally NY Tax §§ 253, 257-a, 260.
[3] The Clerk is entitled to deduct the expenses incurred in collecting mortgage tax pursuant to NY Tax § 262.
[4] Hereafter referred to as 'The Commissioner'.

While the general substance of the MT-4 is straightforward and apparent to the Clerk and the Comptroller, specific practical details have up to this point been in dispute. Each month, mortgage tax collected "shall be paid over by [the Clerk] on or before the tenth day of each succeeding month.[5]" The Clerk is aware of this monthly deadline and typically delivers the MT-4 to the Comptroller's Office between three and seven days prior to the 10th. The Clerk's Office has represented to the Comptroller's Office that the latter's signature is necessary in order to authorize the transfer of mortgage tax amounts to the Comptroller, the NFTA, and SONYMA. The Clerk's practice has been to send the Comptroller basic tax amounts after the MT-4 is signed by the Comptroller and returned to the Clerk. Representatives of the Clerk's Office have indicated that they proceed in this manner based on explicit instructions from their predecessors. The Comptroller's Office, accepting the Clerk's representations on their face, believed that the "signature of the [County's] finance director" is an authorization and thus validation that the numbers on the statement are true and accurate. However, the MT-4 is delivered to the Comptroller's Office each month with limited supporting documentation which would not permit the Comptroller to actually verify the accuracy of the numbers.

This process has led to an uncomfortable monthly ritual between the two offices. On one hand, the Comptroller's Office is hesitant to make a representation to the Tax Commissioner that it is unequipped to verify. On the other hand, the Clerk, believing the Comptroller's signature is necessary to remit payments and subject to a statutory deadline, experiences pressure to comply with a requirement thought to be outside its immediate control. However, this state of affairs need not persist.

## III. Article XI Practice

By no fault of the current occupants of either office, the procedure for recording and transmitting mortgage tax amounts has deviated from the statutory authority. The easiest way to resolve the issues currently experienced is to return to the law. The distribution statute, § 261, articulates the order and manner in which mortgage taxes collected are to be delivered to their intended destinations. First, the additional tax, "with respect to those counties (Erie and Niagara) comprising the Niagara Frontier Transportation District[6], to the Niagara Frontier Transportation Authority.[7]" The Clerk is to send the full amount of additional tax to the NFTA prior to the 10th of each month[8]. The distribution statute then directs the Clerk to distribute the special tax and the assistance tax. The special tax is paid "to the state of New York mortgage agency (SONYMA).[9]" Most counties do not have an assistance tax, and pay the full amount of revenue generated based off of the tax to SONYMA[10]. However, in Erie County, tax generated from the specific residential property transactions that would otherwise have gone to SONYMA are paid to the NFTA[11].

The Clerk must send the appropriate amounts to SONYMA and the NFTA directly[12]. Nowhere in Article XI or its interpretive regulations is the county treasurer mentioned in connection with additional, special, or assistance tax. Those amounts are included on the MT-4, in all likelihood, because the form is delivered to the Tax Commissioner and it is more convenient to have all the figures on one sheet. At some point confusion

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[5] NY Tax § 261(1).
[6] See NY Public Authorities Law § 1299-b.
[7] NYTL § 261(1). (NFTA). The current additional tax distribution statute is slated to expire on December 1, 2024. However, there are no differences between the expiring statute and the new statute which affect Erie County.
[8] *Id.*
[9] NYTL § 261(2); see Title XVII or Article XIII of the Public Authorities Law. (SONYMA).
[10] See NYTL § 253(1-a).
[11] NYTL § 261(2)(ii).
[12] NYTL § 261(2).

could have arisen in Erie County because the Comptroller has oversight over all "county funds and funds for which the county is responsible.[13]" This is not necessarily the case for a county treasurer elsewhere in the state. Since, for the purposes of the MT-4, the Comptroller is occupying the position of treasurer, only the basic tax recorded on the MT-4 is relevant to the Comptroller's role under Article XI.

What remains following the distribution of additional, special, and assistance tax is the basic tax. The statute dictates that "on or before the tenth day of each month the recording officer of each county shall pay over to the county treasurer of said county . . . the balance of the moneys received during the preceding month upon account of taxes paid to him or her.[14]" In plain language, this provision requires the Clerk to deliver the basic tax amount to the appropriate Comptroller's account *on or before* the 10th.

The major disconnect in the current MT-4 practice between the Clerk and Comptroller is almost entirely derived from a misinterpretation of the purpose behind the Comptroller's signature. Seemingly from time immemorial, the Comptroller's signature has been characterized as an authorization, when it's actually a confirmation of receipt. In other words, by signing the MT-4, the Comptroller is not granting the Clerk permission, but rather, akin to signing for a FedEx package.

The text of the statute strongly supports the interpretation that the Comptroller's signature is a simple confirmation that the basic tax has been received[15]. First, the basic tax is the only pot of money that can be definitively connected to the treasurer. The New York Legislature defined and specified each and every aspect of the mortgage tax distribution process in excruciating detail. Amounts deliverable to the NFTA and SONYMA are sent directly from the Clerk to the agencies. There is no mention of the treasurer. Second, under Article XI, there isn't a single instance which contemplates the possibility that the treasurer needs to authorize, direct, or approve any action of the recording officer. The treasurer's role is to receive the money from the recording officer and distribute it amongst the towns. It makes far more sense to conceptualize the MT-4 as memorializing the passage of a multi-million dollar baton, rather than the Comptroller granting permission for the Clerk to send money that the Comptroller is statutorily obligated to receive. Finally, the alternative interpretation renders the statutory mandate practically unworkable. Article XI directs the Clerk to send basic tax to the Comptroller "on or before" the 10th of each month, and requires the Clerk to wire amounts to the NFTA and SONYMA by the same deadline. If treasurers were intended to verify the accuracy of the totals, they would need to review potentially thousands documents to ensure validity. Permitting the Clerk to make the transfer at the deadline and expecting the Comptroller to confidently certify those totals by close of business would be an absurd expectation. Furthermore, the Comptroller's Office wouldn't even be able to begin this task if it didn't have the funds and supporting documentation if the Clerk required permission to remit it in the first instance. Taken together, the MT-4 cannot represent anything more in this context than an acknowledgment that the basic tax had reached the next link in the chain of custody.

## IV. Conclusion

As de jure agents of the state for purposes of mortgage tax collection, the Offices of Clerk and Comptroller bear an obligation to execute the Article XI mandate. By tweaking a few minor aspects of the MT-4 process to align with relevant legal authority, the concerns of the Clerk and the Comptroller can be alleviated.

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[13] See Erie County Charter § 1802. This would include all components of the mortgage tax, each in a fiduciary capacity.
[14] NYTL § 261(3). In Erie County, the Comptroller is considered the Treasurer.
[15] In addition to the legal authority, a review of the Dutchess County Clerk's Mortgage Tax Collection and Distribution Process, published in July 2007, described the MT-4's purpose in similar terms.

First, the Clerk's Office need not wait on any third party to send the additional and assistance tax payments to the NFTA or special tax to SONYMA. The Clerk's Office should still record the amounts on the MT-4 as it does presently, but need only see to it that the payments are issued by the 10th of each month.

Second, the Clerk's Office must send the basic tax amount to the designated Comptroller's bank account on, but preferably before, the 10th of each month. The Clerk should include all supporting documentation that is required by law[16].

Finally, the Comptroller must compare the dollar amount of basic tax recorded on the MT-4 with the dollar amount of the deposit made by the Clerk in the designated account. If those numbers match, the Comptroller should sign the MT-4 and return a signed copy to the Clerk, who then has a completed MT-4 to deliver to the Tax Commissioner.

At that point, the Clerk and the Comptroller will have fulfilled all their respective obligations pertaining to the MT-4. Making these small changes will serve to improve the reporting and distribution of mortgage tax in Erie County. At the same time, such changes will remove an avoidable source of stress for staff in both offices.

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[16] One of the sworn statements on the MT-4 stipulates that the "statement of mortgages recorded, together with the receipts under the mortgage tax law and disbursements approved for the month shown, except taxes to be apportioned by the Commissioner" are included with the MT-4.