

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(2)R
Mortgage Recording Tax
October 31, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M061010A

On October 10, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Port Authority of New York and New Jersey, 225 Park Avenue South, New York, New York, 10003.

The issues raised by Petitioner, The Port Authority of New York and New Jersey, are:

- 1) Whether the taxes imposed by Article 11 of the Tax Law and Chapter 26 of the New York City Administrative Code (collectively, the “mortgage recording tax”) are due upon the recording of any mortgage of property (including, without limitation, leasehold estates) that is part of the redevelopment of the World Trade Center when (a) Petitioner is either the sole named mortgagee (whether as trustee, agent, nominee, or otherwise) or a co-mortgagee (whether or not the other co-mortgagee or co-mortgagees are private entities); (b) Petitioner records the mortgage; (c) the loan funds secured by the mortgage are provided by one or more persons or entities other than Petitioner; and (d) the mortgage is entered into in furtherance of the redevelopment of the World Trade Center including, without limitation, use of the loan proceeds for development costs incurred by parties other than Petitioner in furtherance of or in respect to the redevelopment of the World Trade Center (hereinafter “Development Costs”) or to reimburse parties (including Petitioner) for any such Development Costs.
- 2) Whether the mortgage recording tax is due upon the recording of the applicable instrument or otherwise if the mortgage is supplemented¹ or if the mortgage so supplemented is thereafter from time to time supplemented again to the extent that the then outstanding principal indebtedness (and/or an unfunded principal portion thereof to the extent that the same constitutes or will constitute a bona fide debt) secured by or to be secured by the mortgage (or any resulting substitute mortgage) is not increased, or, if increased, mortgage recording tax is to be imposed only with respect to any increase in the amount of secured indebtedness, and then only if the mortgage is not exempt because of Issue 1, and the mortgage recording tax would otherwise have been required to be paid on such additional indebtedness.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a municipal corporate instrumentality and political subdivision of the states of New York and New Jersey, created by and existing by virtue of the Compact of April 30,

¹ “Supplemented”, “supplementation” and “supplement” as used herein, shall include, without limitation, any assignment, consolidation, substitution, severance, splitting, restatement, modification, amendment, spreader and/or extension of a mortgage.

1921, made by and between the states of New York and New Jersey and thereafter consented to by the Congress of the United States (the "Compact"). As such, Petitioner is generally exempt from state and local taxes of the states of New York and New Jersey. In the Compact, as codified in the Unconsolidated Laws of New York, the two states recited their belief "that a better co-ordination of the terminal, transportation and other facilities of commerce in... the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey;" and that the future development of such facilities would require the cooperation of the States in the encouragement of the investment of capital and in the formulation and execution of necessary plans (See Unconsolidated Laws §6401). The Compact has been amended and supplemented from time to time by legislation adopted by the two States.

In general, the purpose of the states of New York and New Jersey in establishing Petitioner was to provide transportation, terminal, and other facilities of commerce within the Port District. For such purpose the States have from time to time authorized specific transportation and terminal facilities and facilities of commerce and economic development and have given Petitioner power to borrow money upon its bonds or other obligations; to establish charges for the use of such facilities; and, in connection with specific facilities, to acquire real estate by condemnation or the exercise of the right of eminent domain or otherwise. The Port District comprises an area of about 1,500 square miles in both States centering about New York Harbor.

Petitioner's current facilities include, in addition to the World Trade Center, two tunnels and four bridges between the states of New York and New Jersey, the PATH interstate rail transit system (sometimes referred to as the "Hudson Tubes Facility") including a terminal station within the World Trade Center Site, a bus terminal, the Trans-Hudson ferry service, four airports, a heliport, the Newark Legal and Communications Center, six marine terminals, two waterfront development facilities, the Oak Point Rail Freight Link, a resource recovery facility and certain regional development facilities in the Port District.

The World Trade Center, located on an approximately 16-acre site on the lower west side of Manhattan, was authorized in 1962 by the same legislation that authorized Petitioner's acquisition of the Hudson Tubes. Petitioner was authorized to cooperate with other agencies of government in the rehabilitation and redevelopment of the Hudson Tubes-World Trade Center areas, in part for the purpose of the renewal and improvement of such areas, as part of this port development project.

Pursuant to legislation enacted by the states of New York and New Jersey in 1962 (the "Port Development Acts"), Petitioner was "authorized and empowered to establish, acquire, construct, effectuate, develop, own, lease, maintain, operate, improve and rehabilitate a project herein referred to as the port development project, which shall consist of a facility of commerce herein referred to as the world trade center, to be located within the Hudson tubes-world trade center area, and railroad facilities herein referred to as the Hudson tubes and the Hudson tubes extensions." (Unconsolidated Laws §6603.) Further, the Port Development Acts provided that

the Port Authority was “authorized and empowered...to issue bonds for any of the purposes of this act and to provide for payment thereof...and to secure all or any portion of such bonds by mortgages upon any property held or to be held by the [Port Authority].” (Unconsolidated Laws §6603.) The Port Development Acts also provided that the Port Authority “shall proceed as rapidly as may be practicable to accomplish the purposes of this act.”

Additionally, the Port Development Acts establish that:

The effectuation of the world trade center, the Hudson tubes and the Hudson tubes extensions, or any of such facilities constituting a portion of the port development project, are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto. (Unconsolidated Laws §6610.)

Construction of the World Trade Center commenced in 1966 and was completed in 1981. The various components of the World Trade Center, including over 10 million square feet of office space, a United States Customs House, a hotel, the PATH-World Trade Center station, and various retail facilities were destroyed by the terrorist attacks of September 11, 2001.

Since September 11, 2001, Petitioner, together with the lessees of the office and retail components of the World Trade Center site, and Federal, state, and local public officials, community groups, architects and engineers, and other interested parties, has been engaged in various activities pertaining to the rebuilding of the World Trade Center and the redevelopment of the site. It is currently anticipated that the redeveloped World Trade Center site will include the Freedom Tower and four additional office towers, as well as a memorial, memorial museum, cultural facilities, the World Trade Center Transportation Hub (including the PATH World Trade Center terminal), retail facilities, hotel and conference center facilities, streets and significant public open spaces, and the utilities and infrastructure to support such redevelopment.

A significant portion of the Development Costs will be provided through the issuance of debt by various public and private sector entities. Under contemplated financing arrangements, the lessees of various components of the World Trade Center will borrow funds from sources not related to or acting as nominees for the lessees, which funds will be used to pay for or reimburse parties, including Petitioner, for Development Costs. The borrowings will be secured by one or more mortgages against one or more of the leasehold interests held by the lessees, together with such other pledges and guarantees as the lenders require of the lessees. Petitioner’s fee interest in the World Trade Center site will not be encumbered by any of the mortgages.

Under such financing arrangements, Petitioner will be named as the mortgagee, either alone or with the lenders, and record one or more mortgages in the approximate amount of the Development Costs. Although Petitioner will be named as a mortgagee or co-mortgagee, all rights under the mortgages will inure to the benefit of the lenders, who will for all purposes be beneficial owners of the mortgages. Upon recording the mortgages, Petitioner will assign to the lenders all of Petitioner's right, title, and interest in and to the mortgages, and the lenders will, at the time of the assignment or thereafter, fund the mortgages which, at all times, will secure bona fide debt. After assigning its interest to the lenders, Petitioner will continue to own the World Trade Center site, and the other contractual arrangements with the lessees will be unaffected, including Petitioner's enforcement rights under the leases pertaining to the various components of the World Trade Center site. However, it is also contemplated that if the lessees incur additional Development Costs beyond those originally anticipated or make other additional expenditures in performing any obligations of Petitioner with respect to the World Trade Center site, Petitioner will, as mortgagee, enter into the record either alone or with the lenders, an additional mortgage or mortgages against one or more of the leasehold interests held by the lessees and thereafter assign such mortgage or mortgages to the lenders who will, at the time of the assignment or thereafter, fund such mortgages which, at all times, will secure bona fide debt.

After Petitioner initially records any of the mortgages and assigns its interest therein to one or more lenders, the mortgage or mortgages may from time to time (and over a period of several years) be severed and split. The resulting substitute mortgages may be further supplemented and, in this event, appropriate instruments reflecting the supplementation will be recorded in the appropriate amounts, but in no event aggregating more than the then outstanding principal amount including any unfunded advances which constitute bona fide debt to the respective lenders financing all or any portion of the Development Costs, and the lien of the mortgages from the leaseholds not the subject of the respective resulting substitute mortgages shall be released. The lenders (or their successors) will fund the loans to the extent of the amount secured by the substitute mortgage. The funding under the substitute mortgages may be in the form of advances as construction progresses on a particular leasehold or as Development Costs are incurred or in the form of a full advance of the loan proceeds upon or after an assignment of a substitute mortgage. In accordance with customary mortgage financing practices, mortgages securing construction financing may be assigned, supplemented, modified and converted to permanent financing upon completion of construction or the expiration of the term of the initial loans. Permanent loans may be refinanced or assigned by one lender to another. The identity of the mortgagor may also change by reason of the assignment of the lessee/mortgagor's interest to an affiliate or to an unrelated person.

Applicable law and regulations and cases

Section 253 of Article 11 of the Tax Law imposes taxes on the recording of mortgages of real property measured by the principal debt or obligation secured by such mortgages.

Section 250(2)(a) of the Tax Law provides, in part:

The term “mortgage” as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby. ...A contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mortgage of real property for the purpose of this article, and shall be taxable as such upon the amount of such increase or addition....

Section 252 of the Tax Law, applicable to exemptions from the mortgage recording tax, provides, with certain exceptions not relevant herein, that “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.”

Even though section 252 of the Tax Law does not provide a specific exemption for the activities of Petitioner, it is well established that State agencies enjoy an immunity from taxation independent of the statutory exemptions listed in section 252 of the Tax Law for property utilized in the public interest.

Section 255(1)(a) of the Tax Law provides, in part:

(i) If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article...unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage....

(ii) Notwithstanding any provision to the contrary in subparagraph (i) of this paragraph, the taxes imposed by or pursuant to the authority of this article shall apply to the recording of a spreading agreement or additional mortgage which imposes the lien thereof upon real property located in any city in the state having a population of one million or more and not originally covered by or described in a recorded primary mortgage, unless the real property that becomes subject to the lien of such spreading agreement or additional mortgage is owned by the mortgagor of the real property subject to the lien of such recorded primary mortgage....

Section 644.1(a)(1) of the Mortgage Recording Taxes Regulations exempts the recording of mortgages where the mortgagor or mortgagee is New York State or any of its agencies, instrumentalities, or political subdivisions to the extent immune from mortgage recording tax.

In a March 29, 1913, opinion, the Attorney General opined that no mortgage recording tax was due when New York State acted as mortgagor and quoted the following passage from *Matter of Hamilton*, 148 NY 310, 313-314:

The property held by the state, or by any of its municipal divisions, for public purposes, is not, and never has been, subject to taxation...The end and object of all taxation is to raise revenue for the purpose of defraying the expenses of government, and since no revenue could be raised by imposing taxes on property owned by the state itself, or by any of its political subdivisions, such property is in no just or practical sense the subject of taxation....

This principle has been applied to exempt from the mortgage recording tax the recording of mortgages on property when legal title is held by a New York State industrial development agency even though beneficial ownership of such property is held by a private interest in 1982 Opns St Comp No. 82-188, p 240; *One Park Place Associates*, Adv Op St Tx Comm, May 24, 1982, TSB-A-82(1)M.

In *Hotel Waldorf-Astoria Corp. v State Tax Commission*, 86AD2d 330, 334, in acknowledging that a \$45 million mortgage secured by the Waldorf-Astoria hotel was exempt from the mortgage recording tax because the mortgagee (the New York State Employees' Retirement System) was a New York State agency, the court stated that "as a State agency, the Retirement System enjoys an immunity from taxation independent of the statutory exemptions listed in Section 252 of the Tax Law..." The court reasoned that imposition of a tax upon a mortgage held by a New York State agency was tantamount to tax upon the agency itself. The court, thus, concluded that the tax, on the recording of the mortgage securing the loan, in this case amounted to an unlawful assessment of the agency's property in violation of its general immunity from taxation. (See also *Matter of City of New York v Tully*, 88AD2d 701.)

Section 253 of the Tax Law imposes the mortgage recording tax on the exercise of the privilege of recording a mortgage, not on the mortgage itself as property. (See *Franklin Society for Home Building and Saving v Bennett*, 282 NY 79; *Matter of Silberblatt, Inc. v Tax Comm*, 5 NY2d635; *One Park Place Associates*, Adv Op St Tx Comm, May 24, 1982, TSB-A-82(1)(M); and *New York State Urban Development Corp.*, Adv Op Comm T&F, March 10, 1993, TSB-A-93(4)-R.) An informal opinion of the Attorney General, dated March 7, 1956, stated that:

[i]t should be noted that section 257 of Article 11 of the New York State Tax Law is silent as to which party to the mortgage shall pay the tax. Under its terms the taxes

shall be payable on the recording of each loan subject to tax so that the party who records is the one upon whom the tax is imposed....(1956 Atty Gen [Inf Opns] 27, at 28.)

Opinion

Issue #1

Under the Compact, Petitioner was created as a “body corporate and politic.” See Unconsolidated Laws §6404. Section 6451 of the Unconsolidated Laws describes Petitioner as “a body politic and corporate, as an instrumentality or agency of the two states to effectuate such pledge of cooperation.” Accordingly, Petitioner is an instrumentality of the State of New York. See *KIAC Partners*, Adv Op St Tx Comm, May 9, 1996, TSB-A-96(3)R. As such, the recording of any mortgage that is part of the redevelopment of the World Trade Center as described in this Opinion in which Petitioner is named as a sole mortgagee (whether as trustee, agent, nominee or otherwise) or a co-mortgagee (whether or not a private entity is the co-mortgagee), is exempt from the mortgage recording tax, provided that Petitioner is the party that presents the mortgage for recording. See *Hotel Waldorf-Astoria Corp.*, *supra*; *New York State Urban Development Corporation d/b/a Empire State Development Corp.*, Adv Op Comm T&F, May 31, 2000, TSB-A-00(3)R *Battery Park City Authority d/b/a Hugh L. Carey Battery Park City Authority*, Adv Op Comm T&F, June 5, 2002, TSB-A-02(2)R; *New York State Urban Development Corporation d/b/a Empire State Development Corp.*, Adv Op Comm T&F, December 13, 2002, TSB-A-02(6)R; and section 644.1(a)(1) of the Mortgage Recording Taxes Regulations.

Issue #2

In accordance with the above cited section 255 of the Tax Law, once a mortgage has been given and recorded, the recorded primary mortgage may be changed by a supplemental mortgage, and, under the provisions noted above, no additional recording tax will be due as long as the amount secured remains the same. If, however, the indebtedness secured by the mortgage is reduced or the mortgage lien is terminated for any reason, mortgage recording tax would be due upon the recording of an instrument evidencing any increase in the indebtedness secured by the mortgage.

Accordingly, to the extent the principal amount of secured indebtedness is not increased, the recording of any assignment, consolidation, substitution, severance, splitting, restatement, modification, amendment, spreader, and/or extension of the mortgage is exempt from mortgage recording tax, either because such action will not create a new mortgage subject to tax under section 253 of the Tax Law or because the instrument constitutes a supplemental mortgage under section 255 of the Tax Law provided that the instrument so recorded is not subject to tax under section 255(1)(a)(ii) of the Tax Law. In the present case, if an instrument is recorded which evidences an increase in the principal amount secured by the mortgage, and Petitioner is not a party to the recorded instrument, the mortgage recording tax would be due with respect to the

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amount of the increase; or if an instrument is recorded which is subject to mortgage recording tax pursuant to section 255(1)(a)(ii) of the Tax Law, and Petitioner is not a party to the recorded instrument, the tax would be due with respect to the principal amount secured by the mortgage, unless the recording of the instrument is otherwise exempt. See *New York State Urban Development Corporation, supra* and *Battery Park City Authority, supra*.

DATED: October 31, 2006

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