

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(2)R
Mortgage Recording Tax
August 4, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M090323A

The petitioner, [REDACTED] (Petitioner), asks whether the mortgage recording taxes imposed by Article 11 of the Tax Law and Chapter 26 of the New York City Administrative Code (collectively, the "MRT") will apply to the recording of a mortgage encumbering New York real property, in each instance, where the facts are as described below.

We conclude that the transactions described are exempt from the MRT.

Facts

Petitioner is a bank that makes loans in conjunction with projects that also qualify for financing under the 504 Loan Program, administered by the U.S. Small Business Administration (SBA) in conjunction with certified development companies (CDCs). In this case, the CDC is a domestic not-for-profit local development corporation incorporated or reincorporated under §1411 of the New York Not-For-Profit Corporation Law.

Under the 504 Loan Program, a project typically involves the acquisition or lease of real property by a small business (the Borrower) and, frequently, construction, renovation or other improvement of the real property. In a typical financing under the 504 Loan Program that is the subject of this request, Petitioner will lend the Borrower ("Petitioner's Loan") at least 50% of the cost of the acquisition, improvements and certain soft costs associated with the project ("Project Costs") and secure the note with a first mortgage on the property ("Petitioner's Mortgage"). The CDC, in reliance on funds to be provided ultimately by the SBA through the 504 Loan Program, will lend up to 40% of the Project Costs ("CDC Loan") and secure the note by a second mortgage on the property ("CDC Mortgage"). Although they are secured by the same property, Petitioner's Mortgage and the CDC Mortgage are separate and unrelated instruments. The Borrower will provide at least 10% of the Project Costs in the form of equity or subordinated debt.

The funding for the CDC Loan typically is obtained from the sale of debentures by the SBA. However, the sale of debentures with respect to a project cannot take place until after the acquisition and, where applicable, the improvements on the real property are complete. As a result, in many cases the CDC does not have the financial ability or the authority to fund all, or in some instances any portion, of the CDC Loan during the period ("Interim Period") between the commencement of the project and the point in time when the CDC project is completed. In other words, unless and until the CDC receives the proceeds from the sale of the debentures from the SBA, it is unable to fund the CDC Loan.

To allow the Project to proceed under these circumstances, the parties will implement the following, referred to herein as the "Proposed Loan Structure." Petitioner will enter into and fund Petitioner's Loan, and Petitioner will record Petitioner's mortgage which is subject to the MRT. CDC will enter into the CDC Loan and the CDC Mortgage with the Borrower and be named mortgagee, and then assign the CDC Mortgage to Petitioner. Petitioner will advance the funds secured by the CDC Mortgage to the Borrower. CDC or one of its agents will record the CDC mortgage and then record the assignment of that mortgage. Petitioner will hold the recorded CDC Mortgage until the Project reaches the requisite stage of completion or

CDC has raised the requisite funds, at which time Petitioner will assign the CDC Mortgage and related notes to CDC, and CDC will pay to Petitioner the amount advanced by Petitioner to fund the CDC Loan secured by the CDC Mortgage. Alternatively, CDC may simply pay off the CDC Loan secured by the CDC Mortgage held by Petitioner and enter into a new mortgage with Borrower.

Analysis

Article 11 of the New York State Tax Law (“Tax Law”) imposes taxes on the recording of mortgages on real property, based on the principal debt or obligation secured by the mortgage being recorded. Tax Law §253. Chapter 26 of the New York City Administrative Code provides similarly for property situated within New York City. The tax is imposed pursuant to Section 253 of the Tax Law on the act of recording a mortgage, rather than on the mortgage itself. *Franklin Society for Home Building and Savings v. Bennett*, 282 N.Y. 79 (1939); *Matter of Silberblatt, Inc. v. Tax Comm.*, 5 N.Y.2d. 635 (1959).

The MRT statutes enumerate certain exemptions (Tax Law §§252, 252-a, 253.3), none of which is applicable here, but other exemptions arise under the common law, and still others apply by reason of statutory provisions outside of the MRT statutes. It is well established that State agencies enjoy immunity from taxation, independent of the statutory exemptions, for property used in the public interest, on the theory that imposition of a tax upon a mortgage held by a State agency is tantamount to a tax upon the agency itself in violation of its immunity from taxation. *Hotel Waldorf Astoria Corp. v. State Tax Commission*, 86 A.D.2d 330, 334; 451 N.Y.S.2d 261 (1982).¹ In *Hotel Waldorf-Astoria Corp.*, acknowledging that a \$45 million mortgage secured by the Waldorf-Astoria hotel was exempt from the MRT because the mortgagee (the New York State Employees’ Retirement System) was a New York State agency, the court stated: “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.” This principle has been applied in exempting from the MRT the recording of mortgages on property for which the legal title is held by an industrial development agency and the beneficial ownership is held by a non-exempt private party (see 1982 Opinion of the State Comptroller No. 82-188, p. 240, and numerous Advisory Opinions issued by this Department over the years).²

Furthermore, when CDC is a party to a mortgage and records it, a clear statutory exemption from the MRT is provided by §1411(f) of the New York Not-For-Profit Law, which says that “[t]he income and operations of a corporation incorporated or reincorporated under this section shall be exempt from taxation.” This creates an inconsistency between the Not-for-Profit Law and the provision in §252 of the Tax Law that states that no mortgage of real property in New York and no person or corporation owning any debt secured by a mortgage on real property situated in New York is exempt from the taxes imposed by Article 11 of the Tax Law by reason of anything contained in any other statute. The allowance of exemptions in cases where an entity has a specific exemption granted in statute outside of Article 11 is consistent with the principle that, when a conflict exists between two statutes or laws that relate to the same subject matter, the later specific enactment governs the earlier general enactment. This position has been adopted by both the courts and this Department. *Williamsburg Power Plant Corp. v. City of New York*, 255 A.D. 214, 7 N.Y.S.2d 326 (2nd Dep’t 1938), *aff’d* 280 N.Y. 551 (1939); *First National Bank and Trust Co. v. Village of Saltaire*, 256 A.D. 156, 9 N.Y.S.2d 103 (2nd Dep’t 1939).

Since the pertinent provisions of the MRT were enacted in 1909, they must yield to the exemption provisions contained in the 1969 law creating CDCs. Thus, the MRT does not apply where CDC as mortgagee records the CDC mortgage. Neither the recording of the assignment of the CDC Mortgage from CDC to

¹ Also see *City of New York v. Tully*, 88 A.d.2d 701, 451 N.Y.S.2d 2654 (3rd Dept. 1982).

² For recent Advisory Opinions on this issue, see TSB-A-09(1)C, TSB-A-08(1)R, and TSB-A-02(6)R.

Petitioner, nor the eventual assignment of the CDC Mortgage by Petitioner to CDC would be subject to the MRT. The act of assigning a recorded mortgage, in and of itself, does not create a new mortgage subject to the MRT, provided that the correct MRT has been paid on the recording of the mortgage itself. Tax Law §255. Finally, because the recording of the CDC Mortgage by CDC is exempt from the MRT, §258 of the Tax Law does not preclude the enforcement of the CDC Mortgage, notwithstanding that no MRT was paid on its recording.

DATED: August 4, 2009

/S/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.