STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M090311A

The Petitioner, [redacted] (a Delaware limited liability company), asks whether the mortgage recording taxes (MRTs) imposed by Article 11 of the Tax Law and Chapter 26 of the New York City Administrative Code are due upon the recording of a mortgage on Petitioner's new electric generating power plant. The mortgage will secure both private-party lenders that provide capital to construct the plant and Petitioner's obligations to the Power Authority of the State of New York (NYPA) under a Tolling Agreement to sell to NYPA all the power generated by the plant.

Answer: If (1) all power generated by the power plant will be sold to NYPA, (2) NYPA is a co-mortgagee on the mortgage (whether or not the other co-mortgagee or co-mortgagees are private entities), (3) NYPA has authority under the terms of the mortgage to foreclose on the power plant in the event that Petitioner's obligations are breached, and (4) the mortgage is entered into in furtherance of the development and construction of the Power Plant, including, without limitation, to secure the obligations of Petitioner under the Tolling Agreement and to secure loans made by private lenders to Petitioner to fund the development and construction of the power plant, the recording of the mortgage will be exempt from the MRTs.

Facts

Petitioner plans to construct and operate a new power plant to convert natural gas owned by NYPA into electricity for distribution by NYPA. Pursuant to a Tolling Agreement signed by Petitioner and NYPA, all the power from the new plant will be sold by Petitioner to NYPA for 20 years. Petitioner will be paid a fee for converting natural gas into electricity for NYPA which will control all the decisions with respect to the output of the plant.

NYPA is "a body corporate and politic, a political subdivision of the state [of New York], exercising governmental and public powers…." (Section 1002 of the Public Authorities Law.) As such, NYPA is generally exempt from state and local taxes imposed in the State of New York. NYPA was originally established to provide power from hydroelectric facilities along the Niagara and St. Lawrence waterways. When the New York Legislature found that there was a severe shortage of electricity in New York City, NYPA's mandate was expanded to cover the production of electricity in the New York City area (Section 1001-a of the Public Authorities Law). As part of its obligation to alleviate the power shortages in the New York City area, NYPA entered into the Tolling Agreement with Petitioner.

Petitioner will fund a significant portion of the cost to develop and construct the power plant by borrowing from private lenders. The debt will be secured by, *inter alia*, a mortgage on the power plant. The Tolling Agreement provides that Petitioner will grant NYPA a mortgage on the power plant to secure Petitioner's obligations under the Tolling Agreement. The mortgage states that NYPA may foreclose on the power plant if Petitioner breaches its obligations under the Tolling Agreement. The mortgage to NYPA will be combined with the mortgage to the lenders. Petitioner and the lenders will be secured on a *pari passu* basis, and there will be an inter-creditor agreement between the parties governing their respective rights.

When the mortgage is granted by Petitioner, it is anticipated that NYPA and a collateral agent for the lenders will be named as co-mortgagees.

Analysis

Article 11 of the New York State 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. The mortgage recording tax statute enumerates certain exemptions (Tax Law §§252, 252-a, 253.3), none of which is applicable here, but some other exemptions arise under the common law. 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 on a mortgage held by a State agency is tantamount to a tax on the agency itself in violation of its immunity from taxation.[1] This principle has been applied in exempting from the mortgage recording tax 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. In *Hotel Waldorf-Astoria Corp.* v. *State Tax Commission*[2]*,* the Court concluded 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: "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 MRT regulations follow this principle: Where the mortgagor or mortgagee is New York State or any of its agencies, instrumentalities, or political subdivisions, the recording of a mortgage is exempt to the extent the New York State entity is immune from such taxation. 20 NYCRR §644.1(a)(1).

We conclude that the recording of a mortgage on Petitioner's power plant, given to private lenders and NYPA as co-mortgagees, is exempt from the New York State MRTs.

DATED: August 18, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.

[1] See also, *City of New York* v. *Tully,* 88 A.D.2d 701, 451 N.Y.S.2d 265 (3d Dept. 1982) (companion case to *Hotel Waldorf Astoria Corp. supra)*, TSB-A-93(4)R (NYS Urban Development Corporation); TSB-A-2(6)R (NYS Urban Development Corporation); TSB-A-02(6) (Port Authority).

[2] 86 A.D.2d 330, 334; 451 N.Y.S.2d 261 (1982).