

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

TSB-A-11(1)R
Mortgage Recording Tax
August 18, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M110610A

The Department of Taxation and Finance received a petition for Advisory Opinion from [REDACTED]. Petitioner asks whether the taxes imposed by Article 11 of the Tax Law and Chapter 26 of the New York City Administrative Code are due upon the recording of mortgages of certain property that is part of a new 660 megawatt electric transmission system (the “Transmission System”).

We conclude that mortgage recording taxes are not due in the situation presented.

Facts

The facts as presented in the Petition are as follows: Petitioner will be the owner of a 660 megawatt electric transmission system (“Transmission System”) that will be located partially in the State of New Jersey and partially in the State of New York. The New York portion of the Transmission System will include cables under the Hudson River in an easement granted by the New York State Office of General Services and in New York City in public property in which Petitioner will be granted rights by the City of New York and the New York State Department of Transportation. The Transmission System will be owned and operated by the Petitioner. The Transmission System was proposed in response to a Request for Proposals to supply electricity to the New York Power Authority (“NYPA”). Seventy-five percent of the transmission capacity of the Transmission System will be sold by the Petitioner to NYPA under the 20-year Firm Transmission Capacity Purchase Agreement (“FTCPA”) under which NYPA has the option to acquire ownership of 75% percent of the Transmission System at the end of the initial term of the FTCPA and 100% percent ownership of the Transmission System at any time prior to the second anniversary of the Date of Initial Commercial Operation.

NYPA is “a body corporate and politic, a political subdivision of the state of New York, exercising governmental and public powers...” (*See Section 1002 of Chapter 43-A, Article 5, Title 1 of the New York Consolidated Laws.*) As such, NYPA is generally exempt from state and local taxes. When the New York Legislature found that there was a severe shortage of electricity in New York City, NYPA’s mandate was expanded to include the provision of electricity in the New York City area to governmental bodies. *Id.* NYPA will use its transmission capacity to meet the electrical needs of the governmental bodies and agencies it serves in the New York City area. In 2005, NYPA issued a Request for Proposals (“RFP”) to supply it with access to new electricity supplies in order to meet the growing needs of its New York City area customers. Petitioner proposed to develop, build and operate the Transmission System and to enter into the FTCPA in response to the NYPA RFP.

The FTCPA provides that the Petitioner will grant NYPA two mortgage liens on the Transmission System to secure the Petitioner's obligations and NYPA's rights under the FTCPA. One of the mortgages is in favor of NYPA as sole mortgagee and one of the mortgages is in favor of NYPA and a collateral agent for Petitioner's lenders, as co-mortgagees, to secure obligations to NYPA and obligations to private lenders funding a portion of the cost to develop and construct the Transmission System. NYPA and the lenders are secured on a *pari passu* basis and there is an inter-creditor agreement between the parties governing their respective rights under the mortgage. NYPA is the party who presented the mortgages for recording.

Analysis

Article 11 of the 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. The imposition of a tax on the recording of a mortgage held by a State agency is tantamount to a tax on the agency itself in violation of its immunity from taxation¹. 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 (*Hotel Waldorf-Astoria Corp. v. State Tax Commission*, 86 A.D.2d 330, 334; 451 N.Y.S.2d 261 (1982)). 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 mortgage recording tax 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. See *20 NYCRR §644.1(a)(1)*.

In a 2009 Advisory Opinion, this Department affirmed NYPA's exemption from State and New York City mortgage recording taxes (TSB-A-09(3)R). The facts in this petition concerning the transmission project are similar to those in the project that was the subject of the earlier advisory 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.*), 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).

Based upon the foregoing, we conclude that the recording of a mortgage on Petitioner's transmission facilities, given to private lenders and NYPA as co-mortgagees, or to NYPA as the sole mortgagee, is exempt from the mortgage recording tax.

DATED: August 18, 2011

/S/

DEBORAH R. LIEBMAN
Deputy 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.