

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-93 (19) R
Mortgage
Recording Taxes
November 12, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930726A

On July 26, 1993, a Petition for Advisory Opinion was received from the Coliseum Hotel Associates, c/o Steven K. Porter, Esq., Hodgson, Russ, Andrews, Wood and Goodyear, Three City Square, Albany, New York 12207 and Town of Hempstead Industrial Development Agency, c/o Roger J. Bagley, Esq., Hawkins, Delafield and Wood, 67 Wall Street, New York, New York 10005.

The issues raised by Petitioners, Coliseum Hotel Associates (hereinafter "Coliseum") and Town of Hempstead Industrial Development Agency (hereinafter "Hempstead IDA"), are:

1. Whether mortgage recording taxes are due and payable in connection with the recording of the amended loan agreement in which previously unadvanced portions of the notes and bonds will be advanced.
2. Whether mortgage recording taxes are due in connection with the recording of the consolidation agreement.

The County of Nassau, New York (hereinafter the "County") currently owns fee interest in the parcels located in Mitchel Field, Town of Hempstead, Nassau County, New York (the "Land") upon which is located the Marriott Hotel (the "Hotel").

Coliseum is the owner of a leasehold interest in the Land pursuant to an Indenture of Lease dated August 19, 1979 (the "Original Lease"), between the County and Z.I.D. Associates, Inc., and later assigned to Coliseum. Pursuant to the Original Lease, as assigned, Coliseum was permitted to construct a hotel on the Land. Coliseum entered into a long term sublease agreement with Marriott Corporation (the "Marriott Lease") and developed, finance and constructed the existing Hotel.

In September, 1989, in connection with Coliseum's relinquishment of various option rights contained in the Original Lease, Nassau County entered into a new lease agreement (the "Second Lease") with Coliseum for additional vacant land adjacent to the Original Lease parcel and granted to Coliseum, pursuant to an agreement to lease (the "Agreement to Lease"), an option to lease a third parcel of vacant land.

In November, 1989, Coliseum closed a new facility in the total of \$67,500,000 to (i) refinance the existing mortgage on the Hotel and (ii) obtain construction financing for a 220-room addition to the Hotel. Hempstead IDA participated in that financing in which The Sumitomo Bank, Limited, New York Branch acted as lender (the "Lender").

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The structure of the November, 1989, financing was such that Coliseum subleased its interest in the Original Lease and Second Lease (collectively, the "Ground Lease") and its rights under the Agreement to Lease to Hempstead IDA (the "Sublease"). Hempstead IDA in turn sub-subleased the property back to Coliseum (the "Sub-Sublease"). Pursuant to a subordination, non-disturbance and attornment agreement, the Marriott Lease became a sub-sub-sublease (the "Sub-Sub-Sublease").

Coliseum, Hempstead IDA and the Lender entered into a building loan agreement (the "Building Loan Agreement") and a project loan agreement (the "Project Loan Agreement") pursuant to which funds were obtained. (The Building Loan Agreement and the Project Loan Agreement hereinafter referred to collectively as the "Loan Agreements"). Hempstead IDA issued a building loan bond pursuant to the Building Loan Agreement in the amount of up to \$14,563,499 (the "Building Loan Bond") and Coliseum executed a building loan note under the Building Loan Agreement in the amount of \$36,000 (the "Building Loan Note").

Pursuant to the Project Loan Agreement, the existing conventional loan in the amount of \$32,700,000 was refinanced by an amended and restated refinancing loan executed by Coliseum in the said amount (the "Refinancing Loan Note"), Hempstead IDA issued a project loan bond up to \$4,046,501 and Coliseum issued a project loan note evidencing up to \$16,154,000. (The "Project Loan Note", the "Refinancing Loan Note" and the "Building Loan Note" are hereinafter collectively referred to as the "Notes").

As security for the Building Loan Agreement and the advances made under the Building Loan Bond and the Building Loan Note, a building loan mortgage was executed by Coliseum and Hempstead IDA in favor of the Lender in the aggregate amount of \$14,599,499 (the "Building Loan Mortgage"). As security for the Project Loan Agreement and the advances made under the Project Loan Bond, the Project Loan Note and the Refinancing Loan Note, a project loan mortgage was executed by Coliseum and Hempstead IDA in favor of the Lender in the aggregate principal amount of \$20,200,501 (the "Project Loan Mortgage") and an amended and restated refinancing loan mortgage was executed by Coliseum and Hempstead IDA in the principal amount of \$32,700,000 (the "Refinancing Loan Mortgage" and together with the Building Loan Mortgage and the project Loan Mortgage being hereinafter collectively referred to as the "Mortgages"; the Loan Agreements and the Mortgages and any other document executed by, Hempstead IDA or Coliseum in favor of the Lender being hereinafter collectively referred to as the "1989 Financing Documents"). The Mortgages encumber both Hempstead IDA and Coliseum rights, title and interests in and to the Ground Leases and the Agreement to Lease. Coliseum represents that at the time of their recording, all mortgage recording taxes, if any, required to be paid on said mortgages were paid. As of October 18, 1993, \$61,200,000 of the \$67,500,000 secured by the aforementioned mortgage has been advanced.

For the past few years, the performance of the Hotel has not been as projected and, since early in 1992, negotiations have occurred between Coliseum and the Lender to reach an agreement to restructure and extend the existing loan facilities. As a precondition to further negotiations in March, 1992, Coliseum and the Lender entered into various amendments, waivers and consents

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pursuant to which Coliseum irrevocably and unconditionally waived the right to receive advances of loan proceeds in excess of the aggregate total amount of \$62,750,000.

Since that date further negotiations have occurred and now, as part of the proposed workout structure, Coliseum and the Lender have agreed to rescind the foregoing waiver and amend, modify and restate the Loan Agreements to the aggregate total amount of \$67,500,000 pursuant to an Amended Project Loan Agreement and an Amended Building Loan Agreement (collectively, the "Amended Loan Agreements") executed by Coliseum, Hempstead IDA and the Lender to provide for an advance of the heretofore unadvanced portion of the original aggregate amount to be advanced under the Loan Agreements to pay accrued but unpaid interest.

To the extent that the accrued but unpaid interest exceeds the unadvanced portion of the Loan Agreements, the Lender shall make a new loan to Coliseum to fund said costs pursuant to a Note executed by Coliseum (the "New Note") which New Note shall be secured by a new mortgage in like amount (the "New Mortgage"). Hempstead IDA will not participate in the New Mortgage.

In connection with the proposed restructure, it is also proposed that after Coliseum and Hempstead IDA execute the Amended Loan Agreements in favor of the Lender and all advances are made thereunder, Coliseum and the Lender shall consolidate the existing Mortgages, the New Mortgage and the debts referred to therein to form a single lien in the principal amount represented by the Amended Loan Agreement (\$61,200,000 plus capitalized interest accrued to the date of the closing). In connection with the proposed restructuring, Hempstead IDA would not have any further involvement in the project and, therefore, the Sub-Sublease and the Sublease would be cancelled. Pursuant to the Consolidation Agreement, Coliseum would assume all of Hempstead IDA's obligations under the existing IDA Bonds and the other 1989 Financing Documents and Hempstead IDA would be released from all liability thereunder. The interest of Coliseum as tenant under the Ground Lease, which interest is already encumbered by the Mortgages, would continue to be the primary security for the consolidated indebtedness and Coliseum would be the sole party obligated under the indebtedness.

It is contemplated that the Building Loan Agreement and the Project Loan Agreement would be modified and restated as a new loan agreement governing the consolidated loan (the "Loan Agreement"). Pursuant to the Consolidation Agreement and the Loan Agreement, (i) the maturity date of the loan would be extended from November 1, 1994 to November 1, 1999, (ii) the interest rate on the consolidated loan would be modified so that the interest rate would accrue at a fixed rate but be payable out of available cash flow from the project facility at a rate equal to a lower fixed interest rate or at the accrued interest rate (if the available cash flow permits). Moreover, under the terms of the Consolidation Agreement, all unpaid but accrued interest will continue to accrue as interest (and such accrued interest will not bear interest and will not be added to principal) until paid in full. In addition to the foregoing payments, the Lender would be entitled to a portion of the net proceeds from a sale or refinancing of the Hotel as additional interest.

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In connection with the restructuring, Coliseum will enter into an amendment to the Marriott Lease pursuant to which the rental and other payments to and from Coliseum will be modified. Pursuant to the existing Mortgages, Coliseum and Hempstead IDA granted to the Lender all of their interest in all rental payments made by Marriott under the Sub-sub-sublease. To ensure the payment of debt service on the consolidated loan and the payment of other expenses, Coliseum will assign to the Lender all rental payments received from Marriott pursuant to the Marriott Lease from which the Lender will pay said debt service and other permissible expenses. Coliseum and the Lender propose that the Consolidation Agreement, the Loan Agreement, the amendment to the Marriott Lease and the amended and modified debt instruments secured thereby will secure the same indebtedness and obligations created by the 1989 Financing Documents.

Coliseum and Hempstead IDA contemplate preparing and filing with the proposed Amended Loan Agreements and the proposed Consolidation Agreement an affidavit pursuant to Section 255 of the New York State Tax Law setting forth the foregoing facts, as well as all other information required to be in such affidavit in order to obtain exemption from the imposition of additional mortgage recording taxes.

Subdivisions 1, 1-a and 2 of Section 253 of the Tax Law impose taxes on the recording of a mortgage of real property in the State measured by the principal debt or obligation, which is, or under any contingency, may be secured at the date of the execution thereof or at any time thereafter.

Section 252 of the Tax Law provides, with certain exceptions, 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 taxes imposed by this article by reason of anything contained in any other statute..."

Section 255.1(a) of the Tax Law provides, in part, as follows:

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 of 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, except as otherwise provided in paragraph (b) of this subdivision, 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. in which case, a tax is imposed as provided by section two hundred and fifty-three of this chapter on such new or further indebtedness or obligation. (emphasis added)

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In Rednow Realty Corp. v. Tully, 1979, 72 AD2d 621, 420 NYS2d 792, the Court held that where the principal indebtedness of the original mortgage was reduced from \$12 million to \$10 million by execution of a modified mortgage and, subsequently, a remodified mortgage was executed increasing such indebtedness again to \$12 million, such increase of \$2 million was an additional indebtedness subject to the mortgage recording taxes, despite the parties' attempt by appropriate language to retain the original lien of \$12 million when executing the initial modification of mortgage.

In City of New York v. Procaccino, 46 AD2d 594, 364 NYS2d 582 (3d Dept 1975) the Court held that a supplemental mortgage will be exempt from any additional mortgage recording tax if it involves no new principal obligation or mortgage debt but merely consolidates an existing secured debt.

In Brodsky v. Murphy, 26 AD2d 225, 272 NYS2d 238 (3d Dept), aff'd 20 NY2d 282, 231 NE2d 768, 285 NYS2d 73 (1966) the Court held that the extension of maturity date and the method of payment does not create a new mortgage (citing Suffolk County, 5 AD2d at 641, 174 NYS2d at 395) and that new and higher rates of interest did not create a new mortgage.

Moreover, even though Section 252 of the Tax Law does not provide a specific exemption from the operations of industrial development agencies, 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.

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 divisions, 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 mortgages of property when legal title is held by a New York State industrial development agency even though beneficial ownership of such property is held by private interest. (See 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 Ticor Title Guarantee Company, Adv Op Comm T & F, June 25, 1993, TSB-A-93(12)R the Commissioner held that where a mortgage agreement was modified to provide that the accrued interest would be deferred and paid in a fixed sum at maturity and that such accrued interest would not bear interest or be added to the principle amount of such mortgage, that such accrued interest was not a new or further indebtedness or obligation. Therefore, the modified mortgage agreement

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constituted a supplemental mortgage under Section 255.1(a) of the Tax Law and the recording of such agreement was not subject to additional mortgage recording taxes.

With respect to issue "1", pursuant to Section 255 of the Tax Law and Rednow Realty Corp. v. Tully, supra, the amendment to the Loan Agreement to increase the indebtedness from \$62,750,000 back to the original amount of \$67,500,000 constitutes an additional indebtedness subject to the mortgage recording taxes imposed by Section 253 of the Tax Law. However, since Hempstead IDA is a party to such mortgage, pursuant to Section 252 of the Tax Law, Matter of Hamilton, supra, and One Park Place Associates, supra, the recording of Amended Loan Agreement to effectuate such increase in indebtedness is exempt from taxation.

It is noted, however, that any advances or New Mortgages to which Hempstead IDA is not a party will be subject to the mortgage recording taxes pursuant to Sections 252 and 255 of the Tax Law, Rednow Realty Corp. v. Tully, supra, Matter of Hamilton, supra, and One Park Place Associates, supra.

Concerning issue "2", pursuant to Section 255 of the Tax Law and City of New York v. Procaccino, supra, a supplemental mortgage will be exempt from any additional mortgage recording taxes if it involves no new principal obligation or mortgage debt but merely consolidates an existing secured debt. Further, pursuant to Brodsky v. Murphy, supra, a modification to extend the maturity date, change the method of payment or to change the interest rate did not create a new mortgage. Moreover, pursuant to Ticor Title Guarantee Company, supra, a mortgage agreement modified to defer accrued interest until maturity and where such accrued interest did not bear additional interest or was not added to the principle amount of the mortgage, that such modified mortgage agreement was not subject to further mortgage recording taxes. Accordingly, since the consolidation of the existing mortgages and the New Mortgage to form a single lien will not create or secure 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 upon which the proper tax, if any, has been paid, such consolidation agreement will not be subject to mortgage recording taxes.

DATED: November 12, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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