

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

TSB-A-93 (4)R
Mortgage
Recording Taxes
March 10, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930119A

On January 19, 1993, a Petition for Advisory Opinion was received from the New York State Urban Development Corp., 1515 Broadway, New York, New York 10036.

The issues raised by Petitioner, New York State Urban Development Corp., on behalf of itself and its wholly owned subsidiaries, are:

1. Whether the taxes imposed by Article 11 of the Tax Law (the "mortgage recording tax") are due upon the recording of any mortgage of property that is part of Petitioner's New York Exchanges Headquarters Land Use Improvement Project (the "Project") where (i) Petitioner is named mortgagee, (ii) the loan funds secured by the mortgage are provided by one or more persons or entities other than Petitioner, and (iii) the proceeds of the mortgage loans are used for Project development costs.
2. Whether a mortgage recording tax is due upon the recording of the applicable instrument or otherwise to the extent that the principal amount of secured indebtedness is increased if a mortgage referred to in issue "1" is assigned, supplemented, modified, or amended, or if any mortgage so assigned, supplemented, modified, or amended is thereafter from time to time assigned, supplemented, modified or amended.
3. Whether mortgage recording tax is due upon the recording of the applicable instrument or otherwise with respect to an increase in the principal amount of secured indebtedness, to the extent Petitioner continues to be named mortgagee with respect to any such increases if a mortgage referred to in issue "1" is assigned, supplemented, modified or amended, or if any mortgage so assigned, supplemented, modified or amended is thereafter from time to time assigned, supplemented, modified, or amended.

Petitioner and the New York City Public Development Corporation (now known as the New York City Economic Development Corporation ("EDC")) entered into a Letter of Intent dated as of April 30, 1991 with the Coffee, Sugar and Cocoa Exchanges, Inc., the Commodity Exchange Inc., the New York Cotton Exchange and the New York Mercantile Exchange (collectively, the "Four Exchanges") for the development of a new state-of-the-art headquarters on Site 5B of the Washington Street Urban Renewal Area in lower Manhattan (the "Project Site"). In January 1992, the New York Mercantile Exchange ("NYMEX") withdrew from the Project. In December 1992, a new Letter of Intent, outlining the parameters of a reduced project, was entered into by Petitioner, EDC, the Coffee, Sugar and Cocoa Exchanges, Inc., the Commodity Exchange Inc., the New York Cotton Exchange and the New York Futures Exchange, Inc. (collectively, the "Exchanges"). A new facility is needed to replace the Exchanges' severely overcrowded and outmoded facilities in Four World Trade Center and in other buildings in lower Manhattan with expanded modern space for their trading activities and offices.

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Pursuant to Petitioner's General Project Plan, Petitioner is to acquire fee title from the City to the Project Site. Petitioner will enter into three leases (collectively, the "Lease") with the Exchanges for the Project Site. Except for reimbursement of certain Petitioner expenses, all payments under the Lease will inure to the benefit of the City. Upon termination of the Lease, ownership of all buildings and improvements will revert to the landlord and simultaneously to the City. However, the Exchanges will have an option to purchase the fee interest beginning thirty years after completion.

The contemplated financing arrangements for the Project are as follows:

1. Petitioner, as mortgagee, will be obligated to record each of the Project mortgages securing loans whose proceeds are used for Project development costs ("Recognized Mortgages"). The loans that are secured by the mortgages will be provided by lenders other than Petitioner ("Lenders") and the Recognized Mortgages will be executed by the Exchanges in favor of Petitioner. Petitioner's fee interest will not be encumbered by the Recognized Mortgages.

2. Petitioner will undertake the obligation to record the Recognized Mortgages.

3. Upon the recording of the Recognized Mortgages, Petitioner will assign to the Lenders all of its right, title, and interest in and to the Recognized Mortgages.

4. Petitioner will be the named mortgagee in connection with certain refinancings, provided any such refinancings do not exceed the Project development costs less the funds provided by the public sector. In that case, Petitioner will record and assign any such mortgage to the lender(s) Who provided the loan funds.

5. It is anticipated that the Recognized Mortgages will obligate the Exchanges to perform their obligations under the other documents relating to the construction and operation of the Project (the "Project documents"), so that a default under the Lease or other Project document would constitute a default under the Recognized Mortgages. Although, after recording the Recognized Mortgages, Petitioner will assign them to the respective Lenders, Petitioner will continue to hold fee title to the property and will fully retain its enforcement rights under the Lease and the other Project documents.

In addition to the contemplated assignments of the Recognized Mortgages to Lenders as noted above, Petitioner anticipates that the Recognized Mortgages may, from time to time (after Petitioner has assigned all of its interest in the Recognized Mortgages), be further assigned, supplemented, modified or amended and that the applicable instruments reflecting such assignment, supplement, modification or amendment will be recorded. Thus, for example, in accord with customary mortgage financing practices, it is expected that mortgages securing construction

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financing will be assigned, supplemented and modified and converted to permanent financing upon the completion of construction or upon expiration of the term of the initial loans.

The Exchanges also may "take out" equity dollars used for Project development costs in a subsequent refinancing thereby increasing the mortgage indebtedness. Further, from time to time, the Recognized Mortgages may be assigned from one lender to another, or the loans may be refinanced. It is also possible that the identity of the mortgagors will change by reason of the assignment of the lessee's interest either to an affiliate or to an unrelated person. Finally, if and when the Exchanges exercise the purchase option contained in the Lease, the leasehold mortgage may be converted into a mortgage secured by a fee interest.

With respect to issue "1", 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 mortgage. Section 252 of Article 11 of the Tax Law, applicable to exemptions from the mortgage recording tax, provides, with certain exceptions not relevant herein, that "[n]o 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 from the operations of UDC, 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 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 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).

Also, in Hotel Waldorf-Astoria Corp. v. State Tax Commission, 86 AD2d 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: "as a State agency, the Retirement System

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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, 88 AD2d 701).

The UDC, therefore, is exempt from the mortgage recording taxes imposed by Article 11 of the Tax Law by virtue of it being a New York State agency constituting a political subdivision and public benefit corporation.

Furthermore, Section 6272 of the UDC Act provides, in pertinent part, that:

it]he exercise of the powers granted by this act will be in all respects for the benefit of the people of this state ... and will constitute the performance of an essential function ... [UDC] and its subsidiaries shall not be required to pay any taxes, other than assessments for local improvements, upon or in respect of a project or of any property or moneys of [UDC] or any of its subsidiaries, levied by any municipality or political subdivision of the state, nor shall [UDC] or its subsidiaries be required to pay state taxes of any kind, and [UDC], its subsidiaries, projects, property and moneys ... shall at all times be free from taxation of every kind by the state and by the municipalities and all other political subdivisions of the state.

Moreover, section 6283 of the UDC Act states: "[i]nsofar as the provisions of this act are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling.'

Therefore, an apparent inconsistency exists between the Tax Law and the b'DC Act. Where a conflict exists between two enactments relating to the same subject matter, the latter specific enactment governs the earlier general enactment. Williamsburgh Power Plant Corp. v City of New York, 255 App Div 214, affd 280 NY 551.

Inasmuch as section 252 of the Tax Law was enacted in 1909, and last amended in 1966, it must yield to the exemption provisions contained in the law creating UDC which were enacted in 1968. Therefore, if the provisions of the UDC Act exempt from the recording tax the mortgages created pursuant to the Project, such exemption provisions will prevail.

The UDC Act gives Petitioner the power to execute mortgages. Having such power implies that Petitioner may also perform the activity of recording mortgages. It is to be noted that the taxes imposed under section 253 of the Tax Law are not imposed on the mortgages themselves, as property, but on the taking of an action, that is, on the exercise of the privilege of recording a mortgage.

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Franklin Society for Home Building and Savings v Bennett, 282 NY 79; Matter of Silberblatt, Inc. v Tax Comm, 5 NY2d 635; One Park Place Associates, Adv Op St Tx Comm, May 24, 1982, TSB-A-82(1)M.

An informal opinion of the Attorney General, dated March 7, 1956, states 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.

Since Petitioner is the mortgagee and will record the Recognized Mortgages, in view of the Attorney General's opinion, Petitioner would be the party required to pay the taxes imposed by Article 11, if such taxes are due.

However, Section 6272 of the UDC Act, specifically provides that Petitioner or its subsidiaries shall not be "required to pay state taxes of any kind" and Petitioner, its subsidiaries, projects, property and moneys "shall at all times be free from taxation of every kind by the state and by the municipalities and all other political subdivisions of the state." In addition, Section 6284 of the UDC Act provides that the UDC Act "shall be liberally construed so as to effectuate its purposes."

In view of the provisions contained in section 6284 of the UDC Act providing that the UDC Act be liberally construed and section 6272 exempting UDC, its subsidiaries, projects, property and moneys from state taxation of every kind, and the fact that New York State agencies are immune from taxation, it is concluded that Petitioner can record Recognized Mortgages without payment of the mortgage recording taxes imposed under section 253 of Article 11 of the Tax Law. New York State Urban Development Corporation, Adv Op Comm of T & F, May 5, 1989, TSB-A-89(2)R.

Concerning issue "2", Section 255 of the Tax Law contains the supplemental mortgage provisions and provides, in pertinent part, that:

[i]f 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

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by or which under any contingency may be secured by the recorded primary mortgage

Section 250 of the Tax Law provides that "[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."

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. City of New York v State Tax Commission, 130 AD2d 890, 891. Of course, were the indebtedness secured by the lien to be reduced or the lien terminated for any reason, tax would be due on any increase on the new obligation. (See Matter of Rednow Realty Corp. v. Tully, 72 AD2d 621, 622.)

Both sections 253 and 255 of the Tax Law require that only a mortgage on the principal debt or obligation, or a new or further indebtedness other than the principal obligation should be subject to the recording tax. (Matter of Park and 46th St. Corp. v. State Tax Commission, 295 NY 173, 178-179.) Matter of Bay View Towers Apts., Inc. v. State Tax Commission, 48 AD2d 86, 89, affd 40 NY2d 856 (emphasis added).

Accordingly, for purposes of issue "2", to the extent that the principal amount of secured indebtedness is not increased, the recording of any assignment, supplement, modification or amendment of any Recognized Mortgage is exempt from the mortgage recording tax, under current law, either because such action does not create a new mortgage subject to tax under section 253 of the Tax Law, or because such action constitutes a "supplemental mortgage" under section 255 of the Tax Law. Where the principal amount of secured indebtedness of a Recognized Mortgage is increased, the mortgage recording tax is due only with respect to the amount of the increase, supra.

QAs for issue "3", pursuant to Section 6272 of the UDC Act, supra, Petitioner, its subsidiaries, projects, property and moneys are exempt from State taxation of every kind. Therefore, the recording of an instrument in which Petitioner is named mortgagee to increase the principal amount

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of indebtedness secured by a Recognized Mortgage will not be subject to the mortgage recording taxes imposed by Article 11 of the Tax Law.

DATED: March 10, 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.