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

TSB-A-95 (13) - R
Mortgage Recording Taxes
October 3,1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M950731A

On July 31, 1995, a Petition for Advisory Opinion was received from Fifth Win, Inc., 1440 Broadway, Suite 1070, New York, New York.

The issue raised by Petitioner, Fifth Win, Inc., is whether mortgage recording tax was due and payable with respect to a mortgage modification agreement recorded on May 12, 1995, in the Office of the City Register of the City of New York.

On December 31, 1990, Fifth Win, Inc., a Delaware corporation, issued a mortgage note (the "Original New York Note") to Fifth Avenue Capital Trust, a Delaware business trust ("Lender"), in the original principal amount of $222,436,500.00. Affiliates of the Petitioner (the "Non-New York Borrowers") also issued mortgage notes in the same transaction (the "Original, Non-New York Notes"), each of which was secured by one or more parcels of real property located outside the State of New York.

The Original Non-New York Notes consisted of 40 notes originated by 8 borrowers and secured by 45 parcels of real property. Three such parcels were actually located in Westchester and Nassau Counties, within the State of New York. The other 42 parcels were located in 19 states other than the State of New York. For the sake of simplicity, for purposes of this Petition the Petitioner will treat all property of Non-New York Borrowers as if it were located outside the State of New York. Such treatment has no effect on the analysis set forth herein. The aggregate amount of the Non-New York Notes was $277,563,500.000. Therefore, the total amount of all loans was $500 million. The Original New York Notes and the Original Non-New York Notes were issued pursuant to a Loan and Security Agreement among the Petitioner, the Non-New York Borrowers and the Lender dated as of December 31, 1990 (the "Original Loan Agreement").

Pursuant to the Original Loan Agreement, the Petitioner guarantied the obligations of the Non-New York Borrowers. The Petitioner granted a mortgage (the "Mortgage") on its property in New York City securing the Original New York Note and the guaranty obligations of the Petitioner. The Mortgage expressly provided that the maximum amount Secured, or which under any contingency may be secured, thereby was not to exceed $335,500,000.00 (the "New York Secured Amount"). Accordingly, the portion of the New York Secured Amount that initially secured the fixed note obligation was $222,436,500.00 (the "Fixed Portion"), and the portion that initially secured the guaranty obligation of the Petitioner was $113,063,500.00 (the "Guaranty Portion"). Mortgage recording tax in the amount of $9,226,250.00 was paid upon the New York Secured Amount.

Section 2.4 of the Original Loan Agreement permitted each borrower to prepay its respective mortgage note in whole or, in certain cases, in part. In such event, certain of the other borrowers were required to make prepayments of their notes, all as more particularly described below. Between December 31, 1990 and May 12, 1995, there were prepayments by Non-New York Borrowers in the aggregate amount of $126,214,500.00, leaving an outstanding principal balance under all Original Non-New York Notes of $151,349,000.00. Therefore, on May 12, 1995, the total balance of the obligations guarantied by the Petitioner, $151,349,000.00, had not fallen below the amount thereof that was secured by the Mortgage (i.e., $113,063,599.00). Further, at such time, Petitioner had made no payments in respect of its guaranty obligations.

Pursuant to Section 2.4(b)(2) of the Original Loan Agreement, upon any prepayment by a borrower thereunder, the borrowers other than the Petitioner were obligated to make mandatory partial principal payments in respect of their notes, such that the total amount of each prepayment equaled a predetermined "Release Price" that had been established for each property. The language of the Original Loan Agreement providing for such mandatory prepayments is as follows:

> As a condition to a Borrower prepaying in full a Mortgage Note (or partially prepaying a Mortgage Note pursuant to Section 2.4(a)(i), (ii) or (v)), except as hereinafter provided, all Borrowers (but excluding the [Petitioner] until such time as the aggregate prepayments previously made hereunder exceed $180,000,000) shall partially prepay their other Mortgage Notes ... pro rata (based upon the outstanding principal balances thereof) ...

On January 29, 1992 Petitioner made an optional principal payment under the Original New York Note, as permitted by the Original Loan Agreement, in the amount of $8,785,500, leaving an outstanding principal balance of $183,651,000.

The total amount of principal payments made prior to May 12, 1995 under all notes was $165 million. Because that amount is less than the $180 million threshold stated in Section 2.4(b)(2), the Petitioner was not required to make, and did not make, any mandatory principal payments under the Original New York Note.

The intent of the above-quoted language from Section 2.4(b)(2) of the Original Loan Agreement regarding the identity of the party required to make certain mandatory prepayments was to maintain the New York Secured Amount at its original level (reduced by any optional payments made by the Petitioner), until the balance of all of the notes issued pursuant to the Original Loan Agreement had been reduced substantially. This would (a) maximize the amount for which the New York Mortgage could be foreclosed and (b) preserve the maximum mortgage tax credit in the case of future refinancing by the Petitioner. There was and is no other business or legal purpose for such provision.

Effective May 12, 1995, the Petitioner, the Lender, certain of the original Non-New York Borrowers and certain new non-New York borrowers (the "New Non-New York Borrowers") entered into an Amended and Restated Loan and Security Agreement (the "Restated Loan Agreement"). Each of the New Non-New York Borrowers is a wholly-owned subsidiary of the successor by merger to

an original Non-New York Borrower. For bankruptcy purposes, each of the original Non-New York Borrowers that owned a New Non-New York Borrower was merged into a corporation the stock ownership of which was and is identical to that of the merged original Non-New York Borrower. Accordingly, the ownership of each of the New Non-New York Borrowers was transferred by operation of law to such new corporations, without any change in the beneficial ownership thereof. There has been no change in beneficial ownership of any of the Borrowers since the Original Loan Agreement was executed on December 31, 1990.

The aggregate amount of all loans pursuant to the Restated Loan Agreement (the "Refinanced Loans") is $335 million. In connection with the amendment and restatement of the loan agreement, the amounts of the loans to the Petitioner, to the continuing Non-New York Borrowers and to the New Non-New York Borrowers were adjusted to reflect (i) changes in the property securing the loans, (ii) changes in the relative values of the property securing the loans and (iii) contributions of the Non-New York property made by certain of the original Non-New York Borrowers to the New Non-New York Borrowers.

The reductions in the principal amount described herein were not prepayments for purposes of the Original Loan Agreement. Accordingly, they did not trigger an obligation on the part of the other Non-New York Borrowers to make mandatory principal payments. Even if they were treated as prepayments, when aggregated with prepayments actually made by Non-New York Borrowers, the total balance of guarantied obligations still would not have dropped below the $113,063,500.00 secured by the Mortgage.

On May 12, 1995, the Original New York Note was amended and restated, and the amount thereof was reduced. The amended and restated note (the "Restated New York Note") was for an original principal amount of $169,439,000.

Based upon the provisions of the Original Loan Agreement and the allocation of the prepayments that have been made pursuant to the Original Loan Agreement and the adjustments in note allocations made pursuant to the Restated Loan Agreement, the outstanding principal balance of the Mortgage, as of May 12, 1995, is calculated as follows:

New York Secured amount	$335,500,000.00
Original principal balance of Original New York Note	-222,436,500.00
Original balance of Guaranty Portion	$113,063,500.00
Principa1 balance of Restated New York Note	169,439,000.00
TOTAL BALANCE OF NEW YORK SECURED AMOUNT	$282,502,500.00

Pursuant to the Restated Loan Agreement, the Petitioner executed and delivered a Mortgage Modification Agreement (the "Modification Agreement"), which was recorded on May 12, 1995. The Modification Agreement provides that the mortgage, as modified thereby, secures (a) the

Restated Note of $169,439,000 and (b) the guaranties by the Petitioner of the notes of the continuing Non-New York Borrowers and the other New Non-New York Borrowers. The maximum amount secured, or which may under any contingency be secured, by the Mortgage, shall not exceed $282,502,500, which is the outstanding principal balance of the New York Secured Amount calculated above.

Article 11 of the Tax Law imposes taxes on the recording of mortgages of real property measured by the principal debt or obligation secured or which under any contingency may be secured by such mortgage.

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, 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 ....

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.)

In addition, Section 256 of the Tax Law provides, in pertinent part, as follows:

> [i]f the principal indebtedness secured or which by any contingency may be secured by a mortgage is not determinable from the terms of the mortgage, or if a mortgage is given to secure the performance by the mortgagor or any other person of a contract obligation other than the payment of a specific sum of money and the maximum amount secured or which by any contingency may be secured by the mortgage is not expressed therein, such mortgage shall be taxable under section two hundred and fifty-three of this chapter upon the value of the property covered by the mortgage , ... If such maximum amount is expressed in the mortgage or in a sworn statement filed as required by this section, such amount shall be the basis for assessing the tax imposed by this article.

Furthermore, in BT Commercial Corporation, Adv Op Comm T & F, September 3, 1993, TSB-A-93(15)-R, which involved provisions of a loan agreement which specifically allocated readvances and repayments under a revolving line of credit to non-New York real property, the Commissioner opined that "such allocation will be respected and honored by the Department for purposes of computing the mortgage recording taxes due."

The Mortgage constituted, in part, an indefinite mortgage within the meaning of section 256 of the Tax Law. The maximum amount secured by the Mortgage was properly capped at $335,500,000, which consisted of the $222,436,500 Fixed Portion and $113,063,500 Guaranty Portion (i.e., the portion securing an indefinite obligation) and the proper mortgage recording tax of $9,226,250 was paid on such maximum amount.

Up and until the time that the Modification Agreement was recorded on May 12, 1995, the principal balance of the Fixed Portion of the New York Secured Amount was $183,651,000. The Modification Agreement restated this principal balance to be $169,439,000. In accordance with BT Commercial Corporation supra, the determination of these amounts through the application of payments is respected and honored by the Department for purposes of computing the mortgage recording taxes due. Therefore, to the extent of the Fixed Portion of the New York Secured Amount, the Modification Agreement does not increase or add to the amount which was secured by the Mortgage.

Regarding the Guaranty Portion, Petitioner was never required to make any payment in respect of its guaranty obligation. Further, the Guaranty Portion of the New York Secured Amount was capped at an amount less than the aggregate amount of Petitioner's guaranty obligation. There is nothing in the Original Loan Agreement, Mortgage or other loan documents which requires or permits the reduction of the Guaranty Portion of the New York Secured Amount as a result of prepayments by the Non-New York Borrowers. In this case, the prepayments made by Non-New York Borrowers did not exceed the portion of the New York Borrower's guaranty obligations that were secured by the Mortgage. Therefore, the outstanding principal balance of all obligations guarantied by the Petitioner has not fallen below the maximum amount of the original Guaranty Portion, $113,063,500, secured by the Mortgage. There have been no repayments or readvances of the Guaranty Portion of the New York Secured Amount. Thus, the Modification Agreement does not create any new or other guaranty obligation, other than that which was secured by the Mortgage. This result is unaltered by the fact that there are new borrowers in the Restated Loan Agreement as each of the new borrowers are wholly-owned subsidiaries of successors by merger to the original borrowers and the guaranties were always made by affiliates with the same beneficial ownership.

Accordingly, the Modification Agreement constitutes a Supplemental Mortgage which does not create or secure a new or further indebtedness or obligation other than the principal indebtedness or obligation secured or which under any contingency could be secured by the Mortgage. Therefore, provided the proper procedures were followed for the recording of a tax exempt Supplemental

Mortgage pursuant to Section 255 of the Tax Law, there was no mortgage recording tax due and payable upon its recording.

DATED: October 3, 1995

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

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