

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

TSB-A-95 (1)R
Mortgage Recording Taxes
March 13, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M950228A

On February 28, 1995, a Petition for Advisory Opinion was received from Battery Park City Authority, One World Financial Center, New York, New York 102811097.

The issues raised by Petitioner, Battery Park City Authority, are:

1. Whether the taxes imposed by Article 11 of the Tax Law (hereinafter the "mortgage recording tax") will be due upon the recording by Petitioner of one or more mortgages on New York Mercantile Exchange (hereinafter "NYMEX") leasehold interests in leased property to which Petitioner would be either the named mortgagee or a named mortgagor, provided that (a) the proceeds of the mortgage(s) are used for Project development costs, and (b) either (i) Petitioner is the initial named mortgagee under the Mortgage, or (ii) Petitioner executes the Mortgage with NYMEX, as co-mortgagor.
2. Whether mortgage recording tax is due upon the recording by Petitioner or any other person of an instrument to the extent that the principal amount of secured indebtedness is increased if a mortgage referred to in issue "1" is assigned, supplemented, modified and/or assigned (including, without limitation, any spread, consolidation, substitution, severance, restatement and/or extension of such mortgages).

Petitioner was formed pursuant to Title 12 of Article 9 of the Public Authorities Law of the State of New York, as amended (known as the Battery Park City Authority Act), for the public purpose of improving, replanning, reconstructing and redeveloping the Battery Park City project area, and the creating in such area a mixed commercial and residential community.

In August 1994, NYMEX acquired the New York Commodity Exchange (hereinafter "COMEX") in a merger. NYMEX and its member firms are now responsible for approximately 8,100 jobs and approximately \$1 billion in direct economic activity. Projected state and local direct tax revenues from the merged entity are approximately \$117 million annually.

Because no existing building could accommodate NYMEX/COMEX and meet its advanced technological requirements, in early 1994 NYMEX, in anticipation of its merger with COMEX, renewed its search in New York and New Jersey for a suitable site on which to construct a new building. After negotiations between the public sector and NYMEX, (i) NYMEX, Petitioner, the State of New York (the "State"), the City of New York (the "City"), the New York State Urban Development Corporation (the "UDC") and the New York City Economic Development Corporation entered into a letter of understanding dated August 4, 1994, regarding the construction, leasing, occupancy and equipping of a new trading facility and office building (the "Project"), to be located on Site 15 in the Battery Park City project area (the "Site") and (ii) the NYMEX Board of Directors

voted to relocate to the Site instead of accepting a very attractive financial offer from the State of New Jersey. The Project, which is expected to entail development costs of approximately \$224-\$235 million, will contain approximately 500,000 square feet of space and will provide approximately 50,000 square feet of state-of-the-art trading floor space plus ancillary and support space, as well as office space for NYMEX. Office space for member firms may also be provided. The Project will replace NYMEX's severely overcrowded and outmoded facilities in Four World Trade Center, and will enable NYMEX to continue to grow over time in New York and compete effectively in the commodities business.

The Site is owned by Petitioner. The Site, the Project and the equipment to be purchased or leased for use in the Project and in facilities accessory to the Project (the "Leased Property") will be leased to NYMEX pursuant to the provisions of a long-term ground lease (the "Lease") between Petitioner, as landlord, and NYMEX, as tenant.

Approximately \$129 million of the cost of developing the Project will be funded using a combination of State and City grant moneys. It is anticipated that the balance of the development costs will be funded in one or more installments from the proceeds of one or more financings (collectively, the "Mortgage Loan") secured, *inter alia*, by one or more mortgages on NYMEX's leasehold interest in the Leased Property with respect to which Petitioner would be either the named mortgagee or a named mortgagor (collectively, the "Mortgage"). Petitioner's fee interest in the Leased Property will not in any event be encumbered by the Mortgage.

It is possible that the Mortgage Loan will be provided by Petitioner, in which case Petitioner will be the named mortgagee under the Mortgage. However, Petitioner's ability to provide the Mortgage Loan is contingent upon obtaining State legislative authorization. Alternatively, NYMEX may obtain the Mortgage Loan directly from one or more private sources. In furtherance of the public purposes described herein, Petitioner intends to undertake in the Lease (and in the Mortgage) to record the Mortgage in any event, even if it is ultimately determined that Petitioner will not be the mortgagee under the Mortgage.

If Petitioner is not the mortgagee under the Mortgage, then:

- (1) NYMEX will sublet the Leased Property to Petitioner pursuant to a sublease (the "Sub-Lease") having a term coinciding with the term of the Mortgage Loan;
- (2) Petitioner will sublet the Leased Property back to NYMEX pursuant to a sub-sublease (the "Sub-Sublease") having a term coinciding with the term of the Sublease; and
- (3) Petitioner will execute the Mortgage, along with NYMEX, as co-mortgagor, for the purpose of subjecting to the lien of the Mortgage Petitioner's leasehold estate under the Sublease and its interest as sublessor under the Sub-Sublease (but not its fee interest in the Leased Property).

In such event, it is possible that Petitioner, in order to provide credit enhancement for the Mortgage Loan, might be a co-borrower with respect to the Mortgage Loan (i.e., Petitioner might execute the note(s) secured by the Mortgage) and might pledge additional assets of Petitioner as security for the Mortgage Loan.

NYMEX and Petitioner anticipate that the Mortgage will, from time to time, be assigned, supplemented, modified or amended and that the instruments effecting any such assignment, supplementation, modification or amendment will be recorded. For instance, in accordance with customary mortgage financing practices, it is anticipated that the Mortgage will be supplemented, modified and converted from a mortgage or mortgages securing construction financing to a mortgage or mortgages securing permanent financing upon the completion of construction of the Project or upon the expiration of the term of the initial Mortgage Loan.

Further, from time to time, the Mortgage may be assigned from one lender to another (possibly immediately after it is recorded); and it is also possible that the identity of the mortgagor will change, by reason of the assignment of the interest of the tenant under the Lease to an affiliate or to an unrelated person.

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 mortgages. 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 for the activities of Petitioner, 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 mortgagee 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 that "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 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).

In an October 19, 1970 opinion, Department of Taxation and Finance Counsel Best stated with reference to the Town of Wallkill Industrial Development Agency's creating statute that:

"In this situation, the later statute specifically exempts from tax the activities of the Agency, one of which is the power to execute mortgages. The power to execute mortgages implies that the Agency may also perform the activity of recording the mortgage. Therefore, in my opinion, the later statute takes precedence over section 252 of the Tax Law."

Counsel, therefore, opined that the mortgages of the Wallkill Industrial Development Agency, organized pursuant to Article 18-A of the General Municipal Law, and remaining subject to such Article, were exempt from the mortgage recording tax imposed pursuant to Article 11 of the Tax Law. (emphasis added)

In New York State Urban Development Corp., Adv Op Comm T&F, March 10, 1993, TSB-A-93(4)-R the Commissioner advised that the petitioner as an agency of the State of New York was immune from taxation and could record mortgages as part of its New York Exchanges Headquarters Land Use Improvement Project where it was a mortgagee, without the payment of the mortgage recording tax.

Section 1981 of the Battery Park City Authority Act (hereinafter the "BPCA Act") provides as follows:

Exemption from taxes

1. It is hereby determined that the creation of the authority and the carrying out of its corporate purposes is in all respect for the benefit of the people of the state of New York, the county of New York, and the city, and is a public purpose, and the authority shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and shall be required to pay no taxes upon any of the properties acquired by it or under its jurisdiction or control or supervision or upon its activities

2. All bonds, notes and other obligations issued pursuant to this title, together with the income therefrom, as well as the income and property of the authority, shall be exempt from taxation, except for transfer and estate taxes. (emphasis added)

Section 1974(3) of the BPCA Act provides that "[t]he Authority shall have power . . . to acquired lease, hold, mortgage and dispose of real property or personal property or any interest therein for its corporate purposes." (emphasis added)

An apparent inconsistency exists between the Tax Law and the BPCA Act. Accordingly, 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.

Since 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 Petitioner which was enacted in 1981. Therefore, if the provisions of the BPCA Act exempt from the recording tax the mortgages created pursuant to the Project, such exemption provisions will prevail.

The BPCA Act gives Petitioner the power to execute mortgages. Having such power implies that Petitioner may also perform the activity of recording mortgages. It is noted that the taxes imposed by Article 11 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. 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; New York State Urban Development Corp., *supra*.

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

It 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 tax is imposed . . . 1956 Atty Gen [Inf Opns], at 28.

In the instant case, since Petitioner will be the named co-mortgagor or mortgagee in one or more mortgages on NYMEX leasehold interests and will be the party who records such 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.

Moreover, Section 1981 of the BPCA Act specifically provides that Petitioner shall pay no taxes upon any of the properties acquired by it or under its jurisdiction or control or supervision or upon its activities. Pursuant to Section 1974(3) of the BPCA Act, Petitioner, as one of its activities has the power to execute mortgages. Accordingly, since the power to execute mortgages would imply that Petitioner has the power to record mortgages, pursuant to Sections 1974(3) and 1981 of the

BPCA Act, it is concluded that Petitioner can record Mortgages in connection with the Project without payment of the mortgage recording taxes imposed under Article 11 of the Tax Law.

It is noted that Petitioner's authorized activities presently do not include the ability to provide the Mortgage Loan. However, Petitioner will seek legislative authority to obtain the ability to provide the Mortgage Loan, and, thus, obtain the ability to act as mortgagee.

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

"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 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 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 taxable 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 the principal amount of secured indebtedness is not increased, the recording of any assignments, modifications, amendments, spreaders, consolidations, substitutions, severance, restatements, and extensions of the Mortgage is exempt from the mortgage recording tax, under current law, either because such action will 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

TSB-A-95 (1)R
Mortgage Recording Taxes
March 13, 1995

amount of secured indebtedness of the Mortgage is increased, and Petitioner is not a party to the recorded instrument evidencing such increase, the mortgage recording tax is due with respect to the amount of the increase.

DATED: March 13, 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.