

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

TSB-A-90(9) R
Mortgage Recording Tax
Real Estate Transfer Tax
October 29, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M900912C

On September 12, 1990, a Petition for Advisory Opinion was received from D & H Corporation, 40 University Avenue, Suite 918, Toronto, Ontario, Canada M5J 1T1.

The issues raised by Petitioner, D & H Corporation, are whether:

1. an exemption from Mortgage Recording Tax is applicable to a mortgagee that is an agency of the United States, acting as trustee on behalf of the United States.
2. an exemption from the Real Estate Transfer Tax (hereinafter the "transfer tax") is applicable when a conveyance has been authorized by the United States bankruptcy court.

Petitioner, a Delaware corporation, is an indirect wholly-owned subsidiary of Canadian Pacific Limited ("Canadian Pacific"). Petitioner has entered into a contract to purchase substantially all the assets of the Delaware and Hudson Railway Company ("D & H"), a debtor in bankruptcy proceedings pursuant to Chapter 11 of the Bankruptcy Code. D & H filed a voluntary petition for reorganization under Subchapter IV of Chapter 11 on June 20, 1988. On June 8, 1990, the Bankruptcy Court for the District of Delaware authorized the sale of substantially all the assets of D & H to Canadian Pacific pursuant to 11 U.S.C. § 363(b) & (f). Canadian Pacific will purchase such assets through its indirect wholly-owned subsidiary, the Petitioner.

In conjunction with the purchase of the D & H assets, the Petitioner will issue a \$35,000,000 principal amount nonrecourse contingency note (the "note") to the United States of America. To secure the note, the Petitioner will enter into an indenture with the Administrator of the Federal Railroad Administration, as trustee for the United States of America.

In accordance with Section 1402 of the Tax Law a transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars. In addition in accordance with Section 1402-a of the Tax Law an additional transfer tax is imposed upon the transfer of residential real property where the consideration exceeds \$1,000,000.

Section 1405(b)8 of the Tax Law provides that the transfer tax shall not apply to any conveyance given pursuant to the Federal Bankruptcy Act.

TSB-A-90(9) R
Mortgage Recording Tax
Real Estate Transfer Tax
October 29, 1990

In accordance with Section 25B of the Tax Law a mortgage recording tax is imposed on the recording of any mortgage on real property situated within New York State.

In Petition of New York v. New York University, 3AD2d 954 the court held that "a mortgage may be exempt from the mortgage recording tax because it is an obligation of an instrumentality of the Federal government and, as such, is beyond the taxing powers of the State."

Also, in the Opinion of the Attorney General to John J. Murray, Dept. of Agr., March 7, 1956, the Attorney General held that a mortgage instrument is exempt from mortgage recording tax where the United States government is the mortgagee. The opinion also held that "the tax exemption also extends to the mortgagor who likewise falls within this governmental immunity since the mortgage recording tax operates as a tax upon the instrument itself (Pittman v. Home Owners' Corporation, 308 US 21)"

49 USCS § 103 provides that the Federal Railroad Administration is an administration in the Department of Transportation. The head of the Administration is the Administrator who is appointed by the President of the United States.

Accordingly, the conveyance of the assets of D & H to the Petitioner will not be subject to transfer tax since the conveyance will be made pursuant to the Federal Bankruptcy Act. Furthermore the mortgage from the Petitioner to the Administrator of the Federal Railroad Administration, will not be subject to the Mortgage Recording Tax since the mortgagee is an instrumentality or agency of the United States of America which is immune from taxation by New York State.

DATED: October 29, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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