

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

TSB-A-97(4)R
Mortgage Recording Tax
Real Estate Transfer Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M970326A

On March 26, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from the Metropolitan Transportation Authority, 347 Madison Avenue, New York, N.Y. 10017; Fleet National Bank, as Trustee (defined below) 777 Main Street, Hartford, Ct. 06115; Philip Morris Capital Corporation and Grant Transit Co., 200 First Stamford Place, Stamford, Ct., 06902; the Triborough Bridge and Tunnel Authority, 347 Madison Avenue, New York, N.Y., 10017; and Utrecht-America Finance Co., c/o Rabobank Nederland, New York Branch, 36th Floor, 245 Park Avenue, New York, N.Y., 10167.

The issues raised by Petitioners, the Metropolitan Transportation Authority ("MTA"), Fleet National Bank ("Trustee"), Philip Morris Capital Corporation (Capital), Grant Transit Co. ("Grant"), the Triborough Bridge and Tunnel Authority ("TBTA"), and Utrecht-America Finance Co. are as follows.

1) Whether the taxes imposed by Article 11 of the Tax Law and Chapter 26 of the New York City Administrative Code (collectively, "the mortgage recording taxes") are due upon:

(i) the execution, delivery or recording by the TBTA of two mortgages granted by the TBTA to the Lenders (as defined below) on its leasehold interest in the Leased Property (as defined below) under a lease (the "Lease") of the Leased Property by the MTA to the TBTA and an assignment of rents in said mortgages and in the Loan Agreement (described below) (individually or collectively, the "Leasehold Mortgage and the Assignment of Rents") under a sublease (the "Sublease") of the Leased Property by the TBTA to the MTA where (a) the TBTA is named mortgagor, (b) the loan (the "Loan") secured in part by the Leasehold Mortgage and the Assignment of Rents will be provided by one or more persons or entities other than, and unrelated to, the MTA (the "Lenders"), (c) the documents for and securing the Loan (the "Loan Documents") are executed by the TBTA, but the Loan is funded only after either (x) the assignment of all of the TBTA's right, title and interest in the Lease, the Sublease, the Support Assets Purchase Option, the Loan Documents, the Leasehold Mortgage and the Assignment of Rents, and the Collateral Assignment (each as described below) to Fleet National Bank as trustee (the "Trustee") under a trust agreement with Capital or Grant ("Grantor") and the assumption by the Trustee of all of the TBTA's obligations (and release of the TBTA) under the Lease, the Sublease, the Loan Documents, the Leasehold Mortgage and the Assignment of Rents and the Collateral Assignment (the "Assignment") or (y) upon the satisfaction of certain conditions and authorizations relating to the possibility of funding the Loan prior to the Assignment, which conditions and authorizations are not expected to occur, and (d) the proceeds of the Loan are used by the Trustee (as the successor in interest to the TBTA) to fund a portion of the lump sum payment to the MTA, which sum constitutes prepaid rent under the Lease and the cost for the option giving the Trustee the right to extend the initial lease term;

(ii) the assignment by the TBTA to the Trustee of its rights (if any), and the assumption by the Trustee of the TBTA's obligations, under the Leasehold Mortgage and the Assignment of Rents;

(iii) the funding of the Loan to (and the execution and delivery of the Loan Certificates (described below) by) the Trustee only after the Assignment; and

(iv) the payment and performance by the Trustee of its obligations under, the holding by the Lenders of, and/or the enforcement by the Lenders of their rights and remedies under or with respect to any of the loan certificates evidencing the Loan (the "Loan Certificates"), the Loan Documents, the Loan Agreement (as defined below), the Leasehold Mortgage and the Assignment of Rents, or the Fee Mortgage.

(2) Whether the mortgage recording taxes are due upon:

(i) the MTA's execution, delivery, or recording of a mortgage or mortgages upon the MTA's fee interest (individually or collectively, the "Fee Mortgage") in the Leased Property given by the MTA to the TBTA to secure the MTA's obligations under the Lease and the Sublease;

(ii) TBTA's execution, delivery and recording of a collateral assignment or assignments of the Fee Mortgage to the Lenders (individually or collectively, the "Collateral Assignment") to secure the TBTA's obligations under the Loan, the Loan Documents, and the Leasehold Mortgage and the Assignment of Rents;

(iii) the further assignment by the TBTA to the Trustee of the TBTA's rights and the assumption by the Trustee of the TBTA's obligations (if any) under the Fee Mortgage and the Collateral Assignment;

(iv) the funding of the Loan to (and the execution and delivery of the Loan Certificates by) the Trustee only after the Assignment; and

(v) the payment and performance by the Trustee of its obligations under, the holding by the Lenders of, and/or the enforcement by the Lenders of their rights and remedies under or with respect to any of the Loan Certificates, the Loan Documents, the Loan Agreement (as defined below), the Leasehold Mortgage and the Assignment of Rents, or the Fee Mortgage.

(3) Whether the mortgage recording taxes are due upon the execution, delivery or recording of the applicable instrument or otherwise if the Leasehold Mortgage and the Assignment of Rents, the Fee Mortgage, or the Collateral Assignment is assigned, supplemented, modified or amended, or if Leasehold Mortgage and the Assignment of Rents, the Fee Mortgage, or the Collateral Assignment so assigned, supplemented, modified or amended is thereafter from time

to time assigned, supplemented, modified or amended to the extent that the then outstanding principal indebtedness or obligation secured by the Leasehold Mortgage and the Assignment of Rents or the obligations pursuant to the Lease and the Sublease secured by the Fee Mortgage or the Collateral Assignment (as the case may be) are not increased.

(4) Assuming the funding of the Loan occurs after the Assignment, whether the Real Estate Transfer Tax imposed by Article 31 of the New York State Tax Law (the "transfer tax") is due upon:

(i) the MTA's entering into the Lease (which includes the Contingent Purchase Option (as defined below)) with the TBTA;

(ii) the TBTA's entering into the Sublease with the MTA;

(iii) the MTA's issuance of the Support Assets Purchase Option (as defined below) to the TBTA, as well as upon the TBTA's reassignment (subject to a reversionary interest) of all of the TBTA's right, title and interest in the Support Assets Purchase Option back to the MTA, and the MTA's subsequent further assignment (which will occur in the circumstances described below) of all of its right, title and interest in the Support Asset Purchase Option, to the TBTA (or to the Trustee, as the TBTA's successor in interest);

(iv) the Collateral Assignment;

(v) the TBTA's assignment to the Trustee (under the circumstances described below) of all of its right, title and interest in, and the assumption by the Trustee of all of the TBTA's obligations under, the Lease, the Sublease, the Loan Documents, the Leasehold Mortgage and the Assignment of Rents, the Collateral Assignment, and the TBTA's reversionary interest in the Support Assets Purchase Option; and

(vi) the MTA's exercising of the Leasehold Option (as defined below).

Petitioner submits the following facts as the basis for this Advisory Opinion. The Long Island Rail Road (the "LIRR"), a subsidiary of the MTA, presently owns fee interest title to a portion of a 30 acre lot of land in Hollis, New York (Queens County) and the MTA owns fee interest title to the remaining portion of such lot of land, on which is situated buildings and equipment (collectively, a/k/a the "Hillside Maintenance Facility" and hereinafter, the "Property"). The LIRR repairs and maintains rail cars on this Property. The LIRR also uses one or more buildings on the Property for administrative purposes.

The MTA is a public authority that serves as New York State's instrument for carrying out programs designed to continue and improve commuter services. It is a body corporate and politic constituting a public benefit corporation.

TSB-A-97(4)R
Mortgage Recording Tax
Real Estate Transfer Tax

The TBTA is a public authority that serves as one of the MTA's instruments for carrying out its programs and purposes. All the members of its board serve ex officio. Those members are the persons who from time to time hold the offices of the Chairman and members of the MTA. The TBTA is a body corporate and politic constituting a public benefit corporation.

Grantor will be the sole grantor and beneficiary of the Hillside Maintenance Facility Trust, a grantor trust, the trustee of which will be the Trustee. Utrecht-America Finance Co. will be the initial Lender and holder of the Loan Documents.

The LIRR will sell its fee interest in its portion of the Property to the MTA in consideration for a purchase money note. The MTA will then, pursuant to the Lease, lease a portion of the Property (the "Leased Property") to the TBTA for a term of approximately 22 years and grant the TBTA the right to extend the term of the Lease (the "option to renew") for one or more additional periods totaling approximately 21.5 years. The aggregate term of the lease (the "Lease Term") will be not greater than 49 years. The TBTA will be obligated to make a lump-sum payment to the MTA for advance rent for the initial term and for the option to renew and such payment will be made by the Trustee after the Assignment. The MTA plans to use a portion of the lump sum payment to either redeem some of its outstanding bonds or for capital improvements. The remaining portion will be used by the MTA to (i) pay the purchase money note, (ii) purchase treasury securities which will be pledged to the Trustee as security for a portion of the MTA's payment obligations pursuant to the Sublease and (iii) pay its transaction costs.

The TBTA will simultaneously sublease the Property to the MTA for a period shorter than the initial term of the Lease (the "Sublease Term"). The MTA will then sub-sublease the Property to the LIRR (the "Sub-sublease") for a period shorter than the Sublease Term. Pursuant to the terms of the Sublease, the MTA will pay periodic rental payments. Upon the expiration of the Sublease Term, the MTA will have the option, but not the obligation, to purchase the TBTA's remaining leasehold interest in the Lease upon payment of a specified lump sum (the "Leasehold Option").

In the event the MTA does not exercise the Leasehold Option, the TBTA (or the Trustee as its successor in interest) may elect either to (i) retain the Leased Property for the balance of the Lease Term and repay the Loans, (ii) cause the MTA to enter into a renewal sublease for a term of up to 12 years or (iii) cause a successor sublessee to enter into a replacement sublease. In addition, upon expiration of either the Lease, the Sublease, or the successor sublease (if any), the TBTA may elect to purchase the Leased Property from the MTA for its then fair market value (the "Contingent Purchase Option").

Upon the MTA's entering into the Lease with the TBTA, the MTA will give the TBTA (or the Trustee as its successor in interest) the right to purchase a specified portion of the Property that is not subject to the Lease (the "Support Assets Purchase Option"). Under the Sublease, the rights to this option are reassigned to the MTA (in such a manner that for purposes of the New York State Real Property Law, a merger will not occur), which will hold the option unless

TSB-A-97(4)R
Mortgage Recording Tax
Real Estate Transfer Tax

and until the MTA defaults under the Sublease or the MTA elects not to exercise the Leasehold Option. In such circumstances, the Support Assets Purchase Option will be re-reassigned to the TBTA (or to the Trustee, as its successor in interest and holder of the TBTA's reversionary interest previously assigned to it) for no consideration. If the TBTA (or the Trustee as its successor in interest) exercises such Support Assets Purchase Option, it will pay the MTA the fair market value (at the time of exercise) of the property subject to the Support Assets Purchase Option.

The TBTA will enter into a loan and security agreement (the "Loan Agreement") with the Lenders in which the Lenders will agree to make the Loan to the TBTA to fund a portion of the lump sum payment owed by the TBTA to the MTA. The TBTA will execute and deliver to the Lenders as named mortgagees and record the Leasehold Mortgage and the Assignment of Rents, which will comprise two Leasehold Mortgage and Assignment of Rents, one payable prior to the other. The Lenders will not, however, fund such obligation until after either the Assignment (which under this scenario will be to the Trustee for no consideration other than the assumption of the TBTA's obligations thereunder and the release of the TBTA from such obligations) or after the satisfaction of certain conditions and authorizations relating to the possibility of funding the Loan prior to the Assignment, which conditions and authorizations are not expected to occur.

Contemporaneously with the execution and delivery of the Leasehold Mortgage and the Assignment of Rents to the Lenders, the MTA will give the TBTA the Fee Mortgage. The Fee Mortgage will secure the MTA's obligations under the Lease and the Sublease. Either the MTA or the TBTA will record such Fee Mortgage. The TBTA will then execute, deliver to the Lenders, and record the Collateral Assignment.

The TBTA will assign, subject to the lien and security interest in favor of the Lenders created by the Leasehold Mortgage and the Assignment of Rents and the Loan Agreement, to the Trustee all of its right, title and interest in and to the (i) Lease (including the Contingent Purchase Option), (ii) Sublease, (iii) Collateral Assignment, (iv) Loan Agreement and (v) its reversionary interest in the Support Assets Purchase Option, and the Trustee will assume the TBTA's rights and obligations under the foregoing. Upon such assignment (unless earlier funded pursuant to the conditions described above) the Lenders will fund such Loan, the Trustee will execute and deliver the Loan Certificates, and the Trustee will pay the lump sum advance rent and the option to renew from amounts derived from an equity contribution to the Trustee and the Loan proceeds.

The Leasehold Mortgage and the Assignment of Rents, the Fee Mortgage, and the Collateral Assignment may from time to time be further assigned, supplemented, modified, or amended and, in this event, appropriate instruments reflecting the assignment, supplement, modification or amendment will be recorded. The identity of the mortgagor may also change by reason of the assignment of its interest to either an affiliate or to an unrelated person.

Relevant Law and Regulations - Mortgage Recording Tax Issues

Section 253 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 the mortgage. The tax imposed in New York City pursuant to the authority of Section 253-a of the Tax Law is not different for purposes of this opinion. Section 250.2 of the Tax Law defines the term mortgage as follows:

every mortgage or deed of trust which imposes a lien on or affects title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby. An assignment of rents to accrue from tenancies, subtenancies, leases or subleases of real property, within any city in the state having a population of one million or more, given as security for an indebtedness, shall be deemed a mortgage of real property for purposes of this article....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.

Section 252 of Article 11 of the Tax Law, which sets forth exemptions from the mortgage recording tax, provides, with certain exceptions not relevant here, 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 contains this language and does not provide a specific exemption for the operations of MTA or TBTA, it is well established that State agencies enjoy an immunity from taxation independent of the language in section 252 of the Tax Law for property utilized in the public interest. New York State Urban Development Corp., Adv Op Comm T&F, March 10, 1993, TSB-A-93(4)-R and New York State Urban Development Corporation d/b/a Empire State Development Corp., Adv Op Comm T&F, December 18, 1995, TSB-A-95(15)-R. Also, in Matter of City of New York v. Tully, 88 AD2d 701, 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 noted that the State agency was immune from taxation "and [t]his immunity is enjoyed independent of the exemptions from taxation set forth in section 252 of the Tax Law..." The Court reasoned that "[t]he mortgage is similarly property of the immune agency and thus exempt from taxation..."

Also, Section 644.1(a)(1) of the Mortgage Recording Tax Regulations (Subchapter N of 20NYCRR) sets forth the following:

- (a) The recording of the following mortgages involving the State or the Federal Government is exempt from the taxes described in Part 642 of this Title:

(1) mortgages where the mortgagor or mortgagee is New York State or any of its agencies, instrumentalities or political subdivisions, to the extent immune from such taxation (Matter of City of New York v. Tully, 88AD2d 701, lv to app den 57 NY 2d 606);

Section 255 of the Tax Law provides, in pertinent part, as follows:

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

The MTA was established by the Metropolitan Commuter Transportation Act (L 1965 Ch 324). The Legislative Declaration of Purpose, which precedes the Metropolitan Commuter Transportation Act, provides, in pertinent part, that:

the urgent and immediate need for the stabilization, strengthening and improvement of commuter services for the transportation of persons in the metropolitan area can be met by the creation of a public authority to serve as the state's instrument for the carrying out of programs designed to continue and improve commuter services.

Public Authorities Law, Section 1264 (Purposes of Authority) states:

(1) The purposes of the authority shall be the continuance, further development and improvement of commuter transportation...within the metropolitan commuter transportation district....It shall be the further purpose of the authority, consistent with its status as the ex officio board of both the New York city transit authority and the triborough bridge and tunnel authority, to develop and implement a unified mass transportation policy for such district.

(2)... The authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title.

Also, Section 1275 of the Public Authorities Law which sets forth the provisions relative to MTA's tax exempt status provides as follows:

It is hereby found, determined and declared that the creation of the authority and the carrying out of its purposes is in all respects for the benefit of the people of the state of New York and for the improvement of their health, welfare and prosperity and is a public purpose, and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this title. Without limiting the generality of the following provisions of this section, property owned by the authority, property leased by the authority and used for transportation purposes, and property used for transportation purposes by or for the benefit of the authority exclusively pursuant to the provisions of a joint service arrangement or of a joint facilities agreement or trackage rights agreement shall all be exempt from taxation and special ad valorem levies. The authority shall be required to pay no fees, taxes or assessments whether state or local, including but not limited to fees, taxes or assessments on real estate, franchise taxes, sales taxes or other excise taxes, upon any of its property, or upon the use thereof, or upon its activities in the operation and maintenance of its facilities or on any fares, tolls, rentals, rates, charges or other fees, revenues or other income received by the authority and the bonds of the authority and the income therefrom shall at all times be exempt from taxation, except for gift and estate taxes and taxes on transfers...

Section 552 of the Public Authorities Law, in describing TBTA sets forth as follows:

A board, to be known as "Triborough bridge and tunnel authority" is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation.

Section 566 of the Public Authorities Law, in describing TBTA's exemptions from taxation, provides as follows:

It is hereby found, determined and declared that the creation of the authority and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state of New York, for the improvement of their health, welfare and prosperity, and, in the case of some said purposes, for the promotion of their traffic, and is a public purpose, ...and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this title, and the state of New York covenants with the holders of the bonds that the authority shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision...

Analysis and Conclusion - Mortgage Recording Tax Issues

Pursuant to applicable provisions of the Public Authorities Law cited herein, MTA and TBTA are agencies and/or instrumentalities of New York State. As such, and in accordance with New York State Urban Development Corp., New York

State Urban Development Corporation d/b/a Empire State Development Corp., and City of New York v. Tully, supra, MTA and TBTA are immune from taxation. Therefore, as provided in Section 644(1)(a) of the Mortgage Recording Tax Regulations supra, the recording of a mortgage where MTA or TBTA is either a mortgagor or mortgagee is exempt from the mortgage recording taxes.

Issue #1(i)

Based on the foregoing, the recording of the Leasehold Mortgage and Assignment of Rents, under the terms and conditions described in this Advisory Opinion where the TBTA is the named mortgagor, is exempt from the mortgage recording taxes. The execution and delivery of the Leasehold Mortgage and Assignment of Rents are not acts upon which the mortgage recording taxes are imposed pursuant to sections 250 and 253 of the Tax Law.

Issue #1(ii)

In accordance with sections 250 and 253 of the Tax Law, the assignment by TBTA to the Trustee of its rights (if any), and the assumption by the Trustee of the TBTA's obligations, under the Leasehold Mortgage and the Assignment of Rents are not events which would cause the mortgage recording taxes to be imposed.

Issue #1(iii)

In accordance with sections 250 and 253 of the Tax Law, the funding of the Loan and the execution and delivery of the Loan Certificates to the Trustee only after Assignment are not events which would cause the mortgage recording taxes to be imposed.

Issue #1(iv)

In accordance with sections 250 and 253 of the Tax Law, the payment and performance by the Trustee of its obligations under, the holding by the Lenders of, and/or the enforcement by the Lenders of their rights and remedies under or with respect to the Loan Certificates, the Loan Documents, the Loan Agreement, the Leasehold Mortgage and the Assignment of Rents, or the Fee Mortgage are not events which would cause the mortgage recording taxes to be imposed.

Issue #2(i)

The recording of the Fee Mortgage (where MTA is the mortgagor and TBTA is the mortgagee) is exempt since at least one party to the mortgage at the time of recording is an agency and/or instrumentality of New York State. The execution and delivery of the Fee Mortgage are not acts upon which the mortgage recording taxes are imposed pursuant to sections 250 and 253 of the Tax Law.

Issue #2(ii)

The Collateral Assignment is not a mortgage under section 250.2 of the Tax Law. Therefore, its execution, delivery and recording are not subject to the mortgage recording taxes.

Issue #2(iii)

In accordance with sections 250 and 253 of the Tax Law, the further assignment by the TBTA to the Trustee of the TBTA's rights and the assumption by the Trustee of the TBTA's obligations (if any) under the Fee Mortgage and the Collateral Assignment are not events that would cause the mortgage recording taxes to be imposed.

Issue #2(iv)

In accordance with sections 250 and 253 of the Tax Law, the funding of the Loan to (and the execution and delivery of the Loan Certificates by) the Trustee only after the Assignment are not events that would cause the mortgage recording taxes to be imposed.

Issue #2(v)

In accordance with sections 250 and 253 of the Tax Law, the payment and performance by the Trustee of its obligations under, the holding by the Lenders of, and/or the enforcement by the Lenders of their rights and remedies under or with respect to any of the Loan Certificates, the Loan Documents, the Loan Agreement, the Leasehold Mortgage, the Assignment of Rents or the Fee Mortgage are not events which would cause the mortgage recording taxes to be imposed.

Issue #3

The recording of an initial assignment, supplement, modification or amendment of the Leasehold Mortgage and the Assignment of Rents, the Fee Mortgage or the Collateral Assignment to the extent that the then principal indebtedness or obligation secured by the Leasehold Mortgage and the Assignment of Rents or the obligations pursuant to the Lease and the Sublease secured by the Fee Mortgage or the Collateral Assignment (as the case may be) are not increased are either exempt from mortgage recording taxes pursuant to section 255 of the Tax Law or are not subject to mortgage recording taxes because such action does not create a mortgage as defined in section 250.2 of the Tax Law. The recording of any subsequent (following in time to the initial assignment) assignment, supplement, modification or amendment of the Leasehold Mortgage and Assignment of Rents, the Fee Mortgage or the Collateral Assignment under the conditions as described above in the case of an initial assignment, are either exempt from the mortgage recording taxes or are not subject to the mortgage recording taxes for the same reasons as in the case of the initial assignment of these instruments.

Relevant Law - Transfer Tax

Section 1402 of the Tax Law imposes the transfer tax on each conveyance of real property or interest therein when the consideration for the conveyance exceeds \$500.00.

Section 1401(e) of the Tax Law defines the term "conveyance", in part, as follows:

"conveyance" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the real property. Notwithstanding the foregoing, conveyance of real property shall not include a conveyance pursuant to devise, bequest or inheritance; the creation, modification, extension, spreading, severance, consolidation, assignment, transfer, release or satisfaction of a mortgage; a mortgage subordination agreement, a mortgage severance agreement, an instrument given to perfect or correct a recorded mortgage;...

Section 1401(f) of the Tax Law, in defining the term "interest in real property" provides, in pertinent part, that such term includes:

...title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. It shall also include an option or contract to purchase real property....

Section 1401(d) of the Tax Law defines the term "consideration" in pertinent part, as follows:

"Consideration" means the price actually paid or required to be paid for the real property or interest therein, including the payment for an option or contract to purchase real property, whether or not expressed in the deed and whether paid or required to be paid by money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or takes subject to....

Section 1405(b)(1) of the Tax Law, which sets forth the conveyances which are exempt from the transfer tax, sets forth, in pertinent part, that the transfer tax shall not apply to conveyances to the State of New York, or any of its instrumentalities, agencies or political subdivisions (or any public corporation, including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada).

Analysis and Conclusion-Transfer Tax Issues

Issue 4(i)

The MTA's entering into the Lease (which includes the Contingent Purchase Option with the TBTA) is exempt from transfer tax pursuant to section 1405(b)(1) of Tax Law, as the grantee is an agency or instrumentality of New York State.

Issue 4(ii)

The TBTA's entering into the Sublease with the MTA is not a conveyance subject to the transfer tax pursuant to section 1401(e) of the Tax Law as the term of the sublease is less than 49 years. Furthermore, if it was a conveyance subject to transfer tax, it would be exempt for the same reason cited in Issue 4(i).

Issue 4(iii)

The MTA's issuance of the Support Assets Purchase Option to the TBTA, as well as TBTA's reassignment (subject to a reversionary interest) of all of the TBTA's right, title and interest in the Support Assets Purchase Option back to the MTA, and the MTA's subsequent further assignment of all of its right, title and interest in the Support Assets Purchase Option to the TBTA is exempt from the transfer tax pursuant to the aforementioned exemption provided at section 1405(b)(1) of the Tax Law. In the event the MTA is obligated to assign the Support Assets Purchase Option to the Trustee, no transfer tax would be due, since there is no consideration for the conveyance.

Issue 4(iv)

The Collateral Assignment is not a conveyance subject to transfer tax pursuant to the definition of conveyance provided at section 1401(f) of the Tax Law, as the Collateral Assignment constitutes the assignment of a mortgage.

Issue 4(v)

The TBTA's assignment to the Trustee of all of its right, title and interest in, and the assumption by the Trustee of all of the TBTA's obligations under the Lease and the Sublease and the TBTA's reversionary interest in the Support Assets Purchase Option are conveyances which will not incur transfer tax as there is no consideration for these conveyances. The TBTA's assignment to the Trustee of the Loan Documents, the Leasehold Mortgage and the Assignment of Rents and the Collateral Assignment are not conveyances of real property pursuant to section 1401(e) of the Tax Law.

TSB-A-97(4)R
Mortgage Recording Tax
Real Estate Transfer Tax

Issue 4(vi)

The MTA's exercising of the Leasehold Option would result in a conveyance exempt from the transfer tax pursuant to section 1405(b)(1) of the Tax Law.

DATED: March 28, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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