

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(1)R
Mortgage Recording Tax
March 17, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M090210A

On February 10, 2009, a Petition for Advisory Opinion was received from [REDACTED].

The Petitioner, [REDACTED], raises two issues:

Issue (1) Is the tax imposed by Article 11 of the New York State Tax Law and Chapter 26 of the New York Administrative Code (collectively, the “mortgage recording tax”) due upon the recording of any mortgage of property that is part of the Octagon Project on Roosevelt Island (the “Octagon Project”) where (a) Petitioner is either the sole named mortgagee (whether as trustee, agent, nominee or otherwise) or a co-mortgagee (whether or not a private entity is the other co-mortgagee(s)); (b) Petitioner records the mortgage; (c) the loan funds secured by the mortgage are provided by one or more persons or entities other than Petitioner; and (d) at such times as mortgage recording taxes would be due and payable but for Petitioner’s exemption, the mortgagor is obligated to pay Petitioner an amount equal to the mortgage recording taxes that otherwise would have been payable, with all such amounts to be available to Petitioner to further develop and maintain projects on Roosevelt Island.

Issue (2) Is mortgage recording tax due (upon the recording of the applicable instrument or otherwise) if the mortgage referred to in Issue (1) is assigned, supplemented, modified or amended, or if any mortgage so assigned, supplemented¹, modified or amended is thereafter from time to time assigned, supplemented, modified or amended to the extent that the then outstanding principal indebtedness secured by the mortgage is not increased (or, if increased, whether mortgage recording tax is to be imposed only with respect to any increase in the amount of secured indebtedness, and then only if mortgage recording tax would otherwise have been required to be paid on such additional indebtedness).

Facts

The development of Roosevelt Island is a project of the New York State Urban Development Corporation (now known as the Empire State Development Corporation, and referred to herein as “UDC”), pursuant to a 99-year lease with the City of New York.

In 1969, the City of New York (the “City”) requested UDC, pursuant to a lease between the City and UDC as amended (the “City Lease”), to use its statutory powers under the New York State Urban Development Act (the UDC Act)² to carry out the development program for Roosevelt Island as a UDC Project, envisioned by a master plan originally developed by Philip Johnson and John Burgee (the “Master Plan”). The elements of the Master Plan became the General Development Plan (“the GDP”) that was attached as a Schedule to the City Lease.

¹ “Supplemented” and “supplement”, as used herein, include, without limitation, any spreader, consolidation, substitution, severance, restatement and/or extension.

² McKinney’s Unconsolidated Laws, §§ 6251-6287.

In 1981, the New York State Division of Housing and Community Renewal (“DHCR”) assumed the administration of the Island pursuant to an agreement with UDC. In 1984, the New York State Legislature created Petitioner as a body corporate and politic constituting a public benefit corporation and a political subdivision of the State of New York. UDC’s rights and obligations were transferred to Petitioner, as successor in interest, with respect to the development, operation and supervision of both the existing and proposed development on Roosevelt Island under the supervision of DHCR, with certain statutory assurances that Petitioner would repay to UDC all of its investment in Roosevelt Island from the revenues generated by the UDC projects. The Commissioner of DHCR will serve as Chair of Petitioner.³ In 1988, in accordance with the RIOC Act, the City Lease was assigned by UDC to Petitioner and accordingly, the existing and proposed developments continue to be UDC Projects under the UDC Act⁴, subject to the provisions of the City Lease.

The GDP provided for development of a portion of Roosevelt Island called Southtown, calling for the 19.3 acre site to be developed in phases, with approximately 2,000 residential units of low-income, moderate income and conventional housing, retail space, a soccer/baseball field, and a commons (or Town Square). To date, four buildings have been completed as part of the Southtown project, and two more buildings are under construction.

In addition to contemplating the construction of new housing units with public facilities and “Open Space Areas,” the GDP also calls for the rehabilitation of the historic landmarks on Roosevelt Island, including the Octagon Tower. The GDP was further amended and restated in 2003 to provide for the construction of approximately 500 dwelling units in buildings attached or adjacent to the Octagon Tower, together with parking and an ecological park. At a cost of more than \$10 million, which was funded by MEPT Octagon LLC (“MEPT”), the historic Octagon Tower was fully restored to its former exterior appearance, and the surrounding area cleared and opened to the public.

The Octagon Project was implemented by an Agreement of Lease dated as of November 3, 2004 between Petitioner and MEPT (the “MEPT Lease”). MEPT in turn entered into a sublease with Octagon, L.P., (the “Octagon Sub-Sublease”) and Development Agreements with Octagon Development LLC, and a construction management agreement with Gotham Construction Company, LLC, to construct and operate the Octagon Project.

If MEPT obtains a mortgage on its leasehold interest, which is exempt from the imposition of mortgage recording tax as a result of Petitioner’s being named as a co-lender on the mortgage, it is obligated to pay to Petitioner the amount of the mortgage recording taxes which would have been payable but for the exemption. Petitioner will have use of the funds to improve and maintain facilities benefiting all residents of Roosevelt Island.

MEPT initially funded the development costs itself. Under the contemplated financing arrangements, MEPT now intends to borrow funds from a lender (the “Lender”) other than Petitioner. The borrowing will be secured by one or more mortgages against MEPT’s sublease-hold interests in the MEPT Lease and the Octagon Sub-Sublease, and subordinated to both Petitioner’s leasehold interest and the City Lease. Neither the City Lease nor Petitioner’s leasehold interest will be encumbered by the mortgage(s). Petitioner initially will be a named mortgagee, either alone or with the other Lender, and will record the mortgage(s). Although

³ §6387(2) of the RIOC Act.

⁴ McKinney’s Unconsolidated Laws §6253(6).

Petitioner will be named as a mortgagee, all of the rights under the mortgages(s) will inure to the benefit of the Lender, who will for all purposes be the beneficial owner of the mortgage(s). Upon recording the mortgage(s), Petitioner will assign to the Lender all of Petitioner's right, title and interest in and to the mortgage(s). After assigning its interest to the Lender, Petitioner will continue to hold title to its leasehold interest and will have enforcement rights under the MEPT Lease.

After Petitioner initially records the mortgage(s) and assigns its interest to the Lenders, the mortgage(s) may from time to time be further assigned, supplemented, modified or amended and, in any such event, appropriate instruments reflecting such assignment, supplement, modification or amendment will be recorded. Loans may be refinanced or assigned by one lender to another. The identity of the mortgagor may also change either by reason of the assignment of the lessee/mortgagor's interest to an affiliate or to an unrelated person.

Analysis

Article 11 of the New York State Tax Law ("Tax Law") imposes taxes on the recording of mortgages on real property, based on the principal debt or obligation secured by the mortgage being recorded. Tax Law §253. In addition, a contract or agreement by which the indebtedness secured by any mortgage is increased is deemed a mortgage of real property and is taxable as such upon the amount of the increase. Tax Law §250.2. The mortgage recording tax statute enumerates certain exemptions (Tax Law §§252, 252-a, 253.3), none of which is applicable here, but some other exemptions arise under the common law, and still others apply by reason of statutory provisions outside of the mortgage recording tax statutes.

It is well established that State agencies enjoy immunity from taxation independent of the statutory exemptions for property used in the public interest, on the theory that imposition of a tax upon a mortgage held by a State agency is tantamount to a tax upon the agency itself in violation of its immunity from taxation.⁵ This principle has been applied in exempting from the mortgage recording tax the recording of mortgages on property for which the legal title is held by an industrial development agency and the beneficial ownership is held by a non-exempt private party. See 1982 Opinion of the State Comptroller No. 82-188, p 240. In Hotel Waldorf-Astoria Corp. v. State Tax Commission⁶, 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 enjoys an immunity from taxation independent of the statutory exemptions listed in Section 252 of the Tax Law."

In the case of Petitioner, a clear statutory exemption from taxes has been provided by the State Legislature. The RIOC Act provides in part:

[T]he creation of [RIOC] and the carrying out of its purposes is in all respects for the benefit of the people of the state and is a public purpose, and that [RIOC] will be performing an essential governmental function in the exercise of the powers conferred upon it by this act. [RIOC]

⁵ See also, City of New York v. Tully, 88 A.D.2d 701, 451 N.Y.S.2d 265 (3d Dept. 1982) (companion case to Hotel Waldorf Astoria Corp. supra), TSB-A-94(1)R (Jan. 28, 1994) (NYS Energy Research and Development Authority exempt from mortgage recording tax); the Exchanges Advisory Opinion (ESDC exempt from mortgage recording tax); the 42nd Street Advisory Opinion (ESDC exempt from mortgage recording tax).

⁶ 86 A.D.2d 330, 334; 451 N.Y.S.2d 261 (1982).

and its operations, property and moneys shall be free and exempt from taxation of every kind by the city and the state and any subdivision thereof. Except as hereinabove provided and except as may otherwise specifically be provided, nothing contained in this act shall confer exemption from any tax, assessment or fee upon any person, firm, corporation or other entity, or upon the obligations of any of them.⁷ (Emphasis added.)

The RIOC Act also gives Petitioner the power to subject its property to a purchase money or other lien or security interest in connection with the acquisition and development of its property. Section 6388(5) of the Act provides, in part, that in carrying out the development, management and operation, the corporation shall have the power to:

(5) Acquire in the name of the corporation by purchase, grant or gift, or by the exercise of the power of eminent domain pursuant to the eminent domain procedure law, or otherwise, real or personal property, or any interest therein deemed necessary or desirable for the development, management or operation of Roosevelt Island, including, without limitation, leasehold interest, air and subsurface rights, easements and lands under water at the site of Roosevelt Island or in the general vicinity thereof, and to subject such property or interest therein to a purchase money or other lien or security interest in connection with the acquisition and development thereof....

Having this power implies that Petitioner may also perform the activity of recording mortgages.

This creates an inconsistency between the RIOC Act and the provision in §252 of the Tax Law that states that no mortgage of real property in New York and no person or corporation owning any debt secured by a mortgage on real property situated in New York is exempt from the taxes imposed by Article 11 of the Tax Law by reason of anything contained in any other statute. Where a conflict exists between two enactments relating to the same subject matter, the later specific enactment governs the earlier general enactment. Williamsburgh Power Plant Corp. v. City of New York.⁸ Since the pertinent provisions of the mortgage recording tax were enacted in 1909, they must yield to the exemption provisions contained in the 1984 law creating Petitioner. Thus, the mortgage recording tax does not apply where Petitioner records mortgages in the exercise of its statutory powers, and this position has been adopted by both the courts and by this Department.

In an Advisory Opinion about the Southtown Project on Roosevelt Island, this Department affirmed Petitioner's exemption from State and New York City mortgage recording taxes. TSB-A-01(5)R. The facts in this petition concerning the Octagon project are nearly identical to those in the Southtown Project petition.

In light of the above, it is concluded that the mortgage recording tax is not due upon the recording of any mortgage recorded in connection with the Octagon Project, if Petitioner is named mortgagee (whether as trustee, agent, nominee or otherwise) and Petitioner presents the mortgage for recording.

To the extent that the mortgage continues to secure the same principal debt or obligation, the recording of any assignment, supplement, modification, or amendment of a mortgage described in the preceding paragraph is exempt from the mortgage recording tax, either because such action does not create

⁷ §6395(2) of the RIOC Act.

⁸ 255 A.D. 214, 7 N.Y.S.2d 326 (2nd Dept. 1938), aff'd 280 NY 551 (1939).

a new mortgage subject to tax under section 253 of the Tax Law, or because the instrument constitutes a “supplemental mortgage” under Section 255 of the Tax Law. City of New York v. State Tax Commission,⁹ To the extent that a new or further indebtedness is secured in conjunction with the recording of any assignment, supplement, modification, or amendment of such a mortgage, mortgage recording tax would be imposed only with respect to any new or further indebtedness, and then only if mortgage recording tax would otherwise have been required to be paid on the recording of a mortgage that secures the new or further indebtedness.

DATED: March 17, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.

⁹ 130 A.D.2d 890, 891, 516 N.Y.S.2d 132 (1987).