

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

TSB-A-92(5)-R  
Mortgage  
Recording Tax  
September 30, 1992

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M920810A

On August 10, 1992, a Petition for Advisory Opinion was received from KIAC Partners, c/o Airport Cogeneration, 166 Montague Street, Brooklyn, New York 11201.

The issue raised by Petitioner, KIAC Partners, is whether a leasehold mortgage to be granted by Petitioner as a supplemental mortgage to an assignment of rents granted by the Port Authority of New York and New Jersey is exempt under Section 255 of the Tax Law from the mortgage recording tax imposed under Section 253 of the Tax Law.

Petitioner is a New York general partnership between Airport Cogen Corp. (a special purpose subsidiary of Gas Energy Inc., a cogeneration development company of The Brooklyn Union Gas Company) and CEA KIA, Inc. (a special purpose subsidiary of Community Energy Alternatives Incorporated, an indirectly owned subsidiary of Public Service Enterprise Group Incorporated).

Under certain agreements with The Port Authority of New York and New Jersey (the "Authority"), Petitioner will construct and operate a central heating and refrigeration plant, thermal distribution system and ninety net megawatt natural gas-fired cogeneration plant (the "Cogeneration Project") at John F. Kennedy International Airport (the "Airport") in Queens, New York.

The Authority is a body corporate and politic and a municipal corporate instrumentality of the States of New York and New Jersey created and existing by virtue of the Compact of April 30, 1921, made by and between the States of New York and New Jersey and thereafter consented to by the Congress of the United States.

The Cogeneration Project is to be constructed at the Airport on premises leased to the Authority by The City of New York (the "City") and operated by the Authority under an "Agreement with respect to Municipal Air Terminals" between the Authority and the City (the "City Lease"). The Cogeneration Project will be included in the premises covered by the City Lease and is intended to serve and be available on a regular basis for Airport use.

To provide in part for the financing and/or refinancing of certain project costs of the Cogeneration Project, upon request of Petitioner, the Authority would issue up to \$250,000,000 in aggregate principal amount at any one time outstanding of its Special Project Bonds (the "Bonds"). The Bonds would be issued by the Authority pursuant to the provisions of the resolution adopted by the Authority on June 9, 1983, establishing an issue of special limited obligations of the Authority

TSB-A-92(5)-R  
Mortgage  
Recording Tax  
September 30, 1992

known as "Special Project Bonds" (the "Special Project Bond Resolution") and the resolutions adopted by the Authority on June 11, 1992, establishing and authorizing the issuance of the Bonds in certain series (the "Special Project Bond Series Resolutions", collectively, with the Special Project Bond Resolution, the "Resolutions").

In connection with the issuance, sale and delivery of the Bonds, the Authority would enter into a Trust Indenture with bank or trust company to be appointed by the Authority as trustee for the holders of the Bonds (the "Trustee").

Under the Trust Indenture, the Authority would give, grant, mortgage, pledge, grant a security interest in and assign to the Trustee as security for the payment of the Bonds, among other items, all rights, title and interest of the Authority in and to certain rentals (the "Facility Rental") payable by Petitioner to the Authority pursuant to an Agreement of Lease (the "Lease") to be entered into by the Authority and Petitioner providing for the issuance of the Bonds and the leasing to Petitioner of the Cogeneration Project to be constructed from the proceeds of the Bonds and other available monies.

The Bonds would not constitute general obligations of the Authority and neither the full faith and credit of the Authority nor any of its revenues, assets or reserve funds (other than as specifically pledged to the payment of debt service on the Bonds by the Authority in the Resolutions and in the Trust Indenture) would be pledged or would be deemed to be pledged in any manner whatsoever to the payment of debt service on the Bonds or for the fulfillment of any obligation which the Authority would assume to or for the benefit of the holders of the Bonds.

The Authority would execute and deliver to the Trustee an Assignment of Rents (the "Assignment of Rents"), by and between the Authority and the Trustee, which would confirm the delivery by the Authority to the Trustee contemporaneously therewith and the receipt by the Trustee of the Trust Indenture and the trust estate, including the assignment of all right, title and interest of the Authority in and to the Facility Rental (which would include the accelerated Facility Rental, if applicable) payable by Petitioner to the Authority pursuant to the Lease, subject, however, to the provisions of the Trust Indenture, the Lease and the Resolutions.

Under the provisions of the Resolutions, as a condition to the issuance of the Bonds, the payment of the Bonds is to be secured, inter alia, by the leasehold mortgage (the "Leasehold Mortgage"), from Petitioner, as Mortgagor, of its right, title and interest in and to its leasehold interest in the premises under the Lease, to the Trustee for the benefit of the holders of the Bonds, subject to the terms and provisions of the Leasehold Mortgage and the Lease.

The Leasehold Mortgage would secure the payment of the total aggregate principal amount of the Bonds in the maximum aggregate amount of \$250,000,000 or such lesser amount as may be outstanding from time to time, together with the interest payable on the Bonds and the amounts which the Authority was obligated by agreements with or for the benefit of the holders of the Bonds

TSB-A-92(5)-R  
Mortgage  
Recording Tax  
September 30, 1992

to pay or set aside for the amortization, maturity, redemption (including redemption premiums, if any) or retirement of the Bonds, subject to the terms and provisions of the Leasehold Mortgage and the Lease.

The Leasehold Mortgage would impose the lien thereof upon property not originally covered by or described in the Assignment of Rents (i.e., all of the Mortgagor's right, title and interest in and to its leasehold interest in the premises under the Lease, subject to the terms and provisions of the Leasehold Mortgage and the Lease). The Leasehold Mortgage would be recorded in Queens County, New York, as additional security for the debt secured by the mortgages by the Authority to the Trustee to or for the benefit of the holders of the Bonds, which would be recorded in the form of the Assignment of Rents in Queens county, New York prior to recordation of the Leasehold Mortgage.

Section 253 of the Tax Law imposes a tax on the recording of a mortgage of real property in the State measured by the principal debt or obligation, which is, or under any contingency, may be secured at the date of the execution thereof or at any time thereafter. The tax imposed pursuant to the authority of Section 253-a of the Tax Law in New York City is not different for purposes of the opinion.

Although Section 252 of the Tax Law rules out any exemption from taxes given in any other law, the exemption of public bodies or the State from this tax has always been recognized as a matter of constitutional principle.

The Port Authority was created as "a body politic and corporate, as an instrumentality or agency of the two states ... " (McK. Unconsol. L. §6451).

Section 250 of the Tax Law includes the following sentence:

"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."

By virtue of Section 250 of the Tax Law the mortgage from the Authority to the Trustee, which includes rental payable to the Authority is a mortgage under Article 11 of the Tax Law. It may be recorded without payment of the tax, because the borrower is an agency of the State. (Hotel Waldorf-Astoria Corp. v. State Tax Comm., 86 AD 2d 330, iv. to app. denied 58 NY 2d 603)

However, this exemption does not extend to the mortgage to be given by Petitioner to the Trustee, since neither borrower nor lender will be an agency of the State. The fact that the tax, if imposed, may be passed on to the Authority is not sufficient grounds to make the mortgage exempt. The other possible grounds for exemption is section 255, subdivision l(a) of the Tax Law, which provides:

TSB-A-92(5)-R  
Mortgage  
Recording Tax  
September 30, 1992

1. (a) 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, except as otherwise provided in paragraph (b) of this subdivision, unless it creates or secures a new or further indebtedness or obligation secured by or which under any contingency may be secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred and fifty-three of this chapter on such new or further indebtedness or obligation.

The mortgage to be granted by Petitioner to the Trustee comes within the purview of Section 255.1(a) of the Tax Law. Therefore, such mortgage can be recorded without payment of the mortgage recording tax, provided, the assignment of rents granted by the Authority to the Trustee is recorded first. It is important to emphasize that unless the mortgage to be granted by Petitioner to the Trustee is recorded subsequent to the recording of the assignment of rents there is no supplemental mortgage and no exemption.

DATED: September 30, 1992

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

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