TSB-A-95 (16) - R
Mortgage Recording Taxes
December 22, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION   PETITION NO. M950802C

On August 2, 1995, a Petition for Advisory Opinion was received from Greater Syracuse Business Development Corporation, 572 South Salina Street, Syracuse, New York, 13202-3320.

The issue raised by Petitioner, the Greater Syracuse Business Development Corporation ("GSBDC"), is whether construction loan mortgages recorded by the GSBDC are exempt from the mortgage recording tax imposed by Article 11 of the New York Tax Law, where the mortgages are assigned immediately after recording to a private lender for the duration of the construction phase, but then reassigned to GSBDC after the completion of the construction phase for the remainder of the term.

GSBDC is a not-for-profit local development corporation reincorporated under Section 1411 of the Not-For-Profit Corporation Law. GSBDC'S operations include making loans to businesses in Onondaga and contiguous counties secured by, among other things, mortgages on real property situated within New York State. These mortgages are recorded in the County Clerk's office in which the real property is situated.

In furtherance of its corporate purposes and powers, GSBDC participates in permanent financing of construction loans pursuant to the United States Small Business Administration's (SBA) 504 Loan Program (the "Program").

The Program was established by the SBA to make available to local development companies, like GSBDC, funds to loan to eligible business concerns. The Program provides long-term permanent financing to these businesses in participation with private lenders, and requires an equity contribution on the part of the borrower. Typically, the private lender provides permanent financing in an amount not to exceed fifty percent (50%) of the total project cost, with forty percent (40%) provided by the local development company and ten percent (10%) provided by the borrower. However, variations of the 50-40-10 allocation are permitted under certain circumstances.

Pursuant to the loan program, GSBDC commits to lending forty percent (40%) of the total cost, once the construction phase is complete. GSBDC, in furtherance of its corporate purposes and powers, plans to extend its participation in construction loans to Program borrowers by becoming involved, during the construction phase, in lending the amount (forty percent) for which it would ultimately provide permanent financing. GSBDC proposes to accomplish this as follows.

At the closing of the construction loans, in exchange for its commitment, GSBDC would take a promissory note (the "Note") from the borrower for an amount equal to forty percent (40%) of the total project cost. The Note would be secured by a mortgage granted by the borrower to GSBDC (the "Mortgage"). The construction loan agreement (the "Loan Agreement") would require GSBDC to advance funds to the borrower throughout the construction phase of the project up to the amount of its construction loan commitment with the funds provided to it by a participating lender through a one hundred percent (100%) pre-closing syndication of the loan with the lender. At the closing, GSBDC would effectively assign the Loan Agreement to the private lender. Advances under the Loan Agreement would be made by the private lender, directly or through GSBDC. Pursuant to a contract between GSBDC and the private lender, the Note and Mortgage would be directly enforceable only by the private lender even though the Note and Mortgage are never formally assigned to the private lender. The private lender would also take a separate note and mortgage for a portion of the remaining total project cost, typically fifty percent (50%). The remaining ten percent (10%) of the project cost would be provided by the borrower.

Upon completion of the construction phase, GSBDC would, through funding provided to it by the SBA and pursuant to its permanent financing commitment, take out the private lender for the forty percent (40%) of the total project costs that it lent through syndication. There would also be a modification of the Note and Mortgage to reflect permanent financing terms.

Section 252 of the Tax Law provides, with certain exceptions, 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 taxes imposed by this article by reason of anything contained in any other statute..."

Section 1411 of the Not-for-Profit Corporation Law authorizes the creation of local development corporations. Subdivision (c) of section 1411 grants the following powers to local development corporations:

> to construct, acquire, rehabilitate and improve for use by others industrial or manufacturing plants in the territory in which its operations are principally to be conducted, to assist financially in such construction, acquisition, rehabilitation and improvement, to maintain such plants for others in such territory, to disseminate information and furnish advice, technical assistance and liaison with federal, state and local authorities with respect thereto, to acquire by purchase, lease, gift, bequest, devise or otherwise real or personal property or interests therein, to borrow money and to issue negotiable bonds, notes and other obligations therefor, and notwithstanding section 510 (Disposition of all or substantially all assets) without leave of the court, to sell, lease, mortgage or otherwise dispose of or encumber any such plants or any of its real or personal property or any interest therein upon terms as it may determine and, in connection with loans from the New York job development authority, to enter into covenants and agreements and to comply with all terms, conditions and provisions thereof, and otherwise to carry out its corporate purposes and to foster and encourage the location or expansion of industrial or manufacturing plants in the territory in which the operations of such corporation are

> principally to be conducted, provided, however, that no such corporation shall attempt to influence legislation by propaganda or otherwise, or participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

Section 1411(f) of such law provides that "[t]he income and operations of corporations incorporated and reincorporated under this section shall be exempt from taxation."

Notwithstanding the language of Section 252 of the Tax Law, it is noted that claims for exemption from the mortgage recording tax by various public authorities in New York State based on tax exemptions provided in their creating statutes have been consistently allowed. This position is consistent with the general rule that where a conflict or variance exists between two enactments relating to the same general subject matter, the later special statute takes precedence against a general statute and the prior general statute must yield to the later specific or special statute. (Williamsburg Power Plant Corp. v City of New York, 255 App Div 214, affd 280 NY 551; First National Bank and Trust Co. v. Village of Saltaire, 256 App Div 156 and Empire State Certified Development Corporation, Adv Op Comm T&F, June 29, 1993, TSB-A-93(13)-R).

In accordance with the rationale set forth in Williamsburg Power Plant Corp. v City of New York, supra, First National Bank and Trust Co. v. Village of Saltaire, supra, and Empire State Certified Development Corporation supra, since Petitioner is reincorporated under Section 1411 of the Not-For-Profit Corporation Law, and Section 1411(f) provides that the income and operations of corporations incorporated or reincorporated under such section shall be exempt from taxation, the recording of mortgages given to Petitioner is exempt from the mortgage recording tax imposed by Article 11 of the Tax Law. This conclusion is unaltered by the fact that the mortgages are or may be assigned immediately after recording to a private lender for the duration of the construction phase of the Project, but then reassigned to Petitioner after the completion of the construction phase for the remainder of their term.

DATED: December 22, 1995

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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