

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

TSB-A-95 (6)R
Mortgage Recording Taxes
July 6, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M950315A

On March 15, 1995, a Petition for Advisory Opinion was received from Fashion Mall Partners, L.P., c/o The O'Connor Group, 399 Park Avenue, 25th Floor, New York, NY 10022.

The issue raised by Petitioner, Fashion Mall Partners, L.P., is whether an amended mortgage to be presented for recording by Petitioner in connection with a refinancing transaction will be exempt from the mortgage recording taxes imposed by Article 11 of the Tax Law.

Petitioner is a Delaware limited partnership whose general partner is O'Connor Fashion Mall Partners, a New York general partnership.

In December 1992, the County of Westchester Industrial Development Agency, an industrial development agency created pursuant to the New York State Industrial Development Agency Act (the "Agency"), acquired certain land and improvements located in White Plains, New York, for the purpose of constructing thereon an enclosed regional shopping mall (collectively, the "Project"). The Agency obtained construction financing for the Project pursuant to a Building Loan Agreement dated as of December 30, 1992, by and among Bank of Montreal, New York Branch, the Sumitomo Bank, Limited, New York Branch, Bayerische Hypotheken-Und Wechsel-Bank Aktiengesellschaft, New York Branch, and Credit Lyonnais, New York Branch (collectively, the "Existing Lenders"), the Agency and Petitioner. The Agency also obtained construction financing for the Project pursuant to an Indirect Costs Loan Agreement dated as of December 30, 1992, by and among the Existing Lenders, the Agency and Petitioner. The Building Loan Agreement and the Indirect Costs Loan Agreement provide that the Existing Lenders will make advances to the agency from time to time to fund construction costs for the Project up to a maximum aggregate loan amount of \$160,000,000. As of the date hereof, a total of \$114,832,192 has been borrowed by the Agency, which obligation is evidenced by a Building Loan mortgage Note in the current principal amount of \$95,590,052 and an Indirect Costs Loan Mortgage Note in the current principal amount of \$19,242,140. Both the Building Loan Mortgage Note and the Indirect Costs Loan Mortgage Note have a five-year term and are secured by a first mortgage on the real property comprising the Project created pursuant to the Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement (the "Building Loan Mortgage") dated as of December 30, 1992, between the Agency and Petitioner in favor of the Existing Lenders, and the Indirect Costs Loan Mortgage, Assignment of Leases and Rents and Security Agreement (the "Indirect Costs Mortgage") dated as of December 30, 1992, between the Agency and Petitioner in favor of the Existing Lenders, (collectively, the "Mortgage"). The maximum principal amount which is or which under any contingency may be secured by the Mortgage is \$160,000,000.

As a State industrial development agency, the Agency was exempt from mortgage recording tax with respect to the recording of the Mortgage. Consequently, no mortgage recording tax was paid when the Mortgage was recorded.

Pursuant to an Installment Sale Agreement dated as of December 30, 1992, by and between the Agency and Petitioner (the Installment Sale Agreement"), Petitioner agreed to purchase the Agency's right, title and interest in and to the Project for a nominal amount. Pursuant to the Installment Sale Agreement, Petitioner pays the Agency sufficient amounts to meet the Agency's obligations to the Existing Lenders under the Mortgage. Title to the Project will not pass to Petitioner until the Agency has been released from all its obligations under the Mortgage.

The Project is close to completion and the grand opening of the Project is presently scheduled to occur later this month. The parties intended to refinance the construction loan with permanent financing shortly after the grand opening on the terms contemplated by the Mortgage Loan Application and Agreement, between Petitioner and certain lenders (collectively referred to as the "New Lenders"). Under the Mortgage Loan Application and Agreement, the New Lenders will lend a minimum of \$145,000,000 and a maximum of \$155,000,000, as determined by Petitioner in a notice to the New Lenders to be given approximately two weeks prior to closing. It is expected that the borrowing under the Mortgage Loan Application and Agreement would be used to refinance the existing construction loan and to establish an escrow account to fund tenant allowances for the Project.

To accomplish the refinancing of the construction loan, Petitioner intends to exercise its right under Section 11.1 of the Installment Sale Agreement to terminate the Installment Sale Agreement, as a result of which the Agency will transfer all of its right, title and interest in and to the Project to Petitioner. Concurrently with the transfer of title to the Project to Petitioner, the Existing Lenders will assign the Mortgage and related documentation to the New Lenders and the Agency will be released from all of its obligations under the Mortgage. Thereafter, the New Lenders and Petitioner will amend the Mortgage and related documentation to reflect certain changes, including the consolidation of the Building Loan Mortgage and the Indirect Costs Mortgage, a new term and a new interest rate (the Mortgage as so amended hereinafter is referred to as the "Amended Mortgage"). At no point will any of the indebtedness secured by the Mortgage be discharged and the maximum aggregate principal amount secured by or which under any contingency may be secured by the Mortgage will not be increased as a result of such amendment.

Petitioner submitted copies of the Building Loan Agreement, the Indirect Costs Loan Agreement, the Building Loan Mortgage Note, the Indirect Costs Loan Mortgage Note, the Building Loan Mortgage, the Indirect Costs Loan Mortgage, the Installment Sale Agreement, the Mortgage Loan Application and Agreement as part of the Petition for Advisory Opinion.

Subdivisions 1, 1-a and 2 of Section 253 of the Tax Law impose taxes 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.

Section 252 of the Tax Law provides, with certain exceptions, that "no 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 255.1(a) of the Tax Law provides, in part, as follows:

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 of 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 other than the principal indebtedness or obligation 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. (emphasis added)

Section 645.1(a) of the Mortgage Recording Taxes Regulations provides as follows:

Section 645.1 Supplemental mortgages. [Tax Law, 255] (a) A supplemental mortgage is an additional instrument or mortgage which is recorded subsequent to the recording and prior to the discharge or satisfaction of a prior primary mortgage on which all taxes, if any, accrued under article 11 of the Tax Law have been paid, the terms of which make reference to the prior recorded primary mortgage, and which is given and recorded:

- (1) for the purpose of correcting or perfecting such prior recorded primary mortgage;
- (2) pursuant to some provision or covenant in such prior recorded primary mortgage;
- (3) for the purpose of providing additional or further security for the payment of the principal debt or obligation secured by the prior recorded primary mortgage by spreading the lien of the prior recorded primary mortgage to additional real property or by imposing a new lien on such additional real property (see section 645.2[c], [d], [e] or [f] of this Part); or

(4) for the purpose of coordinating or consolidating the liens of prior recorded primary mortgages to form a single and coordinate equal lien; or

(5) for the purpose of modifying a prior recorded primary mortgage, for reasons including but not limited to the following:

(i) adjusting the term for the payment of the debt secured by the prior recorded primary mortgage;

(ii) changing the interest rate on the debt secured by the prior recorded primary mortgage;

(iii) substituting a new mortgagor for the mortgagor;

(iv) substituting a new mortgagee for the mortgagee due to an assignment of the mortgage;

(v) evidencing a change in the amount of debt or obligation which is secured or which under any contingency may be secured by the prior recorded primary mortgage; or

(6) for the purpose of severing the lien(s) of a prior recorded primary mortgage or mortgages into separate liens.

Once a mortgage has been given and recorded, the recorded primary mortgage may be changed by a supplemental mortgage and, under the provisions noted above, no additional mortgage recording taxes will be due as long as the amount secured remains the same. City of New York v. State Tax Commission, 130 A.D. 2d 890, 891. Were the indebtedness secured by a lien to be reduced or the lien terminated for any reason, tax would be due on any increase on the new obligation. (See, Matter of Rednow Realty Corp. v. Tully, 72 A.D. 2d 621, 622).

In City of New York v. Procaccino, 46 AD2d 594, 364 NYS2d 582 (3d Dept 1975) the Court held that a supplemental mortgage will be exempt from any additional mortgage recording tax if it involves no new principal obligation or mortgage debt but merely consolidates an existing secured debt.

In Brodsky v. Murphy, 26 AD2d 225, 272 NYS2d 238 (3d Dept), aff'd 20 NY2d 282, 231 NE2d 768, 285 NYS2d 73 (1966) the Court held that the extension of maturity date and the method of payment does not create a new mortgage (citing Suffolk County, 5 AD2d at 641, 174 NYS2d at 395) and that new and higher rates of interest did not create a new mortgage.

Section 275 of the Real Property Law generally requires that a certificate of discharge of mortgage be recorded whenever a mortgage upon real property is due and payable and the full amount of principal and interest due on the mortgage is paid. The certificate of discharge of mortgage requirement contained in Section 275 of the Real Property Law was designed to prevent taxpayers from avoiding the mortgage recording tax by reusing a "dormant" mortgage as security for another loan or obligation. Section 275(2)(b) of the Real Property Law, however, provides that the full amount of principal and interest due on a mortgage shall not be considered paid whenever such

mortgage continues to secure a bona fide debt and an enforceable lien continues to exist, such as may occur in connection with the refinancing of a construction loan with permanent financing where the new lender acquires the loan from the existing lender and amends the loan documents to reflect changes in terms.

Moreover, Technical Services Bureau Memorandum TSB-M-89(6.1)-R, August 3, 1989 entitled Amendments to Article 11 of the Tax Law and Sections 275 and 339-ee of the Real Property Law by Chapter 241 of the Laws of 1989, provides, in part, as follows:

The replacement of a construction loan with permanent financing will not be subject to section 275 because the mortgaged property continues at all times to serve as collateral for a bona fide debt (first to the construction lender, and then to the permanent lender). The fact that the obligor under the mortgage may change (e.g., a purchaser of the newly constructed building is substituted for the builder) would not alter this conclusion.

Pursuant to the above cited laws, regulations, court decisions and the Technical Service Bureau memorandum, subsequent to the recording of a mortgage on which all taxes, if any, have been paid, a supplemental instrument or mortgage is recorded for purposes of modifying a prior recorded primary mortgage, such additional instrument or mortgage will not be subject to the taxes imposed under Section 253 of the Tax Law 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. In the instant case, Petitioner intends to refinance the construction loan with permanent financing under the terms contemplated by the Mortgage Loan Application and Agreement, between Petitioner and the New Lenders. Under the Mortgage Loan Application and Agreement, the New Lenders will lend a minimum of \$145,000,000 and a maximum of \$155,000,000. It is expected that the borrowing under the Mortgage Loan Application and Agreement would be used to refinance the existing construction loan and to establish an escrow account to fund tenant allowances for the Project. To accomplish the refinancing of the construction loan, Petitioner intends to exercise its right under Section 11.1 of the Installment Sale Agreement to terminate the Installment Sale Agreement, as a result of which the Agency will transfer all of its right, title and interest in and to the Project to Petitioner. Concurrently with the transfer of title to the Project to Petitioner, the Existing Lenders will assign the Mortgage and related documentation to the New Lenders and the Agency will be released from all of its obligations under the Mortgage. Thereafter, the New Lenders and Petitioner will amend the Mortgage and related documentation to reflect certain changes, including the consolidation of the Building Loan Mortgage and the Indirect Costs Mortgage, a new term and a new interest rate. At no point will any of the indebtedness secured by the Mortgage be discharged and the maximum aggregate principal amount secured by or which under any contingency may be secured by the Mortgage will not be increased as a result of such amendment. Accordingly, since the Amended Mortgage presented for recording will not create or secure a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by the Mortgage, the recording of the Amended Mortgage will

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constitute the recording of a supplemental mortgage or instrument under Section 255 of the Tax Law and Section 645.1(a) of the Mortgage Recording Taxes Regulations and will, therefore, not be subject to the mortgage recording taxes imposed under Article 11 of the Tax Law.

DATED: July 6, 1995

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

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