

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

TSB-A-96 (3) R
Mortgage
Recording Taxes
May 9, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M960206A

On February 6, 1996 the Department of Taxation and Finance received a Petition for Advisory Opinion from KIAC Partners, Energy Center, John F. Kennedy International Airport, Building 49, New York, New York.

The issue raised by Petitioner, KIAC Partners, is whether a leasehold mortgage and a personal property security interest 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 are exempt under Section 255 of the Tax Law from the mortgage recording tax imposed under Section 253 of the Tax Law.

Petitioner submits the following facts. The Petitioner is a New York general partnership among (i) Airport Cogen Corp., a special purpose subsidiary of Gas Energy Inc., (ii) Aviation Funding Corp., a special purpose subsidiary of Gas Energy Inc., and (iii) CEA KIA, Inc., a special purpose subsidiary of Community Energy Alternatives Incorporated.

Under agreements between Petitioner and The Port Authority of New York and New Jersey (the "Authority"), Petitioner has constructed and is operating an integrated central heating and refrigeration plant, thermal distribution system and natural gas-fired cogeneration plant (collectively, the "Project") at John F. Kennedy International Airport in Queens, New York (the "Airport").

The Authority is a body politic and corporate and an 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 consented to by the Congress of the United States.

The Project was 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 Project is included in the premises covered by the City Lease and is intended to serve or be available on a regular basis for Airport use.

To provide for the financing of a portion of the costs of the construction and renovation of the Project, on May 4, 1993, the Authority issued \$175,000,000 in aggregate principal amount of its Special Project Bonds, Series 3 (KIAC Partners Project) (the "Series 3 Bonds"). The Series 3 Bonds were issued by the Authority at Petitioner's request pursuant to the provisions of resolutions adopted by the Authority. Specifically, on June 9, 1983, the Authority adopted a resolution establishing an issue of special limited obligations of the Authority known as "Special Project Bonds" (the "Special Project Bond Resolution"). On June 11, 1992, the Authority adopted resolutions establishing and

TSB-A-96 (3) R
Mortgage
Recording Taxes
May 9, 1996

authorizing the issuance of bonds in series (the "Special Project Bond Series Resolutions", and, together with the Special Project Bond Resolution, the "Resolutions").

To redeem the Series 3 Bonds and to refund up to \$75 million of equity investments, which also financed a portion of the costs of the construction and renovation of the Project, the Authority plans to issue at KIAC's request up to \$250 million in aggregate principal amount at any one time outstanding of its Special Project Bonds, Series 4 (KIAC Partners Project) (the "Series 4 Bonds"). The Series 4 Bonds will be issued by the Authority pursuant to the Resolutions.

In connection with the issuance, sale and delivery of the Series 4 Bonds, the Authority will enter into a Trust Indenture (the "Trust Indenture") with a bank or trust company to be appointed by the Authority as trustee for the holders of the Series 4 Bonds (the "Trustee"). Under the Trust Indenture, the Authority will give, mortgage, pledge, grant a security interest in and assign to the Trustee as security for the payment of the Series 4 Bonds, among other items, all right, title and interest of the Authority in and to certain rentals (the "Facility Rentals"). These rentals are payable by the Petitioner to the Authority pursuant to an Agreement of Lease between the Authority and Petitioner, as amended (the "Lease"), providing for the leasing to Petitioner of the Project.

The Series 4 Bonds will not constitute general obligations of the Authority. 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 Series 4 Bonds by the Authority in the Resolutions and in the Trust Indenture) will be pledged or will be deemed to be pledged in any manner whatsoever to the payment of debt service on the Series 4 Bonds or for the fulfillment of any obligation which the Authority may have the right to assume for the benefit of the holders of the Series 4 Bonds.

The Authority will 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 and the Trustee 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 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 Series 4 Bonds, the payment of the Series 4 Bonds is to be secured by, among other things, an assignment by Petitioner of its right, title and interest in and to construction, financing and operational documents entered into in connection with the Project, as well as other personal property of Petitioner (the "Personal Property Security Interest"). The Personal Property Security Interest grants a security interest to the Authority in the personal property owned by Petitioner. The Authority will pledge this security interest to the Trustee through the Trust Indenture.

TSB-A-96 (3) R
Mortgage
Recording Taxes
May 9, 1996

Under the provisions of the Resolutions, as a condition to the issuance of the Series 4 Bonds, the payment of the Series 4 Bonds is also to be secured by the leasehold mortgage (the "Leasehold Mortgage"), from Petitioner, as Mortgagor, to the Trustee for the benefit of the holders of the Series 4 Bonds, of KIAC'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 will secure the payment of the total aggregate principal amount of the Series 4 Bonds in the maximum aggregate amount of \$250,000,000 or such lesser amount as may be outstanding from time to time. It will also secure the interest payable on the Series 4 Bonds and the amounts which the Authority would be or was obligated by agreements with or for the benefit of the holders of the Series 4 Bonds to pay or set aside for the amortization, maturity, redemption (including redemption premiums, if any) or retirement of the Series 4 Bonds, subject to the terms and provisions of the Leasehold Mortgage and the Lease.

The lien of the Leasehold Mortgage will be imposed upon property not originally covered by or described in the Assignment of Rents (i.e., all of Petitioner'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 will be recorded in Queens county, New York, as additional security for the debt secured by the Assignment of Rents by the Authority to the Trustee to or for the benefit of the holders of the Series 4 Bonds. The Assignment of Rents will be recorded in Queens, County, New York prior to recordation of the Leasehold Mortgage.

Applicable Law

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 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 of the Tax Law provides, in part, as follows:

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.

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

TSB-A-96 (3) R
Mortgage
Recording Taxes
May 9, 1996

Section 252 of the Tax Law provides the general exemptions from the mortgage recording tax for the recording of certain mortgages. Although Section 252 does not provide an exemption for the recording of a mortgage given by an instrumentality or agency of this State, the immunity of public bodies or the State from this tax independent of the statutory exemptions has long been recognized (see, Matter of City of New York v Tully, 88 AD 2d 701, lv to app den 57 NY2d 606, 20 NYCRR 644.1[a][1]). In KIAC Partners. c/o Airport Cogeneration, (Adv Op St Tx Comm, September 24, 1992, TSB-A-92[5]-R), which related to earlier bonds issued in connection with the Project, we concluded that "the mortgage from the Authority to the Trustee ... may be recorded without payment of tax, because the borrower is an agency of the State."

Section 255.1(a) of the Tax Law provides 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 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 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 fifty-three of this chapter on such new or further indebtedness or obligation.

Conclusion

The recording of the mortgage given by the Authority to the Trustee in the form of the Assignment of Rents is exempt from the mortgage recording tax because the Authority is an agency or instrumentality of New York State.

Also, the Leasehold Mortgage and Personal Property Security Interest constitute supplemental mortgages within the meaning and intent of Section 255.1(a) of the Tax Law, in relation to the mortgage given by the Authority to the Trustee, assuming that they are recorded subsequent to the recording of the mortgage given by the Authority to the Trustee. This is so because they are given for the purpose of imposing a lien upon property, *i.e.* the leasehold interest and personal property of Petitioner, not originally covered by or not described in the recorded primary mortgage for the purpose of securing principal indebtedness secured by the previously recorded

TSB-A-96 (3) R
Mortgage
Recording Taxes
May 9, 1996

primary mortgage. Therefore, the Leasehold Mortgage and Personal Property Security Interest granted by Petitioner to the Trustee may be recorded without payment of mortgage recording tax.

DATED: May 9, 1996

/s/
Doris S. Bauman
Director
Technical Services Bureau

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