

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(2)R
Mortgage Recording Tax
April 12, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M010316A

On March 12, 2001, a Petition for Advisory Opinion was received from New York State Urban Development Corporation d/b/a Empire State Development Corp., 633 Third Avenue, New York, New York 10017.

The issues raised by Petitioner, the New York State Urban Development Corporation d/b/a Empire State Development Corp. ("ESDC"), are whether:

(1) The taxes imposed by Article 11 of the New York State Tax Law and Chapter 26 of the New York City Administrative Code (collectively, the "mortgage recording tax") are due upon the recording of any mortgage of property that is part of ESDC's Gateway Center Land Use Improvement Project (the "Project") where (a) ESDC is named mortgagee (whether as trustee, agent, nominee or otherwise); (b) ESDC records the mortgage; (c) the loan funds secured by the mortgage are provided by one or more persons or entities other than ESDC; and (d) the proceeds of the mortgage loan are used for Project development costs.

(2) The mortgage recording taxes are due if a mortgage referred to in issue (1) is assigned, supplemented, modified or amended, or if the mortgage so assigned, supplemented, modified or amended is thereafter from time to time assigned, supplemented, modified or amended (upon recording of the applicable instrument or otherwise) to the extent that the then outstanding principal indebtedness secured by the mortgage is not increased.

For the purposes of this opinion, the phrase "development costs" includes, without limitation, all "hard" and "soft" costs with respect to acquisition and construction, all carrying costs, loan fees, acquisition and construction period interest, start-up expenses, and all related costs and fees. The terms "supplemented" and "supplement" include, without limitation, any spreader, consolidation, substitution, severance, restatement and/or extension.

The Project Site is located in the Borough of Brooklyn, City of New York. It is generally bounded by Gateway Drive on the south and west, by Erskine Street on the east, and by Fountain Street on the north. The Project Site is currently divided into portions having two different owners: the New York State Office of General Services ("OGS") and the City of New York. The Project Site is a portion of the Fresh Creek Renewal Area, which was originally designated by the New York City Department of Housing Preservation and Development in 1967. The Project contemplates the acquisition of the entire project site by Gateway Center Properties, LLC (the "Gateway Center") from the City of New York and OGS to cause the development of a 640,000-square foot retail

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shopping center. Among other approvals, the project will require the adoption and affirmation of a General Project Plan by ESDC. Implementation of the Project would achieve a host of public policy objectives including:

- (1) The creation of sustainable jobs, thereby increasing business activity within the region; the creation of new sustainable physical development; and stimulation of related economic growth in the surrounding community.
- (2) The expansion of the City's and State's tax base by opening hitherto underdeveloped areas, generating new employment and business opportunities, and increasing potential revenue generation.
- (3) The removal of the substandard and unsanitary conditions that currently impede effective and economic use of the Project Site and to replace these conditions with a viable commercial development. As noted in The Fresh Creek Urban Renewal Plan (Second Amendment, January 1996), the Project Site possesses the following unsanitary and substandard conditions adversely affecting the quality of life within the Urban Renewal Area and its immediate vicinity: (a) vacant, unfenced, and unsanitary lots; (b) inadequate infrastructure to serve existing development; (c) abandoned or underutilized properties; (d) poorly or improperly designed street patterns and intersections; (e) blocks and lots of irregular form or shape; (f) unsuitable topography, subsoil, or other physical conditions including susceptibility to flooding and unstable soil conditions; and (g) lack of storm water and sanitary sewer connections to serve existing development.

Under the contemplated arrangements, Gateway Center will acquire title to the Project Site from OGS and the City of New York and sell two portions of the Project Site to two separate retail tenants. Gateway Center and the two retail tenants will then lease the Project Site to ESDC, for the construction period of the development, which in turn will sublease the site to Gateway Center and the two retail tenants which subleases will be coterminous with the leases to ESDC. The developer with his designees will construct the commercial buildings on the site in accordance with the General Project Plan and design guidelines. Payments under the sublease will inure to the benefit of ESDC. The payments in lieu of real estate taxes will inure generally to the benefit of ESDC.

The contemplated financing arrangements for the Project are as follows. The developer will borrow funds from sources ("Lenders") other than ESDC, which funds will be used for Project development costs. This borrowing will be secured by one or more mortgages against the developer's fee and leasehold interest. ESDC will initially be a named mortgagee and will record the mortgages. Although ESDC will be named as a mortgagee, all of the rights under the mortgages will inure to the benefit of the Lenders who will for all purposes be the beneficial owners of the mortgages. Upon recording the mortgages, ESDC will assign to the Lenders all of ESDC's right,

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title and interest in and to the mortgages. After assigning its interest to the Lenders, ESDC will continue to hold leasehold title, and will have enforcement rights under the lease.

After ESDC initially records the mortgages and assigns its interest to the Lenders, the mortgages 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. For example, in accordance with customary mortgage financing practices, mortgages securing construction financing may be assigned, supplemented, modified and converted to permanent financing upon completion of construction or the expiration of the term of the initial loans. Permanent 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.

Applicable Law

Article 11 of the Tax Law imposes taxes on the recording of mortgages of real property measured by the principal debt or obligation secured or which under any contingency may be secured by the mortgage. Section 252 of Article 11 of the Tax Law, which sets forth the preponderance of the exemptions from the mortgage recording tax, provides, with certain exceptions not relevant here, 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 the taxes imposed by this article by reason of anything contained in any other statute."

Even though section 252 of the Tax Law does not provide a specific exemption for the operations of UDC, it is well established that State agencies enjoy an immunity from taxation independent of the statutory exemptions listed in section 252 of the Tax Law for property utilized in the public interest. (New York State Urban Development Corp., Adv Op Comm T&F, March 10, 1993, TSB-A-93(4)-R.)

Subdivision (1) of section 6254 of the New York State Urban Development Act (the UDC act) states in pertinent part as follows:

[t]here is hereby created the New York State urban development corporation. The corporation shall be a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation. . . .

In addition, subdivision (2) of section 6262 of the UDC Act states:

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[t]he corporation may transfer to any subsidiary corporation any moneys, real or personal or mixed property or any project in order to carry out the purposes of this act. Each such subsidiary corporation shall have all the privileges, immunities, tax exemptions and other exemptions of the corporation to the extent the same are not inconsistent with the statute or statutes pursuant to which such subsidiary was incorporated. . . .

In a March 29, 1913, opinion, the Attorney General opined that no mortgage recording tax was due when New York State acted as mortgagor and quoted the following passage from Matter of Hamilton, 148 NY 310, 313-314:

The property held by the state, or by any of its municipal divisions, for public purposes, is not, and never has been, subject to taxation . . . The end and object of all taxation is to raise revenue for the purpose of defraying the expenses of government, and since no revenue could be raised by imposing taxes on property owned by the state itself, or by any of its political divisions, such property is in no just or practical sense the subject of taxation. . . .

This principle has been applied in exempting from the mortgage recording tax the recording of mortgages on property the legal title of which is held by an industrial development agency and the beneficial ownership of which is held by a non-exempt private party. (See 1982 Opns St Comp No. 82-188, p 240; One Park Place Associates, Adv Op St Tx Comm, June 18, 1982, TSB-A-82(1)(M) and New York State Urban Development Corp., *supra*.)

In Hotel Waldorf-Astoria Corp. v. State Tax Commission, 86 AD2d 330, 334, in 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. . . ."

Furthermore, Section 6272 of the UDC Act provides, in pertinent part, that:

[t]he exercise of the powers granted by this act will be in all respects for the benefit of the people of this state . . . and will constitute the performance of an essential function . . . [UDC] and its subsidiaries shall not be required to pay any taxes, other than assessments for local improvements, upon or in respect of a project or of any property or moneys of [UDC] or any of its subsidiaries, levied by any municipality or political subdivision of the state, nor shall [UDC] or its subsidiaries be required to pay state taxes of any kind, and [UDC], its subsidiaries, projects,

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property and moneys . . . shall at all times be free from taxation of every kind by the state and by the municipalities and all other political subdivisions of the state. . . .

Section 6283 of the UDC Act states: "[i]nsofar as the provisions of this act are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling."

Also, Section 6284 of the UDC Act provides: "[t]his act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purposes."

Consistent with the legislative mandate of the UDC Act, courts have given liberal interpretation to its tax exemption provisions. For example, in Wein v. Beame, 43 N.Y.2d 326, the New York Court of Appeals upheld an exemption from real property taxes as applied to the Commodore Hotel property in Manhattan. The hotel had been sold to ESDC for one dollar, then leased back to the seller for 99 years. Arguments that ESDC had no real interest in the property, and was a "straw man" brought into the project solely to provide a tax exemption, were rejected. The court stated:

It is not for us to speculate as to the motive for UDC'S participation, nor to delineate the amount of active participation which is necessary to denominate a particular project a UDC project. Here, UDC will be the owner of the building, and it is enough that UDC has to combat otherwise inevitable urban blight, and which is thus clearly in accordance with the benign purposes of the Legislature in creating UDC. . . . (emphasis added)

An apparent inconsistency exists between the Tax Law and the UDC Act. Where a conflict exists between two enactments relating to the same subject matter, the latter specific enactment governs the earlier general enactment. (Williamsburgh Power Plant Corp. v. City of New York, 255 App Div 214, affd 280 NY 551 and New York State Urban Development Corp., supra.)

As the pertinent provisions of section 252 of the Tax Law as cited previously in this opinion were enacted in 1909, they must yield to the exemption provisions contained in the law creating UDC which were enacted in 1968.

Furthermore, the UDC Act gives Petitioner the power to make mortgage loans, secured by first mortgage liens. Having this power implies that Petitioner may also perform the activity of recording mortgages. Section 253 of the Tax Law imposes the mortgage recording tax on the exercise of the privilege of recording a mortgage not on the mortgage itself, as property. (Franklin Society for Home Building and Savings v. Bennett, 282 NY 79; Matter of Silberblatt, Inc. v. Tax

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Comm, 5 NY2d 635; and One Park Place Associates, and New York State Urban Development Corp., *supra*.)

Also, in an informal opinion of the Attorney General, dated March 7, 1956, it was stated that:

[i]t should be noted that section 257 of Article 11 of the New York State Tax Law is silent as to which party to the mortgage shall pay the tax. Under its terms the taxes shall be payable on the recording of each loan subject to tax so that the party who records is the one upon whom the tax is imposed (1956 Atty Gen [Inf Opns] 27, at 28.)

Furthermore, Section 6272 of the UDC Act, specifically provides that Petitioner or its subsidiaries shall not be "required to pay taxes of any kind" and Petitioner, its subsidiaries, projects, and moneys "shall at all times be free from taxation of every kind by the state and by the municipalities and all other political subdivisions of the state."

Also, Section 255 of the Tax Law provides, in pertinent part, as follows:

[i]f 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, 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. . . .

Also, Section 250 of the Tax Law provides that "[a] contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mortgage of real property for the purpose of this article, and shall be taxable as such upon the amount of such increase or addition."

In addition, 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 recording tax will be due as long as the amount secured remains the same. (City of New York v. State Tax Commission, 130 AD2d 890, 891 and New York State Urban Development Corp., *supra*.)

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Conclusions

Based on the foregoing, it is concluded that the mortgage recording tax is not due upon the recording of any mortgage recorded in connection with the Project, if ESDC is named mortgagee (whether as trustee, agent, nominee or otherwise) and ESDC presents the mortgage for recording.

Also, 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 instrument does not create a new mortgage subject to tax under section 253 of the Tax Law, or because such instrument constitutes a "supplemental mortgage" under Section 255 of the Tax Law. (New York State Urban Development Corp., supra.) To the extent that a new or further indebtedness were secured in conjunction with the recording of any assignment, supplement, modification or amendment of such 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 such new or further indebtedness.

DATED: April 12, 2001

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