

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

TSB-A-01(5)R
Mortgage Recording Tax
May 23, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M010102A

On January 2, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Roosevelt Island Operating Corporation of the State of New York, 591 Main Street, Roosevelt Island, New York 10044. Petitioner is herein sometimes referred to as “RIOC”.

The issues raised by Petitioner, Roosevelt Island Operating Corporation of the State of New York, are:

(1) Whether 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 the Southtown Project where: (a) Petitioner is either the sole named mortgagee (whether as trustee, agent, nominee or otherwise) or a co-mortgagee (whether or not a private entity is the other co-mortgagee); (b) Petitioner records the mortgage; (c) the loan funds secured by the mortgage are provided by one or more persons or entities other than Petitioner; and (d) the mortgage is entered into in furtherance of the Southtown Project including, without limitation, use of the mortgage loan proceeds for project development costs incurred by parties other than Petitioner (hereinafter “Development costs”).¹

(2) Whether the mortgage recording tax is due (upon the recording of the applicable instrument or otherwise) if a mortgage referred to in Issue (1) is assigned, supplemented,² modified or amended, or if any mortgage so assigned, supplemented, modified or amended is thereafter from time to time assigned, supplemented, modified or amended, to the extent that the then outstanding principal indebtedness secured by the mortgage is not increased or, if increased, whether mortgage recording tax is to be imposed only with respect to any increase in the amount of secured indebtedness and then only if mortgage recording tax would otherwise have been required to be paid on such additional indebtedness.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

¹ “Development costs,” as used herein, include, without limitation, all “hard” and “soft” costs in respect of acquisition and construction, all carrying costs, loan fees, acquisition and construction period interest, start-up expenses, and all related costs and fees.

² “Supplemented” and “supplement”, as used herein, include, without limitation, any spreader, consolidation, substitution, severance, restatement and/or extension.

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The New Community on Roosevelt Island, of which the Southtown Project is a part, is a project of the N.Y.S. Urban Development Corporation (now known as the Empire State Development Corporation, and sometimes referred to herein as “UDC”). Petitioner is the successor in interest to UDC, as provided for in the Laws of 1984, Chapter 899 (the “RIOC Act”). See McKinneys Unconsolidated Laws Sections 6385-6399. In 1981, the New York State Division of Housing and Community Renewal (“DHCR”) assumed the administration of the UDC Projects on Roosevelt Island pursuant to an agreement with UDC. In 1984, the New York State Legislature created Petitioner as a body corporate and politic constituting a public benefit corporation and a political subdivision of the State of New York. All of UDC’s rights and obligations were transferred to Petitioner, as successor in interest, and Petitioner was authorized to exercise all of the rights of UDC with respect to the development, operation and supervision of both the existing and proposed development on Roosevelt Island under the supervision of DHCR, with certain statutory assurances that Petitioner would repay to UDC all of its investment in Roosevelt Island from the revenues generated by the UDC projects. Subdivision (2) of Section 6387 of the RIOC Act provides that the Commissioner of DHCR shall serve as Chairman and Chief Executive Officer of Petitioner. In 1988, in accordance with the RIOC Act, the City Lease (described below) was assigned by UDC to Petitioner.

A. Southtown Project, a Portion of the New Community Development on Roosevelt Island

In 1969, the City of New York (the “City”) requested UDC, pursuant to a lease between the City and UDC, as amended (the “City Lease”) to use its statutory powers under the UDC Act, to carry out the development program for Roosevelt Island as a UDC Project as envisioned by a master plan originally developed by Philip Johnson and John Burgee (the “Master Plan”). The elements of the Master Plan became the General Development Plan and were attached as a Schedule to the City Lease (together with the several subsequent amendments, the “GDP”), covering the entire 147-acre island, except for the two hospital sites at the most northern and southern ends of the Island. Roosevelt Island is in the borough of Manhattan (Block 1373 Lot 1) and located in the East River between Manhattan and Queens.

After execution of the 1969 City Lease, UDC created a subsidiary, Roosevelt Island Development Corporation, to carry out the GDP. The development of Roosevelt Island then proceeded in phases. The first phase of residential development, Northtown Phase I, completed in the late 1970s, is occupied and contains 2,141 low, moderate and middle-income subsidized residential units financed by UDC under the Mitchell-Lama Program (Article II, Private Housing Finance Law and the UDC Act), with mini schools (PS/IS 217), retail, commercial, community and recreational facilities, and parking spaces located in the garage facility called Motorgate. Northtown Phase II, containing 1,108 residential rental units (80% market rate and 20% subsidized) was completed in the late 1980s, financed by the N.Y.C. Housing Development Corporation and insured under the federal Housing and Urban Development FHA program.

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The GDP, as it relates to Southtown, calls for a 19.3 acre site to be developed with approximately 2,000 residential units of low-income, moderate income and conventional housing, retail space, a soccer/baseball field and a commons (or Town Square).

B. Public Purpose

The principal goal of the Southtown Project is to complete the New Community under the GDP which would retain and heighten the benefits of urban living while preserving a sense of scale and open space for Roosevelt Island residents and New York City as a whole. The Southtown Project also seeks to implement a range of public policy objectives including:

- (1) Completion of the vision of transforming the Island from that of a “welfare island” containing various abandoned institutional facilities to a viable and feasible new community as an alternative to Manhattan (although, the Island is technically in Manhattan).
- (2) Creation of a viable development consisting of residential, commercial, cultural and recreational facilities and providing public access to the waterfront.
- (3) Creation of a new mixed-income neighborhood, including a significant expansion of the City’s housing stock.

C. Project Implementation

The Southtown Project is intended to be implemented in three phases. The Phase I development is comprised of three apartment buildings and a professional soccer/baseball field at the northern end of the project site (north of the subway station) and will be developed primarily for residential use. A portion of these residential units will be set aside for low, moderate, and middle-income households. The first building is scheduled to be used as staff housing for the Memorial Sloan-Kettering Institute. The Phase II development area is located at the southern end of the project site (south of the subway station) and will contain at least three apartment buildings, the Commons (or Town Square) with retail space and landscaped esplanade. The Phase III development area, located in the eastern portion of the project site, will be developed primarily for residential use, with two or three apartment buildings. All three phases will include open space for public recreational and/or community uses.

D. Financing

In September 1999, Petitioner’s Board of Directors approved the final plan and project for Southtown, designated The Related Companies, L.P. and The Hudson Companies Incorporated as joint developers of the Southtown Project (the “Developers”) and finalized all requirements under the State Environmental Quality Review Act. In August 2000, Petitioner entered into a

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Development Agreement with the Developers for all three stages of the development of the Southtown Project, setting forth the general terms of the definitive documents governing the development of the site.

Under the terms of the Development Agreement, Petitioner will sublease the parcels and improvements to the Developers and/or their designees, the Developers will construct a residential building on each parcel in accordance with the City Lease, GDP, the Development Agreement and the design guidelines. Payments under the subleases inure to the benefit of Petitioner (and after expenses, including but not limited to Basic Rent to be paid to the City when due, through Petitioner to the UDC). Phase I development will be commenced with the widening of the West Service Drive, followed by demolition of the Central Nurses Residence. In addition, in January 2001, Petitioner will enter into a sublease for the first building in the Phase I development area and construction thereof will commence immediately thereafter.

The Development Agreement also provides for an exemption from sales taxes on construction materials purchased during the initial construction phase, from real estate taxes and from any mortgage recording taxes, if applicable. The developer is required, however, to make certain payments to Petitioner in lieu of sales, real estate and mortgage recording taxes.

Under the contemplated financing arrangements, the Developers will borrow funds from sources (the "Lenders") other than Petitioner. These funds will be used for project development costs. Alternatively, the Developers may initially fund the development costs themselves, and arrange for financing from the Lenders later in the construction cycle (i.e., subsequent to the closing of the lease and the commencement of construction, but prior to the issuance of a temporary certificate of occupancy for all or part of the building). In either case, the borrowing will be secured by one or more mortgages against the Developers's subleasehold interest, and subordinated to both Petitioner's leasehold interest and the City Lease. Neither the City Lease nor Petitioner's leasehold interest will be encumbered by the mortgage(s). Petitioner initially will be a named mortgagee, either alone or with other Lenders, and will record the mortgage(s). Although Petitioner will be named as a mortgagee, all of the rights under the mortgages(s) will inure to the benefit of the Lenders, who will for all purposes be the beneficial owners of the mortgages. Upon recording the mortgage(s), Petitioner will assign to the Lenders all of Petitioner's right, title and interest in and to the mortgage(s). After assigning its interest to the Lenders, Petitioner will continue to hold title to its leasehold interest and will have enforcement rights under the lease.

E. Refinancing.

After Petitioner initially records the mortgage(s) and assigns its interest to the Lenders, the mortgage(s) 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

A. The Tax Exemption of RIOC Projects

Section 6385 of the RIOC Act provides the following statement of legislative findings and purposes:

The legislature hereby finds, determines and declares that:

(a) the city of New York and the [UDC] have entered into a lease and related agreements providing for the [UDC] to use its statutory powers to create on Roosevelt Island a new community which would retain and heighten the benefits of urban living while preserving a sense of scale and open space for Roosevelt Island residents and New York city as a whole;

(b) the [UDC] has constructed the first phase of the island's development, including public facilities, pursuant to a general development plan for Roosevelt Island, which plan is being updated and contemplates significant future development on the island, including the provision of additional housing, commercial, civic, recreational and other facilities;

(c) it is in the public interest for the [UDC] to transfer all of its rights and obligations with respect to the development, operation and supervision of both such existing and such proposed development to a public benefit corporation which shall be under the supervision of the commissioner of housing and community renewal; and

(d) it is in the public interest that such a public benefit corporation plan, design, develop, operate, maintain and manage Roosevelt Island, that such corporation have vested in it such powers as are necessary or convenient to effectuate those functions and that the [DHCR] be authorized to assist such corporation in the performance of its duties with respect to Roosevelt Island.
(Emphasis added)

Section 6388 of the RIOC Act provides, in part:

The corporation's power shall be limited to carrying out the development, management and operation of Roosevelt Island. In carrying out such development, management and operation, the corporation shall have the power to:

* * *

(5) Acquire in the name of the corporation by purchase, grant or gift, or by the exercise of the power of eminent domain pursuant to the eminent domain procedure law, or otherwise, real or personal property, or any interest therein deemed necessary or desirable for the development, management or operation of Roosevelt Island, including, without limitation, leasehold interest, air and subsurface rights, easements and lands under water at the site of Roosevelt Island or in the general vicinity thereof, and to subject such property or interest therein to a purchase money or other lien or security interest in connection with the acquisition and development thereof, provided that the corporation shall have no authority or power to issue any notes, bonds or other debt obligations, whether for the purpose of financing the development of Roosevelt Island or otherwise;

* * *

(14) Assume and perform the obligations and responsibilities of the urban development corporation under the lease, the tramway franchise, and all other contracts, leases, and agreements heretofore entered into by the urban development corporation relating to the development, management and operation of Roosevelt Island (except that the corporation shall not assume any of the rights, duties and responsibilities of the urban development corporation in relation to any bonds or notes issued, or mortgages or security agreements held, by the urban development corporation or any of its subsidiaries) and exercise all of the rights of the urban development corporation with respect thereto. . . .

Section 6395(2) of the RIOC Act provides, in part:

. . . [t]he creation of [RIOC] and the carrying out of its purposes is in all respects for the benefit of the people of the state and is a public purpose, and that [RIOC] will be performing an essential governmental function in the exercise of the powers conferred upon it by this act. [RIOC] and its operations, property and moneys shall be free and exempt from taxation of every kind by the city and the state and any subdivision thereof. Except as hereinabove provided and except as may otherwise specifically be provided, nothing contained in this act shall confer exemption from any tax, assessment or fee upon any person, firm, corporation or other entity, or upon the obligations of any of them.

B. The Tax Exemption for UDC Projects under the City Lease

Section 6272 of the UDC Act provides, in part:

[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, 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. . . .

C. The Mortgage Recording Tax: Applicable Exemption Provisions

Article 11 of the New York State Tax Law (“Tax Law”) imposes taxes on the recording of mortgages of real property, based on the principal debt or obligation secured by the mortgage being recorded. Tax Law §253 and New York City Administrative Code, §11-2601. The mortgage recording tax statute enumerates a number of exemptions, none of which is applicable here. Tax Law §§252, 252-a, 253.3. In addition, certain exemptions apply by reason of statutory provisions outside the mortgage recording tax statute.

Section 250(2) of the Tax Law provides, in part:

. . . 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.

Section 255(1)(a) of the Tax Law provides, in part:

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. . . unless it creates or secures a new or further

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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....” (Emphasis added).

Opinion

Even though section 252 of the Tax Law does not provide a specific exemption for the operations or projects of Petitioner, 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.)

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, May 24 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 Employee’s 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....”

Subdivision (2) of Section 6395 of the RIOC Act provides that Petitioner and its operations, property and moneys shall be exempt from taxation of every kind by the State and New York City. Furthermore, Section 6388(5) of the RIOC Act gives Petitioner the power to subject its property to a purchase money or other lien or security interest in connection with the acquisition and development of its property. Having this power implies that Petitioner may also perform the activity of recording

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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 Comm, 5 NY2d 635; and One Park Place Associates, and New York State Urban Development Corp. supra.) An informal opinion of the Attorney General, dated March 7, 1956, 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.)

Under the RIOC Act, therefore, the mortgage recording tax does not apply where Petitioner records mortgages in the exercise of its statutory powers.

An apparent inconsistency exists between Article 11 of the Tax Law and the RIOC Act and/or the UDC. 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 Petitioner, enacted in 1984.

The courts have given liberal interpretation to the tax exemption provisions in the UDC Act. 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 UDC for one dollar, then leased back to the seller for 99 years. Arguments that UDC 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)

The recording of mortgages by the UDC under circumstances that were nearly identical to the facts in the present case have been determined to be exempt under the UDC Act from the

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mortgage recording tax. (New York State Urban Development Corp. d/b/a/ Empire State Development Corp., Adv Op Comm T&F, May 31, 2000, TSB-A-00(3)-R.) In view of the transfer of all of UDC's rights and obligations with respect to development, operation and supervision of the Southtown Project to Petitioner, the exemption from State and New York City taxes provided for in the RIOC Act should be given similar broad interpretation.

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 Southtown Project, if RIOC is named mortgagee (whether as trustee, agent, nominee or otherwise) and RIOC 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 action does not create a new mortgage subject to tax under section 253 of the Tax Law, or because the instrument constitutes a "supplemental mortgage" under Section 255 of the Tax Law. (See City of New York v. State Tax Commission, 130 AD2d 890, 891 and 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.

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