

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

TSB-A-82 (1) M
Mortgage Tax
June 18, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M820512A

On May 12, 1982, a Petition for Advisory Opinion was filed by One Park Place Associates, Suite 1000, 500 South Salina Street, Syracuse, New York 13202.

The issue raised is whether the mortgage recording taxes imposed under section 253 of the Tax Law are required to be paid upon the recording of certain mortgages by the City of Syracuse Industrial Development Agency (hereinafter "the Agency"), as well as upon the recording by the Agency of a lease and a pledge and assignment of its rights under such lease.

The City of Syracuse Industrial Development Agency was established by Chapter 641 of the Laws of 1979, which amended the General Municipal Law by adding thereto a new section 926. Under such provision the Agency is established "for the accomplishment of any or all of the purposes specified in title one of article eighteen-A of this chapter [and has] the powers and duties now or hereafter conferred by title one of article eighteen-A of this chapter upon industrial development agencies." Such provision goes on to state that "the agency . . . and its operations and activities shall in all respects be governed by the provisions of title one of article eighteen-A of this chapter." Pursuant to subdivision 2 of section 856 of the General Municipal Law, such an agency is " . . . a corporate governmental agency, constituting a public benefit corporation."

Petitioner states that the "Agency has agreed with the Petitioner, a New York general partnership, to acquire the land for and to cause to be constructed and equipped a ten-story office building (the "Project") to be located in the City of Syracuse, New York, and to lease the Project to the Petitioner pursuant to a simultaneously executed lease (the "Lease Agreement"). The Project will be financed by the issuance by the Agency of three separate series of industrial development revenue bonds. Each series of the Agency's bonds will be secured by: A. a mortgage on the Project which will be executed by the Agency and in which the Petitioner will join as a co-mortgagor for the purpose of mortgaging, as additional collateral security for the bonds, its leasehold estate as created pursuant to the Lease Agreement, and B. a Pledge and Assignment of certain of the Agency's right, title and interest in, to and under the Lease Agreement, including an assignment of the Agency's right to receive rentals under said Lease Agreement."

Petitioner also states that the indentures of mortgage contain covenants to the effect that the Agency is the party required to record the mortgages, as well as "any related documents which are executed by the Agency and the Petitioner to secure the Agency's bonds."

An informal opinion of the Attorney General, dated March 7, 1956, provides that

"It 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.

Since the Agency covenants in the indentures of mortgage that it will record the mortgages and related documents, in view of the Attorney General's opinion the Agency would be the party required to pay the taxes imposed by Article 11, if such taxes are due.

Section 252 of the Tax Law contains a general prohibition against exemptions from the mortgage recording taxes imposed under Article 11 of the Tax Law "by reason of anything contained in any other statute," with certain exceptions not relevant to the present matter. However, such prohibition is overcome by subdivision 1 of section 874 of the General Municipal Law, which provides as follows:

It is hereby determined that the creation of the agency and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state of New York and is a public purpose, and the agency shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities.

One of the powers the Agency is authorized to exercise is the power " . . . to sell, convey, mortgage, lease, pledge, exchange or otherwise dispose of any such property in such manner as the agency shall determine." General Municipal Law, §858(4).

In addition, section 888 of the General Municipal Law provides that:

Insofar as the provisions of this title are inconsistent with the provisions of any other act, general or special, or of any local laws of the municipality, the provisions of this title shall be controlling except in cases of inconsistency with the Indian law.

The previously described portion of section 252 of the Tax Law relating to exemptions is derived from Chapter 729 of the Laws of 1905, and was last amended by Chapter 388 of the Laws

of 1966. Article 18-A of the General Municipal Law, authorizing the creation of the Agency, was enacted by Chapter 1030 of the Laws of 1969. It has been held that where a conflict or variance exists between two enactments relating to the same general subject matter, a later special statute takes precedence over a general statute and the prior general statute must yield to the later specific or special statute. Williamsburgh Power Plant Corp. v. City of New York, 255 App. Div. 214, aff'd 280 N.Y. 551; First National Bank and Trust Co. of Bay Shore v. Village of Saltaire, 256 App. Div. 156.

In this situation, the later statute specifically exempts from tax the activities of the Agency, one of which is the execution of mortgages. The granting of the power to execute mortgages implies that the Agency may also perform the activity of recording mortgages as well as related documents. It is to be noted that the taxes imposed under section 253 are not imposed on mortgages themselves, as property, but on the taking of an action, that is, on the exercise of the privilege of recording a mortgage. Franklin Society v. Bennett, 282 N.Y. 79; Matter of Silberblatt, Inc. v. Tax Comm, 5 N.Y. 2d 635.

It follows from the foregoing that the recording of the mortgages in question by the City of Syracuse Industrial Development Agency, as well as of any other related documents the recording of which would otherwise be subject to tax under Article 11 of the Tax Law, is not subject to the taxes imposed under Section 253 of the Tax Law.

DATED: May 24, 1982

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau