

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

TSB-A-89 (2)R
Mortgage Tax
May 5, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M890324A

On March 23, 1989, a Petition for Advisory Opinion was received from the New York State Urban Development Corporation, 1515 Broadway, New York, New York 10036-8960.

The issue raised is whether mortgages presented for recording by Petitioner, under circumstances described below, are exempt from the mortgage recording tax imposed by Article 11 of the Tax Law. In addition, would mortgage recording tax be due if subsequently such a mortgage is assigned, supplemented, modified or amended, to the extent the then outstanding principal indebtedness secured by the mortgage is not increased and to the extent such principal is increased. Also, would Petitioner be exempt from the mortgage recording tax imposed by Chapter 26 of Title 11 of the New York City Administrative Code.

ISSUE I

Petitioner, the New York State Urban Development Corporation, and certain of its wholly owned subsidiaries (hereinafter collectively "UDC", unless the context requires otherwise), questions whether mortgage recording tax is due upon the recording of any mortgage of property that is part of UDC's 42nd Street Development Land Use Improvement Project (hereinafter "Project") where (i) UDC is the named mortgagee (whether as trustee, agent, nominee or otherwise) and is obligated to record the mortgage, (ii) the loan funds are provided by one or more persons or entities other than UDC, (iii) the proceeds of the mortgage loans are used for Project acquisition and development costs, and (iv) at such times as mortgage recording taxes would have been due and payable but for UDC's exemption, the mortgagor will be obligated to pay UDC or its designee an amount equal to the mortgage recording taxes that otherwise would have been payable, with all such amounts (and interest thereon) retained in one or more separate funds controlled by UDC and the City of New York (hereinafter "City"), which funds will be used solely for Project purposes as determined by UDC and the City.

Facts

UDC was established by the New York State Legislature in 1968. McKinney's Unconsolidated Laws of NY §§ 6251 *et seq.* (New York State Urban Development Corporation Act, L 1968, ch 174, as amended) (hereinafter "UDC Act"). UDC is a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation. As a public benefit corporation, UDC exercises governmental authority.

Section 6252 of the UDC Act provides the following statement of legislative findings and purposes:

It is hereby declared that the acquisition, construction, reconstruction, rehabilitation or improvement of such industrial, manufacturing and commercial facilities, and of such cultural, educational and recreational facilities including but not limited to facilities identified as projects ... are public uses and public purposes for which public money be loaned and private property may be acquired and tax exemption granted, and that the powers and duties of the New York State urban development corporation as hereinafter prescribed are necessary and proper for the purpose of achieving the ends here recited. (Emphasis added.)

Section 6255 of the UDC Act provides that UDC is granted authority to acquire or contract to acquire from any person, firm, corporation, municipality, federal or state agency, by grant, purchase, condemnation or otherwise, leaseholds, real, personal or mixed property or any interest therein; to own, hold, clear, improve and rehabilitate, and to sell, assign, exchange, transfer, convey, lease, mortgage, or otherwise dispose of or encumber the same. In addition, section 6272 of the UDC Act provides that it is entitled to fund, build, lease, sell or manage its properties and projects free from any taxes, other than assessments for local improvements, upon or in respect properties.

The legislature mandated that both the general and specific powers granted to UDC be broadly construed. Section 6284 of the UDC Act provides that the UDC Act "being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purposes." Moreover, section 6283 of the UDC Act provides that whenever the provisions of the UDC Act "are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling."

In 1980, UDC entered into a memorandum of understanding with the City for the redevelopment of the West 42nd Street/Times Square area, the Project area. The redevelopment was conceived as a joint effort, to be implemented by public agencies and private developers designated by UDC and the City. A comprehensive study and plan of the Project area, aimed at turning Times Square into a safe, lively center for entertainment, shopping, commuting and business, was commissioned and completed in 1981. This plan (hereinafter "Project Plan") was initially approved by UDC's Directors in 1981 and finally approved on October 4, 1984. In 1984, the Project also was approved by the City's Board of Estimate.

The public uses and benefits expected to flow from the Project are reflected in the determinations and findings made as part of UDC's approval process for the Project. The UDC resolutions approving the Project in 1984 stated the goals of the Project were, among others:

[t]o overcome conditions of blight in the Project Area which have discouraged new investment for over half a century and which discourage the public's use of this historic part of New York City to eliminate the blight and physical decay, as well as the crime and frightening street life, that now characterize the West 42nd Street area; ... to preserve and restore the area's extraordinary older theaters

for theatrical and upgraded movie use, and, by so doing, to revitalize the project area as a theater and entertainment center serving tourists and all New Yorkers; ... [and] to help upgrade public facilities in the project area, particularly the Times Square subway station

The Project involves the construction of four new office towers, a 2.5 million-square-foot trade mart and a 750-room hotel. Nine turn-of-the-century theaters along West 42nd Street will be restored and converted into legitimate theaters as part of the Project. Numerous public improvements, including sidewalk and lighting improvements, nine new subway entrances and an expanded and reconfigured Times Square subway station, also form part of the Project.

Under the Project Plan, UDC is to acquire fee title, through condemnation or otherwise, to approximately 13 acres of land in midtown Manhattan (hereinafter "Land"). UDC has divided the Land into various sites and will lease the sites to the Projects designated developers (or, in the case of the theaters, possibly to public or not-for-profit organizations). Except with respect to certain theater sites, the tenant of each site (or an affiliate thereof) will be the developer of, and will pay certain acquisition costs for, that site. Each developer also will pay for improvements to public facilities (sidewalks, lighting, subway improvements, etc.) at or near its site. The tenant under each lease will be obligated to construct or rehabilitate certain buildings and improvements on the leased premises. Title to all buildings and improvements will be held by UDC for * the term of the lease. (UDC may convey its title (or any portion thereof) to the Land and Project improvements to a UDC subsidiary, the City, or a public benefit corporation or other entity appropriately constituted and exempt from the payment of real property taxes. If UDC makes such a conveyance, UDC's rights as landlord under the leases will inure to the benefit of the transferee.)

Except for certain UDC expenses, all payments under the leases will inure to the benefit of the City. Upon substantial completion of the Project (and, under certain circumstances, at other times) the City may acquire the landlord's rights under each lease. At the end of the term of each lease, ownership of all buildings and improvements will revert to the landlord, in most cases, however, the tenant will have an option to purchase its site beginning 15 years after completion of the initial construction or renovation work.

Subject to receipt of the rulings requested herein, the contemplated financing arrangements for the Project are as follows:

1. Pursuant to certain documents between UDC and the developers (hereinafter "Project Documents"), UDC will be the named mortgagee (whether as trustee, agent, nominee or otherwise) under each of the Project mortgages securing loans whose proceeds are used for Project acquisition and development costs (hereinafter "Recognized Mortgages"). UDC will be obligated to be so named and will be obligated to record the respective mortgages. The loans which are secured by the mortgages will be provided by lenders other than UDC.

2. At such times as mortgage recording taxes would have been due and payable but for UDC's exemption, the respective developer will be obligated (pursuant to its Project Documents)

to pay to UDC or its designee an amount equal to the mortgage recording taxes that otherwise would have been payable. All such amounts (and interest thereon) will be retained in one or more separate Project public purpose funds controlled by the City and UDC, which funds will be used solely for Project purposes as determined by the City and UDC, including the payment or reimbursement of excess site acquisition costs and possibly the costs of renovating or operating certain of the not-for-profit theaters.

3. Each Recognized Mortgage will, inter alia, obligate the respective developer to perform its obligations under its respective Project Documents, with the result that a default by a developer under its ground lease from UDC or other Project Documents will also constitute a default under its mortgage(s). A separate agreement between UDC and each lender (and/or the respective mortgages themselves) will provide that, although UDC holds legal title to the Recognized Mortgages, the respective lender is, in all other respects, the beneficial owner of the mortgage notes and mortgages. UDC will fully retain all of its enforcement rights under the ground leases.

4. Upon the substantial completion of the improvements relating to a particular lease, or possibly sooner, UDC will assign to the lender all of its right, title and interest in and to the corresponding Recognized Mortgage(s).

The Project is exempt from real property taxation, other than assessments for local improvements, by virtue of UDC's ownership of the Land. The Project also enjoys an exemption from New York sales tax.

Petitioner contends that UDC and its projects are exempt from taxes "of every kind" and the imposition of mortgage recording tax on Recognized Mortgages would result in a tax upon UDC and in respect of the Project, in violation of the Legislature's mandate that UDC not be required to pay any taxes upon or in respect of its projects, properties or monies.

Petitioner further contends that Project mortgages are exempt from the mortgage recording tax where UDC is the named mortgagee, notwithstanding the private lenders' beneficial interest contemplated in such mortgages.

Discussion

Article 11 of the Tax Law imposes taxes on the recording of mortgages of real property measured by the principal debt or obligation secured by such mortgage. Section 252 of Article 11 of the Tax Law, applicable to exemptions from the mortgage recording tax, provides, with certain exceptions not relevant herein, 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.

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 to exempt from the mortgage recording tax mortgages on property when legal title is held by a New York State industrial development agency even though beneficial ownership of such property is held by private interests. (See 1982 Opns St Comp No. 82-188, p 240; One Park Place Associates, Advisory Opinion of the State Tax Commission, May 24, 1982, TSB-A-82(1)M).

Also, 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 " The court reasoned that imposition of a tax upon a mortgage held by a New York State agency was tantamount to a tax upon the agency itself. The court, thus, concluded that the tax, on the recording of the mortgage securing the loan, in this case amounted to an unlawful assessment of the agency's property in violation of its general immunity from taxation. (See also, Matter of City of New York v. Tully, 88 AD2d 701.)

It appears that UDC, therefore, is exempt from the mortgage recording taxes imposed by Article 11 of the Tax Law by virtue of it being a New York State agency constituting a political subdivision and public benefit corporation. However, in any event, the provisions of the UDC act are conclusive in this respect.

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, 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.

Moreover, 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."

Therefore, 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.

Inasmuch as section 252 of the Tax Law was enacted in 1909, and last amended in 1966, it must yield to the exemption provisions contained in the law creating UDC which were enacted in 1968. Therefore, if the provisions of the UDC Act exempt from the recording tax the mortgages created pursuant to the Project, such exemption provisions will prevail.

The UDC Act gives UDC the power to execute mortgages. Having such power implies that UDC may also perform the activity of recording mortgages. It is to be noted that the taxes imposed under section 253 of the Tax Law are not imposed on the 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 for Home Building and Savings v Bennett, 282 NY 79; Matter of Silberblatt, Inc. v Tax Comm., 5 NY2d 635; One Park Place Associates, Advisory Opinion of the State Tax Commission, May 24, 1982, TSB-A-82(1)M.

An informal opinion of the Attorney General, dated March 7, 1956, states 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.

Since UDC is the mortgagee and will record the Recognized Mortgages, in view of the Attorney General's opinion, UDC would be the party required to pay the taxes imposed by Article 11, if such taxes are due.

However, section 6272 of the UDC Act, specifically provides that UDC or its subsidiaries shall not 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." In addition, section 6284 of the UDC Act provides that the UDC Act "shall be liberally construed so as to effectuate its purposes."

Conclusion

UDC will be named mortgagee, the Recognized Mortgages will be recorded by UDC and a default by a developer under its ground lease will be a default under the mortgage. In view of the provisions contained in section 6284 of the UDC act providing that the UDC act be liberally construed and section 6272 exempting UDC, its subsidiaries, projects, property and moneys from state taxation of every kind, and the fact that New York State agencies are immune from taxation, it is concluded that UDC can record Recognized Mortgages without payment of the mortgage recording taxes imposed under section 253 of Article 11 of the Tax Law.

ISSUE 2

If a mortgage referred to in issue 1 is assigned, supplemented, modified or amended, or if any mortgage so assigned, supplemented, modified or amended is thereafter from time to time assigned, supplemented, modified or amended, is the mortgage recording tax due (upon the recording of the applicable instrument or otherwise) to the extent the then outstanding principal indebtedness secured by the mortgage is not increased; or where such principal indebtedness is increased, is mortgage recording tax due only with respect to the amount of the increase.

Facts

In addition to the contemplated assignments of the Recognized Mortgages to lenders noted above, UDC anticipates that the mortgages securing the Project's financing will, from time to time (before and/or after UDC has ceased to be the designated mortgagee), be assigned, supplemented, modified or amended and that the applicable instruments reflecting such assignment, supplement, modification or amendment will be recorded. Thus, for example, in accord with customary mortgage financing practices, it is anticipated that mortgages securing acquisition and construction financing will be assigned, supplemented and modified and converted to permanent financing upon the completion of construction. Further, from time to time, the Project mortgages may be assigned from one lender to another, or the loans may be refinanced. It is also possible that the identity of the mortgagors will change, either by reason of the assignment of a lessee's interest to an affiliate or to an unrelated person. Finally, if and when a lessee exercises a purchase option contained in its lease, the leasehold mortgage may be converted into a mortgage secured by a fee interest.

UDC submits that the recording of any assignment, supplement, modification, or amendment of such mortgages (or successor mortgages) is exempt from the mortgage recording tax to the extent the principal amount of secured indebtedness is not increased. If the mortgage recording tax were to become payable upon the recording of an assignment, supplement, modification or amendment, e.g. upon the conversion to permanent financing or upon a refinancing, the benefits of UDC's tax exemption with respect to the original mortgage would be lost; at best, the tax would only have been deferred.

Discussion

Section 255 of the Tax Law contains the supplemental mortgage provisions and provides, in pertinent part, that:

[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

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."

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. Of course, were the indebtedness secured by the 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 AD2d 621, 622.)

"Both sections 253 and 255 of the Tax Law require that only a mortgage on the principal debt or obligation, or a new or further indebtedness other than the principal obligation should be subject to the recording tax. (Matter of Park and 46th St. Corp. v. State Tax Commission, 295 NY 173, 178-179.)" Matter of Bay View Towers Apts., Inc. v. State Tax Commission, 48 AD2d 86, 89, affd 40 NY2d 856 (emphasis added).

Conclusion

To the extent that the principal amount of secured indebtedness is not increased, the recording of any assignment, supplement, modification or amendment of any Recognized Mortgage is exempt from the mortgage recording tax, under current law, either because such action does not create a new mortgage subject to tax under section 253 of the Tax Law, or because such action constitutes a "supplemental mortgage" under section 255 of the Tax Law. Where the principal amount of secured indebtedness of a Recognized Mortgage is increased, the mortgage recording tax is due only with respect to the amount of the increase.

ISSUE 3

Is UDC exempt from the mortgage recording tax imposed by Chapter 26 of Title 11 of the New York City Administrative Code.

Discussion

Section 253-a.1 of the Tax Law, states:

Any city in this state having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in any such city .o. a tax ... for each one hundred dollars and each remaining major fraction thereof of principal debtor obligation which is or under any contingency maybe secured at the date of execution thereof, or at any time thereafter, by a mortgage on such real property situated within such city and recorded on or after the date upon which such tax takes effect

Section 253-a.2 of the Tax Law states:

The taxes imposed under the authority of this section shall be administered and collected in the same manner as the tax imposed under subdivision one of section two hundred fifty-three., all the provisions of this article relating to or applicable to the administration and collection of the tax imposed by such subdivision shall apply to the taxes imposed under the authority of this section with such modifications as may be necessary to adopt such language to the tax so authorized.

The City imposes a mortgage recording tax pursuant to Chapter 26 of Title 11 of the New York City Administrative Code. The tax is imposed on the recording of a mortgage on real property situated within the City.

Section 11-2603 of the New York City Administrative Code provides that the tax is administered by the Commissioner of Finance in the same manner as the tax imposed under section 253.1 of Article 11 of the Tax Law.

In addition, section 6272 of the UDC Act provides that:

[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.

Conclusion

The rationale exempting UDC from the mortgage recording tax imposed under Article 11 of the Tax Law seems applicable to the City mortgage recording tax imposed under Chapter 26 of Title 11 of the New York City Administrative Code. However, the City mortgage recording tax is administered by the City. Further, an advisory opinion may only be issued by the New York State Commissioner of Taxation and Finance with regard to taxes administered by the State Tax Commission (now the Commissioner) (Tax Law, § 171, subd. 24th) A definitive opinion on the City mortgage recording tax, therefore, should come from the New York City Finance Administration.

DATED: May 5, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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