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

TSB-A-91 (5) R
Mortgage Recording Tax
May 28, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M910206A

On February 6, 1991, a Petition for Advisory Opinion was received from John P. Napoli, c/o Dreyer and Traub, 101 Park Avenue, New York New York 10178.

The issue raised by Petitioner, John P. Napoli, is whether additional mortgage recording taxes are due upon the recording of a modification agreement which modifies an existing mortgage in order to secure, as additional interest, interest on accrued and unpaid interest on the original mortgage indebtedness, without increasing the maximum principal indebtedness secured by the original mortgage.

Petitioner's client (hereinafter the "client") owns fee title interest in real property located within the State of New York. The real property is held subject to a number of first mortgages in favor of X Bank. The mortgage recording tax, pursuant to Section 253 of the Tax Law, has been paid in full on the original principal indebtedness secured by the mortgages when such mortgages were recorded. By its terms, the X Bank mortgages also secure any accrued and unpaid interest on the mortgage funds, but in no event does the amount secured by the mortgage exceed the original indebtedness (the "maximum principal indebtedness").

The Client was not able to pay the interest obligations on a current basis. As a result, the Client and X Bank will agree to defer such accrued and unpaid interest (referred to as the "unpaid interest") provided, however, that additional interest accrues on the unpaid interest. The maximum principal indebtedness secured under the mortgages (equal to the original principal balance of the mortgages) will not change as a result of either the deferral of the unpaid interest or the imposition of additional interest on the unpaid interest. X Bank requires that the existing mortgage be modified in order to secure the original principal indebtedness together with interest earned thereon and, as additional interest, on the unpaid interest.

The maximum principal amounts under the mortgages on which mortgage recording tax has been paid are $209,000,000 and $220,000,000. The entire principal amounts under these mortgages have not yet been fully advanced by the mortgage lenders. The outstanding principal balance of each mortgage is approximately $204,413,000 and $192,750,000, respectfully. To date there have been no payments made to the lenders which have reduced the principal amounts of the subject mortgages.

Section 255.1(a) of the Tax Law provides, in part, 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 of 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 and fifty-three of this chapter on such new or further indebtedness or obligation. (emphasis added)

The State Tax Commission held in Matter of Cosmopolitan Broadcasting Corporation, Dec St Tx Comm, September 28, 1979, TSB-H-79(22)M that where the mortgage secures the payment of a lesser indebtedness, plus interest thereon, the principal indebtedness secured by the mortgage was the sum of lesser indebtedness and the interest and mortgage recording tax was to be computed on such aggregate amount.

The State Tax Commission held in Mater of Michael Dubroff Associates, Inc. et al, Dec St Tx Comm, December 18, 1976 that the principal debt, upon which the mortgage recording tax is measured pursuant to Section 253 of the Tax Law, secured by the agreement includes further indebtedness than that secured by the prior recorded primary mortgages, and that the taxability of this further indebtedness is unaltered by the fact that it represents unpaid interest on the primary mortgages. (emphasis added)

Further, Section 258 of the Tax Law provides, in part, as follows:

> No mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the taxes imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article ....

Pursuant to Section 255 of the Tax Law, the agreement entered into between Client and X Bank to modify the existing mortgage constitutes a supplemental mortgage, the recording of which is subject to the mortgage recording taxes to the extent that the agreement 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. Pursuant to the decisions of the State Tax Commission in the matters of Cosmopolitan Broadcasting Corporation and Michael Dubroff Associates, Inc., et al, accrued interest loses its character as interest when additional interest is allowed to accrue on the unpaid interest, and, thus, become part of the principal indebtedness or obligation secured by the mortgage. Nevertheless, as aforementioned, the maximum principal amounts secured under the recorded primary mortgages are $209,000,000 and

$220,000,000, and the entire principal amounts under these mortgages have not yet been fully advanced by the mortgage lenders. These amounts are said to remain the same despite the modification agreement to include the unpaid interest. Therefore, the modification of the mortgage is not subject to any additional mortgage recording taxes pursuant to Section 255 of the Tax Law since it does not create or secure 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 mortgages.

However, Section 258 of the Tax Law would prevent the release, discharge or enforcement of the prior recorded mortgages where principal advances, including principal advances in the form of unpaid interest, are made that exceed the amount upon which the tax has been paid. Accordingly, if the advances attributable to the modification for the unpaid interest when aggregated with the outstanding principal balances of $204,413,000 and $192,750,000 exceed the maximum amounts secured of $209,000,000 and $220,000,000, respectively, such mortgages will only be enforceable up to the stated maximum amounts.

DATED: May 28, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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