

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

TSB-A-93 (15) R
Mortgage
Recording Taxes
September 3, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930430C

On April 30, 1993, a Petition for Advisory Opinion was received from BT Commercial Corporation, 14 Wall Street, Third Floor, New York, New York 10005.

The issues raised by Petitioner, BT Commercial Corporation, is whether Petitioner will only have to pay a "one-time" mortgage recording tax on the recording of the designated "term" portion of a loan secured by a New York mortgage, where all readvances and repayments of the loan are allocated to non-New York real property.

On November 16, 1992, Petitioner entered into a loan agreement with NCC L. P. (the "Borrower") by which Petitioner agreed to provide Borrower with a loan (the "Overall Loan") in an amount exceeding \$50,000,000. The Overall Loan is designated a "revolver" in its entirety although the balance is highly unlikely to fall below \$25,000,000 at any time. The Overall Loan balance will revolve daily as the Borrower collects its receivables and pays its bills.

The Overall Loan is intended to be secured by liens on most or all assets of the Borrower, including a mortgage encumbering a warehouse in New York (the "New York Mortgage") and mortgages on other warehouses of Petitioner located outside the State of New York. As of the date hereof, the New York Mortgage has not been recorded.

Although the Overall Loan is a "revolver", whereby sums will be readvanced and paid down on a daily basis throughout the term of the loan, the New York Mortgage provides that only \$1,400,000 of the Overall Loan is secured by the New York Mortgage (the "New York Term Loan"). The stated amount of the New York Term Loan approximates the value of the New York collateral.

The New York Mortgage also states that the deemed balance of the New York Term Loan (a portion of the Overall Loan) secured by the New York Mortgage will not fluctuate as long as the balance of the Overall Loan never drops below \$1,400,000; the Overall Loan itself will fluctuate daily.

The New York Mortgage provides that the maximum aggregate principal amount of indebtedness that is or under any contingency may be secured by the New York Mortgage is the New York Term Loan in the amount of \$1,400,000, plus the expenses associated with the mortgaged property, including taxes assessed against the property, premiums on insurance policies on the property, and the costs incurred in upholding the lien of the mortgage (collectively, the "New York Secured Amount").

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The New York Mortgage provides that so long as the balance of the Overall Loan exceeds the amount of the New York Term Loan at all times, the amount of the Overall Loan secured by the New York Mortgage shall equal only the New York Term Loan, and the New York Term Loan shall be reduced only by the Borrower's last and final repayment of the Overall Loan.

The relevant provisions of the New York Mortgage are as follows:

17.5 MAXIMUM AMOUNT OF INDEBTEDNESS. Notwithstanding anything to the contrary in this Mortgage, the maximum aggregate principal amount of indebtedness that is, or under any contingency may be, secured by this Mortgage (including Borrower's obligation to reimburse advances made by Lender), either at execution or at any time thereafter (the "Secured Amount"), is \$1,400,000, plus amounts that Lender expends after a declaration of default under this Mortgage to the extent that any such amounts shall constitute payment of (i) taxes, charges or assessments that may be imposed by law upon any Mortgaged Property; (ii) premiums on insurance policies covering any Mortgaged Property; (iii) expenses incurred in upholding the lien of this Mortgage, including the expenses of any litigation to prosecute or defend the rights and lien created by this Mortgage; or (iv) any amount, cost or change to which Lender becomes subrogated, upon payment, whether under recognized principles of law or equity, or under express statutory authority; then, and in each such event, such amounts or costs, together with interest thereon, shall be added to the indebtedness secured hereby and shall be secured by this Mortgage.

17.6 TREATMENT OF BORROWINGS AND REPAYMENTS. Pursuant to the credit Agreement, the amount of the Secured Obligations may increase and decrease from time to time as Lender advances, Borrower repays, and Lender readvances sums on account of the Loan, all as more fully described in the Credit Agreement. For purposes of this Mortgage, so long as the balance of the Loan equals or exceeds the Secured Amount, the amount of the Loan secured by this Mortgage shall at all times equal only the Secured Amount as more fully described in Section 17.5 hereof. Such Secured Amount represents only a portion of the first sums advanced by Lender with respect to the Loan.

17.7 REDUCTION OF SECURED AMOUNT. The Secured Amount shall be reduced only by the last and final sums that Borrower repays with respect to the Loan and shall not be reduced by any intervening repayments of the Loan by Borrower. As of the Closing Date, the total amount of the Loan exceeds the Secured Amount, so that the Secured Amount represents only a portion of the Secured Obligations actually outstanding.

17.8 APPLICATION OF PAYMENTS AND REPAYMENTS. So long as the balance of the Loan exceeds the Secured Amount, any payments and repayments of the Loan by Borrower shall not be deemed to be applied against, or to reduce, the portion of the Secured Obligations secured by this Mortgage, as more fully described in Section 17.5 hereof. Such payments shall instead be deemed to reduce only such

portions of the Secured Obligations as are secured by mortgages encumbering real property located outside the State of New York, which mortgages secure the entire Secured Obligations (except to the extent, if any, that specific mortgages in such states contain specific limitations on the amount secured).

Subdivisions 1, 1-a and 2 of Section 253 of the Tax Law impose taxes on the recording of a mortgage of real property in the State measured by the principal debt or obligation, which is, or under any contingency, may be secured at the date of the execution thereof or at any time thereafter. The tax imposed pursuant to the authority of Section 253-a of the Tax Law in New York City is not different for purposes of this opinion.

Section 256 of the Tax Law provides, in pertinent part, as follows:

Sec. 256. Mortgages for indefinite amounts or for contract obligations.-- If the principal indebtedness secured or which by any contingency may be secured by a mortgage is not determinable from the terms of the mortgage, or if a mortgage is given to secure the performance by the mortgagor or any other person of a contract obligation other than the payment of a specific sum of money and the maximum amount secured or which by any contingency may be secured by the mortgage is not expressed therein, such mortgage shall be taxable under section two hundred and fifty-three of this chapter upon the value of the property covered by the mortgage, ...

* * *

If such maximum amount is expressed in the mortgage or in a sworn statement filed as required by this section, such amount shall be the basis for assessing the tax imposed by this article.

Although the "revolver" characteristic of the Overall Loan results in the New York Mortgage being a mortgage for an indefinite amount, Petitioner, consistent with Sections 253 and 256 of the Tax Law has properly capped the maximum amount secured at \$1,400,000. Accordingly, upon recordation of the New York Mortgage the mortgage recording taxes will be computed on \$1,400,000, which is the amount stated to be secured by such mortgage.

Further, all repayments and readvances of the Overall Loan can be allocated to non-New York real property security as set forth in the New York Mortgage, and such allocation will be respected and honored by the Department for purposes of computing the mortgage recording taxes due.

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It is noted, however, that in the event the amount secured by the New York Mortgage is reduced below \$1,400,000, and subsequently an additional instrument is recorded in New York State which evidences a further advance or re-advance under such mortgage, further mortgage recording taxes will be imposed, and computed on the amount of such advance or re-advance. See: 1953 Op Atty Gen 198.

DATED: September 3, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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