

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(4)R
Mortgage Recording Tax
September 27, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M100723A

Petitioner, [REDACTED] a limited liability company, asks whether the recording of a First Supplemental Agreement to Leasehold Mortgage (“Supplemental Leasehold Mortgage”), described in the statement of facts, is exempt from the mortgage recording taxes (MRT) imposed by Article 11 of the Tax Law.

We conclude that the recording of the Supplemental Leasehold Mortgage is exempt.

Facts

The Port Authority of New York and New Jersey (the “Port Authority”) is planning to issue a new series of Special Project Bonds (“the Series 8 Bonds”) ¹ to finance the expansion and improvement of Terminal 4 at JFK International Airport in New York City (the “2010 Expansion Project”). The construction of Terminal 4 (“the Original Project”) was financed in part by the issuance of Port Authority Special Project Bonds (“the Series 6 Bonds”) ², authorized in 1996. Documents authorizing issuance of the Series 6 Bonds provided that additional series of Special Project Bonds could be authorized and issued on a parity basis with the Series 6 Bonds for purposes of the project, including expansions, and that the same pledges, mortgages, security interests and assignments applicable to the Series 6 Bonds would be extended to such additional series. ³

As part of the 2010 Expansion Project, the terminal will be leased to Petitioner for an amount sufficient to pay off the debt service on the bonds. A Trustee will be appointed for the bondholders. In order to secure the payment of the principal amount of the bonds, the following agreements are expected to be executed in 2010: The Port Authority will enter into a First Supplemental Trust Indenture with the Trustee for the bondholders and, as provided in the Trust Indenture, the Port Authority and the Trustee will execute a First Supplemental Assignment of Rents, securing the aggregate principal amount of the Port Authority Series 6 and Series 8 Bonds. The Port Authority will record the First Supplemental Assignment of Rents. Petitioner and the Trustee for the bondholders will enter into the Supplemental Leasehold Mortgage, and Petitioner will record this document after the First Supplemental Assignment of Rents is recorded. The purpose of the Supplemental Leasehold Mortgage is to allow the Trustee to address financial problems if they arise by foreclosing on the assignment of rents and/or taking over the operations of the facility from Petitioner, the tenant.

¹ Port Authority of New York and New Jersey Special Project Bonds, Series 8 and 9, JFK International Air Terminal LLC in the total aggregate principal amount of up to \$1.2 billion

² Port Authority of New York and New Jersey Special Project Bonds, Series 6 and 7, JFK International Air Terminal LLC in the total aggregate principal amount of \$935,100,000

³ See First Supplemental Agreement to Leasehold Mortgage, page 2 and First Supplemental Assignment of Rents, page 2.

Analysis

Petitioner has asked whether the recording of the Supplemental Leasehold Mortgage is exempt from the MRT. Section 253 of the Tax Law imposes a tax on the recording of a mortgage of real property in New York 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. Section 250 of the Tax Law provides that an assignment of rents to accrue from tenancies, subtenancies, leases or subleases of real property, within any city in the state having a population of one million or more, given as security for an indebtedness, shall be deemed a mortgage of real property for purposes of Tax Law Article 11.⁴ Although section 252 of the Tax Law rules out any exemption from MRT given in any other law, an MRT exemption for mortgages recorded by government instrumentalities has long been recognized in case law, independent of section 252.⁵ Under this principle, the recording of the First Supplemental Assignment of Rents was exempt from the MRT.

An instrument pledging Petitioner's interest in a lease is also a mortgage when the instrument is given as security for a debt.⁶ The Supplemental Leasehold Mortgage, like the First Supplemental Assignment of Rents, secures payment of the Special Project Bonds. The exemption for governmental instrumentalities, however, does not extend to the Supplemental Leasehold Mortgage, because neither the mortgagor/Petitioner nor the mortgagee/Trustee is a governmental instrumentality. However, the recording of the Supplemental Leasehold Mortgage may be exempt under section 255.1(a) of the Tax Law, which provides:

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...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....

As applied to Petitioner's situation, the First Supplemental Assignment of Rents recorded by the Port Authority is the primary mortgage, which assigns the Port Authority's right to receive rents from Petitioner to the Trustee in order to secure the Port Authority's obligations with respect to the Series 6 and Series 8 Bonds. The First Supplemental Assignment of Rents will be recorded prior to the recording of the Supplemental Leasehold Mortgage. No MRT will be required to be paid in connection with the recording of the First Supplemental Assignment of Rents because the Port Authority is considered a political subdivision of New York State and New Jersey.⁷ The Supplemental Leasehold Mortgage recorded by the Petitioner imposes a lien upon property not originally covered by the First Supplemental Assignment of Rents -- e.g., Petitioner's rights as lessee of the premises pursuant to a lease from the Port Authority. The same indebtedness that is secured by the First Supplemental Assignment of Rents recorded by the Port Authority is the same indebtedness secured by the Supplement Leasehold Mortgage, and the purpose of each of those documents is to secure the indebtedness of the Port Authority with respect to the Series 6 and Series 8 Bonds. Consequently, the Supplemental Leasehold Mortgage is covered by section 255.1(a) because (i) the Supplemental Leasehold Mortgage will be recorded subsequent to the First Supplemental Assignment of Rents, upon which no taxes were due, (ii) the Supplemental Leasehold Mortgage is an additional mortgage imposing a lien upon property not originally covered by the First Supplemental Assignment of Rents and (iii)

⁴ Tax Law §250.2(a).

⁵ *Matter of City of New York v. Tully*, 88 A.D.2d 701, lv to app denied 57 N.Y.2d 606.

⁶ 20 NYCRR §641.6(b)(3).

⁷ See Unconsolidated Laws §6455.

the Supplemental Leasehold Mortgage secures the same principal indebtedness as the First Supplemental Assignment of Rents. Thus, the Supplemental Leasehold Mortgage can be recorded without payment of the MRT, provided that the First Supplemental Assignment of Rents to which it is supplemental, pursuant to its terms, has already been recorded.

DATED: September 27, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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