

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

TSB-A-94 (1)R
Mortgage
Recording Taxes
January 28, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M931019A

On October 19, 1993, a Petition for Advisory Opinion was received from Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

The issues raised by Petitioner, Niagara Mohawk Power Corporation, are:

1. Whether the amendment and restatement of the First Mortgage Bonds, and the concurrent recordation of the Supplemental Mortgage Indenture, being undertaken for the benefit of, and to support the issuance of the Refunding Bonds by, the New York State Energy Research and Development Authority (hereinafter the "Authority"), a New York State agency, are exempt from the imposition of the mortgage recording taxes.
2. Whether the amendment and restatement of the First Mortgage Bonds represents the issuance of a further or additional indebtedness by the Authority.

In 1984, the Authority issued two series of bonds (the "Prior Bonds") to finance the acquisition, construction and installation of various systems and facilities to abate, control and reduce pollution, and to aid in sewage and solid waste disposal, at Petitioner's Nine Mile Point Nuclear Station in Oswego, New York. The Prior Bonds were issued pursuant to Indentures of Trust dated as of July 1, 1984 and October 1, 1984 (the "Prior Indentures") between the Authority and Bankers Trust Company, as trustees (the "Prior Trustees"). In support of the Prior Bonds, first mortgage bonds (the "First Mortgage Bonds") were issued by Petitioner pursuant to certain supplemental indentures to a blanket Mortgage Trust Indenture between Petitioner and Marine Midland Bank, N.A., as trustee (the "Mortgage Trustee"), dated as of October 1, 1937, and thereafter supplemented and amended (the mortgage trust indenture, as so supplemented and amended, the "Mortgage"). Upon issuance, the First Mortgage Bonds were assigned to the Prior Trustee. The terms of the First Mortgage Bonds paralleled the terms of the Prior Bonds, and under the provisions of certain Participation Agreements entered into as of July 1, 1984 and October 1, 1984, each between the Authority and Petitioner (collectively, the "Prior Participation Agreement"), Petitioner was required to make payments of principal and interest on the First Mortgage Bonds to the Prior Trustee on or before the due date for the corresponding payment on the Prior Bonds.

In order to enable Petitioner to take advantage of currently favorable interest rates, the Authority has agreed to issue a single series of refunding bonds (the "Refunding Bonds") in the aggregate principal amount of \$115,705,000, the amount outstanding under the Prior Bonds. The Refunding Bonds will be issued by the Authority pursuant to an Indenture of Trust, dated as of October 1, 1992 (the "Indenture"), between the Authority and The Bank of New York, as Trustee

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(the "Trustee"). Upon the issuance of the Refunding Bonds, the proceeds of the sale thereof will be deposited with the Trustee and remitted to the Prior Trustee, enabling the Prior Trustee, which will then be holding sufficient funds to defease the Prior Bonds, to deliver the existing First Mortgage Bonds to the Trustee. Upon receipt by the Trustee, the First Mortgage Bonds will be redelivered to, and (simultaneously with such delivery) amended and restated by, the Mortgage Trustee to parallel the provisions of the Refunding Bonds. The First Mortgage Bonds, as so amended and restated, will then be reassigned to the Trustee to be held in support of the Refunding Bonds. The Mortgage Trustee, in its capacity as trustee under the Mortgage, will no hold the Mortgage for its own benefit or for the benefit of the holders of the Refunding Bonds.

The First Mortgage Bonds, as amended and restated, will continue to be secured under the Mortgage, as evidence by a consolidated, amended and restated Supplemental Mortgage Indenture, to be entered into as of July 1, 1994 (the "Supplemental Mortgage Indenture"). The Supplemental Mortgage Indenture from Petitioner to the Mortgage Trustee will impose a lien on the mortgage of real property owned by Petitioner solely for the benefit of the Authority and not for the benefit of the holders of the Refunding Bonds.

A Participation Agreement, in form and substance identical to the Prior Participation Agreement, was entered into between the Authority and Petitioner as of October 1, 1992 (the "Participation Agreement"). The Participation Agreement provides, as did the Prior Participation Agreement, that payments by Petitioner on the First Mortgage Bonds will be made to the Trustee prior to the due date for the corresponding payments under the Refunding Bonds. Petitioner is submitting the Supplemental Mortgage Indenture for recordation at the direction of, and to satisfy its obligations to, the Authority under the Participation Agreement.

The recordation of the Supplemental Mortgage Indenture is being undertaken for the benefit of the Authority. The Authority is the obligor under the Prior Indenture and the Indenture, for the benefit of which the First Mortgage Bonds were, and continue to be, provided. Further, the First Mortgage Bonds evidence and secure Petitioner's obligation to make payments to the Authority, thereby assuring the Authority that its obligations under the Prior Bonds and the Refunding Bonds would be timely met. The Trustee, in turn, is acting on behalf of the Authority and holding the First Mortgage Bonds for the benefit of the Authority. Moreover, the Authority is, beneficially through the Mortgage Trustee, the mortgagee under the Mortgage.

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.

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Section 252 of the Tax Law provides, with certain exceptions, that "no 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 taxes imposed by this article by reason of anything contained in any other statute..."

Notwithstanding the language of Section 252 of the Tax Law, the Department of Taxation and Finance has considered claims for exemption from various authorities in New York State based on tax exemptions in their creating statutes and has ruled in certain cases that the recording of the mortgages the authorities issued were exempt from the tax imposed by Article 11 of the Tax Law, despite the fact that Section 252 on its face makes no provision for such an exemption. This position is consistent with the general rule that where a conflict or variance exists between two enactments relating to the same general subject matter, a later special statute takes precedence against a general statute and the prior general statute must yield to the later specific or special statute. (Williamsburg Power Plant Corp. v. City of New York, 255 App Div 214, affd 280 NY 551; First National Bank and Trust Co. v. Village of Saltaire, 256 App Div 156).

Section 1861 of the Public Authorities Law provides that the property of the Authority [New York State Energy Research and Development Authority] and its income and operations shall be exempt from taxation.

In Hotel Waldorf-Astoria Corp. v. State Tax Commission, (86 Ad2d 330, 334), in acknowledging that a \$45 million dollar 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.)

In Riverton Properties, Inc., Dec St Tx Comm, November 6, 1981, TSB-H-81(17)M, the Commission held that an Indenture of Mortgage and Deed of Trust executed by a private party to a trustee in respect of debentures guaranteed by the United States government was not subject to mortgage recording taxes since the United States government by way of its contingent economic interest, was party to the mortgage. In its decision, the Commission concluded that the mortgage from the private party to the trustee constituted a mortgage for the benefit of the United States - - notwithstanding that it was held by the trustee and inured, in the first instance, to the benefit of the debenture holders.

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With respect to issue "1", the recordation of the Supplemental Mortgage Indenture is being undertaken for the benefit of the Authority. The Authority is the obligor under the Prior Indenture and the Indenture, for the benefit of which the First Mortgage Bonds were, and continue to be, provided. Further, the First Mortgage Bonds evidence and secure Petitioner's obligation to make payments to the Authority, thereby assuring the Authority that its obligations under the Prior Bonds and the Refunding Bonds would be timely met. The Trustee, in turn, is acting on behalf of the Authority and holding the First Mortgage Bonds for the benefit of the Authority. Moreover, the Authority is beneficially through the Mortgage Trustee the mortgagee under the Mortgage. Accordingly, since the Authority is a governmental agency exempt from taxation pursuant to Section 1861 of the Public Authorities Law and it has either a direct or indirect interest in the mortgages to be recorded, pursuant to Williamsburg Power Plant Corp. v. City of New York, *supra*, Hotel Waldorf-Astoria Corp. v. State Tax Commission, *supra*, and Riverton Properties, Inc., *supra*, the amendment and restatement First Mortgage Bonds and the concurrent recordation of the Supplemental Mortgage Indenture are not subject to the mortgage recording taxes imposed pursuant to Subdivisions 1, 1-a and 2 of Section 253 of the Tax Law.

Concerning issue "2", as set forth in issue "1", since the Authority is a governmental agency exempt from taxation pursuant to Section 1861 of the Public Authorities Law and holds a direct or indirect interests in the First Mortgage Bonds, whether the amendment or restatement of the First Mortgage Bonds represents the issuance of a further or additional indebtedness by the Authority would be of no consequences for purposes of the mortgage recording taxes.

DATED: January 28, 1994

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

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