

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

TSB-A-97(5)R  
Mortgage Recording Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M970214B

On February 14, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from the New York State Urban Development Corporation d/b/a Empire State Development Corporation, 633 Third Avenue, 37th Floor, New York, New York 10017.

The issues raised by Petitioner, the New York State Urban Development Corporation (UDC), are:

1) Whether the taxes imposed by Article 11 of the Tax Law and Chapter 26 of the Administrative Code of City of New York (collectively, the mortgage recording tax) are due upon the recording of any mortgage of property that is part of the UDC's 42nd Street Development Land Use Project (the Project) where (i) UDC, or its wholly owned subsidiaries, including 42nd St. Development Project, Inc., the subsidiary formed to implement the Project on behalf of UDC, is (a) the named mortgagee (whether as trustee, agent, nominee or otherwise) or (b) a co-mortgagee (whether or not a private entity is the other co-mortgagee), (ii) UDC is obligated to record the mortgage and (iii) the mortgage is entered into in furtherance of the Project, including, without limitation, use of the proceeds of the mortgage loan for acquisition and development costs associated with the Project or other Project purposes incurred by parties other than UDC (any of the foregoing, "Project Costs").

2) If a mortgage referred to in 1) above 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, whether mortgage recording tax is due upon the recording of the applicable instrument or otherwise to the extent that either (a) the then outstanding principal indebtedness secured by the mortgage is not increased (or, if increased, whether mortgage recording tax is imposed only with respect to any increase in the amount of secured indebtedness and then only if mortgage recording tax would otherwise have been required to be paid on such additional indebtedness) or (b) UDC is named as mortgagee or co-mortgagee, with respect to, and is obligated to record, such assignment, supplement, modification or amendment.

Petitioner submits the following facts as the basis for this Advisory Opinion. The petition relates to anticipated transactions. An advisory opinion is based on the facts presented (20 NYCRR 2376.1(a)). We note that the application of the opinion is limited to the anticipated facts set forth in the opinion.

In 1980, UDC entered into a memorandum of understanding with the City of New York (the "City") for the redevelopment of the West 42nd Street/Times Square 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 (the "Project Plan") was approved by UDC's Directors in 1984 and, in the same year, approved by the City's Board of Estimate. Amendments to the Project Plan have been approved in 1984, 1988, 1991, 1994 and 1996.

The Project Plan envisions, among other improvements, the construction of four new office towers at the eastern end of the Project area and, at the western end, a hotel, along with other commercial and retail uses. Construction of certain of the long-term improvements may be deferred if warranted by market conditions. If so, the affected portion of the Project area must be developed, in the near term, for tourist and entertainment-related activities in accordance with an immediate revitalization program known as "42nd Street Now!". In the mid-block, the Project Plan calls for the renovation of nine turn-of-the-century theaters along West 42nd Street to house a mix of entertainment and entertainment-related uses, including live theater. Substantial public improvements, including sidewalk and lighting improvements and new subway entrances, also form part of the Project.

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 set forth certain of the goals of the Project:

To 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....

As part of the 1984 approval process, extensive determinations and findings were made with respect to the Project. These findings projected the following benefits from the Project:

The 42nd Street Project will provide significant economic benefits to the public. In revenues, alone, the City is expected to realize as a result of the new construction an increase of over six times the real estate taxes it would have received, were the Project not built. The Project will also generate thousands of new jobs in the area....

The Project is expected to benefit the public by eradicating or substantially ameliorating the threatening social conditions that pervade the area. The present tawdriness will be eliminated from the Project area and replaced with a lively and wholesome street environment emanating from the active commercial, retail, hotel, theater, and upgraded entertainment uses. As a result of the

improved surroundings, it is anticipated that crime in the project area will be substantially reduced. The expected effect of the Project will be to recreate, through a cohesive project plan, some or all of the former glory of 42nd Street and thus return the area to use and enjoyment by the public as a whole.

Since the Project Plan was approved in 1984, UDC has acquired fee title, through condemnation and otherwise, to most of the approximately 13 acres of land in midtown Manhattan that make up the Project area (the entirety of the Project area, the "Land"). UDC has divided the Land into various sites and, as more fully described below, has leased, or will lease, the sites to private developers or, in the case of certain of the theaters, to a not-for-profit organization, the New 42nd Street, Inc. ("New 42"), which is charged with overseeing the implementation of the Project on those sites.

More specifically, sites 1, 3, 4 and 12, the "office sites" at the eastern end of the Project area, were leased in 1988 to affiliates of Times Square Center Associates ("TSCA"), a partnership between The Prudential Insurance Company of America and an affiliate of Park Tower Realty Corporation. In July 1996, the TSCA entity acting as the Site 12 tenant assigned its interest in the Site 12 lease to an entity controlled by The Durst Organization, which has commenced construction of an office building on Site 12. The New Amsterdam Theatre (which comprises a portion of Site 6) is leased to New Amsterdam Development Corporation ("NADC"), an affiliate of Disney Development Corporation. Renovation of the theater by NADC, currently underway, is scheduled to be completed in the spring of 1997. A lease with an affiliate of the Forest City Ratner Companies for the development of an entertainment/retail complex to be located on portions of Sites 6, 8 and 10 has been signed. Leases with affiliates of the Tishman Urban Development Corporation for the development of a hotel and retail/entertainment complex on Site 7 are being finalized and are expected to be executed shortly. Finally, New 42 has completed the renovation of the Victory Theater, which opened in 1995 as New York's only theater dedicated to young people.

Generally, the tenant of each site, or an affiliate thereof, will act as the developer of that site, with the obligation to construct certain buildings and improvements on the leased premises, or to rehabilitate existing improvements, in accordance with the Project Plan. In addition, as to all sites other than some or all of the theaters leased to New 42, it is anticipated that each tenant (or the applicable developer) will pay (or, through site revenues, will, in effect, reimburse the public parties for) certain costs associated with the acquisition of the relevant site. Certain of the developers may also be expected to defray the cost of improvements to public facilities (sidewalks, lighting, subway entrances, etc.) in the Project areas. Specific financial terms vary substantially from site to site.

Except for the reimbursement of certain UDC expenses and the dedication of certain site revenues to the recovery of other public funds invested in the Project (including, for example, the repayment, with interest, of loan funds made available by UDC for the rehabilitation of the New Amsterdam Theater), other payments made by the tenants under the leases inure to the benefit of the City. In addition, title to the Land and to the landlord's rights under each of the leases will revert to the City upon the occurrence of certain milestone events

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or dates, for example, completion of specific components of the Project. At the end of the term of each lease, ownership of all buildings and improvements will vest in the landlord, free of any interest of the tenant. In some instances, however, the tenant will have an option to purchase its site following a stated period after completion of the initial construction or renovation work.

The City and State have recognized from the outset that tax exemptions and abatements would be required to make the initial development of the Project financially feasible. An important factor in this regard is the real property tax exemption which the Project enjoys by virtue of the ownership of the Land by UDC or a subsidiary of UDC. The leases (other than the lease to the New 42) require payments in lieu of real property taxes to be made in increasing amounts during the lease term. The Project also enjoys an exemption from New York sales tax. Here, too, the developers are generally required to make stipulated payments in lieu of sales taxes to the landlord. Such payments in lieu of sales tax are, in certain instances, required to be applied to site acquisition costs and other Project expenses and purposes. Finally, exemption from mortgage recording tax and, in certain instances, the making of payments in lieu of mortgage recording taxes, is contemplated as a financial component of certain of the transactions.

Pursuant to certain documents between UDC and the developers (the "Project Documents"), UDC will (a) either be the named mortgagee (whether as trustee, agent, nominee or otherwise) or be a co-mortgagee (whether as trustee, agent, nominee or otherwise), and a private entity may be the other co-mortgagee under each of the mortgages and separate assignment of leases and rents (collectively, the "Recognized Mortgages") and (b) be obligated to record the respective Recognized Mortgages. Although UDC will either be the named mortgagee or a co-mortgagee, UDC will have no beneficial interest in the Recognized Mortgage.

Contemporaneously with the execution and delivery of a Recognized Mortgage, or at any time thereafter, UDC may assign all of its right, title and interest in and to the relevant Recognized Mortgage to the lender having beneficial ownership of such Recognized Mortgage, which may be UDC's co-mortgagee.

In addition to the contemplated assignments of UDC's interest in the Recognized Mortgages to other lenders or its co-mortgagee, UDC anticipates that the Recognized Mortgages may, from time to time (whether before and/or after UDC has ceased to be the designated mortgagee or co-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 Recognized 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, a leasehold mortgage may be converted into a mortgage secured by a fee interest or may be spread to cover the fee interest.

**Analysis, Issue #1**

Regarding issue "1", Article 11 of the Tax Law imposes taxes on the recording of mortgages of real property located in New York State, measured by the principal debt or obligation secured by the mortgage. Section 252 of Article 11, 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 with respect to 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. New York State Urban Development Corporation d/b/a Empire State Development Corp., Adv Op Comm T&F, December 18, 1995, TSB-A-95(15)R.

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 any of its political divisions, such property is 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 created pursuant to Article 18-A of the General Municipal Law even though beneficial ownership of the property is held by private interest. (See 1982 Opns St Comp No. 82-188, p 240; One Park Place Associates, Adv Op St Comm, May 24, 1982, TSB-A-82(1)(M) and New York State Urban Development Corp d/b/a Empire State Development Corp., supra)

Also, in Matter of City of New York v. Tully, 88 AD2d 701, in concluding 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 noted that the State agency was immune from taxation "and [t]his immunity is enjoyed independent of the exemptions from taxation set forth in section 252 of the Tax Law...." The Court reasoned that "[t]he mortgage is similarly property of the immune agency and thus exempt from taxation....".

In 1968, the New York State Legislature established UDC as a vehicle for reversing blight and decay in New York's towns and cities. McKinney's Unconsolidated Laws of New York §§ 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. UDC Act § 6254(1). As a public benefit corporation, UDC exercises governmental authority.

Section 6272 of the UDC Act provides, in pertinent part, 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 monies of [UDC} or any of its subsidiaries... 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.

Section 6253(6) of the UDC Act defines a "project" as follows:

A specific work or improvement including lands, buildings, improvements, real and personal properties or any interest therein, acquired, owned, constructed, reconstructed, rehabilitated or improved by [UDC] or any subsidiary thereof, whether or not still owned or financed by [UDC] or any subsidiary thereof...

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 may 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.

Section 6283 of the UDC Act states:

Insofar as the provisions of the act are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling.

Section 6284 of the UDC Act provides:

This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purpose.

Consistent with the legislative mandate of the UDC Act, courts have given liberal interpretation to its tax exemption provisions. For example, in Wein v. Beame, 43 NY2d 326, the New York Court of Appeals upheld an exemption from real property taxes as applied to the Commodore Hotel property in Manhattan. The

hotel had been sold to UDC for one dollar, then leased back to the seller for 99 years. Arguments that UDC had no real interest in the property, and was a "straw man" brought into the project solely to provide a tax exemption, were rejected. The Court stated:

It is not for us to speculate as to the motive for UDC's participation, nor to delineate the amount of active participation which is necessary to denominate a particular project a UDC project. Here, UDC will be the owner of the building, and it is enough that UDC has to combat otherwise inevitable urban blight, which is thus clearly in accordance with the benign purposes of the Legislature in creating UDC. (Id. At 331)

**Conclusion, Issue #1**

In view of the broad exemption granted UDC and its projects by the UDC Act and the direction that the provisions be liberally construed, as well as the general immunity of New York State agencies from taxation, the recording of the Recognized Mortgages is not subject to the mortgage recording tax if the UDC is the named mortgagee or a co-mortgagee (whether as trustee, agent or otherwise) and the Recognized Mortgages are recorded prior to the time that UDC assigns its interest in the mortgages to other lenders or its co-mortgagee.

**Analysis, Issue #2**

Section 255 of the Tax Law provides as follows:

[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. Matter of City of New York v. State Tax Commn., 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. 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 Commn., 295 NY 173, 178-179 and Matter of Bay View Towers Apts. v. State Tax Commn, 48 AD2d 86, 89, affd 40 NY2d 856.

**Conclusion, Issue #2**

The recording of any assignment, supplement, modification or amendment of Recognized Mortgages that were the subject of Conclusion, Issue #1, is not subject to mortgage recording tax to the extent (1) the instrument is not a mortgage subject to tax under section 253 of the Tax Law (as in the case of an assignment of the Recognized Mortgages), (2) the recording is exempt under the supplemental mortgage provisions of section 255 of the Tax Law, but only to the extent that the principal indebtedness or obligation that was secured by the prior primary mortgage is not increased or added to or (3) UDC is named as mortgagee or co-mortgagee with respect to such assignment, supplement, modification or amendment.

DATED: April 18, 1997

/s/  
John W. Bartlett  
Deputy Director  
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.