

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

TSB-A-98(4)R  
Mortgage Recording Tax  
October 30, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M981013B

On October 13, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

The issue raised by Petitioner, Niagara Mohawk Power Corporation, is whether the mortgage recording taxes imposed by and pursuant to the authority of Article 11 of the Tax Law will be due upon the recording of a Supplemental Mortgage Indenture to be entered into in conjunction with (i) the issuance by the New York State Energy Research and Development Authority (the "Authority") of certain refunding revenue bonds as described herein and (ii) the concurrent amendment and restatement of certain underlying first mortgage bonds of Petitioner.

Petitioner submits the following facts as a basis for this Advisory Opinion.

Petitioner is an investor-owned public utility company incorporated in New York and is primarily engaged currently in the generation, transmission, distribution and sale of electricity and the distribution of natural gas in New York.

In 1985, the Authority issued a single series of bonds (the "Prior Bonds") to finance the acquisition, construction and installation of certain pollution control, solid waste and sewage disposal facilities at Unit No.2 of the Nine Mile Point Nuclear Station, a nuclear generating facility located in Oswego, New York ("Unit No. 2"), and certain water pollution control facilities at Petitioner's Dunkirk Steam Station, a fossil fuel electric generating station located near Lake Erie, New York. The Prior Bonds were used to finance a portion of the costs of construction at Unit No. 2, but only to the extent of Petitioner's forty-one percent ownership interest in Unit No. 2. The Prior Bonds were issued pursuant to Indentures of Trust dated as of October 1, 1984, and November 1, 1985, (the "Prior Indentures"), between the Authority and Bankers Trust Company, as trustee (the "Prior Trustee").

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 Bankers Trust Company (successor to 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 October 1, 1984 and November 1, 1985, 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.

To refund the outstanding Prior Bonds, the Authority has agreed to issue a single series of refunding bonds (the "Refunding Bonds") in the aggregate

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principal amount of \$75,000,000, the amount currently outstanding under the Prior Bonds. The Refunding Bonds will be issued by the Authority pursuant to an Indenture of Trust, dated on or about October 15, 1998, (the "Indenture"), between the Authority and The Bank of New York, as Trustee (the "Trustee"). Upon the issuance of the Refunding Bonds, the proceeds of the sale thereof will be deposited with the Trustee and then remitted to the Prior Trustee, enabling the Prior Trustee, which will then be holding sufficient funds to refund the Prior Bonds, to concurrently deliver the existing First Mortgage Bonds to the Trustee. Concurrently with that receipt by the Trustee, the First Mortgage Bonds will be delivered to, and 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 delivered to the Trustee to be held in support of the Refunding Bonds.

The First Mortgage Bonds, as amended and restated, will continue to be secured under the Mortgage, as evidenced by a consolidated, amended and restated Supplemental Indenture, to be entered into on or about October 15, 1998 (the "Supplemental Indenture"). The Supplemental Indenture will impose the lien of the mortgage on 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, which consolidates, amends and restates the Prior Participation Agreement, will be entered into between the Authority and Petitioner on or about October 15, 1998 (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 on or before the due date for the corresponding payments under the Refunding Bonds.

#### **Applicable Law**

Subdivisions 1, 1-a and 2 of Section 253 of the Tax Law impose the mortgage recording tax 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.

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 ...."

Section 1852(1) of the Public Authorities Law provides that the Authority "shall be a body corporate and politic, constituting a public benefit corporation." Section 1861 of the Public Authorities Law provides that the property of the Authority and its income and operations shall be exempt from taxation.

#### **Opinion**

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

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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).

In Matter of City of New York v Tully (88 AD2d 701, lv to app den 57 NY 2d 606), the court confirmed the State Tax Commission's determination that a mortgage given to the New York State Employees' Retirement System was exempt from the mortgage recording tax, concluding that the Retirement System, as a State Agency, enjoyed an immunity from taxation "independent of the exemptions from taxation set forth in section 252 of the Tax Law." Citing this case, section 644.1(a)(1) of the mortgage recording tax regulations provides an exemption from the mortgage recording tax for "mortgages where the mortgagee is New York State or any of its agencies, instrumentalities or political subdivisions, to the extent immune from such taxation" (20 NYCRR 644.1(a)(1)).

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 for 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.

Applying these principles to similar circumstances involving Petitioner, an earlier advisory opinion concluded that a mortgage for the benefit of the Authority was exempt from mortgage recording tax (Niagara Mohawk Power Corporation, Adv Op Comm T&F, January 28, 1994, TSB-A-94(1)R). The opinion stated, in part:

... 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 for 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 of 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.

As in Niagara Mohawk Power Corporation, supra, and for the same reasons stated therein, the Authority is considered to be a mortgagee under Supplemental

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Mortgage Indenture. Therefore, in accordance with Williamsburg Power Plant Corp. v. City of New York, supra, Matter of City of New York v. Tully, supra, Riverton Properties, Inc., supra, and Niagara Mohawk Power Corporation, supra, the restatement of the First Mortgage Bonds and the concurrent recordation of the Supplemental Mortgage Indenture are not subject to the mortgage recording tax.

DATED: October 30, 1998

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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