

BUREAU OF LAW

MEMORANDUM

TO: State Tax Commission

FROM: E. H. Best, Counsel

SUBJECT: In the Matter of the Mortgage
executed by Corlind Holding
Corporation to Small Business
Administration

The above matter concerns a mortgage executed by Corlind Holding Corporation to the Small Business Administration. Mortgage recording tax was demanded by a recording officer and paid at the time of the recording. Refund of such tax is now sought.

In my letters of September 18, 1964 to Counsel to the Register of the City of New York and to the Regional Counsel for the Small Business Administration, I expressed my opinion that mortgages made to the Small Business Administration and mortgages made to a lending institution, in which the Small Business Administration has a participating interest, are exempt from the mortgage recording tax to the extent of the participating interest of the Small Business Administration. Copies of such letters are hereto attached.

Accordingly, the proposed order has been prepared for your signature granting the relief requested by the applicant. If you agree, kindly sign the same and return the file to the Law Bureau for further processing.

Counsel

FVD:dv

Enc.

March 28, 1968

Mortgage tax--sections 252 and 253--
Mortgages to Federal agencies--
Small Business Administration

September 18, 1964

Frederick A. Spinelli, Esq.
Regional Counsel
Small Business Administration
42 Broadway
New York 4, N. Y.

Re: RCIDWR

Dear Mr. Spinelli:

This is in reply to your inquiry concerning application of the New York mortgage recording tax to mortgages in which the Small Business Administration has a particular interest. I regret that an earlier reply has not been possible.

The Small Business Administration was created by U.S.C. §§ 631-647. "to maintain and strengthen the overall economy of the Nation." It is an agency of the United States and, accordingly, its claims in a bankruptcy proceeding enjoy the same priority as other claims of the United States (Small Business Administration v. McMillan, 381 U. S. 446). Although the statute creating SBA does not expressly declare that its mortgages shall be exempt from state taxation, I believe that is unimportant. In the absence of a Constitutional conflict, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance of governmental functions of federal agencies (Seng v. Milk Control Commission, 308 U. S. 280, at page 284). Accordingly, it is my opinion that a mortgage loan by the SBA in the course of its authorized operations is exempt from mortgage recording taxes of, United v. Hays, Inc., Corporation, 304 U. S. 40; Federal Land Bank v. Green, 309 U. S. 374.

It appears that the SBA considers participation in making loans secured by mortgages. Your letter states that in some such cases the bank disburse the funds to the borrower and is named in the mortgage as sole obligor. Through the SBA may have issued as much as 50% of the money. You urge that such a mortgage should be exempt from mortgage tax to the extent of SBA participation. It is my opinion that such a mortgage is exempt from mortgage tax to the extent of SBA participation.

Frederick A. Spinelli, Esq.

In my opinion, such a mortgage is exempt from tax to the extent of the SBA's interest therein, provided its ownership of a participating interest in the mortgage is sufficiently established. This is in accord with an opinion of the Attorney General (1934 Op. Atty. Gen. 189) dealing with mortgages owned by the Reconstruction Finance Corporation but executed to its nominees. In that opinion, the Attorney General said:

"It is the fact of ownership, rather than the name appearing upon the mortgage instrument, that determines the question."

I believe the same principle applies here.

However, I do not believe exemption can be established by merely including in the mortgage a paragraph such as you suggest. Since the mortgage is signed only by the borrower, such a paragraph would be merely a statement by him as to the participation of the SBA. Instead, I believe there should be submitted to the recording officer an affidavit by an officer of the SBA showing that the SBA, immediately upon execution and delivery of the mortgage, possesses a participation interest therein to the extent of its share of the mortgage loan (the amount being stated) and that the mortgage was executed to the participating bank merely for convenience. This is also in accordance with the opinion of the Attorney General cited above.

Very truly yours,

EDWARD H. BEST
Counsel

FX:EB

September 18, 1964

Samuel K. Handel, Esq.
Counsel
Register of the City of New York
Hall of Records
31 Chambers Street
New York 7, N. Y.

Dear Mr. Handel:

Mr. Lorvan of this Department has referred to me your letter of August 24 expressing the opinion that mortgages given to the Small Business Administration are not exempt from mortgage recording tax.

Enclosed for your information is copy of a letter I am sending to Mr. Spinelli, Regional Counsel to the SBA, in which you will note I have expressed a contrary opinion.

Your letter suggests that Congressional consent to the imposition of a State mortgage recording tax may be found in or inferred from 15 U.S.C. 646, which provides that SBA mortgages shall not take priority over antecedent real property tax liens. However, this is a very narrowly limited submission to local taxation. Had Congress intended the SBA to be subject to state taxes generally, it seems clear the statute would have included something like 28 U.S.C. 959 (b), imposing liability for state taxes on Federal court receivers and trustees who operate property in their possession.

You also urge that the mortgage recording tax is ordinarily paid by the mortgagor rather than the mortgagee and that, even if the SBA is exempt, it cannot claim exemption for the benefit of a mortgagor who has agreed to pay the tax. Substantially the same contention was rejected in Pittman v. Home Owners' Corporation, 308 U. S. 21. See, also, Informal Opinions of the Attorney General, 1956, page 26.

Your letter also suggests that although SBA is a governmental agency, its participation in loans to private business is the exercise of a proprietary rather than a governmental function.

Samuel X. Handel, Esq.

-2-

However, the Supreme Court has said that for purposes of tax immunity the United States performs no proprietary functions (Federal Land Bank v. Board of County Commissioners, 368 U. S. 146).

For these reasons, as well as for the other reasons stated in my letter to Mr. Spinelli, I believe that the SSA is exempt from mortgage recording tax.

Sincerely yours,

EDWARD H. DEEST
Counsel

AK:AB

Enc.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
BEFORE THE STATE TAX COMMISSION

Case No.

In the Matter of the Mortgage executed by

GORLIND HOLDING CORPORATION

to

SMALL BUSINESS ADMINISTRATION

ORDER

A petition having been filed by Gorlind Holding Corporation for review of the determination of the recording officer of Queens County imposing mortgage recording tax in the amount of One Thousand Fifty Dollars, (\$1,050), and additional tax under Section 258 of the Tax Law of Three Hundred Fifty-seven Dollars (\$357), total One Thousand Four Hundred Seven Dollars (\$1,407), paid to the recording officer of Queens County on April 21, 1966, upon the mortgage dated September 15, 1960, executed by Gorlind Holding Corporation to Small Business Administration, an agency duly created under and by virtue of an Act of Congress, which mortgage was recorded in the office of said recording officer on September 20, 1960, in Book 7769 of Mortgages Page 261, and

APPLICATION having also been made for refund of One Thousand Four Hundred Seven Dollars, (\$1,407), mortgage recording tax paid as aforesaid;

AND HEARING having been held before Samuel Lorvan, Hearing Officer, designated as such by this Commission, on December 6, 1967, at the office of the State Tax Commission at the State Office Building, 80 Centre Street, New York, New York, and the applicant

having appeared by its attorneys, Freeman & Hyman, Esqs., Harold Hyman, Esq. of counsel; Small Business Administration appeared by Robert M. Morgenthau, United States Attorney for the Southern District of New York, Brian J. Gallagher, Esq., Assistant United States Attorney, of counsel; and the City of New York appeared by J. Lee Rankin, Esq., its Corporation Counsel, Samuel K. Handel, Esq., Special Assistant Corporation Counsel, of counsel; and a report having been made by said Hearing Officer

NOW THEREFORE after examination of the record, the proofs and various documents submitted in the proceeding and after due deliberation, it is hereby found

(1) That on September 17, 1959 the Small Business Administration authorized a loan to Acme Venetian Blind and Window Shade Corp. in the amount of \$250,000.00 on the guaranty of the loan by Corlind Holding Corporation and others.

(2) That on August 29, 1960 to induce the Small Business Administration to loan \$210,000.00 to the Acme Venetian Blind and Window Shade Corp., a loan agreement was executed by the Corlind Holding Corporation and others by the terms of which it guaranteed to reimburse the Small Business Administration for all expenses incurred in connection with the making and the administration of the loan.

(3) That on September 15, 1960 to induce the Small Business Administration to make a loan of \$210,000.00 to the Acme Venetian Blind and Window Shade Corp., the Corlind Holding Corporation executed a guarantee that the amount of the said loan and interest will be paid when due and simultaneously therewith the Corlind Holding Corporation executed a mortgage to the Small Business Administration on its property located in the Borough and County of Queens in the City of New York as security for the loan.

(4) That on September 15, 1960, the Acme Venetian Blind and Window Shade Corporation executed and delivered its note for \$210,000.00 to the Small Business Administration.

(5) On September 20, 1960, the mortgage executed by Corlind Holding Corporation to the Small Business Administration was recorded in the office of the Register of the City of New York, County of Queens in Brooklyn, in Book 7769 of mortgages, at page 261; that no mortgage recording tax was paid on recording.

(6) That on April 21, 1966 a satisfaction of the mortgage was delivered to the acting Register of the City of New York and that on presentation of the satisfaction, the said acting Register refused to accept or to record the satisfaction of the mortgage without the payment of mortgage recording tax and additional tax claimed to be due; that mortgage recording tax of \$1,050.00 and additional tax provided for under Section 258 of the Tax Law in the amount of \$357.00, totaling \$1,407.00, was paid to the Recording Officer under protest.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

1. That said mortgage was not subject to the mortgage recording tax imposed by Article Eleven of the Tax Law.

2. That the recording officer of Queens County erroneously collected the sum of One Thousand Four Hundred Seven Dollars, (\$1,407), as mortgage recording tax thereon.

3. That the determination of the recording officer be and the same hereby is cancelled and annulled and it is hereby

ORDERED

(A) That Samuel K. Handel, recording officer of Queens County be, and he hereby is authorized and directed to deduct the

sum of One Thousand Four Hundred Seven Dollars, (\$1,407), from mortgage tax moneys in his hands or which shall come to his hands and to refund said amount to Corlind Holding Corporation.

(B) That two certified copies of this order be mailed to the recording officer of Queens County, one of which he is directed to file with the records of his office and the other with the treasurer of the City of New York as a warrant for the disbursement.

DATED: Albany, New York on this 1st day of May , 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

PRESIDENT

/s/

A. BRUCE MANLEY

COMMISSIONER

/s/

SAMUEL E. LEPLER

COMMISSIONER