

## BUREAU OF LAW

## MEMORANDUM

*Tishman Rocstar, Inc.*

TO: State Tax Commission

FROM: E. H. Best, Counsel

SUBJECT: In the Matter of a Mortgage Executed By

TISHMAN ROCSTAR, INC.  
to  
BOWERY SAVINGS BANK

The hearing officer, Mr. Samuel Lorvan, has submitted a report and recommendation and a proposed determination and order denying a mortgage tax refund which was requested by the mortgagor. I disagree with Mr. Lorvan and believe that the leasehold mortgage executed by Tishman Rocstar, Inc., mortgagor, to Bowery Savings Bank, mortgages, did not, to the major extent thereto, create a new indebtedness. Accordingly, I have had prepared a proposed determination granting the refund as requested by the applicant. The following are the facts herein:

On July 8, 1949, 420 East 63rd Street Corporation executed a mortgage covering the premises involved to Irving Trust Company to secure payment of \$6,500,000. The mortgage was recorded in the office of the recording officer of the City of New York, New York County in Book 5085 of Mortgages, page 469. Mortgage recording taxes were paid. On September 1, 1961, Union Dime Savings Bank was the holder of this mortgage.

On September 1, 1961, Tillie Feldman, the then fee owner, executed her mortgage to Union Dime Savings Bank to secure an indebtedness of \$2,741,876.13 upon which mortgage recording taxes were paid. This mortgage was consolidated with the \$6,500,000 mortgage then held by it but reduced in the principal amount, to constitute a single mortgage lien of \$6,500,000. The aforesaid mortgage was recorded in Book 5996 of Mortgages, page 85 and is hereinafter designated as the primary mortgage.

On November 30, 1965, Tishman Realty Construction Corp., the then fee owner, hereinafter called Tishman, executed a mortgage to Irving Trust Company to secure payment of \$4,200,000. Mortgage recording taxes were paid. This mortgage, hereinafter called the secondary mortgage, was recorded on September 2, 1965 in Book 6435 of Mortgages, page 438.

By lease dated September 14, 1966, Tishman leased the premises to its wholly owned subsidiary, Tishman Rocstar, Inc., the applicant, hereinafter called Rocstar, for a term of

approximately 99 years.

At a closing held September 19, 1966 at the offices of the attorneys for the Bowery Savings Bank, hereinafter called Bowery, the following transactions took place by instruments dated on that date:

The indebtedness secured by the secondary mortgage was reduced from \$4,200,000 to \$4,000,000 by a \$200,000 payment, and a certificate evidencing such reduction was delivered to Tishman by Irving Trust Company.

Irving Trust Company entered into a subordination agreement with Rocstar whereby the secondary mortgage was subordinated to the leasehold estate of Rocstar under the Rocstar lease.

Union Dime Savings Bank assigned the primary mortgage, upon which there remained a principal balance of \$6,047,548.68 to Bowery Savings Bank for a consideration in the above amount plus an additional 2% premium amounting to \$20,950.90.

Bowery Savings Bank as holder of the primary mortgage, Tishman as fee owner of the premises and Rocstar as owner of the leasehold estate, entered into an agreement entitled the Leasehold Spreader Agreement, spreading and extending the lien of the primary mortgage to cover and include the leasehold.

Bowery Savings Bank, Irving Trust Company and Tishman executed and delivered an instrument entitled Release of Lien, releasing Tishman's fee ownership interest in the premises from the lien of the primary mortgage.

Accordingly, the primary mortgage remained a first mortgage lien in the sum of \$6,047,548.68 against the Rocstar leasehold only, and the secondary mortgage which was subordinated to the Rocstar lease, became a first mortgage lien against the fee ownership of the premises.

Rocstar executed and delivered to Bowery Savings Bank the instrument under review entitled "Leasehold Mortgage." Under its provisions, Rocstar as mortgagor, mortgaged to Bowery Savings Bank, as mortgagee, its leasehold to secure an additional indebtedness in the sum of \$452,451.32. The leasehold mortgage provided that the said mortgage lien in this amount and the lien of the primary mortgage were combined to constitute a single lien in the sum of \$6,500,000, which sum Rocstar has, as mortgagor, covenanted and agreed to pay in accordance with an agreement executed between the parties.

The leasehold mortgage was recorded on September 20, 1966. At the time of the recording the sum of \$2,262.26, which represents the mortgage recording tax on the additional indebtedness of \$452,541.32 was tendered to the recording officer. The mortgage recording officer demanded a mortgage recording tax of \$32,500.00 which represents the tax on \$6,500,000. This amount was paid under protest to the recording officer and the instant application was made to recover the amount of \$30,237.74, representing the tax on the previous indebtedness of \$6,047,548.68. At the time of recording there was filed a statement of oath setting forth the facts on which a claim of tax exemption as required by Section 255 of the Tax Law with respect to supplemental mortgage.

Incidental transactions were entered into between the parties whereby (1) the secondary mortgage was assigned by Irving Trust Company to Aetna Life Insurance Company, (2) Tishman, the fee owner, assigned to Aetna Life Insurance Company, as additional security, the rental income to be received from the tenant owning the leasehold in the event of a default under the secondary mortgage, (3) Rocstar assigned its leasehold back to Tishman providing in the assignment against merger of the leasehold with the fee and (4) Tishman then conveyed the separated leasehold interest and the separated fee interest both to Sutton Terrace Associates. The net result of the transactions was to convert a first mortgage and a second mortgage on the premises into a leasehold first mortgage and a fee first mortgage, respectively.

The transaction whereby a mortgage lien on the entire premises became a lien on the leasehold only is similar to the one used in Brodsky and Second Nominated Properties v. Murphy, 26 A D 2d 225. In that case Brodsky executed a purchase money mortgage on the premises to American Surety Company with the provision that Brodsky would not become personally liable but that the mortgagee would only look to the mortgaged property as security. Second Nominated Properties, Inc., the nominee of Irving Brodsky, the then owner of the premises, then conveyed the land only, and not the buildings thereon, to Massachusetts Mutual Life Insurance Company. The mortgage, reduced to \$3,000,000, was assigned to Massachusetts, the owner of the land only. Massachusetts as the owner of the land and holder of the mortgage released the land it owned from the mortgage. Massachusetts then leased the buildings to Nominated, receiving from Nominated a mortgage on the buildings in the sum of \$3,000,000. This mortgage was characterized as a supplemental mortgage given as further security for the existing indebtedness of \$3,000,000.

The Court rejected the Commission's contention that (1) the leasehold mortgage was a new mortgage different than the original mortgage on the fee, (2) that the change in parties created a new

mortgage, and (3) that a new and further indebtedness was created.

In the instant matter the documents were more finely drawn and there never was any recitation of a new mortgage given as additional security. In the instant matter, the mortgage on the premises was first spread over the leasehold as well as the fee, and then the fee was released from the lien, resulting in the existence of the original mortgage lien over the leasehold only. The old indebtedness of \$6,047,548.68 was kept alive. The mortgage instrument evidencing such old indebtedness was consolidated with the leasehold mortgage evidencing a new indebtedness of \$452,541.32 only.

Neither the leasehold spreader agreement nor the release of lien executed by Tishman, the fee owner, had, as additional security, provided for the assignment from the fee owner to the holder of the primary mortgage of the rental income to be received from the tenant owning the leasehold in the event of a default in payment of the primary mortgage. Here the assignment of such rents was made to the holder of the secondary mortgage, the instrument not under review, as additional security for the payment of the existing obligation of the secondary mortgage. Even if the assignment had been made to the holder of the primary mortgage, it is doubtful whether or not such transaction would be evidence of a further indebtedness under the dictum of the Court in the Brodsky v. Murphy case, supra.

In the Brodsky v. Murphy case supra, there was originally no personal obligation of the mortgagor under the mortgage. Subsequent assumption of the mortgage by new owners did not create a new and additional mortgage. Here likewise, the substitution of new mortgagors did not create a new and additional mortgage. Suffolk County Federal Savings and Loan Association v. Bragalini, 5 N Y 2d 579. Although Mr. Lorvan states these cases are distinguishable his reasons, therefore, appear without merit.

I am accordingly of the opinion that the mortgage tax refund requested by the applicant be granted and I have had prepared a proposed determination granting the same. This proposed determination is submitted along with that of the Hearing Officer, Mr. Lorvan. As soon as you have reached a decision and have signed the appropriate proposed determination, kindly return the entire file to the Law Bureau for further processing.

/s/E. H. BEST

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Counsel

MS:nn  
Encs.

September 30, 1968

*Sent to Commission 2/7/69*

STATE OF NEW YORK  
STATE TAX COMMISSION

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IN THE MATTER OF A MORTGAGE EXECUTED BY

TISHMAN ROCSTAR, INC.

TO

BOWERY SAVINGS BANK

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DETERMINATION  
AND  
ORDER

A petition having been filed by Tishman Realty & Construction Company, Inc., verified on its behalf by Charles C. Quinn, its vice president, for a review of the determination of the recording officer of New York County, imposing mortgage recording tax in the amount of Thirty-two Thousand Five Hundred Dollars, (\$32,500), on the instrument in the form of a Mortgage, dated September 19, 1966, executed by Tishman Rocstar, Inc. to Bowery Savings Bank, recorded in the office of said recording officer on September 20, 1966, and

APPLICATION having also been made for a refund of Thirty Thousand Two Hundred Thirty-seven and 74/100 Dollars, (\$30,237.74), part of the mortgage recording tax paid said recording officer at the time of recording said instrument, by Tishman Realty & Construction Company, Inc., and a consent to the payment of the mortgage tax refund to Tishman Realty & Construction Company, Inc. having been executed by Tishman Rocstar, Inc. and Bowery Savings Bank;

AND HEARING having been held before Samuel Lorvan, Hearing Officer, designated as such by this Commission, at the office of the State Tax Commission, State Office Building, 80 Centre Street, New York, New York, on June 7, 1967, and the applicant having appeared by Sol Pottish, Esq., (Roger Bloom, Esq., 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 the report of the Hearing Officer, and after due deliberation, it is hereby found:

(1) On July 8, 1949, 420 East 63rd Street Corporation executed a mortgage covering the premises involved to Irving Trust Company to secure payment of \$6,500,000. The mortgage was recorded in the office of the recording officer of the City of New York, New York County in Book 5085 of Mortgages, page 469. Mortgage recording taxes were paid. On September 1, 1961, Union Dime Savings Bank was the holder of this mortgage.

(2) On September 1, 1961, Tillie Feldman, the then fee owner, executed her mortgage to Union Dime Savings Bank to secure an indebtedness of \$2,741,876.13 upon which mortgage recording taxes were paid. This mortgage was consolidated with the \$6,500,000 mortgage then held by it but reduced in the principal amount, to constitute a single mortgage lien of \$6,500,000. The aforesaid mortgage was recorded in Book 5996 of Mortgages, page 85 and is hereinafter designated as the primary mortgage.

(3) On November 30, 1965, Tishman Realty and Construction Company, Inc. hereinafter called "Tishman", the then fee owner, executed a mortgage to Irving Trust Company to secure payment of \$4,200,000. Mortgage recording taxes were paid. This mortgage hereinafter called the secondary mortgage was recorded on September 2, 1965 in Book 6435 of Mortgages, page 438.

(4) By lease dated September 14, 1966, Tishman leased the premises to its wholly owned subsidiary, Tishman Rocstar, Inc., the applicant, hereinafter called "Rocstar" for a term of approximately 99 years.

(5) At a closing held September 19, 1966, at the offices of the attorneys for the Bowery Savings Bank, certain transactions took place by instruments dated on that date. Firstly, the indebtedness secured by the secondary mortgage was reduced from \$4,200,000 to \$4,000,000 by a \$200,000 payment and a certificate evidencing such reduction was delivered to Tishman by Irving Trust Company.

(6) Irving Trust Company then entered into a subordinate agreement with Rocstar whereby the secondary mortgage was subordinated to the leasehold estate of Rocstar under the Rocstar lease.

(7) Union Dime Savings Bank then assigned the primary mortgage, upon which there remained a principal balance of \$6,047,548.68 to Bowery Savings Bank for a consideration in the above amount plus an additional 2% premium amounting to \$20,950.90.

(8) Bowery Savings Bank as holder of the primary mortgage, Tishman as fee owner of the premises and Rocstar as owner of the leasehold estate, then entered into an agreement entitled the Leasehold Spreader Agreement, spreading and extending the lien of the primary mortgage to cover and include the leasehold.

(9) Bowery Savings Bank, Irving Trust Company and Tishman then executed and delivered an instrument entitled Release of Lien, releasing Tishman's fee ownership interest in the premises from the lien of the primary mortgage.

(10) Rocstar then executed and delivered to Bowery Savings Bank the instrument under review dated September 19, 1966, entitled "Leasehold Mortgage". Under its provisions, Rocstar as mortgagor, mortgaged to Bowery Savings Bank, as mortgagee, its leasehold to secure an additional indebtedness in the sum of \$452,451.32. The leasehold mortgage provided that the said mortgage lien in this

amount and the lien of the primary mortgage were combined to constitute a single lien in the sum of \$6,500,000, which sum Rocstar has, as mortgagor, covenanted and agreed to pay in accordance with an agreement executed between the parties.

(11) The leasehold mortgage was recorded on September 20, 1966. At the time of the recording the sum of \$2,262.26, which represents the mortgage recording tax on the additional indebtedness of \$452,541.32 was tendered to the recording officer. The mortgage recording officer demanded a mortgage recording tax of \$32,500.00 which represents the tax on \$6,500,000. This amount was paid under protest to the recording officer and the instant application was made to recover the amount of \$30,237.74, representing the tax on the previous indebtedness of \$6,047,548.68. At the time of recording there was filed a statement of oath setting forth the facts on which a claim of tax exemption as required by Section 255 of the Tax Law with respect to supplemental mortgage.

(12) Incidental transactions were entered into between the parties whereby (1) the secondary mortgage was assigned by Irving Trust Company to Aetna Life Insurance Company, (2) Tishman, the fee owner, assigned to Aetna Life Insurance Company, as additional security, the rental income to be received from the lessee owning the leasehold in the event of a default under the secondary mortgage, (3) Rocstar assigned its leasehold back to Tishman providing in the assignment against merger of the leasehold with the fee and (4) Tishman then conveyed the separated leasehold interest and the separated fee interest both to Sutton Terrace Associates. The net result of the transactions was to convert a first mortgage and a second mortgage on the premises into a leasehold first mortgage and a fee first mortgage, respectively.



Based upon all of the foregoing findings, the State Tax Commission hereby

DETERMINES:

(A) That the leasehold mortgage (discussed in finding of facts Nos. 10 and 11) created a new and additional indebtedness in the amount of \$452,541.32 only; and that a mortgage recording tax of \$2,262.26 was due and owing on such new indebtedness.

(B) That the existing indebtedness of \$6,047,548.68 was never discharged and that the primary mortgage evidencing such indebtedness was never satisfied; that the transfer of the lien of said mortgage from the fee to the leasehold did not create a new and additional mortgage.

(C) That the recording officer of New York County erroneously collected the sum of Thirty Thousand Two Hundred Thirty-seven and 74/100 (\$30,237.74) as mortgage recording tax.

(D) That the determination of the recording officer be and the same is hereby cancelled and annulled and it is hereby

O R D E R E D

(1) That the recording officer of New York County be and is hereby directed to deduct the sum of Thirty Thousand Two Hundred Thirty-seven and 74/100 (\$30,237.74) and to refund said amount to Tishman Realty and Construction Company, Inc.

(2) That two certified copies of this order be mailed to the recording officer of New York 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 for the warrant of the disbursement.

(3) That one certified copy of this order be mailed to the City of New York.

DATED: Albany, New York, this ~~xxxxdayxxofxxOctoberxx1968x~~  
this 11th day of February, 1969.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY  
\_\_\_\_\_  
PRESIDENT

/s/

A. BRUCE MANLEY  
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COMMISSIONER