

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of an Instrument Executed	:	
by	:	
200 E. 64th ST. CORP.	:	DETERMINATION
and	:	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY	:	

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Applicant, 200 E. 64th St. Corp., has filed an application with the State Tax Commission pursuant to Article 11 of the Tax Law for a review of a determination by Arthur Maxwell, Associate Mortgage and Land Tax Examiner, Miscellaneous Tax Bureau, that an instrument executed by it and John Hancock Mutual Life Insurance Company was subject to the mortgage recording tax.

Upon notice to all interested parties, a formal hearing was held before Lawrence A. Newman, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York on September 15, 1971, at 9:15 A.M. Berg, Mezansky & Dorf, Esqs. (David Berg, Esq. and John S. Dorf, Esq., of Counsel) appeared for 200 E. 64th St. Corp. J. Lee Rankin, Esq. (Isaac Donner, Esq., of Counsel) appeared for the City of New York. Alexander Weiss, Esq. appeared for the City Register of New York County. Edward H. Best, Esq. (Solomon Sies, Esq., of Counsel) appeared for the Miscellaneous Tax Bureau.

ISSUE

Was a consolidation, modification and extension agreement between John Hancock Mutual Life Insurance Company and 200 E. 64th St. Corp. recorded on June 30, 1970, in the office of the City

Register of New York County subject to the mortgage recording tax, and if said instrument was subject to tax, what was the proper method of determining the amount of said tax?

FINDINGS OF FACT

1. On November 3, 1967, 64th Street-Third Avenue Associates, a New York partnership, (Associates) acquired, by assignment from the tenant therein named, the tenant's interest in a long-term ground lease to premises (the "Premises") 1081-1089 Third Ave. and 206 E. 64th Street, New York City, dated May 2, 1967, between Mardordic Realty Co. Inc., landlord, and United Equities Inc., tenant.

2. On March 12, 1968, "Associates", as the tenant by assignment, executed and delivered to First National Bank of Boston (First Boston) a first leasehold construction mortgage (the "Assigned Mortgage") covering such ground lease and the building and improvements which were to be erected on the Premises by Associates, to secure the payment of a mortgage note (the "Assigned Note") in the principal amount of \$5,500,000.00 and interest. A mortgage tax on the Assigned Mortgage of \$27,500.00 was paid at the time of the recording thereof on March 13, 1968.

3. On June 30, 1970, Associates assigned to its corporate nominee, 200 E. 64th St. Corp. (Taxpayer), by an assignment dated June 15, 1970, all of its interest in the ground lease covering the Premises and the new building and improvements which had been erected thereon (collectively called the "Leasehold"), subject to the Assigned Mortgage.

4. On June 30, 1970, the following additional transactions contemporaneously took place:

a.) pursuant to a Purchase Agreement entered into between Associates and John Hancock Mutual Life Insurance Company, (Hancock) on March 12, 1968, (contemporaneously with the execution and delivery of the Assigned Note and Assigned Mortgage by Associates to First Boston on March 12, 1968), Hancock purchased the Leasehold from Taxpayer for a purchase price of \$1.00, subject to the Assigned Mortgage on the Leasehold held by Hancock in the unpaid principal amount of \$5,500,000.00.

b.) pursuant to a Buy-Sell Agreement entered into on March 12, 1968, between First Boston and Hancock, First Boston assigned to Hancock the Assigned Mortgage and Assigned Note secured thereby, for a purchase price of \$5,500,000.00.

c.) pursuant to said Purchase Agreement dated March 12, 1968, Hancock, as Seller, and Taxpayer, as Purchaser, agreed to enter into the Consolidation, Modification and Extension Agreement (Consolidation Agreement) which provided, among other things, that the lien of the Assigned Mortgage was to be consolidated and merged with and into the interest in the Leasehold to be assigned to Hancock by Taxpayer, and that Hancock would sell the Leasehold to Taxpayer for a purchase price in the principal amount of \$5,500,000.00 as "evidenced by the Assigned Note and secured by the Assigned Mortgage" and payable in monthly installments over a period of 40 years and nine months (with an interest factor of 7 1/2% per annum on reducing balances of such purchase price). In addition, the

Consolidation Agreement provided that Taxpayer would make an annual variable payment (a share of the operating profits based upon the formula contained in section 4 on page 4 thereof) to Hancock in an amount equal to 50% of the excess, if any, of the net annual rental income for each calendar year commencing with the calendar year 1971, over the sum of (i) the monthly installment payments made in each calendar year in reduction of the \$5,500,000.00 purchase price, plus (ii) \$70,000.00 (except that in calculating the annual variable payment with respect to the calendar year 1971, only the months of April through December, 1971, shall be taken into account). Further, it provided that Taxpayer could prepay the unpaid balance of such purchase price on or within 120 days after (a) the 249th monthly installment date, (b) the 309th monthly installment date, or (c) the 369th monthly installment date, plus interest accrued to the date of the prepayment.

5. The Purchase Agreement provided:

"Simultaneously with your purchase of the Leasehold, you and the Seller will execute, acknowledge and deliver an Agreement in the form of Exhibit C hereto (the "Repurchase Agreement") providing for the consolidation and merger of the lien of the Construction Mortgage with the right, title and interest to be assigned by the Assignment and for the repurchase by the Seller of the Leasehold as merged with the lien of the Construction Mortgage."

6. The Consolidation Agreement, the tax on the recording of which is the subject of this review, provided:

"The Seller and the Purchaser hereby consolidate and merge the lien of the Assigned Mortgage with

and into the right, title and interest assigned to the Seller under the Assignment. The Seller hereby agrees to purchase said right, title and interest, as merged and consolidated with said lien, subject to, and in accordance with, the terms and provisions of this Agreement, for the purchase price specified in section 3. Such sale shall be limited to the right, title and interest acquired by the Seller under the Assignment, as consolidated and merged with the lien of the Assigned Mortgage,\*\*\*."

7. Following the assignment of the Leasehold by Taxpayer to Hancock on June 30, 1970, and their contemporaneous entry into the Consolidation Agreement on the same date, Taxpayer assigned its interest therein to Associates.

8. Since the closing of the transaction between Taxpayer and Hancock was scheduled to take place in Boston, Massachusetts, on June 30, 1970, and it was necessary to deposit in escrow with The Title Guarantee Company, prior to June 30, 1970, an executed copy of the Consolidation Agreement and executed copies of two other instruments to be recorded, so that they all could be recorded on June 30, 1970, upon telephone instructions from the attorneys for Hancock and Taxpayer at the Boston closing, taxpayer's attorney on June 23, 1970, hand delivered to the New York County Mortgage Tax Examiner copies of the Consolidation Agreement, together with a copy of a proposed affidavit by Taxpayer's president claiming exemption under section 255 of the Tax Law from the payment of mortgage tax upon the recording of the Consolidation Agreement, with the request that the Mortgage Tax Examiner stamp the backs of the instruments and fill in the recording charges and indicate that no mortgage tax would be due. After examining the instruments, the Mortgage Tax Examiner complied with this request

and endorsed on the face page of the Consolidation Agreement a statement to the effect that same was to be recorded without payment of mortgage tax, per section 255 affidavit, subject to review by the State Tax Commission.

9. On July 28, 1970, the Associate Mortgage and Land Tax Examiner, Arthur Maxwell, notified the Register of New York County that a new mortgage tax should have been paid when the Consolidation Agreement was recorded and that the amount of tax should have been based upon the appraised value of the property secured by said Consolidation Agreement.

#### CONCLUSIONS OF LAW

A. That the Consolidation Agreement was not a supplemental mortgage entitled to exemption from the tax on mortgages under section 255 of the Tax Law. It was an executory contract of sale of the ground lease by John Hancock under which the Taxpayer, as purchaser, was entitled to possession and it constituted security for the purchase price and was therefore a mortgage subject to the tax on recording mortgages. It did not extend nor was it supplemental to the mortgage recorded on March 13, 1968, which was extinguished by merger into the ground lease when both were acquired by John Hancock.

B. That the Consolidation Agreement was in effect a mortgage for an indefinite amount of not less than \$5,500,000.00 since it provided, in addition to certain fixed payments of said sum, for annual variable payments based upon a share of the operating profits of the secured property and therefore pursuant to section 256 of the Tax Law the mortgage tax should have been computed upon the

appraised value of the property secured by the Consolidation Agreement.

C. That the application of the Taxpayer is denied and the determination contained in the letter dated July 28, 1970, of Arthur Maxwell, Associate Mortgage and Land Tax Examiner, Miscellaneous Tax Bureau, is sustained.

DATED: Albany, New York  
*May 9, 1972*

STATE TAX COMMISSION

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COMMISSIONER

*Bruce Mauley*  
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COMMISSIONER

*Milton Krumm*  
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COMMISSIONER