

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Instrument :
Executed by :
ABRAHAM SOMMER and SIGMUND SOMMER :
to : DETERMINATION
NATIONAL STATE BANK OF NEWARK, TRUSTEE :

This application is by Massachusetts Mutual Life Insurance Company (hereinafter called "Massachusetts") and Mutual Benefit Life Insurance Company (hereinafter called "Mutual") for refund of \$65,000.00 mortgage recording tax paid to the recording officer of New York County on January 14, 1965, upon the recording of an instrument called Supplemental Indenture, dated December 30, 1964, executed by Abraham Sommer and Sigmund Sommer to National State Bank of Newark, Trustee.

Pursuant to notice served on interested parties, a hearing was held October 27, 1965.

ISSUE

Was the Supplemental Indenture executed by Abraham Sommer and Sigmund Sommer to National Bank of Newark Trustee dated December 30, 1964, subject to the mortgage recording tax?

FINDINGS OF FACT

1. On June 14, 1960, Webb & Knapp, Inc. was the owner of a certain parcel of real property in the block bounded by 6th and 7th Avenues, 50th to 51st Streets, in the County of New York, City of New York, which is the site of the former Roxy Theatre.

2. On June 14, 1960, Webb & Knapp, Inc. executed and delivered its mortgage note in the principal sum of \$3,335,000.00 to Miltstol Syndicate, Inc., (hereinafter called "Miltstol"), and executed and

delivered a mortgage covering said parcel to secure payment thereof, which mortgage was recorded in the office of the recording officer of New York County on June 20, 1960, in Book 5902 of Mortgages, page 541; mortgage recording tax being paid thereon at recording. Payment of the mortgage indebtedness was due June 14, 1961.

3. On June 14, 1960, Miltstol assigned said note and mortgage to the Trustees of Columbia University, (hereinafter called "Columbia"), which assignment was recorded on June 20, 1960, in Book 5902, page 539.

4. On September 9, 1960, Webb & Knapp, Inc. executed and delivered its mortgage note in the principal sum of \$50,321.20 to Miltstol, and executed and delivered a mortgage covering said parcel to secure payment thereof, which mortgage was recorded on September 13, 1960, in Book 5919, page 283; mortgage recording tax being paid thereon at recording. Payment of the mortgage indebtedness was due on June 14, 1961.

5. On October 7, 1960, Webb & Knapp, Inc. executed and delivered its mortgage note in the principal sum of \$99,915.14 to Miltstol, and executed and delivered a mortgage covering said parcel to secure payment thereof which mortgage was recorded on October 17, 1960, in Book 5925, page 348; mortgage recording tax being paid thereon at recording. Payment of the mortgage indebtedness was due on June 14, 1961.

6. On December 2, 1960, Webb & Knapp, Inc. executed and delivered its mortgage note in the principal sum of \$73,865.00 to Miltstol and executed and delivered a mortgage covering said parcel to secure payment thereof which mortgage was recorded on December 7, 1960, in Book 5936, page 266; mortgage recording tax being paid thereon at recording. Payment of mortgage indebtedness was due on June 14, 1961.

7. On June 13, 1961, Miltstol assigned to Columbia the mortgages dated September 9, 1960; October 7, 1960 and December 2, 1960, together with the mortgage notes secured thereby, which assignment was recorded on June 15, 1961, in Book 5978, page 135.

8. On June 13, 1961, Rox Operating Corporation, (hereinafter called "Rox"), which had become the owner of said parcel entered into an agreement with Columbia reciting that the liens on the four mortgages, dated June 14, 1960; September 9, 1960; October 7, 1960 and December 2, 1960, were consolidated so as to constitute a joint and single lien of \$3,559,101.34, which agreement was recorded on August 3, 1961, in Book 5989, page 263. The due date was extended to January 14, 1962.

9. On January 25, 1963, Columbia and Miltstol, for the stated consideration of \$3,496,356.09, assigned to Mastan Company, Incorporated, (hereinafter called "Mastan"), said mortgages dated June 14, 1960; September 9, 1960; October 7, 1960 and December 2, 1960, as consolidated together with the notes secured thereby; the instrument of assignment was recorded on January 29, 1963, in Book 6134, page 175.

10. On January 28, 1963, Mastan assigned said four mortgages, as consolidated, and the notes secured thereby for the stated consideration of \$3,500,000.00 to Bankers Trust Company, (hereinafter called "Bankers"); the instrument of assignment was recorded on January 29, 1963, in Book 6134, page 179.

11. On January 28, 1963, Rox executed its mortgage note in the principal sum of \$7,500,000.00 to Bankers and executed and delivered a mortgage covering said parcel, together with buildings then or thereafter to be erected thereon, to secure payment thereof, which mortgage was subject, however, to the consolidated mortgage mentioned in paragraph (8) above. This mortgage was recorded on January 29, 1963, in Book 6134, page 168; mortgage recording tax was paid thereon

at recording. Payment of the mortgage indebtedness was due February 3, 1964.

12. On April 20, 1964, Rox executed its mortgage note in the principal sum of \$1,000,000.00 to Bankers and executed and delivered a mortgage covering said parcel, to secure payment thereof, which mortgage was recorded on April 23, 1964, in Book 6272, page 459; mortgage recording tax was paid thereon at recording. Payment of the mortgage indebtedness was due July 20, 1964.

13. On May 13, 1964, a closing was held at which a number of instruments were executed and delivered, including the following:

a. Abraham Sommer and Sigmund Sommer, having become owners of said parcel, and Bankers, by instrument dated May 1, 1964, agreed that the lien of the four mortgages as consolidated, and the lien of the mortgage, executed by Rox to Bankers, were released so far as such liens applied to the land, but the liens of said mortgages were to be retained on the building; which instrument was recorded on May 19, 1964, in Book 5278 of Conveyances, page 311.

b. Bankers assigned the Rox \$1,000,000.00 note and mortgage dated April 20, 1964, to Thomas M. Green by instrument dated May 1, 1964, recorded May 19, 1964, in Book 6280, page 241.

c. Green released to the Sommers the lien of the Rox \$1,000,000.00 mortgage, so far as it applied to the land but retained the lien on the building by instrument dated May 1, 1964; which release was recorded on May 19, 1964, in Book 5278 of Conveyances, page 307.

d. The Sommers conveyed to E. G. Kinloch, and others, as Trustees of General Electric Pension Trust, (hereinafter called "Pension Trustees"), by instrument dated May 1, 1964,

the parcel of property reserving, however, title to the buildings and improvements to be erected thereon for so long as a lease to be made back shall be in effect; which instrument was recorded on May 19, 1964, in Book 5278 of Conveyances, page 316.

e. The Pension Trustees, as Lessor, leased the land to the Sommers, as Lessees, by instrument dated May 1, 1964, for a term from May 13, 1964 to May 31, 2063. Title to the building and improvements remained in the Sommers, but must be surrendered to the Lessor at the expiration or termination of the lease. A memorandum of said lease was recorded May 19, 1964, in Book 5278, of Conveyances, page 321.

f. The Sommers and Bankers agreed to consolidate and extend the liens of the four mortgages, and the one for \$7,500,000.00 executed by Rox, to constitute a single joint first mortgage lien. It is recited therein there has been advanced and remains unpaid upon said mortgages and the notes secured thereby the principal sum of \$11,000,000.00 with interest thereon. The Sommers agree to pay said indebtedness. The liens, as consolidated and extended, cover the Sommer's leasehold interest in the land and their interest as owners of the building. The agreement was recorded on May 19, 1964, in Book 6280 of Mortgages, page 243. No mortgage recording tax was paid thereon at recording. Payment of the entire principal mortgage indebtedness was due December 15, 1964.

g. By instrument dated May 1, 1964, the Sommers and Green agreed that the lien of the Rox \$1,000,000.00 mortgage, shall apply also to the Sommers' leasehold interest of the land in the lease to them by the Pension Trustees. The mortgage was to be a second mortgage lien. The due date was extended to December 1, 1965. The instrument was recorded May 19, 1964, in Book 6280, page 275.

14. On July 16, 1964, Green assigned the Rox \$1,000,000.00 note and mortgage, to the Sommers with express reservation that said mortgage so assigned was not intended to and would not merge with their leasehold estate; said assignment of mortgage was recorded July 20, 1964, in Book 6300, page 27.

15. The Sommers then assigned said Rox note and \$1,000,000.00 mortgage, to Bankers, said assignment of mortgage was recorded on July 20, 1964, in Book 6300, page 30.

16. On June 24, 1964, the Sommers applied to Massachusetts for a mortgage loan of \$16,000,000.00 "to be secured by a first lien on a leasehold estate in unencumbered real estate *** to provide a portion of the cost of construction" of a 23 story office building.

17. On December 17, 1964, Massachusetts approved the loan application in the amount of \$16,000,000.00 to be taken in draws of \$13,000,000.00 and of \$3,000,000.00, the first draw to be made by February 28, 1965, and the later draw by December 31, 1965.

18. On December 30, 1964, a closing was held at which the instruments signed included the following:

a. The Sommers signed a letter dated December 30, 1964, accepting with stated "minor changes" the commitment for a mortgage loan as stated in Massachusetts' letter dated December 17, 1964, as supplemented by letter dated December 22, 1964. It recited, in part,

"It is agreed that we shall not be responsible for the payment of a mortgage tax in connection with the \$12,000,000.00 indebtedness assigned to you by Bankers Trust Company and covered by the Supplemental Indenture, and if you pay such tax you will not assert a claim against us in connection therewith."

b. The Sommers executed a mortgage note in the sum of \$1,000,000.00 to National State Bank of Newark, as Trustee under Supplemental Indenture bearing even date.

c. The Sommers executed a mortgage to National State Bank as such Trustee securing their said note for \$1,000,000.00 on their interest in the building and the lease of the land; recorded January 4, 1965, in Book 6344, page 214. Mortgage recording tax was paid thereon at recording.

d. The Sommers executed to the Trustee an instrument called "Supplemental Indenture". It creates a lien on a leasehold estate in the land and a fee interest in the building as security for new bonds to be issued thereunder. It recites Trustee holds the consolidated five mortgages, on which \$11,000,000.00 is recited unpaid. The Rox \$1,000,000.00 mortgage, and the new \$1,000,000.00 mortgage made by Sommers. The instrument was recorded January 14, 1965, in Book 6347, page 407. It recites, in part, the Sommers desire to further combine and consolidate to secure the sum of \$13,000,000.00,

"and among other things to create and issue a new evidence of indebtedness to be called 5.75 per cent Mortgage Notes due July 1, 1990 *** to evidence the same debt as is now evidenced by *** \$13,000,000.00 secured by the aforesaid Mortgages, *** ".

Section 2.3 reads as follows:

"Section 2.3 - Issue of Notes. Contemporaneously herewith the Mortgagor has delivered to the Trustee for cancellation the entire \$13,000,000.00 principal amount of such mortgage notes outstanding and the Trustee has cancelled the same. Such cancelled notes have been returned to the mortgagor contemporaneously herewith. Contemporaneously herewith

the mortgagor has executed and delivered to the Trustee the Notes described in Section 2.2.

Section 2.2, called "Form and Terms of Notes" calls for the issuance under the indenture of two notes by the Sommers; one for \$8,125,000.00 to Massachusetts and one for \$4,875,000.00 to Mutual.

e. The Sommers executed a promissory note in the sum of \$8,125,000.00 to Massachusetts, secured by the "Supplemental Indenture" of December 30, 1964.

f. The Sommers executed a promissory note in the sum of \$4,875,000.00 to Mutual secured by the "Supplemental Indenture" of December 30, 1964.

g. Massachusetts in appointing National State Bank of Newark as Trustee under the "Supplemental Indenture" stated it is "furnishing the consideration of \$8,125,000.00 for the purchase of a promissory note made by the Sommers. Mutual in appointing said bank as Trustee likewise stated it is furnishing the consideration of \$4,875,000.00 for the purchase of a promissory note made by the Sommers.

h. Of the \$13,000,000.00 paid by the applicants, Massachusetts and Mutual for the purchase of the new promissory notes and received by National State Bank, as Trustee, said Trustee paid \$12,000,000.00 to Bankers; wherefore Bankers assigned to National State Bank for recited consideration of \$11,000,000.00 the consolidated five mortgages, together with the notes described therein, those executed by Webb & Knapp, Inc. and by Rox. This assignment was recorded January 4, 1965, in Book 6344, page 183. Bankers also assigned to National State Bank the Rox \$1,000,000.00 mortgage. The assignment was recorded January 4, 1965, in Book 6344, page 185.

i. At recording of said "Supplemental Indenture" of December 30, 1964, sworn statement representing exemption was submitted.

19. In the statement, affiant, Roger E. Seidel, Esq., states there is being submitted for record a "Supplemental Indenture" dated December 30, 1964, between the Sommers, as mortgagors and the Trustee, which indenture recites the Trustee holds the mortgages originally executed by Webb & Knapp, Inc. and Rox, as mortgagors by the terms of the indenture, said mortgages constitute in the hands of the trustee a mortgage for \$13,000,000.00 covering the fee of the building and the leasehold interest in the land. The indenture recites that execution and delivery thereof shall not in any way extinguish the \$13,000,000.00 indebtedness stated to be outstanding under the mortgages and the indenture. The indenture also recites it is given further to secure the payment of the indebtedness outstanding and secured by the mortgages. The indenture further provides for cancellation of the notes stated to be outstanding under the mortgages and the issuance of notes of \$8,125,000.00 to Massachusetts and of \$4,875,000.00 to Mutual. By said indenture the mortgagors confirm they have admitted the validity and enforceability of the notes and all indebtedness secured by the mortgages which is "also" secured by the indenture; nothing in the indenture shall be considered as affecting said indebtedness; and no part of said indebtedness shall be disturbed, discharged, cancelled, or impaired by the execution of the indenture, the cancellation of the original notes and the delivery of the notes by the Sommers to Massachusetts and to Mutual. Said indenture is given as additional collateral security for payment of the same indebtedness of \$13,000,000.00 secured under the mortgages now unpaid and to better secure the lien thereof and does not create any new or further indebtedness other than that secured under the mortgages;

That the obligors, the Sommers, are the same obligors as those responsible for said indebtedness prior to the execution of the supplemental indenture and the principal amount of said indebtedness remains the same. Request is made for exemption under Article 11 of the Tax Law; however neither Section 255 of the Tax Law nor any other particular section is stated.

20. The request for exemption was denied by the recording officer. The recording officer's grounds for denial are stated in letter dated July 27, 1965.

"This office held that the above described instrument was a new mortgage. It involves new and different mortgagors, new and different secured parties, new and different obligations and finally, new and different property. The instrument creates a mortgage lien of \$13,000,000.00 affecting the mortgagors property to secure payment of the mortgagors two notes in that amount issued or issuable to the Massachusetts Mutual Life Insurance Company and Mutual Benefit Life Insurance Company. Accordingly, this office held that the subject instrument regardless of its title was a mortgage within the meaning of Article 11 of the Tax Law and taxable on the basis of the \$13,000,000.00 obligation secured thereunder."

21. Payment of tax of \$65,000.00 was made under protest.

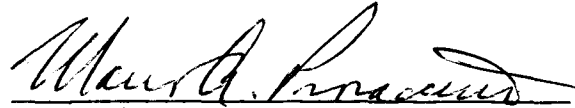
CONCLUSIONS OF LAW

A. That the Supplemental Indenture dated December 30, 1964, was not a new mortgage, but was a supplemental mortgage exempt from the mortgage recording tax in accordance with the meaning and intent of Section 255 of the Tax Law.


B. That the application of Massachusetts Mutual Life Insurance Company and the Mutual Benefit Life Insurance Company is granted.

DATED: Albany, New York
December 27, 1973

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER