

STATE OF NEW YORK
STATE TAX COMMISSION

Three Instruments

In the Matter of ~~the Petitioner~~

Executed by ~~of~~ 1021 BROADWAY, INC. and
H STREET CORPORATION with A. J. ARMSTRONG
COMPANY, INC.

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

~~XXXX For a Redetermination of a Decision of~~
~~a Refund of~~
~~Taxes under Article(s) of the~~
~~Tax Law for the Year(s)~~

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 26th day of September , 1973 , she served the within
Notice of Decision (or Determination) by (certified) mail upon SEE ATTACHED LIST
(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: SEE ATTACHED LIST

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) petitioner herein and that the address set forth on said wrapper is the last
known address of the (representative of the) petitioner.

Sworn to before me this

26th day of September , 1973.

Joyce S. Van Patten

Martha Funaro

Applicants:

1021 Broadway, Inc.
701 Seneca Street
Buffalo, New York

H Street Corporation
701 Seneca Street
Buffalo, New York

A. J. Armstrong Company, Inc.
850 Third Avenue
New York, New York

Representative:

Arnold B. Gardner, Esq.
120 Delaware Avenue
Buffalo, New York

County Treasurer:

Mr. Frank Gawronski
Commissioner of Finance
Erie County Treasurer
45 Church Street
Buffalo, New York



STATE OF NEW YORK

DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A

STATE CAMPUS

ALBANY, N. Y. 12226

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

STATE TAX COMMISSION
Mario A. Procaccino,
~~NOTARY PUBLIC~~ PRESIDENT

A. BRUCE MANLEY
MILTON KOERNER

ADDRESS YOUR REPLY TO

Dated: Albany, New York

September 26, 1973

1021 Broadway, Inc.
701 Seneca Street
Buffalo, New York

and

H Street Corporation
701 Seneca Street
Buffalo, New York

Gentlemen:

Please take notice of the DETERMINATION
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(s) 251 of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within 4 Months
from the date of this notice.

Any inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned.
These will be referred to the proper party for
reply.

Very truly yours,

Paul B. Coburn
HEARING OFFICER

Enc.

cc: Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of Three Instruments :

Executed by :

1021 BROADWAY, INC. and
H STREET CORPORATION :

DETERMINATION

with :

A. J. ARMSTRONG COMPANY, INC. :

This proceeding was initiated by applicants, 1021 Broadway, Inc. and H Street Corporation, pursuant to the provisions of section 251 of the Tax Law to review the act of the recording officer of Erie County in recording an instrument in the form of a mortgage dated December 4, 1967, executed by 1021 Broadway, Inc. to A. J. Armstrong Company, Inc., recorded in the office of said recording officer on December 7, 1967, in Book 6850 of Mortgages, page 276; an instrument in the form of a mortgage dated December 4, 1967, executed by H Street Corporation to A. J. Armstrong Company, Inc., recorded on December 7, 1967, in Book 6850 of Mortgages, page 271; and an instrument in the form of a Consolidation and Spreader Agreement dated December 4, 1967, executed by A. J. Armstrong Company, Inc. with 1021 Broadway, Inc. and H Street Corporation, recorded on December 7, 1967, in Book 7425 of Deeds, page 86, the determinations of the recording officer, if any, and the application of Article 11 of the Tax Law thereto.

Upon notice to all interested parties, a formal hearing was held before Lawrence A. Newman, Hearing Officer, at the offices of

State Tax Commission, Building #9, State Campus, Albany, New York, on July 15, 1969, at 10:00 A.M. H Street Corporation and 1021 Broadway, Inc. appeared by Kavinoky, Cook, Hepp, Sandler & Gardner, Esqs. (Arnold B. Gardner, Esq., of Counsel). The Miscellaneous Tax Bureau appeared by Edward H. Best, Esq. (Solomon Sies, Esq. and Albert J. Rossi, Esq., of Counsel).

ISSUE

Was a mortgage recording tax due for the recording of two mortgages and a consolidation and extension agreement dated December 4, 1967, executed by H Street Corporation and 1021 Broadway, Inc. to A. J. Armstrong Company, Inc. upon the grounds that they did not constitute supplemental mortgages?

FINDINGS OF FACT

1. A mortgage dated December 4, 1967, was executed by 1021 Broadway, Inc. to A. J. Armstrong Company, Inc. and was recorded in the office of the recording officer of Erie County on December 7, 1967, in Book 6850 of Mortgages, page 276. The said mortgage recited in part, that it was given

"to secure the payment of an indebtedness in the sum of \$309,000.00 lawful money of the U.S. to be paid \$60,169.47 by H Street Corporation *** and \$248,830.53 by Senvick Corporation *** to be paid in accordance with the terms of a certain extension agreement between H Street Corporation and the mortgagee and a certain letter agreement between Senvick Corporation and the mortgagee, both bearing even date herewith ***. 19. This mortgage is given by the mortgagor to the mortgagee as collateral security for the performance by the mortgagor of its obligations to the mortgagee pursuant to a certain guaranty of even date herewith pursuant to which the mortgagor has guaranteed to the mortgagee the payment of obligations due to the mortgagee from H Street Corporation and Senvick Corporation, *** affiliated corporations of the mortgagor."

2. A mortgage dated December 4, 1967, was executed by H Street Corporation to A. J. Armstrong Company, Inc. and was recorded in said office on December 7, 1967, in Book 6850 of Mortgages, page 271. The said mortgage contained the same preamble recitation as in the mortgage executed by 1021 Broadway, Inc. to the effect that it secured indebtedness in the sum of \$309,000.00 to be paid \$60,169.47 by H Street Corporation and \$248,830.53 by Senvick Corporation in accordance with the terms of the extension agreement and letter agreement there referred to; and also

"19. This mortgage is given as collateral security, not only for the indebtedness owing from the mortgagor to the mortgagee, but also to secure the obligations of the mortgagor to the mortgagee under and pursuant to a certain guaranty given by the mortgagor to the mortgagee with respect to certain indebtedness due to the mortgagee from Senvick Corporation *** an affiliated corporation of the mortgagor, which indebtedness is described in a certain letter agreement of even date herewith."

3. An instrument in the form of a consolidation and extension agreement dated December 4, 1967, was executed by A. J. Armstrong Company, Inc. with 1021 Broadway, Inc. and H Street Corporation, and was recorded in said office on December 7, 1967, in Book 7425 of Deeds, page 86. It recited the consolidation of three mortgages:

- a) A mortgage dated April 6, 1966, by H Street Corporation to A. J. Armstrong Company, Inc. stated to be in the principal sum of \$400,000.00, recorded in Book 6658, page 263;
- b) A mortgage dated December 4, 1967, by H Street Corporation to A. J. Armstrong Company, Inc. stated to be in the principal sum of \$309,000.00, recorded in Book 6850, page 271; and
- c) A mortgage dated December 4, 1967, by 1021 Broadway, Inc. to A. J. Armstrong Company, Inc. stated to be in the principal sum of \$309,000.00, recorded in Book 6850, page 276.

It further recited that the liens of the three mortgages were spread to constitute one lien upon all of the property described in the three mortgages securing \$309,000.00, and that

"the time of payment of said principal sum secured by said bonds or notes and mortgages, as modified by this agreement, hereby is extended so that the same shall be due and payable in accordance with the terms and provisions of a certain letter agreement executed by Senvick Corporation and Extension Agreement executed by H Street Corporation, both of even date herewith."

4. The certain letter agreement dated December 4, 1967, was executed by Senvick Corporation with A. J. Armstrong Company, Inc., (also signed as guarantors by 1021 Broadway, Inc., Seneca Warehouse & Industrial Center, Inc., H Street Corporation, Irving Levick and Mildred Levick). It recited that Senvick Corporation had made a promissory note originally securing indebtedness in the sum of \$800,000.00; that as of November 9, 1967, Senvick Corporation's indebtedness had been reduced to \$757,459.29; that on or about December 5, 1967, Senvick Corporation will be making to A. J. Armstrong Company, Inc. further principal payment amounting to \$508,628.76; that after said payment the balance of principal indebtedness owed by Senvick Corporation to A. J. Armstrong Company, Inc. will be \$248,830.53.

5. At recording on December 7, 1967, of the two mortgages dated December 4, 1967, and the instrument in the form of a consolidation and extension agreement dated December 4, 1967, a statement was filed with the recording officer of Erie County, which statement was sworn to December 7, 1967, by Arnold B. Gardner, Esq. It stated in part:

"2. No new mortgage money of any kind was advanced by A. J. Armstrong Company, Inc. on December 4, 1967, in any manner in connection with the transactions taking place on December 4, 1967.

"3. I believe that the transactions, and the recording of the new mortgages by 1021 Broadway, Inc. and H Street Corporation in favor of A. J. Armstrong Company, Inc., and the consolidation agreement with respect to the same are all exempt from mortgage tax under section 255 of the Tax Law. The old mortgage by H Street Corporation to A. J. Armstrong Company, Inc., recorded April 6, 1966, has been reduced in unpaid principal balance to \$60,169.47. However, there remains due by H Street Corporation, as guarantor, and Senvick Corporation, an affiliated corporation of H Street Corporation, to A. J. Armstrong Company, Inc. the sum of \$309,000.00. Therefore, the intent of the transactions of December 4, 1967, was to increase the mortgage security given to A. J. Armstrong Company, Inc. on the property of H Street Corporation to said sum of \$309,000.00, to give a further collateral mortgage on the property of 1021 Broadway, Inc., also an affiliated corporation, and also securing said \$309,000.00 debt, and then to consolidate, extend and spread the remainder of the said new mortgages so as to create a single lien securing the payment of \$309,000.00 to A. J. Armstrong Company, Inc."

6. The recording officer of Erie County recorded the three instruments without payment of mortgage recording tax thereon.

7. The mortgages dated December 4, 1967, executed by 1021 Broadway, Inc. and by H Street Corporation, and the consolidation and spreader agreement dated December 4, 1967, together constituted a mortgage of real property securing \$309,000.00.

8. The mortgage dated April 6, 1966, executed by H Street Corporation to A. J. Armstrong Company, Inc. was recorded in the office of said recording officer on April 6, 1966, in Book 6658, page 263. A mortgage recording tax of \$2,000.00 was paid thereon at recording. The State Tax Commission has determined in a companion decision of this date that an additional mortgage recording tax in the sum of \$500.00 had been due at the time of the recording of said mortgage.

CONCLUSIONS OF LAW

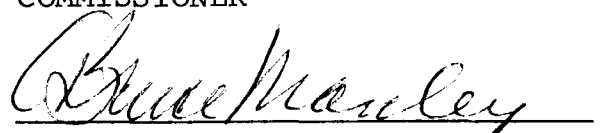
A. That in order for a supplemental mortgage or instrument to be exempt from the mortgage recording tax, all taxes accrued under Article 11 of the Tax Law upon the mortgage or instrument that it supplements must have to have been paid prior to the recording of the supplemental mortgage or instrument in accordance with the meaning and intent of section 255 of the Tax Law. Since the proper tax had not been paid upon the prior mortgage of April 6, 1966, executed by H Street Corporation to A. J. Armstrong Company, Inc., therefore the mortgages and consolidation and extension agreement of December 4, 1967, executed by 1021 Broadway, Inc. and H Street Corporation with A. J. Armstrong Company, Inc. were not entitled to an exemption from the mortgage recording tax.

B. That a mortgage recording tax of \$1,545.00 was due at recording and is now due together with additional tax pursuant to section 258 of the Tax Law.

DATED: Albany, New York
September 26, 1973

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER