

STATE OF NEW YORK

STATE TAX COMMISSION

76614

In the Matter of the Application

of

COHOES INDUSTRIAL TERMINAL, INC.

DETERMINATION

to Review a Determination under Article 11
of the Tax Law with reference to a Mortgage
recorded January 4, 1974.

Applicant, Cohoes Industrial Terminal, Inc., has filed an application with the State Tax Commission pursuant to Article 11 of the Tax Law to review a determination by the Miscellaneous Tax Bureau that a mortgage executed by it and recorded on January 4, 1974, was subject to additional mortgage recording tax in the sum of \$750.00 plus penalties as provided by law.

Upon notice to all interested parties, a formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 2 World Trade Center, New York, New York, on March 19, 1974, at 10:45 A.M. Applicant appeared by Skadden, Arps, Slate, Meagher & Flom, Esqs., (Leon C. Baker, Esq., of Counsel). The Miscellaneous Tax Bureau appeared by Saul Heckelman, Esq., (Francis X. Boylan, Esq., of Counsel).

ISSUE

What portion of a "wrap around" leasehold mortgage from applicant, Cohoes Industrial Terminal, Inc., as mortgagor to the "wrap around" mortgagee was subject to the mortgage recording tax?

FINDINGS OF FACT

1. On or about December 31, 1973, applicant, Cohoes Industrial Terminal, Inc., purchased from Shaker Estates, Inc., a long term

leasehold of an apartment project known as Sparrowbush Apartments and located on Sparrowbush Road in Latham, New York for the sum of \$205,000.00. The original leasehold was created by a lease dated August 28, 1968, between Latham Sparrowbush Corp. as landlord and Shaker Estates, Inc. as tenant. A memorandum of said lease was recorded in the office of the clerk of the County of Albany on August 30, 1968, in Liber 1950 cp 39.

2. On or about December 31, 1973, and simultaneously with the purchase of the aforesaid leasehold, applicant, Cohoes Industrial Terminal, Inc., as mortgagor, executed a purchase money leasehold mortgage to Shaker Estates, Inc., as mortgagee, in the sum of \$100,000.00, mortgaging the leasehold created by the lease dated August 28, 1968, between Latham Sparrowbush Corp. as landlord and Shaker Estates, Inc. as tenant. The mortgage provided that the principal of the mortgage was to be paid in five annual installments of \$20,000.00 each, without interest, commencing December 31, 1974. This mortgage was recorded in the office of the clerk of the County of Albany on January 4, 1974, in Liber 2053 p. 895 and a mortgage recording tax in the sum of \$750.00 was paid thereon.

3. On or about December 31, 1973, and simultaneously with the execution of the instruments and transactions referred to in the prior two paragraphs, applicant, Cohoes Industrial Terminal, Inc., as mortgagor, executed a "wrap around mortgage" to Leon C. Baker and Gloria Baker as trustees of the Coleman Capital Corporation Employees Profit Sharing Trust, (hereinafter referred to as "Baker"), in the sum of \$205,000.00 mortgaging the leasehold created by the lease dated August 28, 1968, between Latham Sparrowbush Corp. as landlord and Shaker Estates, Inc. as tenant, which lease was now owned by applicant, Cohoes Industrial Terminal, Inc.

The mortgage provided that the principal sum of \$205,000.00 was to become due and payable on December 31, 1999, with interest thereon computed from December 31, 1973, at the rate of \$38,000.00 per annum for the year 1974, at the rate of \$28,000.00 per annum through December 31, 1982, and thereafter at the rate of 9% payable monthly on the first day of each month, and to be paid on January 1, 1974, and on the first day of each month thereafter. The mortgage further provided as follows:

"This mortgage is a wrap around mortgage which encompasses a senior mortgage of \$100,000 intended to be recorded simultaneously herewith.

Under certain conditions specified in the note which this mortgage secures, the mortgagee hereunder is required to make principal and interest payments on the senior mortgage, but all such payments are for the account of the mortgagee and not for the account of the mortgagor."

This mortgage was recorded in the office of the clerk of the County of Albany on January 4, 1974, in Liber 2053 p. 884 and a mortgage recording tax in the sum of \$787.50 was paid thereon. No sworn statement requesting a partial exemption from mortgage recording tax was filed at the time of recording.

4. The actual cash advanced by Baker to applicant, Cohoes Industrial Terminal, Inc., was \$105,000.00, which was used by applicant to pay Shaker Estates, Inc. the balance of the purchase price for the leasehold referred to in paragraph "1" over and above the purchase money mortgage referred to in paragraph "2".

5. On January 16, 1974, the Miscellaneous Tax Bureau advised the Albany County Clerk that the mortgage recording tax due upon the mortgage from applicant, Cohoes Industrial Terminal, Inc. to Baker, referred to in paragraph "3", was \$1,537.50 computed upon the sum of \$205,000.00, that there was no basis for exempting a \$100,000.00 portion of said mortgage, and that since no sworn

statement requesting exemption was filed at recording, no exemption should have been allowed. It directed the Albany County Clerk to collect additional mortgage recording tax in the sum of \$750.00 plus the penalties provided for by section 258 of the Tax Law.

6. On January 25, 1974, applicant, Cohoes Industrial Terminal, Inc., demanded a hearing on the issue of what portion of the \$250,000.00 mortgage from it to Baker, referred to in paragraph "3", was subject to the mortgage recording tax.

CONCLUSIONS OF LAW

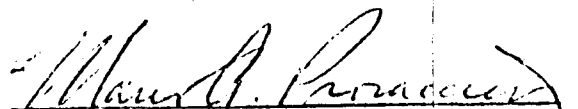
A. That the mortgage recording tax imposed by section 253 of the Tax Law is to be measured by the total debt secured. The total debt secured by the mortgage from applicant, Cohoes Industrial Terminal, Inc. to Baker was \$205,000.00, the consideration for which was \$105,000.00 in cash advanced by Baker to applicant, Cohoes Industrial Terminal, Inc., at the time of the execution of the mortgage and \$100,000.00 by Baker agreeing to make the five \$20,000.00 payments due from applicant, Cohoes Industrial Terminal, Inc. to Shaker Estates, Inc., pursuant to the purchase money mortgage between the two latter parties. In 1999, when the mortgage from applicant, Cohoes Industrial Terminal, Inc., to Baker became due, a principal payment of \$205,000.00 would be required to satisfy said mortgage. Furthermore, the debts from applicant, Cohoes Industrial Terminal, Inc. to Shaker Estates, Inc. and to Baker were separate and distinct. Each debt ran to a different party and was secured by a separate mortgage which might be foreclosed independently of the other. Therefore, a mortgage recording tax in the sum of \$1,537.50 was due upon the sum of \$205,000.00, which latter sum constituted the total debt secured by the mortgage from applicant, Cohoes Industrial Terminal, Inc. to Baker, unless said mortgage was otherwise exempt pursuant to section 255 of the Tax Law.

B. That the mortgage or a portion thereof, from applicant, Cohoes Industrial Terminal, Inc., to Baker did not come within the exemption provided by section 255 of the Tax Law since said mortgage was not recorded to correct or perfect the mortgage from applicant, Cohoes Industrial Terminal, Inc., to Shaker Estates, Inc. or pursuant to some provision or covenant therein or to impose an additional mortgage on property other than that covered by said mortgage as additional security for the original indebtedness.

C. That the application of Cohoes Industrial Terminal, Inc. is denied.

DATED: Albany, New York
May 20, 1974

STATE TAX COMMISSION


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