

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of an Instrument Executed :

by :

J. KNUТСEN & CO., INC. : DETERMINATION

and the Application of First National City Bank :  
to Review a Determination under Article 11 of :  
the Tax Law with reference to a Mortgage :  
Recorded April 26, 1973.

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Applicant, First National City Bank, 399 Park Avenue, New York, New York, has filed an application to review a determination under Article 11 of the Tax Law with reference to a mortgage made by J. Knutsen & Co., Inc. recorded on April 26, 1973.

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, Two World Trade Center, New York, New York, on January 15, 1976 at 10:45 A.M. Applicant, First National City Bank, appeared by Trubin, Sillcocks, Edelman and Knapp, Esqs. (Jonathan Shor, Esq. of counsel). The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq., (James A. Scott, Esq., of counsel).

ISSUE

Whether the mortgage executed by J. Knutsen & Co., Inc. constituted an additional mortgage to three prior mortgages held by applicant First National City Bank which, to the extent of the three prior mortgages, incorporated therein, was exempt from taxation pursuant to section 255 of the Tax Law.

FINDINGS OF FACT

1. On February 20, 1973, J. Knutsen & Co., Inc. executed a mortgage to Irving Trust Company as agent for certain mortgagee banks including First National City Bank. The mortgage secured loans made by the mortgagee banks

to the mortgagor, J. Knutsen & Co., Inc. in the aggregate principal amount of \$5,860,000.00 and was the subject of a "Share Ownership Agreement", of the same date between the mortgagee banks which contained a ratio for prorata ownership in the mortgage.

2. Prior to February 20, 1973, three mortgages securing indebtedness in the amount of \$1,660,000.00, were recorded in the office of the clerk of Rockland County, New York, all of such mortgages being held by First National City Bank. The mortgage recording taxes due on these instruments were paid in full.

3. The "Share Ownership Agreement" which was recorded in Liber 1041 page 728 of the Public Records of Rockland County, in paragraph 2, provides that First National City Bank's prorata ownership in the February 20, 1973 mortgage was \$150,000.00 plus a "mortgage contingency sum". This term was defined as "the aggregate amount, if any, of deficiency judgments which are entered against the mortgagor in the foreclosure of the three mortgages held by National" [First National City Bank]. After this sum is determined, the mortgagee banks would adjust their respective interests, if necessary, prorata. The "Share Ownership Agreement" also provides, in paragraph 10, that any money realized by First National City Bank upon these three mortgages may be retained by that bank. This provision is the one exception in paragraph 10 to an agreement that Irving Trust Company shall have priority in the repayment from the proceeds of the \$5,860,000.00 mortgage for monies advanced to J. Knutsen & Co., Inc.

4. The mortgage was presented for recording to the County Clerk of Rockland County, New York, on April 26, 1973, together with a check for \$31,500.00 for mortgage recording tax and an affidavit of Stephen Mann, a member of the law firm which is counsel to First National City Bank. The affidavit explained that the mortgage recording tax, represented by the check for \$31,500.00 was computed on

the basis of a principal amount of \$4,200,000.00 rather than \$5,860,000.00 since \$1,660,000.00 was already secured by the three prior mortgages held by First National City Bank on which the mortgage recording tax had already been paid. The provisions of section 255 of the Tax Law, the affidavit stated, provide that no payment of mortgage recording tax need be made on \$1,660,000.00 of the \$5,860,000.00 principal sum.

5. The mortgage was recorded by the County Clerk in Liber 1041, page 737 and the check for \$31,500.00 was accepted as payment of the mortgage recording tax due thereon. Subsequently, the Miscellaneous Tax Bureau determined that additional mortgage recording tax in the amount of \$12,450.00 was payable and so advised the Rockland County Clerk. On June 29, 1973 this additional amount and a penalty of \$186.95 was paid under protest to the Rockland County Clerk.

6. On August 26, 1974, First National City Bank applied for a refund of mortgage recording tax and penalty in the sum of \$12,636.75. This application for refund was denied on September 27, 1974. By letter of October 16, 1974 First National City Bank demanded a hearing on the denial of the refund application.

#### CONCLUSIONS OF LAW

A. That the mortgage executed by J. Knutsen & Co., Inc. dated February 20, 1973 constitutes an additional mortgage, and was not a new mortgage, on which mortgage recording tax would be due to the extent of prior recorded mortgages on which the tax due had been paid.

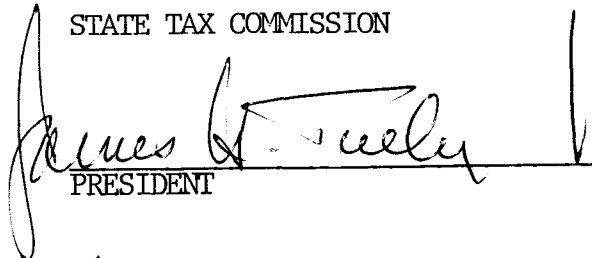
B. That the "Share Ownership Agreement" between the mortgagee banks specifically recognized and continued the priority of First National City Bank's three prior recorded mortgages; and that the provisions therein regarding the "mortgage contingency sum", the possibility of a deficiency judgment and the possibility of adjustment of the respective mortgagee banks' interests do not alter the continued existence of the three prior recorded mortgages.

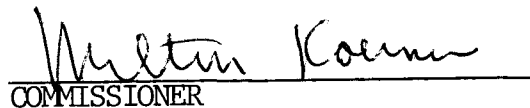
C. That the recording of the additional mortgage dated February 20, 1973, to the extent of the three prior mortgages held by First National City Bank on which mortgage recording tax due has been paid, is not subject to taxation under Article 11 of the Tax Law pursuant to the meaning and intent of section 255 thereof.

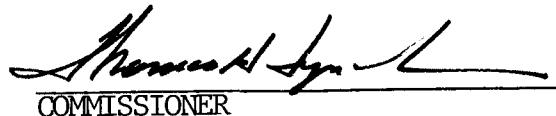
D. That the application of First National City Bank is granted and the County Clerk of Rockland County is hereby directed, pursuant to section 263 of the Tax Law, to refund to said applicant the sum of \$12,636.75.

DATED: Albany, New York  
December 8, 1976

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER