

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
MELVIN I. KENDUCK : DETERMINATION
to Review a Determination under Article 11 :
of the Tax Law with Reference to an :
Instrument Recorded September 3, 1969. :

Applicant, Melvin I. Kenduck, Ten Turner Terrace, Morganville, New Jersey, has filed an application to review a determination under Article 11 of the Tax Law with reference to an instrument recorded September 3, 1969.

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 22, 1975, at 9:15 A.M. Applicant appeared by Dreyer and Traub, Esqs., (Andrew P. Seidman, Esq. and George H. Ross, Esq. of counsel). The City of New York appeared by John P. Curran, Deputy Register, New York County. The Income Tax Bureau appeared by Saul Heckelman, Esq., (James A. Scott, Esq. of counsel).

ISSUE

Was the spreading agreement executed by applicant, Melvin I. Kenduck, on September 2, 1969, and recorded on September 3, 1969, supplemental to previously executed mortgages under section 255 of the Tax Law?

FINDINGS OF FACT

1. William Phillips was the tenant under a lease dated November 16, 1967, made by Chatham Associates, Inc. as landlord and William Phillips, as tenant, as supplemented and modified by a first supplementary agreement dated and executed November 26, 1968, a memorandum of which lease as supplemented and modified was recorded in the Office of the City Register, New York County in Reel 124 at page 794, which lease covers property located on Lexington Avenue between 48th and 49th Streets in New York City.

2. A mortgage dated October 31, 1967, was made by Arlen Operating Company and Parkway Realty Company to The Bank of New York in the principal sum of \$4,000,000.00 which mortgage was recorded in the State of New York in the Office of the County Clerk of Nassau County on November 14, 1967, in Liber 8213, page 174 of Mortgages, in the Office of the County Clerk of Westchester County on December 19, 1967, in Liber 7130, page 41 of Mortgages, in the Office of the County Clerk of Suffolk County on December 19, 1967,

in Vol. 5294, page 62 of Mortgages, in the Office of the City Register, New York County on December 20, 1967, in Rec. 255, page 315; and in the Office of the City Register, Kings County, on November 15, 1967, in Rec. 579, page 275; and the mortgage recording tax was duly paid thereon.

3. A mortgage dated December 21, 1967, was made by Arlen Operating Company and Parkway Realty Company to The Bank of New York in the principal sum of \$1,000,000.00, which mortgage was recorded in the State of New York, in the Office of the County Clerk of Nassau County on December 28, 1967, in Liber 8237, page 123 of Mortgages; in the Office of the County Clerk of Westchester County on December 27, 1967, in Liber 7131, page 539 of Mortgages, in the Office of the County Clerk of Suffolk County on December 28, 1967, in Vol. 5299, page 218 of Mortgages; in the Office of the City Register, New York County on December 26, 1967, in Rec. 256, page 457; and in the Office of the City Register, Kings County on December 27, 1967, in Rec. 614, page 68 and the mortgage recording tax was duly paid thereon.

4. The mortgages referred to in paragraphs "2" and "3" above were consolidated so as to constitute a single lien in the principal sum of \$4,942,668.00 by agreement dated December 21, 1967, and recorded in the State of New York in the Office of the County Clerk

of Nassau County on December 28, 1967, in Liber 8237, page 277 of Mortgages, in the Office of the County Clerk of Westchester County on April 8, 1968, in Liber 7149, page 638 of Mortgages, in the Office of the County Clerk of Suffolk County on January 3, 1968, in Vol. 5302, page 09 of Mortgages, in the Office of the City Register, New York County on December 28, 1967, in Rec. 258, page 69; and in the Office of the City Register, Kings County on January 4, 1968, in Rec. 619, page 436.

5. A mortgage dated as of September 1, 1965, was made by Arlen Operating Company and Yukon Realty Company to The Chase Manhattan Bank in the principal sum of \$5,000,000.00, which mortgage was recorded on December 2, 1965, in Liber 862 of Mortgages, at page 351, in the Office of the Clerk of Rockland County, and the mortgage recording tax was duly paid thereon.

6. A mortgage dated as of October 1, 1967, was made by Arlen Operating Company to The Chase Manhattan Bank (National Association) in the principal sum of \$2,690,919.34, which mortgage was recorded on October 18, 1967, in Liber 910 of Mortgages at page 617, in the Office of the Clerk of Rockland County, and the mortgage recording tax was duly paid thereon.

7. A mortgage dated December 14, 1962, was made by Arbruck Holding Corp. to Frank Sollento, et al., in the principal sum of \$825,000.00, which mortgage was recorded on December 17, 1962, in Liber 3710 of Mortgages at page 347, in the Office of the Register of Bronx County, and the mortgage recording tax was duly paid thereon.

8. A mortgage dated December 14, 1962, was made by Arbruck Holding Corp. to Sidney D. Robins, et al., in the principal sum of \$112,500.00, which mortgage was recorded December 17, 1962, in Liber 3710 of Mortgages, page 353, in the Office of the Register of Bronx County, and the mortgage recording tax was duly paid thereon.

9. The Bank of New York, by an assignment of mortgage dated September 3, 1969, assigned to Melvin I. Kenduck various mortgages, referred to in paragraphs "2" and "3" as consolidated and as therein described, aggregating \$4,942,668.00, which assignment was recorded in the Office of the County Clerk of Nassau County on December 10, 1969 in Liber 8568 of Mortgages at page 399.

10. The Chase Manhattan Bank (National Association), by an assignment of mortgage dated September 4, 1969, assigned to Melvin I. Kenduck the mortgage therein described, referred to in paragraph "5"

in the principal amount of \$5,000,000.00, which assignment was recorded in the Clerk's Office of Rockland County, New York, on December 9, 1969 in Liber 960 of Mortgages at page 50.

11. The Chase Manhattan Bank (National Association), by an assignment of mortgage dated September 4, 1969, assigned to Melvin I. Kenduck the mortgage therein described, referred to in paragraph "6" in the principal amount of \$2,690,919.34, which assignment was recorded in the Clerk's Office for Rockland County, New York, on December 9, 1969 in Liber 960 of Mortgages at page 52.

12. On September 2, 1969, applicant, Melvin I. Kenduck, and William Phillips, entered into an agreement in writing wherein they agreed to spread the lien of the mortgages referred to in paragraphs "2", "3", "5", "6", "7" and "8" to cover the leasehold interest of William Phillips in the property described in paragraph "1". The "Spreader Agreement" provided "that Phillips shall be under no personal liability for the performance, terms, provisions and covenants of the mortgages or the Spreader Agreement and that Phillips shall not be liable for any deficiency between the total amount secured by the mortgages and the proceeds of sale and foreclosure and no deficiency judgment will be sought against Phillips in any foreclosure action."

13. On September 3, 1969, the spreading agreement referred to in paragraph "12" together with a sworn affidavit of applicant, Melvin I. Kenduck, requesting that said agreement be declared exempt from the mortgage recording tax pursuant to section 255 of the Tax Law was presented to the City Register, New York County for recording. The said spreading agreement was duly recorded on said date in the Office of the City Register, New York County in Reel 150, page 654 and no mortgage recording tax was paid thereon.

14. On September 4, 1969, applicant, Melvin I. Kenduck, executed and delivered to Arlen Operating Company and Parkway Realty Company a partial release releasing certain premises described in the mortgages referred to in the "Spreader Agreement". The said partial release was duly recorded in the Office of the Westchester County Clerk on December 8, 1969, in Liber 6898 at page 702.

15. On December 13, 1973, the Miscellaneous Tax Bureau advised the City Register, New York County that the spreading agreement dated September 2, 1969 executed between applicant, Melvin I. Kenduck, and William Phillips and recorded in the office of said Register on September 3, 1969 without payment of mortgage recording tax was not a supplemental mortgage. It further advised the City Register, New York County that a mortgage recording tax in the

sum of \$102,213.00 was due at the time of recording and remained due with penalty. It directed the City Register, New York County to proceed at once to collect the tax and penalty due and to apply the provisions of section 258 of the Tax Law to the instrument until the same had been paid.

16. On May 15, 1974, applicant, Melvin I. Kenduck, demanded a hearing.

CONCLUSIONS OF LAW

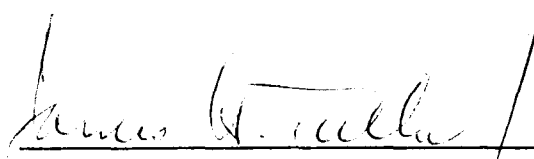
A. That the "Spreading Agreement" executed by applicant, Melvin I. Kenduck, spreading the mortgages therein set forth on the premises therein described was made and recorded for the purpose of imposing the lien thereof upon property not originally covered by nor described in such recorded primary mortgages and for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgages, and did not create or secure a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgages.


B. That the aforesaid spreading agreement is exempt from the mortgage recording tax pursuant to the provisions of section 255 of the Tax Law of the State of New York.

C. That the application of Melvin I. Kenduck is granted.

DATED: Albany, New York
December 3, 1975

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER