

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application :
of :
TODD MART, INC. and WESTMAR PLAZA, INC. : AFFIDAVIT OF MAILING
to Review a Determination under Article 11 :
of the Tax Law with Reference to an :
Instrument Recorded July 3, 1974 :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by certified mail upon Todd Mart, Inc. and Westmar Plaza, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

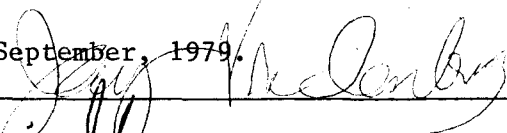
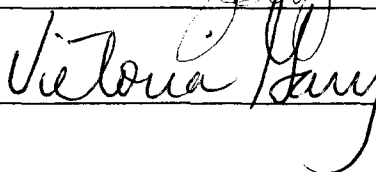
Todd Mart, Inc. and Westmar Plaza, Inc.
3000 Winton Rd. South
Rochester, NY

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 Postal Service within the State of New York.

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

Sworn to before me this

28th day of September, 1979.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application :
of :
TODD MART, INC. and WESTMAR PLAZA, INC. : AFFIDAVIT OF MAILING
to Review a Determination under Article 11 :
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Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by certified mail upon Gary Stephen Hanlon, Realty Income Trust, Mr. Lucien A. Morin and Mr. Arthur Maxwell the representatives of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed post-paid wrapper addressed as follows:

Garry Stephen Hanlon
Tarricone, Bilgore, Weltman, Silver
& Albert
Suite 100, Powers Bldg.
16 Main St. W.
Rochester, NY 14614

Realty Income Trust
3000 Winton Road South
Rochester, New York

Mr. Arthur Maxwell
Mortgage & Real Estate Transfer Tax Section
Room 208, 2nd Floor
Building #9
State Campus

Mr. Lucien A. Morin
Director of Finance
Monroe County
Rochester, New York

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the 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

28th day of September, 1979.

Victoria Gay
Joseph Hidenburg

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Todd Mart, Inc. & Westmar Plaza, Inc.
3000 Winton Rd. South
Rochester, NY

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 251 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,



cc: Petitioner's Representative
Garry Stephen Hanlon
Tarricone, Bilgore, Weltman, Silver & Albert
Suite 100, Powers Bldg. 9, 16 Main St.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
TODD MART, INC. and WESTMAR PLAZA, INC. : DETERMINATION
to Review a Determination under Article 11 :
of the Tax Law with Reference to an :
Instrument Recorded on July 3, 1974. :
:

Applicants, Todd Mart, Inc. and Westmar Plaza, Inc., 3000 Winton Road South, Rochester, New York, filed an application to review a determination under Article 11 of the Tax Law, with reference to an instrument recorded on July 3, 1974 (File No. 00110).

A formal hearing was waived and the case was submitted to the State Tax Commission, based on the entire record contained in the file. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether the recording of the instrument entitled "Collateral Assignment of Leases and Rents" executed by Todd Mart, Inc. and Westmar Plaza, Inc. to Realty Income Trust, dated June 24, 1974, is subject to the mortgage recording tax.

FINDINGS OF FACT

1. Applicants, Todd Mart, Inc. and Westmar Plaza, Inc., were both New York corporations. Todd Mart, Inc. was the fee owner of a shopping plaza (Todd Mart Plaza) situated in the towns of Brighton and Henrietta, in Monroe County. Westmar Plaza is a wholly-owned subsidiary of Todd Mart,

Inc. and was the fee owner of a shopping plaza (Westmar Plaza) situated in the Town of Gates, Monroe County. Realty Income Trust is a real estate investment trust with offices in Providence, Rhode Island.

2. Applicants, Todd Mart, Inc. and Westmar Plaza, Inc., as sellers, entered into a land-sale leaseback contract with Realty Income Trust as buyer. The contract provided that Todd Mart and Westmar Plaza sell the fee interest of the land to Realty Income Trust, exclusive of building and improvements, and that, immediately thereafter, lease the land so sold. The purchase price of the land was \$1.1 million and the buyer agreed to accept title to the land, subject and subordinate to existing first mortgage liens. In addition to the deeds and lease, Todd Mart, Inc. and Westmar Plaza, Inc. executed a Collateral Assignment of Leases and Rents in favor of Realty Income Trust. This Collateral Assignment of Leases and Rents was an assignment of the interest in the occupancy leases existing between Todd Mart, Inc. and Westmar Plaza, Inc., as landlords of the various merchants having stores in the two shopping centers.

3. On July 3, 1974, applicants, Todd Mart, Inc. and Westmar Plaza, Inc., recorded an instrument entitled "Collateral Assignment of Leases and Rents." No mortgage tax was paid thereon by applicants.

4. By letter of July 10, 1974, applicants requested a ruling with respect to mortgage recording tax, in that Realty Income Trust withheld a substantial sum in escrow, pending resolution of this tax question. In a letter dated August 16, 1974, applicants were advised that the Collateral Assignment of Leases and Rents constituted a mortgage taxable under Article 11 of the Tax Law.

5. On October 31, 1974, application was made pursuant to section 256 of the Tax Law, for an order nunc pro tunc, to permit the filing of a statement with payment of the tax, and also to request that the penalty due upon payment of the tax not exceed one-half of one percent per month.

6. On December 3, 1974, applicants paid mortgage recording tax of \$8,456.25 to the County Clerk of Monroe County.

7. On December 18, 1974, the State Tax Commission issued a Determination and Order Pursuant to Section 256 of the Tax Law, granting permission to the Recording Officer of Monroe County to file a sworn statement nunc pro tunc relative to the instrument "Collateral Assignment of Leases and Rents", and to accept the tax computed on the basis of applicants' statement, subject to the review of the Commission.

8. The collateral assignment was executed as additional security for the lease and obligations of applicants, Todd Mart, Inc. and Westmar Plaza, Inc., and they assigned right, title and interest to all leases (other than the lease between the parties), subleases and tenancies affecting the use of the premises, all rents and all rights, title and interest in all guarantees of the assigned leases to Realty Income Trust.

Various terms and conditions were specified. Applicants could manage and operate the premises and collect rents, issues, and profits accruing by virtue of the assigned leases. No rent could be collected in advance without approval of the assignee. In case of default on the lease payment that was to be made by applicants, the assignee (Realty Income Trust) was appointed applicants' lawful attorney and was authorized to enter and to take physical possession, and thereafter take over the

management and operation of the premises including leasing, enforcing, or modifying leases and collecting rent until all amounts secured are paid. The application of proceeds received after the takeover was fully described. Any surplus was to be turned over to applicants and the assignee was accountable to applicants for all monies actually received.

All liability was to be undertaken by applicants. The rights and remedies which may be exercised by the assignee were to be in addition to other rights which the assignee had by virtue of any other obligations, and which could be exercised when deemed expedient. The rights and powers of the assignee, Realty Income Trust, remain in full force until all amounts secured are paid in full. No provisions existed for foreclosure or reversion.

9. Applicants were restricted in the termination, cancellation or acceptance of surrender of a lease without consent of the assignee.

CONCLUSIONS OF LAW

A. That section 250 of the Tax Law provides, in part, the following:

The term "mortgage" as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby.

B. That the assignment of rents and leases by applicants to Realty Income Trust did not affect the title to the buildings and improvements, nor is it a lien or incumbrance thereon.

C. That the assignment of rents alone is not subject to mortgage recording tax. (Albee Fuel Corporation v. Gallman 42 AD2d 323.)

D. That the additional rights and controls granted Realty Income Trust are more in the nature of attorney-landlord and only afford said assignee the power to operate the leasing and collection of rents, or to endeavor to assure the value of the security interest in the rents afforded by the collateral assignment.

E. That such security interest absent a right to foreclosure, encumbrance or loss of a reversionary interest, does not constitute a mortgage. See Matter of Macy & Co. v. Bates 280 App. Div. 292.

F. That the application of Todd Mart, Inc. and Westmar Plaza, Inc. is granted and it is further ordered that:

(i) The Recording Officer of Monroe County is hereby authorized and directed to deduct the sum of \$5,637.50 from mortgage recording tax moneys in his hands or which shall come into his hands pursuant to section 253, subdivision (1) of the Tax Law, and the sum of \$2,818.75 from mortgage recording tax moneys in his hands or which shall come into his hands pursuant to section 253, subdivision (2) of the Tax Law, and refund \$8,456.25 to Todd Mart, Inc. and Westmar Plaza, Inc.

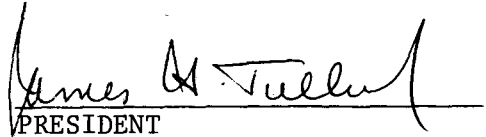
(ii) Of said sum, \$5,637.50 shall be charged back by the Recording Officer on his mortgage tax records to which it was credited, and the sum of \$2,818.75 shall be charged against the Rochester-Genesee Transportation Authority.

(iii) Three certified copies of this order shall be mailed to the Recording Officer, one of which he is directed to file with the records of his office, one with the Commissioner of Finance, and the other with the Rochester-Genessee Transportation Authority, as warrants for these disbursements.


Dated: Albany, New York

SEP 28 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER