

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Hotel Waldorf-Astoria Corporation :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Mortgage Recording Tax :
under Article 11 of the Tax Law
for the Year 1977. :

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Hotel Waldorf-Astoria Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

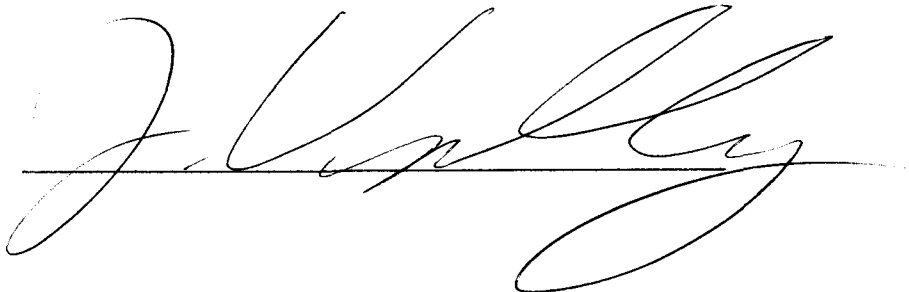
Hotel Waldorf-Astoria Corporation
301 Park Ave.
New York, NY 10022

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
3rd day of October, 1980.

Rebecca Bank



STATE OF NEW YORK
STATE TAX COMMISSION

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of
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AFFIDAVIT OF MAILING

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Philip Lerner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Philip Lerner
Hale, Russell, Gray, Seaman & Birkett
122 E. 42nd St.
New York, NY 10017

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
3rd day of October, 1980.

Richard Bank

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 3, 1980

Hotel Waldorf-Astoria Corporation
301 Park Ave.
New York, NY 10022

Gentlemen:

Please take notice of the Decision 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Philip Lerner
Hale, Russell, Gray, Seaman & Birkett
122 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HOTEL WALDORF-ASTORIA CORPORATION	:	DECISION
	:	
to Review a Determination under Article	:	
11 of the Tax Law with Reference to an	:	
Instrument Recorded in the Office of the	:	
Register of the City of New York, New	:	
York County on December 7, 1977.	:	

Petitioner, Hotel Waldorf-Astoria Corporation, 301 Park Avenue, New York, New York, filed a petition to review a determination under Article 11 of the Tax Law, with reference to an instrument recorded in the office of the Register of the City of New York, New York County, on December 7, 1977 (File No. 21509).

A formal hearing was held before James Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 19, 1979 at 2:45 P.M. Petitioner appeared by Hale, Russell, Gray, Seaman & Birkett, Esqs. (Philip Lerner, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether a mortgage, which was given by petitioner to the New York State Employees' Retirement System and which consisted of a lien upon certain commercial premises owned by petitioner, was exempt from the mortgage recording tax.

FINDINGS OF FACT

1. Petitioner, Hotel Waldorf-Astoria Corporation ("Waldorf"), filed a petition for refund of tax paid, under protest, upon the recording of a mortgage, which petition was received by the Miscellaneous Tax Bureau on December 29, 1977. Petitioner sought refund of the tax plus interest.

2. Waldorf is a corporation organized under New York law, with its principal place of business at 301 Park Avenue, New York, New York.

3. On December 7, 1977, petitioner delivered to the New York State Employees' Retirement System ("NYSERS") a mortgage covering the aforementioned premises to secure a debt in the amount of \$45,000,000.00.

4. The mortgage was presented for recording in the office of the New York City Register, New York County, that same day on behalf of NYSERS. An exemption from the mortgage recording tax was claimed on the ground that NYSERS, as holder of the mortgage, is a State agency and therefore has immunity from the tax.

5. The City Register orally denied the claimed exemption and payment of the tax was made, under protest, in the sum of \$562,500.00 with funds advanced by Waldorf.

CONCLUSIONS OF LAW

A. That the close relationship existing between NYSERS and the State government becomes apparent by perusal of the provisions of the Retirement and Social Security Law which establish the retirement system and govern its operation. The State comptroller is the administrative head of NYSERS, section 11(a), and trustee of the several funds thereof, section 13(b). Pursuant to section 13(d), the custody of all funds of the retirement system is placed within the charge of the head of the treasury division, the Department of Taxation and Finance. The State attorney-general is legal adviser to the system, section 14; and NYSERS is subject to supervision by the superintendent of insurance, section 15.

Funds held by the retirement system are primarily composed of contributions of employers, viz., the State and instrumentalities thereof.

Indeed, it has specifically been held by the Court of Appeals that the retirement system is a state instrumentality "clothed with the sovereign immunity of the State." The Court found:

It [NYSERS] is engaged in an important governmental function, and providing retirement pensions, annuities and other employment benefits for its personnel, comparable to those received by the employees of private industry, certainly assists and promotes the efficient operation of the affairs of the state itself. Glassman v. Glassman, 309 N.Y. 436, 440-41 (1956).

B. That property held for public purposes by the State or by an agency of the State is ordinarily immune from taxation. This immunity is an attribute of the sovereign and exists apart from any statutory exemption.

The property held by the state, or by any of its municipal divisions, for public purposes, is not, and never has been, subject to taxation. The right to impose taxes is a part of the sovereign power which for obvious reasons has never been extended to property which the government itself holds for public use, or which is so held by a municipality. Matter of Hamilton, 148 N.Y. 310, 313-14 (1895).

C. That real property owned by the State or any agency thereof is exempted from taxation by virtue of section 404 of the Real Property Tax Law. Subdivision 2 of said section provides that:

Real property owned by the New York State employees' retirement system acquired or constructed pursuant to subdivision h of section thirteen of the retirement and social security law shall be exempt from taxation.*

The Attorney General has advised that the legislature, in enacting the aforesaid subdivision, did not do so to exclude any other properties of NYSERS from the tax exemption, but to emphasize the existence of an exemption which it believed already existed but needed clarification; and that NYSERS, as a State agency, was entitled to the full exemption of section 404 for its real properties, however acquired or held. Op. Att'y Gen. 24 (1976).

* Retirement and Social Security Law section 13(h) deals with the authority of NYSERS to construct office buildings and parking facilities in designated cities of the State for its own use and for the use of various other departments.

D. That section 252 of the Tax Law exempts from the mortgage recording tax imposed by Article 11 mortgages made to, inter alia, the Home Owners' Loan Corporation, federal land banks and federal home loan banks. Mortgages held by the State and its instrumentalities are not specifically exempted thereby. However, the absence of an exemption is insufficient to override the State's basic immunity from taxation. In order to supercede such immunity, the taxing statute must specifically include the State within its purview. Op. Att'y Gen. 105 (1946).

E. That it is long-established that the mortgage recording tax does not constitute a tax upon property but is a tax upon the privilege of recording a mortgage. See, e.g., Matter of S. S. Silberblatt, Inc. v. Tax Commission, 5 N.Y.2d 635 (1959). It is the act of recordation which is taxed. Inquiry, therefore, into the nature or use of the real property encumbered by the mortgage is unnecessary. The courts and the commission, in cases regarding the applicability of the mortgage tax provisions to particular instruments, have not addressed themselves to the nature of the property underlying the mortgage.

F. That the mortgage constituted property of a State agency and was held for a public purpose, that is, as security for a loan made by the retirement system to Waldorf. NYSERS was established and is empowered to make such investments in order that it may carry out its function of providing benefits to retired State employees.

G. That the mortgage held by NYSERS was exempt from the recording tax imposed by section 253 of the Tax Law. See Matter of Acme Venetian Blind and Window Shade Corp., State Tax Commission, June 30, 1969; Matter of Cooper Specialty Manufacturing Corp., State Tax Commission, June 30, 1969; Matter of Eugene A. McCain and Joan Henderson McCain, State Tax Commission, October 23,

1968; Matter of Corlind Holding Corp., State Tax Commission, May 24, 1968; Matter of Manhattan College, State Tax Commission, March 18, 1968; and Rep. Att'y Gen. 191 (1913).

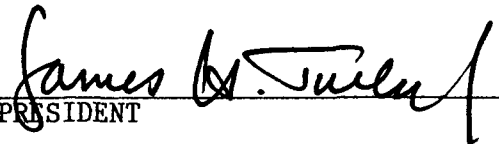
H. That section 263 of the Tax Law does not provide for interest to be paid upon refunds.

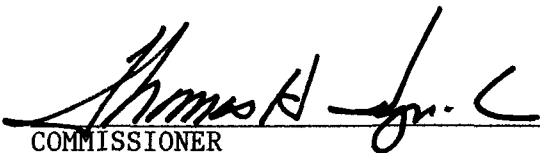
I. That the petition of Hotel Waldorf-Astoria Corporation is denied to the extent indicated in Conclusion of Law "H" but is in all other respects granted.

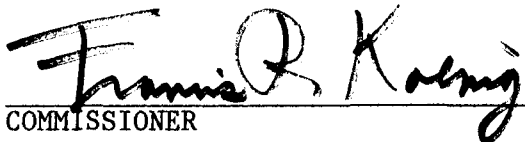
DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1980


PRESIDENT


COMMISSIONER


COMMISSIONER