

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

May 27, 1982

Sunrise Plaza Associates  
45 N. Station Plaza  
Great Neck, NY 11021

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Bennett A. Reiss  
Quadrangle Associates  
Mr. Arthur Maxwell  
Ms. Jean H. Tuthill

Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

SUNRISE PLAZA ASSOCIATES

DECISION

for Review of the Suffolk County Recording  
Officer's Refusal to Record an Executory  
Contract for the Sale of Real Property Without  
Payment of Tax Imposed by Article 11 of the  
Tax Law.

Petitioner, Sunrise Plaza Associates, 45 North Station Plaza, Great Neck, New York 11021, filed a petition for review of the Suffolk County recording officer's refusal to record an executory contract for the sale of real property without payment of tax imposed by Article 11 of the Tax Law (File No. 31704).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 15, 1981 at 11:15 A.M. Petitioner appeared by Bennett A. Reiss, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the executory contract for sale of real property entitled petitioner (as vendee) to possession of the premises, so that recordation of said contract was subject to the taxes imposed by Article 11 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Sunrise Plaza Associates, is a New York partnership, principally engaged in the operation and management of real estate on Long Island, New York.

2. On May 29, 1979, petitioner entered into a contract with Quadrangle Associates ("Quadrangle") for purchase of a parcel of land in the Town of Babylon, County of Suffolk.

3. Quadrangle owns approximately seven to eight acres of which the subject real estate is part.

On May 1, 1970, Quadrangle entered into a land lease of the subject parcel with Mr. Frank Grobman and Mr. Saul Lerner; the initial term of the lease was 25 years and was to commence approximately 12 months from the date of the signing. The lease agreement gave the tenants the right to extend the lease for a total of 4 periods, consisting of 3 periods of 20 years each and one further period of 14 years. Prior to May, 1979, they exercised one of the options. The tenants were also given the right to and did construct, at their own expense, a 100,000 square foot department store on the premises. The bank from which Grobman and Lerner obtained financing for construction of the store required that they exercise the first option in order that the term would be in excess of 25 years.

On September 1, 1977, Messrs. Grobman and Lerner entered into a lease of the department store with F. W. Woolworth Co. ("Woolco"). The term of the sublease is 99 years; in addition, the tenant is given thereunder 5 successive options to extend the term for any period of time not exceeding 5 years on each option. If Woolco chooses not to exercise its options, the sublease gives it the right to secure another subtenant.

At the time of the agreement between petitioner and Quadrangle, the premises were occupied by Woolco pursuant to the sublease.

4. Petitioner's executory sales contract with Quadrangle provided for a purchase price of \$300,000: \$40,000 payable at the time of signing and \$260,000 payable over a deferred period of 30 years.

5. After the contract was signed, a memorandum thereof was prepared and offered to the Suffolk County Clerk for recording. Three additional documents were submitted to the clerk: the contract itself; a letter to Mr. John Dayton, requesting a determination that no mortgage recording tax was due upon recordation of the memorandum; and the affidavit of a partner in Quadrangle which stated that possession of the premises was not given to petitioner by delivery of the contract.

6. The recording officer refused to record the memorandum without payment of mortgage recording taxes.

7. Grobman and Lerner pay a ground rent of approximately \$33,000 per year to petitioner and in turn receive annual rent from Woolco of approximately \$400,000.

8. The land lease prohibits the owner of the subject premises from mortgaging or otherwise creating any encumbrances upon the premises. This prohibition is expressly acknowledged and set forth in paragraph 32(A) of the executory contract:

"The parties acknowledge that Section 19 of the Land Lease prohibits the owner and landlord of the Premises from mortgaging or otherwise creating any security or other liens or encumbrances upon or affecting the fee title in and/or to the Premises or the Improvements, or any part thereof, and that except for said prohibition, the parties would have, in lieu of entering into this installment Contract, effected an immediate conveyance of title, whereby Buyer would take title to the Premises subject only to (i) the matters set forth herein, and (ii) a note and a purchase money first mortgage encumbering the Premises and Improvements, payable to Seller, in an amount equal to the unpaid balance of the purchase price, which note and mortgage would have been added to and made part of the Existing Mortgage and the note secured thereby. If there should develop any conflict of opinion regarding the interpretation or effect of any

term, condition or provisions of this Contract, then an interpretation shall be made bearing the foregoing intent of the parties in mind."

9. The contract also expressly states that the premises were sold and title, when conveyed, is to be conveyed subject to the Grobman and Lerner lease and the Woolco lease.

10. Other provisions of the executory contract relevant to this proceeding are set forth below.

(a) Possession of the premises was not delivered to petitioner upon execution of the contract.

"Buyer shall not receive or be entitled to receive possession of the Premises upon the execution hereof. Upon the closing of title and delivery of the deed, as provided for herein, or upon the expiration or sooner termination of the Exhibit C Agreements [the land lease and others], Buyer shall be entitled to possession of the Premises, in which event Seller shall, but without any cost to Seller, fully cooperate with Buyer in delivering such possession of the Premises to Buyer."

(b) All of Quadrangle's rights and entitlements were assigned to petitioner, as follows:

"Seller hereby assigns and conveys to Buyer all of Seller's rights, entitlements and privileges in and to the Exhibit B and Exhibit C Agreements, including Seller's right to receive any and all rent and additional rent and entitlements and notices that the lessor, landlord or owner of the fee of the Premises would be entitled to receive pursuant to the terms and conditions of said agreements."

(c) In the event of the buyer's default, it forfeits all rights to the premises and the possession thereof:

"Buyer shall forfeit any and all rights to the Premises and Improvements and to the possession thereof and Buyer's rights hereunder; and Seller shall have an immediate right to retake possession of the Premises and Improvements and the Exhibit C Agreements."

11. It is petitioner's position that recording of the executory sales contract was not subject to the taxes imposed by Article 11 because possession of the premises was not given to it under the contract and could only occur

upon full payment of the purchase price, or upon the expiration or termination of the leases.

#### CONCLUSIONS OF LAW

A. That certain executory contracts for the sale of real property are deemed mortgages for purposes of Article 11 of the Tax Law.

"Executory contracts for the sale of real property under which the vendee has or is entitled to possession shall be deemed to be mortgages for the purposes of this article and shall be taxable at the amount unpaid on such contracts." Tax Law section 250.

"The provisions of article eleven of the tax law shall not be applicable to an executory contract for the sale, purchase or exchange of real property, or memorandum thereof, unless the contract provides that the purchaser is entitled to possession of the property." Real Property Law section 294.2.

Only a specified class of executory contract is made taxable: those contracts under which the vendee has or is entitled to possession. "We must take these sections of the statute as we find them. It is not for us to enlarge them upon any notion that the Legislature might reasonably have done so." Matter of Rogers v. Graves, 279 N.Y. 375, 379 (1939).

B. That petitioner does not have nor is it entitled to possession of the premises under the executory contract.

The contract expressly provides that petitioner was not entitled to possession of the premises upon the execution of the contract; possession would be given over upon closing of title and delivery of the deed, or upon the termination of the lease and sublease. Where vendees may not have possession until the date final payment under the executory contract has been made, it has been held that payment of mortgage tax on the sale agreement was not required. Charles v. Scheibel, 128 Misc. 275 (Sup. Ct. Onondaga Co. 1926). See also 1927 Op. Atty. Gen. 228; 1912 Op. Atty. Gen. 157.

The lease and sublease in question had terms of 45 years and 99 years, respectively, and extended well beyond the date for final payment under the executory contract.

C. That as the court stated in Scheibel, the purpose and intent of section 250 of the Tax Law is "to prohibit the substitution of contracts of sale in the place of the usual security by way of mortgage without payment of tax." Id. at 279.

This Commission may, of course, look through the labels to the actualities of the situation. Matter of Drobner v. Chapman, 275 A.D. 520 (3d Dept. 1949). However, the parties herein did not structure their transaction so as to circumvent section 250, but to honor the terms of the land lease. They candidly state in the contract that but for the prohibition in the lease against mortgaging the premises, seller would have immediately conveyed title and buyer would have executed a purchase money first mortgage encumbering the premises.

D. That the recording officer's refusal to accept the memorandum of the contract for recordation without payment of mortgage recording tax was improper and erroneous.


E. That the petition of Sunrise Plaza Associates is hereby granted.

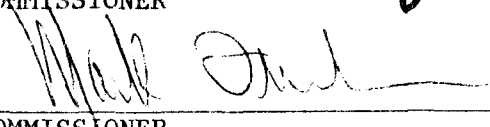
DATED: Albany, New York

MAY 27 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER