

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

LBANY, N. Y. 12227

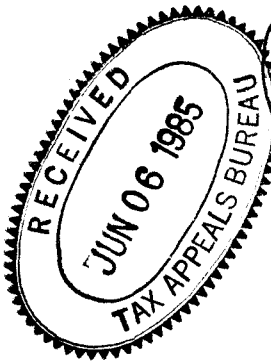
☐ HOLD

NOTICE

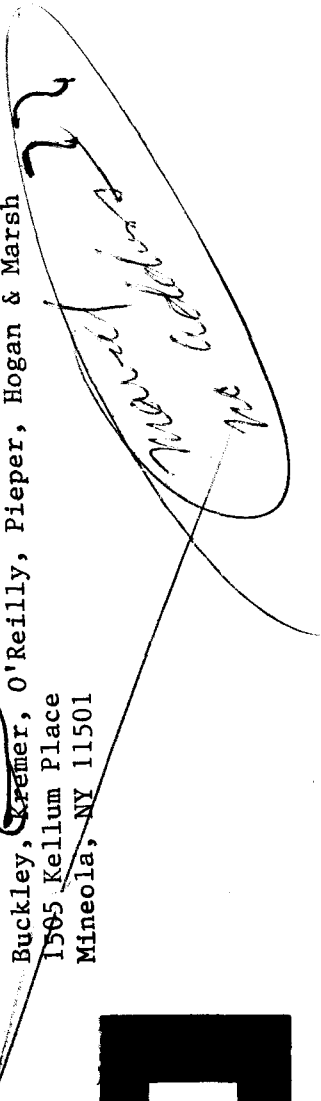
NOTICE

TURN

ed from
in 3849-
80



Barton P. Levine
Buckley, Kremer, O'Reilly, Pieper, Hogan & Marsh
1505 Kellum Place
Mineola, NY 11501



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

May 29, 1985

C. E. Towers Co.
Attn: Hyman Muss
118-35 Queens Blvd.
Forest Hills, NY 11375

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Barton P. Levine
Buckley, Kremer, O'Reilly, Pieper, Hogan & Marsh
1505 Kellum Place
Mineola, NY 11501

AND

The Comptroller of the State of New York
as Trustee of the Common Retirement System
Alfred E. Smith Office Building
Albany, NY 12207

Taxing Bureau's Representative

AND

W. Bernard Richland
Corporation Counsel
City of New York
Municipal Building
New York, NY 10007

AND

Robert Mensing
Mortgage & Real Estate
Transfer Tax Unit
Room 403, Bldg. #9, State Campus
Albany, NY 12227

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
C. E. TOWERS CO.
to Review a Determination under Article 11 of
the Tax Law with Reference to a Mortgage
Recorded on May 28, 1981.

:
:
:
:
:
:
:

DECISION

Petitioner, C. E. Towers Co., c/o Muss Development Co., 118-35 Queens Boulevard, Forest Hills, New York 11375, filed a petition to review a determination under Article 11 of the Tax Law with reference to a mortgage recorded on May 28, 1981 (File No. 41368).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 26, 1984 at 1:15 P.M., with all briefs to be submitted by September 21, 1984. Petitioner appeared by Buckley, Kremer, O'Reilly, Pieper, Hoban & Marsh, Esqs. (Barton P. Levine, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel). The City of New York appeared by Frederick A. O. Schwarz, Jr., Esq. (Arnold Fox, Esq., of counsel).

ISSUE

Whether the recording of a construction loan mortgage executed by petitioner to The Chase Manhattan Bank should be exempted from Article 11 taxation, where such mortgage secured interim financing prior to permanent financing secured by a mortgage executed to the New York State Employees' Retirement System.

FINDINGS OF FACT

1. Petitioner, C. E. Towers Co., is a New York partnership consisting of Hyman Muss and Joshua Muss as principal general partners. Petitioner owns certain real property improved by a 16-story office building and situated at the intersection of Queens Boulevard and 78th Crescent in Queens County.

2. On December 31, 1980, the Comptroller of the State of New York, as trustee of the New York State Employees' Retirement System ("NYSERS"), issued a commitment to make a first mortgage loan to Hyman Muss and Ruth Muss, (trustees pursuant to various trust agreements not in evidence) as fee owners and ground lessors, and to petitioner in the aggregate amount of \$25 million secured by the property described in the foregoing finding. Of the aggregate principal amount, \$19 million (the "floor loan") was to be advanced upon completion of the office building and the satisfaction of certain conditions, and the remaining \$6 million (the "achievement loan") was to be advanced upon the satisfaction of certain other conditions. The commitment was in the form of a letter to petitioner from NYSERS and at paragraph 5.7, entitled "Buy-Sell Agreement", provided as follows:

"Within ninety (90) days of the date hereof, the Borrower and the construction lender shall have entered into an agreement in form and substance satisfactory to us and our special counsel pursuant to which we shall agree to buy and such construction lender shall agree to sell to us the construction note, mortgage and appropriate security instruments. Such agreement shall provide for either an assignment of existing loan documents (which shall be modified to eliminate inconsistencies with this letter) or new loan documents, at our option. If we acquire the Loan by assignment, we shall receive an estoppel affidavit of you and the interim lender stating the amount unpaid on the evidence of indebtedness and that there are no defaults, defenses or setoffs with respect thereto."

3. In accordance with paragraph 5.7 of the NYSERS commitment, on May 11, 1981, petitioner entered into a Building Loan Agreement with The Chase Manhattan Bank ("Chase"), providing for construction loan advances to petitioner not to

exceed in the aggregate \$22,527,376.00. Article III of the agreement established the conditions precedent to Chase's obligation to make the initial advance; section 3.01(d) provided, in relevant part:

"The Permanent Commitment shall have been assigned to Lender; the Permanent Mortgagee shall have consented to such assignment or the Lender, Borrower and the Permanent Mortgagee shall have executed a three party agreement providing for the Permanent Closing..."

Exhibit G to the agreement, constituting the Lien Law Statement, enumerated the expenses previously incurred or expected to be incurred in connection with the loan and to be paid from the loan proceeds and allocated \$337,909.50 to mortgage recording taxes. The loan was evidenced by two notes, one in the amount of \$16,527,367.00 and the second in the amount of \$6 million.

4. The construction loan mortgage for \$16,527,367.00 was recorded in the office of the City Register, County of Queens on May 28, 1981, Reel 1341, page 54. Simultaneously therewith, petitioner paid mortgage recording tax of \$247,911.00 which tax is the subject of this proceeding. Petitioner maintains that it did not protest payment of the tax at the time of recording based on its belief that such protest would be premature: NYSERS did not at that time appear as mortgagee in the instruments being recorded.

5. On July 24, 1981, a Buy-Sell Agreement was entered into among Chase, NYSERS and petitioner pursuant to which NYSERS agreed to purchase the construction loans previously advanced by Chase.

6. On October 28, 1982, Hyman Muss and Ruth Muss, as trustees pursuant to various trust agreements (the fee owner) and petitioner (the ground lessee) executed a Consolidation and Extension Agreement, Security Agreement and Assignment of Leases and Rents to the Comptroller of this state, as trustee of the Common Retirement Fund. This agreement served to combine, consolidate and coordinate two mortgages:

"Mortgage made and executed by Fee Owner to Morton Pickman and Esther Ellman dated July 28, 1980, securing payment of the principal sum to TWO MILLION FOUR HUNDRED SEVENTY-TWO THOUSAND SIX HUNDRED TWENTY-FOUR AND NO/100 (\$2,472,624.00) DOLLARS and interest on said principal sum, together with the obligation secured thereby bearing even date therewith, as modified, which mortgage was recorded in the Office of the Register of the City of New York, County of Queens on July 30, 1980 at Reel 1273, Page 526, and assigned to The Chase Manhattan Bank, N.A. pursuant to that certain Assignment of Mortgage dated May 6, 1981 by Morton Pickman and Esther Ellman, recorded in the Office of the Register of the City of New York, County of Queens on May 28, 1981 at Reel 1341, Page 39, and which mortgage was modified and spread pursuant to that certain Mortgage Modification and Spreader Agreement dated May 11, 1981 recorded in the Office of the Register of the City of New York, County of Queens on May 28, 1981 at Reel 1351, Page 939, and which mortgage has been assigned to Mortgagee by instrument of assignment dated October , 1982,¹ intended to be recorded simultaneously herewith in the Office of the Register of the City of New York, County of Queens; and

"Mortgage made and executed by C. E. Towers, Co. and Fee Owner to The Chase Manhattan Bank, N.A. dated May 11, 1981, securing the payment of the principal sum of SIXTEEN MILLION FIVE HUNDRED TWENTY-SEVEN THOUSAND THREE HUNDRED SEVENTY-SIX and NO/100 (\$16,527,376.00) DOLLARS and interest on said principal sum, together with the obligation secured thereby bearing even date therewith, which mortgage was recorded in the Office of the Register of the City of New York, County of Queens on May 28, 1981, at Reel 1341, Page 54, and which mortgage has been assigned to Mortgagee by instrument of assignment dated October , 1982,¹ intended to be recorded simultaneously herewith in the Office of the Register of the City of New York, County of Queens....".

7. Hyman Muss, as trustee and also as general partner of C. E. Towers Co., submitted an affidavit pursuant to Tax Law section 255 relative to the recording of the Consolidation and Extension Agreement. By such affidavit, petitioner protested payment of the mortgage recording tax totalling \$247,911.00 previously paid at the time of the original recording of the \$16,527,367.00 construction loan mortgage.

1 The day was omitted in the original document.

8. By letter dated November 15, 1982, the Audit Division, Mortgage and Real Estate Transfer Tax Unit, advised petitioner that: (a) "there is no exemption from mortgage recording tax for transactions securing interim financing to lending institutions such as described in the sworn statement..."; and (b) the provisions in the sworn statement requesting refund did not comply with section 263 of the Tax Law and therefore could not be considered an application for refund.

9. Petitioner thereafter submitted a preliminary petition for refund of the mortgage recording tax. By letter dated December 2, 1982, the Audit Division, Mortgage and Real Estate Transfer Tax Unit, denied in all respects petitioner's refund claim.

10. NYSERS does not make any interim construction loans in connection with any of its permanent mortgage loans.

CONCLUSIONS OF LAW

A. That it is undisputed that NYSERS is an agency of this state immune from taxation and that a mortgage executed to and held by NYSERS is exempt from the mortgage recording tax (City of New York v. Tully, 88 A.D.2d 701).

B. That the mortgage for which petitioner seeks exemption was executed to Chase to secure construction loans. Clearly, the loans and the mortgage were contemplated by the NYSERS commitment of December 31, 1980 and NYSERS purchased the loans and was assigned the mortgage. The Chase mortgage was nonetheless a separate document the legal import of which cannot be disregarded. Notably, an exhibit to the Building Loan Agreement allocated loan proceeds to mortgage recording tax. Chase was not named in the NYSERS commitment, and petitioner has not demonstrated a principal-agent relationship between Chase and NYSERS.

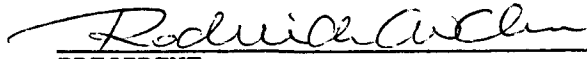
Consequently, the recording officer did not erroneously or improperly collect the tax.

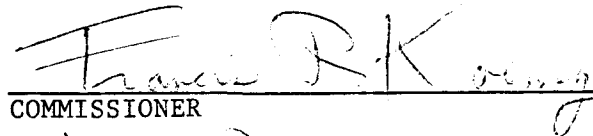
C. That the petition of C. E. Towers Co. is hereby denied in all respects.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1985


PRESIDENT


COMMISSIONER


COMMISSIONER