

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(3)R
Mortgage Recording Tax
June 11, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M010815B

On August 15, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from United Cerebral Palsy Associations of New York State, 330 West 34th Street, 13th Floor, New York, New York 10001 (herein referred to as "Petitioner"). Petitioner, United Cerebral Palsy Associations of New York State, submitted additional information related to the Petition on August 24, 2001, and September 18, 2001.

The issue raised by Petitioner is whether the exemption from the mortgage recording tax provided in Section 253.3 of the Tax Law is applicable to a mortgage executed by Petitioner to Primary Care Development Corporation.

Petitioner presented the following facts as the basis for this advisory opinion.

Petitioner is a New York not-for-profit corporation, which is exempt from federal income tax pursuant to Section 501(c)(3) of the Internal Revenue Code. Petitioner operates programs and services for individuals with mental retardation and developmental disabilities in New York City and upstate counties. Petitioner operates programs licensed by, among others, the Department of Health, State Education Department, Office of Children and Family Services (successor to the Department of Social Services) and Office of Mental Retardation and Developmental Disabilities (successor to the Department of Mental Hygiene).

On June 25, 2001, Petitioner closed on a leasehold mortgage with the Primary Care Development Corporation in the amount of \$2,412,000.00, which mortgage encumbers a leasehold interest located at 921 East New York Avenue, Brooklyn, New York. Located in the premises are four programs operated by Petitioner, with each program occupying a distinct area of the premises, as follows.

1. A Diagnostic and Treatment Center licensed by the New York State Department of Health pursuant to Article 28 of the Public Health Law. The services provided in the Center are all provided by or under the supervision of a physician. This program occupies 40% of total square footage of the premises. Petitioner possesses operating authority to provide primary care services and other medical and clinical services at the premises. Specifically, the Certificate of Incorporation allows Petitioner to provide the following medical and clinical services:

. . . to operate diagnostic and treatment centers and resident treatment facilities for the Cerebral palsied and persons with related mental disabilities or developmental disabilities, provided that before each such diagnostic and treatment center is open and operated, the Corporation shall first obtain all approvals required by Article 28 of the Public Health Law.

TSB-A-02(3)R
Mortgage Recording Tax
June 11, 2002

2. A Day Habilitation Program for individuals with developmental disabilities licensed by the New York State Office of Mental Retardation and Developmental Disabilities. This program occupies 26.4% of total square footage.

3. A Day Treatment Program licensed by the New York State Office of Mental Retardation and Developmental Disabilities. This program occupies 14.2% of total square footage.

4. A Day Habilitation Program for individuals with Traumatic Brain Injury licensed by the New York State Department of Health, which includes case management and counseling. These services do not require physician supervision. This program occupies 4.2% of total square footage.

Additionally, there is common space allocated to the programs. The common space accounts for 15.2% of the total square footage.

The total cost of the renovations is \$2,412,000. Of this amount, the total of the costs directly attributable to the renovation of the Diagnostic and Treatment Center and the cost of renovation of the common space reasonably apportioned to the Diagnostic and Treatment Center equals \$1,044,811 or 43.3% of the leasehold mortgage of \$2,412,000.

Applicable Law and Regulations

Subdivisions 1, 1-a and 2 of section 253 of the Tax Law impose taxes on the recording of a mortgage of real property in the State measured by the principal debt or obligation, which is, or under any contingency, may be secured at date of execution thereof or at any time thereafter. Also, in addition to the Statewide mortgage recording taxes, section 253-a of the Tax Law authorizes New York City to impose a tax on the recording of mortgages of real property situated within New York City.

Section 253.3 of the Tax Law provides:

Notwithstanding any other provision of law to the contrary, the mortgage recording tax shall not be imposed upon any mortgage executed by a voluntary nonprofit hospital corporation or upon any mortgage executed by or granted to the dormitory authority.

Section 644.1(b)(7) of the Mortgage Recording Tax Regulations provides, in part:

For the purpose of this paragraph a voluntary non-profit hospital corporation is a hospital as such term is defined in section 2801(1) of the Public Health Law which operates as a corporation as such term is defined in section 102(5) of the Not-For-Profit Corporation Law (section 253[3] of the Tax Law);

Section 2801(1) of the Public Health Law provides:

“Hospital” means a facility or institution engaged principally in providing services by or under the supervision of a physician or, in the case of a dental clinic or dental dispensary, of a dentist, for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition, including, but not limited to, a general hospital, public health center, diagnostic center, treatment center, dental clinic, dental dispensary, rehabilitation center other than a facility used solely for vocational rehabilitation, nursing home, tuberculosis hospital, chronic disease hospital, maternity hospital, lying-in-asylum, out-patient department, out-patient lodge, dispensary and a laboratory or central service facility serving one or more such institutions, but the term hospital shall not include an institution, sanitarium or other facility engaged principally in providing services for the prevention, diagnosis or treatment of mental disability and which is subject to the powers of visitation, examination, inspection and investigation of the department of mental hygiene except for those distinct parts of such a facility which provide hospital service. The provisions of this article shall not apply to a facility or institution engaged principally in providing services by or under the supervision of the bona fide members and adherents of a recognized religious organization whose teachings include reliance on spiritual means through prayer alone for healing in the practice of the religion of such organization and where services are provided in accordance with those teachings.

Section 102(a)(5) of the Not-For-Profit Corporation Law provides:

“Corporation” or “domestic corporation” means a corporation (1) formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute.

Opinion

As noted above, section 253.3 of the Tax Law provides that the mortgage recording tax shall not be imposed upon any mortgage executed by a voluntary non-profit hospital corporation. The Diagnostic and Treatment Center operated by Petitioner is licensed by the New York State Department of Health pursuant to Article 28 of the Public Health Law and provides services by or under the supervision of a physician for the diagnosis or treatment of human disease, pain, injury, deformity or physical condition. The Diagnostic and Treatment Center is considered a hospital under section 2801 of the Public Health Law. As Petitioner is a not-for-profit corporation that is providing hospital services, it is a voluntary non-profit hospital corporation.

TSB-A-02(3)R
Mortgage Recording Tax
June 11, 2002

However, in addition to providing hospital services at the premises encumbered by the leasehold mortgage, Petitioner will also operate the following non-hospital programs: the Day Habilitation Program for individuals with developmental disabilities, licensed by the New York State Office of Mental Retardation and Developmental Disabilities; the Day Treatment Program, licensed by the New York State Office of Mental Retardation and Developmental Disabilities; and the Day Habilitation Program for individuals with Traumatic Brain Injury, which is licensed by the New York State Department of Health, but does not provide services by or under the supervision of physicians. These programs do not constitute hospitals for purposes of section 2801 of the Public Health Law.

In the Matter of Church Charity Foundation of Long Island v. State Tax Commission, 91 A.D. 2d 746, the court upheld the Tax Department's position that the exemption provided by section 253.3 of the Tax Law was applicable only to the extent that mortgage proceeds are utilized for hospital-related purposes. Church Charity Foundation had executed a construction mortgage for the purpose of building a housing development for the elderly. The court held that it is the purpose for which the mortgage was executed that determines applicability of the exemption in question and not merely Church Charity Foundation's status as a voluntary non-profit hospital corporation.

In the present case, Petitioner notes that the total expenditures for the Diagnostic and Treatment Center, and the portion of common space reasonably apportioned to the Diagnostic and Treatment Center, are equal to 43.3% of the leasehold mortgage of \$2,412,000, or \$1,044,811. Accordingly, 43.3% of the amount secured by the leasehold mortgage is exempt from the mortgage recording tax. The remainder of the mortgage proceeds are not utilized for hospital-related purposes and are, therefore, subject to tax. See Matter of Church Charity Foundation of Long Island, *supra*.

DATED: June 11, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein