STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TRANS WORLD AIRLINES, INC.	:	DECISION DTA No. 805228
for Refund of Mortgage Recording Tax under Article 11 of the Tax Law with Reference to Instruments Recorded on May 23, 1968 and January 31, 1983.	:	

The City of New York filed an exception to the determination of the Administrative Law Judge issued on August 6, 1992 with respect to the petition of Trans World Airlines, Inc., c/o Icahn Enterprises, 100 South Bedford Road, Mt. Kisco, New York 10549. The City of New York appeared by O. Peter Sherwood, Esq. (Edward F. X. Hart, Andrea Grant and Amy F. Nogid, Esqs., of counsel). Petitioner appeared by Rosenman & Colin, Esqs. (Gerald A. Rosenberg, Howard J. Rothman and Kenneth C. Brown, Esqs., of counsel).

The City of New York filed a brief in support of its exception. Petitioner filed a brief in opposition. The City of New York then filed a reply brief. Oral argument, at the City of New York's request, was heard on May 13, 1993, which date began the six-month period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the instrument recorded by petitioner on May 23, 1968 is a mortgage subject to mortgage recording tax.

II. Whether the instruments recorded on January 31, 1983 constituted a "supplemental mortgage" under Tax Law § 255(1) and are thus exempt from the mortgage recording tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "3," "4," "5" and "15" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

In 1966, National Airlines, Inc. ("National") entered into a lease agreement with the Port of New York Authority ("Port Authority") whereby National took possession of a leasehold estate in certain land at John F.Kennedy International Airport ("JFK"). Pursuant to the Port Authority Lease, National was obligated to construct a passenger terminal on the leased property.

We modify the Administrative Law Judge's finding of fact "2" to read as follows:

> In order to secure the construction financing for the proposed terminal, National entered into an agreement with Naterm Corporation,[1] a corporation wholly owned by Smith, Barney and Co., Inc. ("Smith Barney"). Smith Barney arranged the financing and used Naterm as the financing vehicle for the construction of the terminal. Naterm agreed to provide National up to $40 million, pursuant to the Operating Agreement among National, Naterm and the Port Authority.[2]

We modify the Administrative Law Judge's finding of fact "3" to read as follows:

> On April 10, 1968, National assigned the Port Authority Lease to Naterm. The Assignment of Lease conveyed National's leasehold interest at JFK to Naterm. In return, Naterm entered into a subleasing arrangement whereby Naterm's leasehold interest was leased back to National for a term ending one month before the expiration of the leasehold, in return for rental payments. The Assignment of Lease stated that it was made in order to facilitate the construction of a

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[1] The name "Naterm" is derived from the phrase "National Terminal."

[2] We modified finding of fact "2" to substitute the word "provide" for the word "loan" in the last sentence because the documents of the transaction do not use the word "loan."

passenger terminal and that it was subject to the terms of the Operating Agreement.[3]

We modify the Administrative Law Judge's finding of fact "4" to read as follows:

> Naterm raised the money it provided to National by selling its notes pursuant to an agreement with various institutional investors. The notes were issued under a Trust Indenture between Naterm and Morgan Guaranty Trust Company of New York ("Morgan Guaranty"), the trustee for the institutional investors which purchased the notes. Naterm, rather than National, was the obligor on the notes because National did not want its credit directly at stake. National's obligation in the transaction was limited to paying the rent under the Sublease as it was due. National did not want the financing for the construction of its passenger terminal to appear as a liability on its balance sheet or on other credit arrangements. As a result of limiting the obligation of National to paying the rent under the Sublease as it was due, the interest costs on the transaction were greater than they would have been had National been obligated for the overall debt.[4]

We modify the Administrative Law Judge's finding of fact "5" to read as follows:

> Naterm, National and Morgan Guaranty entered into a Security Assignment in which Naterm assigned its leasehold interest to Morgan Guaranty and National agreed that it would pay the rents due to Naterm under the National Sublease to Morgan Guaranty. National and Morgan Guaranty entered into a Security Agreement which also provided that National would pay directly to Morgan Guaranty the amounts due under the National Sublease and that National would take such other actions as were necessary to protect the interests of Morgan Guaranty and the note purchasers. The Security Agreement also obligated National to pay any mortgage recording tax arising out of the filing of any of the financing documents. A Pledge Agreement

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[3] We modified finding of fact "3" to delete the language "sufficient to repay the loan from Naterm to National. The indebtedness of National to Naterm was evidenced by National's obligation to pay rent under the National Sublease" from the third sentence. We deleted this language because we conclude that the record does not support a finding that National was indebted to Naterm for the construction financing.

[4] We modified finding of fact "4" by substituting the word "provided" for the word "loaned" in the first sentence of the fact for the reason stated in footnote 2. We also added the fourth and final sentences to the fact in order to state the extent of National's obligation and the effect of this obligation on the transaction.

between Smith Barney and Morgan Guaranty provided that Smith Barney would pledge all of its stock in Naterm to Morgan Guaranty.[5]

The Operating Agreement between Naterm, National and the Port Authority provided that: (1) Naterm would have no right to use or physically occupy the leased property; (2) Naterm was obligated to advance construction funds to National, in accordance with the National Sublease; and (3) Naterm would reassign to National its entire leasehold interest in the leased property upon the payment of the notes. The Operating Agreement referred to Naterm's issuance of the notes and required the execution of the National Sublease, the Note Purchase Agreement, the Trust Indenture, the Pledge Agreement, the Security Assignment and the Security Agreement.

The Assignment of Lease and the Port Authority Lease were recorded with the Office of the City Register, Queens County, New York, on May 23, 1968. No mortgage recording tax was paid on this recording. The Trust Indenture between Naterm and Morgan Guaranty specifically provided that the Assignment of Lease and the Port Authority Lease were to be the only documents recorded, and also provided that the Financing Documents "not be filed, registered or recorded in any public office," unless such was requested by the owners of the notes. This decision to record only the Assignment of Lease and the Port Authority Lease was made to avoid paying the mortgage recording tax that would otherwise have been due if all documents had been presented for recording to the mortgage recording officer.

In January 1980, Pan American World Airways, Inc. ("Pan Am") merged with National and succeeded to National's rights and obligations under the National Sublease and the other finance documents. In October 1980, Pan Am entered into a sublease (the "TWA Sublease") whereby Pan Am subleased its entire interest under the National Sublease to Trans World

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[5] We modified finding of fact "5" by deleting the words "and the Note Purchase Agreement" from between the words "Sublease" and "and" in the second sentence of the fact. We made this change because the Security Agreement, at paragraph 2(a), required National to pay certain expenses, e.g., certain legal fees, incurred by Naterm under the Note Purchase Agreement, but not all payments due under the Note Purchase Agreement.

Airlines, Inc. ("TWA") for a term ending one day before the expiration of the National Sublease.

On January 31, 1983, the National Sublease, the Operating Agreement and the Security Assignment ("Financing Documents") were recorded with the Office of the City Register, Queens County, New York, the same office with which the Assignment of Lease had been recorded in 1968. In computing the amount of mortgage recording tax due, the mortgage recording officer used the mortgage recording tax rate that was applicable in 1983, which was $2.25 per $100.00 of principal indebtedness. When the Assignment of Lease was recorded in 1968, the mortgage recording tax rate was $.50 per $100.00 of indebtedness.

A mortgage recording tax of $886,665.50 was assessed and paid on January 31, 1983. Of this amount, TWA paid $450,000.00 and Pan Am paid $436,665.50. The amount of the obligation as secured by the mortgage was $39,407,354.94.

Pan Am assigned to TWA all of its right, title and interest to any refund of the mortgage recording tax paid to which either Pan Am or TWA was entitled, pursuant to an authorization executed on May 20, 1986 ("Refund Claim Assignment").

On June 14, 1986, TWA submitted to the Department of Taxation and Finance an application for a partial refund of the mortgage recording tax in the amount of $516,238.00.

The refund was computed as follows:

Mortgage Recording Tax Paid (1983)		$886,667.00
Mortgage Recording Tax Due (1968)	$197,037.00	
Additions to Tax (Late Payment)	173,391.00	370,428.00
		$516,239.00

The additions to tax (late payment) was computed using the one-half of one per centum of the tax due penalty imposed by Tax Law § 258.

The Division of Taxation denied petitioner's refund application in a letter dated August 21, 1987.

The $40 million that was raised through the sale of the notes was used by National, as required by the Financing Documents, to pay for the construction of the National terminal.

The attorney for National during the financing of the passenger terminal testified at hearing to the following:

(a) The purpose of the Assignment of Lease from National to Naterm was to provide Naterm with title to National's leasehold interest so Naterm could assign its interest in the leasehold to Morgan Guaranty, as security for the repayment of the notes.

(b) The Financing Documents were designed to provide the note purchasers of the $40 million that was advanced to Naterm and, in turn, advanced to National, with a security interest in the leasehold interest that National had assigned to Naterm.

(c) In the Pledge Agreement, Smith Barney, the owner of the Naterm stock, pledged its Naterm stock to Morgan Guaranty as additional security for the repayment of the notes that were issued by Naterm to the note purchasers.

(d) If there had been a default on the repayment of the notes, the note purchasers, as one of several remedies available to them, could have foreclosed on their mortgage on Naterm's leasehold interest.

We modify the Administrative Law Judge's finding of fact "15" to read as follows:

> It was the policy of the Department of Taxation and Finance that in the situation at hand, where an Assignment of Lease was recorded in 1968 which on its face was an absolute assignment, and the mortgage recording officer determined that no tax was owing and, subsequently, related financial documents were filed which indicated that the Assignment of Lease was intended as security, and the recording officer determined at that time that a mortgage recording tax was owing, the tax would be based on the initial recording of the Assignment of Lease in 1968.[6]

At the conclusion of the hearing commenced in this matter on September 19, 1990, the City of New York (hereinafter "the City") requested that the record remain open for the purpose of providing the City additional time to consider whether it wished to submit additional evidence. The hearing was rescheduled for December 11, 1990. Due to the

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[6] We modified finding of fact "15" by adding the language "which indicated that the Assignment of Lease was intended as security" to more accurately reflect the record.

unavailability of petitioner's counsel for the December 11, 1990 hearing date, the matter was rescheduled for January 14, 1991.

On November 28, 1990, petitioner provided the City's representatives with a copy of the Refund Claim Assignment.

On December 7, 1990, a telephone status conference call was held in which counsel for the City and petitioner and the Administrative Law Judge participated. The City admitted during this telephone call that the mortgage recording tax had been paid in full on January 31, 1983. In addition, the City admitted that Pan Am had assigned all of its right to any refund of the mortgage recording tax to petitioner, pursuant to the Refund Claim Assignment. However, for the first time, the City stated that it was not conceding that the tax had been paid by TWA and Pan Am in approximately equal amounts. The next telephone status conference call was set down for February 8, 1991.

The hearing scheduled for January 14, 1991 was adjourned but the record was left open to allow the parties to address the issues and submit documentation concerning the payment of the mortgage recording tax.

On January 22, 1991, petitioner's representative submitted copies of the TWA check to the Administrative Law Judge and the City of New York. In his letter, petitioner's representative summarized the telephone conference of December 7, 1990 as follows:

> "There can be no question that (i) the contested mortgage tax was paid in full on January 31, 1983; (ii) Pan Am assigned its rights to any tax refund to TWA; and (iii) TWA has standing to prosecute the refund claim and collect the proceeds."

During the scheduled February 8, 1991 conference call in which counsel for both parties and the Administrative Law Judge participated, the City conceded that TWA had proven payment of its share of the mortgage recording tax paid on January 31, 1983. However, the City did not concede the adequacy of the proof adduced of the payment by Pan Am of the balance of the tax.

On March 4, 1991, at petitioner's request, the Administrative Law Judge executed a Judicial Subpoena Duces Tecum directing that Citibank produce the Pan Am check. The subpoena was delivered to Citibank on March 7, 1991.

On August 14, 1991, petitioner provided to the City's representative and the Administrative Law Judge a copy of Pan Am's check register and transaction journal, which indicated that a Pan Am check was drawn on its Citibank account on January 31, 1983 in the amount of $436,665.50 in payment of the mortgage recording tax.

By letter dated August 23, 1991, the Administrative Law Judge established a post-hearing briefing schedule and stated that the "record of this hearing will remain open for the limited purpose of admitting the missing Pan Am check in the amount of $436,665.50."

On October 25, 1991, petitioner's representative forwarded to the City's representative and the Administrative Law Judge a copy of the Pan Am check drawn on a Citibank account in favor of the Office of the City Register in the amount of $436,665.50 and dated January 31, 1983. The check was endorsed to the Office of the City Register, Queens. Petitioner's representative also forwarded a copy of the letter he received from an assistant vice-president of Citibank dated October 23, 1991. This letter had accompanied the Pan Am check from Citibank to petitioner's representative.

OPINION

The Administrative Law Judge held that it was appropriate to apply section 320 of the Real Property Law to determine whether the Assignment of Lease recorded in 1968 was a mortgage for purposes of the mortgage recording tax imposed by sections 253 and 253-a of the Tax Law. Applying section 320, the Administrative Law Judge concluded that the Assignment of Lease, although an absolute conveyance on its face, was a mortgage because the Financing Documents recorded in 1983 revealed that the Assignment of Lease was intended to secure the repayment of the funds advanced by Naterm. As a result, the Administrative Law Judge concluded that the mortgage recording tax should have been paid in 1968, at the 1968 rates. Further, the Administrative Law Judge determined that the recording of the Financing

Documents did no more than formally complete a transaction that was "part and parcel" of the original mortgage, the Financing Documents were supplemental instruments and their recording was excluded from tax by section 255 of the Tax Law.

Next, the Administrative Law Judge held that section 258 of the Tax Law did not render the Assignment of Lease and Financing Documents inadmissible in this proceeding because the mortgage recording tax was paid in 1983, prior to the commencement of this hearing. In addition, the Administrative Law Judge held that petitioner's failure to record all of the relevant documents in 1968 did not, under section 320 of the Real Property Law, render the mortgage void nor preclude petitioner from pursuing its refund claim.

The Administrative Law Judge also rejected all of the City's defenses to the refund claim. First, the Administrative Law Judge rejected the City's estoppel claim for the reason that the City had not established that it was injured by petitioner's failure to inform the mortgage recording officer in 1968 that the Assignment of Lease was a mortgage. The Administrative Law Judge held that the City had been compensated for petitioner's delay in payment by imposition of the penalty authorized by section 258 of the Tax Law. Second, the Administrative Law Judge concluded that laches did not bar petitioner's refund claim because: the City was not prejudiced by petitioner's delay in recording the Financing Documents; the instant proceeding was timely commenced within the statute of limitations; and petitioner delayed in recording documents, not in commencing an action to enforce a right.

Finding no statutory basis for the City's contention that petitioner was required to pay the mortgage recording tax under protest or duress in order to be entitled to a refund, the Administrative Law Judge also rejected this contention as a basis to deny the refund.

Lastly, the Administrative Law Judge rejected the City's claim that the TWA check, the Pan Am check and the Refund Claim Assignment were not admissible in evidence because petitioner did not offer the documents at the hearing and did not lay a proper foundation for their admissibility. The Administrative Law Judge stated that the City's challenge to the Refund Claim Assignment and to the TWA check was inconsistent with the City's post-hearing

concessions that Pan Am had assigned its rights to any refund to TWA and that TWA had proven payment of its share of the mortgage recording tax. With respect to the payment by Pan Am, the Administrative Law Judge held that State Administrative Procedure Act § 306(2) allowed documentary evidence to be received in the form of copies and that the evidence submitted established payment by Pan Am.

On exception, the City contends that the Administrative Law Judge erred in considering the issue in this case to be whether the transaction was a mortgage. The City asserts that the issue is whether the Assignment of Lease was a mortgage and the City asserts that the Assignment of Lease was not a mortgage, but only enabled a security device to be executed. The City also asserts that the Administrative Law Judge erred in applying the equitable principles underlying section 320 of the Real Property Law to the instant case because the financing transaction here was a complex one structured by sophisticated professionals. Next, the City argues that because petitioner structured the Assignment of Lease so that its form was not that of a mortgage, petitioner should be bound to that form and should not be heard to argue that in substance the Assignment of Lease was something else. Even if there were some basis to argue that the Assignment of Lease was a mortgage, the City argues that petitioner should be estopped from asserting this position. The City contends that the Administrative Law Judge erred in finding that the imposition of penalty compensated the City for the loss of the use of the tax because a penalty is a punishment, not compensation for the time value of money.

The City's next challenge to the Administrative Law Judge's determination is that the Security Assignment recorded in 1983 was not a supplemental mortgage under section 255 of the Tax Law because the purpose of such section is to avoid double taxation. Because tax was never paid on the recording of the Assignment of Lease, the City argues that section 255 does not apply to the recording of the Assignment of Lease. The City also asserts that even if the Assignment of Lease was a mortgage, the documents recorded in 1983 secured $10 million in new and further debt, upon which tax was due in 1983.

In response, petitioner argues that the recording of the Assignment of Lease was taxable because the Financing Transaction, i.e., the complex financing of the passenger terminal, was a mortgage. Petitioner contends that it is erroneous to focus on the issue of whether the Assignment of Lease, rather than some of the other Financing Documents, secured the repayment of the Notes. Next, petitioner argues that the Administrative Law Judge properly relied on, and applied, section 320 of the Real Property Law. Petitioner also asserts that in form the Assignment of Lease was a mortgage because the Assignment explicitly states that it was made to facilitate the construction of the passenger terminal and because it referred to the Operating Agreement. Petitioner next argues that the City cannot prevail with its claim of equitable estoppel because the City did not establish that National had a duty to disclose that the mortgage recording tax was due on the recording of the Assignment of Lease, nor that the City was injured by the late payment of the tax. Finally, petitioner asserts that the Administrative Law Judge correctly applied section 255 of the Tax Law and that the City should be precluded from making the argument, for the first time on appeal, that the documents recorded in 1983 secured $10 million in debt that was not authorized in 1968. If the City is not precluded from raising this point, petitioner concedes that the additional $10 million in debt was taxable in 1983.

We reverse the determination of the Administrative Law Judge.

Given the arguments of the parties, the first task before us is to define the issue. We agree with the City that the issue is whether the Assignment of Lease was a mortgage. The essence of petitioner's argument is that because there was a mortgage granted in this complex financing transaction, then the Assignment of Lease, which was an integral part of the overall financing transaction, was a mortgage.

The mortgage recording tax is imposed on the privilege of recording a mortgage (Matter of Silberblatt, Inc. v. Tax Commn., 5 NY2d 635, 186 NYS2d 646, cert denied 361 US 912) and the amount of the tax is measured by the amount of the debt secured by the mortgage offered for recording (Matter of Citibank, N.A. v. State Tax Commn., 98 AD2d 929, 470 NYS2d 920). We

see no basis in this statutory scheme to impose tax on an instrument offered for recording merely because it is connected with another instrument which does provide security for repayment of a debt. The cases cited by petitioner, Mooney v. Byrne (163 NY 86), Corcillo v. Martut, Inc. (58 AD2d 617, 395 NYS2d 696, affd 45 NY2d 878, 410 NYS2d 811), Atlantic Cement Co. v. Murphy (30 AD2d 456, 294 NYS2d 149, affd 28 NY2d 502, 318 NYS2d 944), R. H. Macy & Co. v. Bates (280 App Div 292, 114 NYS2d 143) and Citizens Natl. Bank & Trust Co. of Oneonta v. State Tax Commn. (274 App Div 722, 87 NYS2d 321) stand for the principle that all of the circumstances surrounding the giving of an instrument should be examined in order to determine whether that specific instrument was intended to be a mortgage. However, these cases do not hold that if there is one instrument intended as a mortgage in a complex transaction, then all the related instruments are also mortgages. Accordingly, we conclude that the question is, considering all of the circumstances of the transaction, whether the Assignment of Lease was intended as a mortgage.

"A mortgage, whether in form or equitable, imports a debt or obligation to be secured, due from the mortgagor to the mortgagee, a right to foreclose, and the reciprocal right to redeem. Without those elements there can be no mortgage . . ." (R. H. Macy & Co. v. Bates, supra, 114 NYS2d 143, 146). Examining all of the circumstances of the instant transaction, we conclude that the Assignment of Lease was not a mortgage because it did not secure repayment of a debt, National having undertaken no obligation with respect to the $40 million debt to finance the construction.

The documents of the transaction indicate that National's responsibility was limited (other than for incidental expenses, see, paragraph "2" of Exhibit "13") to paying the rent under the Sublease as those payments became due (see, paragraph "7" of the Sublease, Exhibit "10"; paragraph "1" of the Security Agreement, Exhibit "13"). We find absolutely nothing in the

documents that indicates that National had any liability for the overall debt as the transaction was originally structured.[7]

The testimony of petitioner's witness, Mr. Ingram, is completely consistent with the documents. Mr. Ingram testified that National wanted to use this manner of financing so that the debt would not appear as a liability of National on its balance sheet or in other credit arrangements (Hearing Tr., p. 49). As to the effect of the financing method chosen, Mr. Ingram testified that it resulted in a higher interest rate because the credit of National was not behind the entire debt instrument, but was "limited to the obligation to make the lease payment which could be reduced in the event of a bankruptcy by National to a claim that would be substantially less than the entire amount of the note" (Hearing Tr., p. 73).

In addition to his acknowledgements that National was not obligated for the overall debt, Mr. Ingram's testimony recognized that the Assignment of Lease did not, and was not intended to, secure repayment of the debt. The following exchange took place on Mr. Ingram's direct examination:

> "Q. Taking into account all of the documents dated as of April 1968, Exhibits 7 through 14, what was the purpose served by the lease assignment by National to Naterm?
>
> "A. It was to transfer title to that leasehold interest to Naterm.
>
> "Q. To what end?
>
> "A. So that Naterm would have title to the property interest and be able to execute security documents, mortgaging the leasehold interest to the trustee's benefit of the lenders" (Hearing Tr., p. 61).

Thus, the testimony of petitioner's witness is consistent with what the documents of the transaction indicate, i.e., that National did not incur the debt and, accordingly, that the Assignment was not intended to secure repayment of the debt.

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[7]The sublease between National and Naterm provides that National could elect to become liable for the debt if Naterm defaulted in its payment of the debt and National chose to guarantee payment of the debt (see, Sublease Agreement, paragraph "19[c]", Exhibit "10"). This provision emphasizes the fact that National was not liable for the debt absent these special conditions.

It follows from the foregoing that we do not find recourse to section 320 of the Real Property Law helpful to petitioner's case. That section provides that a conveyance absolute on its face will be treated as a mortgage if another instrument indicates that the absolute conveyance was intended as security. Because we find no instrument, nor any other evidence, that indicates that Assignment of Lease was intended as security, the provisions of section 320 have no application, in our view, to the instant facts. For similar reasons, we find petitioner's reliance on Citizen's Natl. Bank & Trust Co. of Oneonta v. State Tax Commn. (supra) to be misplaced. In Citizen's National Bank, the instrument not initially offered for recording, the trust agreement, revealed that the document first recorded, the deed, was intended to secure repayment of an indebtedness. In contrast, here, there is nothing that indicates that the Assignment of Lease was intended to secure repayment of any debt.

In our view, the case of R. H. Macy & Co. v. Bates (supra) is more analogous to the instant facts than is Citizen's National Bank. In R. H. Macy, the instruments recorded revealed a transaction of a sale and a leaseback to the grantor, which is similar to the lease/sublease involved here. The Court in R. H. Macy found that the parties did not intend either of the sale/leaseback instruments to be a mortgage. Among the factors the Court found significant in ascertaining the parties' intent were that the parties did not consider a loan, did not discuss a mortgage, and that each of the parties treated the transaction on its books and records as if it was a sale/leaseback, not as if it was a debt and mortgage. These factors are similar to the facts here and support our conclusion that the Assignment of Lease was not a mortgage.

As implied by our opinion thus far, we also do not agree with the Administrative Law Judge as to the application of section 255 to the instant facts. Section 255 exempts a supplemental mortgage from the tax only to the extent that the supplemental mortgage does not secure a new or further indebtedness (Matter of Rednow Realty Corp. v. Tully, 72 AD2d 621, 420 NYS2d 792, lv denied 48 NY2d 610, 425 NYS2d 1025; Matter of City of New York v. Procaccino, 46 AD2d 594, 364 NYS2d 582; Matter of Bay View Towers Apts. v. State Tax Commn., 48 AD2d

86, 367 NYS2d 856, affd 40 NY2d 856, 387 NYS2d 1002). Because it is our conclusion that the Assignment of Lease did not secure any indebtedness, it is also our conclusion that the documents recorded in 1983 secured a new indebtedness that was subject to tax.

Finally, our conclusion that the Assignment of Lease was not a mortgage has made it unnecessary to address the City's claims of estoppel and laches.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the City of New York is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Trans World Airlines, Inc. is denied; and

4. The Division of Taxation's denial of petitioner's refund

application is sustained.

DATED: Troy, New York
October 7, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner