STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TRANS WORLD AIRLINES, INC.	:	DETERMINATION 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.	:	

Petitioner, Trans World Airlines, Inc., c/o Icahn Enterprises, 100 South Bedford Road, Mt. Kisco, New York 10549 filed a petition 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.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 19, 1990 at 9:15 A.M. The record of the hearing remained open until October 28, 1991 to provide petitioner with the opportunity to submit additional documentation. The City of New York filed a brief on December 4, 1991 and a reply brief on January 8, 1992. Petitioner filed a brief on December 3, 1991 and a reply brief on January 8, 1992. Petitioner appeared by Rosenman & Colin (Gerald A. Rosenberg, Esq. and Kenneth C. Brown, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel). The City of New York appeared by O. Peter Sherwood, Esq. (Anshel David, Esq. and J. Erika Dworkin, Esq., of counsel).

ISSUES

I. Whether petitioner has established that it has standing to pursue the refund claimed.

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

III. 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

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.

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 lend National up to $40 million, pursuant to the Operating Agreement among National, Naterm and the Port Authority.

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 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. The Assignment of Lease stated that it was made in order to facilitate the construction of a passenger terminal and that it was subject to the terms of the Operating Agreement.

Naterm raised the money it loaned to National by selling its notes pursuant to an

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

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 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.

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 the Note Purchase Agreement 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 between Smith Barney and Morgan Guaranty provided that Smith Barney would pledge all of its stock in Naterm to Morgan Guaranty.

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 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.

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, 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.

At the conclusion of the hearing commenced in this matter on September 19, 1990, 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 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.

SUMMARY OF THE PARTIES' POSITIONS

The City of New York takes the following positions:

(a) The City of New York initially takes the position that petitioner lacks standing to pursue its refund claim because it failed to lay a proper foundation for the admissibility of the TWA check, Pan Am check and the Refund Claim Assignment. Petitioner also lacks standing because it failed to submit as evidence the originals of the checks and Refund Claim Assignment, and to explain their absence.

(b) Petitioner alleges that the Assignment of Lease was not a mortgage because the document appeared on its face to be an assignment of a leasehold interest, petitioner chose to record it as something other than a mortgage and, therefore, petitioner is now bound by the form in which the document was recorded.

(c) The Assignment of Lease is not admissible in this proceeding since petitioner failed to pay the mortgage recording tax at the time it was recorded in 1968, citing Tax Law § 258. Since the Assignment of Lease is not admissible, there is no evidence of a recordation of a mortgage prior to the Financing Documents being recorded in 1983 and, therefore, the 1983 recordings cannot be considered a nontaxable supplemental mortgage pursuant to Tax Law § 255.

(d) Assuming the Assignment of Lease is admissible into evidence, the 1983 recording of the Financing Documents cannot be considered a supplemental mortgage because: (1) the Assignment of Lease was not a mortgage; (2) the Financing Documents were executed in 1968 as part of the original mortgage and therefore do not supplement a different, prior security assignment or other mortgage; (3) no mortgage recording tax was paid in 1968 pursuant to Tax Law §§ 255 and 257; and (4) petitioner failed to file with the mortgage recording officer a statement under oath of the facts on which its claim for exemption was based, citing Tax Law § 255(2).

(e) The disparity between the purposes of the Mortgage Recording Tax Law and real property recording statutes and the fact that Real Property Law § 320 addresses only the treatment of documents recorded as deeds leads to the conclusion that Real Property Law § 320 cannot dictate that the substance, rather than the form, of the recorded Assignment of Lease determines its actual character.

(f) Since petitioner breached its duty to inform the mortgage recording officer that the Assignment of Lease was a mortgage, it is estopped from asserting that the alleged mortgage existed as of 1968. In addition, petitioner's refund claim is barred by the doctrine of laches due to the long delay in recording all the documents relating to the transactions which occurred in

1968.

(g) The mortgage was invalid because it was recorded in 1968 without payment of the mortgage recording tax, in violation of Tax Law § 258 and Real Property Law § 320.

(h) Petitioner's refund claim is barred because it failed to pay the mortgage recording tax assessed in 1983 under protest or duress.

In response, petitioner takes the following positions:

(a) The copies of the refund claim assignment and the TWA check were accepted by the City of New York in a post-hearing submission of proof; the original of the TWA check was made available to the City for inspection; the City did not object to the introduction of the Pan Am check; and petitioner has established by affidavits the authenticity of the Pan Am check.

(b) The Assignment of Lease must be considered a mortgage pursuant to Real Property Law § 320, which applies to the mortgage recording tax, and taxed as a mortgage pursuant to Tax Law § 253, since it is clear from the Financing Documents that the Assignment of Lease is intended solely as security for repayment of the funds advanced by Naterm to National.

(c) The mortgage is not considered void because of petitioner's failure to pay the mortgage recording tax in 1968, but is merely unenforceable against a subsequent bona fide purchaser until such time as the tax is paid, pursuant to Real Property Law § 320. In addition, as the tax was paid in 1983, the bar to the mortgage's admission into evidence in this proceeding provided by Tax Law § 258 is no longer applicable.

(d) The 1983 recording of the Financing Documents constitutes a supplemental mortgage as the Assignment of Lease was a mortgage and the Financing Documents were recorded for the purpose of perfecting the recorded mortgage, pursuant to Tax Law § 255.

(e) There is no authority for the position that petitioner had a duty to inform the recording officer that the Assignment of Lease was a mortgage, and that a mortgage recording tax was due and owing. Therefore, the doctrine of equitable estoppel is inapplicable as petitioner's silence cannot be considered a misrepresentation of the facts to the mortgage

recording officer. In addition, the doctrine of laches is inapplicable to a proceeding timely commenced within the statute of limitations.

(f) There is no requirement in Tax Law § 263 that the mortgage recording tax be paid under protest or duress in order to obtain a refund.

CONCLUSIONS OF LAW

A. Tax Law §§ 253 and 253-a impose a tax, computed by the amount of "principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state" which is recorded on or after certain dates (not relevant herein). The mortgage recording tax is imposed upon the privilege of recording a mortgage; the underlying debt is the basis for computation (Matter of S. S. Silberblatt, Inc. v. State Tax Commn., 5 NY2d 635, 640, 186 NYS2d 646, cert denied 361 US 912).

B. In determining whether the transaction at issue was a mortgage subject to the mortgage recording tax when the Assignment of Lease was recorded in 1968, it is appropriate to look to Real Property Law § 320 and the cases decided thereunder (see, People v. Gass, 206 NY 609, 135 NYS 1132; Atlantic Cement Co. v. Murphy, 30 AD2d 456, 294 NYS2d 149, affd 28 NY2d 502, 318 NYS2d 944; Donohue v. First Trust Co., 1 AD2d 573, 151 NYS2d 989). Section 320 provides, in relevant part, as follows:

> "A deed conveying real property, which by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage...."

It is thoroughly settled that a deed conveying real property, when accompanied by a written instrument showing that it is intended as security only, although an absolute conveyance in terms, is to be considered a mortgage (see, People v. Gass, supra; Mooney v. Byrne, 163 NY 86; Macauly v. Smith, 132 NY 524; Corcillo v. Martut, Inc., 58 AD2d 617, 395 NYS2d 696, affd 45 NY2d 878, 410 NYS2d 811; Donohue v. First Trust Co., supra; Atlantic Cement Co. v. Murphy, supra; 77 NY Jur 2d, Mortgages, §§ 25 and 29).

The Financing Documents recorded in 1983 establish that the Assignment of Lease

recorded in 1968, although an absolute conveyance in terms, was intended as security to secure the repayment of the funds advanced by Naterm to National to finance the construction of National's passenger terminal. Therefore, the Assignment of Lease must be considered a mortgage (Real Property Law § 320) subject to the mortgage recording tax imposed by Tax Law § 253 (see, Corcillo v. Martut, Inc., supra). The mortgage recording tax should have been paid at the time the Assignment of Lease was recorded in 1968, at the tax rates applicable in 1968.

C. Tax Law § 258 provides, in relevant part, as follows:

> "No mortgage of real property which is subject to the taxes imposed by this article [Art. 11] shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article."

The mortgage recording tax is payable at the time the mortgage (Assignment of Lease) is presented for recording (Tax Law § 257; see, Mutual Life Insurance Co. of New York v. Nicholas, 144 App Div 95, 128 NYS 902). The mortgage may be recorded and the tax paid at any time before the mortgagee seeks to enforce it. In addition, the statute does not make it the duty of the mortgagor to record the mortgage forthwith upon its delivery and the failure to pay the mortgage recording tax does not render the mortgage void (Mutual Life Insurance Co. of New York v. Nicholas, supra), only unenforceable and inadmissible as evidence in any action or proceeding, until such time as the mortgage recording tax is paid. As the mortgage recording tax was paid in 1983, the Assignment of Lease and Financing Documents are admissible in this proceeding.

Real Property Law § 320 provides, in relevant part, as follows:

> "the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time."

The purpose of the Real Property Law, Article 9, dealing with the recording of instruments affecting real property is two-fold: (1) it is intended to protect the rights of innocent purchasers who acquire an interest in property without knowledge of prior encumbrances; and (2) it is designed to establish a public record which would furnish potential purchasers with notice, or at

least "constructive notice", of previous conveyances and encumbrances that might affect their interests (Andy Associates, Inc. v. Bankers Trust Co., 49 NY2d 13, 424 NYS2d 139).

The failure to record all relevant mortgage documents does not make it void between the parties thereto, only as against any subsequent bona fide purchaser for valuable consideration without notice of the unrecorded conveyance (see, O'Neill v. Lola Realty Corporation, 264 App Div 60, 34 NYS2d 449; Fox v. Sizeland, 170 Misc 390, 9 NYS2d 350).

Thus, the failure to pay the mortgage recording tax and failure to record all relevant mortgage documents in 1968 do not render the mortgage void or preclude petitioner from pursuing its refund claim.

D. Tax Law § 255 provides that if a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, such additional instrument or mortgage is not subject to taxation under this article so long as it does not create or secure a new or further indebtedness or obligation other than the principal indebtedness.

Subsequent filings that consolidate, perfect or modify the original mortgage without creating new indebtedness do not incur any mortgage recording tax liability. As the recording of the Financing Documents in 1983 did no more than to formally complete a transaction which was fully contemplated at the time of, and was part and parcel of, the original mortgage, no mortgage recording tax was incurred (City of New York v. State Tax Commn., 130 AD2d 890, 516 NYS2d 132; Bay View Towers Apartments, Inc. v. State Tax Commn., 48 AD2d 86, 367 NYS2d 856, affd 40 NY2d 856, 387 NYS2d 1002). Petitioner was only required to pay the tax at the time it recorded the Assignment of Lease in 1968, computed at the 1968 tax rate.

E. The City of New York has raised several defenses to petitioner's refund claim including the equitable doctrines of estoppel and laches, and the claim that the mortgage recording tax was not paid under duress or protest.

F. The City's position relating to the issue of estoppel is premised upon the claim that petitioner had a duty to inform the mortgage recording officer that the Assignment of Lease was

a mortgage. Petitioner's failure to inform adversely affected the City's Department of Finance by denying it the use of the mortgage recording tax funds during the years 1968 through 1983.

Equitable estoppel is a term applied to a situation where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact. The doctrine rests upon the word or deed of one party which is rightfully relied upon by another who, as a result, changes his position to his injury, so that it would be inequitable to permit the first to enforce rights inconsistent therewith. An indispensable requirement of estoppel is some inequitable or fraudulent conduct engaged in by the party sought to be estopped which is reasonably relied upon by the other party to his detriment. The doctrine prohibits a person, upon principles of honest and fair and open dealing, from asserting rights, if their enforcement would, through his omissions or commissions, work fraud or injustice (57 NY Jur 2d, Estoppel § 13).

Estoppel does not operate to create rights otherwise nonexistent; it operates merely to preclude the denial of a right claimed otherwise to have arisen. Estoppel does not come into being as an equitable defense except where justice to the rights of others demands; it is never intended to work a positive gain to the other party. Its function is to protect from loss which, except for the estoppel, one could not escape, and should be limited in its effects to what may be necessary to put the parties in the same relative position which they would have occupied if the estoppel had never existed (57 NY Jur 2d, Estoppel § 15).

The essential elements of equitable estoppel are: (1) an act constituting concealment of facts or false misrepresentation; (2) an intention or expectation that such acts will be relied upon by the other party; (3) an actual or constructive knowledge of the true facts by the wrongdoer; and (4) reliance by the innocent party causing him to change his position to his substantial detriment (BWA Corporation v. Alltrans Express USA, Inc., 112 AD2d 850, 493 NYS2d 1; see, Lignos v. United States, 439 F2d 1365). The essentials of an estoppel arising under certain circumstances from silence or inaction are (1) a duty to speak; (2) a failure to speak; and (3) damage to another party directly due to this silence (La Porto v. Philmont, 39 NY2d 7, 382

NYS2d 703).

The City of New York is not entitled to have petitioner's refund denied on the basis of estoppel. Assuming, without deciding, that National had a duty to inform the mortgage recording officer in 1968 that the Assignment of Lease was a mortgage, the City has not established that it suffered any injury from the alleged omissions. Although the City was without the use of the funds between 1968 and 1983, it was compensated for this delay by the payment of not only the tax but also a payment of a sum equal to one-half of one per centum of the tax for each month that the tax remained unpaid (Tax Law § 258). In effect, this required petitioner to pay six-percent interest to the City for the use of the money which it would not have otherwise had if the full tax had been paid when actually due (200 E. 64th St. Corp. v. Tully, 86 Misc 2d 1087, 384 NYS2d 695, affd 56 AD2d 699, 391 NYS2d 923). Thus, as the statute places the parties in the position they would have been had National paid the mortgage recording tax in 1968, the application of the doctrine of estoppel is unnecessary as the City has not been damaged by National's failure to pay in 1968. In addition, application of the doctrine to petitioner would result in a windfall to the City by allowing it to keep the difference in the mortgage recording tax between the amount properly due and owing in 1968 and the amount collected in 1983. The application of the doctrine of estoppel cannot result in such a gain to the City. Therefore, the doctrine of estoppel is not applicable to petitioner.

G. The City's allegation that the doctrine of laches bars petitioner's refund claim is based upon the position that it was prejudiced by the unreasonable delay in recording the Financing Documents and paying the mortgage recording tax due.

The equitable term "laches" signifies a delay independent of the statute and is distinguished from the defense of the statute of limitations in that, in order to bar a remedy because of laches, there must appear, in addition to a mere lapse of time, some circumstances from which a party may be prejudiced (75 NY Jur 2d, Limitations and Laches, §§ 4 and 337).

A key element in the case for laches is delay prejudicial to the opposing party (Matter of Barabash, 31 NY2d 76, 334 NYS2d 890). As previously discussed (see, Conclusion of Law

"F"), the City will not suffer an injury or prejudice in the event that the refund claim is not barred. In addition, the defense of laches does not bar an action at law that is commenced within the applicable statute of limitations (Fuchs & Lang Sun Chemical v. Schenectady Chemicals, 43 AD2d 881, 351 NYS2d 754; Appleton v. National Park Bank, 211 AD 708, 208 NYS 228, affd 241 NY 561 [laches does not bar a timely action at law for the payment of money due on defaulted promissory notes]; Battlefields, Inc. v. County Legislature of County of Rockland, 86 Misc 2d 181, 381 NYS2d 769 [laches does not bar timely action for refund of real property taxes]). As the instant refund proceeding was timely commenced within the applicable statute of limitations (Tax Law § 263; CPLR 213[1]), laches is not a bar to this proceeding.

It is also noted that the doctrine of laches deals with an unreasonable delay by a party in commencing an action to enforce a right (see, 75 NY Jur 2d, Limitations and Laches, § 330 et seq). The City's position deals with petitioner's unreasonable delay in filing the Financing Documents in 1983, and not with petitioner's delay in commencing this proceeding. As previously discussed, since the refund claim was timely, the defense of laches is not a bar to this action.

H. The City's contention that petitioner is not entitled to the refund claimed because it did not pay the mortgage recording tax in 1983 under protest or duress is rejected as unsupported by Tax Law § 263. This issue is one of statutory construction and interpretation.

The focus of jurisprudential inquiry in such cases is to determine the legislative intent as expressed in the statute, taking into consideration the nature of the subject matter, the policy behind the statute, and statutes in pari materia (see, United States v. National Mar. Engrs.' Beneficial Assn., 294 F2d 385, 391 [2nd Cir 1961] citing Church of the Holy Trinity v. United States, 143 US 457; Rankin on behalf of Bd. of Ed. City of New York v. Shanker, 23 NY2d 111, 295 NYS2d 625, 628; see also, McKinney's Cons Laws of NY, Book 1, Statutes, §§ 92, 95-98, 111). It is an axiom of statutory construction that where statutory language is clear and unambiguous, a court shall construe it so as to give effect to the plain and ordinary meaning of the words used (Abrams v. Ford Motor Co., 74 NY2d 495, 549 NYS2d 368, 370). Therefore, it

is not within the province of the court (or this administrative body) to give a statute any greater effect than its language allows (People v. Abrams, 82 Misc 2d 979, 372 NYS2d 138, 141) unless necessary to effectuate a demonstrated legislative intention (Matter of Federal Ins. Co. v. State Tax Commn., 146 AD2d 888, 536 NYS2d 595).

Here, the statutory provision contains no requirement that a taxpayer must pay the mortgage recording tax under protest or duress in order to obtain a refund. The City has not cited any authority which supports its position nor has it established that the literal language of the statute contravenes the legislative intent. Therefore, in the absence of a demonstrated legislative intent to the contrary, a deviation from the plain language of the statute is not justified (Matter of Federal Ins. Co. v. State Tax Commn., supra; Matter of United States Life Insurance Company in the City of New York, Tax Appeals Tribunal, April 2, 1992), and petitioner was not required to pay the tax under duress or protest in order to obtain its refund claim.

I. The City of New York contends that the TWA check, the Pan Am check and the Refund Claim Assignment are inadmissible into evidence because petitioner failed to proffer the documents at the hearing and thus did not lay a proper foundation for their admissibility. The City also argues that if a proper foundation were laid at hearing, the documents would be inadmissible unless the City was granted the opportunity to cross-examine any witnesses called to authenticate those documents.

It is initially noted that the record of this hearing remained open from the September 19, 1990 hearing date through August 23, 1991, when it remained "open only for the limited purpose of admitting the missing Pan Am check in the amount of $436,665.50." During this period of time there occurred several telephone status conference calls involving counsel for the City, counsel for petitioner and the Administrative Law Judge. Additionally, various correspondence was exchanged among the City, petitioner, the Division of Taxation and the Administrative Law Judge during this period. A review of the telephone conversations and correspondence establishes that the only issue relating to the payment of the mortgage recording

tax which remained outstanding at the time the record was closed in this matter was whether Pan Am had paid its share of the mortgage recording tax collected on January 31, 1983.

It has been petitioner's position from the time its refund claim was filed through the hearing process that the mortgage recording tax was paid on January 31, 1983 in the amount of $886,665.50, that it was paid by TWA and Pan Am in the amounts of $450,000.00 and $436,665.50, respectively, and that Pan Am assigned to TWA its entire interest in the mortgage recording tax refund in issue in this proceeding.

At no time prior to or during the hearing did the City contest the facts alleged by petitioner surrounding the payment of the mortgage recording tax and the assignment of Pan Am's rights to TWA. In addition, the City's present position is inconsistent with its own concessions during the post-hearing period. During the December 7, 1990 telephone status conference call, the City conceded that the Refund Claim Assignment established that Pan Am had assigned its rights to any refund to TWA. It also conceded that the mortgage recording tax had been paid in full. These concessions were memorialized in petitioner's letter dated January 22, 1991 and not objected to by the City's representatives. By this same letter, petitioner provided a copy of the TWA check to both the City and the Administrative Law Judge. During the February 8, 1991 telephone status conference call, the City's representative conceded that TWA had proven payment of its share of the mortgage recording tax. The allegations that petitioner failed to lay a proper foundation for the introduction of the TWA check and the Refund Claim Assignment are irrelevant in light of the City's concessions. Therefore, the only issue remaining is whether Pan Am paid its share of the mortgage recording tax on January 31, 1983.

In support of its position, petitioner submitted into evidence 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. Subsequently, petitioner submitted a copy of the certified Pan Am check, dated January 31, 1983, payable to the Office of the City Register in the amount of $436,665.50. The

check was endorsed to the Office of the City Register, Queens. The check had been forwarded to petitioner's representative by an assistant vice-president of Citibank. Taken in total, these documents are sufficient to establish that Pan Am paid $436,665.50 in mortgage recording tax on January 31, 1983 to the Office of the City Register, City of New York, Queens County. It is noted that documentary evidence may be received in the form of copies, pursuant to the State Administrative Procedure Act § 306(2).

J. Tax Law § 258 provides, in relevant part, as follows:

> "whenever it shall appear that any mortgage has been recorded without payment of a tax imposed by this article there shall be added to the tax a sum equal to one-half of one per centum thereof for each month or fraction of a month for the period that the tax remains unpaid except where it could not be determined from the face of the instrument that a tax was due, ...in which case there shall be added to the tax a sum equal to one per centum thereof for each month or fraction of a month for the period that the tax remains unpaid. In any case where a mortgage of real property subject to a tax imposed by this article has heretofore been recorded or is hereafter recorded in good faith, and the county clerk or register has held such mortgage nontaxable or taxable at one amount, and it shall later appear that it was taxable or taxable at a greater amount, the state tax commission may remit the penalties in excess of one-half of one per centum per month."

As petitioner consciously made the decision to record only the Assignment of Lease in 1968 to avoid payment of the mortgage recording tax, petitioner is liable for penalties equal to one per centum of the tax for each month from May 23, 1968 to January 31, 1983.

K. The petition of Trans World Airlines, Inc. is granted and the Division of Taxation is directed to issue the claimed refund, as modified by Conclusion of Law "J", to petitioner together with such interest as may be lawfully due and owing.

DATED: Troy, New York
August 6, 1992

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE