

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

TSB-A-01(24)S
Sales Tax
October 26, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001002B

On October 2, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from American Airlines, Inc., P.O. Box 619616, Dallas/Fort Worth Airport, Texas 75261-9616. Petitioner, American Airlines, Inc., submitted additional information pertaining to the Petition on November 29, 2000.

Petitioner presents the following issues (the italicized terms are defined in Petitioner's statement of facts):

(1) Whether its purchases of building materials and services, including those purchases made through Petitioner's primary general contractor, other contractors, and subcontractors, that are used to construct capital improvements for the *JFK Project* will be exempt from sales and compensating use tax by virtue of the exempt status of the *Port Authority* or the City of New York.

(2) Whether its purchases of certain tangible personal property and services purchased in connection with the *JFK Project* will be exempt from sales and compensating use tax when Petitioner contractually acts on behalf of and as agent for the *IDA* and the *IDA* has a fee simple or leasehold interest in the tangible personal property.

(3) What procedures should Petitioner or its primary general contractor employ to ensure that, where applicable, Petitioner, its primary general contractor, other contractors, or subcontractors may purchase building materials and services subject to the exemptions contained in Sections 1115(a)(15) and 1105(c)(3)(iii) of the Tax Law rather than those offered under its *Preliminary Project Agreement* and *Preliminary Sales Tax Letter* with the *IDA*?

Petitioner presents the following facts. This Petition for advisory opinion concerns the demolition of two existing airline passenger terminals and new construction of an approximately two million square foot airline passenger terminal, adjacent parking facility and roadway system at John F. Kennedy International Airport (the "*JFK Project*" and "*JFK*," respectively). Based on an application submitted by Petitioner, the City of New York Industrial Development Authority (the "*IDA*") adopted a resolution, dated January 11, 2000, authorizing the issuance of tax-exempt bonds (the "*IDA Bonds*") to finance the JFK Project.

The JFK Project is a multi-phase, eighty-four month capital improvement project in which Petitioner proposes to invest approximately \$1.3 billion. The JFK Project will entail (1) the demolition of existing terminals 8 and 9; (2) the design and construction of a single, approximately two million square foot American Airlines passenger terminal (the "*New Terminal*"); (3) the

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construction of a New Terminal roadway system; (4) the installation of a centralized ticketing, baggage and security system; (5) the financial contribution (one-third of total cost) toward a passenger parking facility to be constructed by the Port Authority adjacent to the New Terminal; (6) the construction of a passenger tunnel connecting concourse B to the main terminal; and (7) the purchase and installation of related personal property fixtures, computers, communication equipment and infrastructure, furniture, gates, New Terminal office and New Terminal equipment, including passenger loading bridges. Among other features, the New Terminal will contain 55 or more gates, expanded retail space (subject to tenant build-out), and a new customs and immigration facility.

Petitioner currently leases, among other land, structures, buildings and real property improvements at JFK, all of terminals 8 and 9 from the Port Authority of New York and New Jersey (the "*Port Authority*") pursuant to Lease No. AYB-085 (the "*Port Authority Lease*"). The City of New York owns the underlying land and real property improvements at JFK, which is leased to the Port Authority. The Port Authority Lease commenced August 1, 1976 and is scheduled to expire November 30, 2015. Under the terms of the existing Port Authority Lease, title to all construction work by Petitioner at JFK passes to the City of New York as such items are erected, constructed, or installed and become part of the premises. In addition, the Port Authority Lease provides significant use limitations on Petitioner with respect to the leased premises. In connection with the JFK Project, Petitioner and the Port Authority are currently finalizing modifications to the Port Authority Lease related to the JFK Project (the "*Amended Lease*"). It is contemplated that title to all real property improvements made by Petitioner in connection with the JFK Project will be transferred by Petitioner to the City of New York in the manner currently provided in the Port Authority Lease, and such real property improvements will be leased by the City of New York to the Port Authority, which will then become subject to the Amended Lease.

Petitioner has obtained bids and entered into binding commitments with architectural, engineering, and construction firms to undertake the design, development, construction and implementation of the JFK Project on a multi-phase basis. Petitioner, acting as the project operator of the JFK Project, has engaged a primary general contractor (the "*Master GC*") to oversee the development, construction, and implementation of the JFK Project, as well as directly purchase related material for the Project. The Master GC will hire various subcontractors and originate, review and approve purchase orders, material and equipment deliveries, and invoices under procedures, terms and conditions imposed by Petitioner, and as further governed by the Amended Lease. Petitioner may also contract directly with suppliers outside of its relationship with the Master GC to procure goods and services in connection with the JFK Project where it is feasible, and in its interest, to do so.

The IDA has negotiated an agreement with Petitioner, whereby Petitioner may act as the IDA's agent, to acquire, construct, install, use, replace, maintain and repair construction materials, fixtures, machinery and equipment, furniture, and certain other tangible property that are capital in nature and which are incorporated into or installed or used in connection with the JFK Project free

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of New York State and New York City sales and use taxes (the “*Preliminary Project Agreement*” and the “*Preliminary Sales Tax Letter*”) subject to certain reporting and documentation conditions. Petitioner contemplates issuing the Preliminary Sales Tax Letter to its respective suppliers. In instances where Petitioner will purchase taxable items directly from a vendor of goods and services, it may provide the vendor with the Preliminary Sales Tax Letter and then will implement certain contract and invoice processes and account segregation procedures to comply with the requirements imposed by the IDA under the Preliminary Project Agreement and the Preliminary Sales Tax Letter. Petitioner asserts that the sales and use tax exemption extended to Petitioner under the Preliminary Sales Tax Letter was intended to be effective on or after the execution date of the Preliminary Sales Tax Letter, regardless of the date on which Petitioner entered into contractual commitments with suppliers to procure goods and services so long as Petitioner has not remitted payment.

Petitioner, however, is not obligated to utilize the IDA’s sales and use tax exemption if another contractual or statutory exemption is otherwise available. For such purposes, Petitioner will not be subject to the terms and conditions of the Preliminary Project Agreement and the Preliminary Sales Tax Letter. Petitioner contemplates segregating the accounting records for exempt purchases made pursuant to the Preliminary Sales Tax Letter from those made tax-exempt on some other basis. Accordingly, in some instances, Petitioner or its Master GC, contractors, or subcontractors may issue a completed Form ST-120.1, *Contractor Exempt Purchase Certificate*, to vendors for purchases of tangible personal property which will be attached to the New Terminal.

In connection with its use of IDA Bonds to design, construct and implement the JFK Project, Petitioner contemplates assigning its leasehold interest in the Amended Lease to the IDA for items purchased with IDA Bond proceeds. Initially, however, in advance of the issuance of IDA Bonds, Petitioner may pay for JFK Project goods and services from its own funds, and subsequently seek reimbursement from the IDA Bond proceeds. In turn, the IDA will lease the JFK Project leasehold interests back to Petitioner. In instances where the City of New York does not hold title to particular property acquired, constructed, installed, or used in connection with the JFK Project, and property which is financed through the IDA Bonds, Petitioner will transfer title to such property to the IDA, which, in turn, will lease such property back to Petitioner.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as:

. . . a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land . . . regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . .

Section 1101(b)(5) of the Tax Law defines “sale, selling or purchase” as:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1101(b)(9)(i) of the Tax Law defines “capital improvement” as:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 1105 of the Tax Law provides, in relevant part:

. . . there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly . . . or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter. . . .

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term . . . is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article. . . .

Section 1107(a) of the Tax Law provides, in relevant part:

. . . On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed . . . within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivisions (b) and (d) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 1109(a) of the Tax Law provides, in relevant part:

. . . In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed within . . . the metropolitan commuter transportation district . . . and there shall be paid, additional taxes, at the rate of one-quarter of one percent, which shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article. . . .

Section 1110 of the Tax Law provides, in relevant part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor, or repairman in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, if items of the same kind are not offered for sale as such by such contractor, subcontractor or repairman or other user in the regular course of business, (C) of any of the services described in paragraphs (1), (7) and (8) of subdivision (c) of section eleven hundred five, (D) of any tangible personal property . . . not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five have been performed. . . .

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless

such tangible personal property is to become an integral component part of such structure, building or real property.

Section 1116(a) of the Tax Law provides, in relevant part:

. . . any sale . . . by or to any of the following or any use . . . by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The State of New York, or any of its agencies, instrumentalities, public corporations . . . or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons. . . .

Section 526.6(c) of the New York State Sales and Use Tax Regulations provides, in relevant part:

(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell . . . the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer. . . .

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. . . .

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

* * *

(8) The resale exclusion also applies to a sale of service.

Example 12: A jeweler sends a customer's watch to a repairman for servicing. The charge by the jeweler to the customer is taxable. The charge to the jeweler by the repairman is not taxable because the service was purchased for resale by the jeweler.

Section 526.7(a) of the New York State Sales and Use Tax Regulations provides, in relevant part:

(1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling, or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

Section 526.8(c) of the New York State Sales and Use Tax Regulations provides, in relevant part:

Tangible personal property does not include:

(1) real property. . . .

Section 529.2(a) of the New York State Sales and Use Tax Regulations provides, in relevant part:

* * *

(2) A *public corporation* as used in this section means any corporation created by an act of the Legislature for a public purpose. . . .

Example: . . . Industrial Development Agencies are public corporations and may purchase tangible personal property exempt from the sales and use taxes.

Section 541.3 of the New York State Sales and Use Tax Regulations provides, in relevant part:

(a) . . . When a contractor's customer is a governmental entity described in section 1116(a)(1) . . . of the Tax Law, the contract signed by the government representative and the prime contractor is sufficient proof of the exempt status of purchases made for such contract.

(1) Such governmental entities include:

(i) Pursuant to section 1116(a)(1) of the Tax Law the State of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada), or political subdivisions. This group includes, but is not limited to:

* * *

(c) industrial development authorities;

* * *

(g) villages, towns, cities and counties. . . .

(h) any authority, commission or independent board created by act of the Legislature for a public purpose.

* * *

(d) . . . (1) Tangible personal property incorporated into real property owned by a governmental entity . . . is exempt. . . .

(2) Purchase for contracts (other than agency contracts).

(i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, is exempt when it is to become an integral component part of such structure or building.

* * *

(ii) Purchases of tangible personal property incorporated into the real property of an exempt organization by subcontractors and repairmen are accorded the same treatment as purchases by the prime contractor.

* * *

(iv) Except for agency contracts, contractors' purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable services, such as electricity used by the contractor, are subject to tax.

Section 533.2(c) of the Sales and Use Tax Regulations provides:

Purchase records. Every purchaser must maintain documentation to substantiate any exemption, exclusion or exception claimed on the purchase of any tangible personal property or service. The purchase records must provide sufficient detail to independently determine the taxable status of each purchase and the amount of tax due, paid or remitted thereon. Purchase documents should be categorized as follows:

- (1) purchases that are subject to all taxes;
- (2) purchases exempt from all taxes because for resale (inventory and raw materials);
- (3) purchases that are exempt from all taxes for reasons other than for resale . . .
- (4) purchases that are subject only to the statewide sales tax or the New York City sales tax, or a local tax. . . . (Emphasis added)

Section 542.1(b)(5) of the Sales and Use Tax Regulations provides:

In addition to the records required to be kept by Part 533 of this Title and section 1135 of the Tax Law, every agent or project operator of an industrial development agency or authority must maintain the following records and information for each project on which it is the agent or project operator:

- (i) the name, address, and employer identification number of any general contractor, subcontractor, consultant or other agent on the project;
- (ii) the total amounts of New York State and local sales and compensating use taxes exempted on purchases and uses of tangible personal property and/or services (whether at the time of purchase or use or by refund or credit) by or on behalf of the general contractor with respect to such project, and each subcontractor, consultant or other agent on the project, respectively, as a result of such project's tax exempt status pursuant to section 874 of the General Municipal Law or section 1963 or 2326 of the Public Authorities Law, as the case may be; and
- (iii) such other records and information as is necessary to substantiate the information required to be included on any report required to be filed pursuant to this Part.

Section 854 of the General Municipal Law provides, in relevant part:

Definitions.

As used in this act, unless the context otherwise requires:

* * *

(4) "Project" - shall mean any land, any building or other improvement, and all real and personal properties located within the state of New York and within or partially within and partially outside the municipality for whose benefit the agency was created, . . . provided, however, no agency shall provide financial assistance in respect of any project partially outside the municipality for whose benefit the agency was created without the prior consent thereto by the governing body or bodies of all the other municipalities in which any part of the project is, or is to be, located. Where a project is located partially within and partially outside the municipality for whose benefit the agency was created, the portion of the project outside the municipality must be contiguous with the portion of the project inside the municipality. Provided further, that no agency shall provide financial assistance for any project where the project applicant has any agreement to subsequently contract with a municipality for the lease or purchase of such project or project facility.

* * *

(14) "Financial assistance" - shall mean the proceeds of bonds issued by an agency, straight-leases, or exemptions from taxation claimed by a project occupant as a result of an agency taking title, possession or control (by lease, license or otherwise) to the property or equipment of such project occupant or of such project occupant acting as an agent of an agency.

(15) "Straight-lease transaction" - shall mean a transaction in which an agency takes title, possession or control (by lease, license or otherwise) to the property or equipment of a project occupant, entitling such property or equipment to be exempt from taxation according to the provisions of section eight hundred seventy-four of this article, and no financial assistance in the form of the proceeds of bonds issued by the agency is provided to the project occupant.

Section 858 of the General Municipal Law provides, in relevant part:

. . . [E]ach agency shall have the following powers:

* * *

(3) To acquire, hold and dispose of personal property for its corporate purposes;

* * *

(10) To acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects. . . .

Section 862(2) of the General Municipal Law provides, in part, as follows:

(a) Except as provided in paragraph (b) of this subdivision, no financial assistance of the agency shall be provided in respect of any project where facilities or property that are primarily used in making retail sales to customers who personally visit such facilities constitute more than one-third of the total project cost. For the purposes of this article, retail sales shall mean: (i) sales by a registered vendor under article twenty-eight of the tax law primarily engaged in the retail sale of tangible personal property, as defined in subparagraph (i) of paragraph four of subdivision (b) of section eleven hundred one of the tax law; or (ii) sales of a service to such customers. Except, however, that tourism destination projects and projects operated by not-for-profit corporations shall not be prohibited by this subdivision. For the purpose of this paragraph, "tourism destination" shall mean a location or facility which is likely to attract a significant number of visitors from outside the economic development region as established by section two hundred thirty of the economic development law, in which the project is located.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, financial assistance may, however, be provided to a project where facilities or property that are primarily used in making retail sales of goods or services to customers who personally visit such facilities to obtain such goods or services constitute more than one-third of the total project cost, where (i) the project occupant would, but for the assistance provided by the agency, locate the related jobs outside the state, or (ii) the predominant purpose of the project would be to make available goods or services which would not, but for the project, be reasonably accessible to the residents of the city, town, or village within which the proposed project would be located because of a lack of reasonably accessible retail trade facilities offering such goods or services, or (iii) the project is located in a highly distressed area.

(c) With respect to projects authorized pursuant to paragraph (b) of this subdivision, no project shall be approved unless the agency shall find after the public

hearing required by section eight hundred fifty-nine of this chapter that undertaking the project will serve the public purposes of this article by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the state. Where the agency makes such a finding, prior to providing financial assistance to the project by the agency, the chief executive officer of the municipality for whose benefit the agency was created shall confirm the proposed action of the agency.

Section 874 of the General Municipal Law provides, in part:

(1) It is hereby determined that the creation of the agency and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state of New York and is a public purpose, and the agency shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities.

(2) Any bonds or notes issued pursuant to this title, together with the income therefrom, as well as the property of the agency, shall be exempt from taxation, except for transfer and estate taxes.

* * *

(8) Agents of an agency and project operators shall annually file a statement with the state department of taxation and finance, on a form and in such a manner as is prescribed by the commissioner of taxation and finance, of the value of all sales and use tax exemptions claimed by such agents or agents of such agents or project operators, including, but not limited to, consultants or subcontractors of such agents or project operators, under the authority granted pursuant to this section. The penalty for failure to file such statement shall be the removal of authority to act as an agent of an agency or a project operator.

(9) Within thirty days of the date that the agency designates a project operator or other person to act as agent of the agency for purposes of extending a sales tax exemption to such person, the agency shall file a statement with the department of taxation and finance relating thereto, on a form and in such manner as is prescribed by the commissioner of taxation and finance, identifying each such agent so named by the agency, setting forth the taxpayer identification number of each such agent, giving a brief description of the goods and/or services intended to be exempted from sales taxes as a result of such appointment as agent, indicating the agency's rough estimate of the value of the goods and/or services to which such appointment as agent

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relates, indicating the date when such designation as agent became effective and indicating the date upon which such designation as agent shall cease.

Section 917(c) of the General Municipal Law establishes the New York City Industrial Development Agency as an industrial development agency in general having the powers of industrial development agencies under Article 18-A of the General Municipal Law.

In Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y., (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) (“Wegmans II”), the issues presented concerned generally the scope and applicability of the tax exemption established by section 874 of the General Municipal Law, and more specifically, whether that tax exemption applied to operational expenses incurred by plaintiff in the day-to-day operation of several projects in western New York State developed as its supermarkets. Those markets were constructed and equipped under agreements made with various industrial development agencies (“IDAs”) pursuant to Article 18-A of the General Municipal Law, and accordingly their construction was financed by industrial development bonds (“IDBs”) issued by the various IDAs. The projects were technically owned by the respective IDAs as security for the bonds, but were under “lease back” arrangements with the plaintiff. In an earlier action, Wegmans Food Markets v. Department of Tax & Finance of the State of N.Y., 126 Misc. 2d 144, affd 115 AD2d 962, lv to app den 67 NY2d 606, (“Wegmans I”) the section 874 tax exemption was held to be broader than the exemption provided by section 1116 of the Tax Law. The court in Wegmans II stated in part:

The IDAs are not authorized to engage in supermarket businesses, or any other businesses *per se*. Their functions are limited to the acquisition, construction, reconstruction, leasing, improving, maintaining, equipping, and furnishing of projects as security for the repayment of industrial development bonds, in the nature of a mortgage. Although there is a project lease arrangement between an IDA and the private developer, it is a financing lease with the “rent” paid thereunder consisting only of amortized costs and expenses related to the project financing and the IDBs. The IDAs do not pay the costs of utilities or other operational expenses; nor do the leases suggest that the “rent” has been adjusted so as to account for the developer’s payment of operational expenses. The lease is simply a financing tool, designed to secure tax-exempt IDBs, which are part of an overall plan benefitting, financially, the private developer and IDB purchasers. Of course, if IDAs are not authorized to operate a business then it [sic] would have no authority to designate agents to do that which they could not do themselves.

Although some of the numerous expenses listed by plaintiff in their [sic] complaint may be exempt (such as expenses necessary to preserve or repair project property), not all of the claimed expenses would be exempt. Many of these expenses bear no relationship to the purchase, repair or replacement of project property *per se* but instead represent costs of supermarket business operations. . . .

Because all the expenses involved in this action do not have the same relationship to the IDA's ownership of the project and authorized functions under the financing scheme, the expenses must be individually examined to determine what, if any, relationship each bears to the authorized and lawful functions of an IDA, particularly the "maintenance" function. The exemption shall be applicable only to those expenses properly within such function and authority. In this regard, it should be noted that tax-exempt maintenance would be that needed to maintain the structural integrity of the structures constructed or rehabilitated to house the various supermarkets, or to repair equipment used as part of the project.

The use of utilities and washing of windows and other such operating expenses have nothing to do with the underlying financial scheme and should not be tax-exempt under the law. If one business is able to operate indefinitely without paying taxes on its operating expenses simply because at one time its structures were financed with IDBs, that business would have an apparently unintended, open-ended economic advantage over competitors, thereby flying in the face of the fundamental purpose of the law--i.e., the development of economically sound commerce.

This decision is not inconsistent with ("Wegmans I") (supra), where the tax exemption of Section 874 was held applicable to the purchase of tangible personal *property* acquired and owned by the IDA as *security* for the IDBs. Ownership of property, real and personal--as distinguished from operation of the business--was clearly within the express, contemplated function and authority of IDAs under the General Municipal Law.

In ("Wegmans I"), the Court stated:

The Legislature very carefully included all revenues received by an IDA within the purposes of article 18-A. The definition of "revenues" in subdivision (7) of section 854 of the General Municipal Law is all inclusive: "All rents, revenues, fees, charges and other sources of income derived by the agency from the leasing, sale or other disposition of a project or projects."

The term "projects" was also made all-embracing. Subdivision (4) of section 854 of the General Municipal Law defines "Project[s]" as "any land, and building[s] or other improvement, and all real and personal properties located within the state of New York. . . ."

Opinion

With regard to Issue (1), Petitioner is not obligated to utilize the IDA's sales and use tax exemption if another contractual or statutory exemption is otherwise available. Sections 1115(a)(15) and 1115(a)(16) of the Tax Law provide exemptions from sales and use taxes for tangible personal property sold to contractors, subcontractors or repairmen for use or consumption as described in

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Section 1101(b)(4) of the Tax Law, provided that the tangible personal property is to become an integral component part of a structure, building, or real property of an exempt organization described in Section 1116(a) of the Tax Law. The IDA, as tenant of the improvements to real property constructed under the JFK Project, is not the owner of the property. The leasehold interest of the IDA, by itself, does not provide a basis for the exemption for construction materials incorporated into the property of an exempt entity to apply in this case. However, both the Port Authority and the City of New York are exempt organizations described in Section 1116(a)(1) of the Tax Law. According to the terms of the Port Authority Lease and the Amended Lease, title to all real property improvements made by Petitioner in connection with the JFK Project will be transferred by Petitioner to the City of New York “as such items are erected, constructed or installed and become part of the premises.” Where title to a capital improvement constructed or installed by Petitioner, its general contractor, other contractors, or subcontractors, vests with the Port Authority or the City of New York immediately upon completion of its installation, the purchase of tangible personal property for incorporation in such capital improvement are not subject to sales and use taxes (see Trans World Airlines, Inc., *supra*; Olympia & York Battery Park Co., Adv Op Comm T&F, January 29, 1982, TSB-A-82(5)S; 450 Lexington Venture, Adv Op Comm T&F, March 7, 1989, TSB-A-89(8)S).

Petitioner’s payments for the installation or construction of capital improvements are not subject to the sales and use taxes imposed under Sections 1105, 1107, 1109, and 1110 of the Tax Law, whether or not Petitioner is an agent of the IDA. See Section 1105(c)(3)(iii) of the Tax Law.

Concerning Issue (2), Petitioner’s purchases of tangible personal property and services in connection with the JFK Project as agent for the IDA, will be subject to sales and compensating use tax, or exempt from tax, as discussed below. The following discussion is based on the facts presented in the Petition, and on the sections of law and regulations cited above and the decisions in Wegmans Food Markets v. Department of Taxation and Finance (126 Misc 2d 144, aff’d 115 AD2d 962, 1v to app den 67 NY2d 606) and Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y. (Sup Ct, Monroe County, Jan. 10, 1992, Galloway, J.), *supra*. It is assumed for purposes of this discussion that all the terms and conditions of the relevant documents are complied with, and that these terms and conditions are consistent with Petitioner’s description of them as set forth above, in the instant matter.

Purchases of furniture, computers, equipment and other personalty for use at the New Terminal by Petitioner pursuant to the Preliminary Project Agreement and Preliminary Sales Tax Letter will be exempt from the taxes imposed under Sections 1105, 1107, 1109, and 1110 of the Tax Law, provided that (i) the IDA is the owner, lessor or lessee of such property, (ii) the purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser, lessor or lessee and (iii) Petitioner is the disclosed agent of the IDA (see MCI Telecommunications Corporation, Adv Op Comm T&F, October 15, 1998, TSB-A-98(72)S; Viacom Inc., Adv Op Comm

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T&F, June 28, 1996, TSB-A-96(36)S; The Depository Trust Company, et al, Adv Op Comm T&F, June 5, 1996, TSB-A-96(35)S).

Petitioner's purchases, made as agent for and on behalf of the IDA, of the services of installation, maintenance and repair of equipment and other personalty, with a useful life of one year or more, which is in use at the JFK Project, including replacement parts, will be exempt from the sales and compensating use taxes if the conditions described below are met. The services and parts, with respect to equipment and other personalty, must be necessary to maintain, repair or service such equipment and other personalty, used as part of the JFK Project, and the IDA must be the owner, lessor or lessee of such equipment and other personalty. Additionally, the purchase invoices, statements and contracts with vendors and suppliers for services described in this paragraph must provide that the IDA is the purchaser, lessor or lessee with respect to such services and such equipment and other personalty. Petitioner's purchases, made as agent of the IDA, of parts that contain materials or substances consumed in operating the property and that are replaced when the part, material or substance is consumed (e.g., a toner cartridge), or of contracts for general services (e.g., janitorial services), are not exempt from tax. (MCI Telecommunications Corporation, supra; Viacom Inc., supra).

However, in any instance where Petitioner purchases a service of maintaining, repairing or servicing exempt equipment and other personalty which results in the replacement of parts, materials or supplies that are consumed in the daily ongoing operation of equipment or other personalty, where such parts, materials or supplies must be replaced when consumed, the portion of the charges applicable to such parts, materials or supplies will be subject to sales and compensating use taxes, as indicated in Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y. (Sup. Ct., Monroe County, Jan.10, 1992, Galloway, J.), supra. The purchase and use of fuels and energy and utility services are not tax-exempt. Id.

Therefore, when the language of Petitioner's contract with the IDA reflects a) the IDA's fee simple or leasehold interest in the tangible personal property and b) Petitioner's relationship as disclosed agent of the IDA, Petitioner's purchases of tangible personal property and services covered by the contract will be exempt from sales and compensating use tax as provided above.

It is noted that in a transaction where the charge is for both taxable services and qualifying exempt services, the total charge will be subject to sales and compensating use taxes, unless the portion of the charge applicable to the qualifying exempt services is separately stated from the other charges and is reasonable.

With respect to Issue (3), Petitioner, its contractors and subcontractors may purchase materials which will be incorporated as integral components of the real property owned by the City of New York tax exempt provided they furnish the building material supplier with a properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*. Petitioner and its contractors

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should keep on file a copy of the lease between Petitioner and the Port Authority in order to substantiate that the construction performed is exempt from sales and use tax under Section 1115(a)(15) of the Tax Law (see Beechcraft East, Inc., Adv Op Comm T&F, July 29, 1992, TSB-A-92(57)S; 450 Lexington Venture, supra). With respect to the documents required between a prime contractor and the subcontractors, a signed document between them which identifies the project, location and the exempt owner will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. See Section 541.3(d)(2)(v) of the Sales and Use Tax Regulations.

In addition to the records required to be kept by Section 1135 of the Tax Law and Section 533.2(c) of the Sales and Use Tax Regulations, Petitioner, as the agent/project operator of an IDA, is required to file an annual report, Form ST-340, with the New York State Department of Taxation and Finance to report the value of all sales and compensating use tax exemptions claimed by Petitioner, as well as by Petitioner's agents, consultants, contractors and subcontractors associated with the project. See Section 542.1 of the Sales and Use Tax Regulations for information on the filing and record keeping requirements pertaining to this annual report. The account segregation procedures Petitioner intends to implement should establish a separate accountability sufficient to satisfy the agent/project operator obligations set forth in Part 542 of the Sales and Use Tax Regulations, and to provide a clear indication of which purchases are exempt from taxes pursuant to the agreement between Petitioner and the IDA and the Preliminary Sales Tax Letter issued by the IDA, and of the nature and use of the property with respect to which the transaction occurs.

DATED: October 26, 2001

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

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