

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-93 (68) S
Sales Tax
April 28, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930112A

On January 12, 1993 a Petition for Advisory Opinion was received from Prudential Securities Incorporated, 1 New York Plaza, 21st Floor, New York, New York 10292.

The issues raised by Petitioner, Prudential Securities Incorporated, are:

(1) Whether all amounts paid by any Group Agent to make Acquisitions on behalf of Prudential and/or members of the Prudential Group as agent for the IDA pursuant to the Sales Tax Letter as well as all payments from other members of the Prudential Group to the Group Agent which payments represent allocations of costs and all reimbursements from one Group Agent to another where an Acquisition has been made on the reimbursing entity's behalf will be exempt from the imposition of New York State, New York City and the Metropolitan Commuter Transportation District Sales and Compensating Use Taxes (hereinafter referred to as the sales and use taxes) imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law (i) whether payments are made directly to vendors by any Group Agent, for its own account or on behalf of another Group Agent, (ii) even if one Group Agent pays vendors directly and a different Group Agent receives reimbursement from Bond proceeds, or (iii) whether Bond proceeds are forwarded to the vendors through the Bond Trustee.

(2) Whether Debt Service Payments made to the IDA by the Group Agent will be subject to the sales and compensating use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law.

(3) Whether at the time that Option 1 or Option 2 is exercised, sales tax will be imposed only on the Option 1 Price or the Option 2 Price, respectively.

(4) Whether, if, at any time, a Premature Removal Penalty is imposed on Prudential by the IDA, such Premature Removal Penalty shall not be deemed to be consideration for a sale subject to the sales and compensating use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law and, in such instances, whether the sales and use taxes will be imposed only on the purchase price of \$1.00.

This advisory opinion is being requested in connection with a proposed transaction between the New York City Industrial Development Agency (hereinafter referred to as the "IDA"), and Prudential Securities Group, Inc. ("PSGI") and/or Prudential Securities Incorporated ("PSI") (together, "Prudential"), which is being entered into to induce Prudential and its affiliates in the securities business to retain their offices in New York City for approximately twenty years. As a part

of the transaction, Prudential and certain of its affiliates will be occupying space in the buildings known as One New York Plaza, New York, New York and 199 Water Street, also known as Seaport Plaza (each, a "Building", and collectively, the "Buildings"). One New York Plaza is currently owned by The Chase Manhattan Bank, National Association ("Chase") and Seaport Plaza is currently owned by Resnick Water Street Development Co. ("Resnick"). As of the closing date, Prudential Securities Incorporated will be an approximately 66% partner in a partnership that in turn owns a limited partnership interest that carries the right to approximately 15% of the current profits and losses of Resnick and 13% of any residuary value. For purposes of this petition, Chase and Resnick each will be referred to herein as a "Current Owner".

As part of the proposed transaction, the IDA, pursuant to an agreement between New York City (the "City") or the IDA and Prudential, will extend tax benefits to reduce Prudential's costs of operation and maintaining its offices in the City, and help finance the cost of equipment (the "Equipment") and improvements (the, "Improvements"). Among these benefits is the arrangement for sales tax exemptions for Prudential and certain of its eligible affiliates as defined in the Sales Tax Benefits Agreement (the "Prudential Group") pursuant to a Sales Tax Benefits Agreement, as well as a real estate tax abatement on the premises to be occupied by the Prudential Group, with the agreement that certain payments in lieu of real estate taxes ("PILOT Payments") will be made to the IDA with respect to such premises. In connection with this arrangement, the IDA will take nominal title to the real property to be occupied by the Prudential Group. As of the commencement of the transaction, the Prudential Group will occupy in excess of nine hundred thousand rentable square feet in One New York Plaza and in excess of four hundred thousand rentable square feet in Seaport Plaza. Prudential also will have the option to lease additional square footage in each of the Buildings during the term of the transaction. Because the IDA will take title only to those portions of the Buildings occupied by the Prudential Group, it is necessary to create separate real estate tax parcels, the title to which can be conveyed to the IDA. Such separate real estate tax parcels will be created through the use of the condominium form of ownership. Accordingly, (i) the space initially to be occupied by the Prudential Group will consist of condominium units which will be conveyed by the respective Current Owner to the IDA, and (ii) the space to be occupied by the Prudential Group pursuant to its expansion options will consist of condominium units which may be conveyed from time to time by the respective Current Owner to the IDA at the time and to the extent Prudential exercises such options (the units which are from time to time owned by the IDA are herein referred to as the "IDA Units").

The proposed structure with respect to each building will be implemented as follows:

(i) The Building will be converted into a condominium;

(ii) The Current Owner will convey title, for a nominal amount, to the IDA of the initial units comprising the IDA Units, possibly subject to an existing mortgage on the Building. The deed to the IDA of the initial IDA Units (the "Initial Deed") will contain reverters to the Current Owner upon the expiration of, or earlier termination of, the IDA Lease referred to below, or upon certain other events;

(iii) The IDA will then enter into an overlease with the Current Owner for nominal rent (the "Overlease"), pursuant to which the IDA will lease the IDA Units back to the Current Owner;

(iv) The Current Owner will enter into a sublease with Prudential (the "Prime Lease") for a fair market value rent, pursuant to which the Current Owner will lease to Prudential the premises comprising the IDA Units for use by Prudential Securities Incorporated;

(v) Prudential Securities Incorporated will then enter into a sub-sublease with the IDA for nominal rent, pursuant to which Prudential Securities Incorporated will sub-sublet the IDA Units to the IDA;

(vi) The IDA will then enter into a sub-sub-sublease, pursuant to which the IDA will sub-sub-sublet the IDA Units including the Improvements in the IDA Units to PSI, PSGI, and/or Prudential Mutual Fund Management, Inc. ("PMFMI") (the "IDA Lease");

(vii) Prudential Securities Group Inc. and the IDA will enter into a PILOT Agreement, pursuant to which Prudential Securities Group Inc. will make PILOT Payments to a banking institution designated by the IDA as the PILOT Trustee. The PILOT Agreement may be secured by (a) a PILOT Mortgage on the Building, which if granted, will be granted to the IDA by the Current Owner or (b) a letter of credit or other equivalent instrument benefitting the PILOT Trustee;

(viii) The IDA also will enter into an equipment lease with Prudential and/or the Prudential Group pursuant to which the IDA will lease the Equipment to Prudential and/or the Prudential Group (the "Equipment Lease");

(ix) The IDA and a banking institution designated by the IDA (the "Bond Trustee") will enter into a trust indenture to provide for the issuance from time to time by the IDA of its special obligation revenue bonds (the "Bonds") to finance the costs of the Improvements to be made from time to time and the Equipment to be purchased, leased or otherwise acquired from time to time;

(x) The Bonds may be sold to a member of the Prudential Group or to some other Prudential affiliate, in which event the Bond purchaser may borrow money to purchase the Bonds from another member of the Prudential Group; or the Bonds may be purchased by or resold to unrelated third parties; and

(xi) Prudential, the Current Owner and the IDA will each enter into additional agreements, which Petitioner indicates do not contravene or alter any of the facts material to this Advisory Opinion.

The Overlease for Seaport Plaza will require Resnick to make PILOT Payments due from Prudential to the PILOT Trustee in the event Prudential fails to make such payments under the PILOT Agreement. In addition, each Overlease will contemplate the potential for additional units to be conveyed to the IDA in connection with Prudential's expansion options, and will include such IDA Units upon the conveyance thereof to the IDA.

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The Prime Lease will, among other things, require Prudential to (a) pay a fair market value rent with respect to the IDA Units, (b) pay taxes imposed against the IDA Units, if any, and (c) in the case of Seaport Plaza, reimburse Resnick for any PILOT Payments Resnick is required to make under the Overlease as a result of Prudential's default under its PILOT Agreement with the IDA. The Prime Lease also will contain various expansion options which, if exercised, may result in the conveyance of additional unit(s) to the IDA. In the event such additional conveyances are required, the deeds executed in connection therewith will grant the same type of interest and contain the same reverters as the Initial Deed.

The Sales Tax Benefits Agreement (the "Agreement") provides that certain purchases and payments in respect of the acquisition and lease of property, and the entering into of related maintenance contracts (e.g. service contracts for replacing parts with respect to and repairing Equipment, such as computer equipment, which Equipment has a useful life of one year or more but not maintenance such as janitorial services) made in connection with the Prudential Project will be exempt from New York State and New York City Sales and Use Tax. The Agreement contemplates that benefits will be received by the Prudential Group over a period of 22 years and 3 months (starting 10/14/92 and ending 12/31/14). During the first 4 year and 4 month period (the "Initial Period"), any allocated sales tax benefits (a maximum of \$15.1 million except to the extent Prudential utilizes a portion of the ongoing \$20 million dollar benefit as set forth in the next sentence and as provided in the Agreement) which are not utilized will be forfeited. The remaining benefits will be scheduled over the subsequent seventeen (17) years for a maximum sales tax benefit during such seventeen (17) year period, of the lesser of approximately \$20 million or the balance after reduction for the benefits used as provided in the previous sentence which is subject to adjustment as set forth in the Agreement. If in any given year after the Initial Period, the scheduled sales tax benefit is not utilized, Prudential will be given a credit against the PILOT payments it otherwise would be required to make.

In order to create the relationship needed to assure the sales tax exemption with respect to the real property, Prudential and the IDA will enter into a number of "leases" pursuant to which the IDA will sub-sublet the IDA Units from Prudential. Under the Agreement, Prudential and other members of the Prudential Group will be authorized to act as an agent for the IDA in effecting Improvements, making purchases or entering into leases and/or maintenance contracts in connection with the Prudential Project and the Project Property as further described in the Agreement (referred to collectively herein as the "Acquisitions") for the benefit of the Prudential Group ("Group Agent"). In accordance with the internal bookkeeping system of the Prudential Group, and as may be required by certain vendors, under certain circumstances, one Group Agent (e.g., Prudential Securities Inc.) may make an Acquisition on behalf of another Group Agent (e.g., Prudential Securities Group, Inc.). When this occurs, the entity on whose behalf the Acquisition was made will either (1) pay the vendor directly or (2) reimburse the entity that made the Acquisition and paid the vendor on its behalf. Any such reimbursements will not constitute payments for the sale or use of property. Such Acquisitions will be made in all respects in accordance with the Sales Tax Exemption Letter and with the procedural requirements of Section 5 of the Agreement. The Improvements and the Equipment acquired by the IDA then will be leased to the Group Agent for use by the Group Agent and other

members of the Prudential Group. The Improvements and the Equipment will include not only the original Improvements and Equipment but also replacements, enhancements and additions made thereto from time to time over the 21 year Project term.

To finance the Acquisitions (exclusive of interest and payments for Maintenance Contracts as hereinafter explained), the IDA will issue Bonds from time to time which, as stated above, may be bought by a member of the Prudential Group, another Prudential affiliate and/or unrelated third parties. The IDA Leases and the Equipment Lease will require Prudential to make payments equal to the debt service on the Bonds issued by the IDA to finance the Equipment and the Improvements leased thereunder and certain other costs incurred which do not relate to sales or use tax by the IDA in connection with the Prudential Project (the "Debt Service Payments"). Although all Bonds will have a maturity of at least one year from their date of issuance, Bonds issued to finance Acquisitions of Equipment may be prepayable as early as 364 days from their date of issuance. It is thus possible that the Bonds issued in respect of an Acquisition will be repaid within approximately one year, even though the Equipment or Improvements have a longer life, and even though the cost of such Acquisition has not yet been fully paid by the User, as described below. As required by the IDA, Bond proceeds cannot be used to finance the payments under maintenance contracts or, to the extent that the IDA (through its agent, a member of the Prudential Group) enters into any leases of equipment or other tangible capital property, the portion of any payment of rent not otherwise attributable to the deemed "principal portion" of rental payments due under these leases. Petitioner indicates that it is the intention of Petitioner and the IDA that payments with respect to all such maintenance contracts, as well as all payments of rent with respect to leases of Project Property (inclusive of any portion thereof attributable to an interest factor), will be exempt from New York State and New York City Sales and Use Tax.

It is the general practice of the Prudential Group that each member is responsible for its own costs. The sharing of costs with respect to the Acquisitions generally will be handled as follows: the member of the Prudential Group that is the user of the Improvements or Equipment (the "User") will be responsible for paying its pro rata share of the cost thereof to the Group Agent. This charge will accrue on the books of the User, generally on a monthly basis beginning when the Improvements or Equipment are placed in service. From time to time, the User will make a payment to the appropriate Group Agent to settle the intercompany charges described above. Although the Equipment will be located in New York, there may be certain instances in which the Equipment will be utilized by PSGI or any of its subsidiaries located outside of New York (e.g. employees of the California branch office of PSI may have access to a computer which is part of Project Property located in New York). Petitioner indicates that it is the intention of the IDA and Petitioner that Acquisitions with respect to such Equipment and the payments relating to the usage described above will be exempt from New York State and New York City Sales and Use Tax.

Except to the extent described above with respect to the interest factor of financing leases and Maintenance, Contracts, Acquisitions generally will be financed through the Bonds. It is anticipated that Bonds will be sold from time to time. Funds raised through the sale of Bonds will either (i) be available to make payments for the Acquisitions when such payments are due, or (ii) be paid to PSGI or another entity designated by Prudential as reimbursements for the cost of Acquisitions. Bond proceeds that represent reimbursements for Acquisitions may not necessarily be

passed on to the member of the Prudential Group on whose behalf an expenditure was incurred. Petitioner indicates that it is the intention of Petitioner and the IDA that all amounts paid in respect to Acquisitions (i) including Maintenance Contracts and interest on leased equipment or personal property which cannot be funded through Bonds, (ii) to the extent that such Acquisitions (whether paid for directly by the User or paid for by a Group Agent and subsequently settled by intercompany reimbursements with another member of the Prudential Group) are funded through Bonds, whether so funded in advance or arrears, and (iii) whether payments in respect of Acquisitions are made directly by PSI, PSGI, other members of the Prudential Group or the Bond Trustee on behalf of PSI, PSGI or other members of the Prudential Group, will be eligible to qualify for the sales and use tax exemption.

Although various members of the Prudential Group will have the ability to act as the IDA's agent in making Acquisitions, it is anticipated that, in general, PSI and/or PSGI generally will deal directly with vendors on behalf of the Prudential Group and the IDA. For income tax and financial reporting purposes, all members of the Prudential Group will report the Acquisitions in the manner such Acquisitions would have been reported in the absence of the IDA leasing arrangement.

With respect to the IDA Leases and the Equipment Lease, it is anticipated that PSGI and PSI will sign such leases with the IDA (although other members of the Prudential Group may also sign such leases) and that PSI or PSGI, either for their own account or for the account of another member of the Prudential Group with corresponding intercompany reimbursement, will make Debt Service Payments to the IDA with respect to such leases (although PSGI will be the only entity legally responsible for such financial obligation) with funds obtained through their own funding sources, which may consist, among other things, of proceeds from a prior Bond issuance.

Pursuant to the Sales Tax Benefits Agreement, in general, no Project Property may be removed from a PSI City Location (as defined in the Agreement) prior to the expiration of three years after the installation or location of such Project Property at a PSI City Location (the "Retention Period"). However, after the expiration of the Retention Period, such Project Property may be purchased from the IDA by a Prudential entity exercising a purchase option (the "Option 1") for an option price of \$1.00 (the "Option 1 Price") and removed from the PSI City Location pursuant to Section 11 of the Sales Tax Benefit Agreement.

In addition, at the end of the Project term (or sooner when the Bonds have been paid in full), Project Property may be purchased from the IDA by a member of the Prudential Group who exercises a purchase option (the "Option 2") under the Equipment Lease for an option price of \$1.00 (the "Option 2 Price").

If Project Property is removed from a PSI City Location prior to the expiration of the Retention Period without certain stated reasons for such removal (i.e., obsolescence, uselessness, or another good faith reason) ... Prudential must pay the IDA an amount equal to the net present value (Net present value is defined in the Sales Tax Benefits Agreement as meaning, as to a specified or ascertainable dollar amount, (i) the future value, as of January 1, 1995, of any such amount if it shall occur in a calendar year prior to 1995, using an inflation factor of 10% per annum, (ii) the nominal value of any such amount if it shall occur in calendar year 1995, and (iii) the present value, as of

January 1, 1995, of any such amount if it shall occur in calendar year 1996 or any later calendar year, using a discount rate of 10% per annum; provided, however, that such amounts shall be deemed to be received on January 1 of the applicable calendar year) of the sales tax which would have been payable if such item had been purchased by Prudential in its own name on the date of such removal at a purchase price equal to its then fair market value. Such payment will herein be referred to as the "Premature Removal Penalty." Prudential will pay the IDA a purchase price of \$1.00 in addition to the Premature Removal Penalty.

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

Imposition of sales tax. - ... 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 ...

(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 9 of subdivision (b) of section eleven hundred one of this chapter

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

(a) General. 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 subdivision (b) 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 of the Tax Law provides, in relevant part:

(a) General. 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:

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 ..., (A) of any tangible personal property purchased at retail, (B) of any tangible personal property 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 paragraph (1) of subdivision (c) of section eleven hundred five, and (D) of any tangible personal property ... not acquired for purposes of resale, upon which any of the services described under paragraphs (2) and (3) of subdivision (c) of section eleven hundred five have been performed

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

(a) ... 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 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(a) of the Sales and Use Tax Regulations provides, in relevant part:

" ... 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) ... (c) industrial development authorities "

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

Tax exemptions

(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.

Section 917-a 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 Market, Inc. v The Department of Taxation and Finance of the State of N.Y., (Sup Ct, Monroe County, Jan. 10, 1992, Galloway, J.) 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 municipal industrial development authorities 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 local industrial development agencies. The projects were technically owned by the respective agencies 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, iv to app den 67 NY2d 606, the section 874 tax exemption was held to be broader than the exemption provided by Section 1116 of the Tax Law.

The court in its January 10, 1992, opinion 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 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 complaint may be exempt (such as expenses necessary to preserve or repair project property), not all of the claimed expense 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 financing 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 (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 GML.

In accordance with the sections of law and regulations cited above and the decisions in Wegmans Food Markets, Inc. v. Department of Taxation and Finance (126 Misc 2d 144, aff'd 115 AD2d 962, iv to app den 67 NY2d 606) and Wegmans Food Market, Inc. v The Department of Taxation and Finance of the State of N.Y., (Sup Ct, Monroe County, Jan. 10, 1992, Galloway, J.) supra, and provided that all the terms and conditions of the relevant documents are complied with, in the instant matter all amounts paid by any Group Agent to make Acquisitions on behalf of Prudential and/or members of the Prudential Group (pursuant to authorization in the Agreement) as well as all payments to the Group Agent from other members of the Prudential Group representing allocations of costs and/or representing reimbursement from one Group Agent to another Group Agent where an Acquisition has been made on the reimbursing entity's behalf relative to the Acquisitions where the Acquisitions consist of the purchase, lease or license to use of machinery, equipment and certain other tangible personal property for use at the IDA Units or at other Prudential facilities within New York City and/or the installation of improvements and renovations to the leased premises, all of which comprise a part of the Project (including replacements, enhancements and additions), whether purchased by the IDA for subsequent leasing or subleasing to the Group Agent or purchased by the Group Agent for and on behalf of the IDA will be exempt from the sales and use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law, provided that the IDA is the owner or lessor of such property. The method of payment, whether made directly to vendors by any Group Agent on its own behalf or on behalf of any other Group Agent, even if one Group Agent pays vendors directly and a different Group Agent receives reimbursement from Bond proceeds or if Bond proceeds are forwarded to the vendors through the Bond Trustee will not affect the tax exempt status of the transactions involved, so long as purchase invoices, statements and contracts with vendors or suppliers provide that the IDA is the purchaser, lessor or lessee and that Prudential or the member of Prudential Group effecting the purchase or lease is the disclosed agent of the IDA. In addition, payments made by the Group Agent under maintenance contracts as well as payments to the Group Agent from other members of Prudential Group representing allocations of costs for maintenance contracts, where the maintenance contracts provide for the replacement of parts, other than parts that contain materials or substances that are consumed in the operation of the equipment, (e.g., a toner cartridge) where such parts must be replaced whenever the substance is consumed, and repair of or with respect to Equipment, which Equipment has a useful life of one year or more ("Exempt Maintenance Services"), will be exempt from the sales and use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law since such contracts are necessary to maintain or repair the IDA machinery and equipment used as part of the project as indicated in Wegmans Food Market, Inc. v. The Department of Taxation and Finance of the State of N.Y. (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) supra.

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However, it is noted that in any transaction where the charges are for maintenance services, in addition to Exempt Maintenance Services, the total charges will be subject to the tax imposed under Sections 1105(c)(3) or (5) of the Tax Law unless the charges applicable to the Exempt Maintenance Services are separately stated from the other charges or otherwise reasonably allocated.

Debt Service Payments by the Group Agent to the IDA will not be subject to sales and use taxes imposed under Sections 1105, 1107, 1109 or 1110 of the Tax Law.

In Wegman's Food Markets v Department of Tax & Finance of the State of N.Y., 126 Misc 2d 144, aff'd 115 AD2d 962, iv to app den 67 NY2d 606, 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: "Ail 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."

Subdivision (4) of Section 854 of the General Municipal Law defines "Project[s]" as "any land, any building[s] or other improvement, and all real and personal properties located within the state of New York ... "

Accordingly, where Prudential elects to remove property from the IDA project through the exercise of Option 1, Option 2 or by a premature removal of property subject to a Premature Removal Penalty, the consideration given to the IDA by Prudential in any of these instances will be exempt from the sales and use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law.

DATED: April 28, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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