

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

TSB-A-96 (17)S
Sales Tax
March 19, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S951124B

On November 24, 1995, a Petition for Advisory Opinion was received from The Equitable Life Assurance Society of the United States, 787 Seventh Avenue, New York, NY 10019.

Petitioner, The Equitable Life Assurance Society of the United States, states the issues and facts as follows (the underlined terms are defined in Petitioner's statement of facts):

1. Whether the acquisition, lease, installation and use by the Lessees of the Leased Personality, the Facility Equipment and the Tenant Improvements are exempt from the New York State and City Sales and Compensating Use Tax.

2. Whether payments made by the Lessees under contracts for Qualified Maintenance are exempt from the New York State and City Sales and Compensating Use Tax.

3. Whether amounts payable by the Lessees to the Agency which are denominated as "rent" under the Project Property Lease Agreement will be exempt from the New York State and City Sales and Compensating Use Tax, whether such amounts are paid by the Lessees to the Agency or to the Trustee to be applied in satisfaction of the Agency's obligation to pay principal and interest on the Bonds.

4. Whether amounts payable by the Agency to the Trustee in respect of Bond principal and interest will be exempt from the New York State and City Sales and Compensating Use Tax.

No ruling is requested regarding payments made with respect to Project property after the termination of the Project Agreement.

Petitioner currently leases office space at a number of different locations within New York City, and has entered into a lease for office space (the "Facility Realty") at 1290 Avenue of the Americas, New York, New York (the "Project Building"). In order to induce Petitioner to remain in New York City, the City of New York has executed a term sheet with Petitioner pursuant to which Petitioner, Equitable Variable Life Insurance Company, a wholly owned subsidiary of Petitioner (Petitioner and Equitable Variable Life Insurance Company, hereinafter collectively referred to as the "Lessees"), and the New York City Industrial Development Agency (hereinafter the "Agency") will enter into a bond financing agreement (the "project Agreement"). Under the Project Agreement, the Lessees and the Agency will enter into two leases, described more fully below, pursuant to which the Lessees will maintain their New York City leasehold interests, make improvements to the Facility Realty (which will be used as corporate headquarters), and purchase or lease personal property for use at the Facility Realty and at other locations in New York City (such activities collectively referred to as the "Project"), and the Agency will extend to the Lessees certain sales and compensating use tax benefits. In a Resolution adopted June 13, 1995 (the "Resolution"), the Agency

determined that the Project will promote, is authorized by and will be in furtherance of the policy of New York State, as set forth in the New York State Industrial Development Agency Act.

The Sublease of the Facility Realty and the Improvements

Under a lease agreement (the "Company Lease Agreement"), Petitioner will sublease its leasehold interest in the Facility Realty to the Agency for a nominal rent.

The Financing Lease

The Personalty, Capital Improvements, and Qualified Maintenance

Pursuant to an agreement denominated the "Project Property Lease Agreement", the Lessees, on behalf of and as agents for the Agency, will (i) enter into leases, as lessees, with third parties, as lessors, of tangible personal property, including mainframes, personal computers, telecommunications equipment, equipment relating to the operation of the three foregoing categories, and software, all having a useful life of one year or more (the "Leased Personalty"), for use at the Project Building and at other specified locations in New York City, (ii) acquire machinery, equipment, trade fixtures, furniture, furnishings and other tangible personal property, all having a useful life of one year or more (the "Facility Equipment"), for use at the Facility Realty and at other specified locations in New York City, and (iii) make improvements, additions, alterations and modifications to the Facility Realty (the "Tenant Improvements"). The Agency either will hold title to or have a leasehold interest in the Leased Personalty, Facility Equipment and Tenant Improvements.

The Lessees, on behalf of and as agents for the Agency, will also enter into contracts for the maintenance, repair and replacement of parts of the Facility Realty, Leased Personalty, Facility Equipment and Tenant Improvements ("Qualified Maintenance"). The Qualified Maintenance, however, will not include operating or working capital costs, janitorial services, and the cost of replacement 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). Such exclusions from Qualified Maintenance will hereinafter be referred to as "NonQualified Maintenance". The Facility Realty, Leased Personalty, Facility Equipment, Tenant Improvements and contracts for Qualified Maintenance will hereinafter be referred to as the "Project Property".

The Lessees may perform certain functions or services for their affiliates. The Lessees may allocate to their affiliates the costs of performing such functions and services, which may include as overhead an allocable share of costs associated with the Project Property.

The Agency will issue bonds (the "Bonds") pursuant to an Indenture of Trust (the "Indenture") for the purpose of financing the cost of the Project Property other than the Facility Realty and contracts for Qualified Maintenance (the "Project Costs"). Project Costs will be paid either (i) by the Lessees, as agents of the Agency, who will be reimbursed with the proceeds of the Bonds, (ii) by the Lessees, as agents of the Agency, from the proceeds of the Bonds, or (iii) by the trustee appointed under the Indenture (the "Trustee") as agent of and on behalf of the Agency from the proceeds of the Bonds. The liability of the Agency to holders of the Bonds is limited under the

Indenture to the extent of the amount of rent received from the Lessees pursuant to the Project Property Lease Agreement. It is anticipated that the Bonds will be purchased by a Grantor Trust, the sole beneficiary of which will be Petitioner.

The Sublease and Sub-sublease of the Project Property

Pursuant to the Project Property Lease Agreement, the Agency will sub-sublease to the Lessees the Facility Realty and Tenant Improvements and will also sublease or lease to them all of the Leased Personalty and Facility Equipment. The Lessees will be obligated to pay rent for such property to the Agency. The Agency will be obligated to pay to the Trustee principal and interest due on the Bonds. The amount of rent due from the Lessees is equal to the amount of such principal and interest due on the Bonds. The Lessees are required to pay such rent on the same dates that the Agency is required to pay such principal and interest. Pursuant to the Project Property Lease Agreement, instead of paying the rent to the Agency, the Lessees will pay the amount of rent owed to the Agency directly to the Trustee. Pursuant to the Indenture, the Trustee will then apply such payments from the Lessees in satisfaction of the Agency's obligation to pay interest and principal on the Bonds. The Trustee will make principal and interest payments to the registered holder of the Bonds, namely the Grantor Trust, which in turn will distribute such payments to Petitioner, sole beneficiary of the Grantor Trust.

The Agency has issued to the Lessees on Agency letterhead a Pre-Bond Issuance Sales Tax Letter (the "Pre-Issuance Letter") signed by the Agency and dated October 12, 1995, which authorizes the Lessees, on behalf of and as agent for the Agency, to lease the Leased Personalty and to purchase and install the Facility Equipment and the Tenant Improvements, and to enter into contracts for Qualified Maintenance. In addition, paragraph 4 of the Pre-Issuance Letter requires that specific language be included in each contract, invoice, bill, purchase order or lease, stating that the acquisition is on behalf of the Agency. Upon the initial issuance of the Bonds, the Agency will issue a Sales Tax Letter with substantially the same provisions as the Pre-Issuance Letter.

For financial reporting and federal income tax purposes, the Lessees intend to treat the Project Property as having been acquired, leased or contracted for directly by the Lessees. The Lessees will, in accordance with generally accepted accounting principles, treat leases which it enters into (as agents for the Agency) as either capital leases or operating leases. Under section 3.1 of the Project Agreement and in accordance with the definition of "Qualified Personalty Lease" as provided in the Project Property Lease Agreement, leases treated as operating leases must include an option for the Lessees to purchase the property upon the expiration of the lease at or near the fair market value of the property.

The Lessees are subject to additional statutory reporting requirements under New York State insurance law. The Lessees' present intent for such statutory reporting purposes is to treat the Project Property as having been acquired, leased, or contracted for directly by the Lessees. The Lessees will, in accordance with their long-standing statutory reporting practices, treat all leases which it enters into (as agents for the Agency) as operating leases.

The Project Agreement and the agreements executed pursuant thereto will terminate at the earliest of December 31, 2011, the occurrence of an event of default on the Bonds, or the redemption of the Bonds by the Lessees. Upon termination of the agreements, the Agency will convey all of its rights and interests in the Project Property to the Lessees for consideration of one dollar.

The Project will not exceed the allowable one-third retail facilities restriction of Section 862 of the General Municipal Law.

Applicable Law and Regulations

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)(6) of the Tax Law defines "tangible personal property" as:

Corporeal personal property of any nature Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser.

Section 1101(b)(14) of the Tax Law defines "pre-written computer software" as:

Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and

developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

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...

* * *

(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 chapter

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 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(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 ... (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)(28) of the Tax Law provides:

Computer software designed and developed by the author or creator to the specifications of a specific purchaser which is transferred directly or indirectly to a corporation which is a member of an affiliated group of corporations within the meaning of subparagraph six of paragraph (b) of subdivision seventeen of section two hundred eight of this chapter except for clauses (ii) and (iii) of such subparagraph that includes such purchaser, or to a partnership in which such purchaser and other members of such affiliated group have at least a fifty percent capital or profits interest (but only if the transfer is not in pursuance of a plan having as its principal purpose the avoidance or evasion of tax under this article), but in no case including computer software which is pre-written, as defined in paragraph six of subdivision (b) of section eleven hundred one of this article and available to be sold to customers in the ordinary course of the seller's business.

Section 1115(o) of the Tax Law provides:

Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

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 526.7(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(a) of the New York State 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) 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.

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 as follows:

(2) (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(1) and (2) of the General Municipal Law provides as follows:

(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 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 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 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 Taxation and Finance, 126 Misc. 2d 144, aff'd 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 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 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 al 1 real and personal properties located within the state of New York ...

Opinion

Based on the terms of the Project Agreement under which the IDA proposes to make sales and compensating use tax benefits available to Petitioner with respect to Leased Personalty, Facility Equipment, Tenant Improvements and Qualified Maintenance Contracts, and based on the other facts, as described by Petitioner in its petition, and in accordance with 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, lv 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, and provided 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:

1. The Lessees' acquisition, lease and installation of the Leased Personalty, Facility Equipment and Tenant Improvements, as agent for and on behalf of the Agency, will be exempt from taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law (together, the "sales and use taxes"), provided that (i) the Agency is the owner, lessor or lessee of such property, (ii) purchase invoices, statements and contracts with vendors and suppliers clearly indicate that the Agency is the purchaser, lessor or lessee and (iii) the Lessees are the disclosed agents of the Agency.

2. Payments made under the contracts for Qualified Maintenance (which does not include operating or working capital costs or janitorial services) by the Lessees, as agents for and on behalf of the Agency, (a) for purchases of the services of maintaining and repairing tangible personal property consisting of the Leased Personalty, Facility Equipment and Tenant Improvements or (b) for purchases of the services of maintaining and repairing the Facility Realty and Tenant Improvements which constitute real property, property or land, in either case (a) or (b) including replacement of parts, but not including parts (e.g., a toner cartridge) that contain materials or substances consumed in operating the property and that are replaced when the part, material or substance is consumed and also not including contracts for general services (e.g., janitorial services), will be exempt from sales and use taxes, to the following extent:

With respect to Facility Equipment, Leased Personalty and those Tenant Improvements which do not constitute capital improvements, payments for such services and parts will be exempt where the services and parts are necessary to maintain, repair or service such Facility Equipment, Leased Personalty or Tenant Improvements, with a useful life of one year or more, used as part of the Project, provided that the Agency is the owner, lessor or lessee of such Facility Equipment, Leased Personalty and Tenant Improvements. Likewise, with respect to the Facility Realty and Tenant Improvements which constitute capital improvements, payments for such services and parts will be exempt where the services and parts are necessary to maintain the structural integrity of the Facility Realty and such Tenant Improvements, provided that the Agency is the owner, lessor or lessee of the Facility Realty and such Tenant Improvements.

The exemptions described in the preceding paragraph shall not be available unless the purchase invoices, statements and contracts with vendors and suppliers for the services and parts described in the preceding paragraph provide that the Agency is the purchaser, lessor or lessee with respect to the Facility Equipment, Leased Personalty, Tenant Improvements and Facility Realty, and that the Lessees are the disclosed agents of the Agency. In any instance where the maintenance or repair results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of the Facility Equipment or Leased 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 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.

TSB-A-96 (17)S
Sales Tax
March 19, 1996

However, it is noted that in a transaction where the charge is for both taxable maintenance and repair services and qualifying exempt services under a contract for Qualified Maintenance, the total charge will be subject to sales and use taxes, unless the portion of the charge applicable to the qualifying exempt services under the contract for Qualified Maintenance is separately stated from the other charges or otherwise reasonably allocated.

3. Amounts payable by the Lessees to the Agency under the sub-sublease for the Facility Realty and Tenant Improvements and under the sublease or lease for the Leased Personalty and Facility Equipment, which amounts are denominated as "rent" under the Project Property Lease Agreement, will be exempt from the sales taxes imposed under sections 1105, 1107 and 1109 of the Tax Law, whether the Lessees make such payments to the Agency or to the Trustee to be applied in satisfaction of the Agency's obligation to pay Bond principal and interest to the Trustee. The Lessees' use, in accordance with the terms of the Project Property Lease Agreement, of the Facility Realty, Leased Personalty, Facility Equipment and Tenant Improvements which the Lessees lease, sublease or sub-sublease from the Agency under such Project Property Lease Agreement, will not be subject to the compensating use taxes imposed under sections 1107, 1109 and 1110 of the Tax Law.

4. Amounts payable by the Agency to the Trustee in respect of Bond principal and interest are exempt from sales and use taxes.

DATED: March 19, 1996

/s/
Doris S. Bauman
Director
Technical Services Bureau

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