

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

TSB-A-96 (35)S
Sales Tax
June 5, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S951129A

On November 29, 1995, a Petition for Advisory Opinion was received from The Depository Trust Company, National Securities Clearing Corporation, International Securities Clearing Corporation, MBS Clearing Corporation and Government Securities Clearing Corporation, all of 55 Water Street, New York, NY 10041, and Participants Trust Company, 40 Rector Street, New York, NY 10006.

Petitioners, the above mentioned companies, state the issues and facts as follows, (the underlined terms below are defined in Petitioners' statement of facts):

1. Whether amounts paid by one of the Companies to purchase as Agent for the IDA pursuant to the Pre-Bond Issuance Sales Tax Letter and the Sales Tax Letter will be exempt from the sales and compensating use taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, (i) whether such amounts are paid directly to vendors by an Agent, or (ii) whether the Bond Trustee uses Bond proceeds to pay such amounts to vendors on behalf of one of the Companies as Agent for the IDA.
2. Whether Debt Service Payments made to the IDA by DTC will be exempt from the sales and compensating use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law.
3. Whether the option price paid by any one of the Companies to the IDA at the time such company exercises either Option 1 or Option 2 will be subject to the sales and compensating use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law.
4. Whether, if, at any time, a Premature Removal Penalty is paid by one of the Companies to the IDA, such penalty will be exempt from the sales and compensating use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law.

The Depository Trust Company ("DTC"), a New York limited purpose trust company, National Securities Clearing Corporation ("NSCC"), a New York corporation, Participants Trust Company ("PTC"), a New York limited purpose trust company, International Securities Clearing Corporation ("ISCC"), a New York corporation, MBS Clearing Corporation ("MBSCC"), a New York Corporation, and Government Securities Clearing Corporation ("GSCC"), a New York corporation, are in the business of providing services which a clearing agency registered under Section 17A of the Securities and Exchange Act of 1934, as amended, is authorized to provide. These services include (i) clearing house operations for the settlement of trades in the corporate securities, mortgaged backed securities and municipal securities markets, (ii) securities custody services for participating banks and broker dealers, and (iii) related operations of full service securities clearance houses and custodial services and other related operations. The companies have

many members and/or stockholders in common, and are all in the business of providing clearance, settlement and custodial services to the financial industry with each company handling different aspects of these services.

Pursuant to a resolution adopted by the New York City Industrial Development Agency (the "IDA") on September 12, 1995, a Lease Agreement dated as of November 1, 1995 (the "Lease Agreement"), between the IDA and each of DTC, NSCC and PTC (the "Companies"), and a Project Agreement dated as of November 1, 1995 (the "Project Agreement"), between the IDA and the Companies, the IDA has authorized DTC to act as its agent (and, as indicated below, has authorized NSCC and PTC to act as its limited agents) to acquire, lease, install, equip and maintain certain commercial facilities in the City of New York (the "Project") and to acquire (whether by lease or by purchase), equip, furnish, install, lease, sublease, repair, replace and maintain, from time to time, machinery, equipment, trade fixtures, furniture, furnishings and other items of tangible personal property (the "Equipment"), at all or any of 55 Water Street, New York, NY; 7 Hanover Square, New York, NY; 1 Liberty Plaza, New York, NY; 40 Rector Street, New York, NY; 77 Washington Street, Brooklyn, NY; and 45 Washington Street, Brooklyn, NY (collectively, the "Project Premises"), to the extent used by DTC, NSCC, PTC or any of the Eligible Companies for the business of providing securities clearance, settlement and custodial services within the City of New York (such use by any of the Eligible Companies will be for no consideration). "Eligible Companies" is defined in the Project Agreement to mean ISCC, MBSCC and GSCC.

The Project Agreement will provide that payments made to acquire and lease the Equipment and to purchase related maintenance contracts for Qualified Maintenance, defined below, will be exempt from sales and compensating use taxes. These tax benefits will be received by the Companies over the period commencing on August 31, 1995 (the date of the Pre-Bond Issuance Sales Tax Letter hereinafter mentioned) and ending on December 31, 2012.

The proposed structure of the transaction will be as follows:

- (i) The IDA will acquire title to, or a leasehold interest in, the Equipment and will lease (or sublease, as the case may be) the Equipment to the Companies under and pursuant to the Lease Agreement between the IDA and the Companies;
- (ii) The IDA and a banking institution designated by the IDA (the "Bond Trustee") will enter into a trust indenture which will 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 Equipment to be acquired or leased from time to time;
- (iii) The Bonds will not be sold to any of the Companies, but will be sold to an affiliate of one of the Companies; and
- (iv) The Companies and the IDA will enter into additional agreements, which will not contravene or alter any of the facts material to the transactions outlined herein.

Under the Project Agreement, DTC will be authorized to act as agent for the IDA in making acquisitions or entering into leases of the Equipment and in entering into maintenance agreements with respect thereto (all of the foregoing, collectively, "Acquisitions") for the benefit of the respective Companies and Eligible Companies. Each of NSCC and PTC will also be authorized to act as the IDA's limited agent in making Acquisitions, except that these limited agents shall only act as such through their appointment of DTC as their agent for the above purposes. Each of DTC, NSCC and PTC, as agent for the IDA, is herein called an "Agent". When an Agent makes an Acquisition, it generally will pay the vendor directly. In some cases, payments for such Acquisitions will be made to the vendor by the Bond Trustee from Bond proceeds. All Acquisitions will be made in accordance with the Pre-Bond Issuance Sales Tax Letter dated August 31, 1995, as extended and supplemented, and the Sales Tax Letter and the procedural requirements of Section 3.1 of the Project Agreement. The Equipment will then be leased (or subleased) by the IDA to the Companies under the Lease Agreement. Equipment will include not only the original Equipment, but also replacements, enhancements and additions thereto made from time to time over the term of and in accordance with the Project Agreement.

Exhibit A of the Project Agreement provides a listing of the transactions which the IDA intends to be exempt from sales and compensating use tax as follows:

Exemptions from sales or use tax relating to the following categories:

1. the acquisition of machinery, equipment, trade fixtures, furniture, furnishings and other tangible personal property (including any maintenance, repair, replacement, enhancement and additions required with respect to such items) for use at the Project Premises, including computers (and peripherals), telecommunications equipment, business machines and software, but excluding art, plants, objects d'art and other similar decorative items, rolling stock and ordinary office supplies such as pencils, paper clips and paper;
2. the leasing or subleasing of machinery, equipment, trade fixtures, furniture, furnishings and other tangible personal property (including any maintenance, repair, replacement, enhancement and additions required with respect to such items) for use at the Project Premises, including computers (and peripherals), telecommunications equipment, business machines and software, but excluding art, plants, objects d'art and other similar decorative items, rolling stock and ordinary office supplies such as pencils, paper clips and paper; and
3. maintenance, repair and service contracts to be used at the Project Premises for any of the items described in 1 and 2 above; provided, however, that (i) the purchase of any software under any of the above three categories may only be effected if such software shall be embodied in a tangible form (i.e., diskettes, magnetic tape, etc.) and

shall be capitalized or capable of being capitalized under generally accepted accounting principles, and only if such software shall be purchased concurrently with a computer which is being (or shall previously have been) acquired or leased by the [IDA] pursuant to the [Sales Tax Letter or Pre-Bond Issuance Sales Tax Letter] and (ii) any maintenance shall only be for "Qualified Maintenance". "Qualified Maintenance" shall mean, with respect to any of the above categories of property having a useful life of one year or more, the replacement of parts (other than parts that contain materials or substances that are consumed in the operation of such property (e.g., a toner cartridge) where such parts must be replaced whenever the substance is consumed) or the making of repairs, but shall not include maintenance of the type as shall constitute janitorial services.

To finance the Acquisitions (exclusive of interest under leases of Equipment as described below and payments under or for maintenance contracts), the IDA will issue Bonds semiannually. The Lease Agreement will require DTC to make rental payments for the Equipment leased from the IDA equal to the debt service on the Bonds ("Debt Service Payments"). Although all Bonds will mature on December 31, 2012, Bonds of each series may be prepaid after 3 years from the date of issuance, subject to certain conditions. As required by the IDA, Bond proceeds may not be used to finance payments under or for maintenance contracts, or, to the extent that the IDA, through DTC, enters into any lease of Equipment, the portion of any rental payments under such lease not attributable to the deemed "principal portion" of such lease payments.

Pursuant to the Project Agreement, except for certain permitted reasons (including obsolescence, uselessness, and good faith operational or business reasons), the Equipment may not be removed from one of the Project Premises sites to a location other than another Project Premises site prior to the expiration of three years from the date of installation or location of such Equipment at a Project Premises site (the "Retention Period"). After the expiration of the Retention Period, such Equipment may be removed from the Project Premises, provided that the original cost of the remaining Equipment will not fall below specified amounts. In such event, DTC or one of the other Companies will have the right ("Option 1") to acquire such Equipment from the IDA for the nominal consideration of \$1.00.

In addition, upon payment in full of the Bonds, the Equipment may be acquired by DTC or one of the other Companies as DTC may designate for the price of \$1.00 ("Option 2").

If Equipment is removed from one of the Project Premises sites prior to the expiration of the Retention Period for reasons other than certain permitted reasons, DTC or one of the other Companies must pay to the IDA an amount (the "Premature Removal Penalty") equal to the sales tax NPV that would have been payable at the time of the original purchase (based upon its fair market value at the time of the removal) but for the Pre-Bond Issuance Sales Tax Letter or the Sales Tax Letter. "NPV" is defined in the Project Agreement as meaning, as to a specified or ascertainable dollar amount, (i) the future value, as of the Lease Commencement Date (as defined in the Lease

Agreement), of a future dollar amount or amounts discounted from June 30 of the calendar year in which such amounts are paid, taken, incurred or realized at the annual compounded rate of 7.5% per annum. DTC or one of the other Companies will pay the IDA a purchase price of \$1.00, in addition to the Premature Removal Penalty.

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 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 526.7(c)(2) of the New York State Sales and Use Tax Regulations provides, in relevant part:

Where a lease ... with an option to purchase has been entered into, and the option is exercised, the tax will be payable on the consideration given when the option is exercised, in addition to the taxes paid or payable on each lease payment.

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 Tax and Finance of the State of N.Y., 126 Misc. 2d 144, aff'd 115 A.D.2d 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 IDA's 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 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

Based on the structure under which the IDA proposes to make sales and compensating use tax benefits available to Petitioner with respect to Acquisitions, 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. 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 such terms and conditions are consistent with Petitioner's description of them as set forth above, in the instant matter:

(a) Amounts paid by one of the Companies to purchase Acquisitions, as Agent for and on behalf of the IDA, pursuant to the Pre-Bond Issuance Sales Tax Letter and the Sales Tax Letter, whether the payments are made directly to vendors by an Agent, or whether the Bond Trustee uses Bond proceeds to pay such amounts to vendors on behalf of one of the Companies as Agent for the IDA, will be exempt from sales and use taxes as follows:

(1) With respect to purchases (including leases) of Equipment, such amounts paid will be exempt from such taxes, provided that (i) the IDA is the owner, lessor or lessee of the property, (ii) the purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is

the purchaser, lessor or lessee and (iii) one of the Companies effecting the purchase (including a lease) is the disclosed Agent of the IDA.

(2) With respect to maintenance agreements for Equipment, such amounts paid to purchase the service of maintaining, repairing or servicing tangible personal property consisting of Equipment, with a useful life of one year or more, and which is in use at the Project Premises, 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, but not including contracts for general services (e.g., janitorial services), will be exempt from such taxes provided that such maintenance agreements, services and parts, are necessary to maintain, repair or service Equipment used as part of the Project, and provided that the IDA is the owner, lessor or lessee of the Equipment and that the purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser, lessor or lessee and that one of the Companies effecting such purchase is the disclosed Agent of the IDA. In any instance where the maintenance, repair or servicing results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of the Equipment 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 the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, as indicated in We Gmans Food Markets Inc v. The Department of Taxation and Finance of the State of N.Y. (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) supra.

However, it is noted that in a transaction where the charge is for both taxable and exempt services or taxable or exempt parts, tools or supplies, the total charge will be subject to the tax imposed under sections 1105, 1107, 1109 or 1110 of the Tax Law, unless the portion of the charge applicable to the exempt services or parts, tools or supplies is separately stated from the other charges or otherwise reasonably allocated.

(b) Debt Service Payments made to the IDA by DTC under the Lease Agreement will not be subject to sales and use taxes.

(c) The option price paid by any one of the Companies to the IDA at the time either Option 1 or Option 2 under the Lease Agreement is exercised will not be subject to sales and use taxes.

(d) The amount paid to the IDA as a Premature Removal Penalty by one of the Companies will not be subject to sales and use taxes.

DATED: June 5, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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