

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

TSB-A-88 (9) S
Sales Tax
January 15, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870504A

On May 4, 1987, a Petition for Advisory Opinion was received from Citibank, N.A., 153 East 53rd Street, New York, New York 10043.

The issue raised is whether the purchase of materials by Petitioner, its contractors, subcontractors or repairmen are exempt from the New York sales and use tax where the materials will be permanently affixed to real property either (a) owned by the New York City Transit Authority or the City of New York directly or (b) held by the Transit Authority or by the City under a permanent and perpetual easement.

Petitioner will own certain real property located in Queens County, New York. Petitioner intends to construct a new office tower on the premises which construction requires Petitioner to obtain certification of mandatory lot improvements by the New York City Planning Commission. To obtain this certification, Petitioner must construct extensive improvements to the New York City Transit System on Petitioner's, the Transit Authority's and the City's property and must grant a permanent and perpetual easement to the Authority and the City with respect to certain portions of Petitioner's property on which the improvements will be constructed.

Both the Transit Authority and the City of New York are organizations described in section 1116(a)(1) of the Tax Law.

All of the materials which will become affixed to the real property in the easement areas will be owned by the Transit Authority since title to such materials will vest in the Transit Authority upon purchase pursuant to the provisions of the agreement granting the easement.

Section 1115(a) of the Tax Law exempts from the sales tax imposed under section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110:

* * *

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

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

Among the organizations described in subdivision (a) of section eleven hundred sixteen are:

(1) 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

Accordingly, materials which are purchased by Petitioner, its contractors, subcontractors or repairmen and used in adding to, altering, improving, maintaining, servicing or repairing real property owned by the Transit Authority or the City of New York and which become integral components of such real property are exempt from sales and compensating use tax under section 1115(a)(15) and (16) of the Tax Law.

Moreover, it is well established that the term "real property" includes an easement in land. Mittnacht v. Montana, 205 A.D. 643, 200 N.Y.S. 82 (1st Dept. 1923); Klugewicz v. State 259 A.D. 755, 18 N.Y.S.2d.

The easement granting the Transit Authority the use of Petitioner's land as a subway requires exclusive possession by the Transit Authority of a part of Petitioner's land in perpetuity. The easement appropriated by the Transit Authority has left Petitioner as merely the title owner of the land. For all practical purposes, the property belongs to and is possessed by the Transit Authority and the City of New York. Since the easement for a subway is permanent and perpetual, the land subject to the easement will be considered the property of the Transit Authority for purposes of sections 1115(a)(15) and (16) of the Tax Law.

It is noted that the easement here at issue is significantly different from a lease or license to use. A lease is an agreement creating a landlord and tenant relationship entitling the tenant to possession for a specific term with reversion to the landlord-lessor. A license is merely the consent or authority to do an act upon or use the land of another without having an interest or estate in such property.

The marked and leading distinctions between [an easement and a license] are, that in the former there is a permanent interest in the land for some specified period, amounting to an estate in the land, which is assignable, is irrevocable, and gives a right at all times to enter and remain in possession, during its continuance; while [a license] is a mere authority to enter upon the land of another for a temporary purpose

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and to do a particular act or series of acts upon the land. Borough Bill Posting Co. v. Levy, 144 A.D. 784, 129 N.Y.S. 740 (1911); citing Pierrepont v. Barnard, 6 N.Y. 279 (1852).

Accordingly, materials which are purchased by Petitioner, its contractors, subcontractors, or repairmen and used in adding to, altering, improving, maintaining, servicing or repairing real property subject to the easement of the Transit Authority or the City of New York, which become integral components of such real property and title to which vests in the Transit Authority or the City are exempt from sales and compensating use tax under sections 1115(a)(15) and (16) of the Tax Law.

DATED: January 15, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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