

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

TSB-A-89 (28)S  
Sales Tax  
August 8, 1989

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890523A

On May 23, 1989, a Petition for Advisory Opinion was received from The Chase Manhattan Bank, N.A., 1 Chase Manhattan Plaza, New York, New York 10081.

The issues raised in connection with the construction, equipping, furnishing and maintaining of Petitioner's proposed financial services processing center in Brooklyn, New York, and the equipping and maintaining of Petitioner's other facilities within New York City whose operations are related to the operations to be performed at the financial services processing center (together hereinafter referred to as Project) are whether:

a.) the acquisition and installation of machinery, equipment, furniture and furnishings and other property comprising a part of the Project (including replacements, enhancements and additions) leased by the owner thereof either to the New York City Industrial Development Agency (hereinafter referred to as IDA) for sublease to Petitioner, or leased by the owner thereof to Petitioner as agent for and on behalf of the IDA, are 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;

b.) the acquisition and installation of machinery, equipment, furniture and furnishings and other property comprising a part of the Project as additions to, replacements for or enhancements of other property that is part of the Project, either directly by the IDA or by Petitioner as agent for and on behalf of the IDA, are exempt from such sales and use taxes;

c.) maintenance and service contracts for machinery, equipment and computer software comprising a part of the Project entered into directly by the IDA, or by Petitioner as agent for the IDA, are exempt from such sales and use taxes.

Petitioner has recently explored the feasibility of relocating its financial services processing center from Manhattan to Brooklyn (the new center being hereinafter referred to as the CFSC). As part of a benefits package offered to induce Petitioner to relocate its financial services processing center, the IDA will purchase the fee title to two adjoining parcels (separated by a public street) in Brooklyn and will lease the parcels and building(s) to be constructed on such parcels to Petitioner. The IDA also will grant Petitioner the authority to acquire tangible personal property and to enter into contracts, in each case as agent for and on behalf of the IDA with respect to the Project.

The Project, described heretofore, will also include the following:

(a) machinery, equipment, furniture and furnishings (including furniture and furnishings to be located at the CFSC after completion of the Project), and other property to be acquired by the IDA and leased to Petitioner, or acquired by Petitioner as agent for the IDA,

(b) machinery, equipment and computer software either leased by the owner to the IDA and subleased to Petitioner or leased by the owner to Petitioner as agent for and on behalf of the IDA; and

(c) maintenance and service contracts for machinery, equipment and computer software that are part of the Project pursuant to which the service provider will contract with the IDA or with Petitioner as agent for the IDA.

It is anticipated that, as part of the Project, property will be acquired or leased, and maintenance and service contracts will be entered into, all as provided above, over a 25 to 35 year period. It also is anticipated that some of the property included in the Project will be acquired or leased, in the same manner as set forth above, as replacements for or enhancements of other property that is part of the Project. Additionally, the operations performed at the CFSC and at Petitioner's other related facilities may expand, requiring the acquisition or rental of additional property as part of the Project.

On a periodic basis (likely to be semiannually) the IDA will issue bonds or notes to finance (either prospectively or to reimburse Petitioner for amounts expended) the costs of all or substantially all of the machinery, equipment, furniture and furnishings, and other property acquired by the IDA or by Petitioner acting as agent for the IDA. A subsidiary of Petitioner will be permitted to purchase all such agency bonds if Petitioner so elects.

All of the Project property as shall be owned by or leased to the IDA will be leased (or subleased) by the IDA to Petitioner pursuant to a lease agreement whereunder Petitioner will be obligated to make lease payments equal to the principal of and interest due on the bonds and notes issued from time to time by the IDA to finance the Project. The lease agreement will further provide that upon the payment or prepayment in full of the IDA's bonds and notes issued to finance the Project, the IDA shall convey to Petitioner all of the IDA's right, title and interest in the Project property.

Upon the signing of the lease agreement by the IDA and Petitioner, the IDA will, pursuant to statute and regulations, issue a sales tax authorization letter (the "Sales Tax Letter") to authorize Petitioner, as agent for and on behalf of the IDA, to purchase and lease Project property and to enter into maintenance and service contracts for such Project property exempt from sales and use taxes. The Sales Tax Letter will contain a general description of the Project and will provide that the sales and use tax exemption available thereunder will be available only to the extent that property is acquired or rented, and maintenance and service contracts entered into, either directly by the IDA or by Petitioner as agent for the IDA. Petitioner will be required to furnish periodic update information on the Project to the IDA and obtain from the IDA a renewal of authorization for the

Sales Tax Letter accompanied with an updated Project description.

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.

In Wegmans Food Markets, Inc. v. Department of Taxation and Finance (126 Misc 2d 144, aff'd 115 AD2d 962 lv denied 67 NY2d 606) the Court, in discussing the taxability of tangible personal property purchased by an IDA for use by its lessee, stated:

...Wegmans commenced this action for a declaratory judgment seeking a determination that no sales or use tax is payable with respect to purchases of tangible personal property made by either an IDA or Wegmans for installation or use upon or within IDB-financed projects; that no such taxes are payable by reason of payments made by Wegmans under any lease, installment sale, or loan agreement for the

purpose of amortizing the indebtedness of an IDA for bonds issued by it; and, that no such taxes are payable, regardless of whether the IDB is tax exempt under the Internal Revenue Code, and regardless of whether the personal property retains its identity or becomes part of the real property...

The Department agrees that the exemption from state taxes of a governmental agency would ordinarily apply to an IDA. However, it calls attention to section 1116 of the Tax Law, which delineates those organizations exempt from the payment of sales taxes. By 1116(a)(1) of the Tax Law, the State of New York, or any of its agencies, instrumentalities, public corporations or political subdivisions, obtains an exemption, but only 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".

The Department also concedes that by section 888 of the General Municipal Law inconsistent provisions in other Acts are superseded and that the provisions of Article 18-A control. However, it contends that Wegmans has failed in its burden of showing that the legislature intended the exemptions in Article 18-A to supersede the Sales Tax Law. There is nothing in the statute which specifically so provides, which it would if this were the legislative intent. Therefore, the Department argues, since the IDAs are vending services of property of a kind ordinarily sold by private persons, Wegmans, as an occupant of their projects, is obligated for all sales taxes upon the personal property purchased for such projects.

However, there is strong authority to the contrary. The State Comptroller has concluded that section 874 of the General Municipal Law (which provides for the tax exemptions) read in conjunction with section 858(4) (which empowers IDAs to engage in various transactions regarding real property) and section 888 (providing that Article 18-A controls with respect to inconsistencies in other laws) indicates an intention to exempt IDAs from the mortgage recording tax (1982 Opns State Compt No. 82-188, p. 240). There is no reason why such intention would not apply to sales taxes as well. ...

Section 874 subpar. (1), goes on to provide that the creation of IDAs and the carrying out of their corporate purposes are "for the benefit of the people of the state of New York", that they perform a "public purpose", and that they "shall be regarded as performing a governmental function in the exercise of the powers conferred...and shall be required to pay no taxes or assessments upon any of the propert[ies] acquired by [them] or under [their] jurisdiction or control or supervision or upon [their] activities.

To accomplish the foregoing purposes, subparagraph (2) of section 874 exempts IDAs from all taxes, except transfer and estate taxes. Such exemption extends not only to the bonds and notes issued by IDAs, together with the income from them, but to the property of the IDAs as well.

The legislature very carefully included all revenues received by an IDA within the purposes of Article 18-A. The definition of "revenues" in section 854, subpar. (7) 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. Section 854, subpar. (4), defines "Project[s]" as "any land, building[s] or other improvement, and all real and personal properties located within the state of New York...including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto...which shall be suitable for manufacturing, warehousing, research, commercial or industrial purposes...."

...the legislature went to great pains to spell out the categories of property to be included within IDAs' intended activities. Clearly, the purpose was to emphasize that such property was to be included within the tax exemption provided by the statute so long as the IDA owned, controlled or supervised it in connection with its activities, including the equipping and furnishing of a project. Indeed, the statute so provides in section 858, subpar. (10), which empowers an IDA "to acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects."

In accordance with the sections of law and regulations cited above and the decision in Wegmans Food Markets, Inc. v. Department of Taxation and Finance, *supra*, in the instant case, the purchase and/or installation of machinery, equipment, furniture and furnishings and other property comprising a part of the Project (including replacements, enhancements and additions), whether purchased by the IDA for subsequent leasing or subleasing to Petitioner or purchased by Petitioner as agent for and on behalf of the IDA as heretofore described, will be exempt from the sales and use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law, provided that the agreement between the IDA and Petitioner stipulates that the IDA is the owner of any such property.

The word "purchase" above is used as defined in section 1101(b)(5) of the Tax Law and thus includes leases.

The purchase and/or installation of machinery, equipment, furniture and furnishings, and other property comprising a part of the Project as additions to, replacements for or enhancements of other property that is part of the Project, whether purchased by the IDA for subsequent leasing or subleasing to Petitioner or purchased by Petitioner as agent for and on behalf of the IDA, will also

be exempt from such sales and use taxes, provided that the agreement between the IDA and Petitioner stipulates that the IDA is the owner of any such property.

The word "purchase" above is used as defined in section 1101(b)(5) of the Tax Law and thus includes leases.

Maintenance and service contracts for maintaining, repairing and servicing machinery, equipment and computer software comprising a part of the Project, whether entered into by the IDA or by Petitioner as agent for and on behalf of the IDA, will also be exempt from such sales and use taxes, provided that the IDA is the owner of such machinery, equipment and computer software and that, under the agreement between the IDA and Petitioner, the IDA is responsible for maintaining, repairing and servicing such items.

DATED: August 8, 1989

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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