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Taxpayer Services Division
Technical Services Bureau

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Sales Tax
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STATE OF NEW YORK
COMMISSION OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950118B

On January 18, 1995, a Petition for Advisory Opinion, as amended on April 3, 1995, was received from Donaldson, Lufkin & Jenrette Inc., 140 Broadway, 42nd Floor, New York, NY 10005.

Petitioner, Donaldson, Lufkin & Jenrette, Inc., states the issues and facts as follows:

1. Whether Leasing Corp.'s purchases of Equipment for resale to Group Agents pursuant to a resale certificate will be exempt from New York State and New York City Sales and Compensating Use Taxes and the Metropolitan Commuter Transportation District Tax (together, "State and local sales and use taxes").
2. Whether Leasing Corp's purchases of materials to be incorporated into Improvements (including from the Fund and with respect to the IDA Share of the Common Area) on behalf of and as agent of the IDA pursuant to the Exemption Letter and, as applicable, the Project Agreement will be exempt from State and local sales and use taxes.
3. Whether rent payments made after March 5, 1995, for Equipment to Leasing Corp. by the Group Agents, on behalf of and as agents of the IDA, pursuant to the Master Lease and to the Exemption Letter and, as applicable, the Project Agreement will be exempt from State and local sales and use taxes.
4. Whether rent payments for Leased Equipment to third party vendors by the Group Agents, on behalf of and as agents of the IDA, pursuant to the Exemption Letter and, as applicable, the Project Agreement will be exempt from State and local sales and use taxes.
5. Whether payments under Exempt Service Contracts by the Group Agents acting on behalf of and as agents of the IDA will be exempt from State and local sales and use taxes.
6. Whether Debt Service Payments to the IDA under the Financing Lease will be exempt from State and local sales and use taxes.
7. Whether payments of Reimbursements and all payments with respect to Reimbursement Loans will be exempt from State and local sales and use taxes.
8. Whether or not State and local sales and use taxes will be imposed only on the Option Price at the time the Option is exercised.

9. Whether or not, if, at any time, a Premature Removal Penalty is imposed on any of the Group Agents by the IDA, such Premature Removal Penalty shall be deemed to be consideration for a sale subject to State and local sales and use taxes.

This petition for advisory opinion concerns a proposed transaction (the "Project") between the New York City Industrial Development Agency (the "IDA") and Donaldson, Lufkin and Jenrette, Inc. ("DLJ") intended to induce DLJ to maintain its offices in New York City (the "City") for approximately twenty-two (22) years. As part of the Project, DLJ and certain affiliates (the "DLJ Group") will relocate from premises in buildings at 120 Broadway and at 140 Broadway, New York, New York, (together, the "Broadway Premises") to premises in the building at 277 Park Avenue, New York, New York, (the "Building") owned by Stanley Stahl (d/b/a Stahl Park Avenue Company) (the "Owner").

In connection with the Project, the IDA will extend certain economic development benefits to DLJ to reduce the cost of maintaining offices in the City and of acquiring associated improvements and equipment. Among these benefits are (i) a real estate tax abatement on all or a portion of the DLJ premises in the Building evidenced by DLJ's obligation to make certain payments in lieu of real estate taxes ("PILOT") with respect to such premises pursuant to a PILOT agreement (the "PILOT Agreement") and (ii) sales and compensating use tax exemptions pursuant to the Pre-Bond Issuance Sales Tax Letter (November 11, 1994), the Amended and Restated Pre-Bond Issuance Sales Tax Letter (March 6, 1995), the Second Amended and Restated Pre-Bond Issuance Sales Tax Letter (April 26, 1995), the Third Amended and Restated Pre-Bond Issuance Sales Tax Letter (May 17, 1995), the Fourth Amended and Restated Pre-Bond Issuance Sales Tax Letter (June 30, 1995), the Fifth Amended and Restated Pre-Bond Issuance Sales Tax Letter (July 31, 1995) or the Sales Tax Letter (as applicable, the "Exemption Letter") and pursuant to a Project agreement (the "Project Agreement"). The Exemption Letter applies to all of the property, service contracts and purchases under the Project.

In order to extend the real estate tax abatement to DLJ, the IDA will take title to that portion of the Building to be occupied by the DLJ Group, for which DLJ will seek real estate tax abatement. Initially, the DLJ Group will occupy approximately seven hundred thirty-three thousand (733,000) rentable square feet in the Building (not including the Building common area ("Common Area")); DLJ will have expansion options with respect to additional space in the Building (the space initially to be occupied by the DLJ Group in the Building together with any additional space, the "Project Premises"). Because the IDA will not take title to any portion of the Building that the DLJ Group does not lease, the Building will be converted to a condominium form of ownership, with the Project Premises comprising separate condominium units, title to which can be separately conveyed to the IDA. Each unit so conveyed will carry with it an undivided proportionate interest in the Common Area (the aggregate undivided interest in the Common Area, the "IDA Share"). That portion of the Project Premises to be leased by the DLJ Group and for which DLJ will seek real estate tax abatement will consist of the condominium units initially conveyed by the Owner to the IDA and, upon DLJ's exercise of its expansion options or otherwise, so conveyed from time to time thereafter (these initial units together with any additional units, the "IDA Units").

In order for sales and use tax exemptions to be available to DLJ, all purchases eligible for exemption in connection with the Project ("Acquisitions") must be made by the IDA through its designated agents within the DLJ Group (the "Group Agents"). In addition to DL3, the following members of the DLJ Group have been designated as agents of the IDA under the Exemption Letter for purposes of the sales and use tax exemption: Donaldson Leasing Corp.; Donaldson, Lufkin & Jenrette Securities Corporation; DLJ Capital Corporation; DL3 Merchant Banking, Inc.; DLJ Mortgage Capital, Inc.; and Wood, Struthers & Winthrop Management Corp. It is anticipated that from time to time certain additional members of the DLJ Group may be designated by DL3 as agents of the IDA for purposes of the sales and use tax exemption under the Exemption Letter pursuant to the terms of the Project Agreement and the other Project documents. Such Acquisitions will be made in all respects in accordance with (i) the Exemption Letter and, as and when applicable, (ii) the Project Agreement. In addition, the IDA must authorize by specific resolution each site in the City where property acquired in Acquisitions may be situated for use by the DLJ Group in connection with the Project (together, all such sites authorized by IDA resolution, the "Approved Premises"). Currently, the Approved Premises consist of the Broadway Premises and the Project Premises.

To finance the purchase of the Acquisitions, the IDA will from time to time issue special obligation revenue bonds (the "Bonds"). The Bonds may be sold to a member of the DLJ Group (other than a Group Agent) or to unrelated third parties. Proceeds raised through the sale of such Bonds will be available (i) to purchase the Acquisitions directly or (ii) to reimburse the Group Agents (or other members of the DLJ Group) that may have advanced funds to purchase the Acquisitions. Such reimbursements shall be made only for purchases made after the purchaser has been appointed an agent of the IDA. For income tax and financial reporting purposes, the DL3 Group will report the Acquisitions in the same manner that similar acquisitions were reported prior to the Project.

For certain regulatory reasons unrelated to the Project, one member of the DLJ Group, Donaldson Leasing Corp. ("Leasing Corp.") is currently the sole entity within the DL3 Group responsible for making outright purchases for the DLJ Group. It is anticipated that this arrangement will continue under the Project. Accordingly, (i) Leasing Corp., acting on behalf of and as agent of the IDA (as applicable, through contractors acting on behalf of and as agents of Leasing Corp. in its capacity as agent of the IDA), shall purchase and install all materials to be incorporated as permanent improvements, additions and installations to the Project Premises (such materials as so incorporated, including any replacements, enhancements and additions thereto, collectively, the "Improvements"); and (ii) Leasing Corp. shall purchase outright certain furniture, furnishings, machinery, equipment, or other personalty used at the Approved Premises (such personalty purchased outright, including any replacements, enhancements and additions thereto, collectively, the "Equipment") and shall lease the Equipment to the Group Agents, acting on behalf of and as agents of the IDA, as described below. In connection with the Project and in order to lessen the administrative burden resulting from the Project, DL3 anticipates that it will cause Leasing Corp. to restate and consolidate all separate leases under the Project for Equipment in use or to be used at the Approved Premises into a single master lease agreement (the "Master Lease") between Leasing Corp. and the Group Agents. In addition, with respect to Equipment, DL3 may enter into sale-leaseback transactions, as necessary, to obtain third party financing of the Equipment.

Petitioner expects that these sale-leaseback transactions will not be subject to State and local sales and use taxes, consistent with General Electric Capital Corporation, TSB-A-94(14)S (April 4, 1994). However, Petitioner does not now request an opinion with respect to these sale-leaseback transactions.

DLJ is authorized under the PrimeLease (as defined below) to expend up to \$37,979,000, to be financed by Owner, (the "Fund") for various purposes, including the purchase of materials to be incorporated into Improvements. To the extent that all or a portion of the Fund is expended to purchase such materials, the Owner will own, for federal income tax purposes, any Improvements into which such materials are incorporated and so financed. Notwithstanding this, expenditures from the Fund to purchase such materials will be made by Leasing Corp. acting on behalf of and as agent of the IDA (as applicable, through contractors acting on behalf of and as agents of Leasing Corp. in its capacity as agent of the IDA). Any materials to be incorporated as Improvements to the Project Premises purchased with expenditures from the Fund will be affixed to the Project Premises and leased to the Owner by the IDA pursuant to the Overlease (as defined below), subleased to DLJ by the Owner pursuant to the Prime Lease (as defined below), sub-subleased to the IDA by DLJ pursuant to the Facility Lease (as defined below), and sub-sub-subleased to the Group Agents by the IDA pursuant to the Financing Lease (as defined below). It is intended that, to the extent they otherwise would have been subject to sales or use tax, all expenditures from the Fund to purchase Improvements in connection with the Project will be eligible for sales and use tax exemption.

The Master Lease will be either one that is characterized under Accounting Standards of the Financial Accounting Standards Board as a "capital lease" (and is so recorded on the books and records of the lessees) or one in which an option to purchase the subject property is granted to the lessees by the lessor, Leasing Corp.

No similar regulatory reasons require that Leasing Corp. be the sole entity within the DLJ Group to enter into leases of property or into maintenance, service and repair contracts directly. Certain designated members of the DLJ Group, namely, the Group Agents, currently enter into such leases and contracts on their own behalf (e.g., to lease or maintain copying machines). It is anticipated that this arrangement will continue under the Project. Accordingly, each Group Agent, acting on behalf of and as agent of the IDA, may (i) enter into leases with third party vendors for personalty, which such Group Agent will use (such leased personalty, including any replacements, enhancements and additions thereto, collectively, the "Leased Equipment") and (ii) enter into contracts for maintenance, service and repair of real and personal property, consisting of the Improvements, Equipment and Leased Equipment, with a useful life of one year or more, in use at or comprising part of the Approved Premises, including replacement 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) ("Exempt Service Contracts").

a. Improvements. The following structure is proposed to secure the tax benefits offered by the IDA to DLJ with respect to Improvements.

(i) The Group Agents, acting on behalf of and as agents of the IDA (through contractors acting on behalf of and as agents of the Group Agents, in their capacity as agents of the IDA), will purchase and install all materials to be incorporated as Improvements to the Project Premises. (As noted above, Petitioner anticipates that Leasing Corp. will be the sole entity responsible for purchasing materials to be incorporated as Improvements on-behalf of the DLJ Group and of the IDA (either directly or through contractors). However, each Group Agent will be responsible for paying its share of the costs of Improvements to Leasing Corp. After the materials are incorporated as Improvements to the Project Premises and as of the time when such Improvements are placed in service for federal income tax purposes, the books of each Group Agent will reflect its interest in the Improvements. At the same time, each Group Agent will reimburse Leasing Corp. for such Group Agent's share of Leasing Corp.'s expenditures to purchase materials to be incorporated as Improvements (the "Reimbursements"). The Group Agents will make the Reimbursements with funds borrowed from DLJ through nonrecourse loans to each Group Agent secured by such Group Agent's interest in the Improvements (the "Reimbursement Loans").)

(ii) The Group Agents will have purchased all materials to be incorporated as Improvements to the Project Premises, on behalf of and as agents of the IDA, but there will be no installation of any such materials until the IDA acquires a leasehold interest in the Project Premises. (In the period prior to when Bonds are first issued, the IDA will acquire a leasehold interest in the Project Premises by an interim arrangement in which DLJ will lease the Project Premises to the IDA pursuant to an interim lease agreement (the "Interim Lease") for nominal rent and the IDA will lease this interest back to DLJ pursuant to an interim sublease agreement (the "Interim Sublease") for nominal rent. The terms of the Interim Lease and of the Interim Sublease shall each end on the date when Bonds are first issued or earlier upon certain other events.) In the period after Bonds are first issued, the IDA will obtain both title to the IDA Units and a leasehold interest in the Project Premises. The IDA will acquire a leasehold interest in the Project Premises pursuant to the Facility Lease defined below. In addition, the IDA will have acquired title to the IDA Units from the Owner. The Owner will condominiumize the Building and convey title to the IDA Units for a nominal amount to the IDA, subject to an existing mortgage on the Building. The IDA will then lease the IDA Units back to the Owner pursuant to a lease agreement (the "Overlease") for nominal rent. The deed conveying the initial IDA Units to the IDA (the "Initial Deed") will contain reverters to the Owner upon the expiration of, or earlier termination of, the Financing Lease defined below, or upon certain other events.

(iii) The Owner will lease the Project Premises, including the IDA Units, to DLJ pursuant to a lease agreement (the "Prime Lease") for fair market value rent.

(iv) DLJ will then lease the Project Premises, including the IDA Units, to the IDA pursuant to a lease agreement (the "Facility Lease") for nominal rent. The IDA, which also holds title to the Improvements, will lease the Project Premises (including the IDA Units and the Improvements) and the Equipment and Leased Equipment back to the Group Agents pursuant to a lease agreement (the "Financing Lease") for an amount sufficient to repay the Bonds (the "Debt Service Payments").

b. Equipment. The following structure is proposed to secure the tax benefits offered by the IDA to DLJ with respect to Equipment.

(i) Leasing Corp. continuing its present practice, will purchase Equipment and then lease such Equipment used at the Approved Premises to the Group Agents acting on behalf of and as agents of the IDA, pursuant to the Master lease, for fair market value rent.

(ii) The IDA will lease such Equipment back to the Group Agents pursuant to the Financing Lease for the Debt Service Payments.

c. Leased Equipment. The following structure is proposed to secure the tax benefits offered by the IDA to DLJ with respect to Leased Equipment.

(i) The Group Agents acting on behalf of and as agents of the IDA will enter into leases for Leased Equipment with third party vendors for fair market value rent.

(ii) The IDA will lease the Leased Equipment back to the Group Agent which is to use such Leased Equipment pursuant to the Financing Lease for the Debt Service Payments.

d. Other Facts. The Overlease will require the Owner to pay the PILOT due from DLJ in the event DLJ should fail to make such payments under the PILOT Agreement. In addition, the Overlease will contemplate the potential for additional units to be conveyed to the IDA in connection with DLJ's expansion options, and will become applicable to such additional units upon the conveyance thereof to the IDA.

The Prime Lease will, among other things, require DLJ to (i) pay fair market value rent with respect to the Project Premises, (ii) pay taxes imposed against the Project Premises, if any, and (iii) reimburse the Owner for any PILOT paid by the Owner under the Overlease as a result of a DLJ default under the PILOT Agreement. The Prime Lease also will contain various expansion options which, if exercised, may result in the conveyance of additional unit(s) to the IDA. In the event such additional conveyances are consummated, the deeds executed in connection therewith will grant the same type of interest to the IDA and contain the same reverters as the Initial Deed.

The PILOT Agreement will require that DLJ pay PILOT to a PILOT Trustee. The Owner's obligation to pay PILOT under the Overlease will be secured by a first mortgage on the IDA Units ("PILOT Mortgage") to be granted by the Owner as mortgagor to the IDA as mortgagee. The existing mortgage on the Building will be subordinated to the PILOT Mortgage.

Under the Project Agreement (but only for the purpose of the Project Agreement, as DLJ has no intention to remove the Improvements), among other things and with certain limited exceptions, (i) none of the Improvements may be removed from the Project Premises prior to the expiration of three years after the installation or location of such Improvements at the Project Premises and (ii) none of the Equipment or the Leased Equipment may be removed from the Approved Premises (except for removals from one Approved Premises to another Approved Premises) prior to the

expiration of the period provided for in the Project Agreement following the location of such Equipment or Leased Equipment at the Approved Premises (the periods referred to in clauses (i) and (ii) above, the "Retention Period").

At the end of the Project term (or earlier if the Bonds have been redeemed in full), the Improvements, the leasehold interests in the Equipment and Leased Equipment and all rights under the Exempt Service Contracts may be purchased from the IDA by the Group Agent which exercises a purchase option (the "Option") under the Financing Lease for an aggregate option price of \$1.00 (the "Option Price").

If any of the Improvements is removed from the Project Premises or any of the Equipment or Lease Equipment is removed from the Approved Premises prior to the expiration of the Retention Period, other than upon the occurrence of certain specified grounds for such removal (i.e., obsolescence, uselessness, or another good faith reason), the Group Agents must pay the IDA an amount equal to the net present value, at the time of removal, of the sales or compensating use tax which would have been required to be paid at the time of original purchase if such item had been purchased or leased by a Group Agent in its own name on the date of its original purchase, based upon a purchase price equal to its fair market value as of the date of such removal (the "Premature Removal Penalty").

The Project Agreement will provide that certain amounts paid to purchase Acquisitions and related Exempt Service Contracts will be exempt from State and local sales and use taxes. The Project Agreement contemplates that benefits will be received by the DLJ Group over a period of approximately twenty-two (22) years (beginning August 9, 1994, and ending March 31, 2016). Benefits allocated to but not used during the portion of the period while the Building is prepared for DLJ's relocation will be reallocated to the portion of the period after such relocation, for on-going expenditures. All remaining benefits must be used by the end of the period or forfeited. With respect to the Common Area, only the purchase price of materials to be incorporated into Improvements to the IDA Share of the Common Area will be exempt from tax. (DLJ is not expected to pay for any excess of the total costs of Improvements to the Common Area over that portion of such costs which corresponds directly to the IDA Share of the Common Area.)

The IDA and a banking institution designated by the IDA (the "Bond Trustee") will enter into a trust indenture (the "Trust Indenture") to provide for the issuance from time to time by the IDA of the Bonds. The term of the Bonds will end upon the earlier to occur of the maturity date (March 31, 2016) or the redemption of all of the Bonds prior to maturity. However, DLJ is entitled to redeem less than all of the Bonds from time to time, subject to certain requirements of the IDA. Bond proceeds may not be used to finance (i) payments under maintenance contracts (including Exempt Service Contracts) or (ii) that portion of any lease payment for Equipment or for Leased Equipment not otherwise attributable to the deemed "principal portion" of the payments due for such Equipment or Leased Equipment.

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, 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:

. . . 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(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:

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

(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell . . . the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer. (2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. (3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person

who will resell the property. The receipts are subject to tax at the time of the retail sale.

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

(2) 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) . . . (c) industrial development authorities

Section 862 of the General Municipal Laws provides, in relevant part:

Restrictions on funds of the agency

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: (1) 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 service the public purposes of this article by preserving permanent, private sector jobs in the state. Where the agency makes such 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 of the General Municipal Law provides, in relevant part:

(1) It is hereby determined that the creation of the agency and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state of New York and is a public purpose, and the agency shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities.

(2) Any bonds or notes issued pursuant to this title, together with the income therefrom, as well as the property of the agency, shall be exempt from taxation, except for transfer and estate taxes.

Section 917-a of the General Municipal Law establishes the New York City Industrial Development Agency as an industrial development agency in general having the powers of industrial development agencies under Article 18-A of the General Municipal Law.

In Wegmans Food Market, Inc v. The Department of Taxation and Finance of the State of N.Y., (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) ("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 authorities pursuant to Article 18-A of the General Municipal Law, and accordingly their construction was financed by industrial development bonds ("IDBs") issued by the various industrial development agencies. The respective agencies held legal title to the projects 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 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 project lease arrangement between an IDA and the private developer it is a financing lease with the "rent" paid thereunder consisting only of amortized costs and expenses related to the project financing and the IDBs. The IDAs do not pay the costs of utilities or other operational expenses; nor do the leases suggest that the "rent" has been adjusted so as to account for the developer's payment of operational expenses. The lease is simply a financing tool, designed to secure tax-exempt IDBs, which are part of an overall plan benefitting, financially, the private developer and IDB purchasers. Of course, if IDAs are not authorized to operate a business then it would have no authority to designate agents to do that which they could not do themselves.

Although some of the numerous expenses listed by plaintiff in their [sic] complaint may be exempt (such as expenses necessary to preserve or repair project property), not all of the claimed expenses 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 of 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 all real and personal properties located within the state of New York

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In accordance with the sections of law and regulations cited above and the decisions in Wegmans Food Markets Inc. v. Department of Taxation and Finance (126 Misc 2d 144, affd 115 AD2d 962, lv to app den 67 NY2d 606) and Wegmans Food Markets Inc. v. The Department of Taxation and Finance of the State of N.Y., (Sup Ct, Monroe County, 3an. 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) Leasing Corp.'s purchases of Equipment for resale to the Group Agents will be exempt from taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law (sales and use taxes), provided that Leasing Corp. gives the Equipment vendor a properly completed form ST-120, Resale Certificate, as discussed in sections 526.6(c), 526.7(a) and 526.7(c) of the Sales and Use Tax Regulations.

(b) Leasing Corp.'s purchases of tangible personal property to be incorporated as Improvements (including from the Fund and with respect to the IDA Share of the Common Area), as agent for and on behalf of the IDA pursuant to the Exemption Letter and, as applicable, the Project Agreement, will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, provided that the IDA is the owner, lessor or lessee of the property and that the purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser, lessor or lessee and that the Group Agent (in this instance, Leasing Corp.) effecting the purchase or lease is the disclosed agent of the IDA.

(c) Rent payments made after March 5, 1995, for Equipment to Leasing Corp. by the Group Agents, as agents for and on behalf of the IDA, pursuant to the Master Lease, Exemption Letter and, as applicable, Project Agreement, will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, provided that the IDA is the lessee of the Equipment.

(d) Rent payments for Leased Equipment made to third party vendors by the Group Agents, as agents for and on behalf of the IDA, pursuant to the Exemption Letter and, as applicable, the Project Agreement, will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, provided that the IDA is the lessee of the Leased Equipment, that the lease documents provide that the IDA is the lessee and that the Group Agents are the disclosed agents of the IDA. Morgan Stanley Group Inc., Adv. Op. Comm. T&F, December 16, 1993, TSB-A-93(69)S.

(e) Payments made under Exempt Service Contracts by the Group Agents, as agents for and on behalf of the IDA, for the purchase of the service of maintaining, repairing or servicing real property or tangible personal property, consisting of the Improvements, Equipment and Leased Equipment, with a useful life of one year or more, and which comprises part of or is in use at the Approved 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 the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, to the extent that such Exempt Service Contracts, services and parts, are necessary to maintain, repair or service Improvements, Equipment and Leased Equipment used as part of the Project, and provided that the IDA is the owner, lessor or lessee of the Improvements, Equipment and Leased 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 the Group Agents are the disclosed agents 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

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Improvements, Equipment or Leased 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 Wegmans Food Markets, Inc. v. The Department of Taxation and Finance of the State of N.Y. (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, 3.) supra.

However, it is noted that in a transaction where the charge is for both taxable maintenance and repair services and an Exempt Services Contract, the total charge will be subject to the tax imposed under section 1105(c)(3) or (5), 1107, 1109 or 1110 of the Tax Law, unless the portion of the charge applicable to the Exempt Service Contract is separately stated from the other charges or otherwise reasonably allocated.

(f) Debt Service Payments made to the IDA under the Financing Lease will not be subject to the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(g) Payments of Reimbursements by a Group Agent to Leasing Corp. and payments with respect to Reimbursement Loans made by a Group Agent to DLJ with respect to the Group Agent's share of the cost of Improvements, which costs were incurred as agent for and on behalf of the IDA, will not be subject to the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(h) The Option Price paid by a Group Agent to the IDA at the time the Option under the Financing Lease is exercised will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(i) The amount paid to the IDA as a Premature Removal Penalty by any of the Group Agents for the premature removal of property will not be subject to the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

DATED: August 18, 1995

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

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