

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

TSB-A-95 (42)S  
Sales Tax  
December 19, 1995

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950425A

On April 25, 1995 a Petition for Advisory Opinion was received from CS First Boston Corporation, 55 East 52nd Street, Park Avenue Plaza, New York, New York 10022.

Petitioner, CS First Boston Corporation, states the issues as follows:

- (A) Whether Petitioner's payments, as agent of and on behalf of the IDA, to purchase Eligible Personalty will be subject to sales and compensating use taxes.
- (B) Whether Petitioner's payments, as agent of and on behalf of the IDA, to purchase Improvements will be subject to these taxes.
- (C) Whether Petitioner's payments, as agent of and on behalf of the IDA and also Metlife, to purchase certain Improvements will be subject to these taxes.
- (D) Whether Metlife's payments to reimburse Petitioner for amounts Petitioner paid to purchase materials used to construct certain Improvements will be subject to these taxes.
- (E) Whether Petitioner's Debt Service Payments to the IDA will be subject to these taxes.

Petitioner presents the following facts. The petition for an advisory opinion concerns a proposed transaction (the "Project") between the New York City Industrial Development Agency (the "IDA") and CS First Boston Corporation ("CS First Boston") and certain of its affiliates (together with CS First Boston, "CSFB"). The Project is intended to induce CS First Boston to retain its headquarters and maintain certain minimum levels of employment in New York City (the "City") for approximately twenty (20) years and encompasses the acquisition of materials to be incorporated into leasehold improvements which materials will become an integral component part of the structure, building or real property (together, the real property) to which the IDA has title (the "Improvements") at the premises to be occupied by CSFB as well as furniture, machinery, trade fixtures and other tangible personal property (the "Eligible Personalty") for use by CSFB at premises in the City over the term of the Project. The Project will not exceed the allowable 1/3 retail facilities restriction of section 862 of the General Municipal Law.

In connection with the Project, the IDA will extend certain economic benefits to CSFB to reduce CSFB's cost of retaining its headquarters and other operations in the City. Among these benefits is an exemption from the New York State and New York City sales and use tax (the "Sales

Tax") with respect to the Improvements and the Eligible Personalty. The exact terms under which the Sales Tax exemption will be available will be set forth in a Project Agreement, a Sales Tax Letter (the "Sales Tax Letter"), and other agreements to be entered into between the IDA and CSFB (collectively, the "IDA Agreements").

a. Improvements. The structure pursuant to which it is proposed that Sales Tax benefits will be available to CSFB in respect of the Improvements is as follows:

(1) The premises to be occupied by CSFB as its headquarters are owned by Metropolitan Life Insurance Company ("Metlife") and are located at 11 Madison Avenue, New York, New York (the "Building"). In order to facilitate CSFB's arrangement with the City, Metlife will condominiumize the Building and convey title to the premises to be occupied by CSFB (the "Project Premises") to the IDA for a nominal amount. This conveyance will give the IDA legal title to the Project Premises, which by law will include the Improvements. The IDA will then lease the Project Premises back to Metlife pursuant to a lease agreement for a nominal rent (the "Overlease"). Under the Overlease, the Project Premises will include the Improvements as and when constructed.

(2) Metlife will have previously leased the Project Premises to CS First Boston under a lease that is for a fair market value rent and reflects the parties' economic arrangement (the "Prime Lease"). Under the Prime Lease, the Project Premises will include the Improvements as and when constructed.

(3) CS First Boston will then sublease the Project Premises to the IDA for nominal rent (the "Facility Lease") and the IDA will lease back the Project Premises to CSFB pursuant to a lease agreement (the "Financing Lease") for an amount sufficient to repay certain bonds, described below, to be sold by the IDA to finance partially the Improvements as well as to finance partially the Eligible Personalty. The Project Premises subject to the Facility Lease and the Financing Lease will include the Improvements as and when constructed.

(4) CS First Boston is a broker-dealer subject to regulation by the New York Stock Exchange and the Securities and Exchange Commission. Under the rules of these entities, CS First Boston is subject to regulatory capital requirements under which CS First Boston's ability to conduct its business as a broker-dealer is based upon the total amount of regulatory capital shown on its financial statements. Pursuant to applicable rules, the Improvements, if owned by CS First Boston, generally would have the effect of reducing CS First Boston's regulatory capital, thereby limiting its ability to conduct its business. Accordingly, it has been determined that the cost of a majority of the Improvements will be paid for by Metlife and that, for financial reporting and federal income tax purposes, such Improvements will be owned by Metlife.

Although most of the Improvements will be constructed after the Building is subjected to the condominium regime described above, some of the Improvements will be made prior to the creation of the condominium units in accordance with the Sales Tax Letter and the structure described below. The Improvements will be constructed in the following manner: Pursuant to the IDA Agreements, (i) CSFB will be appointed as an agent of the IDA for the purpose of acquiring the materials to be

incorporated into the Improvements (as well as for the purpose of acquiring the Eligible Personalty ,as discussed below), and (ii) CS First Boston will be authorized to designate Metlife as its sub-agent of the IDA to permit Metlife to purchase materials to be incorporated into the Improvements as agent of and on behalf of the IDA, provided that such purchases by Metlife shall only be permitted to be effected through CS First Boston acting as contractor for Metlife. Pursuant to an Agreement of Sub-Agency, between CS First Boston as agent of the IDA and Metlife, Metlife will be designated a sub-agent of CS First Boston in its capacity as agent of the IDA, and shall be permitted to make purchases through CS First Boston as agent of the IDA and as general contractor for Metlife. Pursuant to a Construction Agreement between Metlife and CS First Boston, CS First Boston will be appointed by Metlife as its agent for purposes of constructing certain Improvements. CS First Boston, (a) with respect to such Improvements which will be made by Metlife, acting in CS First Boston's capacity as IDA agent as well as Metlife agent, and (b) with respect to other Improvements which will be made by CS First Boston, acting in its capacity solely as IDA agent, will contract with a general contractor or act as a general contractor to build the Improvements. Legal title to all such Improvements will be held by the IDA. Upon the purchase of materials to be incorporated into the Improvements, CS First Boston will present the Sales Tax Letter entitling it to an exemption from Sales Tax for such materials and will make such purchase(s) as agent for the IDA.

In accordance with the Prime Lease, from time to time CS First Boston will submit to Metlife an invoice detailing, and requesting reimbursement for, amounts paid by CS First Boston to purchase the Improvements (including materials to be incorporated as an integral component part of real property to which the IDA has title) made by CS First Boston, as agent of the IDA and as general contractor of Metlife. Metlife will then reimburse CS First Boston for eligible amounts expended by CS First Boston. The Prime Lease will provide that, for financial reporting and federal income tax purposes, these Improvements for which Metlife makes such reimbursements will be owned by Metlife. Legal title to all such Improvements, however, will be held by the IDA.

During the period before Metlife has converted the Building to condominium units (the "Interim Period"), CSFB will sublease the Project Premises to the IDA for a nominal amount and the IDA will sub-sublease the Project Premises back to CSFB. Construction of the Improvements and purchase of materials to be incorporated as integral component parts of the real property will commence during the Interim Period. Following Metlife's transfer of the condominium units to the IDA, this sublease and sub-sublease will be amended and restated as the Facility Lease and the Financing Lease, respectively, as described in paragraph number (3) above.

(5) With respect to the portion of the purchase price of the materials used to create the Improvements, which materials will become an integral component part of the real property to which the IDA has title, the IDA will from time to time issue special obligation revenue bonds (the "Bonds"). The Bonds likely will be sold to an affiliate of CS First Boston but may also be sold to independent third parties. Proceeds raised from the sale of the Bonds will be used to reimburse CS First Boston for the purchase price (i) of the materials to be incorporated into the Improvements (which purchase price will also be reimbursed by Metlife to CS First Boston with respect to those materials paid for by CS First Boston acting in its dual capacity as agent of the IDA and general

contractor of Metlife) and (ii) of the Eligible Personality. The rent paid by CS First Boston to the IDA under the Financing Lease will be sufficient to pay interest and principal on the Bonds (the "Debt Service Payments").

b. Eligible Personality. The structure pursuant to which it is proposed that Sales Tax benefits will be available to CSFB with respect to the Eligible Personality is as follows:

(1) One or more members of CSFB, acting pursuant to the IDA Agreements as agent of the IDA, will purchase Eligible Personality on behalf of the IDA for use at the Project Premises. The IDA will have legal title to, or a leasehold interest in, the Eligible Personality. In connection with the purchases, the applicable member of CSFB will present the Sales Tax Letter to the supplier indicating that the member is entitled to exemption from sales tax.

(2) The IDA will lease the Eligible Personality to CSFB pursuant to the Financing Lease.

(3) As in the case of the Improvements, the IDA will sell Bonds to a CS First Boston affiliate or to a third party and the proceeds of the sale of such Bonds will reimburse the applicable members of CSFB for their cost to purchase the Eligible Personality. The rent paid by members of CSFB to the IDA under the Financing Lease will also be sufficient to pay the Debt Service Payments attributable to the Eligible Personality.

#### Applicable Law and Regulations

Section 1101(b)(5) of the Tax Law defines "[s]ale, selling or purchase" as: "[a]ny 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 1101 (b) (9) (i) of the Tax Law defines "capital improvement" as:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

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 except ... (iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter; ... .

(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 capital improvement is defined in paragraph nine 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:

(a) Except to the extent that property or services have already been or will be subject to 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 the services described in [paragraph] (1) ... of subdivision (c) of section eleven hundred five, (D) of any tangible personal property ... not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five have been performed ... .

Section 1115 of the Tax Law provides, in relevant part:

Exemptions from the sales and use taxes. -- (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten: ...

(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 or 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.

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 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 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: (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 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.

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.

Opinion

Based on the structures under which the IDA proposes to make sales tax benefits available to CSFB with respect to Improvements and Eligible Personalty, as described by Petitioner in its petition, in accordance with the sections of law and regulations cited above and the decisions in Wegmans Food Markets v. Department of Taxation and Finance (126 Misc 2d 144, aff'd 115 AD2d 962, lv to app den 67 NY2d 606) and Wegmans Food Markets v The Department of Taxation and Finance of the State of N.Y. (Sup Ct, Monroe County, Jan. 10, 1992, Galloway, J.), and provided that all the terms and conditions of the relevant documents are complied with, and that these terms and conditions are consistent with Petitioner's description of them as set forth above, in the instant matter:



(A) Petitioner's payments, as agent of and on behalf of the IDA, to purchase Eligible Personalty will be exempt from sales and use taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, provided that the IDA is the owner or lessor of such property.

(B) An advisory opinion does not determine factual issues. Petitioner's petition does not indicate whether Petitioner's Improvements constitute capital improvements as defined in section 1101(b)(9) of the Tax Law. Therefore, this opinion cannot conclude whether such Improvements are capital improvements. If the Improvements do constitute capital improvements, then Petitioner's payments for these capital improvements will not be subject to sales and use tax imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law. But a purchaser's payment of the purchase price of materials used to construct capital improvements would be subject to tax (see section 1101(b)(4) of the Tax Law), unless otherwise exempt. In the instant case, if, before the IDA takes title to the real property, Petitioner or another person such as a contractor purchases the materials for the improvements, as agent of and on behalf of the IDA, the materials will be exempt from sales and use taxes pursuant to section 874 of the General Municipal Law, since the IDA is purchasing the materials through its agent. If, after the IDA takes title to the property, Petitioner or someone else purchases the materials and they become an integral component part of the real property to which the IDA has title, such purchases will also be exempt from these taxes pursuant to section 1115(a)(15) of the Tax Law, whether or not the purchaser is an agent of the IDA, since the IDA is an exempt organization described in section 1116(a)(1) of the Tax Law.

If the Improvements do not constitute a capital improvement under section 1101(b)(9) of the Tax Law, then the charges for such Improvements which do not constitute capital improvements will be exempt from such taxes only if the purchaser is an agent of the IDA. Thus, the payments to purchase Improvements which do not constitute capital improvements will be exempt from such taxes only where Petitioner makes purchases as agent of and on behalf of the IDA.

(C) Likewise, if the Improvements constitute capital improvements under section 1101(b)(9) of the Tax Law, Petitioner's payments to purchase such materials as agent of and on behalf of the IDA, and also as agent of Metlife, are similarly exempt from sales and use taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, subject to the same analysis and caveats as found in (B) above, and also provided that Metlife is a subagent of the IDA with respect to the purchase of these materials and Improvements.

(D) Metlife's payments to reimburse Petitioner for amounts Petitioner paid to purchase materials used to construct those Improvements with respect to which Petitioner acted as Metlife's agent as described above by Petitioner will not be subject to the sales and use taxes imposed under sections 1105, 1107, 1109, and 1110 of the Tax Law provided that Petitioner and Metlife purchased the materials as agent of and on behalf of the IDA.

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(E) Petitioner's Debt Service Payments to the IDA will not be subject to sales and use taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law. Prudential Securities Incorporated, Adv. Op. Comm. T&F, April 28, 1993, TSB-A-93(68)S.

DATED: December 19, 1995

/s/  
DORIS S. BAUMAN  
Director  
Technical Services Bureau

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