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Taxpayer Services Division
Technical Services Bureau

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Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S951108B

On November 8, 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 (the underlined terms are defined in Petitioner's statement of facts):

1. Whether Purchasing's purchase of Equipment pursuant to a resale certificate with the intention of leasing the Equipment to Leasing or to the Group Agents will be exempt from New York State and New York City Sales and Use Tax.
2. Whether Leasing's lease of Equipment and Leased Equipment pursuant to a resale certificate with the intention of leasing the Equipment and Leased Equipment to the Group Agents will be exempt from New York State and New York City Sales and Use Tax.
3. Whether Leasing's purchase of services under Service Contracts pursuant to a resale certificate with the intention of reselling the services to the Group Agents will be subject to New York State and New York City Sales and Use Tax.
4. Whether Petitioner's purchase, on behalf of and as agent of the IDA, of materials to be incorporated into Improvements to the IDA Share of the Common Area, pursuant to the Exemption Letter and the Project Agreement, will be exempt from New York State and New York City Sales and Use Tax.
5. Whether the purchase of materials to be incorporated into the Owner Improvements to the IDA Share of the Common Area by Petitioner, on behalf of and as agent of the IDA, and as general contractor for the Owner, pursuant to the Exemption Letter and the Project Agreement, will be exempt from New York State and New York City Sales and Use Tax.
6. Whether Leasing's rent payments to Purchasing to purchase Equipment (including Computer Software) will be exempt from New York State and New York City Sales and Use Tax.
7. Whether Leasing's rent payments to third party vendors to purchase Leased Equipment (including Computer Software) will be exempt from New York State and New York City Sales and Use Tax.

8. Whether the Group Agents' rent payments, on behalf of and as agents of the IDA, to Purchasing or to Leasing, for Equipment or Leased Equipment (including Computer Software), pursuant to the Master Lease, where applicable, and to the Exemption Letter and Project Agreement, will be exempt from New York State and New York City Sales and Use Tax.
9. Whether the Group Agents' payments, acting on behalf of and as agents of the IDA, under Exempt Service Contracts will be exempt from New York State and New York City Sales and Use Tax.
10. Whether debt service payments to the IDA under the Financing Lease with respect to Improvements, Owner Improvements, Equipment and Leased Equipment will be exempt from New York State and New York City Sales and Use Tax.
11. Whether New York State and New York City Sales and Use Tax will be imposed on an Automatic Transfer.
12. Whether, at the time the Option is exercised, the amount paid to the IDA as the Option Price will be subject to the New York State and New York City Sales and Use Tax.
13. Whether any Premature Removal Penalty imposed on a Group Agent by the IDA will be deemed to be consideration for a sale subject to New York State and City Sales and Use Tax.

Petitioner presents the following facts. This petition for advisory opinion concerns a proposed transaction (the "Project") between the New York City Industrial Development Agency (the "IDA") and Petitioner and certain of its affiliates (the "Eligible Affiliates" and together with CS First Boston, "CSFB") intended to induce Petitioner to retain its headquarters in New York City (the "City") for approximately twenty two years. As part of the Project, CSFB will relocate to premises in a building at 11 Madison Avenue, New York, New York (the "Building") owned by the Metropolitan Life Insurance Company (the "Owner").

In connection with the Project, the IDA will extend certain economic development benefits to Petitioner 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 Petitioner's premises in the Building evidenced by Petitioner's obligation to make certain payments in lieu of real estate taxes ("PILOT") with respect to the 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 dated January 23, 1995, the Amended and Restated Pre-Bond Issuance Sales Tax Letter dated June 30, 1995, the Second Amended and Restated Pre-Bond Issuance Sales Tax Letter dated August 1, 1995, the Third Amended and Restated Pre-Bond Issuance Sales Tax Letter dated August 28, 1995, the Fourth Amended and Restated Pre-Bond Issuance Sales Tax Letter dated October 30, 1995 or the Letter of Authorization for Sales Tax Exemption (as applicable, the "Exemption Letter") and a Project agreement (the "Project Agreement"). The Exemption Letters apply to all purchases of property and service contracts under the Project.

In order to extend the real estate tax abatement to Petitioner, the IDA will take title to that portion of the Building to be occupied by CSFB, for which Petitioner will seek real estate tax abatement. Initially, CSFB will occupy approximately 1,100,000 square feet in the Building (not including the Building common area ("Common Area")).

Petitioner will have an expansion option with respect to additional space in the Building (the space initially to be occupied by Petitioner 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 CSFB 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 Petitioner and for which Petitioner will seek real estate tax abatement will consist of the condominium units initially conveyed by the owner to the IDA and, upon Petitioner'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 Petitioner, all purchases which the IDA intends to be eligible for exemption from sales and use taxes in connection with the Project (the "Acquisitions") must be made by the IDA through its designated agents within CSFB (the "Group Agents"). In addition to Petitioner, the following Eligible Affiliates have been designated as agents of the IDA under the Exemption Letter for purposes of the sales and use tax exemption: Madison Leasing Corp., CS First Boston Investment Management Corporation, CS First Boston Merchant Bank, Inc., CS First Boston Securities Corporation, CS First Boston USA, Inc., CS First Boston, Inc., and Lattice Trading, Inc. It is anticipated that from time to time certain additional Eligible Affiliates may be designated by Petitioner or the IDA as agents of the IDA for the purpose of purchasing property and services intended to be exempt from sales and use taxes under the Exemption Letter pursuant to the terms of the Project Agreement and the other Project documents. These 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 and where services acquired may be rendered, for use by CSFB in connection with the Project (collectively, all such sites authorized by IDA resolution, the "Approved Premises"). Currently, the Approved Premises consist of the Project Premises and other premises located at 55 East 52nd Street, 12 East 49th Street, 509 Madison Avenue, 599 Lexington Avenue, and 5 World Trade Center.

To finance most 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 CSFB (other than a Group Agent) or to unrelated third parties. Proceeds raised through the sale of the Bonds will be available (i) to make Acquisitions directly or (ii) to reimburse the Group Agents (or other members of CSFB) that may have advanced funds to make Acquisitions. These 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, CSFB will report the Acquisitions in the same manner that similar acquisitions were reported prior to the Project.

Petitioner, acting on behalf of and as agent of the IDA (as applicable, through contractors appointed by Petitioner in its capacity as agent of the IDA to act on behalf of and as agents of the IDA), shall purchase and install all materials to be incorporated as permanent improvements, additions and installations to the Project Premises and the associated Common Area (the materials as so incorporated, including any permanent replacements, enhancements and additions thereto but excluding the Owner Improvements (defined below), collectively, the "Improvements").

Certain of the materials to be incorporated as improvements to the Project Premises and the associated Common Area will be paid for by the Owner (the "Owner Improvements") with the result that they will be owned by the Owner for financial reporting and federal income tax purposes. Accordingly, Petitioner, as agent of the IDA, will purchase materials to be incorporated into the Owner Improvements, while acting also as general contractor for Owner, as explained below. Pursuant to a Construction Agreement between the Owner and Petitioner, Petitioner has been appointed by the Owner as its agent for purposes of constructing the Owner Improvements. Petitioner will from time to time (i) submit to the Owner an invoice detailing and requesting reimbursement of the costs of materials incorporated as the Owner Improvements to the Building by Petitioner, acting in its capacity both as agent of the IDA and general contractor and agent of the Owner and (ii) receive reimbursements from the Owner of such costs. As stated below, the Prime Lease contemplates that for financial reporting and federal income tax purposes, the Owner Improvements will be owned by Owner. Legal title to such Owner Improvements, however, will be held by the IDA. This structure was the subject of an Advisory Opinion issued on December 19, 1995.

Pursuant to Petitioner's corporate policy, (i) an affiliate of Petitioner, Madison Purchasing Corp. ("Purchasing"), is responsible for all purchasing within CSFB and (ii) another affiliate of Petitioner, Madison Leasing Corp. ("Leasing"), is responsible for all leasing within CSFB. Accordingly, Purchasing shall purchase outright all furniture, furnishings, machinery, equipment, or other personalty which retains its character as tangible personal property used at the Approved Premises (such personalty purchased outright, including any replacements, enhancements and additions thereto, collectively, the "Equipment"). Purchasing shall then resell such Equipment either to Leasing or to the Group Agents, acting on behalf of and as agents of the IDA.

Leasing shall enter into all leases with third party vendors for personalty and then shall re-lease such personalty to the Group Agents, acting on behalf of and as agents of the IDA (such leased personalty as so re-leased including any replacements, enhancements and additions thereto, collectively, the "Leased Equipment"). Leasing may also enter into contracts (i) for installation, maintenance, service and repair services to Equipment and/or Leased Equipment with third parties and/or (ii) for maintenance, service and repair services to Improvements and/or Owner Improvements with third parties and, in each case, re-sell such services to the Group Agents, acting on behalf of and as agents of the IDA; in the alternative, Group Agents, acting on behalf of and as

agents of the IDA, may enter into similar service contracts directly with applicable third parties (the service contracts, whether entered into between Leasing and third parties or the Group Agents and third parties, referred to herein as "Service Contracts"). In any event, the IDA will pass on the benefits and burdens of these Service Contracts to CSFB under the Financing Lease (in all cases, the services provided to the Group Agents under the Service Contracts with respect to Equipment and Leased Equipment having a useful life of one year or more, Improvements and/or Owner Improvements located or in use at the Approved Premises, including replacement parts but not including parts (e.g., a toner cartridge) that contain substances consumed in operating the Equipment, Leased Equipment, Improvements and/or Owner Improvements and that are replaced when the substance is consumed, collectively, the "Exempt Service Contracts").

As used herein, the terms Equipment and Leased Equipment shall each specifically include tangible personal property in the form of pre-written computer software, not limited as to any of the following (i) the medium by means of which the software is conveyed to the purchaser (including tangible media, e.g., computer disk, compact disc or magnetic tape, as well as intangible media, e.g., electronic transmission); (ii) the kind of equipment for which acquired (including computers, e.g., mainframe computers and peripherals, work stations, personal computers or networks, as well as related equipment, e.g., modems, printers, copiers, scanners, facsimile machines, equipment for video/multimedia teleconferencing or other telecommunications equipment); and (iii) whether or not such software is used on equipment in which the IDA has an interest (such computer software as not so limited, including any replacements, enhancements, upgrades pursuant to maintenance contracts and additions thereto, collectively, "Computer Software").

In connection with the Project and in order to lessen the administrative burden resulting from the Project, CSFB anticipates that it will cause Leasing to consolidate all separate sub-leases under the Project between it and the Group Agents acting on behalf of and as agents of the IDA for Equipment and Leased Equipment in use or to be used, and all Exempt Service Contracts rendered or to be rendered, at the Approved Premises into a single master agreement (the "Master Lease").

In addition, with respect to the Improvements and the Equipment, CSFB may enter into sale-leaseback transactions, as necessary, to obtain third party financing of the Improvements and the Equipment. It is expected that these sale-leaseback transactions will not be subject to the New York State and New York City Sales and Use Tax consistent with TSB-A-94(14)S. However, Petitioner does not now request an opinion with respect to these sale-leaseback transactions.

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

(i) Purchasing will purchase Equipment, pursuant to a resale certificate, and either (a) re-lease the Equipment to Leasing or (b) re-lease the Equipment to the Group Agents.

(ii) If Purchasing re-leases the Equipment to Leasing, Leasing will lease the Equipment from Purchasing, pursuant to a resale certificate, and then release the Equipment to the Group Agents acting on behalf of and as agents of the IDA, pursuant to the Master Lease. If Purchasing re-leases the Equipment to the Group Agents directly, the Group Agents will lease the Equipment acting on behalf of and as agents of the IDA.

(iii) The IDA will lease the 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. Leased Equipment. The following structure is proposed to secure the tax benefits offered by the IDA to Petitioner with respect to Leased Equipment.

(i) Leasing will enter into leases for Leased Equipment with third party vendors, pursuant to a resale certificate, and then re-lease the Leased Equipment 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 the Leased Equipment back to the Group Agents which are to use the Leased Equipment pursuant to the Financing Lease for the Debt Service Payments.

c. Other Facts. The Overlease will contemplate the potential for additional condominium units to be conveyed to the IDA in connection with Petitioner's expansion option and under other circumstances, and will become applicable to these additional units upon the conveyance of the additional units to the IDA.

The Prime Lease, among other things, requires Petitioner to (i) pay fair market value rent with respect to the Project Premises and (ii) pay taxes imposed against the Project Premises, if any. The Prime Lease contains an expansion option which, if exercised, may result in the conveyance of additional condominium unit(s) to the IDA. In the event the 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 Petitioner pay PILOT to a PILOT Trustee. Petitioner's obligation to pay PILOT will be secured by a form of security acceptable to the IDA.

Under the Project Agreement (but only for the purpose of the Project Agreement, as Petitioner has no intention to remove the Improvements or Owner Improvements), among other things and with certain limited exceptions, (i) none of the Improvements or Owner Improvements may be removed from the Project Premises prior to the expiration of three years after the installation or location of the Improvements or Owner Improvements at the Project Premises and (ii) none of the Equipment or the Leased Equipment may be removed from the Approved Premises prior to the expiration of three years after the location of the Equipment or Leased Equipment at the Approved Premises (the periods referred to in clauses (i) and (ii) above, the "Retention Period").

Generally, at the end of the Retention Period, the IDA will relinquish all of its right, title and interest to the Improvements, Owner Improvements, the leasehold interests in the Equipment and in the Leased Equipment, any interests in the Exempt Service Contracts, which right, title, and interest will vest in the Owner and/or the Group Agents for no consideration (the "Automatic Transfer").

At the end of the Project term (or earlier if the Bonds have been redeemed in full), the Improvements, Owner Improvements, the leasehold interests in the Equipment and in the Leased Equipment and all rights under the Exempt Service Contracts may be purchased from the IDA by the Group Agents pursuant to 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 or Owner Improvements is removed from the Project Premises or any of the Equipment or Leased 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 the 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 make Acquisitions (including, without limitation, Exempt Service Contracts) will be exempt from State and local sales and use taxes. The Project Agreement contemplates that benefits will be received by CSFB over a period of approximately twenty two (22) years (beginning January 23, 1995 and ending December 31, 2016). Any benefits not realized prior to December 31, 2016 will be forfeited. With respect to the Common Area, only the purchase price of materials to be incorporated into Improvements or Owner Improvements to the IDA Share of the Common Area will be exempt from tax. Petitioner is not expected to pay for any excess of the total costs of Improvements or Owner Improvements to the Common Area over that portion of such costs which corresponds directly to 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 of the maturity date (December 31, 2016) or the redemption of all of the Bonds prior to maturity. However, Petitioner 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 (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1101(b)(6) of the Tax Law defines "tangible personal property" as:

Corporeal personal property of any nature.... Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser.
...

Section 1101(b)(14) of the Tax Law defines "pre-written computer software" as:

Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1105 of the Tax Law provides, in relevant part:

...there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business, whether or not the services are performed directly ... or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith...

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term ... is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter. ...

Section 1107(a) of the Tax Law provides, in relevant part:

On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed ... within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivision (b) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 1109(a) of the Tax Law provides, in relevant part:

In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed within ... the metropolitan commuter transportation district ... and there shall be paid, additional taxes, at the rate of one-quarter of one percent, which shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article....

Section 1110 of the Tax Law provides, in relevant part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state ... (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items

are used as such or incorporated into a structure, building or real property by a contractor, subcontractor, or repairman in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, if items of the same kind are not offered for sale as such by such contractor, subcontractor or repairman or other user in the regular course of business, (C) of any of the services described in paragraphs (1), (7) and (8) of subdivision (c) of section eleven hundred five, (D) of any tangible personal property ... not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five have been performed

Section 1116(a) of the Tax Law provides, in relevant part:

... any sale ... by or to any of the following or any use ... by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations ... or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons; ...

Section 526.6(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.

*

*

(8) The resale exclusion also applies to a sale of service.

Example 12: A jeweler sends a customer's watch to a repairman for servicing. The charge by the jeweler to the customer is taxable. The charge to the jeweler by the repairman is not taxable because the service was purchased for resale by the jeweler.

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

- (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.
- (2) Among the transactions included in the words sale, selling, or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

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

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

Section 526.8(c) of the New York State Sales and Use Tax Regulations provides, in relevant part:

Tangible personal property does not include:

- (1) real property;

Section 529.2(a) of the New York State Sales and Use Tax Regulations provides, in relevant part:

* * *

- (2) A public corporation as used in this section means any corporation created by an act of the Legislature for a public purpose ...

Example: ... Industrial Development Agencies are public corporations and may purchase tangible personal property exempt from the sales and use taxes.

Section 541.3(a) of the New York State Sales and Use Tax Regulations provides, in relevant part:

When a contractor's customer is a governmental entity described in section 1116(a)(1) ... of the Tax Law, the contract signed by the government representative and the prime contractor is sufficient proof of the exempt status of purchases made for such contract.

- (1) Such governmental entities include:

- (i) Pursuant to section 1116(a)(1) of the Tax Law the State of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada), or political subdivisions. This group includes, but is not limited to:

* * *

(c) industrial development authorities.

Section 858 of the General Municipal Law provides, in relevant part:

... [E]ach agency shall have the following powers:

* * *

(3) To acquire, hold and dispose of personal property for its corporate purposes;

* *

(10) To acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects; ...

Section 862(2) of the General Municipal Law provides as follows:

(2)(a) Except as provided in paragraph (b) of this subdivision, no financial assistance of the agency shall be provided in respect of any project where facilities or property that are primarily used in making retail sales to customers who personally visit such facilities constitute more than one-third of the total project cost. For the purposes of this article, retail sales shall mean: (i) sales by a registered vendor under article twenty-eight of the tax law primarily engaged in the retail sale of tangible personal property, as defined in subparagraph (i) of paragraph four of subdivision (b) of section eleven hundred one of the tax law; or (ii) sales of a service to such customers. Except, however, that tourism destination projects and projects operated by not-for-profit corporations shall not be prohibited by this subdivision. For the purpose of this paragraph, "tourism destination" shall mean a location or facility which is likely to attract a significant number of visitors from outside the economic development region as established by section two hundred thirty of the economic development law, in which the project is located.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, financial assistance may, however, be provided to a project where facilities or property that are primarily used in making retail sales of goods or services to customers who personally visit such facilities to obtain such goods or services constitute more than one-third of the total project cost, where (i) the project occupant would, but for the assistance provided by the agency, locate the related jobs outside the state, or (ii) the predominant purpose of the project would be to make available goods or services which would not, but for the project, be reasonably accessible to the residents of the city, town, or village within which the proposed project would be located because of a lack of reasonably accessible retail trade facilities offering such goods or services, or (iii) the project is located in a highly distressed area.

(c) With respect to projects authorized pursuant to paragraph (b) of this subdivision, no project shall be approved unless the agency shall find after the public hearing required by section eight hundred fifty-nine of this chapter that undertaking the project will serve the public purposes of this article by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the state. Where the agency makes such a finding, prior to providing financial assistance to the project by the agency, the chief executive officer of the municipality for whose benefit the agency was created shall confirm the proposed action of the agency.

Section 874(1) and (2) of the General Municipal Law provides as follows:

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

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

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

In Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y., (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) ("Wegmans II"), the issues presented concerned generally the scope and applicability of the tax exemption established by section 874 of the General Municipal Law and, more specifically, whether that tax exemption applied to operational expenses incurred by plaintiff in the day-to-day operation of several projects in western New York State developed as its supermarkets. Those markets were constructed and equipped under agreements made with various municipal industrial development agencies pursuant to Article 18-A of the General Municipal Law, and accordingly their construction was financed by industrial development bonds ("IDBs") issued by the various local industrial development agencies. The projects were technically owned by the respective agencies as security for the bonds, but were under "lease back" arrangements with the plaintiff. In an earlier action, Wegmans Food Markets v. Department of Taxation and Finance, 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 a project lease arrangement between an IDA and the private developer, it is a financing lease with the

"rent" paid thereunder consisting only of amortized costs and expenses related to the project financing and the IDBs. The IDAs do not pay the costs of utilities or other operational expenses; nor do the leases suggest that the "rent" has been adjusted so as to account for the developer's payment of operational expenses. The lease is simply a financing tool, designed to secure tax-exempt IDBs, which are part of an overall plan benefitting, financially, the private developer and IDB purchasers. Of course, if IDAs are not authorized to operate a business then it [sic] would have no authority to designate agents to do that which they could not do themselves.

Although some of the numerous expenses listed by plaintiff in their [sic] complaint may be exempt (such as expenses necessary to preserve or repair project property), not all of the claimed expense would be exempt. Many of these expenses bear no relationship to the purchase, repair or replacement of project property per se but instead represent costs of supermarket business operations

Because all the expenses involved in this action do not have the same relationship to the IDA's ownership of the project and authorized functions under the financing scheme, the expenses must be individually examined to determine what, if any, relationship each bears to the authorized and lawful functions of an IDA, particularly the "maintenance" function. The exemption shall be applicable only to those expenses properly within such function and authority. In this regard, it should be noted that tax-exempt maintenance would be that needed to maintain the structural integrity of the structures constructed or rehabilitated to house the various supermarkets, or to repair equipment used as part of the project.

The use of utilities and washing of windows and other such operating expenses have nothing to do with the underlying financial scheme and should not be tax-exempt under the law. If one business is able to operate indefinitely without paying taxes on its operating expenses simply because at one time its structures were financed with IDBs, that business would have an apparently unintended, open-ended economic advantage over competitors, thereby flying in the face of the fundamental purpose of the law -- i.e., the development of economically sound commerce.

This decision is not inconsistent with (Wegmans I(supra)), where the tax exemption of section 874 was held applicable to the purchase of tangible personal property acquired and owned by the IDA, as 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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Based on the structures under which the IDA proposes to make sales and compensating use tax benefits available to Petitioner with respect to Improvements, Owner Improvements, Equipment, Leased Equipment and Exempt Service Contracts, and based on the other facts, as described by Petitioner in its petition, and in accordance with the sections of law and regulations cited above and the decisions in Wegmans Food Markets v. Department of Taxation and Finance (126 Misc. 2d 144, aff'd 115 AD2d 962, lv to app den 67 NY2d 606) and Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y., (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) supra, and provided that all the terms and conditions of the relevant documents are complied with, and that these terms and conditions are consistent with Petitioner's description of them as set forth above, in the instant matter:

- (a) Purchasing's purchases of Equipment for lease to Leasing or to the Group Agents will be exempt from taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law (together "sales and use taxes"), provided that Purchasing 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, and the Equipment is so leased to Leasing or to the Group Agents.
- (b) Leasing's lease of Equipment for re-lease to Group Agents will be exempt from sales and use taxes, provided that Leasing gives to Purchasing 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, and the Equipment is so re-leased to the Group Agents.
- (c) Leasing's purchases of services under Service Contracts for resale to Group Agents will not be subject to sales and use taxes, provided that Leasing gives the service provider 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, and the services are resold to the Group Agents, as described above.
- (d) & (e) Petitioner's purchase of materials to be incorporated into Improvements and Owner Improvements to the IDA Share of the Common Area, as agent for and on behalf of the IDA, and also as general contractor for Owner with respect to Owner Improvements, pursuant to the Exemption Letter, and, as applicable, the Project Agreement, will be exempt from sales and use taxes, provided that (i) the IDA is the owner, lessor or lessee of such property, (ii) the purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser, lessor or lessee and (iii) Petitioner is the disclosed agent of the IDA, and also contractor for the Owner if applicable.

(f) Leasing's rent payments to Purchasing to purchase Equipment (including Computer Software) will be exempt from sales and use taxes, provided that Leasing gives to Purchasing 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, and the Equipment is resold as described above.

(g) Leasing's rent payments to third party vendors to purchase Leased Equipment (including Computer Software) will be exempt from sales and use taxes, provided that Leasing gives the third party vendors 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, and the Leased Equipment is resold as described above.

(h) The Group Agents' rent payments, on behalf of and as agents of the IDA, paid to Purchasing or to Leasing for Equipment or Leased Equipment (including Computer Software), pursuant to the Master Lease, if applicable, and to the Exemption Letter and Project Agreement, will be exempt from sales and use taxes, provided that the IDA is the lessee of the Equipment or Leased Equipment, and the Equipment or Leased Equipment is leased as described above.

(i) Payments made under Exempt Service Contracts by the Group Agents, as agents for and on behalf of the IDA, (1) for purchases of the services of installing, maintaining, servicing and repairing tangible personal property, consisting of the 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), or (2) for purchases of the services of maintaining, servicing and repairing the Improvements or Owner Improvements which constitute real property, property or land, will be exempt from sales and use taxes, to the extent that (1) the Exempt Service Contracts, services and parts, with respect to Equipment and Leased Equipment, are necessary to maintain, repair or service such Equipment and Leased Equipment used as part of the Project, and provided that the IDA is the owner, lessor or lessee of such Equipment and Leased Equipment, or (2) the Exempt Service Contracts, services and tangible personal property, with respect to Improvements and Owner Improvements, are necessary to maintain the structural integrity of the Improvements and Owner Improvements, and provided that the IDA is the owner of such Improvements and Owner Improvements, and also provided that the purchase invoices, statements and contracts with vendors and suppliers for services described in preceding clauses (1) and (2) provide that the IDA is the purchaser, lessor or lessee with respect to Equipment and Leased Equipment and that the IDA is the purchaser with respect to Improvements and Owner Improvements, and that the Group Agents are the disclosed agents of the IDA. In any instance where the installation, maintenance, servicing or repair service results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of the 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 sales and use taxes, as indicated in Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y. (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) supra. The purchase and use of fuels and energy and utility services are not tax-exempt. Id.

However, it is noted that in a transaction where the charge is for both taxable maintenance and repair services and qualifying exempt services under an Exempt Services Contract, the total charge will be subject to sales and use taxes, unless the portion of the charge applicable to the qualifying exempt services under the Exempt Service Contract is separately stated from the other charges or otherwise reasonably allocated.

(j) Debt Service Payments made to the IDA under the Financing Lease with respect to Improvements, Owner Improvements, Equipment and Leased Equipment will not be subject to sales and use taxes.

(k) Since the Owner and/or Group Agents do not pay any consideration upon an Automatic Transfer, as described above, the Automatic Transfer will not be subject to sales and use taxes.

(l) The Option Price paid by a Group Agent to the IDA at the time the Option under the Financing Lease is exercised will not be subject to sales and use taxes.

(m) The amount paid to the IDA as a Premature Removal Penalty by any of the Group Agents will not be subject to sales and use taxes.

All of the foregoing conclusions depend on compliance with the terms and conditions of all of the relevant Project documents, subject to any limitations set forth in such documents.

DATED: December 21, 1995

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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