

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

TSB-A-96 (59)S
Sales Tax
September 23, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950410A

On April 10, 1995, a Petition for Advisory Opinion was received from Manufacturers and Traders Trust Company, c/o Christopher L. Doyle, Esq., 1800 One M & T Plaza, Buffalo, New York 14203-2391.

The issue raised by Petitioner, Manufacturers and Traders Trust Company, is whether its purchase of certain tangible personal property, included in the New York assets of Monroe Savings Bank, FSB, from the Federal Deposit Insurance Corporation (the "FDIC") is exempt from sales and compensating use tax pursuant to Section 1116(a)(2) of the Tax Law.

Petitioner is a banking corporation organized under New York law and has its principal place of business in Buffalo, New York. Monroe Savings Bank, FSB ("Monroe") was, prior to January 26, 1990, a banking corporation, with its principal place of business in Rochester, New York.

On or about January 26, 1990, the Office of Thrift Supervision determined that Monroe was insolvent, closed Monroe and appointed the FDIC as receiver of Monroe's assets pursuant to provisions of Federal law. See 12 USC §1821(c)(2).

Also on January 26, 1990, the FDIC and Petitioner entered into a Purchase and Assumption Agreement ("the Agreement"). Pursuant to Paragraph 3.1(a) of the Agreement, Petitioner purchased from the FDIC all of the assets formerly held by Monroe except as specifically excluded. Paragraph 3.2 of the Agreement and Schedule C to the Agreement list the assets that were excluded from the transaction. Taken together, the provisions of the Agreement required that Petitioner purchase substantially all of the tangible and intangible assets relating to Monroe's New York banking business, with the exception of certain tangible and intangible assets which did not relate to the day-to-day banking business previously engaged in by Monroe in New York. Included in these assets were office furniture and equipment and other tangible personal property. The value of such tangible personal property constituted only a small percentage (less than 0.2%) of the value of all of the Monroe assets purchased by Petitioner pursuant to the Agreement.

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

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article.

* * *

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

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Section 1819 of Title 12 of the U.S. Code which sets forth the corporate powers of the FDIC, does not confer general Federal instrumentality status on the FDIC. Section 1819(b)(1) provides that "[t]he Corporation [FDIC], in any capacity, shall be an agency of the United States for purposes of section 1345 of title 28, without regard to whether the Corporation commenced the action." (28 USC §1345 concerns original jurisdiction in the federal District courts for suits commenced by agencies of the Federal government.) In contrast, the Federal statute creating the Resolution Trust Corporation, which Petitioner asserts is analogous to the FDIC, provides that "[t]here is hereby established a Corporation to be known as the Resolution Trust Corporation which shall be an instrumentality of the United States (12 USC §1441a(b)(1)(A), emphasis added.) The difference in the language of these two provisions is significant. In Federal Deposit Insurance Corp. v. State of New York, the Federal District Court specifically held that the FDIC was not a Federal instrumentality and that the agency status granted by 12 USC §1819 is limited to its one stated purpose (732 F Supp 26 (S.D. N.Y. 1990), affd 928 F 2d 56 (2nd Ct. 1991)). It is the Department's position that the FDIC is not an agency or instrumentality of the United States for the purpose of Section 1116(a)(2) of the Tax Law.

The conclusion that the FDIC is not a Federal agency or instrumentality for purposes of Section 1116(a)(2) of the Tax Law does not mean that the FDIC itself may be held liable for sales and compensating use taxes. The FDIC is exempted from these taxes by 12 USC §1825. However, since the FDIC is not an agency or instrumentality of the United States for purposes of Section 1116(a)(2) of the Tax Law, Petitioner's purchase of tangible personal property from the FDIC was not exempt from sales and compensating use tax pursuant to that section and Petitioner is liable for the tax. Since the FDIC is not an agency or instrumentality of the United States within the meaning of Section 1116(a)(2) of the Tax Law, it is not necessary to address whether the property sold is "of a kind not ordinarily sold by private persons."

DATED: September 23, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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