

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

TSB-A-97(70)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960116A

PETITION NO. S960116B

On January 16, 1996, the Department of Taxation and Finance received Petitions for Advisory Opinion from Travelers Group Inc., 388 Greenwich Street, New York, NY 10013 (S960116A) and Smith Barney Inc., 388 Greenwich Street, New York, NY 10013 (S960116B).

Petitioners, Smith Barney Inc. and Travelers Group Inc., each state the issues and facts as follows.

(1) Installation Services. Whether (1) payments made by a Group Agent to vendors for Exempt Installation Services and (2) payments made to a Group Agent by an Eligible Affiliate Agent which constitute an allocation of costs for Exempt Installation Services for purchases of the services of installing tangible personal property consisting of the Equipment, are exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(2) Computer Software. (a) Whether the acquisition, leasing, subleasing, licensing or sublicensing of Computer Software by Travelers, on behalf of and as agent of the IDA, in an intangible medium (e.g., by electronic transmission) is exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(b) Whether the acquisition, leasing, subleasing, licensing or sublicensing of Computer Software by Travelers, on behalf of and as agent of the IDA, for use in computers and other equipment not previously or concurrently acquired by the IDA (i.e., for use in computers and other equipment owned by Travelers) is exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(c) Whether payments to third parties for Exempt Maintenance Services or Exempt Installation Services with respect to Computer Software acquired, leased, subleased, licensed, or sublicensed by Travelers, on behalf of and as agent of the IDA, (which Exempt Maintenance Services or Exempt Installation Services may include the providing of upgrades to such Computer Software) will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(d) Whether the term Equipment, as used in TSB-A-95(35)S, shall specifically include Computer Software and all rulings issued with respect to Equipment in the Advisory Opinion shall be applicable to Computer Software.

The petitions for advisory opinion concern a transaction (the "TGI Project") between the New York City Industrial Development Agency (the "IDA") and Travelers Group Inc. ("TGI"), Smith Barney Inc. ("SBI") and certain eligible affiliates (TGI, SBI and eligible affiliates are collectively referred to as "Travelers") and are intended to supplement Smith Barney Inc. and Travelers Group Inc., Adv Op Comm T & F, August 18, 1995, TSB-A-95(35)S ("TSB-A-95(35)S") wherein the TGI Project is fully described. Except where otherwise indicated, (i) each capitalized term used but not defined herein shall have the meaning assigned to

such term in TSB-A-95(35)S and (ii) the statement of facts in TSB-A-95(35)S is hereby incorporated by reference into this opinion. One aspect of the description of the TGI Project in TSB-A-95(35)S requires clarification as a result of developments subsequent to the date of TSB-A-95(35)S.

a. Installation Services. Currently, the Agreement provides, inter alia, that purchases of the service of installing the Equipment, which comprises part of the Approved Locations or is in use at the Approved Locations (the "Exempt Installation Services") will be exempt from New York State and New York City sales and use taxes.

b. Computer Software. As currently drafted, the TGI Project documents do not authorize sales and use tax exemption for certain computer software subject to sales tax. For example, the Agreement authorizes exemptions for computer software only if:

such software shall be in a tangible form (i.e., diskettes, magnetic tape, etc.) . . . and only if such software shall be purchased concurrently with a computer which is being (or shall previously have been) acquired or leased by the [IDA] pursuant to this [Agreement].

At Travelers' request, the IDA has agreed to amend the Agreement as necessary to authorize an exemption for computer software consistent with the conclusions of this opinion.

Depending on the terms of the Agreement, as amended to reflect the conclusions of this opinion, Acquisitions in connection with the TGI Project could include computer software not limited as to any of the following:

(i) the medium by means of which conveyed (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 such software is used on equipment in which the IDA has an interest;

(such computer software as not so limited, including any replacements, enhancements and additions thereto, collectively, "Computer Software"). Such Computer Software would be acquired for the TGI Project by one or more of the Group Agents as agents for and on behalf of the IDA.

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 "prewritten computer software" as:

Computer software (including prewritten 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 prewritten computer software programs or pre-written portions thereof does not cause the combination to be other than prewritten 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. Prewritten software or a prewritten 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 prewritten 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 prewritten 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 ... 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 1115(a)(28) of the Tax Law provides:

Computer software designed and developed by the author or creator to the specifications of a specific purchaser which is transferred directly or indirectly to a corporation which is a member of an affiliated group of corporations within the meaning of subparagraph six of paragraph (b) of subdivision seventeen of section two hundred eight of this chapter except for clauses (ii) and (iii) of such subparagraph that includes such purchaser, or to a partnership in which such purchaser and other members of such affiliated group have at least a fifty percent capital or profits interest (but only if the transfer is not in pursuance of a plan having as its principal purpose the avoidance or evasion of tax under this article), but in no case including computer software which is pre-written, as defined in paragraph six of subdivision (b) of section eleven hundred one of this article and available to be sold to customers in the ordinary course of the seller's business.

Section 1115(o) of the Tax Law provides:

Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

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 526.7(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 526.8(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 854 of the General Municipal Law provides, in relevant part:

Definitions.

As used in this act, unless the context otherwise requires:

\* \* \*

(4) "Project" - shall mean any land, any building or other improvement, and all real and personal properties located within the state of New York and within or outside or partially within and partially outside the municipality for whose benefit the agency was created, . . . provided, however, no agency shall provide financial assistance in respect of any project partially outside the municipality for whose benefit the agency was created without the prior consent thereto by the governing body or bodies of all the other municipalities in which any part of the project is, or is to be, located. Where a project is located partially within and partially outside the municipality for whose benefit the agency was created, the portion of the project outside the municipality must be contiguous with the portion of the project inside the municipality.

\* \* \*

(14) "Financial assistance" - shall mean the proceeds of bonds issued by an agency, straight-leases, or exemptions from taxation claimed by a project occupant as a result of an agency taking title, possession or control (by lease, license or otherwise) to the property or equipment of such project occupant or of such project occupant acting as an agent of an agency.

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-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.

CS First Boston Corporation, Adv Op Comm T & F, December 21, 1995, TSB-A-95(43)S concluded that certain rent payments made by certain Group Agents, on behalf of and as agents of the IDA, with respect to Computer Software would be exempt from sales and use taxes provided that the IDA is the lessee of such Computer Software.

#### Opinion

Based on the structures, as described in TSB-A-95(35)S, under which the IDA proposes to make sales and compensating use tax benefits available to Travelers with respect to Exempt Installation Services and Computer Software, and based on the other facts, as described by each 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.), and provided that all the terms and conditions of the relevant documents, as amended or proposed to be amended, are complied with, and that these terms and conditions as amended or proposed to be amended, are consistent with Petitioners' description of them as set forth above and as incorporated by reference from TSB-A-95(35)S, in the instant matter:

(1) Payments made by a Group Agent, on behalf of and as agent of the IDA, to vendors for Exempt Installation Services and payments made to a Group Agent by an Eligible Affiliate Agent, on behalf of and as agent of the IDA, which constitute an allocation of costs for Exempt Installation Services for purchases of the services of installing tangible personal property, consisting of the Equipment, with a useful life of one year or more, and which comprises part of the Approved Locations or is in use at the Approved Locations, 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 sales and use taxes, to the extent that the Exempt Installation Services, services and parts, with respect to Equipment, are necessary to install such Equipment used as part of the TGI Project, and provided that the IDA is the owner, lessor or lessee of such Equipment, and also provided that the purchase invoices, statements and contracts with vendors and suppliers for services described in this paragraph provide that the IDA is the purchaser, lessor or lessee with respect to such Exempt Installation Services and such Equipment, and that the Group Agent is the disclosed agent of the IDA. In any instance where an installation service results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of such 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.

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

(2)(a) and (b) Travelers' acquisition, leasing, subleasing, licensing or sublicensing of Computer Software, on behalf of and as agent of the IDA, pursuant to the Agreement, as proposed to be amended, in an intangible medium (e.g., by electronic transmission), or for use in computers and other equipment not previously or concurrently acquired by the IDA (i.e., for use in computers and other equipment owned by Travelers), 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 such software and also provided that the purchase invoices, statements and contracts with vendors and suppliers for such Computer Software provide that the IDA is the purchaser, lessor or lessee with respect to the Computer Software and that Travelers is the disclosed agent of the IDA.

(c) Travelers' payments, on behalf of and as agent of the IDA, for Exempt Maintenance Services or Exempt Installation Services with respect to Computer Software acquired, leased, subleased, licensed, or sublicensed by Travelers, on behalf of and as agent of the IDA (which Exempt Maintenance Services or Exempt Installation Services may include the providing of upgrades to such Computer Software), which Computer Software is in use at the Approved Locations, will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law to the extent that such payments are for the purchase of Exempt Maintenance Services or Exempt Installation Services, with respect to the Computer Software, which are necessary to install, maintain, repair or service such Computer Software, or are for the purchase of other services to such software described in section 1115(o) of the Tax Law, provided that where such services are provided to Travelers, on behalf of and as agent of the IDA, or to the IDA, in conjunction with the sale of tangible personal property, any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of price given to Travelers or the IDA (see, section 1115(o) of the Tax Law). Notwithstanding the limitation regarding reasonable and separately stated charges in the prior sentence, where Travelers, on behalf of and as agent of the IDA, purchases tangible personal property in conjunction with such Exempt Maintenance Services or Exempt Installation Services with respect to Computer Software acquired, leased, subleased, licensed or sublicensed by the IDA, the purchase of such tangible personal property under such circumstances will be exempt from sales and use taxes where it is used as part of the Project, and provided that the IDA is the owner, lessor or lessee of such Computer Software and also provided that the purchase invoices, statements and contracts with vendors and suppliers for services described in this paragraph provide that the IDA is the purchaser, lessor or lessee with respect to the Computer Software, and that Travelers is the disclosed agent 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 Computer Software, 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.

As indicated, enhancements, modifications and upgrades to computer software which constitute services described in section 1105(c) of the Tax Law are exempt from the taxes imposed by sections 1105, 1107, 1109 and 1110 of the Tax Law pursuant to section 1115(o) of the Tax Law, provided that, however, where such services are provided to a customer in conjunction with the sale of tangible personal property, any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

It is noted that in a transaction where the charge is for both taxable services and qualifying exempt services, the total charge will be subject to sales and use taxes, unless the portion of the charge applicable to the qualifying exempt services is separately stated from the other charges or otherwise reasonably allocated.

It is also noted that, pursuant to section 854(4) and (14) of the General Municipal Law, the IDA may not offer financial assistance in the form of sales and compensating use tax exemptions with respect to property, including software, and services which are used outside the City of New York, without prior consent to such use of such property and services from the jurisdiction in which the property and services are to be used; and, in any case, any such project outside the City of New York must be contiguous to the portion of the project inside the City of New York. Thus, if property, including software, and services are used outside the City of New York without such prior permission, such use would be outside the scope of the IDA's authority and the property and services would be subject to New York State and local sales and use taxes. However, any additional access of software by remote means (telephone lines/modem, for example) from a location outside such jurisdiction should not lead to the conclusion that such software loaded and used at the IDA project is used impermissibly. This does not mean that the software can be downloaded to a computer located outside such jurisdiction for use outside such jurisdiction. Likewise, software could not be purchased as part of an IDA project exempt from tax and removed from such jurisdiction without violating section 854(4) of the General Municipal Law, unless the IDA obtains prior consent from any other contiguous New York municipality in which it will be used.

(d) To the extent that the term Equipment under the Project documents specifically includes Computer Software, then holdings in this advisory opinion with respect to Equipment would also be applicable to such Computer Software, with such modifications as may be necessary to reflect the law relating to computer software and services to computer software and to reflect differences in the nature of software as compared to such equipment, provided that such software is acquired in the manner that such equipment is acquired.

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

DATED: November 19, 1997

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

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