

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

TSB-A-89 (39)S
Sales Tax
November 6, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890817A

On August 17, 1989 a Petition for Advisory Opinion was received from 101 Limited Partnership, C/O Edward J. Minskoff Equities, Inc., 767 Fifth Avenue, New York, New York 10153.

The issue raised is whether purchases of materials, by Petitioner, 101 Limited Partnership, or Petitioner's contractors, subcontractors and materialmen, for use in construction and repair of a new building, capital improvements to such new building or any other improvements to the premises, will be exempt from the imposition of State and Local sales tax under the provisions of sections 1115(a)(15) and 1115(a)(16) of the Tax Law and from the imposition of city taxes under the provisions of Section 11-2006(a) (14) of the New York Administrative Code, when pursuant to the lease between Petitioner as tenant and the Rector, Church wardens and Vestrymen of Trinity Church in the City of New York (which is also known as and does business under the name, Corporation of Trinity Church), hereinafter referred to as "Landlord", such materials are to be permanently affixed and incorporated into property owned in fee by the Landlord.

Landlord is a religious corporation organized and operated exclusively for religious purposes in the State of New York. Landlord holds fee title to the real property known as 95-109 Avenue of the Americas, 8-18 Grand Street and 45-61 Watts Street in New York City, hereinafter referred to as "Premises".

Petitioner intends to lease from Landlord the Premises and any improvements thereon for a term of ninety-nine (99) years.

Pursuant to the lease, Petitioner will, at Petitioner's sole cost and expense, demolish all of the existing buildings on the Premises and construct a new building thereon, hereinafter referred to as the "New Building". Title to the New Building, and title to all materials purchased to construct the New Building or make other capital improvements to the Premises and the New Building is to vest in Landlord immediately upon the purchase of such materials. Upon expiration of the lease, or earlier termination thereof, Petitioner will surrender to Landlord the Premises, the New Building and other capital improvements to the Premises or New Building.

Petitioner contends that whereas Landlord is a religious corporation organized and operated exclusively for religious purposes and has received an exempt organization certificate from the Department of Taxation and Finance, Landlord is thus an organization described in section 1116(a)(4) of the Tax Law and section 11-2007(a)(4) of the New York Administrative Code. Moreover, whereas title to the New Building and all materials purchased to construct the New Building or to make other capital improvements to the Premises and the New Building is to vest in Landlord immediately upon the purchase of such materials before the incorporation of such materials into the New Building or such other premises, such purchases and use of materials to construct,

improve or repair improvements or additions to the New Building or the Premises should be exempt from the State and City sales taxes.

Section 1210 of the Tax Law states in relevant part:

Notwithstanding any other provision of law to the contrary ... any city in this state ... is hereby authorized and empowered to adopt and amend local laws, ordinances or resolutions imposing in any such city or county the following taxes ...:

(a)(1) Either all of the taxes described in article twenty-eight of this chapter at the same uniform rate, as to which taxes all provisions of the local laws, ordinances or resolutions imposing such taxes shall be identical ... with the corresponding provisions in such article twenty-eight, including the ... exemption provisions of such article, so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city ...

Under the provisions of Section 1210 of the Tax Law, Sections 1115(a)(15) and (16) apply in the instant case. The provisions of Section 11-2006(a)(14) are not applicable and, therefore, need not be addressed further.

Section 1105(a) of the Tax Law imposes a sales tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(4)(i) defines the term "retail sale" to include:

. . . [A] sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption 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... regardless of whether the tangible personal property is to be resold as such before it is so used or consumed....

Section 1115(a) of the Tax Law exempts from the sales tax imposed under section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110:

* * *

(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.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, 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.

Among the organizations described in subdivision (a) of section eleven hundred sixteen are:

* * *

(4) Any corporation, ... organized and operated exclusively for religious ... purposes... no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda,... attempting to influence legislation, ... and which does not participate in, or intervene in ..., any political campaign on behalf of any candidate for public office.

Section 528.16 of the Sales and Use Tax Regulations states:

Tangible personal property sold to contractors for use in erecting structures of tax exempt organizations. [Tax Law, 1115(a)(15)]

Form of Contract. (1) The form of contract entered into between an exempt organization and its contractor is not relevant.

Section 541.3 of the Sales and Use Tax Regulations states:

Contracts with exempt organizations. [Tax Law, 1115(a)(15),(16),1116(a);...]

(c) Exempt organizations. Exemption organizations described in section 1116(a)(4)-(6) of the Tax Law are issued, upon application and approval in accordance with the procedure set forth in Part 529 of this Title, a numbered exempt organization certificate by the Taxpayers Services Division. A properly completed exempt organization certification issued by the exempt organization to a contractor constitutes proof of the organization's exempt status for purposes of the State and local sales and compensating use taxes.

* * *

(d) Contracts with exempt organization.

(2) Purchase for contracts (other than agency contracts).

- (i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, is exempt when it is to become an integral component part of such structure or building.
- (ii) Purchases of tangible personal property incorporated into the real property of an exempt organization by subcontractors and repairmen are accorded the same treatment as purchases by the prime contract.

* * *

(v) Documents....

(b) If the customer is an exempt organization other than a governmental entity, the prime contractor must obtain an exempt organization certification from his customer and retain it as part of his records. Copies of the certification must also be furnished to all subcontractors on the job. The subcontractors, must retain a copy of the certification in their records with a copy of the contract which identifies the project and the location. When purchasing tangible personal property for incorporation into the exempt project, the prime contractor and subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

Accordingly, because the materials which are purchased by Petitioner, the contractors, subcontractors, and materialmen for use in construction and repairs of the New Building are to be permanently affixed and incorporated into real property owned in fee by the Landlord and title to the materials is to vest in Landlord immediately upon the purchase of such materials, the purchases of such materials will be exempt from the sales and compensating use tax as provided under Section 1115(a)(15) and 1115(a)(16) of the Tax Law.

Petitioner, the contractors, subcontractors and materialmen may purchase materials which will be incorporated as integral components of the real property owned by Landlord tax exempt provided they furnish the building material supplier with a properly completed form ST-120.1 Contractor Exempt Purchase Certificate. Petitioner and the contractor should keep on file a copy of

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the lease between Petitioner and the Landlord as substantiation that the construction performed was exempt from sales and use tax under Section 1115(a)(15) and 1115(a)(16) of the Tax Law.

DATED: November 6, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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