

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

TSB-A-96 (36)S
Sales Tax
June 28, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S951205A

On December 5, 1995, a Petition for Advisory Opinion was received from Viacom Inc., 1515 Broadway, New York, New York 10036.

Petitioner, Viacom Inc., presents the following issues (the underlined terms are defined in Petitioner's statement of facts):

1. Whether expenditures with respect to Improvements at any of I, II, and III by an Agent or Group Agent, acting on behalf of and as agent of the IDA (including those expenditures made through contractors acting on behalf of and as agent of such Agent or Group Agent, in such Agent's or Group Agent's capacity as agent of the IDA), pursuant to the Exemption Letter and the Project Agreement will be exempt from New York State and New York City Sales and Use Tax.

2. Whether expenditures with respect to Equipment (including Computer Software) by an Agent or Group Agent, acting on behalf of and as agent of the IDA (including those expenditures made through contractors acting on behalf of and as agent of such Agent or Group Agent, in such Agent's or Group Agent's capacity as agent of the IDA), pursuant to the Exemption Letter and the Project Agreement will be exempt from New York State and New York City Sales and Use Tax.

3. Whether payments under Exempt Service Contracts by an Agent or Group Agent acting on behalf of and as agent of the IDA will be exempt from New York State and New York City Sales and Use Tax.

4. Whether Debt Service Payments by an Agent and/or Group Agent to the IDA under the Financing Leases with respect to Improvements and Equipment will be exempt from New York State and New York City Sales and Use Tax.

5. Whether payments by the Users acting on behalf of and as agent of the IDA to an Agent or Group Agent will be exempt from New York State and New York City Sales and Use Tax.

6. Whether at the time the Option is exercised, the Option Price will be exempt from the New York State and New York City Sales and Use Tax.

7. If, at any time, a Premature Removal Penalty is imposed on an Agent or Group Agent by the IDA, whether such Premature Removal Penalty shall be deemed to be consideration for a sale subject to New York State and New York 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 intended to induce Petitioner together with certain affiliates (the "Viacom Group") to retain their operations in New York City (the "City") for approximately fifteen (15) years.

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As part of the Project, the Viacom Group will initially occupy premises in the City in buildings at 1633 Broadway ("Premises I"), owned by MRI Broadway Rental Inc., at 1230 Avenue of the Americas ("Premises II"), owned by Rockefeller Center Properties, and at 1515 Broadway (the "Building"), owned by 1515 Broadway Associates, L.P. (the "Owner").

In connection with the Project, the IDA will extend certain economic development benefits to Petitioner and certain affiliates 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 all or a portion of 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 such 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 (November 17, 1994), the Amended and Restated Pre-Bond Issuance Sales Tax Letter (March 1, 1995), the Second Amended and Restated Pre-Bond Issuance Sales Tax Letter (April 30, 1995), the Third Amended and Restated Pre-Bond Issuance Sales Tax Letter (June, 30, 1995), the Fourth Amended and Restated Pre-Bond Issuance Sales Tax Letter (September 30, 1995), the Fifth Amended and Restated Pre-Bond Issuance Sales Tax Letter (November 30, 1995) or the Sales Tax Letter (as applicable, the "Exemption Letter"); and pursuant to a Project Agreement (the "Project Agreement"). The Exemption Letter applies to all of the property, service contracts and purchases under the Project.

In order to extend the real estate tax benefit to Petitioner, the IDA will take title to that portion of the Building to be occupied by the Viacom Group, for which Petitioner will seek real estate tax benefits. Initially, the Viacom Group will occupy approximately nine hundred fifty three thousand (953,000) rentable square feet in the Building. Petitioner may have expansion options with respect to additional space in the Building (the space initially to be occupied by the Viacom Group in the Building together with any additional space, "premises III"; Premises I, II, and III, collectively, the "Improvement Premises"). Because the IDA will not take title to any portion of the Building that the Viacom Group does not occupy, the Building will be converted to a condominium form of ownership, with Premises III comprising separate condominium units, title to which can be separately conveyed to the IDA. That portion of Premises III to be leased by the Viacom Group and for which Petitioner will seek real estate tax benefits 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 of tangible personal property and services which the IDA intends to be eligible for exemption in connection with the Project ("Acquisitions") must be made by the IDA through one of its designated agents within the Viacom Group (the "Agent"). From time to time, any such Agent may designate another Agent (the "Group Agent") to act on its behalf as its agent, and in each such Agent's capacity as the IDA's agent, for the purpose of making Acquisitions. In addition to Petitioner, the following members of the Viacom Group have been designated agents of the IDA under the Exemption Letter

and Project Agreement for purposes of the sales and use tax exemption: Viacom International Inc.; Riverside Broadcasting Co., Inc.; Antics Inc.; Viacom MGS Services Inc.; Showtime Networks Inc.; Prentice-Hall, Inc.; Prentice Hall International, Inc.; Simon & Schuster, Inc.; Paramount Pictures Corporation; Comedy Partners; USA Networks; Hamilton Projects, Inc.; Worldvision Enterprises, Inc.; Laurel Entertainment, Inc.; Blockbuster Videos, Inc.; and Premier Advertiser Sales Inc. It is anticipated that from time to time certain additional members of the Viacom Group may be designated by Petitioner as agents of the IDA for the purpose of making Acquisitions. Any such 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 will authorize, by specific resolution, each site in the City where property acquired in Acquisitions may be situated and where services acquired in Acquisitions may be rendered, for use by the Viacom Group in connection with the Project (together, all such sites authorized by IDA resolution, the "Approved Premises"). Currently, the Approved Premises consist of all of the following locations in Manhattan; 1515 Broadway; 1633 Broadway; 1230 Avenue of the Americas; 1619 Broadway; 423 West 55th Street; 1775 Broadway; 825 Eighth Avenue (a/k/a 309 West 49th Street); 138-142 West 43rd Street; 2 Broadway; 619 West 54th Street; 866 Third Avenue; 6 West 48th Street; 1700 Broadway; 727 Eleventh Avenue; 350 Fifth Avenue; and 7 Penn Plaza.

To finance 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 the Viacom Group (other than an Agent or Group Agent). Proceeds raised through the sale of such Bonds will be available: (i) to purchase the Acquisitions directly; or (ii) to reimburse the Agents or Group Agents (or other members of the Viacom Group which have been designated agents of the IDA) that may have advanced funds to purchase the Acquisitions. Such 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, the Viacom Group will report the Acquisitions in the same manner that similar acquisitions were reported prior to the Project.

Pursuant to Petitioner's internal corporate policies, generally each member of the Viacom Group is responsible for its own costs. Each such member of the Viacom Group which will use Equipment (each, a "User") will be appointed as an agent of the IDA for the purpose of making Acquisitions, either directly or through a Group Agent acting in its capacity as agent of the User and in its capacity as agent of the IDA. Users will incur costs for Equipment Acquisitions in the following manner: (a) any Agent that is itself a User may purchase Equipment, on behalf of and as agent of the IDA, for its own use, (b) a Group Agent may also purchase Equipment, on behalf of and as agent of one or more Users, and also on behalf of and as agent of the IDA, for the use of such User(s) in which event (i) such User(s) will make a payment to, or be assessed a charge (e.g., an intercompany charge) by, the appropriate Group Agent to reimburse such Group Agent for the cost of such Equipment, and (ii) the Equipment shall be deemed to have been purchased by such User

(or jointly by such Users, if there is more than one User of such Equipment) on behalf of and as agent of the IDA through such Group Agent as its agent and as agent of the IDA, or (c) a Group Agent may purchase Equipment, on behalf of and as agent of the IDA, for its own use and also for the use of one or more other Users, in which event the other User(s) of such Equipment may be assessed a charge (e.g., an intercompany charge) for their use.

The Agent or Group Agent will be authorized to act as the IDA's agent in (i) purchasing materials to be incorporated as permanent improvements, additions and installations to the Improvement Premises and purchasing the services of installing such materials (such materials as so incorporated, including any replacements, enhancements and additions thereto, collectively, the "Improvements"); (ii) making purchases of, or entering into leases and contracts for, as the case may be furniture, furnishings, machinery, equipment, or other personalty for use at the Approved Premises (such personalty, including any replacements, enhancements and additions thereto, collectively, the "Equipment"); and (iii) making purchases of the services of maintaining, servicing and repairing real and personal property consisting of Improvements and Equipment with a useful life of one year or more, comprising part of or in use at the Approved Premises, including replacement parts but not including parts (e.g., a toner cartridge) that contain materials consumed in operating the property and that are replaced when the part is consumed, and also not including contracts for general services (e.g., janitorial services) (the "Exempt Service Contracts").

As used herein, the term Equipment shall specifically include equipment in the form of prewritten 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 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 and upgrades pursuant to maintenance contracts and additions thereto, collectively, "Computer Software").

a. Improvements at Premises III. The following structure is proposed to secure the tax benefits offered by the IDA to Petitioner with respect to Improvements at Premises III.

(i) An Agent or Group Agent, acting on behalf of and as agent of the IDA (through contractors acting on behalf of and as agent of such Agent or Group Agent, in their capacity as agent of the IDA), will purchase and install the materials to be incorporated into Improvements to Premises III.

(ii) The Agent or Group Agent will have purchased all materials to be incorporated as Improvements to Premises III, on behalf of and as agent of IDA, but there will be no installation of

any such materials until the IDA acquires a leasehold interest in Premises III. (In the period prior to when Bonds are first issued, the IDA will acquire a leasehold interest in Premises III by an interim arrangement in which Petitioner will lease Premises III to the IDA pursuant to an interim lease agreement (the "Interim Lease") for nominal rent and the IDA will lease Premises III back to Petitioner pursuant to an interim sublease agreement (the "Interim Sublease") for nominal rent. The terms of the Interim Lease and of the Interim Sublease shall each end on the date when Bonds are first issued or earlier upon certain other events.) In the period after the Bonds are first issued, the IDA will obtain both title to the IDA Units and a leasehold interest in Premises III. The IDA will acquire a leasehold interest pursuant to the Premises III Facility Lease defined below. In addition, the IDA will have acquired title to the IDA Units from the Owner. The Owner will condominiumize the Building and convey title to the IDA Units for a nominal amount to the IDA, subject to an existing mortgage on the Building. The IDA will then lease the IDA Units back to the Owner pursuant to a lease agreement (the "Overlease") for nominal rent. The deed conveying the initial IDA Units to the IDA (the "Initial Deed") will contain reverters to the owner upon the expiration of, or earlier termination of, the Premises III Financing Lease defined below, or upon certain other events.

(iii) The Owner will have already leased Premises III, including the IDA Units, to Petitioner pursuant to a lease agreement (the "premises III Prime Lease") for fair market value rent.

(iv) Petitioner will then lease Premises III, including the IDA Units, to the IDA pursuant to a lease agreement (the "Premises III Facility Lease") for nominal rent. The IDA, which will by then also hold title to the Improvements, will lease Premises III (including the IDA Units and the Improvements) back to one or more Agents and/or Group Agents pursuant to a lease agreement (the "Premises III Financing Lease") for an amount sufficient to repay the Bonds (the "Debt Service Payments").

b. Improvements at Premises I and II. The following structure is proposed to secure the tax benefits offered by the IDA to Petitioner with respect to Improvements at Premises I and II.

(i) An Agent or Group Agent, acting on behalf of and as agent of the IDA (through contractors acting on behalf of and as agent of such Agent or Group Agent, in their capacity as agent of the IDA), will purchase and install materials to be incorporated into Improvements located on Premises I and II.

(ii) MRI Broadway Rental Inc. leased Premises I, and Rockefeller Center Properties leased Premises II, to Petitioner or another member of the Viacom Group which is an agent or Group Agent (in each case, the "Tenant") pursuant to separate lease agreements (the "Premises I Prime Lease" and "Premises II Prime Lease" respectively) for fair market value rent.

(iii) The Agent or Group Agent will purchase all materials to be incorporated as Improvements to Premises I and II, on behalf of and as agent of the IDA, but there will be no

installation of any such materials until the IDA acquires leasehold interests in Premises I and II. (In the period prior to when Bonds are first issued, the IDA will acquire leasehold interests in Premises I and II by an interim arrangement in which the Tenant will lease Premises I and II to the IDA pursuant to the Interim Lease for nominal rent and the IDA will lease Premises I and II back to the Viacom Group pursuant to the Interim Sublease for nominal rent. The terms of the Interim Lease and of the Interim Sublease shall each end on the date when Bonds are first issued or earlier upon certain other events.) In the period after the Bonds are first issued, the Tenant(s) will then lease Premises I and II to the IDA pursuant to separate lease agreements (the "Premises I Facility Lease" and "Premises II Facility Lease" respectively) for nominal rent and the IDA, also holding title to the Improvements, will lease back Premises I and II and the Improvements made at Premises I and II, to one or more Agents and/or Group Agents pursuant to separate lease agreements (the "Premises I Financing Lease" and "Premises II Financing Lease" respectively), each for the respective Debt Service Payments.

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

(i) An Agent or Group Agent, acting on behalf of and as agent of the IDA (or through contractors acting on behalf of and as agent of such Agent or Group Agent, in their capacity as agent of the IDA), will purchase or lease Equipment for use at the Approved Premises.

(ii) The IDA will lease such Equipment to the Agent or Group Agent pursuant to a separate lease agreement (the "Equipment Financing Lease"; collectively, the Premises I, II, III, and Equipment Financing Leases, the "Financina Leases") for the Debt Service Payments.

d. Other Facts. The Overlease will require the Owner to pay the PILOT due from Petitioner in the event Petitioner should fail to make such payments under the PILOT Agreement. In addition, the Overlease will contemplate the potential for additional units to be conveyed to the IDA in connection with Petitioner's expansion options, and will become applicable to such additional units upon the conveyance thereof to the IDA.

The Premises III Prime Lease will, among other things, require Petitioner to: (i) pay fair market value rent with respect to Premises III; (ii) pay real property taxes imposed against Premises III, if any; and (iii) reimburse the Owner for any PILOT paid by the Owner under the Overlease as a result of Petitioner's default under the PILOT Agreement. The Prime Lease may also contain various expansion options which, if exercised, could result in the conveyance of additional unit(s) to the IDA. In the event such 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. The Owner's obligation to pay PILOT under the Overlease will be secured by a form of security

acceptable to the IDA. The existing mortgage on the Building may be subordinated to the PILOT Mortgage.

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

At the end of the Project term (or earlier if the Bonds have been redeemed in full), the Improvements, the Leasehold interests in the Equipment and all rights under the Exempt Service Contracts may be purchased from the IDA by the Agent and/or Group Agent pursuant to a purchase option (the "Option") contained in the Financing Leases for the option price of \$1.00 (the "Option Price").

If any of the Improvements is removed from the Improvement Premises or any of the Equipment is removed from the Approved Premises prior to the expiration of the Retention Period for reasons other than upon the occurrence of certain specified grounds for such removal (i.e., obsolescence, uselessness, or another good faith reason), the Agent or the Group Agent who removes the Improvements or the Equipment must pay the IDA an amount equal to the net present value, at the time of removal, of the sales tax or compensating use tax which would have been required to be paid at the time of original purchase if such item removed had been purchased or leased by an Agent or 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 all amounts paid to make Acquisitions (including, without limitation, Exempt Service Contracts) will be exempt from state and local sales and use tax. The Project Agreement contemplates that benefits will be received by the Viacom Group over a period of approximately fifteen (15) years (beginning November 17, 1994 and ending December 31, 2009). All benefits must be used during that period or forfeited.

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 to occur of the maturity date (December 31, 2009) 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 not otherwise attributable to the deemed "principal portion" of the payments due for such 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 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 526.6(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 industrial development agencies ("IDAs") 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 IDAs. The projects were technically owned by the respective IDAs as security for the bonds, but were under "lease back" arrangements with the plaintiff. In an earlier action, Wegmans Food Markets v. Department of Tax & Finance of the State of N.Y., 126 Misc. 2d 144, affd 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 expenses 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 GML.

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

In Smith Barney Inc., Adv. Op. Comm. Of Taxation and Finance, August 18, 1995, TSB-A-95(35)S, the Commissioner advised that certain payments made to an Agent or to a Group Agent by another Agent or Group Agent, constituting an allocation of costs for Exempt Maintenance Contracts and for the purchase of Acquisitions, would not be subject to sales and use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law.

Opinion

Based on the structures under which the IDA proposes to make sales and compensating use tax benefits available to Petitioner with respect to Improvements, 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 Markets v. Department of Taxation and Finance (126 Misc. 2d 144, affd 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) An advisory opinion does not determine factual issues. Petitioner's petition does not indicate whether Petitioner's Improvements constitute capital improvements as defined in section 1101(b)(9) of the Tax Law. Therefore, this opinion cannot conclude whether such Improvements are capital improvements. If the Improvements do constitute capital improvements, then payments for these capital improvements will not be subject to sales and use tax imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law. But a purchaser's payment of the purchase price of materials used to construct capital improvements would be subject to tax (see section 1101(b)(4) of the Tax Law), unless otherwise exempt. In this case, purchases of materials to be incorporated into Improvements at any of Premises I, II, and III by an Agent or Group Agent, acting on behalf of and as agent of the IDA (including those made through contractors acting on behalf of and as agent of such Agent or Group Agent, in such Agent's or Group Agent's capacity as agent of the IDA), pursuant to the Exemption Letter and the Project Agreement will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law, provided that (i) the IDA is the owner, lessor or lessee of the property, (ii) any purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser, lessor or lessee and (iii) such purchaser is the disclosed agent of the IDA.

If the Improvements do not constitute a capital improvement under section 1101(b)(9) of the Tax Law, then the charges for such Improvements which do not constitute capital improvements will be exempt from such taxes only if the purchaser is an agent of the IDA, as provided above. Thus, the

payments to purchase Improvements which do not constitute capital improvements will be exempt from such taxes only where an Agent or Group Agent, or a contractor acting on behalf of and as agent of such Agent or Group Agent, makes purchases as agent of and on behalf of the IDA.

(b) Purchases (including leases) of Equipment (including Computer Software) by an Agent or Group Agent, acting on behalf of and as agent of the IDA (including those made through contractors acting on behalf of and as agent of such Agent or Group Agent, in such Agent's or Group Agent's capacity as agent of the IDA), and purchases by Users, acting on behalf of and as agent of the IDA, through a Group Agent acting on behalf of and as agent of the User, each acting on behalf of and as agent of the IDA, pursuant to the Exemption Letter and the Project Agreement, will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law provided that (i) the IDA is the owner or lessee of the equipment, (ii) any purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser or lessee and (iii) the Agent or Group Agent is the disclosed agent of the IDA.

(c) Payments made under Exempt Service Contracts by the Agent or Group Agent for and on behalf of the IDA, (1) for the maintenance, service and repair of tangible personal property, consisting of 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 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, are necessary to maintain, repair or service such Equipment used as part of the Project, and provided that the IDA is the owner, lessor or lessee of such Equipment, or (2) the Exempt Service Contracts, services and tangible personal property, with respect to Improvements, are necessary to maintain the structural integrity of the Improvements, and provided that the IDA is the owner of such 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 that the IDA is the purchaser with respect to Improvements, and that the Agent or Group Agent is the disclosed agent of the IDA. In any instance where the maintenance, servicing or repair service results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of the 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. 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.

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.

(d) Debt Service Payments made to the IDA under the Financing Leases with respect to Improvements and Equipment will not be subject to sales and use taxes.

(e) Payments made by a User to a Group Agent to reimburse the Group Agent for the cost of applicable Equipment, or for the User's share in the cost of such Equipment, or to settle intercompany charges for the use of Equipment, will not be subject to sales and use taxes provided that the IDA is the owner, lessor or lessee of such Equipment and the Users making such payments are agents of and acting on behalf of the IDA under the Project at the time that the Users purchase or lease such Equipment.

(f) The Option Price paid by an Agent or Group Agent to the IDA at the time the Option under the Financing Leases is exercised will not be subject to sales and use taxes.

(g) The amount paid to the IDA as a Premature Removal Penalty by an Agent or Group Agent 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: June 28, 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.