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

TSB-A-97(33)S Sales Tax

STATE OF NEW YORK COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961008B

On October 8, 1996, a Petition for Advisory Opinion was received from PaineWebber Group, Inc., 1285 Avenue of the Americas, 16th Floor, New York, New York 10019-6093.

Petitioner, PaineWebber Group, Inc., (hereinafter "<u>PWG</u>") states the issues and facts as follows (the underlined terms below are defined in the statement of facts):

a. Whether the purchase, lease and installation of "<u>Tenant Improvements</u>" and the purchase and lease of the "<u>Project Personalty</u>" by "<u>Maiden Lane</u>", "<u>PWG</u>", "<u>PWI</u>" or any "<u>Affiliate</u>" of "<u>PWG</u>" designated by the IDA as an agent for the IDA, in each case as agent for and on behalf of the IDA, are exempt from New York State and New York City Sales and Use Tax.

b. Whether payments under the leases of the "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" from the IDA to "<u>Maiden Lane</u>", and from "<u>Maiden Lane</u>" back to the IDA, are exempt from New York State and New York City Sales and Use Tax.

c. Whether payments by "PWI" and its "Affiliates" to the IDA under the "<u>Operating Lease</u>" of "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" from the IDA to "<u>PWI</u>" and its "<u>Affiliates</u>" are exempt from New York State and New York City Sales and Use Tax.

d. Whether payments made under the "<u>Maintenance Contracts</u>" by "<u>Maiden</u> <u>Lane</u>", "<u>PWG</u>" or "<u>PWI</u>", in each case as agent for and on behalf of the IDA, are exempt from New York State and New York City Sales and Use Tax.

e. Whether payments by "<u>Maiden Lane</u>" to the IDA under the "<u>Financing Lease</u>" of the "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" from the IDA to "<u>Maiden Lane</u>", and from "<u>Maiden Lane</u>" back to the IDA, to the extent allocable to the services provided under the "<u>Maintenance Contracts</u>", are exempt from New York State and New York City Sales and Use Tax.

f. Whether the payments by "<u>PWI</u>" and its "<u>Affiliates</u>" to the IDA under the "<u>Operating Lease</u>" of the "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" from the IDA to "<u>PWI</u>" and its "<u>Affiliates</u>", to the extent allocable to the services under the "<u>Maintenance Contracts</u>", are exempt from New York State and New York City Sales and Use Tax.

This petition for advisory opinion concerns a proposed transaction (the "<u>Project</u>") between the New York City Industrial Development Agency (the "IDA"), "<u>PWG</u>" and its wholly-owned subsidiary, PaineWebber Incorporated ("<u>PWI</u>") intended to induce "<u>PWG</u>" and "<u>PWI</u>" to maintain their offices in The City of New York (the "City"). In a resolution adopted May 14, 1996 (the "<u>Resolution</u>"), the "IDA"

determined that the "<u>Project</u>" will promote, is authorized by and will be in furtherance of the policy of New York State, as set forth in the New York State Industrial Development Agency Act.

"<u>PWI</u>" leases office space in the City at 1285 Avenue of the Americas and 1251 Avenue of the Americas (collectively, together with any other additional or substitute locations that may be approved by the IDA, the "<u>Project Premises</u>"). "<u>PWI</u>" also leases space at various other locations throughout the City (collectively, the "<u>Other Locations</u>").

For securities industry regulatory reasons, another wholly-owned subsidiary of "PWG", Maiden Lane Leasing Corp. ("<u>Maiden Lane</u>") (rather than "<u>PWI</u>") generally will purchase, lease and install in connection therewith, and will enter into maintenance, service, installation and repair contracts with respect to, as applicable, in each case as agent for and on behalf of the IDA, (i) leasehold improvements in the "<u>Project Premises</u>", and (ii) machinery, equipment, furnishings and other items of personal property for use by "<u>PWG</u>", "<u>PWI</u>" and other affiliates of "<u>PWI</u>" and "<u>PWG</u>" (collectively, "<u>Affiliates</u>"), both in the "<u>Project Premises</u>" and at the "<u>Other Locations</u>". Currently, "<u>Maiden Lane</u>" leases certain leasehold improvements and personal property to "<u>PWI</u>" and "<u>Affiliates</u>"

In order to make available the benefits offered by the City, the IDA, "<u>PWI</u>" and "<u>PWG</u>" have tentatively agreed to the following structure:

A project agreement ("Project Agreement") among the IDA, "PWG", "PWI" and "Maiden Lane" will provide that "Maiden Lane", "PWG", "PWI" or any "Affiliate" of "PWG" designated by the IDA as an agent for the IDA, will, in each case as agent for and on behalf of the IDA, (a) purchase and install construction materials and tangible personal property to be used to make capital improvements at the "Project Premises" (such capital improvements, together with replacements, enhancements and additions thereto, collectively, the "Tenant Improvements") and (b) purchase or lease machinery and equipment, furniture, fixtures and other tangible personal property having a useful life of more than one year (such personal property, whether used in the "Project Premises" or in any of the "Other Locations", and together with any replacements, enhancements and additions thereto, collectively, the "Project Personalty"). (Any equipment lease entered into by "Maiden Lane" as agent for and on behalf of the IDA will be a capital lease for purposes of Financial Accounting Standard No. 13 ("FAS 13") and will not constitute an "Operating Lease" as defined in FAS 13 unless such lease contains a purchase option.) The "Project Agreement" will also provide that "PWI", "PWG" or "Maiden Lane", in each case as agent for and on behalf of the IDA, may enter into qualified contracts for the maintenance of the "Tenant Improvements" and the "Project Personalty", including the replacement of parts (other than parts consumed in the ordinary operation thereof) and the making of repairs, but excluding janitorial services ("Maintenance Contracts").

The "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" will include, without limitation, the following items and any replacements, enhancements and additions to the following items: machinery, equipment, furniture, furnishings, fixtures and other property, heating, lighting, electrical and mechanical systems, heating, ventilation and air conditioning systems, computer hardware, graphics

systems, telephone systems, window and floor treatment (window curtains and the like, and floor coverings), security systems, audio visual equipment, and sprinkler systems and other fire prevention and other extinguishing apparatus. The "Project Personalty" also will specifically include tangible personal property in the form of pre-written computer software, not limited as to any of the following: (i) the medium by means of which the software is conveyed to the purchaser (including both tangible and intangible means); (ii) the kind of equipment for which acquired (including both computers and related 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").

In order for the IDA to have a leasehold interest in the real property on or in which the "<u>Tenant Improvements</u>" will be made, "<u>PWI</u>" will sublease the "<u>Project Premises</u>" (without the "<u>Tenant Improvements</u>") to the IDA, and the IDA will sub-sublease the "<u>Project Premises</u>" (other than the "<u>Tenant Improvements</u>") back to "<u>PWI</u>" (this sub-sublease from the IDA to "<u>PWI</u>" being hereinafter referred to as the "<u>Premises Lease</u>").

The IDA will issue bonds from time to time (referred to herein as "<u>Bonds</u>"), to be purchased by "<u>PWG</u>" or by an eligible affiliate of "<u>PWG</u>", to finance the purchases and leases of "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>".

During the term of the "<u>Project</u>", the IDA will hold title to, or a leasehold or license interest in, the "<u>Tenant Improvements</u>" and the "<u>Project Personalty</u>" and will lease such interest to "<u>Maiden Lane</u>" (such lease being referred to herein as the "<u>Financing Lease</u>"), in each case solely for re-lease by "<u>Maiden Lane</u>" to the IDA. The "<u>Financing Lease</u>" will provide that "<u>Maiden Lane</u>" or its designee will be entitled to the services to be provided under the "<u>Maintenance Contracts</u>" and that "<u>Maiden Lane</u>" or its designee will be obligated to pay, as agent for and on behalf of the IDA, all amounts due under the "<u>Maintenance Contracts</u>". Rents paid by "<u>Maiden Lane</u>" to the IDA under the "<u>Financing Lease</u>" will be in an amount equal to the principal and interest due on the Bonds, i.e., in an amount sufficient to repay the Bonds.

"<u>Maiden Lane</u>" will sublease such "<u>Tenant Improvements</u>" and the "<u>Project</u> <u>Personalty</u>" to the IDA, and, lastly, the IDA will sub-sublease such "<u>Tenant</u> <u>Improvements</u>" and the "<u>Project Personalty</u>" under a master leaseback to "<u>PWI</u>" and its "<u>Affiliates</u>", who will be the users of such "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" (such master lease by the IDA to "<u>PWI</u>" and its "<u>Affiliates</u>" being referred to herein as the "<u>Operating Lease</u>"). "<u>Maiden Lane</u>" will not be the user, in whole or in part, of any of such "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" which it will lease from and to the IDA. The sublease from "<u>Maiden Lane</u>" to the IDA, and the "<u>Operating Lease</u>", each will assign the benefits of the "<u>Maintenance Contracts</u>", as applicable, to the users of the "<u>Tenant Improvements</u>" apply.

If "<u>PWI</u>" relocates its headquarters outside the City, or if certain specified reductions in the number of "<u>PWI</u>" employees in the City occur, "<u>PWI</u>" may be required to make specified payments ("<u>Recapture Payments</u>") to the IDA,

based in part on the amount of the exemptions from State and City Sale and Use Taxes realized with respect to "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" to the date of any such relocation or reductions.

At the conclusion of the "Project" (at the end of the year 2015), the Bonds will mature and be paid off, the sublease of the "<u>Project Premises</u>" to the IDA and the "<u>Premises Lease</u>", the "<u>Financing Lease</u>" and the "<u>Operating Lease</u>" will terminate, and title to the "<u>Project Personalty</u>" and the "<u>Tenant Improvements</u>" and all interests in the "<u>Maintenance Contracts</u>" will be reconveyed to "<u>Maiden Lane</u>" without the payment of any consideration.

The "<u>Project</u>" will not exceed the allowable one-third retail facilities restriction of Section 862 of the General Municipal Law.

Applicable Sales and Use Tax 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 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 prewritten portions thereof does not cause the combination to be to other than prewritten computer software. Prewritten 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 modifications 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:

Except to the extent that property or services have already (a) 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 а 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 526.6(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, barters, 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 Except, however, that tourism service to such customers. 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. 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-today 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 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

industrial development agencies. The projects were technically owned by the respective agencies as security for the bonds, but were under "lease back" arrangements with the plaintiff. In an earlier action, <u>Wegmans Food Markets v.</u> <u>Department of Taxation and Finance</u>, 126 Misc.2d 144, aff'd, 115 AD2d 962, lv to app den 67 NY2d 606 (1986) ("<u>Wegmans I</u>"), the section 874 tax exemption was held to be broader than the exemption provided by section 1116 of the Tax Law. The court in <u>Wegmans</u> 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 would have no authority to designate agents to do that which they could not do themselves.

Although some of the numerous expenses listed by plaintiff in their [sic] complaint may be exempt (such as expenses necessary to preserve or repair project property), not all of the claimed expense would be exempt. Many of these expenses bear no relationship to the purchase, repair or replacement of project property <u>per se</u> 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 it 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 (<u>Wegmans</u> I (supra)), where the tax exemption of section 874 was held applicable to the purchase of tangible personal <u>property</u> acquired and owned by the IDA, as <u>security</u> for the IDBs. Ownership of property, real and personal -as distinguished from operation of the business -- was clearly within the express, contemplated function and authority of IDAs under the General Municipal Law.

In ("<u>Wegmans</u> I"), the Court stated:

The Legislature very carefully included all revenues received by an IDA within the purposes of Article 18-A [the New York State Industrial Development Agency Act]. 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 ... including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto ... which shall be suitable for manufacturing, warehousing, research, commercial or industrial purposes"

<u>Opinion</u>

Based on the structure under which the IDA proposes to make sales and compensating use tax benefits available to "<u>PWG</u>" with respect to "<u>Tenant Improvements</u>", "<u>Project Personalty</u>" and "<u>Maintenance Contracts</u>", as described by "<u>PWG</u>" in its petition, and in accordance with the sections of law and regulations cited above and the decisions in <u>Wegmans Food Markets v. Department of Taxation and Finance</u> (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.)<u>supra</u>, and provided that all the terms and conditions of the relevant documents are complied with, and that these terms and conditions are consistent with "<u>PWG's</u>" description of them as set forth above, in the instant matter:

(1) In the case where "<u>Tenant Improvements</u>" constitute capital improvements, as defined in section 1101(b)(9) of the Tax Law, 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 if "<u>PWG</u>" or an "<u>Affiliate</u>" purchases materials used to construct capital improvements, "<u>PWG's</u>" or the "<u>Affiliate's</u>" purchase would generally be subject to tax (see section 1101(b)(4) of the Tax Law), unless otherwise exempt. However, purchases of materials to be

incorporated into such "<u>Tenant Improvements</u>" at the "<u>Project Premises</u>" by "<u>Maiden Lane</u>", "<u>PWG</u>", "<u>PWI</u>" or "<u>Affiliate</u>" of "<u>PWG</u>" which has been appointed as agent of the IDA, acting on behalf of and as agent of the IDA, pursuant to 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.

In the case where "<u>Tenant Improvements</u>" do not constitute a capital improvement under section 1101(b)(9) of the Tax Law, payments for such "<u>Tenant Improvements</u>" which do not constitute capital improvements will be exempt from such taxes only if the purchaser is the disclosed agent of the IDA, as provided above. Thus, payments to purchase "<u>Tenant Improvements</u>" which do not constitute capital improvements will be exempt from such taxes only where one of the persons specified above makes purchases as agent of and on behalf of the IDA.

Purchases (including leases) of "<u>Project Personalty</u>" (including "<u>Computer</u> <u>Software</u>") by "<u>Maiden Lane</u>", "<u>PWG</u>", "<u>PWI</u>" or "<u>Affiliate</u>" of "<u>PWG</u>" which has been appointed as agent of the IDA, acting on behalf of and as agent of the IDA, pursuant to 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 equipment, (ii) any purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser or lessee and (iii) "<u>Maiden Lane</u>", "<u>PWG</u>", "<u>PWI</u>" or "<u>Affiliate</u>" of "<u>PWG</u>" which has been appointed as agent of the IDA is the disclosed agent of the IDA.

(2) Payments under the leases of the "<u>Tenant Improvements</u>" and "<u>Project</u> <u>Personalty</u>" from the IDA to "<u>Maiden Lane</u>", and from "<u>Maiden Lane</u>" back to the IDA, will not be subject to the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(3) Payments by "<u>PWI</u>" and its "<u>Affiliates</u>" to the IDA under the "<u>Operating</u> <u>Lease</u>" of the "<u>Tenant Improvements</u>" and "<u>Project Personalty</u>" from the IDA to "<u>PWI</u>" and its "<u>Affiliates</u>" will not be subject to the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(4) Payments made to vendors by "<u>Maiden Lane</u>", "<u>PWG</u>" or "<u>PWI</u>", on behalf of and as agent of the IDA, under the "<u>Maintenance Contracts</u>", for purchases of (1) the services of maintaining, servicing, installing and repairing tangible personal property, consisting of "<u>Project Personalty</u>", with a useful life of one year or more, which is in use at the "<u>Project Premises</u>", including replacement 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 the services of maintaining, servicing and repairing the "<u>Tenant Improvements</u>", will be exempt from sales and use taxes, to the extent that (1) the "<u>Maintenance Contracts</u>", services and parts, with respect to "<u>Project Personalty</u>", are necessary to maintain, repair, install or service such "<u>Project Personalty</u>" used as part of the "<u>Project</u>", and provided that the IDA is the owner, lessor or lessee of such "<u>Project</u>" property, with respect to "Tenant Improvements", are necessary to maintain the structural integrity of the "Tenant Improvements", and provided that the IDA is the owner, lessor or lessee of such "Tenant 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 "Project Personalty" and "Tenant Improvements", and also that the person making the payments is the disclosed agent of the IDA. In any instance where the maintenance, servicing, installation or repair service results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of the "Project Personalty" or "Tenant Improvements" 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, to the extent that they may 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 a "Maintenance 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 "Maintenance Contract" is separately stated from the other charges or otherwise reasonably allocated.

Payments under the "Financing Lease" of the "Tenant Improvements" and (5) "Project Personalty" from the IDA to "Maiden Lane", and from "Maiden Lane" back to the IDA, to the extent allocable to the services provided under the "Maintenance Contracts", will not be subject to the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(6) Payments under the "Operating Lease" of the "Tenant Improvements" and "Project Personalty" from the IDA to "PWI" and its "Affiliates", to the extent allocable to the services under the "Maintenance Contracts", will not be subject to the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

DATED: May 22, 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.