

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

TSB-A-97(71)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960529A

On May 29, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Donaldson, Lufkin & Jenrette, Inc., 277 Park Avenue, New York, NY 10172.

Petitioner, Donaldson, Lufkin & Jenrette, Inc., states the issues and facts as follows.

A. (1) Whether purchases of IDA-Equipment by Leasing Corp. (or by one or more of the other Group Agents), as agent for and on behalf of the IDA, pursuant to the Exemption Letter and Project Agreement, will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(2) Whether Leasing Corp.'s lease of DLJ-Leased Equipment from third parties for resale to the Group Agents will be exempt from taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(3) Whether Leasing Corp.'s purchase of services under Service Contracts from third parties for resale to the Group Agents will be exempt from taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(4) Whether rent payments paid to Leasing Corp. for IDA-Equipment by one or more Group Agents, as agents for and on behalf of the IDA, pursuant to the Master Lease, Exemption Letter and Project Agreement will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(5) Whether rent payments paid to Leasing Corp. for DLJ-Leased Equipment by one or more Group Agents, as agents for and on behalf of the IDA, pursuant to the Master Lease, Exemption Letter and Project Agreement, will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(6) Whether payments made to third parties or to Leasing Corp. under Exempt Service Contracts by the Group Agents, as agents for and on behalf of the IDA for the purchase of the service of installing tangible personal property or of maintaining, servicing or repairing tangible personal or real property, consisting of the Improvements, IDA-Equipment, Equipment, Leased Equipment, and DLJ-Leased 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 parts, but not including parts (e.g., a toner cartridge) that contain materials or substances consumed in operating the property and that are replaced when the part, material or substance is consumed, but not including contracts for general services (e.g., janitorial services), will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

B. (1) Whether the acquisition, leasing, subleasing, licensing or sublicensing of Computer Software by the Group Agents, on behalf of and as agents of the IDA, in an intangible medium (e.g., by electronic transmission) will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(2) Whether the acquisition, leasing, subleasing, licensing or sublicensing of Computer Software by the Group Agents, on behalf of and as agents of the IDA, for use in computers and other equipment not previously or concurrently acquired by the Group Agents on behalf of and as agents of the IDA will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(3) Whether payments made under Exempt Service Contracts entered into by the Group Agents, on behalf of and as agents of the IDA, with respect to Computer Software acquired, leased, subleased, licensed, or sublicensed by the IDA (which Exempt Service Contracts may include the providing of upgrades to such Computer Software) will be exempt from the taxes imposed under sections 1105, 1107, 1109 and 1110 of the Tax Law.

(4) Whether the determinations with respect to issues presented in Advisory Opinion 95(36) or in this petition applicable to Equipment, IDA-Equipment, Leased Equipment or DLJ-Leased Equipment which is not otherwise expressly made applicable to Computer Software herein shall be applicable to Computer Software provided such Computer Software is acquired in the same manner as any other item of Equipment, IDA-Equipment, Leased Equipment or DLJ-Equipment.

This petition for advisory opinion concerns a transaction (the "Project") between the New York City Industrial Development Agency (the "IDA") and Donaldson, Lufkin and Jenrette, Inc. ("DLJ") and is intended to supplement Donaldson, Lufkin & Jenrette, Inc., Adv Op Comm T & F, August 18, 1995, TSB-A-95(36)S (the "Advisory Opinion 95(36)") wherein the Project is fully described. Except where otherwise indicated, (i) each capitalized term used but not defined herein shall have the meaning assigned to such term in Advisory Opinion 95(36) and (ii) the statement of Facts in Advisory Opinion 95(36) is hereby incorporated into this opinion by reference.

Acquisition Procedures

Certain aspects of the description of the Project in Advisory Opinion 95(36) require revision or clarification as a result of developments subsequent to the date of Advisory Opinion 95(36). In particular, DLJ seeks the flexibility to adopt three additional acquisition procedures, described below, which were not contemplated at the time of Advisory Opinion 95(36). In addition, DLJ seeks to clarify that installation procedures with respect to personalty will be exempt from the New York State and New York City sales and use taxes.

First, certain purchases of equipment may not be made outright by Leasing Corp. for re-lease, i.e., using a Resale Certificate. Instead, some purchases of furniture, furnishings, machinery, equipment, or other personalty used at the Approved Premises may be made by one or more Group Agents (directly or through a contractor acting on behalf of and as agent of such Group Agents in their

capacity as agents of the IDA), as agent(s) for and on behalf of the IDA pursuant to the Exemption Letter and Project Agreement (such personalty, as purchased by one or more Group Agents, as agents for and on behalf of the IDA, including any replacements, enhancements and additions thereto, collectively, the "IDA-Equipment"). Thus, the IDA will always acquire title to the IDA-Equipment. In those cases where Leasing Corp. is the Group Agent purchaser of IDA-Equipment, as agent for and on behalf of the IDA, such IDA-Equipment may be re-leased to one or more of the other Group Agents, also as agents for and on behalf of the IDA pursuant to the Exemption Letter and Project Agreement.

Second, DLJ may have Leasing Corp. enter into some or all equipment leases with third parties in connection with the Project; such leases would not be entered into by Leasing Corp. for its own use. In such cases, Leasing Corp. will (i) lease personalty from third party vendors using a Resale Certificate (such personalty leased from third party vendors by Leasing Corp. directly, including any replacements, enhancements and additions thereto, collectively, the "DLJ-Leased Equipment") and (ii) re-lease such DLJ-Leased Equipment to the Group Agents, as agents for and on behalf of the IDA, pursuant to the Master Lease, Exemption Letter and Project Agreement.

Third, DLJ may have Leasing Corp. enter into some or all contracts for installation, maintenance, service and repair services with third parties in connection with the Project; such contracts would not be entered into by Leasing Corp. for its own use. In such cases, Leasing Corp. will (i) enter into contracts with third parties using a Resale Certificate (a) for installation, maintenance, service and repair services to tangible personal property (consisting of the Equipment, the IDA-Equipment, the Leased Equipment and the DLJ-Leased Equipment) and (b) for maintenance, service and repair services to real property (consisting of the Improvements) (together, the "Service Contracts") and (ii) resell the services which are the subject of such Service Contracts to the Group Agents, as agents for and on behalf of the IDA, pursuant to the Master Lease, Exemption Letter and Project Agreement (the contracts by which the Group Agents purchase services from third parties or from Leasing Corp., on behalf of and as agents of the IDA, with respect to installation, repair, service and maintenance of the Equipment, the IDA Equipment, the Leased Equipment and the DLJ-Leased Equipment, with a useful life of one year or more and the Improvements in use at or comprising part of the Approved Premises, 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) (together, the "Exempt Service Contracts").

Fourth, in addition to the other services described in Advisory Opinion 95(36), the Project documents authorize the Group Agents to purchase installation services, on behalf of and as agents of the IDA, with respect to personalty (consisting of the Equipment, the IDA-Equipment, the Leased Equipment and the DLJ-Leased Equipment) in use at the Approved Premises.

Structure.

The following description clarifies how these changes will be incorporated into the structure described in Advisory Opinion 95(36).

IDA-Equipment (i) One or more of the Group Agents, acting on behalf of and as agent of the IDA (directly or through contractors acting on behalf of and as agents of such Group Agents, in their capacity as agents of the IDA), will purchase IDA-Equipment pursuant to the Exemption Letter and Project Agreement and, where Leasing Corp. is the purchaser of such IDA-Equipment, Leasing Corp. will lease the IDA-Equipment to the Group Agents, acting on behalf of and as agents of the IDA, pursuant to the Master Lease, Exemption Letter and Project Agreement for fair market value rent. (ii) The IDA will then lease such IDA-Equipment back to the Group Agents pursuant to the Financing Lease for the Debt Service Payments.

DLJ-Leased Equipment (i) Leasing Corp. will enter into leases for DLJ-Leased Equipment with third party vendors pursuant to a Resale Certificate and then lease such DLJ-Leased Equipment to the Group Agents, acting on behalf of and as agents of the IDA, pursuant to the Master Lease, Exemption Letter and Project Agreement, for fair market value rent. (ii) The IDA will then lease such DLJ-Leased Equipment back to the Group Agents pursuant to the Financing Lease, for the Debt Service Payments.

Service Contracts (i) Leasing Corp. will enter into Service Contracts with third parties pursuant to a Resale Certificate and then resell the services which are the subject of such Service Contracts to the Group Agents, acting on behalf of and as agents of the IDA, pursuant to the Master Lease, Exemption Letter and Project Agreement for the fair market value of such services. (ii) The IDA will then sell the services which are the subject of such Service Contracts back to the Group Agents pursuant to the Financing Lease for the Debt Service Payments.

Computer Software

As currently drafted, the Project documents do not authorize a sales tax exemption for certain computer software subject to sales tax. For example, the Exemption Letter authorizes exemption for computer software,

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

At DLJ's request, the IDA has agreed to amend the Project documents as necessary to authorize the same exemption for computer software that is determined through this petition to be available to the IDA under the applicable law (pursuant to the Letter Agreement with Respect to Modifications to Sales Tax Exemptions between the IDA and DLJ dated as of August 18, 1995.)

Depending on the terms of the Project documents, Acquisitions in connection with the Project could include computer software not limited as to any of the following: (i) the medium by means of which conveyed (including tangible media, e.g., computer disk, compact disc or magnetic tape, as well as intangible media, e.g., electronic transmission), (ii) the kind of equipment for which acquired (including computers, e.g., mainframe computers and peripherals, work stations, personal computers or networks, as well as related equipment, e.g., modems, printers, copiers, scanners, facsimile machines, equipment for video/multimedia teleconferencing or other telecommunications equipment) and (iii) whether such software is used on equipment in which the IDA has an interest (such computer software as not so limited, including any replacements, enhancements and additions thereto, collectively, "Computer Software"). Such Computer Software will generally be acquired as Equipment, as Leased Equipment or as DLJ-Leased Equipment.

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 prewritten 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 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 modification or enhancement is designed and

developed to the specifications of a specific purchaser, remains prewritten software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute prewritten computer software.

Section 1105 of the Tax Law provides, in relevant part:

...there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business, whether or not the services are performed directly ... or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith...

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term ... is defined in ... this chapter. ...

Section 1107(a) of the Tax Law provides, in relevant part:

On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed ... within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivision (b) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the

taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 1109(a) of the Tax Law provides, in relevant part:

In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed within ... the metropolitan commuter transportation district ... and there shall be paid, additional taxes, at the rate of one-quarter of one percent, which shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article....

Section 1110 of the Tax Law provides, in relevant part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state ... (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor, or repairman in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, if items of the same kind are not offered for sale as such by such contractor, subcontractor or repairman or other user in the regular course of business, (C) of any of the services described in paragraphs (1), (7) and (8) of subdivision (c) of section eleven hundred five, (D) of any tangible personal property ... not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five have been performed

Section 1115(a) (28) of the Tax Law provides:

Computer software designed and developed by the author or creator to the specifications of a specific purchaser which is transferred directly or indirectly to a corporation which is a member of an affiliated group of corporations within the meaning of subparagraph six of paragraph (b) of subdivision seventeen of section two hundred eight of this chapter except for clauses (ii) and (iii) of such subparagraph that includes such purchaser, or to a partnership in which such purchaser and other members of such affiliated group have at least a fifty percent capital or profits interest (but only if the transfer is not in pursuance of a plan having as its principal

purpose the avoidance or evasion of tax under this article), but in no case including computer software which is pre-written, as defined in paragraph six of subdivision (b) of section eleven hundred one of this article and available to be sold to customers in the ordinary course of the seller's business.

Section 1115(o) of the Tax Law provides:

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

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

... any sale ... by or to any of the following or any use ... by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations ... or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons; ...

Section 526.6(c) of the New York State Sales and Use Tax Regulations provides, in relevant part:

(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 854 of the General Municipal Law provides, in relevant part:
Definitions.

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

* * *

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

* * *

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

Section 858 of the General Municipal Law provides, in relevant part:

... [E]ach agency shall have the following powers:

* * *

(3) To acquire, hold and dispose of personal property for its corporate purposes;

* * *

(10) To acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects; ...

Section 862(2) of the General Municipal Law provides as follows:

(2) (a) Except as provided in paragraph (b) of this subdivision, no financial assistance of the agency shall be provided in respect of any project where facilities or property that are primarily used in making retail sales to customers who personally visit such facilities constitute more than one-third of the total project cost. For the purposes of this article, retail sales shall mean: (i) sales by a registered vendor under article twenty-eight of the tax law primarily engaged in the retail sale of tangible personal property, as defined in subparagraph (i) of paragraph four of subdivision (b) of section eleven hundred one of the tax law; or (ii) sales of a service to such customers. Except, however, that tourism

destination projects and projects operated by not-for-profit corporations shall not be prohibited by this subdivision. For the purpose of this paragraph, "tourism destination" shall mean a location or facility which is likely to attract a significant number of visitors from outside the economic development region as established by section two hundred thirty of the economic development law, in which the project is located.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, financial assistance may, however, be provided to a project where facilities or property that are primarily used in making retail sales of goods or services to customers who personally visit such facilities to obtain such goods or services constitute more than one-third of the total project cost, where (i) the project occupant would, but for the assistance provided by the agency, locate the related jobs outside the state, or (ii) the predominant purpose of the project would be to make available goods or services which would not, but for the project, be reasonably accessible to the residents of the city, town, or village within which the proposed project would be located because of a lack of reasonably accessible retail trade facilities offering such goods or services, or (iii) the project is located in a highly distressed area.

(c) With respect to projects authorized pursuant to paragraph (b) of this subdivision, no project shall be approved unless the agency shall find after the public hearing required by section eight hundred fifty-nine of this chapter that undertaking the project will serve the public purposes of this article by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the state. Where the agency makes such a finding, prior to providing financial assistance to the project by the agency, the chief executive officer of the municipality for whose benefit the agency was created shall confirm the proposed action of the agency.

Section 874(1) and (2) of the General Municipal Law provides as follows:

(1) It is hereby determined that the creation of the agency and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state of New York and is a public purpose, and the agency shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities.

(2) Any bonds or notes issued pursuant to this title, together with the income therefrom, as well as the property of the agency, shall be exempt from taxation, except for transfer and estate taxes.

Section 917-a of the General Municipal Law establishes the New York City Industrial Development Agency as an industrial development agency in general having the powers of industrial development agencies under Article 18-A of the General Municipal Law.

CS First Boston Corporation, Adv Op Comm T & F, December 21, 1995, TSB-A-95(43)S, concluded (i) that leases of tangible personal property, and contracts for installation, maintenance, service and repair services to tangible personal property and for maintenance, service and repair services to real property, entered into for resale using a resale certificate are exempt from sales and use taxes and (ii) that payments made on behalf of and as agent of the IDA with respect to Computer Software (as defined herein) are exempt from sales and use taxes.

Opinion

Based on the structures under which the IDA proposes to make sales and compensating use tax benefits available to Petitioner with respect to IDA-Equipment, DLJ-Leased Equipment, Service Contracts and Exempt Service Contracts, and Computer Software, 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 Wegmans Food Markets v. Department of Taxation and Finance (126 Misc. 2d 144, aff'd 115 AD2d 962, lv to app den 67 NY2d 606) and Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y., (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.), and provided that all the terms and conditions of the relevant documents, as amended, are complied with, and that these terms and conditions, as amended, are consistent with Petitioner's description of them as set forth above, in the instant matter:

A. (1) Leasing Corp.'s purchases of IDA-Equipment (and purchases by one or more of the other Group Agents of IDA-Equipment), as agent for and on behalf of the IDA, pursuant to the Exemption Letter and Project Agreement, will be exempt from sales and use taxes, provided that (i) the IDA is the owner, lessor or lessee of such property, (ii) the purchase invoices, statements and contracts with vendors and suppliers provide that the IDA is the purchaser, lessor or lessee and (iii) Petitioner is the disclosed agent of the IDA.

(2) Leasing Corp.'s lease of DLJ-Leased Equipment from third party vendors for resale to the Group Agents, will be exempt from sales and use taxes, provided that Leasing gives the third party vendors a properly completed Form ST-120, Resale Certificate, as discussed in sections 526.6(c), 526.7(a) and 526.7(c) of the Sales and Use Tax Regulations, that the DLJ-Leased Equipment is re-leased as described above and that Leasing Corp. makes no other use of such property itself.

(3) Leasing Corp.'s purchase of services under Service Contracts from third parties for resale to Group Agents will not be subject to sales and use taxes, provided that Leasing Corp. gives the third party a properly completed Form ST-120, Resale Certificate, as discussed in sections 526.6(c), 526.7(a) and 526.7(c) of the Sales and Use Tax Regulations, that the services are resold to the Group Agents, as described above and that Leasing Corp. makes no other use of such services itself.

(4) The Group Agents' rent payments, as agents for and on behalf of the IDA, paid to Leasing Corp. for IDA-Equipment, pursuant to the Master Lease, Exemption Letter and Project Agreement, will be exempt from sales and use taxes, provided that the IDA is the lessee of the IDA-Equipment, and the IDA-Equipment is leased as described above.

(5) The Group Agents' rent payments, as agents for and on behalf of the IDA, paid to Leasing Corp. for DLJ-Leased Equipment, pursuant to the Master Lease, Exemption Letter and Project Agreement, will be exempt from sales and use taxes, provided that the IDA is the lessee of the DLJ-Leased Equipment, and the DLJ-Leased Equipment is leased as described above.

(6) Payments made to third parties or to Leasing Corp. under Exempt Service Contracts by the Group Agents, as agents for and on behalf of the IDA, (i) for purchases of the services of installing, maintaining, servicing and repairing tangible personal property, consisting of the IDA-Equipment, Equipment, Leased Equipment, and DLJ-Leased Equipment, with a useful life of one year or more, which is in use at the Approved Premises, 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 (ii) for purchases of the services of maintaining, servicing and repairing the Improvements which constitute real property, will be exempt from the sales and use taxes, to the extent that "(a)" the Exempt Service Contracts, services and parts, with respect to IDA-Equipment, Equipment, Leased Equipment, and DLJ-Leased Equipment, are necessary to maintain, repair or service such IDA-Equipment, Equipment, Leased Equipment, and DLJ-Leased Equipment, used as part of the Project, and provided that the IDA is the owner, lessor or lessee of such IDA-Equipment, Equipment, Leased Equipment, and DLJ-Leased Equipment, or "(b)" 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 (i) and (ii) provide that the IDA is the purchaser, lessor or lessee with respect to such Exempt Service Contracts and such IDA-Equipment, Equipment, Leased Equipment, and DLJ-Leased Equipment, and that the IDA is the purchaser with respect to Improvements, and that the Group Agents are disclosed agents of the IDA. In any instance where the installation, maintenance, servicing or repair service results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of the Improvements, IDA-Equipment, Equipment, Leased Equipment, or DLJ-Leased 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.

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.

B. (1) & (2) The Group Agents' acquisition, leasing, subleasing, licensing or sublicensing of Computer Software, on behalf of and as agents of the IDA, pursuant to the Exemption Letter, and, as applicable the Project Agreement and other Project documents, will be exempt from sales and use taxes provided that (i) the IDA is the owner, lessor or lessee of such property, (ii) the purchase invoices, statements and contracts with vendors and suppliers for such Computer Software provide that the IDA is the purchaser, lessor or lessee with respect to the Computer Software and (iii) the Group Agents are disclosed agents of the IDA. This is so where the Computer Software is purchased in an intangible medium (e.g., by electronic transmission), as well as where the Computer Software is for use in computers and other equipment not previously or concurrently acquired by the Group Agents on behalf of and as agents of the IDA.

(3) The Group Agents' payments, on behalf of and as agents of the IDA, under Exempt Service Contracts entered into by the Group Agents on behalf of and as agents of the IDA, with respect to Computer Software acquired, leased, subleased, licensed, or sublicensed by the IDA (which Exempt Service Contracts may include the providing of upgrades to such Computer Software) where the Computer Software is in use at the Approved Premises will be exempt from sales and use taxes to the extent that such payment's are for the purchase of the services of installing, maintaining, repairing or servicing such Computer Software, or for other services to such software described in section 1105(c) of the Tax Law, provided that, where such services are provided to the Group Agents, on behalf of and as agents of the IDA, or to the IDA, in conjunction with the sale of tangible personal property, any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of price given to the Group Agents or the IDA (see section 1115(o) of the Tax Law). Notwithstanding the limitation regarding reasonable and separately stated charges in the prior sentence, where the Group Agents, on behalf of and as agents of the IDA, purchase tangible personal property under such Exempt Service Contracts, with respect to Computer Software acquired, leased, subleased, licensed or sublicensed by the IDA, the purchase of such tangible personal property under such circumstances will be exempt from sales and use taxes where it is used as part of the Project, provided that the IDA is the owner, lessor or lessee of the Computer Software and also provided that the purchase invoices, statements and contracts with vendors and suppliers for the Exempt Service Contracts provide that the IDA is the purchaser, lessor or lessee with respect to the Computer Software and that the Group Agents are the disclosed agents of the IDA. In any instance where the installation, maintenance, servicing or repair service results in the replacement of parts, materials or supplies that are consumed in the ongoing operation of the Computer Software, where such parts, materials or supplies must be replaced when consumed, the portion of the charges

applicable to such parts, materials or supplies will be subject to sales and use taxes, as indicated in Wegmans Food Markets v. The Department of Taxation and Finance of the State of N.Y. (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) supra.

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

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

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

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

TSB-A-97(71)S
Sales Tax

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

DATED: November 20, 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.