

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

TSB-A-98(72)S
Sales Tax
October 15, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980401B

On April 1, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from MCI Telecommunications Corporation, 1133 19th Street, N.W., Washington, D.C. 20036.

Petitioner, MCI Telecommunications Corporation, states the issues and facts as follows:

1. Whether the purchase, lease, installation, construction, maintenance, and repair of Project Property (as hereinafter defined), by Petitioner as agent for the County of Westchester Industrial Development Authority (the "IDA"), or agents appointed by Petitioner pursuant to an authorization granted by the IDA to appoint such agents, are exempt from the New York State and local sales and compensating use taxes.

2. Whether Petitioner's payments to the IDA for the lease of the Project Property are subject to New York State and local sales and compensating use taxes.

3. Whether Petitioner's payment to the IDA to exercise an option to purchase the Project Property, or the value of the Project Property transferred to Petitioner by IDA at the termination of the lease, is exempt from the New York State and local sales and compensating use taxes.

This petition for an advisory opinion concerns the development of a telecommunications switching station by Petitioner (the "Project"). To induce Petitioner to locate the Project in Westchester County, New York, the IDA has made an agreement with Petitioner to grant financial assistance, as defined in section 854.14 of the General Municipal Law, to Petitioner through a straight-lease transaction, as defined in section 854.15 of the General Municipal Law.

On December 3, 1996, the IDA passed an inducement resolution to establish the Project, which was subsequently amended on January 23, 1997. The IDA, pursuant to its statutory authority to promote the community interests within Westchester County, issued on May 8, 1997, a Sales Tax Letter to Petitioner representing their mutual agreement for the development of the Project at 401 Fieldcrest Drive, Elmsford, Westchester County, New York (the "Project Premises").

As contemplated by the IDA and Petitioner, "Project Property" means (i) the Project Premises, a building to be built at the Project Premises (the "MCI Building"), improvements to the Project Premises and the MCI Building, and materials and fixtures to be installed in or on the Project Premises or MCI Building, as well as renovations, repairs and additions made to the Project Premises and the MCI Building (together, the "Improvements") and (ii) machinery, equipment, furniture, furnishings, and other items of tangible and intangible

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personal property (including computer hardware and software, but excluding exhaustible materials such as pencils, paper clips, and paper) which have a useful life of one year or more and which are purchased, leased or maintained for use on or at the Project Premises or in or at the MCI Building, including equipment and expendable supplies used in constructing the Improvements (the "Equipment"). The scope of the exemption from taxes will include the acquisition, improvement, installation, and maintenance of the Project Property.

Petitioner leases the Project Premises, pursuant to a net lease, from Baker Properties, a Connecticut limited partnership, dated as of March 11, 1997. Pursuant to the Agency Sublease Agreement, Petitioner will sublease the Project Premises to the IDA; and the IDA will sub-sublease the Project Premises back to Petitioner pursuant to the MCI Sublease Agreement. Pursuant to these documents and the Project Agreement, (i) Petitioner as agent for the IDA will arrange for the acquisition and construction of the Improvements and the acquisition, installation, maintenance and repair of the Equipment, (ii) the IDA will lease the Project Property to Petitioner, for use in Petitioner's business, and (iii) at the expiration of the Agency Sublease Agreement or upon the exercise by Petitioner of the purchase option under the Project Agreement, Petitioner will acquire the Project Property (other than the Project Premises) from the IDA.

To exempt the Project Property from sales and compensating use taxes, Petitioner will, as agent for the IDA, contract for the purchase, lease, installation, construction, maintenance, and repair of the Improvements and the Equipment. Petitioner, as agent of the IDA, will advance funds necessary for the Project and will offset against the rent due to the IDA ("Base Improvement Rent") amounts advanced by Petitioner on behalf of the IDA.

The exemption from taxes resulting from the financial assistance will apply to charges to purchase or lease Project Property, and to the installation, maintenance and repair of Project Property. The exemption will apply only to property which has a useful life of more than one year, except that it will also apply to property used in the construction process with a useful life of one year or less. The exemption will not apply to the purchase of consumable operational property or services, such as telephone services, electricity, or office and cleaning supplies and services.

To carry out the purchase, lease, installation, construction, maintenance, and repair of the Project Property, Petitioner and agents of the IDA appointed by Petitioner will follow a notice and documentation procedure for all expenditures made for or upon Project Property, to ensure that they are properly qualified for the exemption from taxes under the Sales Tax Letter issued by the IDA. All purchase orders and contracts entered into relating to Project Property will reflect that the sale is being made by the seller to the particular purchasing entity (Petitioner or another appointed agent, such as a contractor or subcontractor), as agent for the IDA. When a transaction involves Project Property and non-Project Property, there will be a bifurcation of the transaction and a clear indication of the portion which is part of the Project and exempt from taxes pursuant to the agreement between Petitioner and the IDA, the Sales Tax Letter issued by the IDA, and the nature and use of the property with respect to which the transaction occurs.

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Petitioner has been given the authority to designate other persons to be agents of the IDA for Project purposes, to act on behalf of the IDA pursuant to the Sales Tax Letter issued by the IDA. All acquisitions of Project Property made by Petitioner or by another agent, on behalf of the IDA, during the term of the agreement will also be pursuant to the agency relationship with the IDA; and such Project Property will also be leased to Petitioner under the general lease agreement for the Project Property.

When a purchase or contract is made by Petitioner for or with respect to Project Property, it will be entered into by Petitioner as agent for the IDA. When a purchase is made by another entity which Petitioner has appointed as agent of the IDA, such as a contractor, it will be as agent of the IDA as designated by Petitioner.

All purchase orders, bills, contracts, invoices, and other documents evidencing transactions entered into by Petitioner or by another entity which Petitioner appointed as agent of the IDA, for which exemption from taxes is intended, will identify that the transaction is made with and on behalf of the IDA and that it specifically relates to the Project. All invoices and bills will be addressed to Petitioner or such other entity, as the agent of the IDA.

Applicable Law and Regulations

Section 1101(b)(5) of the Tax Law defines "sale, selling or purchase" as:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1101(b)(6) of the Tax Law defines "tangible personal property" as:

Corporeal personal property of any nature ... Such term shall also include 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)(9)(i) of the Tax Law defines "capital improvement" as:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

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

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

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

* * *

(28) 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.

* * *

(35) Computer system hardware used or consumed directly and predominantly in designing and developing computer software for sale.

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, 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 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.

(15) "Straight-lease transaction" - shall mean a transaction in which an agency takes title, possession or control (by lease, license or otherwise) to the property or equipment of a project occupant, entitling such property or equipment to be exempt from taxation according to the provisions of section eight hundred seventy-four of this article, and no financial assistance in the form of the proceeds of bonds issued by the agency is provided to the project occupant.

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.

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Section 923-a of the General Municipal Law establishes the Westchester County 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 whether 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, 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 (1986) ("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 project 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 operation 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 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 (General Municipal Law).

In ("Wegmans I"), the court stated:

The legislature very carefully included all revenues received by an IDA within the purposes of Article 18A (the New York State Industrial Development Agency Act). The definition of "revenues" in section 854, subpar. (7) 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, any 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

Opinion

Based on the structures under which the IDA proposes to make sales and compensating use tax benefits available to Petitioner with respect to Project Property, and based on the other facts presented in the petition, and in accordance with the sections of law and regulations cited above and the decisions

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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 are complied with, and that these terms and conditions are consistent with Petitioners' description of them as set forth above in the instant matter:

1. Petitioner's purchase or lease from others of Project Property, made as agent for and on behalf of the IDA, will be exempt from sales and compensating 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.

An advisory opinion does not determine factual issues. This Petition does not indicate to what extent 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 Petitioner's payments for installation or construction of these capital improvements will not be subject to sales and use tax imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law, whether or not Petitioner is an agent of the IDA. 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 because the IDA or its agent is the purchaser of the tangible personal property, as discussed in the preceding paragraph.

If an Improvement does not constitute a capital improvement under Section 1101(b)(9) of the Tax Law, then the charges for installation or construction of such Improvement which does not constitute a capital improvement will be exempt from such taxes only if the purchaser is an agent of the IDA. Thus, the payments to install or construct Improvements which do not constitute capital improvements will be exempt from such taxes only where Petitioner or another person makes purchases as agent of and on behalf of the IDA.

Petitioner's purchases, made as agent for and on behalf of the IDA, (i) of the services of installation, maintenance and repair of the Equipment, with a useful life of one year or more, which is in use at the Project, 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) of the services of maintenance and repair of those Improvements which constitute real property, will be exempt from the sales and compensating use taxes, to the extent that "(a)" the 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 "(b)" the 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,

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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 services and such Equipment, and that the IDA is the purchaser with respect to Improvements.

However, in any instance where Petitioner purchases a service of maintaining, repairing or servicing exempt Equipment or Improvements which results in the replacement of parts, materials or supplies that are consumed in the daily ongoing operation of Equipment or 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 compensating 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.). The purchase and use of fuels and energy and utility services are not tax-exempt. Id.

Pursuant to section 1115(o) of the Tax Law, 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, 1109 and 1110 of the Tax Law, whether or not the purchaser is an agent of the IDA; 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.

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 compensating 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 Westchester County, 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 Westchester County must be contiguous to the portion of the project inside Westchester. Thus, if property, including software, and services are used outside Westchester County 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 compensating 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 State municipality in which it will be used.

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

Transactions for the purchase, lease, installation, construction, maintenance and repair of the Project Property, made by agents appointed by Petitioner, as agent for and on behalf of the IDA, are afforded the same status as purchases made by the Petitioner as agent of the IDA and will be exempt from sales and compensating use taxes to the same extent and under the conditions described above.

2. Petitioner's lease payments to the IDA under the Project Agreement with respect to the Project Property will not be subject to sales and compensating use taxes.

3. Petitioner's payments to the IDA to exercise the Option to Purchase Project Property will not be subject to sales or compensating use taxes; nor will the IDA's transfer of the Project Property to Petitioner at the time such Option is exercised be subject to sales or compensating use taxes based on the value of the Project Property.

All of the forgoing 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: October 15, 1998

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

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