

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

TSB-A-93 (71) S
Sales Tax
September 1, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930302D

On March 2, 1993 a Petition for Advisory Opinion was received from American International Group, Inc., 70 Pine Street, 24th Floor, New York, New York 10270.

The issue raised by Petitioner, American International Group, Inc., is whether purchases and leases of personal property made by Petitioner, American International Realty Corporation, American International Facilities Management, Inc., A. I. Credit Corp., and Additional Lessees as an agent for the New York City Industrial Development Agency are exempt from New York State and New York City sales and use tax.

The parties involved in this transaction are all members of an affiliated group which files a consolidated income tax return for federal purposes. The parent of this group is Petitioner. The Equipment Lessees under the agreements are the Petitioner as well as the following corporations:

American International Realty Corporation
American International Facilities Management, Inc.
A. I. Credit Corp.

In addition to these companies, affiliates of Petitioner are entitled to be added as Additional Lessees under the agreements and have not yet been identified at this time. The additional lessees must be controlled by, or 50% owned by Petitioner.

The Equipment Lessees and Additional Lessees referred to above are hereinafter referred to as "Taxpayer"

Taxpayer and the New York City Industrial Development Authority (hereinafter "IDA") entered into a bond financing arrangement in order to induce Taxpayer to maintain a certain level of employment in New York from January 14, 1993 to July 1, 2003. Pursuant to that arrangement the IDA authorized Taxpayer to purchase or lease certain personal property as agent for the IDA. Charges for maintenance, installation, service and repair of the property were also intended to be tax exempt. The purchase price or rent would initially be paid by Taxpayer and then reimbursed to Taxpayer with the proceeds of the bonds. Taxpayer will then lease or sublease the property from the IDA. Title to the property will revert to Taxpayer at the termination of the agreement. For financial and tax purposes the Taxpayer intends to treat this transaction as a financing arrangement and account for the property as if owned by Taxpayer. Petitioner has only made tax exempt purchases and leases of property since entering into its relationship with the IDA on January 14, 1993.

Taxpayer has been provided with a "Sales Tax Letter" which is on IDA letterhead and signed by the IDA. It intends to present the Sales Tax Letter when acquiring the property. The letter advises that the Taxpayer is the IDA's agent and exempt from state and local sales and compensating use tax levied by the State and City of New York. In addition, the lease agreement requires specific language stating that the acquisition is on behalf of the IDA be included in each contract, invoice, bill, purchase order or lease.

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

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

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

* * *

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

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

(5) maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term ... is defined in paragraph 9 of subdivision (b) of section eleven hundred one of this chapter

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

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

(a) General. 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 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 tax within this state (A) of any tangible personal property purchased at retail, (B) of any tangible personal property 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 paragraph (1) of subdivision (c) of section eleven hundred five, and (D) of any tangible personal property ... not acquired for purposes of resale, upon which any of the services described under paragraphs (2) and (3) of subdivision (c) of section eleven hundred five have been performed

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

(a) ... 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 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 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) ... (c) industrial development authorities ... "

Section 874 of the General Municipal Law provides, in relevant part:

Tax exemptions

(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 there from, 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 agency under Article 18-A of the General Municipal Law.

In Wegmans Food Market, Inc. v The Department of Taxation and Finance of the State of N.Y., (Sup Ct, Monroe County, Jan. 10, 1992, Galloway, J.) 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 applies to operational expenses incurred by plaintiff in the day-to-day operation of several projects in western New York State developed as its supermarkets. Those markets were constructed and equipped under agreements made with various municipal 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 local 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 Tax & Finance of the State of N.Y., 126 Misc 2d 144, affd 115 AD2d 962, iv to app den 67 NY2d 606, the section 874 tax exemption was held to be broader than the exemption provided by Section 1116 of the Tax Law.

The court in its January 10, 1992, opinion 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 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 financing 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 (supra), where the tax exemption of section 874 was held applicable to the purchase of tangible personal property acquired and owned by the IDA, as security for the IDBs. Ownership of property, real and personal--as distinguished from operation of the business--was clearly within the express, contemplated function and authority of IDAs under the GML.

In accordance with the sections of law and regulations cited above and the decisions in Wegmans Food Markets, Inc. v. Department of Taxation and Finance (126 Misc 2d 144, aff'd 115 AD2d 962, iv to app den 67 NY2d 606) and Wegmans Food Market, Inc. v The Department of Taxation and Finance of the State of N.Y., (Sup Ct, Monroe County, Jan. 10, 1992, Galloway, J.) supra, and provided that all the terms and conditions of the relevant documents are complied with, in the instant matter all amounts paid by Taxpayer to make purchases and leases of personal property as agent of the IDA will be exempt from the sales and use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law provided that the IDA is the owner of the property. Payments made by the Taxpayer as agent of the IDA, which represent costs for maintenance, installation, service and repair contracts, where the contracts provide for the replacement of parts, other than parts that contain materials or supplies that are consumed in the operation of project equipment, (e.g., a toner cartridge) where such parts must be replaced whenever the supply is consumed, and repair of or with respect to equipment, which equipment has a useful life of one year or more (exempt maintenance services), will be exempt from the sales and use taxes imposed under Sections 1105, 1107, 1109 and 1110 of the Tax Law to the extent that such services under such contracts are necessary to maintain or repair the IDA equipment used as part of the project as indicated in Wegmans Food Market, Inc. v. The Department of Taxation and Finance of the State of N.Y. (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.) supra. Prudential Securities, Incorporated. Adv Op Comm T&F, April 28, 1993.

However, it is noted that in any transaction where the charges are for maintenance services, in addition to exempt maintenance services, the total charges will be subject to the tax imposed under Sections 1105 (c)(3) or (5) of the Tax Law unless the charges applicable to the exempt maintenance services are separately stated from the other charges or otherwise reasonably allocated. Prudential Securities, Incorporated. Adv Op Comm T&F, April 28, 1993.

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Debt service payments by the Taxpayer to the IDA will not be subject to sales and use taxes imposed under Sections 1105, 1107, 1109 or 1110 of the Tax Law. Payments under the leases of the personal property from the Taxpayer to the IDA are not subject to state and local sales or compensating use tax by virtue of the IDA's statutory exemption from tax.

DATED: September 1, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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