

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

TSB-A-82(5)S
Sales Tax
January 29, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S811026A

On October 27, 1981 a Petition for Advisory Opinion was received from Olympia & York Battery Park Co., 245 Park Avenue, New York, NY 10167.

Petitioner inquires as to the sales and use tax liabilities involved in connection with a major construction project, as described below.

Petitioner is a New York partnership. Petitioner proposes to lease from the Battery Park City Authority (hereinafter "BPCA") certain parcels, plots and pieces of land located in lower Manhattan. These properties are owned by BPC Development Corporation (hereinafter "Development"), a subsidiary of the New York State Urban Development Corporation (hereinafter "UDC"). Development has leased the land to BPCA for a term expiring in 2069. The proposed lease to Petitioner will extend through June 17, 2069.

Under the terms of the proposed lease, Petitioner will be required to construct various non-residential buildings, structures and improvements and to maintain and repair such buildings, structures and improvements, keeping the same in good and safe condition. The lease will provide that title to all materials which are to be incorporated into the buildings are to vest in BPCA upon the purchase of such materials. Petitioner will be required to include a provision to similar effect in all contracts it enters into in connection with construction of the buildings and in connection with any subsequent improvements made to the buildings. BPCA will at all times have title to the buildings and improvements to be erected by Petitioner under the lease. Petitioner will have no interest in the buildings other than as tenant under such lease. At the expiration of BPCA's lease with Development, title to all buildings and improvements to the land will vest in Development.

It is anticipated that during construction and following completion of the buildings, Petitioner may from time to time engage in additional construction work with respect to the buildings, including additions, alterations and capital improvements undertaken in connection with the leasing of space to subtenants of Petitioner. The lease will provide that title to all materials used in constructing such additions, alterations and improvements to the buildings shall vest in BPCA immediately upon purchase by Petitioner, its contractors, subcontractors, and materialmen, in the same manner as materials used in the initial construction of the buildings. The proposed lease contemplates that Petitioner's subleases with its subtenants may provide that title to all additions and improvements to the buildings made by or at the expense of such subtenants will vest immediately in BPCA.

On the last day of the lease term, or upon any earlier termination thereof, Petitioner will be required to surrender the buildings and underlying property to the BPCA. Petitioner is also required to repair and rebuild damaged property. In the event that the whole or substantially all of a parcel of land subject to the lease is taken by eminent domain, the lease shall terminate and expire on the date of taking. Petitioner shall receive that portion of the condemnation award, if any, which is attributable to the buildings. If less than substantially all of any parcel subject to the lease shall be taken by eminent domain, the lease shall continue without abatement of rental, and Petitioner must, at its own cost and expense, proceed to restore any remaining part of the buildings not taken, so that the latter shall be complete, rentable, self-contained architectural units in good condition and repair. If the amount of the condemnation award exceeds the cost of such restoration, Petitioner may retain such excess.

Upon entering the lease described above, Petitioner will enter into two other agreements with BPCA, the Civic Facilities Construction Agreement and the Civic Facilities Maintenance Agreement. The Construction agreement provides for the design and construction by Petitioner, at the cost and expense of BPCA, of various improvements on, over, under, through and adjacent to the buildings and improvements to be constructed by Petitioner under the Lease. These improvements (hereinafter referred to as "Civic Facilities") consist of all infrastructure improvements necessary to service the buildings and other portions of Battery Park City, and include such items as

- (i) electrical, gas, water and telephone mains and branches, sanitary and storm sewers, fire hydrants and street fire alarms, street lighting, access improvements and landscaping;
- (ii) streets, curbs and sidewalks;
- (iii) a landscaped public esplanade and a plaza (with amenities such as fountains and reflecting pools);
- (iv) two pedestrian bridges (including, without limitation, the entrances, terminals, supports, heating, ventilating and air-conditioning systems thereof, and the steps, escalators and elevators leading thereto; and
- (v) foundations, piles, platforms and supports required for the foregoing improvements.

Under the terms of the Civic Facilities Construction Agreement, title to all materials, fixtures, and equipment purchased by Petitioner, its contractors, subcontractors, and materialmen, to be incorporated into the Civic Facilities shall, immediately upon purchase of the same and at all times thereafter, become and constitute the property of BPCA, free and clear of all liens, claims, security interests and encumbrances.

The Construction Agreement requires Petitioner to include in all of its contracts and agreements for the construction of the Civic Facilities language reciting that all materials, fixtures, and equipment purchased for incorporation in the Civic Facilities shall upon purchase become the property of the BPCA. Under the Maintenance Agreement, Petitioner, as contractor, will agree to operate the Civic Facilities, to put, keep and maintain the Civic Facilities in good and safe condition, and to make all repairs thereto, structural and non-structural, ordinary and extraordinary, necessary to keep the same in good and safe condition.

Finally, it is anticipated that Petitioner will incur certain costs for architectural and engineering services in connection with the design, construction and alteration of the subject buildings and civic facilities.

Petitioner requests an Advisory Opinion to the effect that materials, fixtures, and equipment purchased, whether directly or through contractors, subcontractors, and materialmen for use:

- (1) in constructing the buildings to be erected at Battery Park City under the terms of the Lease;
- (2) in adding to, altering or improving said buildings following their substantial completion, including additions, alterations and improvements undertaken in connection with space leased to subtenants (but excluding improvements undertaken by or at the expense of a subtenant of Petitioner, unless the subtenant's sublease specifically provides for the vesting of title to the improvements in BPCA);
- (3) in restoring and reconstructing the Buildings and improvements in the event of damage or destruction due to fire or other casualty or resulting from a partial taking by condemnation or eminent domain;
- (4) in maintaining, servicing or repairing the Buildings over the terms of the Lease,
- (5) in constructing the Civic Facilities under the Construction Agreement; and
- (6) in maintaining, servicing, repairing, restoring and reconstructing the Civic Facilities pursuant to the Maintenance Agreement shall be exempt from sales and use tax under Articles 28 and 29 of the Tax Law, provided that the property so purchased becomes an integral component part of the Buildings or the Civic Facilities, as the case may be.

Petitioner also requests an Advisory Opinion to the effect that the architectural and engineering services purchased by Petitioner in connection with the design, construction and alteration of the Buildings to be erected under the Lease and the Civic Facilities to be constructed under the Civic Facilities Construction Agreement shall not be subject to sales and use tax under Articles 28 and 29 of the Tax Law.

Section 1105(a) of the Tax Law imposes the State sales tax on the ". . . receipts from every retail sale of tangible personal property, except as otherwise provided in this article." Section 1101(b)(4)(i) defines the term "retail sale" to include "a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption 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, . . . regardless of whether the tangible personal property is to be resold as such before it is so used or consumed."

However, paragraphs (15) and (16) of subdivision (a) of section 1115 of the Tax Law provide exemptions from the sales and compensating use taxes with respect to the following classes of tangible personal property:

"(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."

Section 1116(a)(1) of the Tax Law provides for an exemption from sales and compensating use taxes with respect to 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 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." The UDC and its subsidiaries, such as Development, are exempt from sales and compensating use taxes pursuant to Section 1116(a)(1) of the Tax Law. Mck. Unconsol. Laws §§6254(1), 6262(2), 6272. BPCA is similarly exempt, as a public corporation. Public Authorities Law, § 1973.

Under the proposed lease agreement and the Civic Facilities Construction Agreement Petitioner will construct (or in the event of damage or certain takings by eminent domain, reconstruct) buildings and make capital improvements upon the real property leased to it by BPCA. Title to all buildings constructed by Petitioner pursuant to these agreements, and to all capital improvements to such buildings, will vest in BPCA. In constructing buildings and performing capital

improvements, title to which vests in BPCA, Petitioner will be erecting buildings of, or making capital improvements on the real property of, an organization described in subdivision (a) of section 1116 of the Tax Law. The underlying property upon which Petitioner will perform its construction work is owned by Development. Capital improvements to the underlying property made by Petitioner under its agreements with BCPA will therefore be improvements to real property of an organization described in subdivision (a) of section 1116 of the Tax Law. Accordingly, tangible personal property purchased by Petitioner, its contractors, subcontractors, and materialmen to be used in performance of the construction work contemplated in Petitioner's proposed agreements with BPCA will be exempt from sales and compensating use taxes pursuant to sections 1115(a)(15) and (16) of the Tax Law, provided such tangible personal property becomes an integral component part of the building or capital improvement involved. The foregoing is also applicable to additions, alterations and improvements to the completed buildings, including those undertaken in connection with space leased to subtenants, but only where the same in fact constitute capital improvements.

Under the terms of the proposed lease and the Civic Facilities Maintenance Agreement, Petitioner will be required to maintain the buildings and capital improvements it constructs in good and safe condition, and to make repairs to this end. Title to these buildings and capital improvements will vest in BPCA. In maintaining and repairing them, therefore, Petitioner will be maintaining and repairing real property of an organization described in subdivision (a) of section 1116 of the Tax Law. Accordingly, tangible personal property purchased by Petitioner, its contractors, subcontractors or materialmen, for purposes of maintaining and repairing these buildings and capital improvements will be exempt from sales and compensating use taxes under section 1115(a)(16) of the Tax Law, provided such tangible personal property becomes an integral component part of the buildings and capital improvements.

Finally, receipts from the provision of architectural and engineering services, consisting of the preparation of plans and blueprints and the offering of technical advice and information, is not subject to the sales tax imposed under section 1105(c) of the Tax Law. Opinion of Counsel, April 18, 1966. The purchase of such services by Petitioner in connection with the performance of its contracts with BPCA will therefore not be subject to such tax.

The conclusions expressed above with reference to the State sales taxes imposed under Section 1105 of the Tax Law are applicable also to the State compensating use tax imposed under section 1110 of the Tax Law, the New York City and Yonkers sales and compensating use taxes imposed under sections 1107 and 1108 of the Tax Law, respectively, the sales and compensating use taxes for the Metropolitan Commuter Transportation District imposed under section 1109 of the Tax Law and local sales and compensating use taxes imposed pursuant to the authority of Article 29 of the Tax Law.

DATED: January 13, 1982

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau