

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

TSB-A-89 (8.1)S
Sales Tax
April 27, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

MODIFIED ADVISORY OPINION PETITION NO. S881116A

This modifies an Advisory Opinion issued to 450 Lexington Venture, 885 Third Avenue, New York, N.Y. 10022.

The purpose of this modification is to address issues which were raised by Petitioner subsequent to the issuance of the original opinion.

The additional issues raised are:

1) Whether the purchases of materials, by "space tenants" or their contractors, for use in constructing and installing "space tenant" improvements are exempt from state and local sales tax when, pursuant to the space lease agreement between Petitioner and the space lessee, such materials are to be permanently incorporated into real property owned in fee by the United States Postal Service (USPS).

2) Whether a copy of the space lease agreement is sufficient proof of the exempt status of the purchases of materials, by the "space tenants" and the contractor, for use in constructing and installing "space tenant" improvements in the leased premises owned in fee by the USPS and whether the Form ST-120.1, Contractor Exempt Use Certificate is sufficient proof of the exempt status of the materials purchased, by the subcontractors and materialmen, for use in constructing and installing such "space tenant" improvements.

The original Advisory Opinion established that Petitioner, as tenant, has entered into a lease with the USPS, whereby the USPS, as landlord, is leasing to Petitioner real property for a period of 99 years. Under the terms of the lease between Petitioner and the USPS, Petitioner is to construct a thirty-one story commercial tower (Tower) on top of an existing eight story building.

Petitioner has also entered into space lease agreements with "space tenants" whereby Petitioner will sublease space to the space tenants. Under the terms of each space lease, title to all materials that are incorporated into the Tower by each space tenant (other than any materials that may belong to a space tenant as expressly provided in the space lease) will automatically, without any payment or any other act on the part of the USPS, be and become an integral component of the Tower and the property of the USPS.

It is anticipated that each space tenant will engage either its own contractor or construction manager, Petitioner or Petitioner's contractors (hereinafter referred to as contractor) to act as the general contractor for the construction or installation of its space tenants improvements. The contractor will, in turn, hire subcontractors or materialmen. Purchases of materials which are incorporated into and become physical components of the Tower, for the purpose of constructing and installing space tenant improvements, will be made by Petitioner, the space tenants, the contractor, the subcontractors and the materialmen.

Petitioner, the contractor and the space tenants intend to rely on the space lease as sufficient proof of the exempt status of the materials purchased. The subcontractors and materialmen will rely on a properly completed form ST-120.1, Contractor Exempt Purchase Certificate, between the space tenant and the contractor and between the contractor and each subcontractor or materialman, that identifies the project, location and exempt owner (USPS) as the basis for the exempt status of the materials purchased.

Petitioner, under the terms of a consent agreement, will pay to the Metropolitan Transportation Authority (MTA) any tax savings, that accrue during the initial construction and finishing of the Tower, on the purchase of materials for the construction and installation of space tenant improvements, as a result of ownership of the real property by the USPS. Each space lease will provide, in most instances, that the space tenant pay to Petitioner the amount of any tax savings which accrue to the space tenant or that any sums to be paid or credited to the space tenant by Petitioner be reduced by the amount of such accrued tax savings. In either instance, Petitioner, pursuant to the consent agreement, will pay any tax savings accrued by the space tenants to the MTA.

The relevant portions of Sections 1105(a), 1104(b)(4)(i), 1115(a)(15) and (16), and 1116(a)(2) of the Tax Law are set forth in the original Advisory Opinion. Applicable portions of Sections 528.16 and 541.3(a)(1)(i) and (d)(2)(i), (ii) and (v) of the Sales and Use Tax Regulations are also set forth in the original Advisory Opinion.

Inasmuch as the materials purchased by Petitioner, the contractor, the space tenants, subcontractors or materialmen for use in constructing and installing the space tenant improvements will become integral components of the real property owned by the USPS, and inasmuch as title to the materials will immediately transfer to the USPS upon such installation, the purchases of such materials will be exempt from sales and compensating use tax as provided under Sections 1115(a)(15) and 1115(a)(16) of the Tax Law.

Petitioner, the contractor, space tenants, subcontractors or materialmen may purchase materials, which will be incorporated as integral components of the real property owned by the USPS, tax exempt provided they furnish the building material supplier a properly completed form ST-120.1, Contractor Exempt Purchase Certificate. Petitioner, the contractor and the space tenants should keep on file a copy of the sublease agreement between Petitioner and the space tenants as substantiation that the construction and installation performed was exempt from sales and use tax under Section 1115(a)(15) and 1115(a)(16) of the Tax Law.

DATED: April 27, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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