

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

TSB-A-89(8)S
Sales Tax
March 7, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S881116A

On November 16, 1988, a Petition for Advisory Opinion was received from 450 Lexington Venture, 885 Third Avenue, New York, N.Y. 10022.

The issues raised are:

(1) Whether purchases of materials, by Petitioner or the general contractor, for use in constructing a thirty-one story commercial office tower (Tower) on top of an existing eight story building, constructing new building columns, footings, girders and supports (Supports) in the subsurface beneath the existing building, and renovating the facade and internal portions of the existing building, are exempt from state and local sales tax when pursuant to the lease between Petitioner as tenant and the United State Postal Service (USPS) as landlord, such materials are to be permanently affixed and incorporated into real property owned in fee by the USPS or held by the USPS under a permanent and perpetual easement.

(2) (a) Whether a copy of the lease will provide sufficient substantiation of the exempt status of purchases of materials, by Petitioner or the general contractor, for use in constructing the Tower and Supports and in the renovation of the existing building.

(b) Whether the Form ST-120.1, Contractor Exempt Purchase Certificate will provide sufficient substantiation of the exempt status of the purchases of such materials by the subcontractors and the materialmen.

Petitioner is a New York partnership. 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. This real property consists of the land, an eight story building currently being used as a USPS Post Office and the subsurface of the land (beneath the building) wherein the Metropolitan Transportation Authority (MTA) maintains railroad tracks and platforms on which it conducts certain railroad activities.

The United States of America purchased the land from the New York Central Railroad Company and subsequently transferred title to the property to the USPS, which, under the Deed, owns the land in fee. The land includes the subsurface and ownership of the subsurface is subject to rights and easements retained by the New Central Railroad Company in the Deed and currently held by New York Central's successors, The Penn Central Corporation and its subsidiary, The Owasco River Railway, Inc. (collectively, the Railroad). The Railroad has leased these retained subsurface rights and easements to the MTA. However, the Deed grants back to the United States of America, out of the retained rights and easements, certain easements in the subsurface for structural support of the United States buildings and improvements.

The relevant portion of the Deed which grants back such easements states: Excepting and reserving unto the Railroad Company, its successors and assigns forever, from out of the grant of the above described parcel of land, the permanent and perpetual rights and easements required for the exclusive use by the Railroad Company, its successors and assigns, (including lessees and licencees) for railroad, station, terminal and other purposes of the Railroad Company, its successors and assigns, of [the Subsurface] ... The Railroad Company further grants to the United States, its successors and assigns, the permanent and perpetual right and easement to maintain, renew and replace within the [Subsurface] the building columns, footings, girders and supports hereinafter called supporting structures, now or at any time constructed therein. The location and/or dimensions of the supporting structures may at any time or times at the request and to accommodate the necessary purposes of either the Railroad Company or the United States, with the written assent of the other and upon such other terms and conditions as may be agreed between them be from time to time changed; provided such change shall not prevent or interfere with the suitable and convenient occupation, use and operation of the [Subsurface] for railroad, station, terminal and other purposes of the Railroad Company, its successors and assigns, or the proper and necessary support of the present building, or the building or buildings that may be erected by the United States upon the parcel of land above described. (N.Y. County Register's Office, Liber 3850, cp. 488-489 and 490-491.)

As tenant under the lease, Petitioner will construct a thirty-one story commercial office tower on top of the existing eight story building and make certain renovations to the facade and internal portions of that building. Under the terms of the lease, title to the building and all materials that are incorporated into the building by Petitioner (other than any materials that may belong to a subtenant pursuant to the terms of such subtenant's space lease) will, without any payment or any other act on the part of the USPS, be and become an integral part of the building and property of the USPS.

In order to construct the commercial office tower, it is necessary that new building columns, footings, girders and supports be constructed in the subsurface. Because the Railroad and the MTA hold rights and easements in the subsurface, and as the construction of the building columns, footings, girders and supports will interface with railroad operations, Petitioner must obtain certain consents from the Railroad and the MTA regarding the exact location and/or dimensions of the new subsurface construction as well as to certain related matters. Petitioner, the MTA and the Railroad will therefore enter into an agreement under which the MTA and the Railroad will grant their consent.

It is anticipated that Petitioner will hire a contractor or construction manager (hereinafter the contractor) to act as a general contractor or construction coordinator during the construction period. The contractor will, in turn, hire subcontractors. Other subcontractors or materialmen may also be engaged. Purchases of materials for incorporation into the building will be made by Petitioner, the contractor, the subcontractors and materialmen.

Petitioner and the contractor intend to rely on the lease as sufficient proof of the exempt status of the materials purchased. The subcontractors and materialmen will rely on a signed exemption document, 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.

Section 1105(a) of the Tax Law imposes a sales tax on "[t]he 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....

Section 1115(a) of the Tax Law exempts from the sales tax imposed under section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110:

*

*

*

(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.

repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, is exempt when it is to become an integral component part of such structure or building.

- (ii) Purchases of tangible personal property incorporated into the real property of an exempt organization by subcontractors and repairmen are accorded the same treatment as purchases by the prime contractor.

* * *

- (v) Documents. (a) If the customer is a governmental entity, copies of signed contracts and government purchase orders are sufficient evidence to establish the exempt status of the job between the governmental entity and the prime contractor. With respect to the documents required between a prime contractor and the subcontractors, a signed document between them which identifies the project, location and exempt owner, will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. When purchasing such tangible personal property for the exempt project, the contractor or subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

Accordingly, because the materials which are purchased by Petitioner, the contractor, subcontractors or materialmen for use in constructing the thirty-one story commercial office tower or for renovating the facade and internal portions of the existing building will become integral components of the real property owned by the USPS and because the USPS will immediately take title to such materials, the purchases of such materials will be exempt from sales and compensating use tax as provided under Section 1115 (a)(15) and 1115 (a)(16) of the Tax Law.

TSB-A-89(8)S
Sales Tax
March 7, 1989

Ownership to the subsurface is granted to the USPS through the Deed which originally conveyed the property from the New York Central Railroad to the United States of America. Under the provisions of the Deed, the Railroad retained permanent and perpetual rights and easements to the subsurface for exclusive use by the Railroad, its successor's and assigns (including lessees and licensees) for railroad, station, terminal and other purposes. However, the deed also granted back to the United States of America, its successors and assigns, the permanent and perpetual right and easement to maintain, renew and replace within the subsurface the supporting structures then or at any time constructed therein. The Deed also provides that the location and/or dimensions of the supporting structure may be changed at any time at the request of either the Railroad Company or the United States by written assent and upon such terms and conditions as may be agreed. Although title to the property and the right and easement subsequently transferred from the U.S. to the USPS and the rights and easements of the Railroad transferred to the Penn Central Corporation and its subsidiary and subsequently transferred to their lesser, the MTA, the rights and easements as provided in the Deed continue to be relevant. Accordingly, as the materials which are purchased for use in constructing the new building columns, footings, girders and supports within the subsurface beneath the existing building will become integral components of real property owned by the USPS, the purchases of such materials will be exempt from sales and compensating use tax as provided under Section 1115 (a)(15) of the Tax Law.

Petitioner, the contractor, subcontractor's and 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 with a properly completed form ST-120.1, Contractor Exempt Purchase Certificate. Petitioner and the contractor should keep on file a copy of the lease between Petitioner and the USPS as substantiation that the construction performed was exempt from sales and use tax under Section 1115 (a)(15) and 1115(a)(16) of the Tax Law.

DATED: March 7, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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