

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

TSB-A-91 (23)S
Sales Tax
February 22, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S901114A

On November 14, 1990 a Petition for Advisory Opinion was received from Insurance Services Office, Inc., 160 Water Street, New York, N.Y. 10038.

The issues raised by Petitioner, Insurance Services Office, Inc., are whether:

1. Tangible personal property purchased by Petitioner's contractors and subcontractors which becomes an integral component of leased premises at 7 World Trade Center will be exempt from sales and use taxes under Sections 1115(a)(15) and 1115(a)(16) of the Tax Law.
2. The rental of tools and equipment by Petitioner's contractors and subcontractors for use in installing such tangible personal property into the leased premises at 7 World Trade Center is similarly exempt from sales and use taxes.

Petitioner entered into a lease dated January 25, 1990 (and amended October 1, 1990) for space at 7 World Trade Center pursuant to which Petitioner received a license to commence work on the premises. Pursuant to a lease dated December 31, 1980, between 7 World Trade Company and the Port Authority the land upon which 7 World Trade Center has been constructed has been leased from the Port Authority of New York and New Jersey (the "Port Authority") to 7 World Trade Company.

Section 4.12 of the December 31, 1980 lease states, "Legal title to the Tower building construction, including improvements, appurtenances and fixtures shall vest in the Port Authority immediately upon erection or affixation of all or any part on or to the premises."

Section 13.11 of the lease between Petitioner and 7 World Trade Company states: "Tenant has informed Landlord that Initial Tenant's Changes may include interconnecting stairwells and elevators between floors of the Demised Premises, raised floors to accommodate computer facilities, auditoriums, cafeterias, dining rooms, lunch rooms, vertical mail systems and security systems (hereinafter called 'Special Tenant Installations'), and Landlord hereby approves, in concept, Special Tenant Installations subject to all applicable provisions of this Article governing the performance of Tenant's Changes and Landlord's approval of plans and specifications therefor (which consent shall not be unreasonably withheld or delayed) and further subject, in the case of auditoriums, cafeterias, dining rooms and lunch rooms, to any restrictions contained in this lease relating to the use and operation thereof. Landlord may, at its option and at Tenant's expense (such expense to be limited to the Direct Cost thereof), make final connections into the Building security system of any security systems to be installed by Tenant in the Demised Premises. All Special Tenant Installations shall remain upon and be surrendered with the Demised Premises unless Landlord, by notice to

Tenant, no later than sixty (60) days prior to the stated Expiration Date of this lease (or thirty (30) days after sooner termination of this lease) shall require all or any portion of the Special Tenant Installations to be removed from the Demised Premises prior to the expiration of the Term, at Tenant's expense, provided, however, notwithstanding anything to the contrary contained herein, in the event that at such time a lease executed by Landlord and a succeeding tenant of all or any part of the Demised Premises provides for use by such tenant of Special Tenant Installations (for example, if the Demised Premises are leased on a multi-floor basis and the succeeding tenant will use interior stairs that constitute Special Tenant Installations), then Tenant shall not be required to remove such Special Tenant Installations. Tenant shall repair, to Landlord's satisfaction and at Tenant's expense, any damage to the Demised Premises caused by the removal of Special Tenant Installations. The term Special Tenant Installations shall exclude Tenant's property."

Section 14.01 of such lease provides:

"All fixtures, equipment, improvements and appurtenances attached to or built into the Demised Premises at the commencement of or during Term, whether or not by or at the expense of Tenant, shall be and remain a part of the Demised Premises, shall be deemed the property of Landlord and shall not be removed by Tenant, except as hereinafter in this Article expressly provided."

Section 14.02 of such lease provides:

"All movable partitions, special cabinet work, other business and trade fixtures, machinery and equipment, card key readers, communications equipment and office equipment, whether or not attached to or built into the Demised Premises, which are installed in the Demised Premises or on the roof pursuant to Article 43 by Tenant, and can be removed without structural damage to the Building, and all furniture, furnishings and other articles of movable personal property owned by Tenant and located in the Demised Premises (all of which are sometimes referred to as 'Tenant's Property') shall be and shall remain the property of Tenant and may be removed by it at any time during the Term; provided that if any of Tenant's Property is removed, Tenant or any party or person entitled to remove same shall repair to Landlord's reasonable satisfaction or pay the Direct Cost of repairing any damage to the Demised Premises or to the Building resulting from such removal."

Section 7.01 of such lease provides:

"Subject to the provisions of this Article, this lease, and all rights of Tenant hereunder, are and shall be subject and subordinate in all respects to the Underlying Lease, all ground leases, overriding leases and underlying leases of the Land and/or the Building now or hereafter existing and to all mortgages which may now or hereafter affect the Land and/or the Building and/or any of such leases, whether or

not such mortgages shall also cover other lands and/or buildings, to each and every advance made or hereafter to be made under such mortgages, and to all renewals, modifications, replacements and extensions of such leases and such mortgages and spreaders and consolidations of such mortgages. This Section shall be self-operative and no further instrument of subordination shall be required. In confirmation of such subordination, Tenant shall promptly execute and deliver any instrument that Landlord, the lessor of any such lease or the holder of any such mortgage or any of their respective successors in interest may reasonably request to evidence subordination, provided such instrument includes the nondisturbance provisions of this Article. The leases to which this lease is, at the time referred to, subject and subordinate pursuant to this Article are hereinafter sometimes referred to as 'superior leases' and the mortgages to which this lease is, at the time referred to, subject and subordinate are hereinafter sometimes referred to as 'superior mortgages' and the lessor of a superior lease or its successor in interest at the time referred to is sometimes hereinafter referred to as a 'lessor'. . . ."

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 1110 of the Tax Law states, in part:

Imposition of Compensating Use Tax.

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..., except as otherwise exempted under this article, (A) of any tangible property purchased at retail, (B) of any tangible personal property manufactured, processed or assembled by the user, . . . (ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor . . . in erecting structures or buildings, or building on or otherwise adding to, altering, improving maintaining, servicing or repairing real property, . . . property or land...

Section 1109(a) of the Tax Law states, in part that:

. . .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 1101(b)(4)(i) of the Tax Law 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.

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 Port Authority constitutes such a public corporation exempt from sales and compensating use taxes.

Section 528.16 of the Sales and Use Tax Regulations states:

Tangible personal property sold to contractors for use in erecting structures of tax exempt organizations. [Tax Law, §1115(a)(15)]

Form of Contract. (1) The form of contract entered into between an exempt organization and its contractor is not relevant.

Section 541.3 of the Sales and Use Tax Regulations states:

Contracts with exempt organizations. [Tax Law, 1115(a)(15), (16), 1116(a); . . .]

(a) When a contractor's customer is a governmental entity described in section 1116(a)(1) or (2) 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:

* * *

(h) any authority. . . created by act of the Legislature for a public purpose.

* * *

(d) Contacts with exempt organization.

(2) Purchase for contracts (other than agency contracts).

(i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, 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.

Section 1101 of the Tax Law states, in part:

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a)(b)(c) and (d) of section eleven hundred five and by eleven hundred ten, the following terms shall mean:

(9) Capital improvement. (i) 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:...

A memorandum issued by Technical Services Bureau, TSB-M-83(17)S, dated June 15, 1983, titled Taxable Status of Leasehold Improvements For or By Tenants, states, in part:

Additions or alterations to real property for or by a tenant of such property will be presumed to be temporary in nature..., unless a contrary intention is demonstrated. A specific lease provision which states that: 1) immediately upon installation, title to such installation vests in the lessor, and 2) the addition or alteration becomes part

of and remains with the premises after the termination of the lease, will be recognized as a demonstration of contrary intention (i.e., an intention of permanence). A provision granting the lessor the right to require removal of the improvement will not negate this demonstration of intention of permanence; nor will a provision which states that the improvement becomes the property of the lessor upon expiration of the lease or upon termination of the tenancy.

Under the lease agreement between Petitioner and 7 World Trade Company, "[a]ll fixtures, equipment, improvements and appurtenances attached to or built into the Demised Premises at the commencement of or during Term. . . shall be and remain a part of the Demised Premises, shall be deemed the property of Landlord and shall not be removed by Tenant, except as expressly provided".

Such lease defines "interconnecting stairwells and elevators between floors..., raised floors to accommodate computer facilities, auditoriums, cafeterias, dining rooms, lunch rooms, vertical mail systems and security systems" as "Special Tenant Installations" and states that "[a]ll Special Tenant Installations shall remain and be surrendered with the Demised Premises unless Landlord by notice to Tenant, . . . shall require all or any portion of the Special Tenant Installations to be moved from the Demised Premises prior to the expiration of the Term, at Tenant's expense.

Such lease also provides that "[a]ll movable partitions, special cabinet work, other business and trade fixtures, machinery and equipment, card key readers, communications equipment and office equipment, whether or not attached to or built into the Demised Premises, which. . . can be removed without structural damage to the Building, and all furniture, furnishings and other articles of movable personal property owned by Tenant and located in the Demised Premises (all of which are sometimes referred to as 'Tenant's Property') shall be and remain the property of Tenant and may be removed by it at any time during the Term. . . .

However, the lease between 7 World Trade Company and Port Authority provides that "legal title to the Tower building construction, including improvements, appurtenances and fixtures shall vest in the Port Authority immediately upon erection or affixation of all or any part on or to the premises."

Where tangible personal property purchased by Petitioner's contractors or subcontractors becomes an integral component part of 7 World Trade Center, such tangible personal property is considered to be incorporated into improvements to real property of an organization described in Section 1116(a)(1) of the Tax Law. Accordingly, in those instances where the items of tangible personal property purchased by Petitioner's contractors or subcontractors for use in performance of the construction work contemplated in Petitioner's agreement with 7 World Trade Company become integral components of real property owned by Port Authority and where Port Authority will take title to such tangible personal property and such tangible personal property shall be and remain a part of the demised premises, the purchases of such tangible personal property will be exempt from sales and compensating use tax as provided under Section 1115(a)(15) and 1115(a)(16) of the Tax Law.

Salomon, Inc., Adv Op, Comm T & F, November 20, 1989, TSB-A-89(46)S. The provision in Section 13.11 of the lease between Petitioner and 7 World Trade Company, whereby Landlord may require all or any portion of the Special Tenant Installations to be removed from the demised premises prior to expiration of the Term does not negate the intention of permanence of the leasehold improvements (See: Technical Services Bureau Memorandum, TSB-M-83(17)S, June 15, 1983) nor preclude the contractor's or subcontractor's purchases of tangible personal property for incorporation into such leasehold improvements from the exemption provided under Section 1115(a)(15) and 1115(a)(16) of the Tax Law.

However, it is noted that certain of Petitioner's Special Tenant Installations or portions thereof constitute items which, generally, are not considered to be installed in such a manner whereby they become an integral component part of real property but retain their identity as tangible personal property after installation. Included within such Special Tenant Installations which will not qualify for the exemption under Section 1115(a)(15) or (16) are the raised floors to accommodate computer facilities, Raised Computer Floors, Inc. vs Chu, 116 AD2d 958. Also in accordance with Section 541.5(d) of the Sales and Use Tax Regulations included in items not qualifying for the exemption will be, if applicable, seating for the auditorium (theater seats), cafeteria fixtures such as free standing shelves, bars, appliances (refrigerators and stoves) and furniture (tables and chairs), and dining room and lunch room furniture and free standing fixtures. Accordingly, as such items will not become integral component parts of the Demised Premises at 7 World Trade Center but will retain their identity as tangible personal property after installation, the installation of such items will not qualify for the exemption provided under Section 1115(a)(15) and (16) of the Tax Law. The total charges to Petitioner for the installation (materials and labor) of such items will be subject to State and local sales tax.

Petitioner's contractors and subcontractors may purchase tangible personal property which will be incorporated as integral components of the real property owned by Port Authority 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 relevant portions of the lease between Petitioner and 7 World Trade Company along with a copy of the relevant portions of the lease between 7 World Trade Company and Port Authority 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.

Section 541.3 of the Sales and Use Tax Regulations, states in part:

Contracts with exempt organizations. [Tax Law, §§1115(a)(15), (16). . .

(d) Contracts with exempt organizations.

(2) Purchase for contracts (other than agency contacts).

(iv) Except for agency contracts, contractor's purchases of construction supplies, which do not become part of an exempt organization's real property and are used or consumed by the contractor. . .are subject to the tax.

The following types of property. . .are representative, but not intended to be all-inclusive, of contractor's purchases which are subject to tax, irrespective of whether the contractor has a time and material, lump sum, or other type of contract (except agency contract), with an exempt organization:

(a) construction machinery and equipment, including rentals and repair parts;

(c) contractors' supplies, tools and miscellaneous equipment, whether purchased or rented. . .; and

(d) any other items purchased or rented by a contractor for use in performing the contract and not incorporated in the realty.

Since the tools and equipment rented by Petitioner's contractors and subcontractors for use in installing tangible personal property into the leased premises at 7 World Trade Center will not become a part or integral component of Port Authority's real property and will be considered to be used or consumed by the contractors or subcontractors, such purchases fall within the types of property enumerated within Section 541.3(d)(2)(iv) of the Sales and Use Tax Regulations. Accordingly, such purchases do not qualify for the exemption provided under Sections 1115(a)(15) and (16) of the Tax Law and thus are subject to the taxes imposed under Sections 1105(a), 1109 and 1110 of the Tax Law.

DATED: February 22, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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