

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

TSB-A-91 (56)S
Sales Tax
August 15, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910422A

On April 22, 1991, a Petition for Advisory Opinion was received from American Linen Supply Co., 8 Lord Street, Buffalo, New York 14240.

The issue raised by Petitioner, American Linen Supply Co., is whether the exemption from sales tax provided under Section 1116(a)(1) of the Tax Law applies to a wastewater treatment system which Petitioner installed as replacement equipment in lieu of dry cleaning equipment where such replacement was made in accordance with the terms of an agreement previously entered into between Petitioner and the Erie County Industrial Development Agency.

On July 1, 1978 Petitioner and the Erie County Industrial Development Agency entered into an agreement to finance the renovation of the facility located at 8 Lord Street in Buffalo, New York. The terms of this industrial revenue bond financing state that all tangible personal property located at the facility on July 1st became the property of the Erie County Industrial Development Agency and all equipment purchased to replace said property is to be in the name of the Erie County Industrial Development Agency.

In 1986, a new wash aisle was installed at the Buffalo facility. At that time, the existing wash aisle was replaced with new equipment. As a result of this new equipment, the plant decided to discontinue dry cleaning activity and removed the two American Dry Cleaning machines, the elimination of which dramatically increased the pollution emitted from the wastewater. To reduce the increased wastewater pollution, Petitioner has installed a Memtek Wastewater System.

The Lease Agreement entered into between Petitioner and the Erie County Industrial Development Agency, states, in part:

THIS LEASE AGREEMENT, dated as of July 1, 1978, by and between ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY, a public benefit corporation of the State of New York having its office at 107 Delaware Avenue, Buffalo, New York 14202 (the "Issuer"), and AMERICAN LINEN SUPPLY CO., a business corporation duly organized and existing under the laws of the State of Delaware having its principal office at 47 South 9th Street, Minneapolis, Minnesota 55402, and authorized to do business in the State of New York (the "Company").

Article IV, Section 4.1(e), of the Lease Agreement states, in part:

The Issuer confirms the appointment of the Company as its agent and the Issuer hereby appoints the Company to continue to act as its true and lawful agent, and the Company hereby accepts such agency, (i) to acquire, improve and equip the Facility in accordance with the Plans and Specifications, (ii) to make, execute, acknowledge and deliver any contracts, orders, receipts, writings and instructions with any other Persons, and in general to do all things which may be requisite or

proper, all for improving the Project and acquiring and installing the Equipment with the same powers and with the same validity as the Issuer could do if acting in its own behalf, (iii) to pay all fees, costs and expenses incurred in the improvement of the Project and the acquisition and installation of the Equipment from funds made available therefor in accordance with this Agreement and (iv) to ask, demand, sue for, levy, recover and receive all such sums of money, debt, dues and other demands whatsoever which may be due, owing and payable to the Issuer under the terms of any contract, order, receipt, or writing in connection with improvement and completion of the Project and the acquisition and installation of the Equipment, and to enforce the provisions of any contract, agreement obligation, bond or other performance security.

Article VI, Section 6.1 of the Lease Agreement states, in part:

Maintenance and Modifications of Facility by Company.

* * *

(b) The Company from time to time may make any structural additions, modifications or improvements to the Facility or any part thereof which it may deem desirable. All such structural additions, modifications or improvements so made by the Company shall become a part of the Facility. The Company agrees to deliver to the Issuer all documents which may be necessary or appropriate to convey to the Issuer title to, or other satisfactory interest in, such Property.

Section 6.2 of Article VI states, in part:

Installation of Additional Equipment. The Company from time to time may install additional machinery, equipment or other personal property in the Facility (which may be attached or affixed to the Facility), and such machinery, equipment or other personal property shall not become, or be deemed to become, a part of the Facility. The Company from time to time may remove or permit the removal of such machinery, equipment and other personal property from the Facility and may create or permit to be created any Lien on such machinery, equipment or other personal property; provided that any such removal of such machinery, equipment or other personal property shall not breach any agreement between the Company and the Bank and shall not adversely affect the structural integrity of the Facility or impair the overall operating efficiency of the Facility for the purposes for which it is intended and provided further that if any damage is occasioned to the Facility by such removal, the Company agrees to promptly repair such damage at its own expense.

Article VIII, Section 8.10 of the Lease Agreement states, in part:

Identification of Equipment. All Equipment which is or may become the property of the Issuer pursuant to the provisions of this Agreement shall be properly identified by the Company by such appropriate records, including computerized records, as may be approved by the Bank. In this regard all improvements,

machinery, equipment and other Property of whatever nature affixed or attached to the Land or used by the Company in connection with the Land or the Project shall be deemed presumptively to be owned by the Issuer, rather than the Company, unless the same were installed by the Company and title thereto was retained by the Company as provided in Section 6.2 of this Agreement and such improvements, machinery, equipment and other Property were properly identified by such appropriate records as were approved by the Bank.

Article IX, Section 9.2 of the Lease Agreement states, in part:

Removal of Equipment. (a) The Issuer shall not be under any obligation to remove, repair or replace any inadequate, obsolete, worn out, unsuitable, undesirable or unnecessary item of Equipment. In any instance where the Company determines that any item of Equipment has become inadequate, obsolete, worn out, unsuitable, undesirable or unnecessary, the Company may remove such item of Equipment from the Facility and may sell, trade in, exchange or otherwise dispose of the same, as a whole or in part, free from the Lien of the mortgage, provided that:

(1) Such removal will not materially impair the efficient operation of the Facility for the purpose for which it is intended, and

(2) the Company shall either

(a) substitute for such removed item of Equipment and install in the Facility other machinery, equipment or related property having equal or greater value in the operation of the Facility (but not necessarily having the same function), all of which substituted machinery, equipment or related property shall be free of all Liens, other than Permitted encumbrances, and shall become a part of the Equipment. . .

Section 1101(b)(4) of the Tax Law defines the term "retail sale" in part, as: "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. . .is deemed to be a retail sale regardless of whether the tangible personal property is to be sold as such before it is so used or consumed."

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 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 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 1115 of the Tax Law provides, in relevant part:

Exemptions from sales and use taxes.--

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(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, improving real property, property or land of such an organization, . . . ; 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, . . . ; 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 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 an 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 which sets forth the law with reference to industrial development agencies provides:

(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 therefrom, as well as the property of the agency, shall be exempt from taxation, except for transfer and estate taxes.

Section 891-a of the General Municipal Law establishes the Erie County Industrial Development Agency.

No sales or use tax is imposed upon any tangible personal property incorporated into or used upon or within any project financed in whole or in part by industrial development bonds whether such tangible personal property retains its identity or becomes part of the real property as long as such tangible personal property becomes the property of the IDA and regardless of whether such tangible personal property was purchased with industrial development bond proceeds or by any other funds. Wegmans Food Markets, Inc. v. Department of Taxation and Finance (126 Misc 2d 144, aff'd 115 AD2d 962 lv denied 67 NY2d 606)

In the instant case, Petitioner removed two dry cleaning machines. As allowable pursuant to Article IX, Section 9.2 of the Lease Agreement between Petitioner and the Erie Country Industrial Development Agency, Petitioner elected to install a wastewater treatment system as replacement equipment in lieu of replacing the two dry cleaning machines with equipment of a like nature.

Therefore, in accordance with the sections of law and regulations cited above and the decision in Wegmans Food Markets, Inc. v. Department of Taxation and Finance, supra, Petitioner's purchases and/or installation of the wastewater treatment system will be exempt from New York State and Local Sales and Use Tax provided that such system was purchased by Petitioner as agent of the Erie County Industrial Development Agency, and provided that title to such equipment was transferred to the Erie County Industrial Development Agency in accordance with Section 8.10, Article VIII of the Lease Agreement.

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However, it is noted that if such equipment was installed in a manner that did not result in the equipment becoming part of the real property and if title to such equipment was not transferred to the Erie County Industrial Development Agency but remained with Petitioner in accordance with Section 6.2, Article VI of the Lease Agreement, Petitioner will be liable for sales or use tax on the total cost of such equipment including any charge for installation.

DATED: August 15, 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.