STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **FAGLIARONE, GRIMALDI & ASSOCIATES** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period November 20, 1984 through March 15, 1986.	DECISION DTA NO. 804023

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 19, 1988 with respect to the petition of Fagliarone, Grimaldi & Associates, 650 James Street, Syracuse, New York 13203 for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period November 20, 1984 through March 15, 1986 (File No. 804023). Petitioner appeared by Charles J. Engel, Jr., Esq. The Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both parties filed briefs on exception. Oral argument, at the request of the Division, was heard on November 15, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's payments for electric utility service, repair services and certain tangible personal property were exempt from sales and use taxes.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference, except that we modify findings of fact "1" and "3" as stated below. Such facts are as follows:

Finding of fact "1" is modified as follows:

> On December 19, 1984, petitioner, Fagliarone, Grimaldi & Associates, and the City of Syracuse Industrial Development Agency ("Agency") entered into a Lease Agreement. The Lease Agreement in Articles IV, VI and IX provided, among other things, as follows:
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> a. The Agency, as lessor, sought to "acquire, construct, equip and develop certain commercial facilities consisting of the acquisition, renovation of an existing office building, in the City of Syracuse...for the lease (with an option to purchase) or sale" to petitioner. The Agency further proposed to undertake this project as an authorized project under the New York State Industrial Development Agency Act.
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> b. The project was to be financed, in part, by the issuance of an industrial revenue bond by the lessor in the principal amount of $900,000.00. The bond would be secured by a mortgage on petitioner's interest in the project and by a pledge of the revenues received by petitioner from the leasing of the project.
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> c. Petitioner agreed to renovate and develop the project and the Agency appointed the lessee as its agent to completion of the renovation and development of the facility on the demised premises. In a subsequent paragraph of the Lease Agreement it was stated that petitioner would act as an independent contractor and not as an agent "in connection with...such renovation, construction, development and expansion of the Facility." However, the same section at a later point stated that petitioner, on behalf of the Agency, would complete the renovation, construction and development of the facility as promptly as possible. Furthermore, petitioner agreed that "Title to all building, material and equipment so acquired and constructed by [petitioner] after the delivery of the Bond and the execution of this Lease Agreement shall vest in the [Agency] free and clear of all liens and Encumbrances except permitted Encumbrances."
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> d. In the event of a default by a vendor or contractor, petitioner was given the right to prosecute or defend any action or proceeding involving the vendor or contractor in the name of the Agency.
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> e. Petitioner agreed that the rent payable to the Agency would be equal to the principal and interest due on the bond. Moreover, petitioner was directed to make the payments payable under the Lease Agreement directly to the bondholder, The Merchants National Bank & Trust Company of Syracuse.
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> f. Petitioner had the right to prosecute or defend an action in the name of the Agency if its right to possession was threatened.
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> g. Petitioner agreed to pay all taxes and governmental charges "which may be required by law or by this Lease Agreement that may at any

time be lawfully assessed or levied against or with respect to the Project or any machinery, equipment or other property acquired by the Lessee in substitution for, as a renewal or replacement of, or a modification, improvement or addition to the Project...." However, this obligation was qualified with the provision that "[n]othing herein shall preclude the Lessee, at its expense and in its own name and behalf, from applying for any tax exemption allowed by the federal government, the state or any political or taxing subdivision thereof under any existing or future provision of law which grants or may grant such tax exemption."

h. Petitioner agreed to purchase and the Agency agreed to sell the project for $100.00 at the earlier of the expiration of the lease term or payment of the bond and administrative expenses.

i. Petitioner agreed to keep the "facility" and all other improvements forming a part of the project in good repair and operating condition making from time to time all necessary repairs thereto and renewals and replacements thereof. Petitioner, at its own expense, retained the right to make additions, modifications and improvements to the project (in accord with project specifications) which became a part of the project. Further, petitioner reserved the right to install additional machinery, equipment, furniture, property or fixtures in the facility which do not become part of the project, but remain the sole property of petitioner.

Upon executing the Lease Agreement, petitioner sublet the offices in the project to various individuals. In accordance with its obligation to the subtenants, petitioner made repairs and provided maintenance to the building and paid for the electric utility service.

Finding of fact "3" is modified to read as follows:

> On or about May 10, 1986, petitioner applied for a refund of sales and use taxes. Specifically, petitioner sought a refund in the amount of $3,787.63, representing sales tax payments of $3,468.47 for electricity and the balance representing sales tax paid for certain maintenance services and the purchase of certain supplies. The maintenance services included recharging and inspecting fire extinguishers, cleaning of an oil burner, inspection of heating equipment, calibrating thermostats, replacing a handle assembly on a urinal flush valve, plunging a drinking fountain drain, installation of a hand soap dispenser and trash pickup. The supplies purchased included the purchase of various cleaning agents and disinfectants as well as cleaning utensils, purchase of paper towels and toilet tissue, light bulbs, a flag and calcium pellets for melting of ice. Petitioner's refund application was supported by copies of invoices. The copies of the invoices pertaining to electrical service do not show the name of the party billed.

> However, the invoices pertaining to repairs list the names of both the City of Syracuse Industrial Development Agency and petitioner. On several invoices the reference to the Syracuse Industrial Agency is in a distinctly different style of type from that of petitioner.

On July 16, 1986 and August 6, 1986, the Division requested that petitioner provide material to substantiate the claim for a refund of sales tax. The Division did not receive a response to either request and, as a result, the Division denied petitioner's claim for a refund on September 4, 1986.

On or about October 9, 1986, petitioner filed a petition challenging the denial of the refund. The petition explained that the claim for refund could not be substantiated because the original exemption certificate issued by the City of Syracuse Industrial Development Agency was lost and it took time for a new exemption certificate to be issued. Petitioner attached to its petition a document encaptioned "City of Syracuse Industrial Development Agency Statement of Tax Exempt Status" which provided as follows:

> "Effective November 9, 1984 Fagliarone, Grimaldi & Associates (the 'Developer') became the agent of the City of Syracuse Industrial Development Agency (the 'Agency') for the purpose of the acquisition, construction, equipping and developing of real property at 650 James Street, Syracuse, New York (the 'Project') and, in addition, as of December 19, 1984 became the agent of the Agency for the purpose of operating the Project.
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> The Developer, as of these effective dates, became authorized to purchase and lease as agent of the Agency, materials and services for the acquisition, construction, equipping, development and operation of the Project.
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> The Agency is a corporate governmental agency and a public benefit corporation of the State of New York. The Agency is an exempt organization under the provisions of Subdivision (a)(1) of Section 1116 of the New York Tax Law. Governmental entities such as the Agency are not required to issue or furnish Exempt Purchase Certificates (Form ST-120.1) to substantiate their tax-exempt status.
>
> Because of the Agency's exempt status, any applicable sales or use taxes as of the dates mentioned above should be totally excluded from any quotes or invoices for tangible personal property and otherwise taxable services relating to the acquisition, construction, equipping, development and operation of the Project as of the applicable dates by specifically indicating thereon sales or use tax as 'none -- tax exempt'. If taxes were included in any such quotes or invoices, they should be recalculated and an adjustment made in the selling price."

The foregoing statement was dated October 3, 1986 and signed by Eugene Marjinsky, Finance Commissioner of the City of Syracuse.

OPINION

General Municipal Law section 874 provides in relevant part:

> "(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."

The Administrative Law Judge determined that all the purchases involved herein by petitioner were as agent for the Agency and that the facts in this case are similar to those in Wegmans Food Markets, Inc. v. Department of Taxation and Finance (126 Misc 2d 144, affd 115 AD2d 962 lv denied 67 NY2d 606). Accordingly, the Administrative Law Judge determined that the purchases were exempt from tax and petitioner's petition should be granted.

The Division on exception asserts that the situation here differs from that in Wegmans first, because there is no evidence that petitioner acted as agent for an Industrial Development Agency ("IDA") and second, because the purchases here were in the nature of operating costs rather than development costs as were the purchases in Wegmans.

The petitioner, in response to the exception, reasserts its position that Wegmans controls, that petitioner is an agent of the IDA and that the purchases at issue are exempt from sales tax.

We reverse the determination of the Administrative Law Judge.

The court in Wegmans analyzed the enabling legislation under which IDAs operate and examined the purchases involved against the activities in which an IDA is authorized to engage in to achieve its purposes. The court concluded that the purchases were exempt.

In Wegmans the issue presented for summary judgment was "whether purchases of tangible personal property made for the purpose of installing or using such property upon or within projects financed by industrial development bonds ("IDBs") are exempt from sales or use tax." (Wegmans

Food Markets, Inc. v. Department of Taxation and Finance, supra, at 144.)

In Wegmans, a requirement of the IDB financing was that all equipment purchased for the projects became the property of the IDA regardless of whether such equipment was purchased with bond proceeds or, in the case of cost overruns, purchased with Wegmans own funds. All purchases of equipment for the eleven Wegmans' projects financed with IDBs were made in the name of the IDA, with Wegmans acting as agent for such purchases. The assets comprising each project were security for the bonds issued for that project regardless of the source of payment, and bond purchasers had a security interest in all the assets, title to which was held in the name of the IDA.

The basis of the court's decision in Wegmans rested on its interpretation of the enabling legislation for IDAs (General Municipal Law {{ 850 et seq.) that it was never the intention of the Legislature to exclude personal property from the tax exemption granted an IDA by General Municipal Law section 874 since such property is as much a part of a project developed by the IDA as real estate or buildings. The court held that the exemption of section 874 extended to all property so long as the IDA owned, controlled or supervised it in connection with its activities, including the equipping and furnishing of a project." (Wegmans Food Markets, Inc. v. Department of Taxation and Finance, supra, at 150.) Further, it was determined, the exemption applied not only to the IDA but also to occupants of its projects. Essential to the court's holding in this regard is that the IDA continued to own the personal property, that such personal property was an integral part of the projects occupied by Wegmans and that "the Department failed to show that the acquiring and leasing of such property was not essential to the IDA's activities . . ." (Wegmans Food Markets, Inc. v. Department of Taxation and Finance, supra, at 150).

From the Court's decision in Wegmans we perceive three conditions for the determination that purchases with respect to an IDA financed project are exempt from sales tax. First, that the property purchased is essential to the IDA's activities (Wegmans Food Markets, Inc. v. Department of Taxation and Finance, supra, at 150). Second, that the sales tax should not be imposed where the result would increase the cost of the project required to be financed by the IDA financing

(Wegmans Food Markets, Inc. v. Department of Taxation and Finance, supra, at 152). Finally, that the property purchased became the property of the IDA. Applying these conditions to the instant facts, we conclude that the purchases are not exempt from sales tax.

We first address the issue of whether the purchases at issue were essential to the Agency's activities. As found by the Administrative Law Judge, all of the purchases were made as services provided to the subtenants by petitioner. It is undisputed that these purchases occurred after the renovation and development of the building was completed and were in connection with the operation of the facility. The issue is then whether purchases for the operation of the facility were essential to the Agency's activities.

Pursuant to section 858(10) of the General Municipal Law, an IDA has the power "to acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects". The Division of Taxation argues that an IDA does not have authority under this provision to operate a project and that "maintain" as it is used in this phrase encompasses only rehabilitation work and not ongoing operations. Without deciding whether the statute necessarily precludes an IDA from involvement in the operational phase of a project, we conclude that in the instant case the Agency clearly limited the scope of its activities to the development phase of the project. This limitation is consistently evidenced throughout the provisions of the lease agreement. For example, in the fourth whereas clause it is stated that "the Lessor has indicated its intention to acquire, construct, equip and develop certain commercial facilities consisting of the acquisition, renovation of an existing office building . . .". The "cost of the project" is defined in the lease to include "such other expenses as may be necessary or incident to the financing of the Project, the acquisition, construction and equipping of the Project and placing the same in operation . . .". In section 2.1(b) of the lease, the Agency warrants that it "proposes to complete the renovation and modernization and development of the Facility." At section 4.1(a) of the lease, the Agency "agrees to renovate and develop the Project . . .".

In contrast to the foregoing provisions which affirmatively state the Agency's involvement in the development phase of the Project, at Article VI the lease specifically excludes the Agency from involvement in, or responsibility for, the operation and maintenance of the facility. The Agency is relieved of "any obligation to renew, repair or replace any inadequate, obsolete, worn out, unsuitable, undesirable or unnecessary parts of the Facility" by section 6.2 of the lease. Instead, the petitioner, at section 6.1 of the lease, undertakes that it will "at its own expense keep the Project in as reasonably safe condition as its operation shall permit and . . . during such time as the Project is in operation, keep the Facility and all other improvements forming a part of the Project in good repair and in good operating condition, making from time to time all necessary repairs thereto and renewals and replacements thereof." Finally, at section 6.3 of the lease the petitioner agrees to pay ". . . all utility and other charges incurred in the operation, maintenance, use, occupancy and upkeep of the Project . . .".

We conclude that the lease in this case clearly evidences the Agency's intent to limit its activity to the development phase and not to participate in the operational phase of the project. Accordingly, the instant purchases which all occurred during, and in connection with, the operational phase of the project cannot be found to be essential to the Agency's activities. The purchases fail then to satisfy this criterion of Wegmans.

The second basis of the decision in Wegmans was that sales tax should not be imposed where it would require that "[t]he financing arrangement would now have to include sales tax in the total of the debt payments." (Wegmans Food Markets, Inc. v. Department of Taxation and Finance, supra, at 152.) Clearly, the court in Wegmans sought to avoid a tax that would increase the cost of developing the project and thus, the amount of IDA financing necessary to pay for the project. Since the instant purchases are between petitioner and the subtenants, they have no impact on the cost of the project, nor on the amount of IDA financing necessary for the project to be developed. Therefore, we conclude that the purchases at issue here do not fall within this rationale for tax exemption.

With respect to the third condition in Wegmans, we note that the major purchase at issue here, the electricity, unlike the purchases in Wegmans, is not tangible personal property. Clearly, the electricity cannot be viewed as becoming a part of the project, is not owned by the Agency, nor is it an asset in which the Agency has a security interest. For the remaining purchases, our review of the record indicates that petitioner did not prove that any of the services were performed on property that belonged to the Agency. Similarly, where tangible personal property was purchased petitioner did not prove that it became the property of the Agency. Depending on its nature, installed tangible personal property could remain the property of the petitioner (section 9.4 of the lease) or it could become the property of the Agency (section 6.1 of the lease). Petitioner did not prove that any of the tangible personal property was installed, much less the nature of the installation. Accordingly, petitioner failed to prove that it satisfied the third condition of Wegmans, that the purchases became the property of the IDA.

Our holding here that the Agency's activity, and thus its sales tax exemption, does not extend to the operational phase of the project is in accord with the decision in Matter of Erie County v. Roberts (94 AD2d 532), where the court recognized that IDA financing did not transform the project into a public work. The court stated, "[t]he public purpose of the financing scheme must not be confused with the purely private purpose of the venture itself, its structure and its operation. The public involvement concerns only the creation of the economic conditions and incentives which will encourage and foster this type of private development. The promotion of economic development is an incidental benefit which is distinct from the primary and objective function of this project as a private business." (Matter of Erie County v. Roberts, supra, at 540, emphasis added.)

We recognize that our conclusion herein appears to be in conflict with the document dated October 3, 1986 and signed by the Finance Commissioner of the City of Syracuse to the extent this document states that petitioner is the agent for the Agency with respect to the operation of the Project. This conflict is inevitable, since the October 3, 1986 document conflicts, on this point,

with the terms of the lease between the parties. As discussed above, the lease makes petitioner solely responsible, at its own cost, for the maintenance and repair of the Project during its operation. Such absolute legal and financial responsibility is inconsistent with the assertion that petitioner was acting as the agent of the Agency with respect to the operation of the Project. Thus, to the extent that the October 3, 1986 document and the lease agreement are inconsistent we have determined the lease agreement is controlling.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed; and

3. The petition of Fagliarone, Grimaldi & Associates is denied and the Division of Taxation's denial of the refund claim is sustained.

Dated: Troy, New York
May 4, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner