

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| FAGLIARONE, GRIMALDI & ASSOCIATES | : | DETERMINATION |
| 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. | : | |

Petitioner, Fagliarone, Grimaldi & Associates, 650 James Street, Syracuse, New York 13203, filed a petition 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).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, W. A. Harriman Campus, Albany, New York, on November 23, 1987 at 9:30 A.M., with all briefs to be filed by February 5, 1988. Petitioner appeared by Charles J. Engel, Jr., Esq. The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner's payments for electric utility service and repairs were made as an agent for the City of Syracuse Industrial Development Agency, thereby rendering said purchases exempt from sales and use taxes.

FINDINGS OF FACT

1. 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 provided, among other things, as follows:

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.

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 projectand by a pledge of the revenues received by petitioner from the leasing of the project.

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 the title to all "building, material and equipment" so acquired and constructed by petitioner after delivery of the bond and execution of the Lease Agreement vested in the Agency.

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.

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.

f. Petitioner had the right to prosecute or defend an action in the name of the Agency if its right to possession was threatened.

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.

2. 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.

3. 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 repairs to and maintenance of the building. 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.

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

for a refund on September 4, 1986.

5. 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.

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.

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.

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioner maintains that its refund claim should be granted because the purchases in question were made as an agent for the City of Syracuse Industrial Development Agency.

7. The Audit Division contends that the Lease Agreement does not establish an agency relationship. Furthermore, it is argued that the Lease Agreement contemplates that petitioner will be paying sales tax. Lastly, it is argued that the statement from the City of Syracuse Industrial Development Agency (Finding of Fact "6") is of no consequence since it was executed after the period in question.

CONCLUSIONS OF LAW

A. That Tax Law § 1116(a)(1) provides that the purchases of New York State agencies, instrumentalities, public corporations and political subdivisions are exempt from sales and use taxes. The Department of Taxation and Finance ("Department") has recognized that, as public benefit corporations, the purchases of industrial development authorities ("IDA's") are exempt from the payment of sales tax by virtue of Tax Law § 1116(a)(1) (see ___ Tax Status of IDA Projects, TSB-M-87[7]S).

B. That the leading decision on the exempt status of purchases made by entities located in projects financed by industrial development bonds is Wegmans Food Markets, Inc. v. Department of Taxation and Finance (126 Misc2d 144, affd 115 AD2d 962, lv denied 67 NY2d 606). In Wegmans, plaintiff operated a chain of stores which sold food, groceries and other merchandise at retail. It also maintained transportation, storage and production facilities which serviced its chain of stores. Since 1976, plaintiff had constructed 11 stores and support facilities which were financed, at least in part, by the issuance of Industrial Development Bonds ("IDB's"). The Court noted that IDB's were issued by IDA's established under the General Municipal Law. It was also noted that the proceeds of the bonds were used to finance the construction of projects and that, typically, an IDB-financed project was owned by the IDA and leased to the business enterprise. The terms of the lease would provide for payments which equaled the amount due on the bonds and that eventually the business enterprise could purchase the project.

With respect to the particular projects in which Wegmans was involved, all equipment purchased for the projects became the property of the IDA regardless of the source of funds to purchase equipment. Moreover, all purchases of equipment were made by Wegmans as agent for the IDA. The assets constituting each project were security for the bonds issued for that project, and bondholders hold a security interest in all of the assets although title is in the name of the IDA.

Following an audit, the Department found that Wegmans' purchases of tangible personal property (with one exception not relevant herein) were taxable regardless of whether the property was purchased with bond proceeds or funds from other sources.

Thereafter, plaintiff commenced an action for a declaratory judgment seeking a determination that no sales and use taxes were due with respect to purchases of tangible personal property made by either an IDA or Wegmans for installation or use upon or within IDB-financed projects; that sales and use taxes are not payable by reason of payments made by Wegmans under any lease, installment sale or loan agreement for the purpose of amortizing the indebtedness of an IDA for bonds issued by it; and that no sales and use taxes are payable regardless of whether the IDB is tax exempt under the Internal Revenue Code or whether the personal property becomes part of the real property.

The Court granted plaintiff's motion for summary judgment and held, among other things, that purchases of tangible personal property by an occupant of a building financed by industrial development bonds made for the purpose of installing or using such property upon or within such project are exempt from sales and use taxes (Wegmans Food Markets, Inc. v. Department of Taxation and Finance, supra, at 145). In reaching this conclusion, the Court stated that Article 18-A of the General Municipal Law "resonates throughout with the purposeful design of establishing tax exemptions upon property owned by IDAs as well as upon property it 'controls' or 'supervises' and upon 'its activities' "

(id. ___ at 148). The Court further noted that to accomplish the purposes set forth in subdivision (1) of section 874 of the General Municipal Law, subdivision (2) of said section "exempts IDAs from all taxes except transfer and estate taxes. Such exemption extends not only to the bonds and notes issued by IDAs, together with the income from them, but to the property of the IDAs as well" (id. ___ at 149). The Court also reasoned that:

"[L]ogic and common sense would compel the extension of the sales tax exemption to a project occupant such as Wegmans. Any sales tax would become part of the cost of establishing and maintaining a project and, necessarily, the amount an occupant would be obliged to pay to occupy a project would become increased accordingly. The financing arrangement would now have to include sales tax in the total of the debt payments." (Id. at 152.)

C. That, on the basis of Wegmans, it is concluded that the claim for refund of sales and use taxes should have been granted. In Wegmans, as in this case, proceeds of bonds were used to finance the construction of a project; the project, which was financed by the industrial development bond, is owned by the IDA and leased to the business enterprise; the lessee's purchases of equipment in furtherance of the project become the property of the Agency; the lease payments equal the principal and interest due on the bonds; the lessor was granted a security interest in the facility; and it is contemplated that the lessee will purchase the project at the conclusion of the lease. Thus, it is concluded that the Lease Agreement involved herein created a relationship which is similar to that which existed in Wegmans. Consequently, petitioner's purchases in furtherance of the project are considered to be the purchases of the City of Syracuse Industrial Development Agency and therefore exempt from tax. In reaching this conclusion, it is recognized that most of the purchases at issue herein were in the nature of operational expenses rather than development costs. However, petitioner remains the agent of the IDA until such time as the expiration of the lease or the payment of the bond, and those expenses incurred as agent in furtherance of the project are exempt from tax. It is noted that an alternative conclusion would be contrary to the reasoning set forth in Wegmans inasmuch as the imposition of sales tax would increase the amount petitioner would have to pay to occupy the project.

D. That, in view of the foregoing rationale, the Audit Division's argument pertaining to the date the statement from the City of Syracuse Industrial Development Agency was executed becomes academic.

E. That the petition of Fagliarone, Grimaldi & Associates is granted and the Audit Division is directed to refund the sum of \$3,787.63, together with such interest as may be lawfully owing.

DATED: Albany, New York
May 19, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE