

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Brooklyn Navy Yard Development Corp.	:	
(Formerly Commerce Labor Industry Corp. of Kings)	:	AFFIDAVIT OF MAILING
	:	
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/78-5/31/81.	:	

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 8th day of May, 1985, he served the within notice of Decision by certified mail upon Brooklyn Navy Yard Development Corp. (Formerly Commerce Labor Industry Corp. of Kings), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brooklyn Navy Yard Development Corp.
(Formerly Commerce Labor Industry Corp. of Kings)
Brooklyn Navy Yard
Brooklyn, NY 11205

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
8th day of May, 1985.

David Parchuck

James A. [Signature]

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 8, 1985

Brooklyn Navy Yard Development Corp.
(Formerly Commerce Labor Industry Corp. of Kings)
Brooklyn Navy Yard
Brooklyn, NY 11205

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James H. Tully, Jr.
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State Street
Albany, NY 122071780
Taxing Bureau's Representative

FINDINGS OF FACT

1. On or about June 30, 1966, the United States of America closed the New York Naval Shipyard, also known as the Brooklyn Navy Yard, Brooklyn, New York, and on June 10, 1970, conveyed said premises to the City of New York.

2. Petitioner, Brooklyn Navy Yard Development Corporation, a non-profit local development corporation then known as Commerce Labor Industry Corporation of Kings, entered into a lease of a portion of the premises with the City of New York on December 17, 1971. It was the objective of both petitioner and the City of New York that petitioner sublease portions of the demised premises to industry and thereby increase job opportunities in the neighborhoods surrounding the facility.

3. On November 20, 1981, as the result of a field audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$67,481.92, plus interest, for the period June 1, 1978 through May 31, 1981.

The field audit report reveals that petitioner had requested exempt status for utilities from Consolidated Edison as of September 1, 1980. Petitioner had not paid use tax on self use of utilities and the auditor recommended an assessment of tax on \$333,765.00 in utility charges for petitioner's use during the audit period, resulting in a use tax liability of \$26,701.20. Review of utility sales for the audit period disclosed that petitioner started billing one of its subtenants, S & F Warehouse, for utility use as of August 1, 1980, but S & F Warehouse refused to accept responsibility for the tax, based on its lease with petitioner in which petitioner had "accepted responsibility for such tax in the past". Review of electric bills disclosed that petitioner had originally been taxed on "all utility bills (sic) purchased directly from

Con Ed, and that a credit was subsequently then given by Con Ed for exempt (0%) or production exempt (4%) sales." Accordingly, the Audit Division assessed petitioner for utility sales made to S & F Warehouse (upon which no sales tax was remitted) of \$509,759.00, resulting in a sales tax liability of \$40,780.72.

4. Petitioner was formed as Commerce Labor Industry Corporation of Kings under the Membership Corporations Law of the State of New York on February 21, 1966. The certificate of incorporation provided, in part, as follows:

"SECOND: The corporation shall be a nonprofit local development corporation organized under Article XIX of the Membership Corporations Law and operated exclusively for the charitable or public purposes of relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, instructing of (sic) training individuals to improve or develop their capabilities for such jobs, carrying on scientific research for the purpose of aiding the territory in which its operations are principally to be conducted by attracting new industry to such territory or by encouraging the development of, or retention of, an industry in said territory, and lessening the burdens of government and acting in the public interest..."

THIRD: The corporation shall be a nonprofit corporation. All income and earnings of the corporation shall be used exclusively for its corporate purposes or accrue and be paid to the New York Job Development Authority. No part of the income or earnings of the corporation shall inure to the benefit or profit of, nor shall any distribution of its property or assets be made to any member or private person, corporate or individual, or any other private interest, provided that, the corporation may repay loans and repay contributions (other than dues) made to it, but only if and to the extent that any such contributions may not be allowable as a deduction in computing taxable income under the internal revenue code of 1954.

* * *

FIFTH: The corporation shall not attempt to influence legislation by propaganda or otherwise, or participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

SIXTH: None of the directors, officers, members or employees of the corporation shall receive or be lawfully entitled to receive any pecuniary profit from the operation thereof but may receive reasonable compensation for services rendered and property delivered in effecting one or more of its corporate purposes."

5. The lease between petitioner and the City of New York dated December 17, 1971 referred to petitioner as a "non-profit local development corporation" and stated that Chapter 1061 of the Laws of 1968 determined that establishing facilities to create and improve job opportunities and to provide equipment, employment, training and education in employment skills, was a public purpose and a governmental function, and further stated that the parties desired to enter into the lease for industrial development, management and operation for said purposes.¹

6. Article 4 of the lease provided that rent was to be composed of two factors, annual Base Rental and annual Additional Rental.

Section 4.02:A of the lease provided that after payment of the annual Base Rental, petitioner was to pay to the City of New York an annual Additional Rental:

"which shall be the balance, after the payment of the annual Base Rental, of all rents and other payments due to (petitioner) from the operation, use and occupancy of, or derived from, the Demised Premises, after deducting therefrom (certain items which amount to expenses plus a reserve fund.)"

7. Section 16.01 of the lease provided that petitioner "shall pay for all utilities and services including...electricity to or used on the demised premises...".

Section 16.02 provided that petitioner "shall furnish or cause to be furnished electricity...as required by Occupants, from the power plant on the Demised Premises or other sources to Occupants of the Demised Premises."

¹ The Board of Estimate of the City of New York and the Borough Improvement Board of the Borough of Brooklyn approved the lease.

8. The lease was amended on December 30, 1977 to, inter alia, add a new section 4.02:A1 to read as follows:

"After rental arrearage has been fully satisfied by LESSEE, it shall pay over to City 75% of any Additional Rental due and retain 25% of any Additional Rental due, provided that such 25% permitted to be retained by LESSEE shall be used only for the development, redevelopment and construction of facilities within the demised premises which would further the objectives of the Urban Renewal Plan."

9. On June 28, 1982, petitioner filed a certificate of amendment to its certificate of incorporation under section 803 of the Not-for-Profit Corporation Law.² The certificate of amendment changed petitioner's name to Brooklyn Navy Yard Development Corporation. The certificate of amendment also stated that petitioner was a corporation as defined in subparagraph (a)(5) of section 102 of the Not-for-Profit Corporation Law and a Type C corporation under sections 201 and 1411 of said law, which provide, in part, as follows:

102(a)(5) N-PCL: "...a corporation...(2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute."

201 N-PCL: "Type C - A not-for-profit corporation of this type may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective."

1411(b) N-PCL: "A local development corporation is a type C corporation under this chapter (the Not-for-Profit Corporation Law)."

10. During the period at issue, petitioner was exempt under section 501(c)(4) of the Internal Revenue Code.

11. On October 12, 1982, the Internal Revenue Service issued a letter stating that it had determined that petitioner was exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code. The exempt status

² The Not-for-Profit Corporation Law repealed and, in effect, replaced the Membership Corporations Law effective September 1, 1970.

was granted with the understanding that petitioner would amend its certificate of incorporation so that the petitioner's purposes did not go beyond the purposes of an organization exempt under section 501(c)(3) of the Internal Revenue Code. The letter further stated that this could be accomplished by adding to the certificate of incorporation the paragraphs referred to as "THIRTEENTH" and "FOURTEENTH" in Finding of Fact "12", infra. The letter concluded that "(t)his letter supersedes and modifies our letter of February, 1966 which stated that your organization was exempt under section 501(c)(4) of the Code."

12. On October 19, 1982, petitioner filed another certificate of amendment to its certificate of incorporation under section 803 of the Not-for-Profit Corporation Law. The amendment, inter alia, added the following articles relating to Federal tax exempt status and the distribution of assets upon dissolution:

"THIRTEENTH: Notwithstanding any other provision of these articles, the Corporation is organized exclusively for one or more of the following purposes: religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involved the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, as specified in Section 501(c)(3) of the Internal Revenue Code of 1954, and shall not carry on any activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954.

FOURTEENTH: In the event of dissolution, all of the remaining assets and property of the Corporation shall after necessary expenses thereof be distributed to such organizations as shall qualify under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, or to another organization to be used in such manner as in the judgment of a Justice of the Supreme Court of the State of New York who will best accomplish the general purposes for which this corporation was formed."

Articles "THIRTEENTH" and "FOURTEENTH" were added to comply with the understanding of the Internal Revenue Service in its letter of October 12, 1982 (Finding of Fact "11", supra).

13. On November 5, 1982, the Department of Taxation and Finance issued an Exempt Organization Certificate naming petitioner as an organization exempt from payment of New York State and local sales and use tax.

14. In a letter dated December 1, 1982, the Department of Taxation and Finance stated that petitioner's sales of electricity "are not subject to tax".

15. The Audit Division contends, in effect, that petitioner did not attain exempt status prior to October 12, 1982, when the Internal Revenue Service issued its letter stating that petitioner was exempt from Federal income tax. The Division maintains that prior to said amendment, petitioner failed to meet the organizational test under section 501(c)(3) of the Internal Revenue Code and that it also failed to sustain its burden of proof to show that the operational test under said section was met. The Division maintains that exempt status cannot be applied retroactively.

Petitioner, however, contends that Federal exempt status is not necessarily controlling and that a sale by or to an organization meeting the criteria of section 1116(a) of the Tax Law is not subject to sales or use tax.

16. Petitioner and the Audit Division stipulated and agreed that since the issues are the same, the decision in this matter will also be determinative for purposes of the State Tax Commission of the application for refund of state and local sales tax filed by petitioner for the period September 30, 1979 to August 31, 1982 in the amount of \$253,458.75.

CONCLUSIONS OF LAW

A. That section 1116(a) of the Tax Law provides, in pertinent part, as follows:

"(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to sales and compensating use taxes imposed under this article:

* * *

(4) Any corporation, association, trust or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;".

The above paragraph (4) is virtually identical to paragraph (3) of section 501(c) of the Internal Revenue Code ("List of Exempt Organizations"). It is noted, however, that section 501(a) of the Internal Revenue Code differs somewhat from the opening phrase of section 1116(a) of the Tax Law, in that the former provides that the organization shall be exempt from taxation, while the latter provides that a sale or amusement charge by or to the organization shall not be subject to sales or use tax. (See also: NYCRR 529.7(a), which became effective on November 24, 1982, which was after the periods at issue.)

B. That notwithstanding the similarity of sections 1116(a)(4) of the Tax Law and 501(c)(3) of the Internal Revenue Code, the State Tax Commission is not bound by a ruling of the Internal Revenue Service as to exempt organization status, but rather can make its own determination of status under section

1116(a)(4). (See: 20 NYCRR 529.1(j)(1), which also was effective November 24, 1982, but which represents the long-standing policy of the State Tax Commission.)

C. That a recently adopted regulation, 20 NYCRR 529.1(d)(2), which was effective on September 24, 1984, provides, in part, as follows:

"(2) Taxes paid by any person or organization which at the time of the sale upon which tax was paid would have qualified for exempt status pursuant to the provisions of this Part are refundable. This will be true even if the taxpayer has not received certification of its exempt status from the Technical Services Bureau at the time of the transaction... However, when a person or organization is required to amend its documents or change its operations in order to qualify for exemption, the organization will not be entitled to refund of taxes paid on purchases prior to the effective date of the amendment or change..."

D. That petitioner met both the organizational and operational tests under section 1116(a)(4) of the Tax Law during the periods at issue.

(1) The Organizational Test

(a) Article "SECOND" of petitioner's certificate of incorporation provides that petitioner was to be organized and operated for charitable and educational purposes (Finding of Fact "4", supra).

(b) Article "THIRD" of said certificate provides that no part of the income or earnings shall inure to the benefit of, nor any distribution of its property or assets be made to any private person, corporate or individual. In fact, said article provides that any income not used for petitioner's corporate purposes was and is to be paid to the New York Job Development Authority. (Finding of Fact "4", supra).

(c) Article "FIFTH" of said certificate provides that petitioner shall neither attempt to influence legislation by propaganda or otherwise or participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. (Finding of Fact "4", supra).

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BROOKLYN NAVY YARD DEVELOPMENT CORPORATION	:	DECISION
(FORMERLY COMMERCE LABOR INDUSTRY CORPORATION	:	
OF KINGS)	:	
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 June 1, 1978 through	:	
May 31, 1981.	:	

Petitioner, Brooklyn Navy Yard Development Corporation (Formerly Commerce Labor Industry Corporation of Kings), Brooklyn Navy Yard, Brooklyn, New York 11205, 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 June 1, 1978 through May 31, 1981 (File No. 35927).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 9, 1984 at 1:00 P.M., with all briefs to be submitted by July 20, 1984. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey (James H. Tully, Jr., Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner was an exempt organization within the meaning of section 1116(a)(4) of the Tax Law and consequently is not liable for sales and use taxes on (i) self use of electricity and (ii) sales of electricity to a subtenant.

Thus, while the precise language of the amendments required by the Internal Revenue Service differed somewhat from the language contained in the certificate of incorporation as originally filed, in substance Articles "SECOND", "THIRD", and "FIFTH" are the same as the added Articles "THIRTEENTH" and "FOURTEENTH". (Finding of Fact "12", supra).

It is noted that petitioner did not challenge the Internal Revenue Service's requirement that it amend its certificate of incorporation. Obviously, it chose the quicker and less expensive alternative. It also noted that petitioner already had Federal exempt status under section 501(c)(4) of the Internal Revenue Code (i.e., civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, etc.).

(2) The Operational Test

The facts clearly show that petitioner was operated exclusively for charitable and educational purposes, with the ultimate goal of providing education, training and employment opportunities for inner-city residents. It is noted that the effect of the annual Additional Rental provision of section 4.02:A of the lease (Finding of Fact "8", supra) is to make the City of New York the beneficiary of any gain or profit realized by petitioner under the lease. Accordingly, during the period at issue petitioner was an exempt organization within the meaning of section 1116(a)(4) of the Tax Law and was not liable for sales and use taxes on its use of electricity and its sale of electricity to S & F Warehouse.³ While the caption refers to "income", the statutory provision itself refers to "income and operations". While sales and

³ It is noted that section 1411(f) of the Not-for-Profit Corporation Law (derived from Membership Corporations Law section 233) provides that:

"(f) Exemption of income from taxation. The income and operations of corporations incorporated or reincorporated under this section (i.e., local development corporations) shall be exempt from taxation."

use taxes are not specifically referred to, said statute shows that the legislature intended to grant some form of tax relief to local development corporations such as petitioner.


E. That the petition of Brooklyn Navy Yard Development Corporation is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 20, 1981 is cancelled and the refund requested (as per stipulation referred to in Finding of Fact "16", supra) is approved.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 08 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 808

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to <i>James H. Tully Jr.</i>	
Street and No. <i>Brooklyn Navy Yard</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11205</i>	
Postage	<i>74.20</i>
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$ <i>74.20</i>
Postmark or Date	

PS Form 3800, Feb. 1982

P 693 169 807

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

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Sent to <i>Brooklyn Navy Yard</i>	
Street and No. <i>Brooklyn Navy Yard</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11205</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$

Feb. 1982

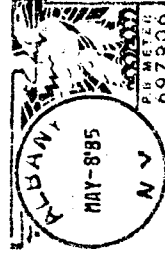
CLAIM CHECK
NO

219352

☐ HOLD

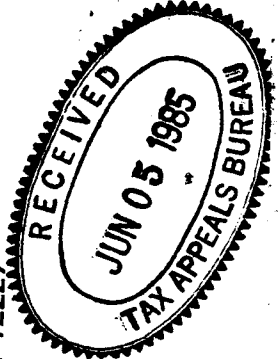
DATE *5/10*
1ST NOTICE *5/16*
2ND NOTICE *5/26*
RETURN

Detached from
PS Form 3849-
Oct. 1980



Brooklyn Navy Yard Development Corp.
(Formerly Commerce Labor Industry Corp. of Kings)
Brooklyn Navy Yard
Brooklyn, NY 11205

UNIT PAID
DO NOT RETURN
ON THIS ENVELOPE



TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED

P 693 169 807

MAIL

REQUEST FOR BETTER ADDRESS

Requester Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 6/6/85
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition For - Dec. - 5/8/85
Name Brooklyn Navy Yard Development Corp.	
Address (Formerly Commerce Labor & Industry Corp. of N.Y.) Brooklyn Navy Yard Brooklyn, N.Y. 11205	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	Unclaimed

Searched by DD	Section	Date of Search 6/6/85
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

The Appeal Bureau
Room 107 - Bldg. 9
State Capitol
Albany, New York 12224

Tax Appeal Bureau
Room 107 - Bldg. 9
State Capitol
Albany, New York 12224

Enclosed for the
Albany, New York
State Capitol
Room 107 - Bldg. 9
is a check for the
amount of \$100.00
which is the balance
due on the account
of the appeal of the
tax on the property
of the State of New
York.

TA 26 (9-79)

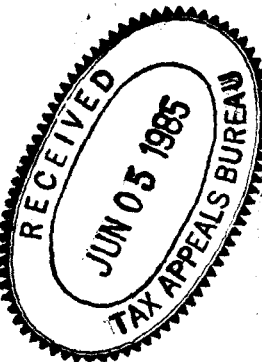
STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



Brooklyn Navy Yard Development Corp.
(Formerly Commerce Labor Industry Corp. of Kings)
Brooklyn Navy Yard
Brooklyn, NY 11205

CLAIM CHECK
NO.

219352

☐ HOLIDAY

DATE

5/10

1ST NOTICE

5/16

2ND NOTICE

5/28

RETURN

Detached from
PS Form 3849
Oct. 1980

CERTIFIED

P 693 169 607

MAIL

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 8, 1985

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Building #9, State Campus
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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James H. Tully, Jr.
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State Street
Albany, NY 122071780
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STATE OF NEW YORK

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FIFTH: The corporation shall not attempt to influence legislation by propaganda or otherwise, or participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

SIXTH: None of the directors, officers, members or employees of the corporation shall receive or be lawfully entitled to receive any pecuniary profit from the operation thereof but may receive reasonable compensation for services rendered and property delivered in effecting one or more of its corporate purposes."

5. The lease between petitioner and the City of New York dated December 17, 1971 referred to petitioner as a "non-profit local development corporation" and stated that Chapter 1061 of the Laws of 1968 determined that establishing facilities to create and improve job opportunities and to provide equipment, employment, training and education in employment skills, was a public purpose and a governmental function, and further stated that the parties desired to enter into the lease for industrial development, management and operation for said purposes.¹

6. Article 4 of the lease provided that rent was to be composed of two factors, annual Base Rental and annual Additional Rental.

Section 4.02:A of the lease provided that after payment of the annual Base Rental, petitioner was to pay to the City of New York an annual Additional Rental:

"which shall be the balance, after the payment of the annual Base Rental, of all rents and other payments due to (petitioner) from the operation, use and occupancy of, or derived from, the Demised Premises, after deducting therefrom (certain items which amount to expenses plus a reserve fund.)"

7. Section 16.01 of the lease provided that petitioner "shall pay for all utilities and services including...electricity to or used on the demised premises...".

Section 16.02 provided that petitioner "shall furnish or cause to be furnished electricity...as required by Occupants, from the power plant on the Demised Premises or other sources to Occupants of the Demised Premises."

¹ The Board of Estimate of the City of New York and the Borough Improvement Board of the Borough of Brooklyn approved the lease.

8. The lease was amended on December 30, 1977 to, inter alia, add a new section 4.02:A1 to read as follows:

"After rental arrearage has been fully satisfied by LESSEE, it shall pay over to City 75% of any Additional Rental due and retain 25% of any Additional Rental due, provided that such 25% permitted to be retained by LESSEE shall be used only for the development, redevelopment and construction of facilities within the demised premises which would further the objectives of the Urban Renewal Plan."

9. On June 28, 1982, petitioner filed a certificate of amendment to its certificate of incorporation under section 803 of the Not-for-Profit Corporation Law.² The certificate of amendment changed petitioner's name to Brooklyn Navy Yard Development Corporation. The certificate of amendment also stated that petitioner was a corporation as defined in subparagraph (a)(5) of section 102 of the Not-for-Profit Corporation Law and a Type C corporation under sections 201 and 1411 of said law, which provide, in part, as follows:

102(a)(5) N-PCL: "...a corporation...(2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute."

201 N-PCL: "Type C - A not-for-profit corporation of this type may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective."

1411(b) N-PCL: "A local development corporation is a type C corporation under this chapter (the Not-for-Profit Corporation Law)."

10. During the period at issue, petitioner was exempt under section 501(c)(4) of the Internal Revenue Code.

11. On October 12, 1982, the Internal Revenue Service issued a letter stating that it had determined that petitioner was exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code. The exempt status

² The Not-for-Profit Corporation Law repealed and, in effect, replaced the Membership Corporations Law effective September 1, 1970.

was granted with the understanding that petitioner would amend its certificate of incorporation so that the petitioner's purposes did not go beyond the purposes of an organization exempt under section 501(c)(3) of the Internal Revenue Code. The letter further stated that this could be accomplished by adding to the certificate of incorporation the paragraphs referred to as "THIRTEENTH" and "FOURTEENTH" in Finding of Fact "12", infra. The letter concluded that "(t)his letter supersedes and modifies our letter of February, 1966 which stated that your organization was exempt under section 501(c)(4) of the Code."

12. On October 19, 1982, petitioner filed another certificate of amendment to its certificate of incorporation under section 803 of the Not-for-Profit Corporation Law. The amendment, inter alia, added the following articles relating to Federal tax exempt status and the distribution of assets upon dissolution:

"THIRTEENTH: Notwithstanding any other provision of these articles, the Corporation is organized exclusively for one or more of the following purposes: religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involved the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, as specified in Section 501(c)(3) of the Internal Revenue Code of 1954, and shall not carry on any activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954.

FOURTEENTH: In the event of dissolution, all of the remaining assets and property of the Corporation shall after necessary expenses thereof be distributed to such organizations as shall qualify under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, or to another organization to be used in such manner as in the judgment of a Justice of the Supreme Court of the State of New York who will best accomplish the general purposes for which this corporation was formed."

Articles "THIRTEENTH" and "FOURTEENTH" were added to comply with the understanding of the Internal Revenue Service in its letter of October 12, 1982 (Finding of Fact "11", supra).

13. On November 5, 1982, the Department of Taxation and Finance issued an Exempt Organization Certificate naming petitioner as an organization exempt from payment of New York State and local sales and use tax.

14. In a letter dated December 1, 1982, the Department of Taxation and Finance stated that petitioner's sales of electricity "are not subject to tax".

15. The Audit Division contends, in effect, that petitioner did not attain exempt status prior to October 12, 1982, when the Internal Revenue Service issued its letter stating that petitioner was exempt from Federal income tax. The Division maintains that prior to said amendment, petitioner failed to meet the organizational test under section 501(c)(3) of the Internal Revenue Code and that it also failed to sustain its burden of proof to show that the operational test under said section was met. The Division maintains that exempt status cannot be applied retroactively.

Petitioner, however, contends that Federal exempt status is not necessarily controlling and that a sale by or to an organization meeting the criteria of section 1116(a) of the Tax Law is not subject to sales or use tax.

16. Petitioner and the Audit Division stipulated and agreed that since the issues are the same, the decision in this matter will also be determinative for purposes of the State Tax Commission of the application for refund of state and local sales tax filed by petitioner for the period September 30, 1979 to August 31, 1982 in the amount of \$253,458.75.

CONCLUSIONS OF LAW

A. That section 1116(a) of the Tax Law provides, in pertinent part, as follows:

"(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to sales and compensating use taxes imposed under this article:

* * *

(4) Any corporation, association, trust or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;"

The above paragraph (4) is virtually identical to paragraph (3) of section 501(c) of the Internal Revenue Code ("List of Exempt Organizations"). It is noted, however, that section 501(a) of the Internal Revenue Code differs somewhat from the opening phrase of section 1116(a) of the Tax Law, in that the former provides that the organization shall be exempt from taxation, while the latter provides that a sale or amusement charge by or to the organization shall not be subject to sales or use tax. (See also: NYCRR 529.7(a), which became effective on November 24, 1982, which was after the periods at issue.)

B. That notwithstanding the similarity of sections 1116(a)(4) of the Tax Law and 501(c)(3) of the Internal Revenue Code, the State Tax Commission is not bound by a ruling of the Internal Revenue Service as to exempt organization status, but rather can make its own determination of status under section

1116(a)(4). (See: 20 NYCRR 529.1(j)(1), which also was effective November 24, 1982, but which represents the long-standing policy of the State Tax Commission.)

C. That a recently adopted regulation, 20 NYCRR 529.1(d)(2), which was effective on September 24, 1984, provides, in part, as follows:

"(2) Taxes paid by any person or organization which at the time of the sale upon which tax was paid would have qualified for exempt status pursuant to the provisions of this Part are refundable. This will be true even if the taxpayer has not received certification of its exempt status from the Technical Services Bureau at the time of the transaction... However, when a person or organization is required to amend its documents or change its operations in order to qualify for exemption, the organization will not be entitled to refund of taxes paid on purchases prior to the effective date of the amendment or change..."

D. That petitioner met both the organizational and operational tests under section 1116(a)(4) of the Tax Law during the periods at issue.

(1) The Organizational Test

(a) Article "SECOND" of petitioner's certificate of incorporation provides that petitioner was to be organized and operated for charitable and educational purposes (Finding of Fact "4", supra).

(b) Article "THIRD" of said certificate provides that no part of the income or earnings shall inure to the benefit of, nor any distribution of its property or assets be made to any private person, corporate or individual. In fact, said article provides that any income not used for petitioner's corporate purposes was and is to be paid to the New York Job Development Authority. (Finding of Fact "4", supra).

(c) Article "FIFTH" of said certificate provides that petitioner shall neither attempt to influence legislation by propaganda or otherwise or participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. (Finding of Fact "4", supra).

Thus, while the precise language of the amendments required by the Internal Revenue Service differed somewhat from the language contained in the certificate of incorporation as originally filed, in substance Articles "SECOND", "THIRD", and "FIFTH" are the same as the added Articles "THIRTEENTH" and "FOURTEENTH". (Finding of Fact "12", supra).

It is noted that petitioner did not challenge the Internal Revenue Service's requirement that it amend its certificate of incorporation. Obviously, it chose the quicker and less expensive alternative. It also noted that petitioner already had Federal exempt status under section 501(c)(4) of the Internal Revenue Code (i.e., civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, etc.).

(2) The Operational Test

The facts clearly show that petitioner was operated exclusively for charitable and educational purposes, with the ultimate goal of providing education, training and employment opportunities for inner-city residents. It is noted that the effect of the annual Additional Rental provision of section 4.02:A of the lease (Finding of Fact "8", supra) is to make the City of New York the beneficiary of any gain or profit realized by petitioner under the lease. Accordingly, during the period at issue petitioner was an exempt organization within the meaning of section 1116(a)(4) of the Tax Law and was not liable for sales and use taxes on its use of electricity and its sale of electricity to S & F Warehouse.³ While the caption refers to "income", the statutory provision itself refers to "income and operations". While sales and

³ It is noted that section 1411(f) of the Not-for-Profit Corporation Law (derived from Membership Corporations Law section 233) provides that:

"(f) Exemption of income from taxation. The income and operations of corporations incorporated or reincorporated under this section (i.e., local development corporations) shall be exempt from taxation."

use taxes are not specifically referred to, said statute shows that the legislature intended to grant some form of tax relief to local development corporations such as petitioner.

E. That the petition of Brooklyn Navy Yard Development Corporation is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 20, 1981 is cancelled and the refund requested (as per stipulation referred to in Finding of Fact "16", supra) is approved.

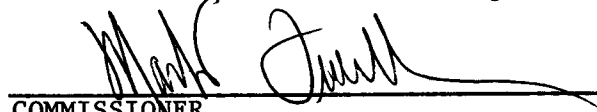
DATED: Albany, New York

STATE TAX COMMISSION

MAY 08 1985


PRESIDENT


COMMISSIONER


COMMISSIONER