STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WFC TOWER A COMPANY	:	DETERMINATION DTA NO. 810154
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, 1985 through May 31, 1989.	:	

Petitioner, WFC Tower A Company, 237 Park Avenue, New York, New York 10017, 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, 1985 through May 31, 1989.

Petitioner by its duly appointed attorney and representative, Hutton & Solomon (Kenneth I. Moore, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel), signed a waiver of hearing and consented to have this matter determined based upon stipulated facts, documents and briefs. On June 16, 1993, the Division of Taxation submitted the agreed joint Stipulation of Facts with 15 numbered exhibits attached. The last day for filing of briefs, after various extensions, was November 2, 1993. Both parties submitted briefs within that time parameter. After due consideration of the evidence and arguments had herein, Carroll R. Jenkins, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner, when acting on behalf of the Battery Park City Authority ("the Authority"), a tax exempt organization, must pay sales and use tax on tangible personal property it purchased in furtherance of construction of the Authority's building project (commercial office space), where the items were not incorporated into a capital improvement but were used to furnish and equip the leased office space.

II. Whether such tangible personal property purchased by petitioner for lease or rental to its

tenant constituted a purchase for resale excluded from sales and use tax.

III. Whether petitioner has established by clear and convincing evidence that it is entitled to a reduction (i.e., a credit) in the sales and use tax asserted here based upon amounts asserted against, and paid by, Oppenheimer & Company, Inc., as the second party to the transaction with petitioner.

IV. Whether petitioner has established that reasonable cause exists for abatement of penalty.

FINDINGS OF FACT

The parties entered into a Stipulation of Facts the relevant portions of which are included in the following Findings of Fact.

Petitioner, WFC Tower A Company (formerly known as Olympia & York Battery Park Company) (hereinafter, "petitioner" or "Landlord"), is a New York partnership, with offices at 237 Park Avenue, New York, New York 10017.

Petitioner is the ground lessee of the Battery Park City World Financial Center Building "A" ("the Building"). The ground lessor is the Battery Park City Authority, which leases the real property from its owner, the Battery Park City Development Corporation, a subsidiary of the New York State Urban Development Corporation. All three of these preceding entities are agencies and/or instrumentalities of the State of New York or one of its subdivisions. Petitioner's purpose in leasing the real property was to construct the Building on the authority's behalf and lease space therein to third parties.

On February 28, 1990, after an audit by the the Division of Taxation ("Division"), petitioner was issued a Notice of Determination and Demand for Payment of Sales and Uses Taxes Due in the amount of $126,100.54, plus penalty and interest, for the period June 1, 1985 to November 30, 1988 ("Notice # 1"). As a result of the same audit, on April 9, 1990, the Division issued to petitioner a second notice of determination asserting sales and use tax in the amount of $23,090.64, plus penalty and interest, for the period December 1, 1988 to May 31, 1989 ("Notice # 2").

Petitioner made a timely Request for Conciliation Conference with the Division's

Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation conference was held, and as a result thereof, a Conciliation Order (CMS No. 105495) was issued on August 23, 1991 (the "order"). The order reduced the tax asserted by Notice # 1 to $96,769.69, plus penalty and interest. The order reduced the tax asserted by Notice # 2 to $17,721.79, plus penalty and interest. On November 4, 1991, petitioner filed the instant petition for hearing with the Division of Tax Appeals.

On or about August 15, 1985, petitioner entered into two separate agreements with Oppenheimer Holdings, Inc. ("Holdings"), as tenant. The first agreement was a lease of office space in the Building ("Office Lease"), and the second was a Leasehold Improvements Agreement ("LIA").

The Office Lease provided that all fixtures, equipment, improvements and appurtenances attached to or built into the leased premises at the commencement of the lease or during the term of the lease shall be the property of the ground lessor, i.e., the Battery Park City Authority (Ex. 7, § 13.01). The Office Lease then carved out an exception stating, in pertinent part:

> "[A]ll machinery and equipment, business and trade fixtures, vaults, . . . communications equipment, office equipment and movable partitions, whether or not attached to or built into the Premises, which are installed in the Premises by or for the account of the tenant and can be removed without structural damage to the Building, and all furniture, furnishings and other articles of movable personal property located in the Premises (herein collectively called 'Tenant's Property') may be removed by Tenant at any time during the term of this lease" (Ex. 7, § 13.02, pp. 133-134; emphasis added).

The parties to this proceeding agree that, upon purchase by petitioner, the tenant's property, under the terms of the ground lease, did not become the property of the Authority, because the tenant property did not become part of the structure.

On the same date, August 15, 1985, petitioner entered into the LIA with Holdings, as tenant. The terms of the LIA are tied to the terms of the Office Lease, including the provisions recited above. The LIA provided, inter alia, that petitioner, as landlord, would advance over $31,000,000.00 to complete construction of the leased premises pursuant to the tenant's requirements and furnish and equip the tenant's offices with tangible personal property required

by that agreement. The $31,000,000.00 advanced by petitioner under the LIA, covered both capital improvement work and the installation of fixtures, equipment and other tangible personal property which were not incorporated into capital improvements (i.e., the tenant's property). Holdings later assigned its interest in the lease and LIA to Oppenheimer & Co., Inc. Hereinafter the term "tenant" is used interchangeably to refer to both Holdings and Oppenheimer & Co., Inc..

Amounts expended by petitioner for the tenant's property required to be furnished under the LIA were to be reimbursed by the tenant in monthly "Leasehold Improvement Payments" which were in addition to amounts otherwise payable as "rent" for the premises (Office Lease § 1.04). The tenant agreed to make annual Leasehold Improvement Payments to petitioner of $2,521,841.00 (id., § 1.04[c]). The record does not reflect how much of these annual Leasehold Improvement Payments related to capital improvement work and how much constituted monthly rental for the tenant's property, consisting of fixtures, equipment and other tangible personal property.

The parties agree that none of the tenant's property giving rise to the tax asserted in this case was incorporated into the Building as a capital improvement.

A work order notice sent from petitioner to the tenant, and in evidence as Exhibit "12", shows that petitioner did not include sales and use tax on its charges to the tenant for work performed under the LIA. Petitioner concedes that it did not report or pay sales and compensating use tax on its purchases of the tenant's property, nor did it charge sales and use tax on the rental payments charged to the tenant.

There is no evidence in the record that the tenant's property provided by the landlord pursuant to the LIA was essential to the construction of the project, nor does the record reflect how the tenant's property was financed. The record is also silent with respect to how any benefit would have accrued to the Authority by not charging sales and use tax to its tenant for the subject items.

Petitioner and tenant agreed, and the Division stipulated, that by August 2, 1986 the

landlord had substantially completed all the work required to be performed for the tenant pursuant to the LIA.

After an initial dispute on the issue, petitioner and the tenant finally agreed that the commencement date of the Lease and the LIA was August 2, 1986, and the Expiration Date of the Term of the Lease is August 31, 2006 (Ex. 13).

Of the $114,491.48 in tax remaining in dispute after the BCMS conference, petitioner now concedes it owes $8,170.48 in tax. The balance of the assessment remaining in dispute consists of the following tenant property:

ITEMS	PRICE	TAX @ 8.25%
1. Blinds	$ 145,498.00	$ 12,004.00
2. Intercom Speakers	37,885.00	3,126.00
3. Kitchen	507,923.00	41,904.00
4. Partitions	73,250.00	6,043.00
5. Mail Conveyer	980.00	81.00
6. Trading Desks	481,723.00	39,742.00
7. Planter Liners	11,490.00	948.00
8. Projection Screens	7,510.00	620.00
9. Miscellaneous	22,477.00	1,854.00
TOTALS:	$1,288,736.00	$106,321.00

Sometime in 1987, Oppenheimer & Co., Inc., the lessee and office tenant, was audited for sales and use tax by the Division for the periods March 1, 1981 through February 28, 1987. There was no agreement in that audit to exclude any transactions with petitioner. The Proposed Audit Adjustment asserting sales and use tax of $175,004.16, plus penalty and interest, was agreed to and paid by Oppenheimer. No other information regarding the tenant's audit is in the record.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner urges that:

(a) since the tenant's property was purchased by or on behalf of the Authority, an instrumentality of the State of New York, it was not subject to sales and use tax when purchased by petitioner; and/or

(b) At the time petitioner purchased the tenant's property, it was for "resale as such" to

the tenant and not subject to sales and use tax; and

(c) That although the receipts arising from the rental of the tenant's property to the tenant were subject to sales and use tax, the Division's audit policy on "overlapping audits" exempted petitioner from collecting and remitting the tax due; and

(d) that penalties should be abated.

The Division agrees with petitioner that the transactions between petitioner and the tenant constituted a taxable event, but denies that petitioner is entitled to a tax credit based on the Division's policy governing overlapping audits. The Division also denies that petitioner's purchases of the tenant's property were exempt based on the fact that the project was owned by a public authority, since the tenant's property, states the Division, was transferred to the tenant, not to the Authority. Finally, the Division notes that petitioner has failed to allege or show facts that would constitute reasonable cause for abatement of penalties.

CONCLUSIONS OF LAW

A. Except to the extent that property or services have already been or will be subject to sales tax, a use tax is imposed on every person for the use within this State of any tangible personal property purchased at retail (Tax Law § 1110). Where any customer has failed to pay sales tax to the person required to collect the same, it shall be the duty of the customer to file a return and pay the tax within 20 days (Tax Law § 1133[b]).

Petitioner claims that its purchases of the tenant's property for use in the project owned by the Authority were exempt from sales tax. Tax Law § 1115(a)(15) exempts from the sales and use tax imposed under sections 1105(a) and 1110 of the Tax Law, receipts from sales of the following:

> "Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization . . . ; 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." (Emphasis added.)

Tax Law § 1116(a) sets forth as an exempt organization for purposes of section 1115(a)(15), the

State of New York, its agencies, instrumentalities, public corporations and political subdivisions where it is the purchaser, user or consumer of property or services. While the Authority in this case is an exempt organization, petitioner's purchases of the tenant's property (Finding of Fact "15 ") do not qualify for the exemption since the tenant's property never became "an integral component part" of the building or the property of the Authority. Indeed, petitioner and the Division agree that the tenant's property never became the property of the Authority (Petitioner's Reply letter-brief, p. 1; Division's Brief, p. 9). This conclusion is also supported by the fact that the tenant had a right to remove the tenant property after the lease had commenced. The tenant's right of removal militates against a finding that the tenant's property became part of a capital improvement or was intended to be permanently incorporated into the structure (Matter of ADT Co. v. State Tax Commission, 113 AD2d 140, 142, 495 NYS2d 274, appeal dismissed 67 NY2d 917, 501 NYS2d 1026; Matter of Merit Oil of New York v. State Tax Commission, 124 AD2d 326, 328, 508 NYS2d 107 [3d Dept 1986]).

B. The Division and petitioner both argue, not terribly convincingly, that since ownership in the tenant property never vested in the Authority, it necessarily follows that upon purchase by petitioner, ownership in that property immediately vested in the tenant. Accordingly, states the Division, petitioner's purchase of the tenant property was taxable, because it was not on behalf of the Authority, but rather on behalf of the tenant. Petitioner takes this same premise, but concludes that even if its purchases were otherwise taxable, it is not taxable here due to an overlapping audit of its tenant on which the same transactions were taxed.

This requires that the following threshold questions be answered. If, under the terms of the ground lease as everyone agrees, ownership of the tenant property did not vest in the Authority, how could there be a "resale", and by whom?

It must be borne in mind that in determining a tax issue, the question of whether there has been a "purchase" or a "sale" is not determined by the lease agreements, but by the Tax Law and regulations. For purposes of the Tax Law, the term "sale" is defined 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 by any

means whatsoever for a consideration" (Tax Law § 1101[b][5]; emphasis added). With respect to a rental, the Division's regulations provide that a transfer of possession has occurred where there has been a transfer of "custody or possession of the tangible personal property, actual or constructive" (20 NYCRR 526.7[e][4][i]).

It is undisputed that petitioner advanced the monies necessary to pay for the tenant's property, and that the tenant's property was delivered to petitioner for installation in the tenant's future office space. This transfer of possession ("delivery") of the property for a consideration constituted a "sale" to petitioner under the Tax Law. While there is no dispute that the tenant's property was not "to be incorporated in the [b]uilding" as a capital improvement and did not become the property of the Authority (Ex. 6, § 11.08; Petitioner's Reply letter-brief, p. 1; Division's brief, p. 9), it did become the property of petitioner for the purpose of installing the machinery, equipment and fixtures (i.e., "the Tenant's property") in the demised premises pursuant to the Office Lease and LIA.

The property was not owned by the tenant until there had been a transfer of possession, i.e., "delivery". A transfer of possession has occurred where there has been a transfer of "custody or possession of the tangible personal property, actual or constructive" (20 NYCRR 526.7[e][4][i]). Upon the tenant's occupying the premises (thereby accepting the delivery of the personalty therein), or upon commencement of the lease (thereby constructively accepting delivery of such property), whichever occurred first, possession of the tenant's property was transferred to the tenant, and a "resale", under the Tax Law can be deemed to have occurred.

The argument that title to the property immediately (upon purchase by petitioner) passed to the tenant is therefore incorrect, since custody and control over the tenant property had not, at that point, been transferred to the tenant.[1] This conclusion is buttressed by the fact that only

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[1]The argument that ownership of the tenant's property vested in the tenant immediately upon purchase by petitioner is rejected for a second reason. This argument suggests that an "agency" relationship existed between the tenant and petitioner, whereby petitioner was authorized to act on the tenant's behalf. Neither party offered any evidence that would support such an agency relationship. It is incongruous that petitioner would make this argument, since its purchases of tenant property, if made as agent for the tenant, would have been taxable at the outset, and

after the lease had commenced was the tenant given that singular incident of ownership, i.e., the right to remove the tenant's property from the demised premises at any time (Ex. 7, § 13.02).

Petitioner and the tenant agreed that the Office Lease and the LIA commenced on August 2, 1986. Further, the Division and petitioner stipulated that petitioner had substantially completed its performance of the work required under the LIA by August 2, 1986. If it is determined that a "resale" occurred, it can be reasonably inferred from the facts in evidence that the parties intended August 2, 1986 to be the effective date of the transfer of possession, custody or control to the tenant (20 NYCRR 526.7[e][4][i]).

C. Petitioner argues that the tenant's property was purchased for resale to the tenant, and therefore was not subject to tax (Petitioner's Brief, p. 8). There is a statutory presumption that all receipts for property or services are subject to tax and the burden to prove otherwise rests with the taxpayer (Tax Law § 1132[c]; see, Matter of Savemart, Inc. v. State Tax Commission, 105 AD2d 1001, 482 NYS2d 150, 152, lv denied 65 NY2d 604, 493 NYS2d 1025; Matter of Blodnick v. State Tax Commission, 124 AD2d 437, 507 NYS2d 536). The sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property" except as otherwise provided by Article 28 of the Tax Law (Tax Law § 1105[a]). A "retail sale" is defined, in pertinent part, as a "sale of tangible personal property to any person for any purpose, other than (A) for resale as such . . . " (Tax Law § 1101[b][4][i][A]; emphasis added).

D. The Division's regulations provide:

> "(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.
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> "(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate" (20 NYCRR 526.6[c][1], [2]).

The Court of Appeals has held that an item is purchased for resale, for purposes of Tax Law §

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destroys its argument that the purchases were for resale to the tenant.

1101 when the purchaser acquires the item for the purpose of resale (see, Matter of Albany Calcium Light Co. v. State Tax Commission, 44 NY2d 986, 987, 408 NYS2d 333; Micheli Contr. Corp. v. New York State Tax Commission, 109 AD2d 957, 958, 486 NYS2d 448). Any resale which is purely incidental to the primary purpose of the business is not a purchase for resale as such (see, Matter of Laux Advertising v. Tully, 67 AD2d 1066, 414 NYS2d 53; Matter of Custom Management Corporation v. New York State Tax Commission, 148 AD2d 919, 539 NYS2d 550).

In this case the tenant's property was purchased by petitioner for resale or rental to the tenant. Although there are no copies of resale certificates in the record, the Office Lease and the Leasehold Improvement Agreement clearly reflect that but for the tenant's requirements set forth in those agreements, the tenant's property (Finding of Fact "15") would not have been installed in the demised premises. These items were clearly required by the tenant as a condition of leasing the premises. Petitioner's purchases of these items were not incidental to petitioner's development of the project, but rather, were essential to its completion. As such petitioner's purchase of the tenant's property was for resale and not subject to tax (see, Tax Law § 1101[b][4][i][A]).

E. Even if when purchased by petitioner, the tenant's property was exempt from sales tax as a purchase for resale, it was nevertheless subject to tax when sold (leased) to the tenant. Petitioner agrees, but argues that tax is not due here because the tenant had (at the time of the instant audit) already been audited by the Division for sales and use tax and had agreed and paid the tax asserted. Therefore, petitioner urges it is entitled to a credit for any amounts paid by the tenant.

F. Petitioner's argument that it is entitled to a credit for sales and use tax asserted against the tenant is based on the Division's "overlapping audit policy." The Division's policy regarding overlapping audits is contained in a memorandum dated November 4, 1988 from the Sales Tax Audit Administrator to District Office Sales Tax Audit Personnel, captioned "Overlapping Audits." This memorandum indicates that for a vendor to obtain an audit adjustment based on

an overlapping audit of the vendor and his customer, the vendor must establish the audit period of the purchaser, that the purchaser agreed to the audit findings and that there was no agreement to exclude the particular transactions at issue from the audit of the customer. Therefore, it is the Division's policy to reduce a vendor's assessment for any amount assessed on sales to a particular customer if the customer was audited and agreed to the audit findings for the same audit period (Matter of Allied Aviation Serv. Co. of N.Y., Tax Appeals Tribunal, June 27, 1991). A taxpayer is not entitled to an adjustment to the audit findings where the customers' audits were either ongoing and not, as yet, agreed to, or were complete but not agreed to or were being protested (id.). As has already been noted, in this case the tenant was audited for the period March 1, 1981 to February 28, 1987. Petitioner was audited for the period June 1, 1985 to May 31, 1989, which is not the same period covered by the audit of the tenant. Since petitioner and the tenant were not audited for the same periods, the Division's policy governing overlapping audits, as construed in Matter of Allied Aviation Serv. Co. of N.Y. (supra), does not apply. That being the case, petitioner, to be entitled to the claimed credit, was required to show by some other means constituting clear and convincing evidence, that the tax here asserted had been paid to the State of New York. That showing has not been made.

G. Petitioner argues that the Division erred in imposing tax in this matter and that error should not be exacerbated by imposition of penalties. The grounds for reasonable cause are defined in the Division's regulations to include:

> "[a]ny . . . cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect . . ." (20 NYCRR 536.5[c][5]).

The burden of showing that there was reasonable cause and that penalty was wrongfully assessed is on the taxpayer. Petitioner has failed to place any evidence in the record that would satisfy that burden.

H. The petition of WFC Tower A Company is denied and the notices of determination dated February 28, 1990 and April 9, 1990, as adjusted by Conciliation Order No. 105495, are sustained.

DATED: Troy, New York
March 17, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE