

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(47)S
Sales Tax
November 20, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S961118B

On November 18, 1996, the Department of Taxation and Finance received a Petition for Advisory opinion from the Rome Research Corporation, 314 South Jay Street, Rome, New York 13440.

The issue raised by Petitioner, Rome Research Corporation, is whether certain materials and supplies it purchases for use under its contract with the United States ("U.S.") government are excluded from sales and compensating use taxes as purchases for resale.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner entered into a contract with the U.S. government, Department of the Air Force, in direct support of government testing, maintaining and operating government facilities, and to perform research, at Rome Laboratory, Griffiss Air Force Base. Petitioner submitted a copy of the contract, entitled "Rome Laboratory Technical Support Contract"(the "Contract"). The Contract provides that Petitioner "shall provide engineering, technical, operations and maintenance (O&M) and management services to support Rome Laboratory." The Contract provides for cost reimbursement to Petitioner, plus a fixed fee.

Under the Contract, the government must provide at no charge the base support necessary for Petitioner to fulfill its obligations. Such base support includes all necessary materials and supplies. If such materials and supplies are not available, Petitioner, following procedures contained in the Contract, purchases materials and supplies for use at Rome Laboratory. In these transactions, Petitioner's purchase orders and vendor invoices name Petitioner as the purchaser. Petitioner has a substantially "dependent" role in making contract purchases. Petitioner is contractually required to obtain prior approval from the U.S. government for all contract related purchases. When materials and supplies are required, a U.S. Government authorization form must be completed and approved by the Rome Laboratory Program Manager, a U.S. Government employee. All approved purchase requisitions are then delivered to Petitioner for processing and ordering of the goods. The materials and supplies purchased are then delivered directly from the vendor to the Government site. Upon receipt, the government signs for the materials and supplies and accepts full responsibility and title. Petitioner is then reimbursed by the government for the purchases via its normal invoicing process. The U.S. government is liable to Petitioner for all purchases that have been approved by the Program Manager. Petitioner does not warehouse the items purchased in any part of its facility, and the cost associated with these items is never carried financially in a company inventory account.

The Contract does not confer agency status on Petitioner or provide that Petitioner shall make purchases as the agent of the U.S. government.

The following are portions of Petitioner's contract with the U.S. government:

SECTION H - SPECIAL CONTRACT REQUIREMENTS

(3) BASE SUPPORT (JUL 1992) Base support will be provided by the government to the contractor in accordance with the provisions of this clause . . .

(a) Base support includes government -controlled working space, material, equipment, services (including automatic data processing), or other support (excluding use of the Defense Switched Network (DSN)) which the government determines can be made available at, or through, any Air Force installation where this contract will be performed. All Government property in the possession of the contractor, provided through the base support clause, will be used and managed in accordance with the Government Property Clause.

* * *

(c) Unless otherwise stipulated in the contract schedule, support will be provided on a no-charge-for use basis and the value will be a part of the Government's contract consideration.

(d) . . . the contractor (or authorized representative) will not purchase, or otherwise furnish any base support requirement provided by the clause (or authorize others to do so), without prior written approval of the Contracting officer regarding the price, terms, and conditions of the proposed purchase, or approval of other arrangements.

Applicable Law

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of

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section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

Section 1105(a) of the Tax Law imposes a tax upon:

The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Opinion

Petitioner's role is essentially that of a service provider while the U.S. government's role is to provide Petitioner with the materials and supplies necessary to fulfill its function as such service provider. When materials are not readily available, the Contract contains a mechanism for Petitioner to procure such materials and supplies. Using this procedure, Petitioner purchases materials and supplies in its name and has them delivered to the U.S. government's job site where the U.S. government takes title and possession. Although the U.S. government takes title to these materials and supplies, they are purchased by Petitioner for use in performing its contractual obligations. Petitioner does not purchase materials and supplies exclusively for resale to the U.S. government, since Petitioner uses them to provide services required under the Contract. Therefore, Petitioner's purchases are not excluded from sales tax under Section 1101(b)(4)(i) of the Tax Law. See Matter of West Valley Nuclear Services Co., Inc., Dec Tax App Trib, November 13, 1998, TSB-D-98(15)S; determination confirmed, 264 A.D.2d 101, appeal denied 95 N.Y.2d 760. In West Valley, as in the present case, the contractor had entered into a cost reimbursement contract with the U.S. government, under which the contractor purchased materials and supplies necessary to perform its contractual obligations and the government took title to materials and supplies purchased by the contractor upon delivery by the supplier. It was held in West Valley that under these circumstances the contractor's purchases of materials and supplies were not excluded from tax as purchases for resale. Accordingly, Petitioner's purchases of materials and supplies pursuant to the Contract are retail purchases which are subject to sales and compensating use tax unless some other exemption applies.

DATED: November 20, 2000

/s/
Jonathan Pessen
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Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.