

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-15(46)S
Sales Tax
November 18, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S091015A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether its purchases of tangible personal property made pursuant to a contract with the US Army are exempt from New York State and local sales taxes as purchases for resale.

We conclude that Petitioner’s purchases are not exempt as purchases for resale.

Facts

Petitioner has a cost-reimbursement contract with the United States to provide facilities operations, maintenance, repair and renovations at an Army post located within New York State (“Post”).

The contract with the Army requires Petitioner to provide two main categories of services: servicing government-owned real property and servicing government-owned tangible personal property (e.g., motor vehicles). Examples of services to real property include snow plowing, trash collection, lawn care, and repair and maintenance of buildings, structures and roads. Petitioner is also responsible for operating a warehouse on the base and for operating an office that handles paperwork for moving the possessions of military personnel overseas. However, these two functions involve few or no purchases for which Petitioner obtains reimbursement from the Army.

Petitioner is paid on a cost-plus basis. It is reimbursed dollar-for-dollar for certain purchases it makes as part of the contract. In addition, it is paid for general administrative expenses. This portion of Petitioner’s receipts is calculated as percentage of the total cost. Petitioner also receives a base fee, which is 2.5 percent of the total contract cost. In addition, Petitioner may receive a reward fee, which is a bonus, if in performing the contract it satisfies quantitative and qualitative goals set by the Army.

When it is necessary for Petitioner to purchase property in order to perform the contract, Petitioner purchases this property in its own name and is responsible for paying the seller. Title to the property is transferred to the Army immediately upon delivery to the Post. Petitioner states that it is not an agent of the Army and does not hold itself out as such. Petitioner invoices the Army on a monthly basis for such purchases. All such property remains on the Post after Petitioner’s contractual relationship with the Army concludes.

Analysis

Tax Law § 1105(a) imposes sales tax on the receipts from the retail sale of tangible personal property. “Retail sale” is defined, in relevant part, as the “sale of tangible personal property to any person other than for resale” Tax Law § 1101(b)(4)(i)(A). The Sales and Use Tax Regulations provide:

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.

20 NYCRR § 526.6(c).

However, only purchases made exclusively for resale come within the resale exclusion. *See Matter of West Valley Nuclear Services Co. v. Tax Appeals Tribunal*, 264 AD2d 101(3d Dep’t 2002); *see also Michelli Contracting Corporation v. State Tax Comm’n*, 109 AD2d 957 (3d Dep’t 1985); *Matter of Savemart Inc. v. State Tax Comm’n*, 105 AD2d 1001 (3d Dep’t 1984). Petitioner’s purchases of property are made for the purpose of performing its contract with the Army, and Petitioner uses the property in the performance of that contract. Therefore, the property is not purchased exclusively for resale and Petitioner cannot avail itself of the resale exclusion. *See Matter of West Valley Nuclear Services, supra*. Accordingly, Petitioner must pay State and local sales tax on its purchases of property under its contract with the Army.

If, however, Petitioner makes purchases of materials that will be used in maintaining, servicing or repairing a structure, building or other real property owned by the Army, and those materials will become an integral component part of such structure, building or other real property, Petitioner can purchase those materials exempt from sales tax. *See* Tax Law § 1115(a)(16). Petitioner can claim this exemption by providing its supplier with a properly completed Form ST-120.1 *Contractor Exempt Purchase Certificate*.

DATED: November 18, 2015

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.