New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-88 (18)S
Sales Tax
February 29, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S871014A

On October 14, 1987, a Petition for Advisory Opinion was received from Young & Rubicam Inc., 285 Madison Avenue, New York, New York.

The issue raised is whether Petitioner has established a principal-agency relationship with its client, the United States Army Recruiting Command, or is acting as a vendor of tangible personal property to the United States Army Recruiting Command.

Petitioner is an advertising agency which is being retained by the United States Army Recruiting Command (hereinafter "USAREC") as its advertising agency. Petitioner asserts that it is the agent for USAREC and, therefore, that all of Petitioner's purchases of tangible personal property and services used in performance of its contract with USAREC are actually purchases by the federal government and thus exempt from all state and local sales or use tax.

Petitioner cites as authority for this position the case of Kern-Limerick v. Scurlock, Commissioner of Revenue for Arkansas, 347 US 110, 98 L Ed 546, 74 S Ct 403. In this case, the court found a principal-agent relationship between the U.S. government and its contractor since the contractor was obligated to obtain prior approval before procuring any goods or services, the contractor had no independence when purchasing any property and title passed to the government upon purchase of the goods. Moreover, Petitioner states that the case of United States v. New Mexico, 455 US 720, 71 L Ed 2d 580, 102 S Ct 1373 (1982), is inapplicable because Petitioner avers only that it is an agent of the government and not an instrumentality of the government.

Notwithstanding Petitioner's assertion, United States v. New Mexico is particularly instructive with respect to the contract here at issue. As Petitioner correctly states, the court explored the circumstances where immunity from tax existed by virtue of being an agency or instrumentality of the government. The court determined that "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." Id. 455 US at 735, 71 L Ed 2d at 592. Moreover, the court stated that in the case of a sales tax, such as that at issue in this advisory opinion, "it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale-in both a real and a symbolic sense - a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure." Id. 455 US at 742, 71 L Ed 2d 597 citing Kern-Limerick, supra.

Nevertheless, the court found that the principles enunciated in Kern-Limerick did not invalidate New Mexico's sales tax as applied to purchases by the contractors even though the government was directly liable to the vendors for the purchase price because (1) the contractors made purchases in their own names, (and presumably were themselves liable to the vendors); (2) the vendors were not informed that the government was the only party with an independent interest in the purchase; (3) the government failed to formally denominate the contractors as purchasing agents and (4) the contractors were not required to obtain advance government approval for purchases.

The contract between Petitioner and USAREC contains no provision which can be construed as formally or explicitly delegating agency status to Petitioner. It seems obvious that if the government intended to make Petitioner its agent, it would have manifested some explicit intention to do so in its contract. Furthermore, the purchase order used by Petitioner appears to be in the name of Petitioner with USAREC identified only as a "client". Clearly, vendors are not informed that the government is the only party with an independent interest in the purchase; nor could vendors conclude from the purchase order that Petitioner is not liable to them for its purchases notwithstanding that title passes to the U.S. Army. Again, it seems obvious that if the government intended to make Petitioner its agent, it would have manifested its intention in some manner in its purchase order.

Additionally, Petitioner cites Technical Services Bureau Memorandum TSB-M-83(16)S as further support for its position.

Technical Services Bureau Memorandum TSB-M-83(16)S provides:

> A. Principal-agent Relationship
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> In order for a principal-agent relationship to exist for sales tax purposes, the conditions set forth in TSB-M-78(3)S must be met. Those conditions are:
>
> 1. the advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent,
>
> 2. the advertising agency must obtain and retain written evidence of agent status with the client prior to the acquisition of any tangible personal property or service, and
>
> 3. the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may not use the property for its own account, such as by charging the item to the account of more than one client.
>
> Condition 1 above will be met only where the complete name

of the client is disclosed on any purchase order given to a supplier and the advertising agency is identified as agent acting for and on behalf of the disclosed client (e.g., X advertising agency as agent for Y, name of client). The mere listing of the client's account number or name or the statement "for the account of" are deemed to be insufficient for meeting condition 1.

Condition 2 above will be met only where there exists a properly executed written agency agreement which clearly sets forth that the advertising agency is appointed to act as agent for and on behalf of the client with respect to making purchases.

Condition 3 above will be met when any expenditures by the firm as agent for a client are billed to the client without being marked up.

Petitioner states that it meets the three conditions necessary to establish a principal-agent relationship based upon the following:

1) Y&R discloses to the dealer/supplier that the property or services are purchased for the government and

2) The price billed the government, exclusive of its agency fee, is the same amount paid to the supplier.

Petitioner states that it believes that the requirement of written evidence of agent status is met for the following reasons:

1) Y&R has a written contract, and receives a "Delivery Order" prior to commencement of each project.

2) Y&R does not initiate any project. It may act only upon an order from the government.

3) It must strictly adhere to the federal guidelines and procurement regulations set forth in the contract and the FAR's referred to therein.

4) Y&R has no independence in selecting which goods and services will be used in performing and fulfilling the contract. It must submit an estimate which includes three bids. The government selects which goods and services are used. Y&R may only make recommendations.

5) Title to the goods passes directly from the vendor to the government.

6) Y&R may not proceed with a project until funding has been obligated and approval is granted.

7) Once the project has commenced, the government still retains control. It may have the project changed or stopped at any time (termination for convenience) FAR 52.249-04.

The Technical Services Bureau Memorandum states that an agency agreement "...will be met only where there exists a properly executed written agency agreement..." (Condition 2) As previously discussed, the contract which Petitioner submitted does not contain any language which indicates the intention of the government to name Petitioner as an agent for USAREC. On the contrary, language in the contract indicates that it is a cost-plus-fixed-fee type of contract. The contract provides:

SECTION B SUPPLIES/SERVICES AND PRICES

B-2 PAYMENT

a. For provisions of supplies and/or services in compliance with delivery orders issued under this contract, contractor shall be paid

(1) For in house labor by the contractor's employees, a fixed price determined in accordance with paragraph H-8 of this contract, and

(2) For subcontracted supplies or services, the lesser of contractor's actual costs or the ceiling price negotiated in accordance with paragraph H-8 of this contract, subject to price revision in accordance with paragraphs H-10 and H-11 of this contract. Contractor shall not be paid profit, fee, overhead or commission on subcontract cost.

Moreover, Condition 1 is not met since the purchase order does not identify Petitioner as agent acting for and on behalf of USAREC. On the contrary, it merely identifies the U.S. Army as a "client."

The contract and purchase order supplied by Petitioner is in all respects consistent with the status of Petitioner as contractor to USAREC whereby it will sell goods and services to USAREC. Accordingly, it is concluded that such is Petitioner status for New York sales and use tax purposes. The contract and purchase order are found to contain no language which could be construed as creating a principal-agent relationship for New York sales and use tax purposes.

DATED: February 29, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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