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

TSB-A-89 (1)S
Sales Tax
January 5, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO.S880608A

On June 8, 1988, a Petition for Advisory Opinion was received from Peat Marwick Main and Co., 345 Park Avenue, New York, New York 10154.

The issue raised is whether a construction management company, while acting in an agency capacity for the owner of a construction project, is subject to the sales and use taxes imposed under section 1105 and section 1110 of the Tax Law.

Petitioner has set forth a hypothetical situation whereby a corporation (hereafter "XYZ Corp.") is headquartered in New York City and has offices in other cities in the United States, as well as in foreign countries.

XYZ Corp. provides construction management and consulting 'services to its clients for construction of new buildings and renovation of existing buildings. The management services provided include, but are not limited to: construction planning and scheduling of construction activities, the furnishing of staff for the administration, coordination and management of the project, the assurance that each contractor performs and completes its respective portion.[of the work in accordance with the appropriate contract documents, the arrangement, as agent for the client, for all work, labor, services, materials, supplies and equipment necessary to execute and complete the work and the performance of construction' accounting services on behalf of the client.

Upon the acceptance of a construction management and/or consulting engagement, XYZ Corp. enters into a construction management and/or consulting agreement with the owner of the building. The agreement empowers XYZ Corp. to act as the agent for the ownership entity.

Petitioner states as follows:

Opinion Requested

> It is our view that because of the clear and unequivocal agency relationship, any assessment for or obligation with respect to sales and/or use taxes in connection with the purchase of goods or services by the agent should be made directly against the Owner and not against the Agent who acts only in its capacity as agent for disclosed principal, the Owner. Therefore, we request that an opinion be rendered which reflects the State's position that XYZ corporation is not subject to audit for sales/use taxes on those purchases it makes on behalf of the owners.

Supporting Arguments

> The management construction and/or consulting agreement between XYZ and the building owners clearly establishes that an agency relationship exists between the two parties. The purchase orders and contracts clearly disclose to suppliers and contractors that XYZ is acting as an agent for the building owners. In providing the construction management and consulting services, XYZ never takes possession/title to tangible personal property purchased on behalf of the owner. Enclosed are sample forms of the purchase order and trade contracts normally used by XYZ which clearly state that the purchase is being made by XYZ "as agent for."

Section 1133 of the Tax Law provides that every person required to collect sales or use tax shall be personally liable for the tax imposed, collected or required to be collected. Additionally, any purchaser who fails to pay sales or use tax due is also personally liable for such tax. In the context of Petitioner's hypothetical situation, the owner of the building in whose name taxable property or services are purchased is a purchaser who would be personally liable for sales tax thereon.

Whether XYZ Corp. qualifies for sales tax purposes as agent for the building owner depends not only upon the provisions of the agreement between XYZ Corp. and the building owner but also upon XYZ Corp.'s actual dealings with the owner and with vendors. If XYZ Corp., in fact, operates in the manner described in documents submitted with Petitioner's Petition for Advisory Opinion, it will be deemed the agent of the building owner for sales tax purposes.

Assuming that XYZ Corp. properly qualifies as the agent of the building owner, it may nevertheless be personally liable for sales tax on purchases of taxable goods and services made by XYZ Corp. as agent for the building owner. It is a general rule of agency that an agent of a disclosed principal may not be held personally liable on a contract by parties other than the principal since the contract is that of the principal and not of the agent. Clarkson v. Krieger (1930) 254 NY 114; Keskal v. Modrakowski (1928) 249 NY 406.

Thus, it is ordinarily the case that an agent will not be liable for sales or use tax on the purchase of taxable goods or services purchased by the agent in the name of its principal since only the principal is the purchaser of the goods and services. However, if, for example, an agent purports to act with authority when in fact it has none, the agent will incur personal liability on the contract including liability for sales and use tax. Similarly, an agent may always choose to bind itself personally on a contract as when an agent commits its own financial resources as security to induce a third party to enter into a contract. For additional examples of exceptions to the general rule, see Kieskal v. Modrakowski, supra; Renel Construction, Inc. v. Brooklyn Cooperative Meat Distribution Center, Inc. (1977, 1st Dept) 59 AD2d 391, 399 NYS2d 511, aff'd 46 NY2d 859, 414 NYS2d 511; Rhynders v. Greene (1938) 255 AD 401, 8 NYS2d 143; R.L. Rothstein Corp. v Kerr S.S. Co. (1964 1st Dept) 21 AD2d 463, 251 NYS2d 81, affd 15 NY2d 897, 258 NYS2d 427; Suzuki v. Small (1925) 214 AD 541, 212 NYS 589, affd

243 NY 590; Passaic Falls Throwing co. v. Villeneuve-Pohl Corp. (1915) 169 AD 727, 155 NYS 669.

Accordingly, Petitioner is advised that while an agent acting in its capacity as agent for a disclosed principal is ordinarily not personally liable for sales or use tax due from its principal, such protection is not absolute and is limited in its. scope as recognized by a variety of cases setting forth exceptions to the general rule. It should be noted that under circumstances where an agent is liable for sales and use tax as discussed above, an officer, director or employee of such agent (where such agent is a corporation, partnership or proprietorship) who is under a duty to act for such agent in complying with any requirement under Article 28 of the Tax Law (i.e. a "responsible officer") would be required to collect tax under the second sentence of section 1131(1) of the Tax Law and would share personal liability for such tax with such agent.

Additionally, it is noted that an entity acting as agent in facilitating purchases for another in one transaction may be a vendor with regard to the other in another transaction. This would seem to be the rationale for the court's conclusion that the transactions between the bank-purchaser and its "agent" were taxable as sales from the "agent" to the bank in Chemical Bank v. Tully (94 AD2d 1). Thus, it is necessary in any set of circumstances to establish whether an entity is acting as agent of a purchaser or as vendor to the purchaser. It cannot be both in the same transaction.

DATED: January 5, 1989

s/ FRANK J. PUCCIA
Director
Technical Services

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