

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

TSB-A-94 (29)S
Sales Tax
July 11, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940309A

On March 9, 1994, a Petition for Advisory Opinion was received from Suffolk County Department of Parks, Post Office Box 144, Montauk Highway, West Sayville, New York 11796.

The issue raised by Petitioner, Suffolk County Department of Parks, is whether purchases made by Global Golf, Inc., (hereinafter the "Licensee"), under contract to operate the concessions at the Bergen Point Country Club are subject to sales and use taxes.

The Licensee entered into an agreement with the County of Suffolk (the "Licensor") to operate the concessions at the Bergen Point Country Club which is owned by the county. By agreement the Licensor granted to the Licensee exclusive rights and privileges to operate and maintain a golf course, golf school, driving ranges; to manage the golf professional shop; to operate, construct and maintain a miniature golf course and to operate and maintain the restaurant, catering and bar facilities; and to undertake necessary improvements and repairs necessary and incidental for the operation and maintenance of the facilities.

The term of the agreement is from March 5, 1993 through December 31, 2002, with options to renew for two additional five year terms. The Licensee has to satisfy certain capital improvement requirements set forth in the agreement within eight years of the execution of the agreement.

The Licensee is required to expend a minimum of ten thousand dollars each year during the term of the License for new equipment, furnishings and/or refurbishment of existing equipment or facilities to be used on the golf course and in the restaurant, catering and bar concessions and related facilities. All equipment becomes the property of the Licensor upon expiration or termination of the agreement, free and clear of any and all liens and encumbrances.

Further, the Licensee has to pay for the total cost of all construction and renovations including, professional, legal and permit fees. All improvements, upon completion, become the property of the Licensor.

The capital improvement plan includes the following:

1. Purchase of equipment
2. Fairway reclamation
3. Rough reclamation

4. Tee and green reclamation
5. Fairways and bunkers
6. Cart path construction
7. Automatic irrigation system
8. Landscaping and planting
9. Building renovations to clubhouse, restaurant and garage
10. Berms and tide gates
11. Renovations to driving range
12. Architectural and design services
13. Construction of miniature golf and pitch and putt course
14. Renovations to course drainage
15. Construction of additional parking spaces

Section 1105(a) of the Tax Law imposes a sales tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1110 of the Tax Law provides, in part, as follows:

Imposition of Compensating Use Tax.

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state...except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user,...(ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor or repairman in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land...

Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale" to include:

...a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real

property, property or land are defined in the real property tax law...regardless of whether the tangible personal property is to be resold as such before it is so used or consumed...

Section 1115(a) of the Tax Law exempts from the sales tax imposed under Section 1105(a) of the Tax Law and from the compensating use tax imposed under Section 1110:

* * *

(15) 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 as the terms real property, property or land are defined in the real property tax law; 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.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; 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.

Section 1116 of the Tax Law provides, in pertinent part, as follows:

Sec. 1116. Exempt organizations--(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

Section 528.16 of the Sales and Use Tax Regulations provides, in part, as follows:

Reg. Sec. 528.16. Tangible personal property sold to contractors for use in erecting structures of tax exempt organizations.--(Tax Law, Sec. 1115(a)(15)). (a) Exemption.
(1) Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in Part 529 of this

title, is exempt when it is to become an integral component part of such structure or building.

Example 1: An exempt organization contracts to have a building erected on its land. Purchases by its contractor of tangible personal property, such as nails, sheet rock and plywood that become part of the structure are exempt.

* * *

Example 5: Lumber and other materials that are used to build forms are not exempt since they do not become a component part of the structure.

Example 6: Equipment rentals such as cranes, bulldozers, back hoes, etc. for use in building a structure for an exempt organization are subject to tax.

(2) Tangible personal property sold to a contractor, subcontractor or repairman for use in adding to, altering, or improving real property, property, or land owned by an organization described in Part 529 of this title is exempt when it becomes an integral component part of the structure, building or real property.

(b) Form of contract. (1) The form of contract entered into between an exempt organization and its contractor is not relevant. (emphasis added)

In Insurance Services Office, Inc., Adv Op Comm T&F, February 22, 1991, TSB-A-91(23)S the Commissioner opined that Petitioner's contractors and subcontractors could purchase tangible personal property which would be incorporated as an integral component part of the real property leased by Petitioner from a governmental entity tax exempt provided Petitioner furnished the building material suppliers with a properly completed Form ST-120.1, Contractor Exempt Purchase Certificate. The Commissioner further opined that tools and equipment rented by Petitioner's contractors and subcontractors for use in installing tangible personal property into the leased premises did not become an integral component part of the exempt organizations real property and were considered to be used or consumed by the contractors and subcontractors. Thus, such rentals did not qualify for the exemption provided under Sections 1115(a)(15) and (16) of the Tax Law and were subject to the taxes imposed under Sections 1105(a) and 1110 of the Tax Law.

Technical Service Bureau Memorandum, TSB-M-83(17)S, dated June 15, 1983, entitled Taxable Status of Leasehold Improvements For or By Tenants, provides, in pertinent part, that:

Additions or alterations to real property for or by a tenant of such property will be presumed to be temporary in nature... unless a contrary intention is demonstrated. A specific lease provision which states that: 1) immediately upon installation, title

to such installation vests in the lessor, and 2) the addition or alteration becomes part of and remains with the premises after the termination of the lease, will be recognized as a demonstration of contrary intention (i.e., an intention of permanence). A provision granting the lessor the right to require removal of the improvement will not negate this demonstration of intention of permanence; nor will a provision which states that the improvements becomes the property of the lessor upon expiration of the lease or upon termination of the tenancy.

Where tangible personal property purchased by the Licensee's contractors or subcontractors becomes an integral component part of the Bergen Point Country Club which is owned by Suffolk County, such tangible personal property is considered to be incorporated into improvements to real property of an organization described in Section 1116(a)(1) of the Tax Law. Accordingly, in those instances where the items of tangible personal property purchased by the Licensee's contractors or subcontractors for use in performance of the construction work or repair work contemplated in the Licensee's agreement with the Licensor becomes integral components of real property owned by the Licensor and where the Licensor will take title to tangible personal property and such tangible personal property will be and remain a part of the demised property, pursuant to Section 528.16 of the Sales and Use Tax Regulations, Insurance Services Office, Inc., supra, and Technical Services Bureau Memorandum, TSB-M-83(17)S, supra, the purchases of such tangible personal property will be exempt from the sales and compensating use tax as provided under Sections 1115(a)(15) and 1115(a)(16) of the Tax Law.

Thus, in the instant case, tangible personal property purchased by the Licensee's contractors or subcontractors which becomes an integral part in the Licensor's real property, such as the fairway reclamation, rough reclamation, tee and green reclamation, fairway and bunkers, cart path construction, automatic irrigation system, landscaping and plantings, building renovations to the clubhouse, restaurant and garage, berms and tide gates, driving range, construction of miniature golf and pitch and putt course, course drainage, and additional parking spaces, will be considered incorporated into improvements to real property of an organization described in Section 1116(a)(1) of the Tax Law and will be exempt from sales and compensating use tax as provided under Sections 1115(a)(15) and 1115(a)(16) of the Tax Law. Purchases of tangible personal property which does not become an integral part of the Licensor's real property will be subject to sales tax.

It is noted, however, that tools, equipment and supplies purchased or rented by the Licensee's contractors and subcontractors for use in repairing or installing tangible personal property into the Bergen Point Country Club which will not become a part or integral component of the Licensor's real property, will be considered to be used or consumed by the contractors or subcontractors. Therefore, pursuant to Section 528.16 of the Sales and Use Tax Regulations and Insurance Services Office, Inc., supra, such purchases will not qualify for the exemption provided under Sections 1115(a)(16) and 1115(a)(16) of the Tax Law and thus are subject to the taxes imposed under Sections 1105(a) and 1110 of the Tax Law.

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It is further noted that architectural and design services performed by a licensed architect are not enumerated services subject to sales tax under Section 1105(c) of the Tax Law with the exception of design services which do not require an architectural license to perform. Accordingly, expenditures by the Licensee for such architectural and design services will not be subject to sales tax. However architects are required to collect appropriate sales tax when they perform interior decorating and design services.

DATED: July 11, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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