

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

TSB-A-98(30)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970806F

On August 6, 1997, a Petition for Advisory Opinion was received from James J. Kelly, 4600 Broadway, New York, New York 10040.

The issues raised by Petitioner, James J. Kelly, are:

1. Whether Custodians are exempt from paying sales and use taxes on the purchase of supplies on behalf of their employer, the Board of Education of the City School District of the City of New York, an exempt governmental agency.

2. If the answer to issue 1 is yes, what are the proper procedures and documentation to be used by Custodians when purchasing supplies from vendors on behalf of the Board of Education?

Petitioner submits the following facts.

School Custodians and School Custodian Engineers (collectively "Custodians") are classified civil servants employed directly by the Board of Education of the City School District of The City of New York (the "Board of Education") to provide for custodial care and maintenance of buildings owned or leased by the Board of Education.

Petitioner is a School Custodian Engineer and President of Local 891, International Union of Operating Engineers, AFL-CIO, the collective bargaining agent for Custodians in their capacity as employees of the Board of Education.

On February 7, 1995, the Board of Education issued Plant Operations Circular No. 17-1994/95 that directed Custodians to use form ST-119.1, Exempt Organization Certification, in lieu of paying sales tax on their purchases. Circular No.17-1994/95, at paragraph 2, directs that:

The attached Exempt Organization Certification (ST-119.1) shall be submitted to a vendor for all purchases subject to sales tax. This form should be presented to the vendor before any purchase is made.

The sample form ST-119.1 that was attached to Circular No.17-1994/95 designates the Board of Education as the exempt organization and displays a purported exempt organization number.

On July 16, 1997, the Board of Education issued Plant Operations Circular No. 31-1996/97, which reiterated that "[s]tate sales tax should not be paid in purchasing supplies earmarked for school buildings as per Circular No. 17-1994/95 dated February 7, 1995."

Circular No. 31-1996/97 indicates that Custodians receive an allocation from the Board of Education for custodial supplies for their schools. Custodians must account for their expenditures of allocated monies by filing with the Board

of Education a prescribed form listing their purchases, together with invoices and other supporting documentation. Custodians must return unspent allocations to the Board of Education.

Applicable Law and Regulations

Section 1116(a) of the Tax Law provides, in part:

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 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property ... of any type mentioned in subdivisions (a),(b),(c) and (d) of section eleven hundred five, ... are subject to tax until the contrary is established, and the burden of proving that any receipt, . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless . . . the purchaser, not later than ninety days after delivery of the property . . . furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where . . . an affidavit, statement or additional evidence referred to in the previous sentence is received within the time limit set forth therein, but is deficient in some material manner, and where such deficiency is thereafter removed, the receipt of . . . such affidavit, statement or additional evidence shall be deemed to have satisfied all of the requirements of the preceding sentence. Where such . . . an affidavit, statement or additional evidence has been furnished to the vendor, the burden of proving that the receipt ... is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish . . . such an affidavit, statement or additional evidence in proper form,

Section 529.1 of the Sales and Use Tax Regulations provides, in part:

(a) Except as otherwise provided in this Title, any sale by or to any person or organization described in this Part or any amusement charge to such a person or organization where it is the purchaser, or any use or occupancy by any such person or organization is not subject to the sales or use tax imposed by article 28 or authorized by article 29 of the Tax Law. Any sale, amusement charge, use or occupancy by or to any person or organization who or which does not qualify for exemption pursuant to the provisions of this Part may qualify for exemption as described in other provisions of this Title.

* * *

(d) (1) Any person or organization claiming exemption from tax must furnish its vendor with documentation substantiating its right to the exemption claimed before it may purchase exempt from tax . . . In addition, the billing must be made directly to the person or organization and paid for from the funds of such person or organization, except as otherwise provided in this Title. Any transaction which is not supported by proper documentation is subject to tax at the time of purchase. See Part 532 (Collection of Tax) of this Title.

* * *

(j) The provisions of this subdivision apply only to those persons or organizations described in: sections 529.4 (relating to the United Nations or other international organizations); 529.5 (relating to diplomatic missions, diplomatic personnel and foreign government-owned enterprises and agencies); 529.6 (relating to health maintenance organizations); 529.7 (relating to religious, charitable, scientific, testing for public safety, literary and educational organizations, and organizations for the prevention of cruelty to children or animals and organizations which foster amateur athletics); 529.8 (relating to organizations consisting of past or present members of the Armed Forces of the United States); 529.9 (relating to certain Indian nations or tribes); and 529.10 (relating to rural electric cooperatives) of this Part.

* * *

(2) A person or organization other than diplomatic missions, diplomatic personnel and foreign government-owned enterprises and agencies described in section 529.5 of this Part is required to submit an application and supporting documents to the New York State Department of Taxation and Finance, Taxpayer Assistance Bureau, in order to establish exemption....

* * *

(7) An exempt organization certificate applies only to the organization which requested and was granted such exemption. The use of an exempt organization certificate by any person or any organization that was not issued the exemption is a misuse of such certificate. Such misuse can result in the revocation of the exempt status previously granted to the organization.

Section 529.2 of the Sales and Use Tax Regulations provides:

(a) Governmental entities. (1) Agencies and instrumentalities of the State as used in this section means any authority, commission or independent board created by an act of the Legislature for a public purpose.

* * *

(3) A political subdivision as used in this section means a county, town, city, village, school district, fire district, special district corporation and board of cooperative educational services of this State. (Emphasis added)

(b) As purchaser. (1) New York State, or any of its agencies, instrumentalities, public corporations or political subdivisions (hereinafter referred to as New York State governmental entities) are not subject to sales or use tax when they are the purchaser, user, or consumer of tangible personal property or services or when they are the occupant of a hotel room or a patron at a place of amusement, club, roof garden, cabaret or other similar places.

(2) New York State governmental entities as purchasers, users, consumers, occupants or patrons must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document. (Emphasis added)

Opinion

In this case, Petitioner is representing one of the many public schools under the authority of the Board of Education. The Board of Education employs Custodians to perform custodial duties and to purchase various supplies for the schools. In 1995 and 1997 the Board of Education issued circulars to advise Custodians of the procedures regarding the purchase of supplies for the schools. The circulars instructed Custodians to issue an Exempt Organization Certification, Form ST-119.1, to make tax exempt purchases from vendors when purchasing supplies for the school. The circulars indicated that Custodians must account to the Board of Education for expenditures of allocated monies, and must return unspent balances to the Board of Education.

The Board of Education is a political subdivision of New York State. Under Section 1116(a)(1) of the Tax Law, Custodians, acting in their capacity as employees of the Board of Education, may purchase tangible personal property on behalf of the Board of Education exempt from tax if the proper procedures and documentation are used.

However, the document given to the Custodians by the Board of Education (the Exempt Organization Certification, Form ST-119.1) is not the proper exemption document to be used by a government entity. A proper document to be given by a Custodian to a vendor, to make an exempt purchase, is a purchase order from the Board of Education. An Exempt Organization Certification is not appropriate for a governmental entity like the Board of Education. The Exempt Organization Certification is designed for use by organizations of the kind described in Section 529.1(j) of the Sales and Use Tax Regulations which must apply for an Exempt Organization Certificate (Form ST-119) and corresponding exempt organization number.

If a Board of Education purchase order is not available, Custodians may make exempt purchases under the facts described above by furnishing vendors with a letter on the Board of Education's letterhead, signed by the Custodian, which reads substantially as follows:

I, [name of Custodian], a Custodian at the [name of school], am authorized to purchase custodial supplies for the Board of Education of The City of New York (the "Board of Education"), and I am purchasing these supplies from [name of vendor] on behalf of the Board of Education. This purchase is being paid for from funds made available by the Board of Education.

I understand that any purchases I make for personal use, rather than for use as custodial supplies at my school, are subject to sales tax. I understand that civil and /or criminal penalties may result from the misuse of this document.

Vendors should retain these letters to prove the exempt status of sales made to Custodians, and must be able to associate the letters with particular sales invoices. See Section 533.2 of the Sales and Use Tax Regulations. Sales invoices must indicate that the purchases are being made on behalf of the Board of Education.

DATED: May 20, 1998

/s/
JOHN W. BARTLETT
Deputy Director
Technical Services Bureau

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