

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

TSB-A-99(24)S
Sales Tax
April 8, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S981023A

On October 23, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from the Village of East Aurora, 571 Main St., East Aurora, New York 14052. Petitioner, the Village of East Aurora, provided additional information pertaining to the petition on January 5, 1999.

The issue raised by Petitioner is whether the purchase of materials by Environmental Elements New York Inc. ("Enelco") used for the operation of a wastewater treatment facility constructed and operated solely for Petitioner is subject to sales and use tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner, pursuant to an Order on Consent issued by the Department of Conservation, was required to build a new wastewater treatment facility (the "facility"). This was done by Petitioner with financing through the Environmental Facilities Corporation (a New York Public Authority) issuing its special obligation bonds. Petitioner contracted with Enelco in 1985 to operate the facility. All costs, including taxes, incurred by Enelco in the operation of the facility were reimbursed by Petitioner. Title to the facility was in Enelco. Petitioner had an option at all times to purchase the facility, which option was exercised by Petitioner in 1995.

Petitioner submitted a copy of its service agreement with Enelco. The agreement does not contain any language expressly making Enelco the agent of Petitioner. Under the agreement, Petitioner pays Enelco a service fee on a quarterly basis, which covers Enelco's costs and also includes a management fee. Enelco is responsible for obtaining insurance, including liability insurance, in its own name. Paragraph 7.10 of the agreement provides, in part, as follows:

No Waiver. The exercise or performance by the village of any of its approval rights or obligations respectively under paragraph 5.18 [pertaining to modifications by Enelco to the operation and maintenance manual for the facility] or Section 11 [pertaining to changes to operating or maintenance procedures, or repairs to the facility] may not subject the Village to any responsibility or liability for the design or construction of New Facilities, operation or maintenance of the New Facilities . . . (emphasis added)

Applicable Law & Regulations

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(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 part:

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 541.3(d)(2)(iv) of the Sales and Use Tax Regulations provides, in part:

Except for agency contracts, contractors' purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable services, such as electricity used by the contractor, are subject to the tax.

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The following types of property and services are representative, but not intended to be all inclusive, of contractors' purchases which are subject to tax, irrespective of whether the contractor has a time and material, lump sum, or other type of contract (except agency contract), with an exempt organization:

(a) construction machinery and equipment, including rentals and repair parts;

(b) contractors' office supplies;

(c) contractors' supplies, tools, and miscellaneous equipment, whether purchased or rented, including materials to make forms and scaffolding;

(d) any other items purchased or rented by a contractor for his use in performing the contract and not incorporated into the realty.

Example 7: Lumber and other materials which are used to build forms are not exempt since they do not become part of the structure.

Example 8: Equipment rentals under the dominion and control of the contractor, such as rentals of cranes, bulldozers, backhoes, etc. for use in building a structure for an exempt organization are subject to tax.

Opinion

Petitioner is a political subdivision of New York State which is exempt from sales and use tax under Section 1116(a)(1) of the Tax Law.

Purchases of materials by a contractor for use in performing services for an exempt organization are not exempt merely because the contractor has an agreement with the exempt organization. As provided in Section 541.3(d)(2)(iv) of the Sales and Use Tax Regulations, "Except for agency contracts, purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable services, such as electricity used by the contractor, are subject to tax." Enelco's purchases, therefore, of tangible personal property for use in operating the wastewater treatment facility which does not become part of the facility are subject to sales and compensating use tax, unless Enelco makes such purchases as Petitioner's agent.

In order for an agency relationship to exist, there must be a "manifestation" that Enelco consents to act on behalf of Petitioner, subject to its control, and that Petitioner authorizes the fiduciary relationship. See Matter of Hooper Holmes v Wetzler, 152 AD2d 871, lv den, 75 NY2d 706; Matter of Swet, Dec Tx App Trib, February 22, 1991, TSB-S-91(10)S. Whether an agency

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relationship exists is a question of fact that must be resolved based upon the circumstances in each case.

The service agreement submitted by Petitioner does not contain any language which expressly confers agency status on Enelco. Paragraph 7.10 of the agreement indicates that Petitioner is not subject to liability for the operation or maintenance of the facility by Enelco. This is inconsistent with a principal-agent relationship, since the principal generally will be liable for actions performed by its agent within the scope of its agency. It appears from this contract that Petitioner intended Enelco to operate the treatment facility as an independent contractor. Assuming Enelco does not make purchases as Petitioner's agent, any supplies used by Enelco in operating the facility for Petitioner, which do not become part of the facility, are subject to sales and use tax when purchased by Enelco. It is immaterial that Petitioner's contract contains language that allows Enelco to recoup its sales tax expense from Petitioner.

Under the provisions of Section 1115(a)(16) of the Tax Law, a contractor is allowed to make tax exempt purchases of tangible personal property for use in maintaining, servicing or repairing real property of an exempt organization as described in Section 1116(a) of the Tax Law if the tangible personal property is actually incorporated into the real property. Therefore, those purchases of tangible personal property by Enelco after the village purchased the facility in 1995 would be exempt where the property became part of the facility. Purchases by Enelco while it owned the facility were not exempt under Section 1115(a)(16), since the facility at that time was not real property of an exempt organization.

DATED: April 8, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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