

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(32)S
Sales Tax
July 13, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S081027A

The Department of Taxation and Finance received a petition requesting an advisory opinion from [REDACTED] (Petitioner). Petitioner asks whether sales and use tax applies to its rental of cranes to a subcontractor working for a contractor who, in turn, was employed by an entity purported to be the agent of an exempt governmental entity (the Port Authority of New York and New Jersey). The cranes are to be utilized in the construction of the “Freedom Tower” at the World Trade Center in lower Manhattan. The Department concludes based upon the facts presented, that Petitioner must collect tax on its rental of cranes to the contractor in question.

Facts

Petitioner is engaged in the business of renting cranes for use in construction projects within New York City. Petitioner has been renting cranes to [REDACTED] (Construction Company), which is a subcontractor employed by Corporation B, which in turn, is a contractor employed by 1 World Trade Center, LLC. Among the documents supplied by Petitioner for consideration by the Tax Department is a letter from the Port Authority of New York and New Jersey (“Port Authority”) dated June 21, 2007 which provides, in part:

This letter also confirms that 1 World Trade Center, LLC, a wholly owned entity of the Port Authority, is the net lessee of 1 WTC [1 World Trade Center] and the improvements being constructed in connection therewith, pursuant to a lease dated July 16, 2001 which was Amended and Restated on November 16, 2006, which lease is for a term of ninety-nine years . . . The Lease is in full force and effect.

Petitioner represents that 1 World Trade Center, LLC is the official agent of the Port Authority, and that Corporation B is acting as the agent of 1 World Trade Center, LLC.

Petitioner also provided a copy of a letter from Corporation B dated November 28, 2007, addressed to Construction Company, among others, which refers to “your contract/vendor agreement with 1 World Trade Center, LLC.” This suggests that Construction Company may have been either a contractor employed directly by 1 World Trade Center LLC or a subcontractor employed through Corporation B which in turn is under an agency contract with 1 World Trade Center LLC. In either case, given the other documents provided by Petitioner to the Tax Department with respect to the status of Construction Company, our analysis remains the same, as does our conclusion.

Petitioner has been charging sales tax in connection with its rental of cranes to Construction Company. Construction Company has claimed that the subject crane rental transactions are exempt from sales tax because it is renting cranes as an agent or sub-agent of an exempt governmental entity.

Petitioner submitted with its Petition various documents, including:

- A) Form DTF-122, *Certification of Agency Appointment by a New York Governmental Entity*. This form designates 1 World Trade Center LLC as agent for the Port Authority of New York and New Jersey and has been executed by representatives of both organizations;
- B) The aforementioned correspondence dated November 28, 2007, from Corporation B which identifies Construction Company as being a contractor or subcontractor participating in the construction of the “Freedom Tower” at 1 World Trade Center;
- C) Form ST-120.1, *Contractor Exempt Purchase Certificate*, which names Construction Company as the vendor, Corporation B as the purchasing contractor, and identifies Corporation B as agent for 1 World Trade Center LLC; and
- D) Form ST-122, *Exempt Purchase Certificate for an Agent of a New York Governmental Entity*, which names Construction Company as the seller, 1 World Trade Center LLC as the purchaser, and identifies 1 World Trade Center LLC as agent for the Port Authority of New York and New Jersey.
- E) Excerpts from a contract between “the Authority” and an unidentified “Contractor.” One clause of the contract, entitled “Agency for Rental of Construction Equipment and Purchase of Materials not Incorporated in Permanent Construction” provides that the Contractor agrees to act as the agent of the Authority “for the rental of all construction equipment necessary or desirable for or incidental to the performance of the Contract.”

Issue

Whether the documentation supplied by Construction Company to Petitioner supports the contention that its crane rental transactions are exempt from the collection and remittance of sales and compensating use tax, because Construction Company is acting as the agent of a New York governmental entity? If Construction Company is not making the purchase as the agent of a New York governmental entity, are its crane rental transactions exempt from the collection of sales tax under any other provision of the Tax Law?

Analysis

State and local sales taxes are imposed on the receipts from every retail sale of tangible personal property and various specified services, except as otherwise provided. Tax Law §1105. In general, the Tax Law provides an exemption from sales tax for purchases made by New York governmental entities. This exemption applies to 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.” NY Tax Law §1116(a)(1). The Port Authority of New York and New Jersey is one such “public corporation” created by an act of the Legislature for a public purpose and/or pursuant to an agreement or compact with another state. *See Japan Airlines Co., LTD.*, Adv Op Comm T & F, February 28, 2000, TSB-A-00(10)S. A subsidiary corporation formed by the Port Authority “shall have all of the privileges, immunities, tax exemptions and other exemptions” of the Port Authority. *See Unconsolidated Laws §6612.*

A New York governmental entity may also make exempt purchases through a third party, but only where the third party has been appointed by the governmental entity to act as agent on its behalf. (cf., *Matter of West Valley Nuclear Servs. Co.*, Tax Appeals Tribunal, November 13, 1998, *Tribunal confirmed Matter of West Valley Nuclear Servs. Co. v. Tax Appeals*, 264 AD2d 101, *lv denied* 95 NY2d 760 [wherein the petitioner failed to establish that it was an agent for the Department of Energy when it made purchases under their contract]; *Matter of 7 World Trade Center*, Det Tax App Trib, April 3, 2003, DTA No. 817373). Generally, in order for a third party to make exempt purchases as the agent of a governmental entity, the following conditions must be satisfied: (1) the purchasing agent must have the authority to legally bind the credit of the government entity at the time of the purchase, to the extent that the vendor can proceed against the government entity for payment if the invoice is not paid; (2) the purchase is within the authority granted by the government entity (and the government entity has the authority to make such an appointment); (3) the agency appointment must be in writing and in effect at the time of purchase; (4) the government entity exercises the requisite amount of control over the agent; (5) the risk of loss of the item or service purchased is on the government entity; (6) the agent discloses to the vendor that it is making the purchases as agent of the government entity; and (7) the invoices are made out in the government entity's name or indicate that the purchase is being made by an agent of the government entity on its behalf. Furthermore, the parties must otherwise conduct themselves in a manner consistent with a principal/agent relationship, and any contract or written agreement between the parties must not contain any clauses that are or may be interpreted to be, inconsistent with the purported agency relationships.

Determining whether a principal/agent relationship exists requires a legal determination that a vendor may not be in a good position to make. In order to remove some of the uncertainty, the Tax Department created forms that a New York governmental entity and its properly appointed agent may complete. These include Form DTF-122, entitled *Certification of Agency Appointment by a New York Governmental Entity*, where the governmental entity certifies the designation of the agent to make tax exempt purchases on its behalf, the scope of the appointment, and an acknowledgment that the credit of the governmental entity is bound by the agent for purchases made within the scope of this authority. When making a purchase or rental of tangible personal property (other than motor fuel, diesel motor fuel and residential petroleum products) or services on behalf of a New York governmental entity, the agent must also provide the vendor with a copy of a properly executed and completed Form ST-122, *Exempt Purchase Certificate for an Agent of a New York Governmental Entity*. In order for form ST-122 to be properly completed, Form DTF-122 must also be attached.

A vendor like Petitioner in this case would be protected from liability for the sales and use taxes otherwise due if all of the following conditions are met:

- A) A properly completed Form ST-122 is received from the purchaser within 90 days of the delivery of the property or the rendition of services;
- B) A properly completed Form DTF-122 (which is valid for the date the property is delivered or the service is rendered) is attached to form ST-122;
- C) Form ST-122 along with Form DTF-122 are accepted in good faith by the vendor; and

- D) The bill or invoice that is provided by the vendor to the purchaser as agent indicates that the purchase is being made by the purchaser as agent on behalf of the named governmental entity.

Notwithstanding the use of these forms, a purchaser's agency relationship with a governmental entity is always subject to a later review by the Tax Department to see if the substantive legal elements meet the requirements of the relevant case law. However, the vendor will be protected from tax liability if the above conditions are met. See Technical Services Bureau Memorandum entitled *Purchases by New York Governmental Entities Through Properly Appointed Agents*, June 8, 2005, TSB-M-05(6)S, (3)M. (See generally, *Sales and Fuel Excise Tax Information for Properly Appointed Agents of New York Governmental Entities*, Publication 765 (5/05].)

Based upon the facts presented in this case, the only tendered written agreement of agency certified by the Port Authority is that of 1 World Trade Center, LLC as indicated by the Form DTF-122 executed by both parties. Construction Company is not listed as an agent of the Port Authority, or of 1 World Trade Center, LLC, on either Form DTF-122 or Form ST-122 presented to Petitioner in this case. The contract excerpt provided by Petitioner between "the Authority" and an unidentified "Contractor" does not identify Construction Company as a party to the contract, or the project to which the contract pertains. Even if it was assumed that Construction Company had its own agency agreement with the Port Authority, or a subsidiary of the Port Authority that also qualified as an exempt governmental entity, Petitioner would only be protected from sales tax liability on its crane rentals if Petitioner received Construction Company's own Form ST-122 with attached Form DTF-122 executed by the governmental entity's representatives naming Construction Company as the governmental entity's agent for the purposes specified in the form. (Form DTF-122 clearly requires that a separate certification of agency must be completed for each contractor or subcontractor who is to purchase on behalf of a government entity.) Since the documentation presented to Petitioner by Construction Company in this case does not name Construction Company as the agent of a governmental entity, we conclude that Petitioner would not be protected from sales tax liability on the acceptance of this documentation. Without Form ST-122 or Form DTF-122 made out to the proper parties, it is not necessary to examine whether the invoices provided by Petitioner indicate that Construction Company is making purchases as the agent of a named governmental entity.

The question remains whether, as an independent contractor, Construction Company may qualify on some other basis to rent crane equipment for use on the "Freedom Tower" project exempt from sales tax liability.

Certain types of purchases made by contractors may be exempt from sales tax. Generally, purchases of tangible personal property by a contractor for use in erecting, adding to, or altering a structure or building owned by a New York governmental entity, or in maintaining, servicing, or repairing real property owned by such entity, are exempt when the personal property is to become an integral component part of the structure, building or real property. Tax Law §§1115(a)(15), (16). In these circumstances, a contractor who is registered with the Tax Department for sales tax purposes may make tax exempt purchases of such tangible personal property by presenting to vendors Form ST-120.1, entitled *Contractor Exempt Purchase Certificate*. The exemptions under §§1115(a)(15), (16) do not apply where the purchasing contractor is renting construction equipment that will not be

incorporated into the structure of the completed building or project. *See* 20 NYCRR § 541.3(d) (2) (iv). *See also Matter of 7 World Trade Center, supra.*

Purchases of tangible personal property by a contractor, subcontractor, or repairman may also be exempt from sales tax if used directly and exclusively in adding to, altering or improving a tenant's leased premises for use as commercial office space, provided the leased premises are located in certain eligible areas of lower Manhattan and the tangible personal property becomes an integral component part of the building in which the leased premises are located. Tax Law §1115(ee)(3), (7). Purchases of tangible personal property by a tenant or landlord for use in adding to, altering, or improving a tenant's leased premises for use as commercial office space may, in certain circumstances, qualify for exemption regardless of whether the tangible personal property becomes an integral component part of the building in which the leased premises are located, if the leased premises are located in the World Trade Center site. Tax Law §1115(ee)(2), (6). However, the exception provided by section 1115(ee)(6) does not extend to section 1115(ee)(3), which exempts certain tangible personal property sold to a contractor, subcontractor or repairman. Moreover, section 1115(ee) does not apply to tangible personal property for use in erecting or adding to a structure or building of a landlord. Tax Law §1115(ee)(5). It does not appear from the facts in this Advisory Opinion that Petitioner's rentals of cranes to Construction Company are exempt under section 1115(ee).

In conclusion, there is no basis for Petitioner to be protected from sales tax liability in connection with its rental of crane equipment to Construction Company in the context of the facts presented in the case.

DATED: July 13, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.