

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

TSB-A-83(15)S
Sales Tax
March 24, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S820209B

On February 9, 1982 a Petition for Advisory Opinion was received from Hydroacoustics, Inc., P.O. Box 23447, Rochester, New York 14692.

The issue raised herein is whether purchases made by Petitioner pursuant to contracts with the United States Government or its agencies under a cost plus fixed fee arrangement are subject to sales tax.

Petitioner enters into contracts with the United States Government to supply products and/or to perform research. Some of the work is performed by the Petitioner pursuant to contracts known as "cost plus fixed fee" contracts. These contracts are subject to the Armed Services Procurement Regulations (ASPR) section 7-203.21(c) of which states that "title to all property purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor."

Purchase orders prepared by Petitioner in connection with purchases made pursuant to these contracts are made out in Petitioner's own name. The purchase orders indicate, however, the particular Government contract number involved, and state that the purchases are being made in accordance with the ASPR. Vendors bill Petitioner in its own name. Petitioner pays the bills with its own funds and is entitled to reimbursement from the Government for all payments made to vendors. Petitioner is not required to obtain advance approval from the Government for specific purchases made in connection with the contracts.

Section 1116(a)(2) of the Tax Law exempts from sales and compensating use taxes:

"The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer " (Emphasis added).

As indicated by the language emphasized in the above-quoted statute, the exemption applicable to sales purportedly made to the United State and its agencies or instrumentalities is co-extensive with the Federal government's immunity deriving from the Supremacy Clause of the United States Constitution (U.S. Const., Art VI, cl.2). Such provision has been recently and authoritatively construed, insofar as it bears on the issue presented herein, in United States v. New Mexico, ___ U.S. ___, 50 LW 4326(1982).

United States v. New Mexico involved federal contractors operating under cost plus fixed fee contracts with the Department of Energy. The Court there stated that the applicability of "constitutional tax immunity" to federal contractors "requires something more than the invocation of traditional agency notions." Rather, the test was stated as follows: ". . . tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on the agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id* at 4330. The Court found the following characteristics of the transactions there under scrutiny to be of significance:

1. The contractors made the purchases in their own names.
2. The vendors were not informed that the government was the only party with an independent interest in the purchases.
3. The contractors were presumably liable on the sales.
4. The contractors were not required to obtain advance governmental approval of its purchases.

As the Court put it, "these factors demonstrate that the contractors have a substantial independent role in making purchases, and that the identity of interests between the government and the contractors is far from complete. "*Id* at 4332. The Court concluded, accordingly, that the test enunciated supra had not been satisfied, and that the purchases by the contractors were subject to tax.

It is significant not only that the circumstances in the present matter wholly accord with the four factors cited as significant by the Supreme Court, but that the present case bears other similarities to the particulars laid out in United States v. New Mexico. Thus, in both instances title to the purchased property passed directly from the vendor to the government, and the risk of loss with respect to the property being borne (with certain exceptions, in the present matter) by the government. It is to be noted, in addition, that the contractors in United States v. New Mexico had an even closer identification with the government than that presented by Petitioner herein, in that Petitioner pays for its purchases from its own funds and is only subsequently reimbursed by the Department of Energy, whereas the payments in the New Mexico case were made with Federal funds.

It is concluded, accordingly, that Petitioner's purchases under its described contracts with the United States government are not exempt from sales and use taxes under section 1116(a)(2) of the Tax Law. It is to be noted that the judicial decisions cited by Petitioner do not compel a contrary conclusion. U.S. and E.I. du Pont de Nemours & Co. v. Livingston, 179 F. Supp. 9, aff'd ___ U.S., ___ involved a different set of facts than that presented by Petitioner herein. In du Pont, thus, the bulk (75%) of the purchases by the contractor required prior approval by the government; Du Pont entered into the contract "without hope of gain, except the nominal one dollar, payable upon final

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completion of the contract, but upon whom was imposed no risk of loss; "and, in addition, the fact that DuPont was required to include in its subcontracts certain provisions typical of public contracts was held by the Court to suggest that "the parties regarded the subcontracts as ones entered into by or on behalf of the United States." Id. at 18. The other case cited by Petitioner, Bethlehem Steel Co. v. Joseph, 284 AD 5, dealt not with the extension of Federal constitutional immunity to contractors, but with the question of resale. Naturally, property to which title passes to the government and which is delivered to the government (prior to any use by Petitioner) in performance of the contract with Petitioner may be purchased by Petitioner without the payment of tax. In such cases, Petitioner should furnish its vendor with a properly completed resale certificate (Form ST-120). Letter of Counsel, June 9, 1966.

DATED: March 8, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau