

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

TSB-A-95 (30)S
Sales Tax
July 18, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940705A

On July 5, 1994, a Petition for Advisory Opinion was received from Genetelli & Associates, 400 Madison Avenue, New York, New York 10017.

The issue raised by Petitioner, Genetelli & Associates, is whether purchases of supplies, equipment and services for use in performing environmental engineering and consulting services for exempt governmental agencies are subject to sales tax and, if so, would such purchases be exempt if Petitioner's client entered into an agency contract with the exempt governmental agency. Additionally, if purchases made under such agency contract are exempt, must all the conditions specified in section 541.3(d)(4) of the Sales and Use Tax regulations be met.

Company X will purchase certain supplies, equipment and services for use in performance of its services. Included among Company X's purchases will be books, maps, engineering equipment, computers, automobiles, and services including printing, graphics, drilling and lab testing. These items will not be transferred to the clients by Company X in conjunction with the performance of its services, but nevertheless will often be transferred to the clients when the services are completed.

Some of the written contracts entered into by Company X will specify that the company may act as an agent of the client in purchasing supplies, equipment and services, while other written contracts will be silent on the matter. Regardless of the terms of the written contract, all of the principal/agent relationship conditions set forth in section 541.3(d)(4)(i) of the Sales and Use Tax Regulations will not be met.

The contracts that Company X enters into with clients that appoint it as agent will contain the following:

_____ * hereby confers agency status, for the purpose of purchasing supplies, equipment and services, to the Contractor and to the Contractor's subagents responsible for the performance of environmental engineering and consulting services, including, but not limited to, preliminary site characterizations, detailed site investigations, site analysis, remedial investigations, feasibility studies and preparation of written reports, as well as remedial design and engineering services during construction and operating and maintenance engineering and consulting services during start-up.

_____ * acknowledges that any sales tax exemption resulting from the delegation set forth above applies solely to

purchases of supplies, equipment and services for use in performing the environmental engineering and consulting services set forth in this agreement.

* The blank line represents a New York Tax Law Section 1116(a)(1) or (2) organization.

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

Section 1115(a)(15) and (16) 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 of the New York State Tax Law:

(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(a)(1) of the Tax Law provides an exemption from sales and compensating use taxes with respect 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 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 1116(a)(2) of the Tax Law provides essentially the same exemption for the United States government and its agencies and instrumentalities.

Section 541.3(d)(4) of the sales tax regulations sets forth the conditions necessary to create an agency contract.

(4) Agency contracts.(i) If an exempt organization described in section 1116(a)(3),(4),(5) or (6) of the Tax Law enters into an agency contract with the prime contractor and all subcontractors, all purchases for such contract are exempt as long as the property and services are purchased by the contractor or subcontractor as agent for the exempt organization. In order to create a principal/agent relationship all of the following conditions must be met:

(a) purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor specifying that the contractor is acting as agent for the exempt organization (e.g. X contractor, as agent for Y, name of exempt organization) and identify the place of delivery;

(b) payment must be made by the exempt organization or by the contractor, acting as agent, directly to the vendor from a special fund created by the exempt organization for this specific purpose;

(c) deliveries must be made to the job site; or under certain circumstances (such as where the materials require additional fabrication before installation on the job site or for storage to protect the materials from theft or vandalism prior to installation at the job site) deliveries may be made to a site, other than the job site, providing the ultimate delivery of the material is made to the job site. Where delivery is made to a site other than the job site, the purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor as agent, identify the place of delivery, the exempt organization's full name and address and the job site location where the materials will ultimately be delivered for installation; and

(d) The contractor must furnish the vendor with the exempt organization certification when acting as agent for such organization. A statement signed by a responsible officer of the exempt organization which identifies the contract and the contractor, as agent for the exempt organization, must be either made on the exempt organization certification or appropriately attached thereto. (Emphasis supplied)

In the matter of MGK Constructors, Dec Tax App Trib, March 5, 1992, TSD-D-92(23)S, the Tribunal held that when acting as a purchaser, user or consumer, the City of New York is not subject to sales tax pursuant to Section 1116(a)(1) of the Tax Law. Moreover, a contractor acting as an agent of the city would likewise not be subject to sales tax in accordance with Sections 541.2(c) and 529.2(b) of the Sales and Use Tax Regulations.

The Tribunal further held that the criteria set out in Section 541.3(d)(4) of the Sales and Use Tax Regulations for establishing whether an agency relationship exists is applicable only to exempt organizations identified under Sections 1116(a)(3) - (6) of the Tax Law, and as New York City is an exempt organization pursuant to Section 1116(a)(1) of the Tax Law, it was not subject to such criteria.

Thus the Tribunal held that since no regulation sets forth a criteria for establishing whether an agency relationship exists with an exempt organization identified in Sections 1116(a)(1) and (2) of the Tax Law, that the general rule of agency as cited in the Matter of Hooper Holmes, Inc. v. Wetzler, 152 AD2d 871, 544 NY2d 233, 235, lv denied 75 NY2d 706, 552 NYS2d 929, must be applied. In Hooper Holmes, Inc. v. Wetzler, supra, the court stated: "To establish an agency or representative relationship there must be a manifestation that petitioners consented to act on behalf of their clients, subject to the latter's control and that the clients authorized this fiduciary relationship."

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Accordingly, in the instant case, where Company X is authorized by a governmental agency exempt from sales tax under sections 1116(a)(1) or 1116(a)(2) of the Tax Law, to act as agent on its behalf in connection with the purchase of the supplies, equipment and services described above, and such delegation is authorized by law, the purchase of such supplies, equipment and services will not be subject to sales tax in accordance with the provisions of said sections. The criteria for exemption set forth in Hooper Holmes, Inc. v. Wetzler, supra, that the agency relationship be manifested through the exempt organization's consent for Company X to act as agent on its behalf will be met if the contract between the exempt organization and Company X contains substantially the language contained in the contract provision conferring agency status set forth above and if the purchase orders issued by Company X indicate that it is acting as agent for the exempt organization. Monetary Management of New York, Inc., Adv Op Comm T&F, August 23, 1993, TSB-A-93(45)S.

Any service that will be resold by Petitioner's client may also be purchased tax free.

DATED: July 18, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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