

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division**

TSB-A-05(1)S
Sales Tax
January 4, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030904B

On September 4, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from MARCOR Remediation, Inc., 246 Cockeysville Road, Suite 1, Hunt Valley, Maryland, 21030-2149.

The issues raised by Petitioner, MARCOR Remediation, Inc., are whether, under the circumstances described below:

1. Purchases or rentals of equipment, tires and maintenance items for the equipment, as well as other consumable materials, for use in the performance of a subcontract for the New York City Police Department are subject to sales and compensating use tax; and
2. Charges to the general contractor are subject to sales tax.

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

Petitioner performed forensic debris screening from September 17, 2001, through December 2002, at the Fresh Kills landfill site as a subcontractor to Garner Environmental Services, Inc. ("Garner"). Garner was the general contractor to the New York City Police Department ("NYPD") for such services. The screening services were performed as part of the cleanup and investigation of the World Trade Center attack on September 11, 2001. Essentially, Petitioner sifted through the Ground Zero debris for evidentiary materials that would assist investigators and that would help to identify victims of the attack. Petitioner did not transport any of the debris from Ground Zero to the Fresh Kills landfill and did not perform any forensic investigations. In the performance of its contract, Petitioner rented equipment, purchased tires and other maintenance items for the rented equipment, and purchased consumable materials such as Tyvek suits and respirators.

Documents submitted by Petitioner indicate that Garner's contract with the NYPD was signed pursuant to an Emergency Standby Services contract. Petitioner submitted the following excerpts from this contract:

This contract is being established in order to permit the State, local governments, school districts and others authorized by law to respond immediately and effectively with needed products and services in the event that an emergency is declared by any political

subdivision or the Governor of the State of New York in accordance with the laws of the State of New York; (hereafter “declared emergency”).

Authorized Contract Users. It is anticipated that this contract will be used primarily by or at the direction of the State Emergency Management Office (SEMO). SEMO may make purchases, or direct other state agencies or local governments to do so. The Contractor understands and agrees that the use of this contract in the event of a declared emergency is optional and will [be] primarily for, but not limited to, New York State agencies (“Agencies”). Upon approval of the Commissioner of OGS, this contract may also be accessed and utilized by local governments, school districts and others authorized by law, (collectively with Agencies referred to as “Authorized Users”), located in or providing services to those designated counties or locations where the governor has declared a state of emergency or disaster area and who shall be solely responsible for performance and payment.

Under the New York State Office of General Services, Procurement Services Group, Appendix B - General Specifications for Procurement Contracts - Part I, General - All Procurements, # 17.b. Purchases made by the state of New York and certain non-State Authorized Users are exempt from New York State and local sales taxes and, with certain exceptions, federal excise taxes. To satisfy the requirements of the New York State Sales tax exemption, either the Purchase Order issued by a State Agency or the invoice forwarded to authorize payment for such items will be sufficient evidence that the sale by the Contractor was made to the State, an exempt organization under Section 1116(a)(1) of the Tax Law. Non-State Authorized Users must offer their own proof of exemption where required. No person, firm, or corporation is, however, exempt from paying the State Truck Mileage and Unemployment Insurance or Federal Social Security taxes, which remain the sole responsibility of the Contractor. . . .

Petitioner also submitted a document indicating that the NYPD sent a work order to Garner to commence forensic screening at the Fresh Kills landfill.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, *a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . .* (Emphasis added)

Section 1105 (a) of the Tax Law imposes a sales tax upon:

The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(c) of the Tax Law imposes sales tax on the receipts from every sale, except for resale, of certain enumerated services.

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:

* * *

(15) Tangible personal property *sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen . . . or (ii) adding to, altering or improving real property, property or land (A) 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.* (Emphasis added)

(16) Tangible personal property sold to a contractor, subcontractor or repairman *for use in maintaining, servicing or repairing real property, property or land (i) 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. (Emphasis added)

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

Except as otherwise provided in this section, any sale . . . to any of the following or any use 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 . . .;

Section 526.3 of the Sales and Use Tax Regulations provides, in part:

The term *purchase at retail* means a purchase by any person of tangible personal property or services, for any purpose other than:

(a) for resale of the property or services as such or when the property is purchased for resale as a physical component part of tangible personal property; or

(b) for use by the purchaser in performing services subject to the tax under section 1105(c)(1), (2), (3) or (5) of the Tax Law *where the property becomes a physical component part of the property upon which the services are performed or is later actually transferred to his customer in conjunction with the taxable services performed. (Emphasis added)*

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) Special rule--sales specifically included as retail sales. (1) *A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or adding to, altering, improving, maintaining, servicing or repairing real property, property or land, is deemed to be a retail sale, regardless of whether the tangible personal property is to be resold as such before it is used or consumed. (Emphasis added)*

* * *

(c)(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) *becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.* (Emphasis added)

* * *

Example 9: A painter purchases plastic drop cloths and sandpaper and after painting a customer's premises, leaves the used drop cloths and sandpaper at the premises. The drop cloths and sandpaper, even though of limited or no use after the painting, have not been purchased for resale as they are items used by the painter in performing a taxable service. The drop cloths and sandpaper are not actually transferred to the purchaser of the service in conjunction with the performance of the service.

Section 529.2 of the Sales and Use Tax Regulations provides, in part:

(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.

(2) *A public corporation* as used in this section means any corporation created by an act of the Legislature for a public purpose or pursuant to an agreement or compact with another state or Canada.

* * *

(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.

(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. . . .

(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.

Section 529.7(h) of the Sales and Use Tax Regulations provides, in part:

Sales to exempt organizations. (1) Any sale or amusement charge to or any use or occupancy by an exempt organization to which an exempt organization certificate has been issued is exempt from sales and use tax.

(2) In order to exercise its right to exemption the organization must be the direct purchaser, occupant or patron of record. It must also be the direct payer of record and must furnish its vendors with a properly completed exempt organization certification. *Direct purchaser, occupant or patron* as used in this paragraph includes any agent or employee authorized by the organization to act on its behalf in making such purchases, provided the organization and its agent or employee are both identified on any bill or invoice. An organization is the direct payer of record where direct payment is made by the organization or from its funds directly to the vendor.

Section 541.2(c) of the Sales and Use Tax Regulations provides, in part:

An *agency contract* means an agreement which permits a contractor and subcontractor to act as an agent of, that is, in the place of the principal, his customer. Purchases made by the agent-contractor or agent-subcontractor on behalf of the principal are treated in the same manner as if the purchases were made by the principal. All purchases (including rentals of contractor's tools, supplies, machinery and equipment) made by the agent-contractor or agent-subcontractor on behalf of the principal are treated in the same manner as if the purchases were made by the principal.

Section 541.3(a) of the Sales and Use Tax Regulations provides, in part:

Governmental entities. When a contractor's customer is a governmental entity described in section 1116(a)(1) or (2) of the Tax Law, *the contract signed by the government representative and the prime contractor is sufficient proof of the exempt status of purchases made for such contract.* (Emphasis added)

(1) Such governmental entities include: (i) Pursuant to section 1116(a)(1) of the Tax Law 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. . . .

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

Contracts with exempt organizations. (1) Tangible personal property incorporated into real property owned by a governmental entity or by an exempt organization is exempt, whether the contract is on a lump sum, time and material, cost-plus, or other basis.

(2) Purchase for contracts (other than agency contracts). (i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, *is exempt when it is to become an integral component part of such structure or building.* (Emphasis added)

* * *

(ii) Purchases of tangible personal property incorporated into the real property of an exempt organization *by subcontractors and repairmen are accorded the same treatment as purchases by the prime contractor.* (Emphasis added)

(iii) Tangible personal property purchased by a contractor, which remains tangible personal property after installation, is exempt from the tax when purchased for and sold to an exempt organization.

Example 6: An exempt organization contracts to have a new wing built onto their existing building. The new wing includes the addition of a cafeteria. The contractor may purchase, exempt from the tax, the tangible personal property that becomes part of the capital improvement to real property and the tangible personal property which remains tangible personal property.

(iv) *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.* (Emphasis added)

The following types of property and services are representative, but not intended to be all-inclusive, of contractor's 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; and*

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

Example 7: Lumber and other materials which are used to build forms are not exempt since they do not become a component 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.

(v) Documents. (a) If the customer is a governmental entity, copies of signed contracts and government purchase orders are sufficient evidence to establish the exempt status of the job between the governmental entity and the prime contractor. With respect to the documents required between a prime contractor and the subcontractors, a signed document between them which identifies the project, location and exempt owner, will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. When purchasing such tangible personal property for the exempt project, the contractor or subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

Section 541.9(a) of the Sales and Use Tax Regulations provides, in part:

The purchase, rental, lease or license to use construction equipment . . . by a contractor is subject to sales and use tax.

Section 541.9(c)(1) of the Sales and Use Tax Regulations provides, in part:

Rentals and leases of equipment to contractors. (i) Where a contractor leases equipment, the contractor is liable for the combined State and local sales and use tax on the total charges at the highest rate in effect in any jurisdiction in which the equipment is used during the lease payment period, (e.g., daily, weekly, monthly, depending on the frequency of payment).

Opinion

Petitioner performed forensic debris screening from September 17, 2001, through December 2002, at the Fresh Kills landfill site as a subcontractor to Garner. Petitioner sifted through the Ground Zero debris for evidentiary materials that would assist investigators and help to identify victims. Petitioner did not transport any of the debris and did not perform any investigations. Garner was the general contractor, having a contract with the NYPD to perform services at that site. In the performance of its contract, Petitioner, as a subcontractor to Garner, rented equipment, purchased tires and other maintenance items for the rented equipment, and purchased consumable materials such as Tyvek suits and respirators.

From the documents submitted, Garner had a contract to perform services for the NYPD, an exempt governmental entity. See section 1116(a)(1) of the Tax Law, and sections 529.2(a), (b) and 529.7(h)(2) of the Sales and Use Tax Regulations. In general, the fact that a subcontractor has a contract with a person having a contract with an entity exempt under section 1116(a)(1) of the Tax Law, does not affect the taxability of the purchases made by the subcontractor for equipment, parts, services or supplies which do not become incorporated as an integral component part of the realty of the exempt entity.

As a subcontractor to Garner on its contract with the NYPD, Petitioner performed forensic screening of the debris resulting from the attack on the World Trade Center. The facts in this Petition do not indicate that Petitioner was to provide rental equipment, parts, maintenance items for the equipment or any other consumables directly to either Garner or the NYPD. Therefore, Petitioner's role was essentially that of a service provider. Rental equipment, parts, maintenance items and other consumables were purchased by Petitioner for use in performing its contractual obligations to Garner and were not purchased for resale as such to either Garner or the NYPD. See *Global Golf*, Adv Op Comm T&F, September 7, 2000, TSB-A-00(34)S; *Rome Research Corporation*, Adv Op Comm T&F, November 20, 2000, TSB-A-00(47)S; *West Valley Nuclear Services Co., Inc.*, Dec Tax App Trib, November 13, 1998, TSB-D-98(15)S, determination confirmed, 264 AD2d 101, appeal denied 95 NY2d 760.

Purchases of equipment and related property or supplies by contractors, or subcontractors, which do not become part of the property upon which the services are performed and are not actually transferred to the purchaser of the services are considered to be used or consumed by the contractor and are subject to sales tax. See section 1101(b)(4)(i) of the Tax Law, and sections 526.3(b), 526.6(c)(6), 541.3(d)(2)(iv) and 541.9(a) of the Sales and Use Tax Regulations. Therefore, Petitioner's purchases or rentals of equipment, parts, maintenance items and other consumables are retail purchases subject to tax, unless otherwise exempt.

Petitioner's purchases or rentals of equipment, parts, services and consumable materials do not qualify for the exemption under section 1115(a)(15) or (16) of the Tax Law because these items are not transferred to, and do not become an integral component part of the property of, the NYPD as a result of Petitioner's services.

Pursuant to section 1116(a)(1) of the Tax Law, the City of New York is not subject to sales tax when acting as a purchaser, user or consumer. Moreover, a contractor or subcontractor acting as agent of the city would likewise not be subject to sales tax on its purchases. See *MGK Constructors*, Dec Tax App Trib, March 5, 1992, DTA Nos. 807262, 807881 and 807882; and sections 529.2(b) and 541.2(c) of the Sales and Use Tax Regulations.

Excerpts from the contracts between Garner and the NYPD provided by Petitioner simply provide that purchases made by New York State, its local governments or political subdivisions are exempt from New York State and local sales taxes, and that either the purchase order issued by a State agency or the invoice forwarded to authorize payment for such purchases will be

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sufficient evidence that the sale by the Contractor (Garner) was made to an entity exempt under section 1116(a)(1) of the Tax Law. However, nothing in the contract language furnished by Petitioner with the Petition for Advisory Opinion indicates that Garner was appointed as agent of the NYPD. Furthermore, nothing in this language indicates that even if Garner were appointed as the NYPD's agent, that the NYPD had granted further authority to Garner permitting it to appoint any other persons as agent of the NYPD. Even had the contract authorized Garner to act as the NYPD's agent, such authority would not automatically extend to Petitioner simply because Petitioner was hired by Garner as a subcontractor. Therefore, based on the facts in this Advisory Opinion, Petitioner's purchases or rentals of equipment, parts and other maintenance items for the equipment, and consumable materials do not appear to have been made as an agent of the NYPD, and thus, do not qualify for exemption from sales tax. See *Rome Research Corporation, supra*; *West Valley Nuclear Services Co., Inc., supra*; *Village of East Aurora, Adv Op Comm T&F, April 8, 1999, TSB-A-99(24)S*, which determined that a contractor was not acting as the agent of a governmental entity.

Therefore, Petitioner's purchases and rentals of the equipment, parts, and consumable materials are subject to New York sales and use tax.

The forensic screening services Petitioner performed consisted of sorting through debris at the Fresh Kills landfill. Sorting has been determined to be a nontaxable service, with respect to the sorting of letters by zip code and the sorting of radioactive waste to determine classification for disposal purposes. See *Morton L. Coren, P.C., Adv Op Comm T&F, March 6, 1997, TSB-A-97(12)S*; *NDL Organization, Inc., Adv Op Comm T&F, March 4, 1998, TSB-A-98(16)S*. The sorting services performed by Petitioner are, likewise, not among the enumerated services subject to sales tax pursuant to section 1105(c) of the Tax Law. Thus, Petitioner's charges to Garner for performing forensic screening services are not subject to tax.

DATED: January 4, 2005

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