

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

TSB-A-97(54)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z950802D

On August 2, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Greater Syracuse Business Development Corporation, 572 South Salina Street, Syracuse, New York, 13202-3320. Petitioner subsequently provided additional information pertaining to the Petition.

The issue raised by Petitioner, Greater Syracuse Business Development Corporation, is whether the sales and compensating use tax imposed by Article 28 of the Tax Law and the mortgage recording taxes imposed or authorized to be imposed by Article 11 of the Tax Law are imposed in connection with activities directly related to projects in which Petitioner participates in furtherance of its purposes as established by Section 1411(a) of the Not-For-Profit-Corporation Law (N-PCL).

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

Petitioner is a Not-For-Profit Local Development Corporation reincorporated under Section 1411 of the N-PCL. Petitioner's operations include providing financial assistance to businesses in Onondaga and contiguous counties.

In furtherance of its corporate purposes and powers, Petitioner provides assistance to businesses located in its geographic area to finance certain eligible construction projects by participating in permanent financing of construction loans pursuant to the United States Small Business Administration's ("SBA") 504 Loan Program.

The 504 Loan program was established by the SBA to make available to local development companies, like Petitioner, funds to lend to eligible small business concerns. The 504 Loan Program provides long-term permanent financing to these businesses in participation with private lenders, and requires an equity contribution on the part of the borrower. Typically the private lender provides permanent financing in an amount not to exceed fifty percent of the total project cost, with forty percent provided by the local development company and ten percent provided by the borrower.

In the circumstances which are the subject of this Advisory Opinion, Petitioner would adopt a formal resolution whereby it would commit to undertake completion of an eligible project which would involve the acquisition of and/or the construction, renovation and improvement of real property and/or the acquisition and installation of equipment (the "Project"). At or before the construction financing closing, Petitioner would obtain an interest in the Project, from a participating company (the "Company") by way of one of the following three transactions.

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1. Sale/Leaseback - The Company would transfer the real property and the personal property involved in the Project to Petitioner by delivering a deed with respect to the real property and, if necessary, a bill of sale with respect to any personal property to Petitioner. Petitioner would then lease the real and personal property back to the Company. The Company would be required to purchase back the real and personal property when the lease expires.

2. Installment Sale - The Company would transfer its interest in the real and personal property to Petitioner by delivering a deed and bill of sale for the real and personal property, respectively. Petitioner would then enter into an installment sale agreement with the Company, transferring the real and personal property back to the Company in exchange for the installment sale payments.

3. Lease/Leaseback - The Company would lease its interest in the real and personal property to Petitioner. Petitioner would then sublease the real and personal property back to the Company.

In each of the above transactions, the Company would borrow money to finance the Project from a commercial bank (including the forty percent to be ultimately provided by Petitioner pursuant to the 504 Loan Program after completion of the construction phase of the project). The repayment of the entire amount financed (the "Loan") would be secured by a mortgage on the real property or other form of security interest on the personal property. Petitioner would join in any mortgage or security agreement and the commercial bank would be the mortgagee or secured party. In all likelihood the Company would be asked to join in the mortgage or security agreement to undertake the affirmative obligations thereunder.

In the sale/leaseback transaction, payments under the lease from Petitioner back to the Company would correspond to the debt service payments due under the Loan and the lease would obligate the Company to make such payments directly to the involved commercial lender. In the installment sale and lease/leaseback transactions, the debt service under the Loan would correspond to the payments due under the installment sale agreement or rental payments under the sublease, as the case may be, and the involved lender would be receiving its debt service payments directly from the Company.

Petitioner would covenant and agree to arrange for the deed, mortgage, memorandum of installment sale agreement, and/or a memorandum of lease or sublease, as appropriate, to be recorded immediately following the closing.

Upon payment in full of the Loan, the Company would reacquire the real and personal property from Petitioner.

Petitioner would appoint the Company as its agent in all of the above transactions and the Company would covenant to construct and complete the Project on behalf of Petitioner. As agent of Petitioner, the Company's purchases of equipment and materials used in the Project would be by the Company on behalf of Petitioner. The invoice would refer to the Company as agent for Petitioner, as

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the purchaser. Petitioner will apply for exemption from sales and use taxes pursuant to Section 1116(a)(4) of the Tax Law and, if exemption is obtained, will provide the Company with an Exempt Organization Certification for presentation to vendors for purchases made by the Company in connection with the Projects. The equipment or materials purchased may act as additional security for the Loan.

Petitioner submitted a copy of a lease agreement and a copy of an installment sale agreement as part of its Petition for Advisory Opinion. Petitioner represents that the agreements entered into between Petitioner and the Company will contain the same terms.

Regarding the imposition of sales tax to the above transactions, Section 1105(a) of the Tax Law imposes a sales tax upon the receipts from every retail sale of tangible personal property unless otherwise excluded or exempt. Sales of real property are not subject to sales tax.

Section 1115 of the Tax Law provides, in part:

Sec. 1115. Exemptions from sales and use taxes.--(a) 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 erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering, 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 of the Tax Law provides, in part:

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Sec. 1116. 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:

* * *

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of any candidate for public office;

* * *

(b) Nothing in this section shall exempt:

(1) retail sales of tangible personal property by any shop or store operated by an exempt organization described in paragraph (4), paragraph (5) or paragraph (6) of subdivision (a) of this section.

Section 529.7(a)(2) of the Sales and Use Tax Regulations provides:

An organization is not exempt from tax because it is organized and operated as a nonprofit organization or because it appears to meet the requirements of this section. In order to establish its exempt status, it is necessary to file a completed application as set forth in subdivision (f) of this section and prove that the organization meets the statutory requirements.

Section 541.3(d)(4) of the Sales and Use Tax Regulations provides, in part:

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

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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 materials 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.

If the proposed agency contract differs from the requirements of this subparagraph, copies of the proposed contract and procedures may be submitted for an opinion to the Instructions and Interpretations Unit, Sales Tax Section, Technical Services Bureau, W.A. Harriman Campus, Albany, N.Y. 12227.

(ii) All purchases or rentals of materials, equipment, tools, and supplies by an exempt organization or by a contractor or subcontractor, as agent for an organization which is exempt from sales taxes under section 1116(a)(3), (4), (5) or (6), are exempt from sales and use taxes when the contract fully complies with the requirements set forth in subparagraph (i) of this paragraph.

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(iii) A contractor is liable for the tax due on purchases or rentals of equipment, tools and supplies made under a purported exempt organization agency contract if subsequently it is determined the contract does not qualify as an agency contract.

Example 9: A contractor enters into a purported agency contract with an exempt organization for the construction of a capital improvement to real property. The exempt organization or the contractor, acting as agent for the exempt organization, makes tax free purchases or rentals of materials, tools and/or equipment and supplies. Subsequently, it is determined the contract does not qualify as an agency contract. The contractor is liable for the tax due on the purchases or rentals of tools and/or equipment and supplies. The purchase of materials incorporated into the capital improvement to real property owned by the exempt organization is exempt from the tax, providing proper exempt documentation is given to the vendor of the materials.

In this case, Petitioner is reincorporated under Section 1411 of the N-PCL as a Not-For-Profit Local Development Corporation. Under Section 1411(a) of the N-PCL, local development corporations are operated for "exclusively charitable or public purposes" related to relieving and reducing unemployment. In accordance with Section 529.7(a)(2) of the Sales and Use Tax Regulations an organization is not exempt from sales tax simply because it is organized and operated as a nonprofit organization or because it appears to meet the requirements of this section. In order to establish its exempt status, it is necessary to file a completed application with the Department of Taxation and Finance to certify that it is an organization described under Section 1116(a)(4) of the Tax Law.

Petitioner states that it will apply for exemption from sales and use taxes pursuant to Section 1116(a)(4) of the Tax Law. Therefore, provided Petitioner applies for and receives an Exempt Organization Certificate confirming that it meets the requirements under Section 1116(a)(4) of the Tax Law, Petitioner's purchases will be exempt from sales and use taxes. In addition, pursuant to Section 541.3(d)(4) of the Sales and Use Tax Regulations, if the Company is appointed as agent for Petitioner, the Company, as agent for Petitioner, may make purchases on behalf of Petitioner exempt from sales and use taxes, provided the conditions set forth in Section 541.3(d)(4) of the Sales and Use Tax Regulations for making exempt purchases in principal/agent relationships are followed. It does not appear from the facts described above that the requirement for agency specified in Section 541.3(d)(4)(b) of the Sales and Use Tax Regulations will be satisfied since the Company will be borrowing money to finance the Projects set forth in the above transactions from a commercial bank, rather than payment for the Project being made by Petitioner, as an exempt organization, or by the Company, acting as agent, directly to the vendor from a special fund created by Petitioner for this specific purpose.

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It should be noted that, whether or not Petitioner enters into an agency agreement with the Company, pursuant to Sections 1115(a)(15) and (16) of the Tax Law, tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building, or in maintaining, servicing or repairing real property, property or land, of an organization described in subdivision (a) of section eleven hundred sixteen, or in adding to, altering or improving real property, property or land of such an organization, is not subject to sales and use tax where such tangible personal property becomes an integral component part of such structure, building or real property. The contractor should issue a properly completed contractor exempt purchase certificate (Form ST-120.1) to its supplier in order to make exempt purchases of building materials for exempt organization projects. Therefore, if Petitioner establishes its exemption under Section 1116(a)(4) of the Tax Law, tangible personal property sold to a contractor, subcontractor or repairman for incorporation into the Project would not be subject to sales and use tax under the ownership interest set forth in transaction 1 above. However, purchases in connection with transactions 2 and 3 above would be subject to sales and use tax if Petitioner did not have an ownership interest in the real property when the Project was being constructed. It should be noted that purchases will not qualify for exemption under Section 1115(a)(15) or 1115(a)(16) if an exempt organization has only a leasehold interest in real property. See Section 528.16 of the Sales and Use Tax Regulations.

In addition, while purchases by an organization described in Section 1116(a)(4) of the Tax Law are exempt from tax, sales of tangible personal property by such an organization through a shop or store are subject to sales tax. Thus, Petitioner's sales or leases of tangible personal property to the Company in the transactions described above will be taxable if made from a shop or store, unless the tangible personal property is otherwise exempt under Article 28 of the Tax Law (e.g., machinery or equipment used directly and predominantly in production for sale which is exempt under Section 1115(a)(12) of the Tax Law). See Section 529.7(i)(2) of the Sales and Use Tax Regulations for definition of "shop or store."

Regarding the mortgage recording taxes, Petitioner was issued an Advisory Opinion related to a proposed transaction in which it was participating, in furtherance of its corporate purpose. See Greater Syracuse Business Development Corporation, Adv Op Comm T&F, December 22, 1995, TSB-A-95(16)R. In that opinion, Petitioner was a mortgagee and the recording of the mortgage was deemed exempt from the mortgage recording taxes based on exemption from taxation provided at

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Section 1411(f) of the Not-For-Profit Corporation Law. Accordingly, with respect to this Advisory Opinion, any mortgage recorded in which Petitioner participates as mortgagor would be similarly exempt from the mortgage recording taxes.

DATED: August 25, 1997

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

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