

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

TSB-A-90 (52)S
Sales Tax
October 23, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900628C

On June 28, 1990 a Petition for Advisory Opinion was received from Farash Corporation, 919 Winton Road South, Rochester, New York 14618.

The issues raised by Petitioner, Farash Corporation, are:

1. Whether the agency conferred on Max Farash by the County of Monroe Industrial Development Agency (hereinafter COMIDA) is a general and unrestricted agency under the law of the State of New York and, as such, appropriately includes the right to reconfer such agency on other entities (subagents).
2. Whether Max Farash's designation of Petitioner as subagent was the legal equivalent of COMIDA's appointment of Petitioner to act on its behalf.
3. Whether the agency conferred on Petitioner by Max Farash was sufficient to exempt from sales tax Petitioner's purchases of materials and rentals of equipment in connection with the COMIDA projects.

COMIDA, a public benefit corporation established pursuant to the authority of Article 18-A of the General Municipal Law of the State of New York, entered into inducement agreements with Max M. Farash whereby Max M. Farash, as agent of COMIDA, would acquire, improve (i.e., construct), and equip certain IDA facilities known collectively as Corporate Place. Corporate Place was constructed in multiple phases; each under the auspices of COMIDA; each pursuant to its own set of Agreements; and each financed by separate issues of Industrial Development Revenue Bonds. The language pertaining to the creation of an agency between COMIDA and Max M. Farash for the two Corporate Place phases at issue is the same.

Max M. Farash performed his contracts with COMIDA through Petitioner, his wholly owned construction company.

Petitioner contends that Max M. Farash designated Petitioner as a subagent for purposes of making the purchases of materials and rentals of equipment and machinery requisite for the construction and equipping of the respective COMIDA facilities and Petitioner so acted. When COMIDA entered into inducement agreements with Max M. Farash, individually, it did so with the full expectation that Max M. Farash himself would not physically perform the labor on the projects. It was contemplated that one or more entities to be selected by Max M. Farash would do so, but the identities of those entities were unknown at the time the contracts were being finalized.

The relevant language which appears in the contracts between COMIDA and Max M. Farash entitled Section 4.1, Construction of the Facility, states in part:

B. Title to all materials, equipment, machinery and other items of Property intended to be incorporated or installed in the Facility shall vest in the Issuer immediately upon deposit on the Land or incorporation or installation in the Facility, whichever shall first occur. Farash shall execute, deliver and record or file all instruments necessary or appropriate to so vest title in the Issuer and shall take all action necessary or appropriate to protect such title against claims of any third Persons.

E. The Issuer hereby appoints Farash its true and lawful agent, and Farash hereby accepts such agency: (i) to acquire, construct and equip the Facility in accordance with the Plans and Specifications, (ii) to make, execute, acknowledge and deliver any contracts, orders, receipts, writings and instructions with any other Persons, and in general to do all things which may be requisite or proper, all for the acquisition, construction and equipping of the Facility with the same powers and with the same validity as the Issuer could do if acting in its own behalf, (iii) to pay all fees, costs and expenses incurred in the acquisition, construction and equipping of the Facility from funds made available therefor in accordance with this Lease Agreement and (iv) to ask, demand, sue for, levy, recover and receive all such sums of money, debts due and other demands whatsoever which may be due, owing and payable to the Issuer under the terms of any contract, order, receipt, or writing in connection with the acquisition, construction and installation of the Facility, and to enforce the provisions of any contract, agreement, obligation, bond or other performance security.

On May 23, 1985 a resolution was adopted by COMIDA which states in part:

Section 4. [Max M.] Farash is hereby appointed the true and lawful agent of the Issuer (i) to acquire, construct and equip the Facility, (ii) to make, execute, acknowledge and deliver any contracts, orders, receipts, writing and instructions, as the stated agent for the Issuer, and (iii) in general to do all things which may be requisite or proper for completing the Facility, all with the same powers and the same validity as the Issuer could do if acting in its own behalf. In addition, Farash is hereby authorized to advance such funds as may be necessary to accomplish such purposes and, to the extent permitted by law, the Issuer agrees to reimburse Farash therefor out of the proceeds of the Bonds.

Section 541.3 of the Sales and Use Tax Regulations states in part:

Contracts with exempt organizations. [Tax Law, §§1115(a)(15), (16), 1116(a). . .] (a) Governmental entities. When a contractor's customer is a governmental entity described in section 1116(a)(1). . .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.

(1) Such governmental entities include:

(i). . .(c) industrial development authorities. . .

(d) Contracts with exempt organizations. (1) . . all tangible personal property incorporated into real property owned by a governmental entity. . . is exempt. . .

(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 part of such structure or building.

(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.

(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. . . .

The following type 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.

(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. . . .

When an IDA enters into an agency contract with the prime contractor and all subcontractors, all purchases for such contract are exempt if the property and services are purchased by the contractor or subcontractor as agent for the IDA.

To establish that all purchases are made by the IDA, the IDA and the prime contractor must enter into a written agency contract and the IDA must also issue letters designating the prime contractor and the subcontractors as its agents for a particular project. The contractors then may purchase material tax exempt as follows:

1. Present the supplier with a properly completed Contractors' Exempt Purchase Certificate and a statement from the IDA designating the purchaser as their agent with each purchase order.
2. Each purchase order must identify the purchaser as agent of the IDA and indicate the project for which the purchase is made.
3. All invoices and bills are to be addressed to the purchaser as agent of the IDA and must also identify the project.

In consequence, unless Petitioner is appointed an agent of the IDA, it can purchase exempt only tangible personal property which is actually transferred to the IDA and becomes an integral component part of the building or the real property.

However, if Petitioner is designated an agent of the IDA, it can purchase tax exempt all material incorporated in the capital construction, and it can also buy or rent equipment, tools and supplies necessary for the performance of the contract without paying the sales tax by following the procedures outlined in paragraphs 1, 2 and 3, above. Re Kilby Brothers, Inc., Adv Op, Comm of T & F, August 29, 1985, TSB-A(51)S.

The authority conferred upon an agent by a principal and the right of the agent to reconfer such authority upon a subagent is discussed in New York Jurisprudence 2d, in part, as follows:

"It is a general rule that in all cases of delegated authority where personal trust or confidence is reposed in the agent, and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied. Consequently, an agent cannot transfer the authority conferred upon him personally unless there is some manifestation of consent from the principal to such delegation.

Even though an agent has the power to appoint a subagent he can delegate no greater authority than he himself has. . . ." 2 NY Jur2d §147

"The limitations which are placed by the law upon the delegation of the authority of an agent are not so strict as to preclude any delegation of authority. Thus, there are certain well-defined cases

in which the agent may be deemed to have the authority to delegate his authority to another. A principal may, of course, give express authority to his agent to delegate the authority conferred on him, and in such a case, the delegation is valid and a subagent represents the principal as if directly appointed by him. An authority to delegate an agent's authority may also be implied from the nature of the agency. If the nature of the business, the conduct of which is committed to an agent, is such that it must be contemplated by the principal that the authority conferred on the agent will be exercised through subagents, a power in the agent to delegate that authority will be implied. Thus, the rule that an agency to collect and receive money is one of personal trust and confidence, and therefore not to be delegated for another without authorization, is applicable to special authority but not to a general agency to take charge of and manage the business of a principal. Also, if a principal has actual notice or knowledge of a delegation of authority by his agent and recognizes the subagent as his agent it is ordinarily a ratification of the delegation and equivalent to an original authorization thereof. Such a result is reached where the principal agrees to pay the subagent commissions or accepts the benefits of a contract knowingly negotiated by him." 2 NY Jur2d §148

Since the relevant language in Section 4.1E of the contract between COMIDA and Max M. Farash and in Section 4 of the resolution adopted by COMIDA on May 25, 1985 grants Max M. Farash general authority "to do all things requisite or proper" for acquisition, construction, equipping and completing the facility, "with the same powers and the same validity as the Issuer could do if acting in its own behalf", the agency conferred on Max M. Farash by COMIDA is considered to be a general and unrestricted agency, with the right to reconfer such authority to subagents such as the Petitioner. 2 NY Jur2d §§147 & 148, supra.

Accordingly, Max M. Farash's designation of Petitioner as subagent would be the legal equivalent of COMIDA's designating Petitioner as agent to act on COMIDA's behalf. However, as Petitioner has not submitted a copy of a letter from either COMIDA or Max M. Farash designating Petitioner as an agent or subagent for the particular project at issue, it cannot be resolved within the context of this Advisory Opinion that Max M. Farash reconferred authority to Petitioner as a subagent. Re Kilby Brothers, Inc., Adv Op, Comm of T & F, August 29, 1985, TSB-A-85(51)S, supra; The Pioneer Group, Dec, Tx App Trib, October 4, 1990.

Moreover, as it cannot be resolved that Petitioner was granted subagent status, neither can it be resolved within the context of this Advisory Opinion that Petitioner's purchases of materials and rentals of equipment in connection with the COMIDA projects were exempt from tax.

DATED: October 23, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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