

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

TSB-A-90(7)S
Sales Tax
February 7, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890829A

On August 29, 1989, a Petition for Advisory Opinion was received from West Valley Nuclear Services Co., Inc., P.O. Box 191, West Valley, New York 14171-0191.

The issues raised by Petitioner, West Valley Nuclear Services Co., Inc. are:

I. Whether it relied to its detriment on the Department's letter of February 22, 1982, such that New York is now estopped from assessing any sales or use tax prior to January 31, 1989.

II. Whether it qualifies for the agency contract exemption, thereby making inappropriate any sales or use tax on its purchases under the contract.

Petitioner, a subsidiary of Westinghouse Electric Corporation, has a contract to perform services at the West Valley Demonstration Project as the general contractor for the U.S. Department of Energy.

Petitioner submitted a copy of the contract between the U.S. Department of Energy and West Valley Nuclear Services Inc. Petitioner also submitted a copy of a letter dated February 22, 1982 and written by the Sales Tax Instructions and Interpretations Unit addressed to West Valley Nuclear Services stating that West Valley was acting as an agent for the Department of Energy. The pertinent part of such letter stated:

Based on the information furnished in a letter dated October 9, 1981 by the Department of Energy Idaho Operations Office, it is considered that you may act as an agent in the performance of contract No. DE-ACO7-81NE 44139.

Petitioner asserts that it is acting as an agent for the Federal government and, as such, the Federal government and not Petitioner is the purchaser of the property which Petitioner uses to perform its services. It further asserts that the Department is estopped from assessing any taxes prior to January 31, 1989.

The applicable sections of the sales and use tax imposed by Article 28 of the Tax Law provide that:

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:

* * *

(2) 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, or where it sells services or property of a kind not ordinarily sold by private persons.

Section. 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 or improving real property, property or land of such an organization, as the terms of 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 541.2(c) of the sales tax regulations defines an agency contract as:

(c) 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.

The contract between the U.S. Department of Energy and Petitioner submitted by it contained the following pertinent provisions:

ARTICLE IX - CONTRACTOR PROCUREMENT (Apr 1984)

9.1 DOE reserves the right at any time to require that the Contractor submit for approval any or all procurements under this contract. The Contractor shall not procure any item whose purchase is

expressly prohibited by the written direction of DOE and shall use such special and directed procurement sources as may be expressly required by DOE.

The Contractor shall provide information concerning procurement methods, practices, and procedures used or proposed to be used and shall use methods, practices and procedures which are acceptable to DOE. Procurement arrangements under this contract shall be made in the name of the Contractor, shall not bind nor purport to bind the Government, shall not relieve the Contractor of any obligation under this contract (including, among other things, the obligation properly to supervise, administer, and coordinate the work of subcontractors), and shall be in such form and contain such provisions as are required by this contract or as DOE may prescribe. (Emphasis supplied)

- 11.1 Compensation for Contractor's Services. Payment for the allowable costs as hereinafter defined, and of the fixed fee, and of the base fee, and of so much of the maximum available award fee as may be determined by the Contracting Officer as hereinafter provided (termed "award fee"), as the case may be, shall constitute full and complete compensation for the performance of the work under this contract. This contract shall be a cost-plus-fixed-fee contract for the period ending on September 30, 1983; and for the period subsequent to such date this contract shall be a cost-plus-award-fee contract. (Emphasis supplied)

On October 1, 1986 the contract was extended for another five-year term; however, the substance of the contract remained unchanged.

Based upon section 541.2(c) of the sales and use tax regulations, an agent must be able to act in the place of his principal. The Department of Energy Contract contains specific language prohibiting Petitioner from acting on its behalf (e.g. "[p]rocurement arrangements under this contract shall be made in the name of the Contractor, shall not bind nor purport to bind the Government..."). The language of the contract not only fails to name the contractor as an agent of the government, but also specifically prohibits the contractor from acting in an agency capacity. Consequently, since Petitioner, rather than the Federal government, is making the purchases and since such purchases do not become an integral component part of a structure, building or real property owned by the Federal government, such purchases do not qualify for exemption from tax under any of the provisions referred to above and are, therefore, subject to sales and use tax. (Re Butler Mechanical, Inc., Adv Op Comm T & F, December 22, 1987, TSB-A-88(7)S.)

In addition, the letter of February 22, 1982 wrongly determined that Petitioner was an agent of the Federal government for purposes of contract no. DE-ACO7-81NE 44139. Accordingly, Petitioner may not rely upon such letter.

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(Turner Construction v. State Tax Commission 57 AD2d 201, 394 NY Supp 2d 78, (1977); Re Butler Mechanical, Inc., supra.) Petitioner is liable for all appropriate taxes.

DATED: February 7, 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.