

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

TSB-A-00(34)S  
Sales Tax  
September 7, 2000

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000324A

On March 24, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Global Golf, Inc., 69 Bergen Avenue, West Babylon, NY 11704. Petitioner, Global Golf, Inc., furnished additional information with respect to the Petition on May 3, 2000.

The issue raised by Petitioner is whether purchases of equipment made by Petitioner as licensee of the County of Suffolk under contract to operate the concessions at the Bergen Point Country Club are subject to State and local sales and use taxes.

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

Petitioner operates the concessions at the Bergen Point Country Club ( the "Club") under a license agreement entered into with the County of Suffolk. Pursuant to the agreement, Petitioner is required to purchase equipment to be used on the golf course and related facilities, e.g., triplex mowers used to cut and maintain the greens. Suffolk County Department of Parks, Adv Op Comm T&F, July 11, 1994, TSB-A-94(29)S describes Petitioner's license arrangement with the County of Suffolk. Suffolk County Department of Parks states:

"The Licensee entered into an agreement with the County of Suffolk (the 'Licensor') to operate the concessions at the Bergen Point Country Club which is owned by the county. By agreement the Licensor granted to the Licensee exclusive rights and privileges to operate and maintain a golf course, golf school, driving ranges; to manage the golf professional shop; to operate, construct and maintain a miniature golf course and to operate and maintain the restaurant, catering and bar facilities; and to undertake necessary improvements and repairs necessary and incidental for the operation and maintenance of the facilities.

The term of the agreement is from March 5, 1993 through December 31, 2002, with options to renew for two additional five year terms. The Licensee has to satisfy certain capital improvement requirements set forth in the agreement within eight years of the execution of the agreement.

The Licensee is required to expend a minimum of ten thousand dollars each year during the term of the License for new equipment, furnishings and/or refurbishment of existing equipment or facilities to be used on the golf course and in the restaurant, catering and bar concessions and related facilities. All equipment

becomes the property of the Licensor upon expiration or termination of the agreement, free and clear of any and all liens and encumbrances.

Further, the Licensee has to pay for the total cost of all construction and renovations including, professional, legal and permit fees. All improvements, upon completion, become the property of the Licensor."

Petitioner intends to make equipment purchases in the future in the name of "Global Golf as Agent for Suffolk County."

As part of its Petition for Advisory Opinion, Petitioner submitted a copy of the agreement it entered into with the County of Suffolk. The agreement states, in part, as follows:

A) LICENSE

The LICENSOR hereby grants to the LICENSEE and the LICENSEE hereby accepts from the LICENSOR a License to operate for the period herein stated, subject to all of the terms and conditions herein contained, the Bergen Point Golf Course, Golf School, Golf Professional Shop, Golf Driving Ranges, Miniature Golf Course and Restaurant, Catering and Bar Concession and related facilities located at Bergen Point Country Club . . .

\* \* \*

B. TERMS AND CONDITIONS

\* \* \*

3) The License shall consist of the operation, management, supervision, and maintenance of the aforementioned facilities including the renovation, construction and improvement contemplated under this Agreement and incidental to its performance . . .

\* \* \*

5) The LICENSEE agrees to provide a minimum of thirty-five (35) electric or gas powered golf carts for public users of the course. . .

6) The LICENSEE will be responsible for providing a minimum of thirty (30) pull carts for public use.

\* \* \*

8) The LICENSEE is authorized by the LICENSOR to retain all revenue received from the rental of electric or gas golf carts, pull carts, driving ranges, pro shop, golf lessons, miniature golf fees, greens fees and restaurant, catering and bar operations except for those amounts prescribed in the License fee under Paragraph B10.

\* \* \*

10) The LICENSEE agrees to pay the LICENSOR as compensation for the License and for the privilege of operating said License within the Bergen Point Country Club and for the period aforesaid, as follows: (See Attachment 1) [Attachment 1 sets forth payment schedule]

D. UTILITIES AND EXPENSES

1) LICENSEE will be responsible for all costs associated with telephone service. LICENSEE may retain revenues generated by use of pay telephones.

2) LICENSEE shall pay directly for all costs associated with utilities, including heating oil, electric, water and gas on the premises.

\* \* \*

4) a) The LICENSEE shall be required to expend a minimum of ten thousand and no/100 (\$10,000.00) dollars each year during the term of the License for new equipment, furnishings and/or refurbishment of existing equipment or facilities to be used on the Golf Course and in the Restaurant, Catering and Bar Concession and related facilities and must get the written approval of the Commissioner only for any extraordinary purchases not in the normal course of business for a facility of this type.

\* \* \*

G) IMPROVEMENTS AND RENOVATIONS OF FACILITIES; EQUIPMENT

\* \* \*

3) The LICENSEE shall maintain an inventory of all equipment purchased and/or leased for the operation, service and maintenance of the Bergen Point Country

Club facilities...All equipment shall become the property of the LICENSOR upon expiration or termination of this Agreement, free and clear of any and all liens and encumbrances.

\* \* \*

I. MISCELLANEOUS

1) LICENSEE TO ASSUME ALL RISKS

The LICENSEE assumes all risks in the operation and maintenance under this License and shall be solely responsible and answerable in damages for all injuries and accidents in person or property. . . .

\* \* \*

7) The LICENSEE agrees to conduct and use the Licensed premises for no other purposes than herein stated and to equip the same at the LICENSEE's own cost and expense, except for such equipment and facilities as supplied by the LICENSOR.

\* \* \*

17) Nothing herein contained shall create or be construed as creating a partnership between the Suffolk County Department of Parks, Recreation and Conservation or of the LICENSOR and the LICENSEE or to constitute the LICENSEE or the LICENSEE's employees as agents or employees of the Suffolk County Department of Parks, Recreation and Conservation or of the County.

**Applicable Law and Regulations**

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

Section 1115(a) of the Tax Law exempts from the sales tax imposed by Section 1105(a) of the Tax Law and from the compensating use tax imposed under Section 1110:

\* \* \*

(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) of the Tax Law provides, in part:

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:

(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, or where it is a vendor of services or property of a kind not ordinarily sold by private persons. . . .

Section 528.17 of the Sales and Use Tax Regulations provides:

Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property of an organization described in Part 529 of this Title is exempt if it is to become an integral component part of such structure, building or real property.

*Example:* A painting contractor uses masking tape on a contract for an organization described in Part 529 of this Title. The tape is subject to tax since it will not become an integral component part of the real property.

Part 529 of the Sales and Use Tax Regulations provides, in part, for exemption from sales and compensating use taxes with respect to the state of New York and any of its agencies, instrumentalities and political subdivisions.

Section 541.2(c) of the Sales and Use Tax Regulations defines *agency contract* as:

. . .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(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.

\* \* \*

(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 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

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(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)

### **Opinion**

Petitioner has entered into an agreement with the County of Suffolk to provide concessions services related to the facilities located at the Club. Section 1116(a)(1) of the Tax Law designates agencies, instrumentalities and political subdivisions of the State of New York as organizations exempt from the payment of sales tax. The County of Suffolk is a political subdivision of New York and is therefore exempt from direct taxation on its purchases and use of tangible personal property and taxable services. Purchases of tangible personal property and services by a contractor for use in performing an operations and maintenance contract for an exempt organization are not exempt merely because the contractor has an agreement with the exempt organization and the organization will acquire title to the property upon the expiration of the contract. Purchases for such a contract are exempt from sales and use taxes only if the property and services are purchased by the contractor or subcontractor as agent for the exempt organization, or if some statutory exemption applies. For example, Section 1115(a)(16) of the Tax Law would exempt tangible personal property purchased by a contractor that is used to perform repair services to the exempt organization's real property, if the tangible personal property is actually incorporated into (becomes part of) the real property of the exempt organization (see Village of East Aurora, Adv Op Comm T&F, April 8, 1999, TSB-A-99(24)S).

Petitioner's purchases, therefore, of equipment for use in maintaining the facilities located at the Club, which do not become an integral component part of the facilities, are subject to sales and compensating use taxes, unless Petitioner makes such purchases as Suffolk County's agent. In Matter of MGK Constructors, Dec Tax App Trib, March 5, 1992, TSB-D-92(23)S, the Tribunal held that, since no regulation sets forth criteria for establishing whether an agency relationship exists with an exempt organization identified in Section 1116(a)(1) of the Tax Law, the general rule of agency as cited in Matter of Hooper Holmes v Wetzler, 152 AD2d 871, lv den, 75 NY2d 706, must be applied. In that decision, the court stated "to establish an agency or representative relationship there must be a manifestation that petitioners consented to act as agent on behalf of their clients, subject to the latter's control, and that the clients authorized this fiduciary relationship."

Applying this principle to the facts in this Petition, several factors lead to the conclusion that there is no agency relationship between Petitioner and the County of Suffolk. The Agreement submitted by Petitioner does not contain any language which expressly confers agency status on Petitioner; nor does the contract provide that Petitioner accepts its status as such an agent. Rather, Paragraph I.17 of the Agreement states that "Nothing herein contained shall create or be construed as creating a partnership between the Suffolk County Department of Parks, Recreation and Conservation or of the LICENSOR and the LICENSEE or to constitute the LICENSEE or the LICENSEE's employees as agents or employees of the Suffolk County Department of Parks,

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Recreation and Conservation or of the County.” (Emphasis added) Paragraph I.7, as well as various provisions in Paragraph D, provide that Petitioner will be responsible for and shall pay directly all costs for equipment and utility services associated with operating the club facilities. Paragraph B.8 provides that Petitioner is to retain all revenues from golf cart rentals, usage fees and restaurant and bar revenues. Moreover, Paragraph G(3) of the Agreement provides that, while the equipment purchased or leased for the operation, service and maintenance of the Club facilities shall become the property of the County of Suffolk upon expiration or termination of the Agreement, it must be given by Petitioner to the County of Suffolk free and clear of any and all liens and encumbrances. Thus, it appears that Petitioner’s credit, not the credit of the County of Suffolk, is bound on the purchases of equipment and other expenses. Accordingly, the Agreement provides that Petitioner does not act as agent of Suffolk County, with respect to any of the purchases of property or services required or contemplated under the License Agreement. Nor is Suffolk County obligated to any of the vendors which sells such property or services to Petitioner for the purchase price of such property or services. Such factors were found significant to establishing the existence of an agency relationship in Kern-Limerick v. Scurlock (347 US 110). The lack of these elements here indicates a lack of consent by Suffolk County and Petitioner to create an agency relationship with respect to Petitioner’s purchases (see Matter of West Valley Nuclear Services Co., Inc., Dec Tax App Trib, November 13, 1998, TSB-D-97(37)S). Therefore, it cannot be shown that Petitioner is acting on behalf of the County of Suffolk as its purchasing agent, subject to the County of Suffolk’s control; and Suffolk County has not authorized this fiduciary relationship, notwithstanding that Petitioner may identify itself as agent for Suffolk County when making purchases. Thus, Petitioner’s purchases are not exempt on the basis that it is acting as an agent for Suffolk County as an exempt organization under Section 1116(a)(1) of the Tax Law.

Petitioner, rather than Suffolk County, is making the purchases required under the contracts. Petitioner purchases such tangible personal property and services in its capacity as contractor; and uses such property and services itself to perform its contract obligations. Thus, such sales to Petitioner are retail sales, as defined under Section 1101(b)(4)(i) of the Tax Law, subject to the tax imposed under Section 1105(a) or 1110 of the Tax Law. Accordingly, Petitioner must pay sales or use tax on its purchases or uses of such property. However, under the provisions of Section 1115(a)(16) of the Tax Law, Petitioner’s purchases of tangible personal property which it uses to maintain or repair County owned property are exempt from sales and use taxes, provided that the tangible personal property is incorporated as an integral component part of a structure, building or real property owned by the County. See Section 528.17 of the Sales and Use Tax Regulations. See also Bedford Hills Supply, Inc., Adv Op Comm T&F, July 23, 1997, TSB-A-97(46)S. When purchasing property qualifying for exemption under Section 1115(a)(16) of the Tax Law from a supplier, Petitioner or its subcontractor must issue Form ST-120.1, *Contractors Exempt Purchase Certificate*, to the supplier within 90 days of delivery of the property. See Section 1132(c) of the Tax Law and Section 541.3(d)(2)(v) of the Sales and Use Tax Regulations.

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Equipment and supplies purchased by Petitioner do not become an integral component part of the County's real property. Equipment and supplies are considered to be used or consumed by Petitioner in the performance of its contracts. No tax exemption applies to such equipment and supplies purchased for Petitioner's own use. Therefore, Petitioner must pay tax on equipment and supplies purchased for use in complying with its contractual obligations which are not incorporated into the realty of the County (see Suffolk County Department of Parks, supra; Sullivan Humes Painting, Adv Op Comm T&F, August 31, 1987, TSB-A-87(31)S; Bedford Hills Supply, Inc., supra).

DATED: September 7, 2000

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

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