

Taxpayer Services Division
Technical Services Bureau

TSB-A-98(67)S
Sales Tax
September 9, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S980603A

On June 3, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Town of Tonawanda, New York, 2919 Delaware Avenue, Kenmore, New York 14217-2308.

The issue raised by Petitioner, Town of Tonawanda, New York, is whether purchases of construction materials by a contractor for the construction of a facility which is to be owned by Petitioner are subject to State and local sales and use taxes.

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

Petitioner is a municipality and owns a recreation area. Petitioner desires to have a facility built in the recreation area which will house a driving range, other recreational activities and concessions. The cost of the facility will be approximately \$1.5 million.

The facility will be constructed by a contractor at cost. The contractor will pay for the construction of the facility. Petitioner will own and have title to the facility during all phases of the construction and post construction. Upon completion of the facility, the contractor will pay to Petitioner an annual license fee for the operation of the facility for an agreed upon number of years. Petitioner will maintain the right to evict or terminate the license upon just cause. In addition, ownership of the property will not revert to the contractor upon the expiration of the license agreement.

Applicable Laws and Regulations

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

Section 1115 of the Tax Law provides, in part:

Exemption 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

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:

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:

(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 528.16(a) of the Sales and Use Tax Regulation provides, in part:

Exemption. (1) Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in Part 529 of this Title, is exempt when it is to become an integral component part of such structure or building.

Example 1: An exempt organization contracts to have a building erected on its land. Purchases by its contractor of tangible personal property, such as nails, sheet rock and plywood that become part of the structure, are exempt.

Opinion

Petitioner is a municipality and owns a recreation area which it desires to have a facility built which will house a driving range, other recreational activities and concessions. The cost of the facility will be approximately \$1.5 million. The facility will be constructed by a contractor at cost. The contractor will pay for the construction of the facility. Petitioner will own and have title to the facility during all phases of the construction and post construction. Upon completion of the facility, the contractor will pay to Petitioner an annual license fee for the operation of the facility for an agreed upon number of years. Petitioner will maintain the right to evict or terminate the license upon just cause. In addition, ownership of the property will not revert to the contractor upon the expiration of the license agreement.

Pursuant to Section 1115(a)(15) of the Tax Law, tangible personal property sold to a contractor for use in erecting a structure or building for an organization described in Section 1116(a) of the Tax Law is not subject to sales

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and use tax, if the tangible personal property becomes an integral component part of the structure or building. Petitioner, as a municipality of the State of New York, is an organization described in Section 1116(a) of the Tax Law. Accordingly, since the contractor will be erecting a structure or building owned by an organization exempt under Section 1116(a) of the Tax Law, the contractor's purchases of construction materials which will become a permanent part of such structure or building for the exempt organization are not subject to State and local sales and use taxes under Section 1115(a)(15) of the Tax Law. The contractor's purchases of tools, equipment, and supplies which do not become an integral component part of the structure or building will be subject to sales and use tax.

DATED: September 9, 1998

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

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