Letter Ruling 93-16: Payment of Sales and Use Taxes by Contractor and Subcontractors on Purchases of Tangible Personal Property used as Part of a Government Project

December 3, 1993

You have requested a letter ruling on behalf of (hereinafter "Management Consultant") concerning the imposition of sales and use taxes on sales of tangible personal property to Management Consultant, and its subcontractors, in connection with the (hereinafter the "Project"). Management Consultant has entered into an agreement with the (hereinafter the "State"), acting by and through the (hereinafter the "Agency"), to provide management consulting services in connection with the Project. The issue presented by your letter ruling request is whether purchases of tangible personal property by Management Consultant [1] in performance of its obligations under the agreement with the Agency are subject to Massachusetts sales and use taxes. For the reasons stated below, we rule that such purchases are subject to tax.

I. Represented Facts

Management Consultant is a joint venture comprised of [Corporation One and Corporation Two]. [Corporation One] is a corporation organized and existing under the laws of Nevada and a wholly owned subsidiary of [Inc.], With a principal place of business located in California. [Corporation Two] is a corporation existing under the laws of New York, having a principal place of business located in Massachusetts.

Management Consultant has entered into an agreement, dated June 14, 1991 (hereinafter the "Agreement"), with the State, acting by and through the Agency, a regularly constituted department of State government, to provide management consulting services in connection with the Project. The Agency is in the process of planning, designing and constructing a widened and depressed Artery and an extension of the Turnpike from its present terminus at the Artery, across Harbor, to a new terminus at Airport. The Project requires advanced management skills to coordinate the efforts of the Agency and other public and private entities so as to ensure the appropriate design, phasing and construction of the Project. The Agency has selected Management Consultant to manage the Project, to bring together the different disciplines necessary to manage the construction of the Project and to perform the diversified planning, feasibility and environmental studies and other design services necessary to complete the Project.

The Agreement provides that Management Consultant will manage the Project and that it, or its subcontractors, will provide planning, feasibility and environmental studies, as well as, engineering, architectural and other design services necessary to complete the Project. It specifically provides that, when carrying out its obligations under the Agreement, Management Consultant is deemed to be acting as the Agency's agent in its dealings with third parties in connection with the Agreement.

Further, the Agreement provides that Management Consultant will be deemed to be the Agency's agent in this regard, as long as it acts within the scope of its employment in accordance with the duty of care and standard of performance, as provided by the Agreement.

For its management and other services, Management Consultant will receive payment under a cost-plus-net fee arrangement. The Agreement provides that Management Consultant will be paid a net fee plus the sum of its allowable reimbursable costs. The Agreement describes reimbursable costs as direct salary costs, indirect costs, direct expenses and reserve for indirect cost adjustment. Under the Agreement, title to all tangible personal property purchased by Management Consultant is said to vest upon acquisition in the Agency.

Management Consultant is responsible for obtaining insurance for the Project, as required by the Agreement. If the insurance is approved by the Agency, premiums paid for such insurance is a reimbursable cost. Services and work product performed by Management Consultant must conform to the standards of care and practice exercised by comparable organizations engaged in performing comparable work. Management Consultant agrees that such services and work product will be free from errors and omissions resulting from failure to conform to the foregoing standard.

Management Consultant is liable to the Agency for loss, damage or expense incurred by the Agency, including without limitation, claims of contractors, subcontractors, and suppliers caused by Management Consultant's errors or omissions in its services or errors and omissions in the service of its subcontractors, agents or employees. Also, Management Consultant, at its own expense, must indemnify and hold harmless the Agency, its commissioners, officers and employees from and against all claims, causes of action, legal proceedings, suits, losses, damages and expenses initiated, suffered or claimed to have been suffered by third parties not involved by contract in the Project, but only to the extent that they arise out of or result from the negligence or fault of Management Consultant in its performance under the Agreement.

The Agency has issued a Contractor's Exempt Purchase Certificate (DOR Form ST-5C) to the Management Consultant, and, in turn, Management Consultant has issued copies of the Contractor's Exempt Purchase Certificate to its subcontractors. Management Consultant and its subcontractors have made, or have attempted to make, tax exempt purchases of tangible personal property under the Agreement using the Agency's Contractor's Exempt Purchase Certificate. Also, Management Consultant has purchased motor vehicles in connection with the Project, with title to the vehicles taken in the name of Management Consultant as nominee, which it claims are exempt from tax.

II. Discussion

A. Statutory Exemption Under G.L. c. 64H, § 6(d)

Management Consultant's principal argument in support of its claim of exemption is that it is an agent of the State, both by virtue of the Agreement and under common law. [2] Management Consultant claims that, as agent for the Agency, all sales of tangible personal property to Management Consultant are sales of tangible personal property to the State, and, therefore, exempt from sales tax under G.L. c. 64H, § 6(d). [3]

Management Consultant's construction of § 6(d) is not supported by applicable law. Exemption from sales and use taxes by virtue of § 6(d) must derive directly from the plain words of the statute, and not by implication, unless taxpayer can show the contrary by clear and unequivocal evidence. See First Agricultural National Bank v. State Tax Commission, 353 Mass. 172, 175-77 (1967) (reversed on other grounds, 392 U.S. 339 (1968)). Management Consultant's status as a common law agent is not relevant to the analysis. See id. If Management Consultant cannot demonstrate that it is a constituent part of the State or an "agency," as opposed to "agent," of the State, it cannot claim an exemption under § 6(d). Id; see also United States v. New Mexico, 455 U.S. 720, 736 (1982).

The Supreme Judicial Court has interpreted the term "agencies" to mean either a regularly constituted department of government or an entity which is wholly owned by the government and which exercises exclusively governmental functions." First Agricultural National Bank v. State Tax Commission, 353 Mass. at 176. From the facts presented, we conclude that Management Consultant is neither a regularly constituted department of government nor wholly owned by the State. Management Consultant is simply a private commercial entity performing a variety of services in connection with its obligations under a contract with the State. Further, Management Consultant

enjoys substantial independence under the Agreement over its financial affairs and the overall conduct of its business. Thus, it cannot be said to be a constituent part of the State or claim exemption under § 6(d). See id; see also United States v. New Mexico, 455 U.S. at 736.

Management Consultant asks us to broadly construe § 6(d) and to exempt not only "agencies" of the State but also all those who contract with the State as "agents." This we cannot do. The applicable case law requires a more narrow construction of § 6(d). See First Agricultural National Bank v. State Tax Commission, 353 Mass. at 175-76. The Supreme Judicial Court has stated that "'[t]he burden of proof is upon the one claiming the exemption to show clearly and unequivocally that he comes within the terms of the exemption.'" Id. (emphasis added). Management Consultant has not presented us with any persuasive authority that would show "clearly and unequivocally" that its construction of § 6(d) "comes within the terms of the exemption." See id.

Also, a broad construction of § 6(d) would lead to inconsistent results in the administration of the tax laws under chapter 64H, and, in particular, the various exemptions under § 6. See Polaroid Corp. v. Commissioner of Revenue, 393 Mass. 490, 497 (1984) (Terms of a statute are to be construed in relation to other statutory provisions and the general statutory scheme.). For example, building materials and supplies incorporated into a construction project owned by a governmental body referred to under § 6(d) are exempt from sales tax. G.L. c. 64H,§ 6(f). Implicit in § 6(f) is the concept that contractors, notwithstanding their possible status as agents, are consumers of the tangible personal property they purchase in the performance of their contracts. But for the exemption under § 6(f), such contractors would be required to pay sales tax on all their purchases made in connection with the contracts. It is only by virtue of § 6(f) that building materials and supplies incorporated into government construction projects are exempt. See e.g. Letter Ruling 79-36. Taxpayer's construction of § 6(d) would, through the "miracle" of agency, exempt not only building materials and supplies, but, also, most every other item of property used in the project, and, therefore, render § 6(f) essentially meaningless.

Moreover, the taxpayer's construction of § 6(d) would conflict with the Court's decision in S.J. Groves & Sons v. State Tax Commission, 372 Mass. 140 (1977). In S.J. Groves, which also involves a government contract, the Court construed the term "building materials and supplies" very narrowly, and limited the term to building materials and supplies directly incorporated into making improvements or directly consumed in making improvements in the construction project. Id. at 143-45. Under the taxpayer's construction of § 6(d), the materials and supplies that were not exempt under § 6(f) would have been exempt under § 6(d). We think the Legislature would not have been so careful and circumspect in drafting a governmental exemption under § 6(f) that so easily could be undone by standard or boiler-plate contractual language common to most all government construction contracts.

Finally, the United States Constitution requires that any claim of exemption from state taxation based upon the sovereign immunity of the state be based upon the same principles that determine the propriety of state taxation imposed on any agent or instrumentality of the United States Government. See Washington v. United States, 460 U.S. 537, 540 (1983). In Massachusetts, the propriety of state taxation imposed on any agent or instrumentality of the United States Government is determined under the principles announced by the United States Supreme Court in United States v. New Mexico, 455 U.S. 720. See Letter Ruling 82-100; 84-19; 85-46.

Under the principles of United States v. New Mexico, private persons and privately owned corporations organized for profit that perform some governmental functions are not immunized from nondiscriminatory state taxes of general application. Id. at 733. [4] A finding of constitutional tax immunity requires something more than the invocation of traditional agency notions. Id at 733-36. A private taxpayer may claim an exemption from taxation based upon the doctrine of implied immunity only where the private taxpayer is so assimilated by the government that it becomes one of its constituent parts. Id. To claim such an exemption, the government must reserve such control over the activities and financial affairs of the taxpayer so that it may properly be called its servant. Id. These are the same principles announced by the Supreme Judicial Court in First Agricultural Bank. See First Agricultural National Bank v. State Tax Commission, 353 Mass. at 177-93.

We conclude that Management Consultant is not a servant or constituent part of the Agency, and may not claim exemption as such merely by virtue of its agency relationship with the State. Management Consultant is a privately owned joint venture organized for profit. It directly controls its business activities and the activities of its employees. For example, it determines which materials and which services are necessary to complete the Project and purchases them, in most cases,

without the prior approval of the State and in its own name. The Agency's very limited control over certain Management Consultant's activities and finances do not rise to the level where it has become so assimilated by the Agency that it is a constituent part thereof. Management Consultant's purchases of tangible personal property under the Agreement, therefore, are not exempt from sales and use taxes.

B. Sale for Resale

1. Tangible Personal Property In General

The Agreement provides that title to all tangible personal property purchased by Management Consultant in connection with the Project vests in the Agency. As a result, Management Consultant claims that sales of tangible personal property to Management Consultant are sales for resale, exempt from sales tax under G.L. c. 64H, § 8(a), and that the subsequent transfer of tangible personal property to the Agency is exempt from sales tax under G.L. c. 64H, § 6(d). Management Consultant claims that such a result necessarily follows based upon the reasoning of the California Court of Appeals in Aerospace Corporation v. State Board of Equalization, 218 Cal. App. 3d 1300 (1990). We disagree.

In Aerospace, the California Court of Appeals held that an aeronautical contractor's purchase of tangible personal property in performance of its contract with the United States government was a purchase for resale and that the resale of such property by the contractor to the United States was exempt under the California Taxation and Revenue Code. Id. at 1309. In California, a sale of property is not a retail sale subject to sales tax if the buyer plans to resell the property in the regular course of business. [5] The court found evidence of such an intention to resell. Id. Thus, there was no sales tax due on the transaction. Id. Also, the court also held that there was no use tax due on the the tangible personal property purchased and used by Aerospace in performance of its contract with the United States because use of the property occurred after the title to such property had passed to the United States. Id. In California, use of property owned by the United States is not subject to use tax. Id.

It is our opinion that the reasoning of the California Court of Appeals in Aerospace is not applicable to Massachusetts. The decisions of the Massachusetts Supreme Judicial Court do not rely on the mere formalities of a taxpayer presenting a resale certificate to its vendor or on the subjective intent of the taxpayer when deciding whether a sale is for "resale in the regular course of business." [6] See e.g. Jan Co. Central, Inc. v. Commissioner of Revenue, 405 Mass. 686, 690 (1989); Clark Franklin Press Corp. v. State Tax Commission, 364 Mass. 598, 602 (1974). Instead, the Supreme Judicial Court has looked beyond the mere words of the statute to the underlying purposes of the sales and use tax statutory scheme and the resale exclusion within that scheme to give meaning to the language in question. See Jan Co. Central, Inc. v. Commissioner of Revenue, 405 Mass. 686, 688-90 (1989).

In Massachusetts, an excise is imposed upon the "retail sale" or "sale at retail" of tangible personal property in the Commonwealth. See G.L. c. 64H, § 2. A complementary use excise is imposed upon the storage, use or other consumption of tangible personal property in the Commonwealth. See G.L. c. 64I, § 2. The sales tax established under G.L. c. 64H, and the use tax established under G.L. c. 64I, are complimentary components of a unitary taxing program designed to reach all transactions, unless specifically exempted, in which tangible personal property is sold inside or outside the Commonwealth for storage, use or other consumption within the Commonwealth. Towle v. Commissioner of Revenue, 397 Mass. 599 (1986).

This "unitary taxing program" is also fashioned so as to exclude or exempt from tax many intermediate transactions in the economic process so as to prevent the pyramiding of taxes. See Courier Citizen Co. v. Commissioner of Corporations & Taxation, 358 Mass. 563, 567 (1971); see also Jan Co. Central, Inc. v. Commissioner of Revenue, 405 Mass. 686, 690 n. 3. The intent, then, behind the sales and use tax statutes is to tax the ultimate retail consumer, which is accomplished under G.L. c. 64H, through the definition of "retail sale." See Courier Citizen Co. v. Commissioner of Corporations & Taxation, 358 Mass. at 567-68. As a consequence, a "retail sale" or "sale at retail" is defined as " a sale of ... tangible personal property for any purpose other than resale in the regular course of business." G.L. c. 64H, § 1 (emphasis added).

The Supreme Judicial Court has stated that the "language [resale in the regular course of business] must find its meaning in the inherent nature of the business in question." In other words, the Court looks to see whether the transferor of the tangible personal property is in the business of selling

property (a retailer or wholesaler) or whether the transferor provides a service. Clark Franklin Press Corp. v. State Tax Commission, 364 Mass. at 602; see also Jan Co. Central, Inc. v. Commissioner of Revenue, 405 Mass. at 690.

Generally, where the taxpayer is treated as providing non-taxable services, tangible personal property used and consumed by the taxpayer in providing those services are treated as taxable sales, and there is no resale. J.R. Hellerstein & W. Hellerstein, STATE TAXATION, II Sales and Use, Personal Income, and Death and Gift Taxes, 12.06[1].. The same rule applies in Massachusetts. Once it is determined that the inherent nature of the taxpayer's business is providing a non-taxable service, the taxpayer is the ultimate consumer of the tangible personal property purchased and there is no resale of the same product upon delivery or retransfer to the transferor's client or customer. See Jan Co. Central, Inc. v. Commissioner of Revenue, 405 Mass. at 690-91. The delivery or retransfer of the tangible personal property is considered "incidental to the transferor's business, serving to facilitate the consummation of the principal transactions." Id. at 689 (emphasis added).

The Project requires advanced management skills to coordinate the efforts of the Agency and other public and private entities so as to ensure the appropriate design, phasing and construction of the Project. The Agency selected Management Consultant for its specific management skills and expertise - to manage the Project, to bring together the different disciplines necessary to manage the construction of the Project and to perform diversified planning, feasibility and environmental studies and other design services necessary to complete the Project. In this capacity, the weight of the evidence is that the "inherent nature" of Management Consultant's business is to provide management consulting services and not the sale of tangible personal property.

The facts as represented indicate that Management Consultant's purchases of tangible personal personal property generally are for its own use in providing the services contracted for under the Agreement. Based upon Massachusetts tax law, such purchases of tangible personal property are subject to sales tax. See Clark Franklin Press Corp. v. State Tax Commission, 364 Mass. at 602; see also Jan Co. Central, Inc. v. Commissioner of Revenue, 405 Mass. at 690. Moreover, there is no sale for resale even if such property is delivered or retransferred to the Agency upon the completion of the Project. See Jan Co. Central, Inc. v. Commissioner of Revenue, 405 Mass. at 690-91.

The above construction of the sale for resale provision is consistent with the plain words of the statute. The statute defines a "sale at retail" or a "retail sale" as a "sale of tangible personal property for any purpose other than resale in the regular course of business." G.L. c. 64H, § 1 (emphasis added). The sole purpose of the purchase must be for resale in order to be entitled to the resale exemption. See Coca Cola Bottling Co. of Northampton v. Commissioner of Revenue, 393 Mass. 726 728-29 (1985) (emphasis added); see also J.R. Hellerstein & W. Hellerstein, supra, 14.02[6]. This exclusionary provision, then, sweeps into the resale "exemption" all ordinary commercial transactions where goods are bought exclusively for wholesale or resale trade. Thus, under the plain words of the statute, the use or consumption of tangible personal property by Management Consultant in performance of its service contract, no matter how insignificant, negates the "exemption."

Management Consultant argues that the Agreement provides that the title vests in the Agency upon the delivery of tangible personal property to Management Consultant, and, therefore, that the Agreement's title clause reflects a sale of tangible personal property to the Agency. See e.g. Aerospace Corporation v. State Board of Equalization, 218 Cal. App. 3d at 1309 (title clauses determine passage of title). However, under Massachusetts tax law, the mere fact that a contract provides that title to tangible personal property purchased by a party vests in the State or that the property may eventually be delivered to the State does not establish that the tangible personal property was resold by that party in the "regular course of business," or, for that matter, resold at all. See Clark Franklin Press Corp. v. State Tax Commission, 364 Mass. at 602; see also Boeing v. Tax Commissioner of North Dakota, 169 N.W.2d 696, 707 (1969) (Court looked to substance over form since title provisions in government contracts are used for reasons other than to reflect a sale). Under these facts, we conclude that there is no purchase for resale in the regular course of business with respect to the tangible personal property purchased by Management Consultant in the performance of its obligations under the Agreement.

2. Blueprints, Drawings and Plans

The Agreement also provides that Management Consultant or its subcontractors will provide planning, feasibility and environmental studies, as well as, engineering, architectural and other

design services necessary to complete the Project. Management Consultant claims that these designs and plans, and, in particular, the many copies of such required on a project of such magnitude are exempt from sales tax as sales for resale.

The plans, designs and blueprints, etc. represent services embodied in tangible personal property. In such cases, the Supreme Judicial Court has applied the "object of the transaction" test to determine whether there has been a transfer of tangible personal property or services. See e.g. Houghton Mifflin Co. v. State Tax Commission, 373 Mass. 772 (1977); Commissioner of Revenue v. Houghton Mifflin Co., 396 Mass. 666 (1986).

The Appellate Tax Board has determined that, as a general rule, the object of the transaction between architects and engineers and their clients is for the service and not the sale of tangible personal property. See Stone and Webster Engineering Corporation v. State Tax Commission, Doc. No. 53902 (1972). The service provider is considered the consumer of any tangible personal property purchased for the purpose of rendering the services. See id. Further,any architectural or engineering plans, drawings, reports or other similar tangible personal property produced or reproduced under the Agreement have value only as a result of the consulting, architectural and engineering services being rendered. They are not being "sold." See id. Therefore, Management Consultant and its subcontractors are the ultimate consumers of the plans, designs and blueprints, etc., and copies thereof - there is no "sale for resale in the regular course of business." [7] See DOR Directive 93-4.

C. Ingredient and Component Part

Management Consultant also claims that materials and supplies that are consumed by engineering and architectural firms in producing blueprints, drawings and other items are exempt from sales tax under G.L. c. 64H, § 6(r), [8] as materials that become an ingredient and component part of tangible personal property to be sold, and, that the subsequent "sale" to the Agency of the personal property to be sold is exempt from sales tax under § 6(d). Thus, it argues that no tax is due on such items either at the time of their initial purchase or in any subsequent transaction. Both of these claims rely, in part, on whether there is a "sale" of tangible personal property between Management Consultant and Agency.

With respect to tangible personal property purchased in connection with the providing of construction consulting, architectural, engineering and any other similar services, the Appellate Tax Board's rationale in Stone and Webster Engineering Corporation v. State Tax Commission, Doc. No. 53902 (1972), is controlling. In Stone and Webster, the taxpayer was in the business of providing engineering services, including design and construction services for power and industrial projects. It also constructed projects from plans developed by others, made engineering reports, business examinations and appraisals, and undertook consulting engineering work for industrial and utility clients. The taxpayer operated under cost-plus contracts with its clients, and it sent its clients an itemized monthly statement containing a list of the expenditures incurred by the taxpayer for the account of the client in connection with the particular project. In the case of reproductions, the taxpayer treated that expenditure as a "sale" to the client, and collected sales tax on the "sale."

The Appellate Tax Board determined that the reproductions were not "tangible personal property to be sold," within the meaning of G.L. c. 64H, § 6(r), and, in turn, that the materials used and consumed in producing the reproductions were not exempt from sales tax under § 6(r). In performing its contract, the taxpayer was not selling tangible personal property. Rather, the Board concluded that the object of the transaction between taxpayer and its clients was for engineering services, and that property, such as, reproductions, plans or drawings furnished to those clients under the cost-plus contract had a value only as a result of the engineering services rendered or in the process of being rendered. Id. The Board's determination was not affected by the fact that taxpayer itemized its expenditures or that it collected sales tax on the reproductions, plans and drawings.

We agree with the Board's reasoning in Stone and Webster. Based on the facts as represented, we conclude that the object of the transaction between Management Consultant and the Agency is for management, construction, engineering, architectural and other similar services, and not for the sale of tangible personal property. Therefore, materials and supplies purchased by architectural and engineering firms in producing blueprints, drawings and other items in performing their obligations under the agreement are not exempt from sales tax under § 6(r). [9]

C. Contractor's Exempt Purchase Certificate

The Agency has issued a Contractor's Exempt Purchase Certificate (DOR Form ST-5C) to the Management Consultant, and the Management Consultant has issued copies of the Exempt Purchase Certificate to its subcontractors. Management Consultant and its subcontractors have used the Agency's Contractor's Exempt Purchase Certificate to make purchases of tangible personal property needed to perform the respective services required of them under the Agreement.

A Contractor's Exempt Purchase Certificate is valid only to purchases of building materials and supplies exempt from sales tax under G.L. c. 64H, § 6(f). See DOR Form ST-5C. For purposes of Section 6(f), building materials and supplies include "all materials and supplies consumed, employed or expended in the construction ... of any building, structure, public highway, bridge or other public work, as well as such materials and supplies incorporated therein. [It]...also include[s] rental charges for construction vehicles, equipment and machinery rented specifically for use on the site of any such tax exempt project or while being used exclusively for the transportation of materials for any such tax exempt project." Id.

In S.J. Groves & Sons Co. v. State Tax Commission, the Supreme Judicial Court, focusing on the term "building materials and supplies," made it clear that such "building materials and supplies" must be either "physically incorporated," or, if not physically incorporated, "consumed, employed or expended in the construction ... of any building, structure, public highway, bridge or other public work." See S.J. Groves & Sons Co. v. State Tax Commission, 372 Mass. at 143-45. The Court went on to describe those "building materials and supplies" that do not qualify for the § 6(f) exemption.

Equipment, tools, machinery and replacement parts within the meaning of G.L. c. 64H, §§ 6(r) and (s), are not "building materials and supplies" under § 6(f), unless they are physically incorporated into the construction project. Id. Further, the Court excluded construction vehicles, equipment and machinery purchased specifically for use on the site or being used exclusively for the transportation of materials for any such tax exempt project. S.J. Groves & Sons Co. v. State Tax Commission, 372 Mass. at 144 (emphasis added). Also excluded from the meaning of "building materials and supplies" are office supplies, such as paper, and office equipment, such as shelves, doors and furniture. Id at 144-45.

The Department has issued several rulings concerning the application of G.L. c. 64H, § 6(f). The earliest, and one of the most instructive, is Letter Ruling 79-36. In Letter Ruling 79-36, a contractor requested a ruling as to whether its purchases, or its subcontractors' purchases, under a cost-plus fixed-fee contract with the United States Department of Transportation were exempt from sales tax. The Department ruled that the sales of materials and supplies purchased by the contractor or its subcontractors that were incorporated in improvements or directly consumed in making improvements were exempt from sales tax under G.L. c. 64H, § 6(f). Id.; see also Letter Ruling 91-7 (electricity used in public construction project exempt) and Letter Ruling 83-62 (purchase of sand, gravel, cement and concrete was exempt if incorporated or used). Sales of all other materials, supplies and equipment used by the contractor and its subcontractors in the administration and performance of the contract were subject to Massachusetts sales tax. Id.; see also Letter Ruling 83-15 (purchase of construction vehicles not exempt) and Letter Ruling 79-51 (purchase of office equipment not exempt).

Thus, Management Consultant's authority to use the Agency's Exempt Purchase Certificate (DOR Form ST-5C) is limited to building materials and supplies that are incorporated in improvements or directly consumed in making improvements to the Project are exempt from sales tax. See S.J. Groves & Sons Co. v. State Tax Commission, 372 Mass. at 144; Letter Ruling 79-36. To the extent Management Consultant and its subcontractors have purchased tangible personal property, other than "building materials and supplies" within the meaning of G.L. c. 64H, § 6(f), with the Agency's Exempt Purchase Certificate (DOR Form ST-5C), Management Consultant, or its subcontractors, are responsible for the payment of use taxes on such purchases. See G.L. c. 64I, § 2.

D. Motor Vehicles

Finally, Management Consultant's claim of exemption for its motor vehicles is based again on its status as an "agent," which we addressed earlier in Section A of this ruling - the exemption under G.L. c. 64H, § 6(d) does not apply, in general, to contractors or common law "agents" of the State. Management Consultant also claims that the Department's Motor Vehicles Regulation, 830 CMR 64H.25.1(7)(d), which limits the exemption under § 6(d), as it applies to motor vehicles only to situations where a vehicle is registered in the name of the government agency, is invalid as being beyond the scope of the statute. Management Consultant has cited no authority demonstrating that

the cited regulatory interpretation of the relevant statutory provision is unreasonable. See Consolidated Cigar Corp. v. Department of Public Health, 372 Mass. 844, 855 (1977), quoted in Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 776 (1980). Without having established that it is entitled to an exemption and without having established that the Motor Vehicle Regulation is contrary to the law, Management Consultant is subject to sales tax on motor vehicles purchased for the Project. See G.L. c. 64H, § 6(f); see also S.J. Groves & Sons. v. State Tax Commission, 372 Mass. at 144.

Very truly yours,

Mitchell Adams
Commissioner of Revenue
December 3, 1993
LR 93-16

1 For purposes of this letter ruling, rulings and references to Management Consultant also apply to its subcontractors.

2 Taxpayer has not expressly asked, and we do not rule on, whether the provision under the Agreement creates a common law agency relationship between Management Consultant and the Agency. For purposes of this ruling, we assume, without deciding, that such an agency relationship exists.

3 Section 6(d) provides that "[s]ales to ... the commonwealth or any political subdivision thereof, or their respective agencies" are exempt from sales tax. G.L. c. 64H, § 6(d).

4 This requirement that all privately owned corporations organized for profit that perform some governmental functions pay nondiscriminatory state taxes is also based on a sound tax policy that all businesses for profit within the Commonwealth share the cost of government services provided to all. See First Agricultural National Bank v. State Tax Commission, 353 Mass. at 191-92.

5 In California a sales tax is imposed upon a percentage of the gross receipts of all retailers for the privilege of selling tangible personal property at retail. Rev. & Tax Code § 6051. A "sale" is defined as "any transfer of title or possession ... of tangible personal property for a consideration." Id. § 6006. And, a "retail sale" is defined as a "sale for any purpose other than resale in the regular course of business." Id. § 6007.

6 The Agreement incorporates by reference federal regulations 49 CFR 18.00 et seq. In particular, these provisions provide that the Agency may direct Management Consultant to sell or dispose of the tangible personal property purchased under the Agreement. Thus, the Agency may never take possession of and may never use or consume the tangible personal property in question.

7 Although not stated under its statement of facts, we assume that at some point construction contractors will perform work on the Project. In such a case, a contractor operating under a cost-plus-fixed-fee contract is considered the consumer of the tangible personal property for Massachusetts sales and use tax purposes. See Seltzer and Company, Inc. v. State Tax Commission; Ace Heating Service Inc. v. State Tax Commission, Doc. Nos. 68886, 68887 (July 31, 1975), aff'd sub nom. Ace Heating Service Inc. v. State Tax Commission, 356 N.E.2d 698, 700 (1976). As a result, sales of tangible personal property to the contractor in connection with the contractor's building services likewise are not considered "sales for resale in the regular course of business," notwithstanding the fact that, here too, title to all property purchased vests upon acquisition to the Agency. See Clark Franklin Press Corp. v. State Tax Commission, 364 Mass. 598, 602. Thus, each contractor or subcontractor is also responsible for the payment of sales and use taxes on tangible personal property purchased under the Agreement. See Letter Ruling 80-44; 81-66; 82-45; 82-121.

8 Section 6(r) exempts "[s]ales of materials ... which become an ingredient or component part of tangible personal property to be sold or which are consumed and used directly and exclusively ... in an industrial plant in the actual manufacture of tangible personal property to be sold...." G.L. c. 64H, § 6(r).

9 In the case of construction contractors, the Appellate Tax Board's determinations in Seltzer and Company, Inc. v. State Tax Commission; Ace Heating Service Inc. v. State Tax Commission, Doc. Nos. 68886, 68887 (1975), aff'd sub nom. Ace Heating Service Inc. v. State Tax Commission, 356 N.E.2d 698 (1976), are also instructive. The taxpayers there involved were heating contractors, involved in the installation heating systems under lump-sum contracts. They claimed that materials used such installations were exempt under § 6(r).

The Appellate Tax Board, relying on concepts from Emergency Regulation No. 12 dealing with a contractor making purchases of tangible personal property under cost-plus contracts, held that the contractors were the consumers of the tangible personal property and were responsible for the payment of tax on their purchases. See id. Moreover, materials purchased under the construction contract did not come within the § 6(r) exemption. See id; see also Letter Ruling 83-7, 83-34, 84-85.

Where Management Consultant operates under the Agreement as a "contractor," it is the consumer of the tangible personal property it purchases under the Agreement, and is responsible for the payment of sales and use taxes on all such purchases. See id. As a result, its purchases of tangible personal property in providing contractor services under the Agreement are not exempt from sales tax under § 6(r). See id.