



301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC PRIVATE LETTER RULING #92-3

TO: Westinghouse Savannah River Company
Post Office Box 616
Aiken, South Carolina 29802

SUBJECT: Federal Government
(Sales and Use)

TAX MANAGER: Jerry Knight

REFERENCES: S.C. Code Ann. Section 12-36-2120(1) (Supp. 1991)
S.C. Code Ann. Section 12-36-2120(2) (Supp. 1991)

AUTHORITY: S.C. Code Ann. Section 12-4-320
SC Revenue Procedure #87-3

SCOPE: A Private Letter Ruling is a temporary document issued to a taxpayer, upon request, and it applies only to the specific facts or circumstances related in the request.

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PRIVATE LETTER RULINGS ARE GENERALLY EDITED FOR CONFIDENTIALITY. THE TAXPAYER HAS GRANTED THE COMMISSION PERMISSION TO PUBLISH THIS DOCUMENT UNEDITED.

Questions:

Are sales to Westinghouse Savannah River Company (“WSRC”) exempt from South Carolina sales and use taxes as sales to the federal government, pursuant to Code Section 12-36-2120(2)?

Facts:

WSRC is a Delaware corporation whose corporate headquarters is located in Aiken, South Carolina. WSRC was organized for the exclusive purpose of managing and operating the Savannah River Site (“Site”), the primary purpose of which is to produce tritium and plutonium

for the federal government. In carrying out this function, WSRC regularly purchases a wide variety of goods from in-state and out-of-state vendors. WSRC has a so-called “direct pay” certificate issued by the Commission, which allows WSRC to make purchases free of the sales and use tax and to directly pay to the Commission any taxes which may be due.

The site was operated by E.I. du Pont de Nemours & Company (“du Pont”) for the federal government from August 1, 1950 until April 1, 1989, at which time WSRC assumed responsibility for the Site’s management and operation.

Discussion:

South Carolina Code Section 12-36-2120(2) exempts from the sale and use taxes “the gross proceeds of sales, or sale price of tangible personal property sold to the federal government”. Therefore, it must be decided if sales to WSRC are tantamount to sales to the federal government.

In United States of America and E.I. du Pont de Nemours and Co. v. Livingston, 170 F. Supp. 9 (1959), a U.S. District Court case, it was ruled that sales of tangible personal property to du Pont for use in operating the Savannah River Site were exempt from the South Carolina sales and use tax, as du Pont acted as the “alter ego” of the federal government and contracts entered into by du Pont were “entered into...by or on behalf of the United States”.

In arriving at its decision, the court pointed to the following facts:

Du Pont’s credit was not to be advanced or risked. Its disclosures in its requests for quotation and its purchase orders that the goods were being procured for the United States, to whom title would directly pass, and its imposition of the terms required of public contracts with the United States, negated (demonstrated against) any individual liability of its own. What obligations did arise from the purchase orders were discharged by drawing directly upon public funds.

* * * *

It is clear that du Pont’s procurement activities were authorized, and were openly on behalf of the United States. . . .

An examination of WSRC’s contract with the federal government reveals that, like du Pont, WSRC is also acting on behalf of the federal government. This determination is made based upon:

1. Information from WSRC’s contract with the U.S. Department of Energy –

Section I.55, page I-60:

“Title to all property acquired by the Contractor (WSRC) under such an authorization shall vest in the Government unless otherwise specified in the contract”.

Section I.75, page I-82:

“c. Special bank account – use. All advances of Government funds shall be withdrawn pursuant to a letter of credit in favor of the bank or, in the option of the Government, shall be made by check payable to the Contractor (WSRC), and shall be deposited only in the Special Bank Account referred to in the Agreement for Special Bank Accounts. No part of the funds in the Special Bank Account shall be (1) mingled with any funds of the Contractor or (2) used for a purpose other than that of making payments for costs allowable under this contract or payments for other items specifically approved, in writing, by the Contracting Officer.”

“d. . . .the Contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.”

Section I.79, page I-88:

“b.Subcontracts shall be in the name of the Contractor (WSRC), and shall not bind or purport to bind the Government”.

Section I.52, page I-57:

“If the Contracting Officer authorizes supplies to be shipped on a commercial bill of lading and the Contractor (WSRC) will be reimbursed these transportation costs as direct allowable costs, the Contractor shall ensure before shipment is made that the commercial shipping documents are annotated with....the following notations.:

Transportation is for the U.S. Department of Energy and the actual total transportation charges paid to the carrier(s)....shall be reimbursed by the Government.”

2. Information form the “Special Bank Account Agreement” –

Page 1:

“This agreement is entered into this 15th day of December, 1989 between the UNITED STATES OF AMERICA, represented by the Department of Energy (hereinafter referred to as DOE); Westinghouse Savannah River Company....; and the Citizens and Southern National Bank of Georgia....”

Exhibit C. Page 1:

“1. GENERAL INFORMATION

The checks-paid letter of credit is a technique used by the Federal Government to provide payment to a recipient (WSRC) who is performing services or providing goods to the

Department of Energy (DOE). Under this method, the recipient issues checks for program purposes. When these checks are presented to the servicing financial institution (C&S) for payment, the checks will be totaled and the financial institution will draw funds from the servicing Federal Reserve Bank to cover them. The financial institution is compensated for services performed in the form of non-interest bearing time deposit.”

3. WSRC’s Purchase Orders contain the following statement: “U.S. DEPARTMENT OF ENERGY, CONTRACT AC09-89SR18035”.

In summary, WSRC’s credit is not advanced or risked; WSRC’s purchase orders disclose certain purchases are made on behalf of the federal government; title to property acquired by WSRC vests in the federal government; and vendors are paid directly from the federal government’s special checking account.

Conclusion:

Purchases of tangible personal property by WSRC on behalf of the federal government under the provisions of the aforementioned contract are exempt from the South Carolina sales and use taxes pursuant to Code Section 12-36-2120(2). Purchases made by WSRC which are not on behalf of the federal government are subject to the South Carolina sales and use taxes.

NOTE: This document does not address purchases of tangible personal property by subcontractors and other entities performing work at the Savannah River Site. Whether such purchases are taxable or not must be determined on a case-by-case basis.