



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

SC PRIVATE LETTER RULING #94-2 (TAX)

TO: ABC, Inc.

SUBJECT: Federal Government - XYZ
(Sales and Use Tax)

DATE: February 15, 1994

REFERENCE: S.C. Code Ann. Section 12-36-2120(2) (Supp. 1993)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 1993)
SC Revenue Procedure #93-6

SCOPE: A Private Letter Ruling is a document issued by the Department of Revenue to a specific person.

NOTE: A Private Letter Ruling may only be relied upon by the person to whom it is issued and only for the transaction or transactions to which it relates. A Private Letter Ruling has no precedential value.

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

Question:

Are purchases by ABC Inc. ("ABC") of tangible personal property to provide security services for the XYZ exempt from South Carolina sales and use taxes as purchases by the federal government, pursuant to Code Section 12-36-2120(2)?

Conclusion:

Purchases by ABC of tangible personal property on behalf of the federal government under the provisions of the contract discussed in the facts, whereby (1) ABC's credit is not advanced or risked; (2) ABC's purchase orders disclose purchases are made on behalf of the federal government; (3) title to property acquired by ABC vests in the federal government; and (4) vendors are paid directly from the federal government's special checking account, are exempt from the South Carolina sales and use taxes pursuant to Code Section 12-36-2120(2).

Purchases by ABC which are not on behalf of the federal government are subject to the South Carolina sales and use taxes, unless otherwise exempt or excluded under the South Carolina sales and use tax law.

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

Facts:

ABC, Inc. ("ABC") is a Florida corporation which was organized for the exclusive purpose of providing security services for governmental entities. ABC provides security services to the XYZ ("XYZ").

The XYZ was designed, constructed, and operated by XYZ & Company ("AAA"). XYZ continued to operate the XYZ until April 1, 1989 at which time the management and operation of the XYZ became the responsibility of YYY Company ("YYY").

YYY is a Delaware corporation whose corporate headquarters is located in South Carolina. YYY was organized for the exclusive purpose of managing and operating the XYZ, the primary purpose of which is to produce nuclear material for the federal government.

It is ABC's duty to protect the XYZ and to prevent the nuclear material from being stolen from the XYZ.

As the prime contractor for security at the XYZ, ABC must, in accordance with the terms of its contract with the federal government, manage, operate, and provide security services for the XYZ. ABC is required to provide, train, and maintain an armed and uniformed protective force for the physical protection of the interests of the ZZZ ("ZZZ") at the XYZ. (Contract, Sections C.1, C.7 and C.11) ABC personnel are authorized to carry firearms and make arrests without warrants while engaged in the performance of their official duties. (Contract, Sections C.7, C.11 and H.15) ABC personnel are also authorized to use deadly force if necessary. (Contract, Sections C.3(a) and C.8)

Also, ABC is obligated to provide various special services to ZZZ. For example, ABC is required to maintain a "Special Response Team" to provide emergency response to events involving terrorists, criminals and others. (Contract, Section C.3(b)(1)) In addition, ABC provides basic law enforcement and investigations. ABC's duties also include preparation and implementation of a security program. All project security services are accomplished in accordance with ZZZ guidance. ABC's employees are indemnified by the federal government for any actions taken in the course of employment. (Contract, Section H.16)

ABC is also required to establish programs and provide technical support to ZZZ such as strategic planning and budget planning; provide program integration planning involving ZZZ and other contractors; and implement ZZZ guidelines, regulations and requirements relating to security and other matters.

ABC is also authorized to expend funds of the federal government pursuant to a special bank account established between ABC and ZZZ. While ABC controls the expenditures of the funds, the funds belong to the federal government. (Contract, Section I. 59(d), Contract, Attachment B.) From time to time in the performance of the contract, ABC may acquire various types of property to carry out the terms of the contract. Title to all property acquired at ABC's direction vests directly with the federal government. (Contract, Section I. 61(b), Contract, Attachment E.) In addition, when purchasing such property, ABC will stamp the following on the purchase invoice:

The consignee of the supplies and materials requisitioned herein is acting in behalf of and as agent for the ZZZ with respect to the expenditure of Government funds.

Discussion:

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

In United States of America and E.I. du Pont de Nemours and Co. v. Livingston, DCSC, 170 F. Supp. 9, aff 364 US 281, reh den 364 US 855, (1959), the court held 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 ABC's contract with the federal government reveals that, like du Pont , ABC is also acting on behalf of the federal government. This determination is made based upon:

INFORMATION FROM ABC'S CONTRACT WITH THE FEDERAL GOVERNMENT, INCLUDING MODIFICATION DE-AC09-88SR18002-M024

Section I.72, page 94 of Modification M024:

"Except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Contractor [ABC], for the cost for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The Contractor shall make such disposition of rejected items as the Contracting Officer shall direct. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to, and vest in the Government upon (1) issuance for use of such property in the performance of this contract, or (2) commencement of processing or use of such property in the performance of this contract, or (3) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the Contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty."

Attachment E:

All property used in performance of this contract at the XYZ (or other locations as directed by ZZZ) shall be either Government-furnished or contractor-acquired Government property.

Section I.59, page 89:

"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 [ABC], and shall be deposited only in the Special Bank Account referred to in the Agreement for Special Bank accounts, which is attached hereto and incorporated into this contract as an appendix. The Contractor shall likewise deposit in the Special Bank Account any other revenues received by the Contractor in connection with the work under this contract. 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. Title to funds advanced.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."

Stamp Notation used on Purchase Invoices:

"The consignee of the supplies and materials requisitioned herein is acting in behalf of and a agent for the ZZZ with respect to the expenditure of Government funds."

In summary, ABC's credit is not advanced or risked; ABC's purchase orders disclose certain purchases are made on behalf of the federal government; title to property acquired by ABC vests in the federal government; and vendors are paid directly from the federal government's special checking account. When such conditions are met, sales to, or purchases by, ABC are exempt under Code Section 12-36-2120(2).

For questions concerning sales to the federal government, and sales to persons under contract with the federal government, contact John P. McCormack at (803) 737-4438.