

Jul 23, 1993

Re: Technical Assistance Advise ment 93(A)-049

Sales Tax - Lease Purchase of Computer Hardware; Licensing
of Computer Software; Maintenance Agreement Covering
Hardware and Software

Section 212.08(6), F.S.

Rules 12A-1.001(9)(a) and 12A-1.032(4),(5), F.A.C.

Petitioner: XXX (Herein "the Company")

Address: XXX

FEI# XXX

XXX (Herein "the Supplier")

Dear :

This response is in reply to your May 10, 1993, petition for the Department's issuance of a Technical Assistance Advise ment ("TAA") pursuant to s. 213.22, F.S., concerning the captioned matter and parties. Your petition has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, F.A.C.

Therefore, the Department is herewith granting your request for the issuance of a TAA and the ensuing discourse shall embody said ruling.

DISCUSSION OF FACTS

Your petition and supporting documents impart the following significant information regarding the issues under advise ment herein:

FROM YOUR PETITION

"[The Company] has a contract with the Secretary of the United States Department of Health and Human Services Health Care Financing Administration ['HHS'] to carry out the provisions of the Social Security Act by administering Part B of the Medicare program (a copy of the contract is attached as Exhibit A). Medicare Part B provides

supplemental benefits for aged and disabled individuals who elect to enroll under such program and is financed by premium payments from enrollees, together with funds appropriated by the federal government, 42 U.S.C. 1395j. The Secretary of HHS is authorized to enter into contracts with entities to carry out the provisions of the Act, 42 U.S.C. 1395u. The Act sets out requirements for the contract and, pursuant to the contract, [the Company] assumes many of the responsibilities of the government in administering the Medicare Program.

"[The Company] determines the coverage of services; the reasonable charges for the services furnished; and makes the payments determined to be due for those services rendered to eligible individuals. (Article II, p.2, Contract). The contract details the procedure [the Company] must utilize in determining reasonable charges and coverage of services. (Article V, p.5, Contract). It also provides a hearing procedure that must be followed when requests for payment are denied, not acted upon with reasonable promptness, or when the amount or such payments is in controversy. (Article XI, p.10, Contract).

"The funds for payment of benefits and expenses are advanced by letter of credit to [the Company's] designated commercial bank. (Article VIII, p.6, Contract). The letter of credit specifies a maximum amount that may be withdrawn each month and amounts which are not withdrawn do not carry over to the next month. [The Company] is paid its `cost of administration under the principle of neither profit nor loss.' (Article XV, p.12, Contract).

"In order to perform the obligations under its contract, [the Company] is acquiring optical scanning equipment from [the Supplier] to be utilized to input claims information into the Medicare Part B claims processing system. The equipment will only be utilized for the Medicare program and all costs of the equipment will be reimbursed dollar for dollar by the federal government. (A copy of the contract is attached as Exhibit B). A description of the equipment to be purchased is included in the contract. The

contract provides that the seller and [the Company] will develop a 'mutually agreed upon Detailed Programming Specification document' for the licensing of software. [The Company] is also purchasing a maintenance agreement from [the Supplier] covering both the equipment and software."

FROM THE DOCUMENT STYLED "PART B CONTRACT"

Throughout the Part B Contract ("Contract") the Company is referred to as the "Carrier." Article I, I of the Contract defines the term "Carrier" as follows:

"The term 'Carrier' means the contractor which is a party to this contract pursuant to section 1842 of the Act, as amended." (Emphasis Supplied)

REQUESTED ADVISEMENT

You endeavor to elicit the Department's advice regarding the following specific question:

"Whether the purchase of equipment, software and a maintenance agreement by [the Company] to be used in providing Medicare benefits is subject to sales tax."

DISCUSSION OF LAW

We consult s. 212.08(6), F.S., as pertinent to the resolution of your question regarding sales and use tax:

"(6) EXEMPTIONS; POLITICAL SUBDIVISIONS.

"There are also exempt from the tax imposed by this chapter sales made to the United States Government, a state, or any county, municipality, or political subdivision of a state when payment is made directly to the dealer by the governmental entity. This exemption shall not inure to any transaction otherwise taxable under this chapter when payment is made by a government employee by any means, including, but not limited to, cash, check, or credit card when that employee is subsequently reimbursed by the

governmental entity. This exemption does not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof when such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision thereof, except public works in progress or for which bonds or revenue certificates have been validated on or before August 1, 1959...."

The operative rule construing and elucidating the forgoing subsection of statute is Rule 12A-1.001(9), F.A.C., which states the following:

"(9) GOVERNMENTAL UNITS.

"(a) All sales made directly to the United States Government, a state, or any county, municipality, or political subdivision of a state are exempt, except machines, equipment, parts, and accessories therefor used in the generation, transmission, or distribution of electricity. Except for purchases by employees of the United States Government, this exemption is not available for any taxable transaction when payment is made by a governmental employee by use of personal funds, including cash, checks, or credit cards, when the employee is subsequently reimbursed by the governmental entity. Payment must be made directly to the dealer by the governmental entity of a state, or any county, municipality, or political subdivision of a state. Purchases made by Federal employees on behalf of their agency are exempt even though the employee is subsequently reimbursed by the agency. Such governmental entities desiring to qualify for the exemption must obtain from the Department of Revenue a consumer's certificate of exemption (see Rules 12A-1.038 and 12A-1.039, F.A.C.). The exemption provided in this subsection shall be strictly defined, limited, and applied to each entity as provided herein. (Emphasis Supplied)

You argue that Company in carrying out its obligations under the Contract should be viewed as a federal instrumentality in much the same way that federal employees were deemed to be federal

instrumentalities and, thus, immune from state sales tax in the matter of Chestnut Fleet Rentals v. Dept. of Rev., 559 So.2d 264 (Fla. 1st DCA 1990). Recall that in this case the court held that notwithstanding the provisions of s. 212.08(6), F.S., the Supremacy Clause of the United States Constitution, Article VI, Clause 2, precluded imposition of sales tax on automobile rentals to federal employees who paid for rentals with personal funds and were later reimbursed by the government. The court concluded that the employees were acting as instrumentalities of the federal government when paying for the rented vehicles such that incidence of tax would have fallen on the government.

In reaching its findings the Chestnut Court looked to the important distinctions made between federal employees and contractors under contract with the federal government by the United States Supreme Court in the matter of United States v. New Mexico, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). In that case, the court found that contractors conducting business with the federal government under an advance funding procedure were taxable entities independent of the United States such that a state use tax could be applied to the contractors without offending federal sovereignty, as the contractors were not constituent parts of the government. The court held that the contractors were not entitled to immunity as they could not be regarded as instrumentalities of the government. The court contrasted the contractors' relationship with the federal government with that of federal employees. The court concluded that the differences between the two were "crucial", and that unlike federal employees, contractors could not properly be regarded as "constituent parts" of the Federal Government.

CONCLUSIONS OF LAW

Applying the line of reasoning set out in the above case law to the instant facts can lead to but one inescapable conclusion. This conclusion is that the Company is clearly a contractor not a federal employee and, thus, unlike a federal employee is not a constituent part or instrumentality of the federal government when acting on the federal government's behalf pursuant to the Contract. Therefore, the purchase of equipment, software (other than customized software) and a maintenance agreement by the

Company to be used in providing Medicare benefits is subject to sales tax. As to the portion of the subject transaction attributable to purchase of customized software by the Company, we hereby concur with your analysis that said portion of the transaction constitutes the purchase of a professional service and is exempt from sales or use tax pursuant to the provisions of Rule 12A-1.032(4),(5), F.A.C.

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in s. 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response and your request are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of s. 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect confidential information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or this response.

Sincerely,

Daniel M. Wagner, Jr.
Tax Law Specialist

DW/

Control No. 8739