

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-94 (4)S
Sales Tax
February 24, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930416A

On April 16, 1993 a Petition for Advisory Opinion was received from Dutchess County Resource Recovery Agency, 41 Sand Dock Road, Poughkeepsie, New York 12601.

The issue raised by Petitioner, Dutchess County Resource Recovery Agency, is whether purchases by Dutchess Resource Management, Inc. (hereafter DRMI) necessary to operate, repair and maintain the Dutchess County Resource Recovery Facility, which is owned by Petitioner, are exempt from sales and use taxes pursuant to Section 541.2(c) of the Sales and Use Tax Regulations or Section 2047-n of the Public Authorities Law.

In 1982, the New York Legislature passed special legislation entitled "Dutchess County Resource Recovery Agency Act" (Chapter 675 of the Laws of 1982, the Act), which created the Dutchess County Resource Recovery Agency (Petitioner), a public benefit corporation. The Act authorizes Petitioner to construct and operate a resource recovery facility for disposing of solid waste and for producing and selling energy, and the exercise of such power constitutes an essential governmental function. The facility which is owned by Petitioner is situated on an approximately 11.5 acre site, which is also owned by Petitioner, located in the Town of Poughkeepsie, New York.

Petitioner indicates that, in accordance with its duties and responsibilities under the Act, Petitioner, as authorized by Section 120-w of the New York General Municipal Law, entered into a Service Agreement, dated June 29, 1989, with DRMI, a wholly-owned subsidiary of Westinghouse Electric Company, a copy of which Petitioner furnished as part of its petition. Pursuant to the contract, DRMI's primary responsibility is to operate and maintain the facilities on the site on behalf of Petitioner. Petitioner, in turn, agrees to provide processable waste for disposal.

Petitioner also indicates that, in support of its responsibilities under the contract, DRMI, as operator of the facility, is charged with all procurement activities related to labor, materials, and equipment necessary for the operation, overhaul, repair, and maintenance of the facility which includes, but is not limited to, the cost of all machinery, equipment, replacement parts, material, etc. However, Petitioner will pay DRMI a sum certain for repair and/or replacement of major facility components as set forth under article 6.5.4. of the Service Agreement.

DRMI occupies the Facility and operates it for Petitioner. On behalf of Petitioner and in furtherance of Petitioner's activity of providing the Facility for the benefit of the public, DRMI purchases supplies, equipment and services for installation in and improvement of the Facility. Procurement of the supplies, equipment and services is essential to Petitioner's activity. Finally, according to Petitioner, ownership of the Facility and the supplies, equipment and services procured by DRMI remains at all times in Petitioner.

Although DRMI maintains responsibility for all procurement activities, all purchases of supplies, equipment and services are made on behalf of Petitioner and expended in support of the operation of the Facility. If New York sales tax is incurred on supplies, equipment and services purchased or leased by DRMI, Petitioner must reimburse DRMI as a sales tax pass-through under Article 6.5.3. of the Service Agreement.

Petitioner indicates that it has issued a notice to vendors stating that DRMI, acting on Petitioner's behalf, is exempt from the payment of sales or compensating use taxes on purchases or leases of materials, goods or services relating to the construction, reconstruction, repair, equipping, operation or maintenance of the Facility.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax.—..., there is hereby imposed and there shall be paid a tax ... upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105-B of the Tax Law states, in part:

Reduced tax rates on certain parts, tools, supplies and services relating to tangible personal property used or consumed in production. -- (a) Notwithstanding any other provisions of this article, but not for purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (a) of section eleven hundred five on the receipts from the retail sales of parts with a useful life of one year or less, tools and supplies for use or consumption directly and predominantly in the production of ... electricity, ... or steam for sale by manufacturing, processing, generating, ... shall be paid at the rate of two percent for the period commencing September first, nineteen hundred eighty and ending February twenty-eighth, nineteen hundred eighty-one, and such retail sales shall be exempt from such tax on and after March first, nineteen hundred eighty-one.

(b) Notwithstanding any other provisions of this article, but not for the purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (c) of section eleven hundred five on receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be paid at the rate of two percent for the period commencing September first, nineteen hundred eighty and ending February twenty-eighth, nineteen hundred eighty-one and such receipts shall be exempt from the tax on sales imposed under

subdivision (c) of section eleven hundred five on and after March first, nineteen hundred eighty-one.

(c) Notwithstanding any other provision of this article, but not for purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or pursuant to the authority of article twenty-nine of this chapter, the compensating use tax imposed by section eleven hundred ten on the use of parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section and services described in subdivision (b) of this section, shall be paid at the rate of two percent for the period commencing September first, nineteen hundred eighty and ending February twenty-eighth, nineteen hundred eighty-one and such use shall be exempt from the compensating use tax imposed by section eleven hundred ten on and after March first, nineteen hundred eighty-one.

Section 1115 of the Tax Law states, in part:

Exemptions 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:

(12) Machinery or equipment for use or consumption directly and predominantly in the production of ... electricity, ... or steam for sale by ..., generating , ...

(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, 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.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, 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 states, 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 529.2 of the Sales and Use Tax Regulations states, in part:

New York State, agencies, instrumentalities, public corporations, and political subdivisions thereof. [Tax Law, S 1116(a)(1)] (a) Governmental entities.

(1) Agencies and instrumentalities of the State as used in this section means any authority, commission or independent board created by an act of the Legislature for a public purpose.

(2) A public corporation as used in this section means any corporation created by an act of the Legislature for a public purpose or pursuant to an agreement or compact with another state or Canada.

Example: Urban Development Corporations and Industrial Development Agencies are public corporations and may purchase tangible personal property exempt from the sales and use taxes.

(b) As purchaser. (1) New York State, or any of its agencies, instrumentalities, public corporations or political subdivisions (hereinafter referred to as New York State governmental entities) are not subject to sales or use tax when they are the purchaser, user, or consumer of tangible personal property or services

(2) New York State governmental entities as purchasers, users, consumers, occupants or patrons must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document.

Article 8, Title 13-D of the Public Authorities Law states, in pertinent part:

DUTCHESS COUNTY RESOURCE RECOVERY AGENCY

§ 2047-b. Definitions

As used or to refer to in this title, unless a different meaning clearly appears from the context:

1. "Agency" means the public benefit corporation created by section two thousand forty-six-c of this title, known as the Dutchess County Resource Recovery Agency.

4. "Cost" as applied to any project, includes the cost of construction, the cost of the acquisition of all property, including real property and other property, both real and personal and improved and unimproved, the cost of demolishing, removing or relocating any buildings or structures on lands so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved or relocated, the cost of all systems, facilities, machinery, apparatus and equipment, financing charges, interest prior to, during and after construction to the extent not paid or provided for from revenues or other sources, the cost of engineering and architectural surveys, plans and specifications, the cost of consultants' and legal services, the cost of lease guarantee or bond insurance, other expenses necessary or incidental to the construction of such project and the financing of the construction thereof, including the amount authorized in the resolution of the agency providing for the issuance of bonds to be paid into any reserve or other special fund from the proceeds of such bonds and the financing of the placing of any project in operation, including reimbursement to the county, or any municipality, state agency, the state, the United States government, or any other person for expenditures that would be costs of the project hereunder had they been made directly by the agency.

6. "Construction" means the acquisition, erection, building, alteration, improvement, increase, enlargement, extension, reconstruction, renovation or rehabilitation of a solid waste management-resource recovery facility; the inspection and supervision thereof; and the engineering, architectural, legal, fiscal and economic investigations and studies, surveys, desks, plans, working drawings, specifications, procedures and other actions incidental thereto.

9. "Person" means any natural person, partnership, association, joint venture or corporation, exclusive of a public corporation.

10. "Project" means any solid waste management-resource recovery facility, the planning, development, financing, construction, operation, or maintenance of which is authorized to be undertaken in whole or in part by the agency pursuant to this title.

15. "Solid waste management-resource recovery facility" or "facility" means any facility, plant, works, system, building, structure, improvement, machinery, equipment, fixture or other real or personal property which is to be used, occupied or employed for the collecting, receiving, transporting, storage, processing,

or disposal of solid waste or the recovery by any means of any material or energy product or resource therefrom including but not limited to recycling centers, transfer stations, baling facilities, rail haul or maritime facilities, collection vehicles processing systems, resource recovery facilities, steam and electric generating and transmission facilities, including auxiliary facilities to supplement or temporarily replace such generating facilities, steam distribution facilities, sanitary landfills, plants and facilities for compacting, composting or pyrolyzation of solid wastes, incinerators, and other solid waste disposal, reduction or conversion facilities and resource recovery equipment and disposal equipment as defined in subdivisions four and five of section 51-0903 of the environmental conservation law.

§ 2047-c. Dutchess County Resource Recovery Agency

1. A corporation known as the Dutchess County Resource Recovery Agency is hereby created for the public purposes and charged with the duties and having the powers in this title. The agency shall be a body corporate and politic constituting a public benefit corporation

6. It is hereby determined and declared, that the agency and the carrying out of its powers and duties are in all respects for the benefit of the people of the county and the state for the improvement of their health, welfare and prosperity and that such purposes are public purposes and that the agency is and will be performing an essential governmental function in the exercise of the powers conferred upon it by this title.

§ 2047-e. Powers of the agency

The agency shall have the power:

3. To acquire in the name of the agency, hold, sell, lease, mortgage or otherwise dispose of property, real, personal or mixed, or any interest therein, without limitation, for its corporate purposes; provided, however, that in the acquisition of any real property designated as the site for any facility, the agency shall give consideration to the present and any proposed land use character of the area in which the site is to be located and the zoning laws or regulations, if any, otherwise generally applicable to such area.

5. To collect, receive, transport, process, dispose of, sell, store, convey, recycle, and real with, in any lawful manner and way, solid waste and any products or by-products thereof now or hereafter developed or discovered, including any energy generated by the operation of any solid waste management-resource recovery facility. Any such disposal or sale may be effected on such terms and in such manner as the agency may deem proper.

6. To plan, develop and construct projects and to pay the cost thereof and to have the right to contract in relation thereto with municipalities or persons within

or without the county and to own and operate, maintain, repair, improve, reconstruct, enlarge, and extend, subject to the provisions of this title, any of its projects acquired or constructed under this title, and to sell, lease, mortgage or otherwise dispose of any project or part thereof to any person or public corporation, subject to such conditions and limitations as the agency may determine to be in the public interest.

7. To assist in the planning, development and construction of and the financing of the cost of any solid waste management-resource recovery facility to be located in the county whether or not such solid waste management-resource recovery facility is to be owned or operated by the agency, which assistance may include loans to any person or public corporation. Any such solid waste management resource recovery facility producing either electricity or shaft horsepower and useful thermal energy shall constitute a co-generation facility as defined in subdivision two-a of section two of the public service law.

15. Subject to any limitations imposed by any contract pursuant to subdivision two of section two thousand forty-six-t of this title, to fix and collect rates, rentals, fees and other charges for the use of the facilities of, or services rendered by, or any commodities furnished by, the agency so as to provide revenues sufficient at all times to pay, as the same shall become due, the principal and interest on the bonds of the agency, together with the maintenance of proper reserves therefor, in addition to paying, as the same shall become due, the expenses of operating and maintaining the properties of the agency, together with proper reserves for debt service, depreciation, maintenance and contingencies and all other obligations and indebtedness of the agency.

18. To do all things necessary or convenient to carry out the powers expressly given in this title.

§ 2047-f. Governmental capacity of the agency and municipalities

The county, other municipalities within the county and the agency in carrying out their respective powers and duties under this title shall be deemed to be acting in a governmental capacity. The construction, operation and maintenance of any project financed in whole or in part by the agency, shall be deemed to be the performance of an essential governmental function by the agency acting in its governmental capacity, whether such project shall be owned or operated by the agency or by any person or other public corporation.

§ 2047-n. Exemption from taxes, assessments and certain fees

1. It is hereby determined that the creation of the agency and the carrying out of its corporate purpose is in all respects for the benefit of the people of the county and the state and is a public purpose and the agency shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this title and shall not be required to pay any taxes or assessments upon any

property owned by it or under its jurisdiction, control or supervision or upon its activities, or any filing, recording or transfer fees or taxes in relation to instruments filed, recorded or transferred by it or on its behalf. The construction, use, occupation or possession of any property owned by the agency or the county, including improvements thereon, by any person or public corporation under a lease, lease and sublease or any other agreement shall not operate to abrogate or limit the foregoing exemption, notwithstanding that the lessee, user, occupant or person in possession shall claim ownership for federal income tax purposes. The agency shall be deemed a public authority for the purposes of section four hundred twelve of the real property tax law.

2. Any bonds issued pursuant to this title together with the income therefrom as well as the property of the agency shall be exempt from taxes, except for transfer and estate taxes. The state hereby covenants with the purchasers and with all subsequent holders and transferees of bonds issued by the agency pursuant to this title, in consideration of the acceptance of any payment for the bonds, that the bonds of the agency issued pursuant to this title and the income therefrom and all revenues, moneys, and other property pledged to secure the payment of such bonds shall at all times be free from taxation, except for transfer and estate taxes.

§ 2047-q. Interest in contracts prohibited

It shall be a misdemeanor for any member of the governing body or any officer, agent, servant or employee of the agency to be in any way or manner interested, directly or indirectly, in the furnishing of work, materials, supplies or labor, or in any contract therefor which the agency is empowered by this title to make.

§ 2047-x. Effect of inconsistent provisions

In so far as the provisions of this title are inconsistent with the provisions of any other act, general or special, or of the county charter or any local law, ordinance or resolution of the county or any other municipality, the provisions of this title shall be controlling. Nothing contained in this section shall be held to supplement or otherwise expand the powers or duties of the agency otherwise set forth in this title. Nothing contained in this title shall be held to alter or abridge the powers and duties of the department of environmental conservation.

Petitioner has submitted a copy of the Dutchess County Service Agreement which states in part:

ARTICLE ONE

Definitions

1.1 Definition of Terms

DISCRIMINATORY TAX: Any tax or other imposition levied by the State or one of its Subdivisions which (a) discriminates against or has the effect of discriminating against (i) owners or operators of mass-burn and resource recovery Facilities of the general character and purpose of the Facility, (ii) producers or sellers of electrical or thermal energy, (iii) owners or operators of combustion products emissions stacks or (iv) generators of Process Residue; and (b) which tax or other imposition applies to or results from the operation of the Facility or to the Contractor or its affiliates, or the direct or indirect beneficial owners of such affiliates, in respect of the Contractor's or its affiliate's ownership of the Facility.

FACILITY: All elements of the County's resource recovery facility as constructed and accepted by the Agency, including the O'Connor Combustion System, the Site, the buildings, equipment, rolling stock, machinery and other real and personal property including such improvements that may be necessary to fulfill the terms of this Agreement.

SERVICE FEE: The amount paid by the Agency to the Contractor pursuant to Articles 6.5.1 and 6.5.2 for operation, overhaul, repair and maintenance of the Facility.

UNCONTROLLABLE CIRCUMSTANCES: Any act or event that prevents a party to this Agreement from performing its obligations hereunder or complying with any conditions required of the party hereunder if such act or event is beyond the reasonable control of the party relying thereon as justification for nonperformance or noncompliance. Such acts or events may include but shall not be limited to the following:

- (b) ... except that such adoption, change, etc. relating to Federal and State tax law shall not be an Uncontrollable Circumstance ...

ARTICLE TWO

Responsibilities of the Parties and Appendices

2.1 Responsibilities of the Parties

The Agency hereby retains the Contractor and the Contractor hereby accepts this retainment to operate and maintain the Facility on behalf of the Agency

ARTICLE THREE

Operations

3.3 Labor, Materials and Equipment

The Contractor will provide all labor, materials and equipment necessary for the operation, overhaul, repair and maintenance of the Facility.

3.6 Repair, Replacement and Maintenance

The Contractor shall keep the Facility in good operating condition, conduct all required overhauls and make all necessary repairs and replacements, maintain an adequate inventory of spare parts to prevent unnecessary downtime and otherwise manage the Facility consistent with good engineering practices for facilities similar to the Facility. The Contractor's estimate for repair and replacement of major equipment components is set forth in Appendix N. The Contractor shall maintain the safety of the Facility at a level consistent with applicable law and good engineering practices, shall establish and maintain safety procedures for the Facility and shall enforce all reasonable safeguards for the safety and protection of persons or property on and near the Site, including the designation of a qualified employee to be responsible for safety procedures.

3.21 Liens and Encumbrances

The Contractor shall keep the Site and the Facility free from any and all liens and encumbrances arising out of or in connection with acts, omissions or debts of the Contractor or any of its subcontractors or suppliers,
...

ARTICLE SIX

Payments

6.1 Basic Financial Responsibilities of the Parties

The Agency shall pay Debt Service on the Bonds, any Debt Service reserve funds under the Trust Indenture, the Contractor's compensation under Article 6.4, Discriminatory Taxes and property taxes or assessments directly related to ownership of the Facility. ...

6.5.3 Pass Through Costs - The Agency shall reimburse Contractor for the following direct costs and expenses:

- (e) Taxes, including any Discriminatory Tax, and state and local sales taxes on supplies and equipment purchased or leased by the Contractor provided that the Contractor first attempts to acquire such supplies and equipment on a tax exempt basis and cooperates with the Agency in the challenge to the levy of any such tax; excluding Federal and State taxes paid by the Contractor based on net income and employee benefit taxes;
- (f) Utilities including electric (but excluding electricity generated by the Facility), gas, oil, water and sewer, up to the Maximum Utility Usage Guarantee as listed in Appendix M.

ARTICLE TWELVE

Miscellaneous

12.5 Relationship of the Parties

No party to this Agreement shall have any responsibility whatsoever to perform services or to assume contractual obligations that are the obligations of the other party; nothing herein shall constitute either party a partner, agent or representative of the other party, ...

12.11 Industrial Property Rights

The Contractor shall pay all royalties, license fees and import duties relating to its obligations under this Agreement. ...

12.12 Permits

It will be the obligation of the Agency to secure and maintain a Part 360 Solid Waste Management Facility Operating Permit from the New York State Department of Environmental Conservation and to secure and maintain any other environmental permits or other permits or certificates that are or may be required during the term of this Agreement. The Contractor will provide the Agency with any information in its possession or under its control that is required to obtain and maintain environmental and other permits.

12.18 Transfer or Removal of Equipment

... The Contractor will retain ownership of the Contractor furnished tools and equipment (included testing equipment), utilized in performance of its work. In no event shall the Agency take possession of or transfer or remove any such Contractor tools and equipment.

In the instant matter, Petitioner was created as a public benefit corporation for a public purpose pursuant to Section 2047-c of the Public Authorities Law and was granted exemption from taxes as provided in Section 2047-n of the Public Authorities Law.

Petitioner was authorized to construct, operate, repair and maintain a resource recovery facility under the provisions of Sections 2047-e, 6. and 7. of the Public Authorities Law.

Petitioner has entered into a Service Agreement with DRMI, wherein DRMI has been retained, generally, to operate and maintain the Dutchess County Resource Recovery Facility on behalf of Petitioner.

Section 2047-f of the Public Authorities Law provides that Petitioner will be acting in its governmental capacity and performing an essential governmental function during the construction, operation and maintenance of any project financed in whole or in part by Petitioner, whether the project is owned or operated by Petitioner, any person or other public corporation.

The exemption provided by Section 2047-n of the Public Authorities Law includes sales and use taxes. To the extent Section 2047-n of the Public Authorities Law is inconsistent with Section 1116(a)(1) of the Tax Law, Section 2047-n of the Public Authorities Law controls. See, Section 2047-x of the Public Authorities Law.

However, the exemption provided under Section 2047-n of the Public Authorities Law applies only to transactions wherein Petitioner is the purchaser and payor of record. The exemption afforded under Section 2047-n does not extend to DRMI. Also, since the provisions of Section 2047-q provide that it will be a misdemeanor for any agent of Petitioner to act directly or indirectly in the furnishing of work, materials, supplies or labor or in any contract therefore and since Article 12, Part 12.5 of the Service Agreement states that "nothing herein shall constitute either party a partner, agent or representative of the other party; DRMI is prohibited from acting as Petitioner's agent and may not make purchases as such.

Generally, any purchases of tangible personal property made by DRMI will be subject to the tax imposed under Section 1105(a) of the Tax Law. However, when DRMI makes purchases of machinery or equipment including parts with a useful life of more than a year, for Petitioner's resource recovery facility, the purpose of which are for use or consumption directly and predominantly (more than 50% of use) in the production of electricity or steam for sale, such purchases will qualify for the exemption from state and local sales and use taxes provided under Section 1115(a)(12) of the Tax Law. Similarly, DRMI's purchases of parts with a useful life of one

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year or less, tools or supplies for use directly and predominantly in the production of electricity or steam for sale will qualify for the exemption from state and local sales and use tax provided under Section 1105-B(a) of the Tax Law unless delivery of such purchases occurs within New York City in which instance the purchases will be subject to New York City local sales or use tax. Any charges paid by DEMI for the service of installing, repairing, maintaining or servicing the parts with a useful life of one year or less, tools or supplies will be exempt from state tax but subject to the New York City taxes and all other local sales and use taxes.

Any transactions entered into by DRMI involving purchases of tangible personal property which will be incorporated into Petitioner's real property as the result of a capital improvement or repair to such real property will qualify for the exemption from tax provided under Section 1115(a)(15) or 1115(a)(16) of the Tax Law, whichever is applicable since the tangible personal property will actually be incorporated into the structure, building or real property of an exempt organization as described in Section 1116(a) of the Tax Law.

DATED: February 24, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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