



Publication 765

Sales and Fuel Excise Tax Information for Properly Appointed Agents of New York Governmental Entities

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About this Publication

New York State and local (New York) governmental entities are exempt organizations under Article 28 of the New York State Tax Law and thus may generally purchase property and services exempt from State and local sales and use taxes (sales tax). In addition, such entities may purchase motor fuel, diesel motor fuel, and residual petroleum product for their own use or consumption exempt from New York State motor fuel, diesel motor fuel, and petroleum business taxes (fuel excise taxes) under Articles 12-A and 13-A of the Tax Law. (It is noted that this exemption does not apply to the regulatory petroleum testing fee imposed on the importation or production of motor fuel.) A New York governmental entity, if authorized by applicable law, may also make exempt purchases through a person (called an “agent”) who is properly appointed by the governmental entity to act on its behalf. This publication does not address the question of whether a governmental entity has the legal authority to appoint an agent; rather, this publication merely assumes that such authority exists.

While each New York governmental entity must determine for itself whether or not it possesses such legal authority, this publication provides information to assist such entities and persons contracting with them in determining whether a person is considered a governmental entity’s properly appointed agent, or whether a different type of relationship exists between the parties, such as an independent contractor relationship. The publication also addresses whether an agent’s purchase on behalf of a governmental entity is exempt from sales and fuel excise taxes. It does not pertain to purchases made by employees of New York governmental entities on behalf of the entities.

In order for a person to make exempt purchases as “agent” on behalf of a governmental entity, the following conditions must be satisfied: (1) the governmental entity must properly appoint the person to make purchases as its agent, (2) the purchases must be within the scope of the agent’s authority, and (3) the conduct of the parties must be consistent with the agency relationship. **Where a person makes a purchase without the authority to legally bind and commit the credit of the governmental entity to the seller, such purchase is not exempt from tax as a purchase on behalf of the governmental entity.**

If any of the above conditions, as further detailed in this publication, are not met with regard to a particular purchase, the person making the purchase will not be considered an agent of a New York governmental entity for purposes of that purchase, and, therefore, the purchase will not be exempt (unless some other exemption applies). Persons making purchases on behalf of a governmental entity face significant tax liabilities if their relationship to the governmental entity is later determined not to be that of a properly appointed agent or if their otherwise taxable purchase is found not to be within the scope of the agency relationship.

An independent contractor is required to pay sales and/or fuel excise taxes on purchases made to fulfill its obligation under a contract with a governmental entity. Depending on the terms of the contract, the independent contractor may pass on some or all of the economic burden of the sales and/or fuel excise

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taxes to the governmental entity. However, the fact that the independent contractor is reimbursed by the governmental entity for the purchases made (e.g., through a cost-plus contract) does not make the independent contractor's purchases exempt from sales and/or fuel excise taxes.

The term "governmental entities" as used in this publication does not include Industrial Development Agencies (IDAs), whose agents must follow the procedures outlined in section 542.1 of the Sales and Use Tax Regulations.

If you have any questions regarding governmental entities and agents, please contact us. See the *Need help?* section on the back cover of this publication.

Exemption for New York Governmental Entities

General

In general, the Tax Law provides exemption from sales tax for purchases made by New York governmental entities and exemption from fuel excise taxes for purchases made for the entities' own use or consumption. *New York governmental entities* means the State of New York, or any of its agencies, instrumentalities, public corporations, or political subdivisions. For the purposes of this publication, this term does not include IDAs.

Agencies and instrumentalities

Agencies and instrumentalities includes any authority, commission, or independent board created by an act of the New York State legislature for a public purpose.

Examples of New York State agencies and instrumentalities:

- New York State Department of Transportation
- New York State Office of General Services
- New York State Thruway Authority

Public corporations

A *public corporation* includes a "public benefit corporation" created by an act of the New York State legislature for a public purpose, or pursuant to an agreement or compact with another state or Canada. For example, the Urban Development Corporation and the Port Authority of New York and New Jersey are public corporations.

Political subdivisions

A *political subdivision* means a county, town, city, village, school district, fire district, special district corporation, or Board of Cooperative Educational Services (B.O.C.E.S.) of New York State.

The Principal/Agent Relationship

Who is an agent?

An agent is a person who accepts the authorization by another, called the "principal," to act on behalf of, and legally bind the principal and whose actions are subject to the principal's control. An agent may be appointed by the principal to take certain actions on behalf of the principal in regard to business transactions. In general, an agent acting within the scope of the agency agreement has the same powers as the principal and can do anything that the principal has authorized it to do.

What is a principal/agent relationship?

A principal/agent, or “agency,” relationship is a fiduciary relationship that is created when a principal authorizes an agent to act on behalf of and legally bind the principal while under the principal’s control and the agent agrees to act in such capacity.

A mere statement that an agency relationship exists is not, by itself, sufficient evidence to support the existence of such a relationship. The facts and circumstances surrounding the relationship, including the duties, powers and responsibilities of each party, must establish that an agency relationship exists.

Establishing the relationship

A person making purchases should **not** rely solely on the assertion by a governmental entity that such purchaser is the governmental entity’s agent in determining whether the purchaser is the agent of the governmental entity. The purchaser makes such a determination at his or her own risk. If the Tax Department subsequently determines that a purchaser is **not** an agent of the governmental entity, or that purchases were not made within the scope of an agency relationship (for example, the agent lacked the authority to commit the principal’s credit), the purchaser will be liable for sales tax and fuel excise taxes due on any purchases that do not otherwise qualify for exemption.

Determining whether or not a situation meets the above criteria is a legal conclusion which requires a review of all of the appropriate facts and circumstances between the parties to the purported agency relationship. Since every situation will have its own set of facts, it is impossible for the Tax Department to set forth an absolute set of guidelines upon which an agency relationship is considered to exist. However, listed below are a number of requirements that generally must be met for an agency relationship to exist and for purchases by an agent to be exempt as purchases on behalf of a governmental entity pursuant to an agency relationship:

The principal must authorize the agent to make purchases on the principal’s behalf and the agent must accept the appointment

- The principal and agent must agree to create the relationship. The principal must authorize the agent to make purchases on the principal’s behalf and legally bind the principal in all matters within the scope of the agency relationship. The agent must agree to act on the principal’s behalf, subject to the principal’s control.

The principal may not authorize an agent to perform a task that the principal itself is not authorized to perform

- The principal itself must have the authority to perform the activity which it seeks to appoint the agent to perform. The principal cannot authorize the agent to perform acts which are required to be performed by the principal itself, or which the principal is prohibited from doing, or which are illegal. Since the agent's authority can never exceed that of the principal, the agent would be required to follow any procurement procedures that the governmental entity is required by law to follow, such as competitive bidding requirements or the compulsory use of purchase orders.

The appointment of an agent must be timely

- Generally, the principal must appoint a person as its agent *before* the person performs services for the principal. In the case of a purchase made on behalf of a New York governmental entity, the person cannot make purchases exempt from tax as an agent on behalf of the governmental entity until the governmental entity has appointed the person as its agent. Therefore, purchases made by the person prior to such appointment are subject to tax unless the purchases otherwise qualify for exemption.

The agency relationship must be evidenced by a written agreement

- The agency agreement must be in writing. Although an agency relationship may generally be established by the conduct of the parties, or by verbal agreement, an agent of a New York governmental entity cannot make tax exempt purchases on behalf of the governmental entity unless the agency agreement is in writing.

The written agreement must describe the scope of the agent's authority

- The written agreement must describe the scope of the agent's authority with regard to making purchases. For example, the agreement may specify that the agent is authorized only to purchase certain types of property or make purchases up to a certain dollar amount.

Other contractual terms between the parties must be consistent with the agency relationship

- Other contractual terms between the parties must be consistent with the agency relationship. That is, a contract (or portion of a contract) which authorizes a person to make purchases as an agent of a governmental entity may not achieve that purpose if other terms of the contract, or a separate contract between the parties, are inconsistent with the agency relationship.

The principal must have control over an agent's actions

- The principal must reserve to itself full control over both the desired result of the agency and the manner or means by which the agent performs its services.

The principal must bear the risk of loss.

- Generally, the principal must bear the risk of loss in each transaction or activity the agent undertakes pursuant to the authority granted to it as agent. This means that the principal must reimburse or indemnify the agent for expenses or liabilities incurred by the agent for its acts, when these acts are within the scope of the authority granted by the principal.

The agency relationship must be disclosed

- The agent must disclose the existence of the agency relationship whenever the agent seeks to make an exempt purchase on behalf of the governmental entity. The disclosure should be evidenced by having the bill or invoice made out either to the principal or in the form "X as agent of and on behalf of Y, Governmental Entity."

The principal is liable to the seller for the purchases of its agent

- The principal must authorize the agent to legally commit the credit of the governmental entity in order for the agent to make exempt purchases on the governmental entity's behalf.

Examples

Example 1: An advertising agency hired by a New York governmental entity to create television advertisements for the State's tourism industry claims to be an agent of the governmental entity. The agreement between the advertising agency and the governmental entity states that the governmental entity will have final approval over the completed advertisements, but the advertising agency will retain creative control of the project and determine the manner in which the advertisements are produced. Result: Since the advertising agency, not the governmental entity, controls the manner and means by which the advertisements are produced, no agency relationship exists, and the advertising agency's purchases are subject to sales and fuel excise taxes.

Example 2: An organization claims it is an agent of a New York governmental entity, but the contract between the purported agent and the governmental entity explicitly states that the organization's actions are not binding on the principal. Result: No agency relationship exists, and the organization's purchases are subject to sales tax and fuel excise taxes.

Example 3: A New York governmental entity purports to appoint a construction contractor as its agent, but the contract between the governmental entity and the contractor specifies that the contractor is the purchaser of any tangible personal property purchased pursuant to the contract. In addition, title to the property purchased by the

contractor is retained by the contractor. Result: Since the contractor retains title to the property and is deemed the purchaser under the contract, the contractor did not purchase the property as an agent of the governmental entity. Therefore, the contractor's purchases are subject to sales tax and fuel excise taxes.

Agent Purchases

Tangible personal property and certain services

Generally, purchases of tangible personal property and certain services made by a person contracted to provide services to a New York governmental entity are subject to sales tax. However, if a person is properly appointed to make purchases as an agent of a governmental entity, and the purchases of tangible personal property or services are within the scope of the agency relationship and otherwise meet the requirements described in this publication, the person may make such purchases exempt from sales tax on behalf of the governmental entity.

[See Tax Law Sections 1116(a) (1) & (2)]

Motor fuel and diesel motor fuel

Generally, purchases of motor fuel and diesel motor fuel made by a person contracted to provide services to a governmental entity are subject to sales and fuel excise taxes. However, if a person is properly appointed to make purchases as agent of a governmental entity, and the purchases of motor fuel and diesel motor fuel are within the scope of the agency relationship and otherwise meet the requirements described in this publication, the person may make such purchases exempt from sales and fuel excise taxes as long as the fuel purchased is used or consumed by the governmental entity. Fuel purchased for an agent's own use or consumption, even if used to perform a service for a governmental entity, is not exempt from the sales and fuel excise taxes. This means that if a contractor who is an agent of a governmental entity **only** for the purpose of making purchases on behalf of the governmental entity purchases motor fuel or diesel motor fuel and uses the fuel in performing a service for the governmental entity as an independent contractor, the purchase of the fuel is subject to the sales and fuel excise taxes.

[See Tax Law Sections 1116(b)(5), 282-a(3)(a), 284(1), and 301-b(c)(1), (2) & (3)]

Example 4: A board of education contracts with a transportation company to transport children to school. Because of liability concerns, the board of education **does not** appoint the transportation company as its agent for purposes of operating the vehicles used to transport the

children. Under the contract, the board of education appoints the transportation company its purchasing agent for purposes of making purchases on its behalf. When the transportation company purchases diesel motor fuel, it is committing the credit of the school district. Result: While the transportation company is the board of education's agent when it purchases the fuel, the diesel motor fuel is **not** exempt from sales tax or the fuel excise taxes because the transportation company is not the board of education's agent when it provides the transportation service (i.e., operates the vehicles). For the motor fuel and diesel motor fuel to be exempt from sales tax and the fuel excise taxes, the fuel must be used or consumed by the board of education or its agent.

Residual petroleum product

Generally, purchases of residual petroleum product made by a person contracted to provide services to a governmental entity are subject to sales tax and to the petroleum business tax imposed under Article 13-A of the Tax Law. However, if a person is properly appointed to make purchases as agent of a governmental entity, and the purchases of residual petroleum product are within the scope of the agency relationship and otherwise meet the requirements described in this publication, the person may make such purchases exempt from sales tax on behalf of the governmental entity. Such residual petroleum product may be purchased exempt from the petroleum business tax only if it is used or consumed by the governmental entity. Residual petroleum product purchased for an agent's own use or consumption, even if used to perform a service for a governmental entity, is not exempt from the petroleum business tax. This means that if a contractor who is an agent of a governmental entity **only** for the purpose of making purchases on behalf of the governmental entity purchases residual petroleum product and uses the product in performing a service for the governmental entity as an independent contractor, the purchase of the product is subject to petroleum business tax.

[See Tax Law Sections 1116(a)(1) & (2) and 301-b(c)(4)]

Exemption Certificates

Effective July 1, 2005, when making a purchase of tangible personal property or services, the agent of a governmental entity must provide the seller with Form ST-122, *Exempt Purchase Certificate for an Agent of a New York Governmental Entity*. When making a purchase of motor fuel, diesel motor fuel, or residual petroleum product, the agent of a governmental entity must provide the seller with Form FT-122, *Fuel Tax Exempt Purchase Certificate for an Agent of a New York Governmental Entity*. A copy of Form DTF-122, *Certification of Agency Appointment by a New York Governmental Entity*, must be attached to Form ST-122 or Form FT-122.

A seller will be protected from liability for the tax if all the following conditions are met:

- a properly completed Form ST-122 or FT-122 is received from the purchaser within 90 days of the date of the transaction; and
- a properly completed Form DTF-122 that is valid on the date of the transaction is attached to Form ST-122 or Form FT-122; and
- Form ST-122 or Form FT-122 with Form DTF-122 attached are accepted in good faith; and
- the bill or invoice that is provided to the purchaser indicates that the purchase is being made by the purchaser as agent on behalf of the named governmental entity.

As noted above, the seller may accept a properly completed Form ST-122 or FT-122 with Form DTF-122 attached for up to 90 days after delivery of the property or service rendered. However, Form DTF-122 must indicate that the purchaser's appointment as agent was valid on the date of the transaction.

If the seller accepts a properly completed Form ST-122 or FT-122, and Form DTF-122 in good faith, the seller may use the forms to substantiate an exempt sale. A certificate is properly completed if all the required entries are made. A certificate is accepted in good faith when the seller has no knowledge that the certificate is false or is fraudulently given, and reasonable, ordinary due care is exercised in the acceptance of the certificate. See the instructions in the respective forms for additional details. Forms DTF-122, ST-122 and FT-122 may only be obtained by calling (518) 485-2889.

Transfers to a Purchasing Agent

***Certain transfers may
be taxable***

If a person appointed only as a purchasing agent of a governmental entity purchases tangible personal property or certain services on behalf of the governmental entity and subsequently uses the property or service in the performance of a service for the governmental entity, that person will be deemed to have made a taxable (unless otherwise exempt) purchase from the governmental entity to the extent that the person paid consideration of any type to the governmental entity for the property or service. For example, consideration includes a credit or charge-back against the price of the service being provided to the governmental entity.

Example 5: A transportation company that is an independent contractor enters into a three-month contract with a city to transport children to summer day camp. The city appoints the transportation company as its agent for purposes of purchasing the vans. Pursuant to the transportation contract, the city will furnish the vans to the transportation company, and will reduce its payments to the transportation company by an amount equal to the rental value of the vans. The transportation company purchases the vans exempt from sales tax as agent for the city. In making these purchases, the transportation company legally binds and commits the credit of the city to the seller of the vans. The transportation company then uses the vans in the performance of its contract with the city.

Under these conditions, the transfer of possession (rental) of the vans from the city to the transportation company for consideration, (i.e., the reduction in the amounts payable to the transportation company under the transportation contract), is a **taxable** transaction that is subject to sales tax. If the city does not collect the tax from the transportation company, the transportation company must remit the tax directly to the Tax Department.

Independent Contractors

Agents vs. independent contractors

Generally, while an agent is authorized to act in the place of and legally bind another party (its principal), and perform services subject to the other party's control, an independent contractor performs services for another party and controls the manner in which the services are performed. An important factor to consider when determining whether a person is acting as an agent or as an independent contractor is the person's ability to control how the work is done. The independent contractor decides how a service will be performed and is under the control of the other party only with respect to the result or finished product. An independent contractor who is performing a service for a governmental entity is not, in the performance of that particular service, the agent of the governmental entity.

Example of an independent contractor

Example 6: A New York governmental entity contracts with a snow removal company to provide for the removal of snow from a State owned parking lot. The governmental entity is required to make a lump sum annual payment to the company for this service. The snow removal company hires and schedules employees, provides the snow removal equipment, and directs and controls the work performed by the employees. The snow removal company is acting as an independent contractor under this contract. Therefore, its purchases of tangible personal property and taxable services are subject to sales tax, and its purchases of the motor fuel and diesel motor fuel that it consumes are subject to the sales tax and fuel excise taxes.

Certain purchases may be exempt

Certain types of purchases made by an independent contractor may be exempt from sales tax. Purchases of tangible personal property by a building contractor for use in erecting, adding to, or altering a structure or building or maintaining, servicing or repairing a structure or building owned by a New York governmental entity are exempt when the property is to become an integral component part of the structure or building. In these instances, a contractor who is registered with the Tax Department for sales tax purposes may make tax exempt purchases of such property by presenting vendors with Form ST-120.1, *Contractor Exempt Purchase Certificate*. Generally, purchases of property made by a contractor while performing services for the New York governmental entity where the property is *not* incorporated into real property, structures or buildings owned by the governmental entity are subject to tax.

Examples of exempt and taxable purchases by independent contractors

Example 7: A building contractor who is registered with the Tax Department for sales tax purposes enters into a contract with a New York governmental entity to construct a building. The contractor purchases steel, lumber, and other building materials which will become integral component parts of the completed building. Result: Since the building materials will be used to erect a building owned by New York State and will become part of the structure, the contractor may purchase the materials exempt from sales tax by presenting the vendor with Form ST-120.1, *Contractor Exempt Purchase Certificate*.

Example 8: A New York governmental entity enters into a contract with an excavating contractor to repair damage to a water line located on the governmental entity's property. The contractor rents a bulldozer and backhoe and uses this equipment to complete the repair. Result: Since the rented equipment will **not** be incorporated into the real property owned by the governmental entity, the rental of the equipment by the contractor is subject to sales tax.

Reimbursement for sales tax and fuel excise taxes paid

If an independent contractor performs services for a New York governmental entity and is reimbursed by the governmental entity for its purchases of property, including motor fuel, diesel motor fuel and residual petroleum product, used to perform the services, the contractor is still required to pay sales tax and fuel excise taxes on its purchases, unless the purchases otherwise qualify for exemption. When the New York governmental entity reimburses the contractor for its purchases, the taxes should be included as an expense of the contractor and should also be reimbursed, if provided for in the contract.

New York State Tax Department

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Text Telephone (TTY) Hotline (for persons with hearing and speech disabilities using a TTY): If you have access to a TTY, contact us at (518) 485-5082. If you do not own a TTY, check with independent living centers or community action programs to find out where machines are available for public use.



Telephone assistance

Sales Tax Information Center: (518) 485-2889

To order forms and publications: (518) 457-5431



Persons with disabilities: In compliance with the Americans with Disabilities Act, we will ensure that our lobbies, offices, meeting rooms, and other facilities are accessible to persons with disabilities. If you have questions about special accommodations for persons with disabilities, call the information center.