



**Revenue Ruling
No. 09- 001
September 15, 2009
Sales and Use Tax**

Concerning the Taxability of Certain Transactions by Non-Profit Economic Development Corporations for Use in Economic Development Projects

The purpose of this Revenue Ruling is to provide analysis of transactions for sale or lease and rental taxes of certain property transacted to non-profit Economic Development Corporations (“EDC’s”) and subsequently transferred to for-profit corporations under an economic development project. The issue under review concerns whether or not the EDC is held for the consequential transaction taxes when transactions are not taxed to ultimate user of the property, either due to a specific exemption attributed to the product or an exemption attributed to an activity. This issue is also germane to transactions wherein the property is acquired for the use of a public entity through an EDC. Economic development corporations can be created to facilitate the public/private partnership for private development, and as a private entity the EDC can transact outside of the public bidding process to avoid the limitations imposed thereunder.

Illustrative Scenario

Louisiana Economic Development, a state agency, partners with business and industry providing funding for development projects designed to stimulate growth of business and employment within Louisiana. Economic Development Corporations are non-profit corporations which activities have been sanctioned by the local government where the economic development project is located. A cooperative endeavor agreement (“AGREEMENT”) is entered into between an EDC and another entity, either another non-profit, public entity receiving funding through an EDC pass-through entity, or a for-profit entity. An EDC is authorized to receive public funds through a cooperative endeavor agreement and through that agreement, purchase tangible personal property and/or provide assets to private industry for economic development purposes.

In this factual scenario, a non-profit economic development corporation (“EDC”) is structured as a pass-through entity to receive money from the State of Louisiana through a cooperative endeavor agreement to purchase property and transact with the entity that will ultimately use the property. Manufacturer (“SELLER”) sells product either directly to EDC or to a retailer (“SELLER”), which retailer then re-sells the property to EDC. When EDC is not the END-USER, then both of the above sales transactions to EDC are exempt because the property is for re-sale or lease to a subsequent END-USER. Under the instant scenario, EDC leases the property to a for-profit end-user entity (“END USER”). For purposes of this discussion, the transaction to END-USER is exempt from sales tax or lease tax. The result would be the same if the end-user was a governmental entity being channeled funds through an EDC or a similarly situated non-profit entity which transactions were exempt from taxation.

A Revenue Ruling is issued under the authority of LAC 61III.101 (C). A Revenue Ruling is written to provide guidance to the public and to Department of Revenue employees. It is a written statement issued to apply principles of law to a specific set of facts. A Revenue Ruling does not have the force and effect of law and is not binding on the public. It is a statement of the department's position and is binding on the department until superseded or modified by a subsequent change in statute, regulation, declaratory ruling, or court decision.

A Cooperative Endeavor Agreement is a public record and is subject to the Public Records Doctrine.¹ For purposes of this hypothetical project, the AGREEMENT asserts that the consideration for the lease of tangible personal property by EDC is the sum of one dollar per year.

Summary of transactions between SELLER, NON-PROFIT EDC, and

The STATE OF LOUISIANA

- 1) Manufacturer will sell the equipment to SELLER or to EDC.
- 2) SELLER will sell its purchased equipment to EDC (nonprofit corporation in the Cooperative Endeavor Agreement).
- 3) The STATE will make monthly lease payments to EDC (the actual purchase price of the property or contract). EDC will lease the equipment to FOR-PROFIT END-USER at the rate of \$1 per year. FOR-PROFIT will use the equipment exclusively for EXEMPT ACTIVITY.
- 4) At the end of the lease term between EDC and for-profit END-USER, title and possession of the equipment will revert to the STATE. The STATE will grant, at the end of the lease term, a right of use of the equipment to the for-profit END-USER for an indefinite period.

Legal Analysis

Pursuant to La. R.S. 47:302, the sales tax is imposed on the “sale at retail, the use, the consumption, the distribution, and the storage for use or consumption. . .” in Louisiana of tangible personal property. La. R.S. 47:301(10)(a)(i) provides that “[f]or purposes of the imposition of the state sales and use tax, “retail sale” or “sale at retail” means a sale to a customer or to any other person for any purpose other than for resale as tangible personal property. . . .” (emphasis added). Therefore, a sale for resale does not fall within the definition of “retail sale” or “sale at retail”; however, other sales do.

**Exemptions applicable to the transactions between MANUFACTURER/SELLER, NON-PROFIT EDC, and
the STATE OF LOUISIANA**

- 1) Manufacturer will sell the equipment to SELLER or to RE-SELLER; SELLER or RE-SELLER will sell the equipment or other tangible personal property to EDC.

The transactions of sale from manufacturer(s) to SELLER and/or RE-SELLER are sales for resale; thus, the transactions are excluded from sales tax under La. R.S. 47:301(10)(a):

(i) Solely for the purposes of the imposition of the state sales and use tax, "retail sale" or "sale at retail" means a sale to a consumer or to any other person for any purpose other than for resale as tangible personal property, or for the lease of automobiles in an arm's length transaction, and shall mean and include all such transactions as the secretary, upon investigation, finds to be in lieu of sales; provided that sales for resale or for lease of automobiles in an arm's length transaction must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale or for the lease of automobiles, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax.

¹ Records pertaining to an Economic Development proposal may remain confidential during the phase of “active negotiation,” subject to approval of the Secretary of Economic Development and conditioned upon all requirements being met pursuant to R.S. 44:22 of the Public Records Act. The period of confidentiality during active negotiation may remain open for a period of twelve months, and with additional requisites met, be extended an additional twelve months, but in no case shall exceed twenty-four months. R.S. 44:22B. Active negotiation terminates upon the person deciding to no longer pursue the proposal, the Economic Development Department deciding to no longer pursue the proposal, or when the negotiation is submitted to a public body for public review. R.S. 44:22C.

The transactions of sale from SELLER to RE-SELLER are sales for resale (to EDC); thus, the transactions are excluded from sales tax under La. R.S. 47:301(10)(a), as set forth above.

- 2) SELLER will sell its purchased equipment to EDC (non-profit corporation in the Cooperative Endeavor Agreement).

The transaction(s) from SELLER to EDC are not sale(s) for resale; thus, La. R.S. 47:301(10)(a) will not apply. If the property is being sold by EDC to END-USER for market value, then the transaction falls within the re-sale exemption of La. R.S. 47:301(10)(a) and tax would not be collectible on the transaction from SELLER to EDC.

The Legislature eliminated the requirement previously existing under Louisiana Revised Statute 47:306(B)(1)(a), and there is no longer a duty imposed upon dealers to collect an advance Sales tax on “. . . every manufacturer, wholesaler, jobber, or supplier who sells to anyone for sale at retail any article of tangible personal property, the retail sale of which is taxable under this Chapter. . . .”²

- 3) EDC purchased the tangible personal property and will lease the property to END-USER, for consideration of \$1 per year. However, EDC will be paid monthly a capitalized value of the grant from the State, which will reflect the actual value of the purchased property. END-USER will use the tangible personal property exclusively for EXEMPT ACTIVITY.

Louisiana Revised Statute 47:301(7) defines ‘lease’ as follows:

(7)(a) “Lease or rental” means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or renter, for a consideration, without transfer of the title of such property.

Louisiana Revised Statute 47:301(7)(c) sets forth an exemption within the definition of lease:

(c) The term “lease or rental”, as herein defined shall not mean or include a lease or rental of property to be used in (exempt activity). . .

The lease of the equipment by EDC to END-USER is a lease to a company engaged in EXEMPT ACTIVITY, thus the lease of the equipment from EDC to END-USER is exempt from lease taxes under La. R.S. 47:301(7)(c).

- 5) At the end of the lease term between EDC and END-USER, title and possession of the equipment will revert to the STATE. The STATE will grant END USER right of use of the equipment for an indefinite period.

In summary, the transactions subject to inquiry in Request Nos. 1, 2, and 4 are exempt from payment of sales tax, and the inquiry returns to whether the transaction of purchase of the equipment by EDC from SELLER (Transaction No. 3) is subject to sales or lease tax or exempt under other statutory analysis.

EDC’s Purchase of the Transaction Equipment from SELLER

Is EDC an “instrumentality” of PARISH and thereby excluded from the definition of “person” under La. R.S. 47:301(8)(c)? If EDC is not an instrumentality of PARISH, will it be required to pay any sales tax on any of its purchases or uses of tangible personal property or procurement of taxable services, including its purchases of the Transaction Equipment from SELLER?

² As provided in Act No. 393 of the 2007 Regular Session of the Louisiana Legislature (“Act No. 393”), for tax periods beginning on or after January 1, 2008, any Manufacturer that has annual sales of tangible personal property that average in excess of \$500,000 will not be required to collect or remit any advance sales tax provided that the Manufacturer otherwise satisfies the requirements set forth in Act No. 393. For all transactions that take place on or after January 1, 2009, no advance sales tax collection or remitting will be required for qualified Manufacturers.

As stated above, La. R.S. 47:301(10)(a)(i) provides that “[f]or purposes of the imposition of the state sales and use tax, “retail sale” or “sale at retail” means a sale to a customer or to any other person for any purpose other than for resale as tangible personal property. . .” (emphasis added). Therefore, a sale for resale does not fall within the definition of “retail sale” or “sale at retail”. Under the facts presented, there is no intent by EDC to sell the property to END USER; therefore, the sale by SELLER to EDC is not a sale for resale and is a retail sale unless it is otherwise excluded from the above statute.

Since there is no qualification of ‘purpose’ that will exempt the sale or use in question, i.e., the statute states that any purpose qualifies under the statute, the only other exemption that might re-characterize the transaction from one of “retail sale” or “sale at retail” to exempt status would be if it is found that EDC is not “a customer or any other person”.

For sales tax purposes, a “person” is defined in La. R.S. 47:301(8), in pertinent part, as follows:

(a) “Person”, except as provided in Subparagraph (c), includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any parish, city and parish, municipality, district or other political subdivision thereof or any board, agency, instrumentality, or other group or combination acting as a unit, and the plural as well as the singular number.

* * *

(c) For purposes of the payment of the state sales and use tax and the sales and use tax levied by any political subdivision, “person” shall not include this state, any parish, city and parish, municipality, district, or other political subdivision thereof, or any agency, board, commission, or instrumentality of this state or its political subdivisions. . . .

It is certain that EDC is not “[the] State, [a] parish, city or parish municipality, district, or other political subdivision thereof, or any agency, board, or commission. . .”. However, EDC urges that it is an instrumentality of PARISH by virtue of the fact that it is a nonprofit Economic Development Corporation³ approved by PARISH pursuant to La. R.S. 33:9022 *et seq.* and part of a “Cooperative Endeavor Agreement” which uses funds of the STATE to promote public purposes. EDC asserts that no definition of “instrumentality” exists in Louisiana law and thus reliance upon dictionary definitions is required. The Department rejects this contention.

Federal and state case law has long recognized the status of “instrumentality of the government” or “instrumentality of the state” and identifies the qualities that are evaluated to make such determinations. Indeed, even the Louisiana Constitution sets forth the idiom “the state or any instrumentality thereof. . .”, *La. Const. art. 10 § 1(A)*, and the Louisiana Supreme Court and its appellate courts have developed an evaluative process to determine whether the orbit of powers or functions exercised by an entity are that of

³ Louisiana Revised Statute 33:9024(B) describes an EDC as follows:

An economic development corporation organized under the provisions of this Chapter is a private, nonprofit corporation and is prohibited from functioning as an agency of the state or of any political subdivision of the state, and its directors, officers, or employees are prohibited from functioning as and are not to be considered to be public employees for any purposes whatsoever, and neither the state of Louisiana nor any agency or subdivision of the state may assign to any economic development corporation so organized any of the normal powers of government, including the following:

- (1) The power to impose or collect taxes or fees.
- (2) The power to license or to exercise governmental regulatory authority over any person or entity.
- (3) The power to carry out, or to employ or contract with persons to carry out, any governmental function which is purely and solely of a public nature.

an instrumentality of the state or otherwise. Authoritative or primary sources of law are legislation and custom. *La. C.C. art. 1*. As further stated in the 1987 Revision Comments:

They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom.

There are entities that have or have not been identified as such instrumentalities through a plethora of cases; therefore, there is existing definition to the quality of being such an entity. That said, the Department will not rely upon the common definition of the word “instrumentality” as found in *Black’s Law Dictionary* (or other source of common usage) as it cannot provide the integrity of definition as have been provided by the courts through legal analysis for the legal term “instrumentality of the state”. Further, the legal term “instrumentality of the state” has broader application than that of mere sales tax law, and is appropriately recognized as determined by the exercise of powers or functions of an entity, not upon the discreet character of taxation or tax laws. As such, an analysis related to a determination of whether an entity is an instrumentality of the state concerns the broad analysis of executive, legislative, and even constitutional authorities and the relationship of those to public and private rights or obligations.

An Instrumentality of the State or Local Government Defined

Louisiana law defines the term “instrumentality of the state” in its narrowest context, though the factors for such analysis for determining “instrumentality” of the state are similar or the same as determining “agency”⁴. The Louisiana Supreme Court case of *Polk v. Edwards*, (93-CA-0362) 626 So.2d 1128 (La. 8/20/93) is particularly illuminating in that the enabling act creating the “Casino Act” specifically excluded the Louisiana Economic Development and Gaming Corporation⁵ (“Casino Corporation”) from being considered an ‘agency’, and the *Polk* court was called upon to determine if it was an instrumentality of the state. Similarly, in the instant matter, economic development corporations are specifically prohibited from being recognized as agencies of the state or any subdivision of the state, La. R.S. 33:9024(E)(1), and this Revenue Ruling determines if such economic development corporations, which is the corporate status of EDC, are instrumentalities of the local government under which authority they are created.

In *Polk v. Edwards*, citizens filed an action challenging the constitutionality of four statutes authorizing the licensing of gaming operations in Louisiana. The Casino Corporation was created, and the legislation authorized the Corporation to establish and maintain a personnel program. Those personnel were specifically excluded from the Louisiana State Civil Service System. La. Const. art. 10, § 1(A) requires that employees of an instrumentality of the state be recognized as belonging to state civil service system. *Polk* asserted that the corporation was an instrumentality of the state and, with the Corporation’s employees denied civil service classification, the Act unconstitutional.

The trial court reviewed those factors found both to designate the corporation as an entity recognized and created by government so as to have some responsibility toward the public or government, and those factors found to establish powers and functions interrelated with government. As to the first category, of which most if not all could be classified as ministerial duties, *Polk* recognized that the Corporation had been created by the state; the governor appointed the board, the chairman of the board, and could remove for cause; that it was established to advance the interests of the state and to carry out a public purpose; and that the Corporation was subject to legislative audit and oversight.

⁴ See *Bankston v. Board of Ethics for Elected Officials*, (No. 98-C-0189) 715 So.2d 1181 (La. 6/22/98); *Slowinski v. England Economic and Industrial Development District*, (No. 2002-C-0189) 828 So.2d 520 (La. 10/15/02).

⁵ “Louisiana Economic Development and Gaming Corporation Act”, Acts 1992, No. 384, §1, eff. June 18, 1992. Redesignated from La. R.S. 4:601 by Acts 1996, 1st Ex. Sess., No. 7, §3, eff. May 1, 1996.

However, as to the second category, the district court found substantively greater than mere ministerial duties, which included the transfer of some governmental powers and restraints. The *Polk* district court found that the Corporation was owned by the State; that all officers and employees were engaged full-time and could not engage in any other occupation for remuneration while working for the corporation; and, the employees were subject to suspension, dismissal, reduction in pay, demotion, transfer, or other personnel action. Most significantly, the Casino Act granted to the Corporation and its board of directors extensive power to conduct gaming operations in general: the board was empowered to adopt rules for the conduct of specific games and gaming operations, including the types of games to be conducted, the granting of credit to a person, and special procedures for making and soliciting requests for major procurement; the Corporation was subject to the public bid law for purchases over \$100,000 or special procedures adopted by the Corporation; all rules, regulations, or special procedures of the board would include legislative oversight and publication of notice of intent in accordance with the Administrative Procedures Act; the Corporation was authorized to conduct hearings, issue subpoenas, and to compel the attendance of witnesses, and to punish as contempt the failure to obey its orders.

The Supreme Court upheld the finding of the district court that the Corporation was an instrumentality of the state, *Polk* at 1147:

It has been held that such broad regulatory powers could not be delegated to a private or non-governmental agency. *State Licensing Board of Contractors v. State Civil Service Comm'n*, 119 So.2d 847, 849 (La. App 1st Cir. 1959) *aff'd*, 240 La. 331, 123 So.2d 76 (1960). . .

After considering its powers and functions, as well as the interrelationship with the state in many areas, we find that the Casino Corporation is an instrumentality of the state and is subject to the provisions of the civil service system. The Casino Corporation does not enjoy an existence separate from the state. It does not independently transact its business and hire its personnel. Furthermore, its actions determine the progress of the gaming industry, which the legislature has designed to assist the growth of tourism and generate revenue as a benefit to the general welfare.

In the instant matter, the EDC is owned by private parties, the entity can own property and does (or will) own the equipment being acquired through the transactions, and no power or function of government has been accorded to EDC. Merely directing payments to EDC for payment to another entity within the cooperative endeavor agreement does not rise to the level of “power or function” of government so as to render the nonprofit corporation an “instrumentality of the state or other local government.” In fact, La. R.S. 33:9024(B) specifically excludes such transfer of power or function to a nonprofit economic development corporation, and states:

An economic development corporation organized under the provisions of this Chapter is a private, nonprofit corporation and is prohibited from functioning as an agency of the state or any political subdivision of the state, and its directors, officers, or employees are prohibited from functioning as and are not to be considered public employees for any purpose whatsoever, and neither the state of Louisiana nor any agency or subdivision of the state may assign to any economic development corporation so organized any of the normal powers of government, including the following:

The power to impose or collect taxes or fees.

- (1) The power to license or to exercise governmental regulatory authority over any person or entity.

- (2) The power to carry out, or to employ or contract with persons to carry out, any governmental function which is purely and solely of a public nature. [Emphasis added.]

Louisiana Revised Statute 33:9024 (E) further states:

Economic development corporations are not agencies of the state, nor of any subdivision of the state, and are prohibited from exercising governmental powers or carrying out functions which are purely and solely of a public nature.

Thus, even though excluded as being termed “agency” of the state or local government, the finding of “instrumentality” is determined by analysis of the same or similar factors. As to nonprofit economic development corporations, the legislature has determined that they are private entities unauthorized to hold public power or function such as to render it an instrumentality of government.

In *Slowinski v. England Economic and Industrial Development District*, (No. 2002-C-0189) 828 So.2d 520 (La. 10/15/02), the Louisiana Supreme Court examined again the relationship of powers of an entity for the purpose of determining whether it was an ‘instrumentality’ of the state. In 1992, the federal government closed England Air Force Base to the devastation of the local economy of Rapides Parish. The Louisiana State Legislature created the England Economic and Industrial Development District (“EEIDD”) to facilitate the transition from the closure to a viable local economy. EEIDD was sued on employment matters and plaintiffs urged that it was an instrumentality of the state. The Supreme Court reversed both the district and appellate courts to find that it was not. The Court set forth the issues at 523:

. . . this Court must determine (1) whether EEIDD is “an arm of the state” or state agency, or (2) whether EEIDD is sufficiently detached from the state that is more local and autonomous in nature, similar to a parish or municipal government. This determination requires a fact intensive inquiry, investigating the entity's powers and functions, as well as its interrelationship with the state. *Polk*, 626 So.2d 1128 (La.1993); *State Licensing Board of Contractors v. State Civil Service Commission*, 123 So.2d (La.1960). Additionally, we find factors such as the geographic scope and level of autonomy are helpful in investigating the “relationship” prong of the analysis. *Anderson v. Red River Waterway Commission*, 231 F.3d 211 (5th Cir.2000).^{FN2}

FN2. In *Anderson*, the court addressed the issue of whether the Red River Waterway Commission was an “arm of the state” entitled to Eleventh Amendment immunity. Although *Anderson* did not directly address whether a public entity was an instrumentality of the state for purposes of state civil service, we find its analysis useful in examining a political subdivision's connection to the state. The Court of Appeals in *Anderson* used six factors as a guide in the determination of whether an entity is an arm of the state: (1) whether the state statutes and case law characterize the agency as an arm of the state, (2) the source of funds for the entity, (3) the degree of local autonomy the entity enjoys, (4) whether the entity is concerned primarily with local, as opposed to statewide, problems, (5) whether the entity has authority to sue and be sued in its own name, and (6) whether the entity has the right to hold and use property. *Id.* at 214.

Significantly, and in direct contradiction to the statutes at issue in the instant matter, the court cited EEIDD’s enabling legislation, which is set forth at 527:

The exercise by the board of the powers conferred by this Subpart shall be deemed and held to be *essential governmental functions of the state*. As the exercise of the powers granted hereby will be in all respects for the *benefit of the people of the state*, for the increase of their commerce and prosperity, and for the improvement of their health and

living conditions, the district shall not be required to pay any taxes, including, but not limited to, sales and use taxes, ad valorem, occupational licencing [sic], income, or any other taxes of any kind or nature....(emphasis in original).

The Supreme Court then opined, at 527:

Admittedly, phrases such as “essential governmental functions of the state” and “for the benefit of the people of the state” could be construed to imply a legislative intent for EEIDD to be considered a state instrumentality. However, we are more persuaded by the legislature's omission of an express declaration that EEIDD shall be considered an instrumentality of the state.

Hence, not only was it most significant that the entity be exercising essential governmental functions of the state for the benefit of the people of the state, it simply was not enough for the Supreme Court to deem the entity an ‘instrumentality of the state’. The comparison of the instant matter is not contravened in that the entity was considered to be similar to a “unit of local government”. The determination was made by analysis of several factors, though the factors were not in and of themselves exclusive to the determination. Essential in the analysis were the public powers and functions accorded to the created entity, and the relationship with the public source of power. EDC is organized under Chapter 2 of Title 12 of the Revised Statutes of 1950 as a private nonprofit corporation. Its powers would encompass any lawful activity for which private corporations may be formed under that chapter. As such, it has the power to sue and be sued, and the power to own movable and immovable property. Nowhere pursuant to Title 12, Chapter 2, or the entity’s Articles of Incorporation or its Bylaws is it required to purchase property pursuant to the Public Bid Laws, or is it subject to following the Administrative Procedures Act for any activities that it engages in. It has no regulatory authority, and it has been accorded no authority to exercise any governmental power or function. It functions to channel money from the State of Louisiana to other private entities.

It is also interesting that the Supreme Court found that even though the entity was exempt from all state taxes, that fact failed to support a finding that it was an ‘instrumentality’ of state government. “[W]e can find nothing in the Louisiana Revised Statutes, Civil Code, or even the jurisprudence that states that tax exempt status equates to being a state instrumentality.” *Slowinski*, at 526.

In *Bankston v. Board of Ethics for Elected Officials*, (No. 98-C-0189) 715 So.2d 1181 (La. 6/22/98), the Louisiana Supreme Court visited additional issues related to the legal status of entities asserted to be instrumentalities or agencies of the state. In reaching its conclusion that the entity of that inquiry was not a public entity, the Court relied upon its reasoning in an earlier case, *State v. Smith*, to find that the contractual relationship between the public entity source of funds and other factors did not re-characterize the legal status of a private nonprofit corporation into a public entity. The Court stated, at 1184-1185:

In *State v. Smith*, 357 So.2d 505 (La.1978), this Court was called upon to determine whether Community Advancement, Inc., a community action agency, was a state, or public, agency. This Court identified several factors that should be used in determining whether or not an entity should be so classified. Those factors were the following: (1) the entity was created by the Legislature; (2) the powers were specifically defined by the Legislature; (3) the property of the entity belonged to the public; and (4) the entity's functions were exclusively of a public character and performed solely for the public benefit. *Smith*, 357 So.2d at 507.

In *Smith*, we noted that a continuing theme running through the jurisprudence which had previously addressed this issue was that entities which were classified as state agencies were either created by the Legislature or established by the Constitution. *Id.* Consequently, in *Smith*, we declined to hold that Community Advancement, Inc. was a state agency for the reason that it was not legislatively created. In reaching this

conclusion, we noted that Community Advancement, Inc. had not been established by some special act of the Legislature, but rather that it was established by corporate charter in compliance with general state corporations law. Moreover, we noted that the federal Economic Opportunity Act, which authorized federal financial assistance for community action programs, contemplated that a private nonprofit agency could be a community action agency as defined in the federal statute.^{FNS} We additionally found that Community Advancement, Inc.'s relationship with East Baton Rouge Parish, by which it was designated a community action agency, was contractual, and that the flow through of public funds was not enough to transform Community Advancement, Inc. into a public agency.

Cooperative Endeavor Agreements Do No Render a Participant Nonprofit Corporation an Instrumentality of the State or Local Government

“Economic development is a legitimate concern of government because it serves the public interest, but it is not purely and solely a public purpose, since successful economic development serves the private interests of business and industry as much as the public interest.” La. R.S. 33:9021(7). With this statement, the legislature has definitively set forth the limitations that are accorded to economic development, and have identified it as merely an ‘interest’ of governmental entities. Nowhere in 33:9020 *et seq.* does the legislature announce that ‘economic development’ is a function of the government. In fact, La. R.S. 33:9021⁶ merely recognizes the abilities of the government to address this matter of public concern through partnership with private enterprise.

⁶Louisiana Revised Statute 33:9021 provides as follows:

It is hereby found and declared that:

- (1) There exists in some of the regions, parishes, and municipalities of the state a condition of substantial and persistent unemployment, underemployment, and other forms of economic distress.
- (2) Such unemployment, underemployment, and other forms of economic distress cause hardships to many individual citizens of the state and their families, waste invaluable human resources, and adversely affects the welfare and prosperity of the people.
- (3) The maintenance of the economy of the several local governmental subdivisions of the state at a high level is necessary to overcome these problems and is vital to the best interest of the state.
- (4) The maintenance of the economy of the several local governmental subdivisions of the state at a high level is a matter of public policy and the cooperative economic development activities and powers prescribed and conferred by this Chapter are for a public purpose for which public money may be expended.
- (5) As the maintenance of the economies of said local political subdivisions at a high level is found and declared to be a public purpose, the state’s assistance to areas and regions of substantial and persistent unemployment, underemployment, and other forms of economic distress is necessary for the employment of effective steps in the planning, promotion, and financing of local economic development.
- (6) State authorization to local governmental subdivisions, public corporations, and public benefit corporations to engage in cooperative endeavors with each other, the United States or its agencies, or with any public or private associations, corporations, or individuals for the purpose of economic development would help said local governmental subdivisions to alleviate the conditions of unemployment, underemployment, and other forms of economic distress presently existing in their areas, and as such, is in the public interest.
- (7) Economic development is a legitimate concern of government because it serves the public interest, but it is not purely and solely a public purpose, since successful economic development serves the private interests of business and industry as much as the public interest.
- (8) Public-private partnerships which take advantage of the special expertise and experience of representatives of the private sector can be among the most effective programs to encourage and maintain economic development.
- (9) The economic development needs of the state of Louisiana require the existence of entities which can function as public-private partnerships, taking advantage of the congruence between the public interest and the interest of business and industry.
- (10) It is in the best interest of the state of Louisiana and of its regions, parishes, and municipalities to encourage, create, and support public-private partnerships and to permit and encourage participation by representatives of

There is one singular purpose to be accomplished by the state legislature declaring economic development to be of public policy and of interest to the welfare of the government (as distinct from a function of the government). The State of Louisiana and its political subdivisions are strictly prohibited by La. Const. art. 7 § 14 from loaning, pledging, or donating the funds, credit, property, or things of value of the state or any political subdivision to any person, association, or corporation, public or private. Without the declaration that 'economic development' is a 'public purpose', the granting of public funds to a private entity is strictly prohibited. Thus, the purpose of La. R.S. 33:9021 is to create a means by which public monies can be granted to private interests without violating the Louisiana constitution.

The granting of public funds to another public or private corporation can only be accomplished through the 'cooperative endeavor agreement', which is a contractual arrangement between a governmental entity and a public or private corporation. The contractual arrangement contains conditions to ensure that a public purpose is achieved through the granting of public monies or property. However, nowhere in La. R.S. 33:9021 does the legislature convert a private corporation into an 'instrumentality' of state or local government because it, or in tandem with other private interests, has agreed to perform some activity which benefits the public. In fact, the statute clearly and expressly limits the character of the arrangement to one of a public-private "partnership". Thus, the legislature has spoken only to the character of the arrangement in La. R.S. 33:9021, not to the characterization or re-characterization of the private corporation. Requestors cannot attach such significant legal authority to the character of EDC, or any other nonprofit economic development corporation.

In numerous instances, legislative enactment or other law establishes the characterization or classification of an entity. The absence of a legislative or constitutional pronouncement declaring an entity as agency or instrumentality of the state is compelling. It is even more compelling when the legislative pronouncement declares that a particular entity is not an 'agency of the state'. In the instant matter, the legislature has clearly spoken as to how it deems an economic development corporation. The activities of such a corporation do not approach the standards required to be deemed a public entity, which would include being deemed an instrumentality of the state.

An 'agency' or 'instrumentality of the state' may possess similar or diverse attributes of control by the governmental authority over it and may have varying degrees of authority accorded to it. The courts analyze the obligations, responsibilities and degree of governmental authority the entity is authorized to exercise to determine its classification. Critical to find an entity an 'agency' or 'instrumentality' of the state are the factors showing that the entity is either empowered to act as the government or required to act as the government. Thus, being required to act as the government would include the requirement to follow the Public Bid Law or to operate under the constrictions of a civil service system. Being empowered to act as the government would include such activities as authority to implement and enforce governmental regulations upon private parties. Alone, the ability to accept monies and make payments does not rise to a standard of exercising governmental acts, regardless of the public good that may result. EDC cannot be considered an 'instrumentality of the state' based upon legislative enactment and established case law.

Instrumentalities Are Not Immune From Taxation

Even if it could be said that EDC was an instrumentality of the State or local government, which it cannot, then the state sales tax would still apply under prevailing law of the U.S. Supreme Court and the Louisiana Supreme Court. "The exemption of instrumentalities of the state or federal government from taxation does not extend to anything outside of governmental functions." *State v. Whitney National Bank of New Orleans*, 189 La. 211, 179 So. 84, at 86 (Jan. 10, 1938) *rehearing denied*, citing *Indian Motorcycle Co. v. U.S.*, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277.

Whitney, at So.86:

Under the doctrine laid down in the case of *Trinityfarm Construction Co. v. Grosjean, State of Louisiana*, 291 U.S. 466, 54 S.Ct 469; 78 L.Ed 918, (03/05/1934), the immunity from taxation does not apply where the tax at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. This same doctrine was followed in *Alward v. Johnson*, 282 U.S. 509, 51 S.Ct. 273, 75 L.Ed 496.

In the case *Helvering v. Powers*, 293 U.S. 214, 55 S.Ct., 171, 174, 79 L.Ed 291, the court, after reviewing the case of *South Carolina v. U.S.*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed 261, stated: ‘We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the state, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the state.’

Whitney, at La. 218, So. 86.

“Necessary, immediate, or direct” does not describe the transaction of purchasing or leasing equipment for ultimate use by a for-profit corporation, END USER. The state in this instance has agreed to provide economic assistance to the FOR-PROFIT corporation to encourage certain employment goals be met by the FOR-PROFIT corporation.

The business of END USER, in this example that of a for-profit corporation, or the establishment of a nonprofit corporation to distribute public funds, or being part of a cooperative endeavor agreement which purpose is specifically stated to be that of “private-public partnership” is of a sort normally within the reach of the state taxing power, and is distinct from the usual governmental functions. “. . .[E]conomic development corporations are intended to operate as public-private partnerships. . .”. La. R.S. 33:9024 (C)(1). Under the rationale of *Whitney*, the operation of a for-profit company or a nonprofit corporation is not the exercise of a power necessary to carry on the business for which state or local governments are established and the carrying on of such business is not beyond the taxing power of the state.

EDC asserts that “[a]ny sales tax levied against an EDC results in a direct reduction in the State’s appropriation of funds to alleviate the identified economic distress present in the political subdivision.” This is a legally unjustified argument in support of designating a private nonprofit corporation an instrumentality of the government. To the contrary, EDC is merely increasing the amount of the public grant of monies by demanding that it be exempt from sales tax, which increase in grant of public funds was not part of the agreement. END USER, the ultimate user, is obtaining use of government purchased equipment for the cost of \$1 per year. It enjoys exemption from lease tax by statute for this equipment. However, EDC is required to pay the sales tax on the purchase of the equipment. The parties to the cooperative endeavor agreement may contractually arrange their affairs in the manner that they choose.

It is noted at this point that no Louisiana non-profit corporation engaged in a cooperative endeavor agreement is excluded or exempted from sales or lease taxes on its purchases or leases. In fact, under two other well established programs for economic development which target underemployment and economic distress in communities, the Quality Jobs Program and Enterprise Zone Program, there is no exemption from sales taxes for purchases made by the companies who engage in these economic development programs. Both of these programs afford those corporations operating under its guidelines and within its rulemaking to obtain sales tax rebates for a period of two years when all conditions of their agreements on employment and/or investment are met.

Finally, La. R.S. 301(18)(a)(iii) provides an exemption on equipment used for re-lease, and states in pertinent part:

The term "use", for purposes of sales and use taxes imposed by the state on the use for rental of automobiles which take place on or after January 1, 1991, and by political subdivisions on such use on or after July 1, 1996, and state sales and use taxes imposed on the use for lease or rental of tangible personal property other than automobiles which take place on or after July 1, 1991, shall not include the purchase, the importation, the consumption, the distribution, or the storage of tangible personal property to be leased or rented in an arm's length transaction as tangible personal property. . . . Beginning July 1, 2002, for purposes of the imposition of the tax levied by any political subdivision of the state, the term "use" shall not include the purchase, the importation, the consumption, the distribution, or the storage of any tangible personal property which is to be leased or rented in an arm's length transaction in the form of tangible personal property.

Because the equipment was leased by EDC to END USER for a consideration of one dollar per year, it is not an 'arms-length transaction' as contemplated by the statute. Thus, this exemption cannot be applied in the instant matter.

Conclusion

Based upon the significant findings of the Louisiana Supreme Court in numerous decisions, and the facts as they are presented in this matter, it is determined that EDC, a nonprofit economic development corporation, is not an instrumentality of the State of Louisiana or of any other political subdivision of the state. No distinction can be found in any authority to conclude that the analysis applied to EDC should differ from any other entity evaluated to determine its public status. Since EDC is not an 'instrumentality' of the state or other political subdivision, EDC is a "person" pursuant to La. R.S. 47:301(8) and the transaction is subject to sales tax. Further, the purchase is not exempt under La. R.S. 47:301(18)(a)(iii) as the transaction between EDC and END USER, in that it is made for less than market value, is not one at 'arms length'. Thus, the sale from SELLER to EDC is not exempt from sales taxes. Any other obligations present for collection of sales taxes due would apply.

The assertion that sales taxes levied against an EDC results in a direct reduction in the State's appropriation of funds for 'public purposes' is legally incorrect. In actual fact, to grant a tax exemption to the EDC transactions circumvents the legislature's well-constructed policies of the Economic Development Act and acts to increase the amount of the public grant of monies not intended by the grantor, in this case the State of Louisiana.

The Department has previously expressed a similar conclusion in Revenue Ruling 01-009, published on October 8, 2001.

If you should have any questions or need additional information, please contact the Policy Services Division at (225) 219-2780.

Sincerely,

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