

# Rulings of the Tax Commissioner

**Document Number:** 14-15  
**Tax Type:** Retail Sales and Use Tax  
**Brief Description:** Indefinite Delivery Contract: True Object  
**Topics:** Government Contractor; Property Subject to Tax; Taxable Transactions; Taxable Income  
**Date Issued:** 02/03/2014

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February 3, 2014

Re: § 58.1-1821 Application: Retail Sales and Use Tax

Dear \*\*\*\*\*:

This is in response to your letter submitted on behalf of \*\*\*\*\* (the "Taxpayer") in which you request a reconsideration of the prior determination issued to the Taxpayer. The Department has spent a great deal of time reviewing and evaluating the issues in this case. I apologize for the extended delay in responding to your request.

## FACTS

The Taxpayer is a systems integrator that develops and implements systems solutions for agencies of the federal government. The contested purchases relate to the \*\*\*\*\* (the "System"). The purchases were made pursuant to a contract ("System Contract") between the Taxpayer and the \*\*\*\*\* (the "Federal Agency") regarding the System. The Taxpayer is requesting a reconsideration of the determination issued by the Tax Commissioner on June 11, 2009. The Taxpayer states that the determination is based on two key findings that are not supported by the facts or Title 23 of the Virginia Administrative Code (VAC) 10-210-693.

## DETERMINATION

### Finding #1: Indefinite Delivery Contract

The Taxpayer maintains that the Tax Commissioner's determination that the contract at issue is not an indefinite delivery contract is incorrect. The Taxpayer states that the determination correctly recognized that the Taxpayer is a U.S. General Services Administration (GSA) Schedule contractor, and the Federal Agency acquired goods and services under the GSA Schedule. However, the

Taxpayer maintains that the Department incorrectly concluded that these facts do not make the System Contract between the Taxpayer and the Federal Agency an indefinite delivery contract.

*Virginia Code* § 58.1-602 defines sale as:

Any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property and any rendition of a taxable service for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication, and the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

In this instance there are two contracts to be considered - the contract between the Taxpayer and the GSA, and the System Contract between the Taxpayer and the Federal Agency. The contract between the Taxpayer and the GSA is used for the procurement of goods and services by Federal government agencies. This contract is the vehicle through which the Taxpayer became a GSA Schedule contractor. Under this contract, there is no sale of tangible personal property or taxable sale of a service as considered in the *Va. Code* § 58.1-602 definition of sale. Additionally, there is no exchange of consideration with respect to this contract.

The System Contract is the contract through which the Taxpayer sells goods and services to the Federal Agency, as considered in *Va. Code* § 58.1-602. As a result of the System Contract, the Federal Agency purchases goods and services for a consideration from the Taxpayer. It is through this contract that the transactions assessed in the audit originated. Accordingly, it is the Systems Contract, not the contract between the Taxpayer and the GSA, that must be evaluated to determine the application of the retail sales and use tax.

As stated in the prior determination, the System Contract is not deemed an indefinite delivery contract for the purposes of the audit at issue or for this redetermination. Based upon a review of the information provided by the Taxpayer, I do not find a reason to hold otherwise. If all contracts between vendors and government agencies were reviewed in the context of the GSA Schedule through which the goods and services were procured, then all such contracts between vendors and government agencies would be deemed indefinite delivery contracts. While I am certain that some contracts of this nature are in fact indefinite delivery contracts, I am equally certain that not all of them are.

## Finding #2: True Object

The Taxpayer maintains that an additional review of the System Contract demonstrates that the System Contract is indeterminate in nature. The Taxpayer further maintains that the true object of the various modifications and orders placed by the Federal Agency must be analyzed to determine the application of the sales and use tax. The System Contract at issue was entered into on June 28, 2002, with an effective date of July 1, 2002.

On October 6, 2008, a revised government contractor regulation went into effect. The revisions, in part, provided guidance with respect to indeterminate delivery/indeterminate quantity (ID/IQ) contracts. Prior to October 6, 2008, Title 23 10-210-693 read as follows:

The appropriate tax treatment of purchases of tangible personal property by persons who contract with the federal government, the state or its political subdivisions, is based upon whether the contract is for the sale of tangible personal property (e.g., a computerized data retrieval system) or for the provision of an exempt service (e.g., facilities management of real property construction). If a contract is for the sale of tangible personal property, a contractor may purchase such tangible personal property exempt from the tax using a resale exemption certificate, ST-10. The tangible personal property may be resold to the government exempt of the tax.

However, if a contract is for the provision of services, the contractor is deemed to be the taxable user and consumer of all tangible personal property used in performing its services, even though title to the property may pass to the government or the contractor may be fully and directly reimbursed by the government, or both.

In Public Document (P.D.) 01-6 (1/4/01), the government contract at issue was deemed an ID/IQ contract. It was determined that the underlying ID/IQ contract provided little evidence of the government's true object. Accordingly, the application of the sales and use tax in that instance was based on individual delivery orders and not on the contract at issue.

In this instance, the System Contract has not been deemed an indeterminate delivery contract. Accordingly, Title 23 VAC 10-210-693, as it existed at the time of the effective date of the contract governs. Based upon the terms of the SOW, which provides the scope of the support services to be provided, and for the reasons stated in the prior determination, the System Contract is deemed a contract for the provision of services. Accordingly, the Taxpayer is liable for the tax on purchases of tangible personal property used in the provision of such services. Because the

System Contract was entered into prior to the effective date of the revised government contractor regulation, and because the System Contract is not an indeterminate delivery contract, the application of the tax cannot be based upon the true object of task and/or delivery orders. The information provided in the Taxpayer's reconsideration is insufficient to warrant a change in the prior determination issued to the Taxpayer.

### CONCLUSION

Based upon the information and explanations provided in the Taxpayer's request for reconsideration, I do not find that the prior determination was made based upon a misunderstanding of the facts. Accordingly, with respect to the issues addressed herein, the determination previously issued is upheld. Based upon the prior determination, the assessment has been revised. A revised bill, with interest accrued through July 2, 2009, will be mailed shortly to the Taxpayer. No further interest will accrue provided the outstanding assessment is paid within 30 days from the date of the bill. The Taxpayer should remit payment to: Virginia Department of Taxation, 600 E. Main Street, 23<sup>rd</sup> Floor, Richmond, Virginia 23219, Attn: \*\*\*\*\*. If you have any questions concerning payment of the assessment, you may contact \*\*\*\*\* at \*\*\*\*\*. This is the final time the Department will address the tax assessment for the audit period at issue.

The *Code of Virginia* section, regulations and public document cited are available on-line at [www.tax.virginia.gov](http://www.tax.virginia.gov) in the Laws, Rules and Decisions section of the Department's web site. If you have any questions about this response, you may contact \*\*\*\*\* in the Office of Tax Policy, Appeals and Rulings, at \*\*\*\*\*.

Sincerely,

Craig M. Burns  
Tax Commissioner

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