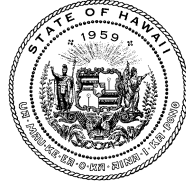


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DEPUTY DIRECTOR

January 16, 2013

LETTER RULING 2013-01

[Redacted Text]
[Redacted Text]
[Redacted Text]
[Redacted Text]
[Redacted Text]

Re: Application of Section 237-29.53, HRS to certain activities of
[Redacted Text]

Dear [Redacted Text]:

This responds to your letter request of [Redacted Text], 2011, through your representative, [Redacted Text] as supplemented by the email of [Redacted Text], 2012 and transmittal of [Redacted Text], 2013, requesting a ruling from the State of Hawaii Department of Taxation (the "Department") on whether under the facts and circumstances of this matter, the gross income [Redacted Text] (the "Company") is exempt from the general excise tax pursuant to Section 237-29.53, Hawaii Revised Statutes.

SHORT ANSWER

Based on the information contained in your letter request, the provision of services in connection with an Environmental Impact Statement (EIS) issued for real property that is **not** located in Hawaii is consumed out of state and thus is subject to the exported services exemption contained in §237-29.53, HRS.

FACTS REPRESENTED BY THE COMPANY

[Redacted Text] Joint Venture is a joint venture between [Redacted Text], a [Redacted Text] corporation with its headquarters in [Redacted Text], and [Redacted Text], a [Redacted Text] corporation with its headquarters in [Redacted Text], and was formed to engage in the business of environmental consulting. The Taxpayer has entered into a contract with the United States Department of Defense ("DoD"), through the [Redacted Text] (the "Navy"). The contract covers the preparation of one or more EISs for certain DoD training locations in the [Redacted

Text] region.

An EIS is required under the federal National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and requires federal agencies to prepare environmental documentation prior to making a decision to conduct an action that may have a significant impact on the environment. Generally, an agency may either prepare an Environmental Assessment or an EIS describing the proposed action and its potential environmental impacts. These documents focus on the geographic location of the proposed action and typically include facts generated by studies conducted in that geographic area. An EIS is written when the agency determines there is a probability that impacts to the environment will occur if the proposed action goes forward. The EIS is part of the process that allows a senior federal decision maker to make an informed decision concerning the alternatives to the proposed action, the nature of environmental impacts, and any mitigation measures which may be required.

The Company's contract with the DoD is just a general framework, with the specific requirements of the work to be done to be set forth in one or more Statement of Work documents.

The EISs to be prepared by the Company relates to DoD training activities that will take place in a variety of locations across the **[Redacted Text]** region, including but not necessarily limited to the **[Redacted Text]**, **[Redacted Text]**, and **[Redacted Text]**. The DoD contract will require the Taxpayer to analyze the impact of proposed training activities on the physical environment and natural resources in various specific areas. The Taxpayer will collect data regarding the existing baseline environment and analyze the potential impact of proposed activities. The study will include documentation relating to both terrestrial and marine natural resources, cultural resources, physical resources, land use regulations, socioeconomic factors, legal issues, transportation, utilities and infrastructure issues.

The specific site areas which are the subject of the first Statement of Work are on the island of **[Redacted Text]** in **[Redacted Text]**, on **[Redacted Text]** in **[Redacted Text]**, and in **[Redacted Text]**. There are no sites within the State of Hawaii included within the scope of the existing Statement of Work. It is anticipated that additional sites will be identified in subsequent Statement of Work documents. These additional sites may – or may not – include sites in Hawaii.

The contract for the EIS is being administered by Navy personnel located in Hawaii. Delivery of the final EIS, and the various studies and analyses appended to it, will be made by electronic means, and at least some of the DoD/Navy personnel receiving that transmission are expected to be in Hawaii at the time of receipt. For certain briefings, the Taxpayer is also required to provide hard copies – the hard copies may be delivered in either Honolulu or Washington, D.C., depending on the meeting location.

The actual work of preparing the EIS will be done in a variety of locations. The existing

Statement of Work provides that the Taxpayer should anticipate approximately six (6) site visits of five (5) days each, with at least two (2) site visits each to the [Redacted Text], [Redacted Text] and [Redacted Text]. Much of the actual writing of the reports and studies will be done at various locations including [Redacted Text]'s headquarters in [Redacted Text], [Redacted Text], [Redacted Text]'s headquarters in [Redacted Text], and at office(s) of consultants and/or subcontractors who may be located virtually anywhere in the world.

The Company has agreed that the redacted version of this ruling attached as Exhibit A will be available for public inspection and copying.

LAW AND ANALYSIS

Section 237-29.53, HRS provides in pertinent part:

Exemption for contracting or services exported out of State. (a) There shall be exempted from, and excluded from the measure of, taxes imposed by this chapter, all of the value or gross income derived from contracting (as defined under section 237-6) or services performed by a person engaged in a service business or calling in the State for use outside the State where:

- (1) The contracting or services are for resale, consumption, or use outside the State; and
- (2) The value or gross income derived from the contracting or services performed would otherwise be subject to the tax imposed under this chapter on contracting or services at the highest rate.

As explained in Tax Information Release ("TIR") 2009-02:

The "used or consumed" test sources gross receipts to the place "in which the services are intended to be used or consumed." See HAW. ADMIN. RULES §18-237-8.6-03. The sourcing focus, then, shifts from where the taxpayer-service provider is physically located (as under the "place of performance" test) to the place where the customer uses or receives a benefit from the services. The Department's administrative rules regarding the county surcharge imposed by section 237-8.6, HRS, reflects the "used or consumed" test.

With regards to contracting, the purchaser uses or consumes the contracting services in the locale where the real property to which the contracting relates is situated.

To a certain extent, that the services performed by the Company are contracting services relating to real property located outside of Hawaii. Section 237-29.53, HRS provides in pertinent part that a contractor includes:

Every person engaging in the practice of architecture, professional engineering, land

surveying, and landscape architecture, as defined in section 464-1.

Section 464-1, HRS defines “professional engineer as “a person who holds oneself out as able to perform, or who does perform, any professional service such as **consultation, investigation, evaluation, planning**, design, or observation of construction or operation, in connection with any public or private utilities, structures, buildings, **machines, equipment**, processes, works, or projects, wherein the safeguarding of life, health, or **property** is concerned or involved, when such professional service requires the application of engineering principles and data.”

In addition, the Company is providing to the DoD an EIS. Each EIS is unique to a particular parcel or section of real property. For example, an EIS prepared for a particular location in [Redacted Text] cannot be used as the EIS for a different parcel in [Redacted Text]. The EIS allows the DoD to make an informed decision as to whether to proceed with a particular plan of action regarding that particular piece of real property. Thus, to the extent that the services of the Company are not considered to be contracting, they are services that are consumed wholly out of state.

This is clarified and explained further by the proposed administrative rules issued along with TIR 2009-02:

§18-237-29.53 Exemption for contracting or services exported out of state (a) Gross receipts from contracting (as defined under section 237-6, Hawaii Revised Statutes (HRS)) or services performed by a person engaged in a service business or calling in the State is exempt from general excise tax if the contracting or services are intended to be used or consumed outside of the State.

(b) Contracting or services are intended to be used or consumed outside of the State if the purchaser ultimately uses or receives the primary benefit of the acquired contracting or services outside of the State.

...

(d) The following factors will be considered in determining whether the purchaser ultimately uses or receives the primary benefit of the acquired services outside of the State:

...

(2) Whether the services were acquired primarily for the benefit of the purchaser’s overall business activities or specific business activities (if the purchaser conducts business activities in more than one state), and to what extent, if any, a purchaser’s Hawaii business activities directly and substantially benefit from the services provided.

No single factor is determinative and all facts and circumstances will be considered in determining whether the purchaser ultimately uses or receives the primary benefit of the acquired services outside of the State....

In terms of “use and consumption” of the EIS, the study relates to sites outside Hawaii and is to assist the DoD in determining where and how to conduct certain training activities. If sites in Hawaii are identified later, an EIS prepared for such site would be “used or consumed” in Hawaii and subject to tax accordingly.

Thus, under HRS Section 237-29.53, services involved in preparing an EIS for a location not in Hawaii are not subject to the Hawaii general excise tax because the services are used and consumed outside Hawaii.

CONCLUSION

Based on the information in your letter request, the gross income received for preparation of an EIS relating to real property not in Hawaii will be exempt from the general excise tax pursuant to §237-29.53, HRS.

This ruling is applicable only to the Company, and shall not be applied retroactively. It may not be used or cited as precedent by any other taxpayer. The conclusions reached in this letter are based on our understanding of the facts that the Company has represented. If it is later determined that our understanding of these facts is not correct, the facts are incomplete, or the facts later change in any material respect, the conclusion in this letter will be modified accordingly. This ruling also may be subject to change due to future amendments to laws, rules, or official Department positions.

If you have any further questions regarding this matter, please email me at mark.j.yee@hawaii.gov. Additional information on Hawaii’s taxes is available at the Department’s website at www.state.hi.us/tax.

Very truly yours,

s/ Mark J.C. Yee

MARK J.C. YEE
Administrative Rules Specialist