



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-247058

May 20, 1992

Mr. Willie M. King
Director
Financial Management Division
U.S. Equal Employment Opportunity
Commission
Washington, D.C. 20507

Dear Mr. King:

This is in response to your letter dated November 5, 1991, to our Claims Group, requesting a decision on whether the Equal Employment Opportunity Commission (EEOC) should pay the District of Columbia personal property tax assessed against the Haworth Company and its assignee, the McDonnell Douglas Finance Corporation (MDFC), on furniture which the EEOC is leasing from Haworth under the terms of the Federal Supply Schedule. You need assistance in determining the EEOC's liability for the taxes itemized on the invoices prepared by Haworth.

The general rule is that if the burden or incidence of a tax, by state or local law, is placed on the purchaser, then the United States as the purchaser is constitutionally immune from payment of the tax. On the other hand, if the incidence of the tax is on the seller, the seller is liable for and actually pays the tax. However, as with other costs of doing business, the seller may then pass the amount of the tax on to the purchaser. In that case, the purchaser is not paying the tax but merely reimbursing the seller for that cost. Accordingly, the United States as purchaser would not be constitutionally immune from making such a payment to the seller since it is not being taxed directly by the state. See 55 Comp. Gen. 1358 (1976) and cases cited.

In order to make a definite ruling on a particular tax, it is necessary to examine the law that imposes it. The furniture rentals to the EEOC within the District of Columbia are subject to the District of Columbia personal property tax. D.C. Code (1981 Edition Revised) § 47-1521 et seq. (1990). Specifically, section 47-1521(c) provides: "Persons owning leased personal property having a taxable

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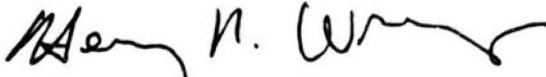
situs in the District of Columbia shall be subject to the tax and to the filing requirement of § 47-1524(b)." (Emphasis added.) Thus, as the emphasized language indicates, the D.C. personal property tax is a tax on the owner/lessor. Under the leasing arrangement described in the record, while EEOC as the lessee had an option to buy the leased property, under the terms of the lease Haworth/MDFC as the lessor retained the ownership interest in the property until that option was exercised. Therefore, we find that the tax is not a direct tax on the government and the EEOC is not constitutionally immune from the economic burden of the D.C. personal property tax if, by contract or otherwise, it is liable to the lessor for the amount of the tax. See 49 Comp. Gen. 204 (1969).

The Federal Acquisition Regulation (FAR) provisions on state and local taxes generally provide that the offered price includes all applicable state and local taxes unless otherwise specified in the contract, and therefore the government cannot be required to pay any additional amount for tax. See 48 C.F.R. Subpart 29.3 and § 52.229 (1990). However, here you state the furniture was leased under the provisions of the Federal Supply Schedule for Furniture Systems (Cumulative Edition, May 10, 1991). Paragraph (n) of the "Special Provisions" section for leasing provides that, notwithstanding the FAR clause on state and local taxes, the contract price excludes all state and local taxes levied on or measured by the contract price. Paragraph (n) goes on to provide that "the contractor shall state separately on its invoices taxes excluded from the contract price, and the government agrees either to pay the amount of the taxes to the contractor or provide evidence necessary to sustain an exemption."

Since we have determined that the tax at issue is a tax on the lessor and EEOC as the lessee is not constitutionally immune from paying it, there is no evidence EEOC could provide which would sustain an exemption. Therefore, under the provisions of paragraph (n) of the Federal Supply Schedule, it appears that EEOC has obligated itself to pay the amount of the tax on the furniture which has been invoiced by Haworth/MDFC. The only exception to payment would be if EEOC and Haworth/MDFC had specifically excluded EEOC from paying this tax under the terms of the rental contracts. You did not provide copies of the rental contracts with your submission so we are unable to determine if such an exception exists. Accordingly, you should review the rental contracts in light of the information provided here to determine whether payment was specifically waived.

Otherwise, EEOC is required to pay the invoices as presented.

Sincerely yours,

for 
James F. Hinchman
General Counsel