

COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT.

TAXATION: RETAIL SALES AND USE TAX.

Without express or implied language in Act that may be interpreted to authorize such transaction, industrial development authority may not be designated as general contractor for construction of manufacturing plant to enable manufacturer to construct plant without paying state sales and use tax on construction materials.

The Honorable Harry J. Parrish

Member, House of Delegates

January 7, 1999

You ask whether an industrial development authority has the statutory power to enter into a contract with a private manufacturer whereby the authority acts as general contractor in the construction of the manufacturer's plant.

You forward a copy of a tax ruling issued by the Department of Taxation which concludes that, under the facts there presented, the construction materials purchased by an industrial development authority that serves as the general contractor for a manufacturer in the construction of the manufacturer's plant would not be subject to the sales and use tax imposed by §§ 58.1-603 and 58.1-604 of the *Code of Virginia*.¹ Although you do not question the correctness of the Tax Department's ruling, you question the authority of an industrial development authority to enter into such a contract.

Industrial development authorities are created under the Industrial Development and Revenue Bond Act, Chapter 49 of Title 15.2² (the "Act"). The express legislative intent in authorizing the creation of industrial development authorities is "so that such authorities may acquire, own, lease, and dispose of properties and make loans" in furtherance of one of the purposes of an industrial development authority.³ Included within the purposes of an industrial development authority are the promotion of industry and the development of trade.⁴

Section 15.2-4905 of the Act grants authorities certain powers, together with all powers incidental to or necessary for the performance of the express powers. An industrial development authority has the power to acquire, to improve or equip, to lease, and to convey "authority facilities."⁵ Section 15.2-4902 defines "authority facilities" to include "facilities for commercial enterprises ... constructed or installed by or for the authority pursuant to the terms of this chapter." An authority may also issue its bonds for the purpose of carrying out its powers⁶ and may make loans or grants from the authority's revenues to individuals or business entities for the purpose of promoting economic development.⁷

Whether a transaction in which an industrial development authority is engaged comes within any of the express or implied powers of § 15.2-4905 will depend on the facts of the particular transaction. It is my opinion, however, that § 15.2-4905 neither expressly nor by implication authorizes a transaction that consists solely of an authority's being designated as the general contractor in the construction of a manufacturing plant in order to enable the manufacturer to construct the plant without the payment of the state sales and use tax on the construction materials.⁸ Accordingly, without specific language in § 15.2-4905 that reasonably can be interpreted to authorize a transaction, in which the purpose is to eliminate the payment of sales and use taxes, I am unable to conclude that the General Assembly intended to encompass such transactions within the Act.⁹

¹ See Va. Tax Rep. (CCH) ¶ 202-849, at 14,011 (Apr. 12, 1995). The ruling states the following facts. The manufacturer, as owner of the project, would pay the cost of constructing the facility. *Id.* at 14,012. The manufacturer would enter into a contract with the local industrial development authority for the authority to serve as general contractor and to contract with subcontractors. *Id.* The manufacturer would serve as construction manager or contract with a third party to serve as construction manager. *Id.* While the manufacturer would be involved directly or indirectly in many aspects of managing and supervising the construction of the facility, all materials used in constructing the facility would be purchased directly by and billed to the authority on its credit pursuant to official authority purchase orders using authority funds. *Id.* The industrial development authority would furnish these materials to the subcontractors for use in construction. *Id.* The authority would contract with subcontractors and suppliers, and its credit would be bound in the performance of those contracts. *Id.* The manufacturer would pay funds to the authority as and when the authority presents draw requests, and the authority would pay the subcontractors and suppliers. *Id.* at 14,013. Based on these facts, the Department ruled that, because an industrial development authority is a political subdivision of the Commonwealth pursuant to § 15.2-4903, the purchases by the authority would be exempt from the sales and use tax pursuant to the exemptions for purchases by political subdivisions under §§ 58.1-609.1(4) and § 58.1-610(B). *Id.* However, in its ruling the Department made clear that such ruling was "not intended to address the authority of the IDA to engage in the activities described." *Id.* at 14,014.

² Sections 15.2-4900 to 15.2-4920.

³ Section 15.2-4901.

⁴ *Id.*

⁵ Section 15.2-4905(4)-(6).

⁶ Section 15.2-4905(7).

⁷ Section 15.2-4905(13).

⁸ See 1983-1984 Op. Va. Att'y Gen. 200, 201 (liberal construction requirement does not mean enlargement of scope of Act to include cases or objects not manifestly within legislative contemplation).

⁹ I express no opinion on the tax issues presented in the Department of Taxation's letter ruling or on any transaction involving different facts.