

## TECHNICAL ASSISTANCE ADVISORY 97-002

**Subject: Consumers Sales and Service Tax And Use Tax**

This document is a response to a request for a Technical Assistance Advisory, as provided in W. Va. Code § 11-10-5r, based upon facts submitted in support of the said request.

### **FACTS**

A request for a Technical Assistance Advisory has been filed by **The N. American Purchasing Company** and its wholly owned subsidiary, **The W. Va. Manufacturing Company**, to request a Technical Assistance Advisory: 1) with respect to the Sales Tax exemption for certain purchases of materials, machinery and equipment to be installed as part of the construction of **The W. Va. Manufacturing Company's** new West Virginia manufacturing facility and, 2) to allow **The N. American Purchasing Company** to act as purchasing agent for **The W. Va. Manufacturing Company** after the facility is complete.

**The N. American Purchasing Company**, a 100% owned subsidiary of **The American Parent Company**, was formed to provide centralized management, purchasing, and other support type services for its various subsidiaries (hereinafter referred to as **North American Manufacturing Companies**, which engage in manufacturing at various locations in North America. For those **North American Manufacturing Companies** which are presently operating, **The N. American Purchasing Company** provides centralized purchasing of raw materials, component parts and other items to keep the **North American Manufacturing Companies** supplied. **The N. American Purchasing Company** also manages, coordinates and acts as agent for its **North American Manufacturing Companies** with respect to contracting for capital projects such as facility construction, expansion, upgrade and repairs. Items purchased by **The N. American Purchasing Company** on behalf of the **North American Manufacturing Companies** are paid for

through a consolidated controlled cash disbursement account in which funds of **The N. American Purchasing Company** and each **North American Manufacturing Company** are maintained and accounted for separately. Purchases made by **The N. American Purchasing Company** on behalf of any of its subsidiaries are charged to the subsidiaries when accounts are reconciled at the end of each month.

**The W. Va. Manufacturing Company**, a newly formed subsidiary of **The N. American Purchasing Company**, is constructing a new manufacturing facility to be located in West Virginia. Once the facility is operational, **The W. Va. Manufacturing Company** will engage in manufacturing within West Virginia. Accordingly, **The W. Va. Manufacturing Company** is exempt from Sales Tax with respect to purchases of tangible personal property and services directly used or consumed in the activity of manufacturing. W.Va. Code §§ 11-15-9(b)(2) and 11-15A-3. In matters related to the construction of **The W. Va. Manufacturing Company's** new facility, **The N. American Purchasing Company** will act as **The W. Va. Manufacturing Company's** agent, in the same manner as described above for the other **North American Manufacturing Companies**.

It is presently anticipated that the construction of **The W. Va. Manufacturing Company's** new plant will occur in several phases and that **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will enter into one or more construction, purchase or service contracts to complete each phase. The first phase is underway and involves site preparation work. The second phase involves the construction of the building. The third phase will involve the purchase and installation of the production machinery and equipment at the new facility.

From the inception of this project, various subsidiaries of **The American Parent Company**, including **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, have shared responsibility for and have been intimately involved in the design of the new plant. Prior to submitting any portion of the project for bid by contractors, **The N. American Purchasing Company** worked closely with the design engineers on every aspect of the new facility. In many cases **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, has, before selection of a contractor for the building, developed strict specifications for some materials and equipment for the new plant and lists of approved suppliers for other items.

**The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, has signed a contract for construction of the building with a general contractor. **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, may enter into other contracts related to this phase of the construction. Some of those construction contracts may provide that **The N. American Purchasing Company** will direct purchase certain materials and equipment for installation by the contractor. At the end of each month a reconciliation between **The N. American Purchasing Company** and **The W. Va. Manufacturing Company** will occur, at which time **The W. Va. Manufacturing Company** will reimburse **The N. American Purchasing Company** for all purchases of equipment and materials made by **The N. American Purchasing Company** on its behalf during the previous month and for all progress payments made by **The N. American Purchasing Company** to the contractor.

**The N. American Purchasing Company** is maintaining close on-site supervision of construction. In some cases, **The N. American Purchasing Company** will rely on a contractor to select materials and equipment suitable for a particular application or to select quantities of materials and equipment to be direct purchased by **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**. At other times, the contractors will purchase materials and equipment needed to construct the project. **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will maintain final authority regarding selection and approval of items of material, machinery and equipment to be direct purchased.

All items direct purchased by **The N. American Purchasing Company** will be ordered using a Purchase Order which specifies that the purchase will be made by **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, and which provides the vendor with **The W. Va. Manufacturing Company's** direct pay permit number. All payments will be made by **The N. American Purchasing Company** from the consolidated bank account. **The N. American Purchasing Company** or **The W. Va. Manufacturing Company** will maintain a representative on-site to accept delivery of direct purchased items.

**The N. American Purchasing Company** and **The W. Va. Manufacturing Company** believe that requiring a contractor to guarantee and warrant a facility for some period of time (e.g. two

years) after completion of construction results in better quality workmanship than would be achieved without making such guarantee part of the work. **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, may direct purchase certain materials and equipment for the facility. In such cases the seller and/or manufacturer of materials and equipment may provide express and/or implied guarantees and warranties to **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**. If any contractor's warranties and guarantees include a guarantee or warranty of materials or equipment direct purchased by **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, that contractor's warranties and guarantees will run directly to **The N. American Purchasing Company**, as third party warrantor for **The W. Va. Manufacturing Company**. If required for contractor to perform its guarantee and warranty obligations under the contract, **The N. American Purchasing Company** will cooperate with the contractor and assign, to the extent necessary, the seller's or manufacturer's express or implied warranties and/or guarantees. No direct guarantee and warranty, for materials or equipment direct purchased by **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will run from a contractor to **The W. Va. Manufacturing Company**.

It is presently anticipated that a large portion of the machinery, equipment and materials required to install the production line at the new plant will be direct purchased by **The N. American Purchasing Company** and installed by third-party contractors. Some equipment will be manufactured overseas by third party manufacturers and then purchased by **The Overseas Parent Company**, a foreign corporation and parent of **The American Parent Company**, which will, in turn, sell the equipment to **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**. Some equipment will be manufactured by **The Overseas Parent Company**, itself, and sold to **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**. Procedures similar to the procedures which will be implemented with respect to the construction of the building will be in place for the installation of the production equipment. However, it is not anticipated that **The N. American Purchasing Company** will require contractors installing the production line to warrant and guarantee equipment direct purchased by **The N. American Purchasing Company**.

It is anticipated that upon completion of the facility **The N. American Purchasing Company** will provide centralized purchasing of raw materials, component parts, and numerous other items to keep **The W. Va. Manufacturing Company** supplied and operating.

Based on the facts set forth above, **The N. American Purchasing Company** and **The W. Va. Manufacturing Company** request three rulings from the Department of Tax and Revenue.

- (1) First, **The N. American Purchasing Company** and **The W. Va. Manufacturing Company** request a ruling that **The N. American Purchasing Company** is acting as **The W. Va. Manufacturing Company's** agent as to all purchases of tangible personal property and services as centralized purchaser for **The W. Va. Manufacturing Company**. More specifically, with respect to purchases of tangible personal property and services relating to the construction of the new manufacturing facility and installation of the production line, **The N. American Purchasing Company** will be considered **The W. Va. Manufacturing Company's** agent and will be entitled to provide **The W. Va. Manufacturing Company's** direct pay permit to vendors. **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will be required to file a West Virginia Direct Pay Permit return in the month following the month in which **The N. American Purchasing Company** makes purchases on **The W. Va. Manufacturing Company's** behalf.
- (2) Second, **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, is entitled to use the Sales Tax exemption for manufacturers for all purchases of materials and/or equipment, which qualify as directly used or consumed in the activity of manufacturing and which property, will be installed by the building general contractor or other contractors as part of the construction of the new facility or by contractors as part of the installation of the production line.
- (3) Third, upon completion of the facility, **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will be entitled to use the Sales Tax exemption for manufacturers in fulfillment of its function of

centralized purchaser of raw materials, component parts, and other items purchased to keep **The W. Va. Manufacturing Company** supplied. **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will be required to file a West Virginia Direct Pay Permit return on a monthly basis for items purchased by **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**. Items directly used or consumed by **The W. Va. Manufacturing Company** in the activity of manufacturing shall be exempt and items purchased which will be used or consumed in West Virginia but not directly in the activity of manufacturing shall be subject to tax.

DISCUSSION AND ANALYSIS

**The American Parent Company** is a subsidiary of **The Overseas Parent Company**. **The N. American Purchasing Company** is a 100% owned subsidiary of **The American Parent Company**, and the **North American Manufacturing Companies**, including **The W. Va. Manufacturing Company**, are 100% owned subsidiaries of **The N. American Purchasing Company**.

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**The N. American Purchasing Company** was formed to provide centralized management, purchasing, and other support type services for its subsidiaries which engage in manufacturing at locations in North America. For those **North American Manufacturing Companies** which are presently operating, **The N. American Purchasing Company** provides centralized purchasing of raw materials, component parts and other items to keep the **North American Manufacturing Companies** supplied. **The N. American Purchasing Company** also manages, coordinates and acts as agent for its **North American Manufacturing Companies** with respect to contracting for capital projects such as facility construction, expansion, upgrade and repairs. Items purchased by **The N. American Purchasing Company** on behalf of the **North American Manufacturing Companies** are paid for through a consolidated controlled cash disbursement account in which funds of **The N. American Purchasing Company** and each **North American Manufacturing Company** are maintained and accounted for separately. Purchases made by **The N. American Purchasing Company** on behalf of any of its subsidiaries are charged to the subsidiaries when accounts are reconciled at the end of each month.

The corporate structure here described is not one where the entities involved operate autonomously. Each corporate subsidiary is in essence a functional component of a single enterprise or single business.

The **North American Manufacturing Companies** operate to pursue the manufacturing function, but are not autonomous in that **The N. American Purchasing Company** provides centralized purchasing of raw materials, component parts and other items to keep the **North American Manufacturing Companies** supplied. The items purchased by **The N. American Purchasing Company** on behalf of the **North American Manufacturing Companies** are paid for through a consolidated controlled cash disbursement account controlled by **The N. American Purchasing Company** in which funds of **The N. American Purchasing Company** and each **North American Manufacturing Company** are maintained and accounted for separately.

The **North American Manufacturing Companies** do not have the autonomy to make their own purchases, pay their own bills or control cash accounts out of which their operating expenses are paid. These functions are carried out by **The N. American Purchasing Company**. Likewise, **The N. American Purchasing Company** does not directly manufacture goods produced by **The American Parent**

Company's corporate group. The N. American Purchasing Company produces no goods for sale. The N. American Purchasing Company provides only an accounting, purchasing and cash disbursement function within the enterprise, and so is not an autonomous entity within the scheme of the overall manufacturing business enterprise carried on by the The American Parent Company's corporate group.

CONCLUSION

**REQUESTED RULING 1:**

- (1) First, The N. American Purchasing Company and The W. Va. Manufacturing Company request a ruling that The N. American Purchasing Company is acting as The W. Va. Manufacturing Company's agent as to all purchases of tangible personal property and services as centralized purchaser for The W. Va. Manufacturing Company. More specifically, with respect to purchases of tangible personal property and services relating to the construction of the new manufacturing facility and installation of the production line, The N. American Purchasing Company will be considered The W. Va. Manufacturing Company's agent and will be entitled to provide The W. Va. Manufacturing Company's direct pay permit to vendors. The N. American Purchasing Company, as agent for The W. Va. Manufacturing Company, will be required to file a West Virginia Direct Pay Permit return in the month following the month in which The N. American Purchasing Company makes purchases on The W. Va. Manufacturing Company's behalf.

**RESPONSE:**

Section 11-15-8d of the West Virginia Code reads as follows:

11-15-8d. Limitations on right to assert exemptions.

Persons who perform "contracting" as defined in section two of this article, or persons acting in an agency capacity, may not assert any exemption to which the purchaser of such contracting services or the principal is entitled. Any statutory exemption to which a taxpayer may be entitled shall be invalid unless the tangible



personal property or taxable service is actually purchased by such taxpayer and is directly invoiced to and paid by such taxpayer: Provided, That this section shall not apply to purchases by an employee for his or her employer; purchases by a partner for his or her partnership; or purchases by a duly authorized officer of a corporation, or unincorporated organization, for his or her corporation or unincorporated organization so long as the purchase is invoiced to and paid by such employer, partnership, corporation or unincorporated organization.

Transition rule. This section shall not apply to purchases of tangible personal property or taxable services in fulfillment of a purchasing agent or procurement agent contract executed and legally binding on the parties thereto prior to the fifteenth day of September, one thousand nine hundred ninety: Provided, That this transition rule shall not apply to any purchases of tangible personal property or taxable services made under such a contract after the thirty-first day of August, one thousand nine hundred ninety-one; and this transition rule shall not apply if the primary purpose of the purchasing agent or procurement agent contract was to avoid payment of consumers sales and use taxes.

Emphasis added.

Unlike many other corporate controlled groups, the **The American Parent Company's** corporate group (as between **The N. American Purchasing Company** and **The W. Va. Manufacturing Company**) constitutes a single enterprise with specific functions of that enterprise allotted to the corporate components in specific ways. It is impossible for **The N. American Purchasing Company** to operate as a discrete autonomous business enterprise under the current functional structure of the corporate group. The same is true of **The W. Va. Manufacturing Company**. It cannot operate as a discrete autonomous business.

In order for the **The American Parent Company's** corporate group to carry on normal day to day operations, it is necessary for **The N. American Purchasing Company** to purchase raw materials and supplies for direct and indirect use in manufacturing by **The W. Va.**

**Manufacturing Company.** The business enterprise can carry on only if each of the integrated corporate components of the **The American Parent Company's** corporate group functions as a part of the day to day overall business enterprise of the group.

Given the unique interdependence of the corporate group members, it is obvious that the group enterprise cannot operate unless **The N. American Purchasing Company** acts as a de facto purchasing arm of **The W. Va. Manufacturing Company** and all other **North American Manufacturing Companies.**

Although section 11-15-8d of the West Virginia Code disallows the use of an agency relationship for purposes of asserting a consumers sales and service tax exemption, the section specifically does not apply to purchases by an employee for his or her employer; purchases by a partner for his or her partnership; or purchases by a duly authorized officer of a corporation, or unincorporated organization, for his or her corporation or unincorporated organization. These exceptions are reflective of the concept that purchases by a representative of the exempt Taxpayer that can be identified as a functional part of the Taxpayer (such as an employee, officer or partner of the Taxpayer) may assert the Taxpayer's exemption.

In the case of **The N. American Purchasing Company** and **The W. Va. Manufacturing Company**, these entities are in reality parts of the same business enterprise. They are not autonomous entities, and cannot operate without constant functional interdependence. The **The American Parent Company's** corporate group is structured so that **The N. American Purchasing Company**, as a matter of normal day to day business practice, does essentially all purchasing for **The W. Va. Manufacturing Company**. The request by **The N. American Purchasing Company** and **The W. Va. Manufacturing Company** to allow **The N. American Purchasing Company** to use **The W. Va. Manufacturing Company's** direct pay permit to assert the consumers sales and service tax exemptions available to **The W. Va. Manufacturing Company** has not been made merely in order to assert those exemptions for purchases related to construction of the new **The W. Va. Manufacturing Company** facility.

It is the finding of the Department of Tax and Revenue that section 11-15-8d of the West Virginia Code does not apply to

prohibit the agency relationship between **The N. American Purchasing Company** and **The W. Va. Manufacturing Company**. Notwithstanding formal separation by corporate structure, **The N. American Purchasing Company** and **The W. Va. Manufacturing Company** are functional parts of the same business, and **The N. American Purchasing Company** should be allowed to assert the consumers sales and service tax exemptions allowed for **The W. Va. Manufacturing Company** as if **The N. American Purchasing Company** were an employee, officer or partner of **The W. Va. Manufacturing Company**. Because of the unique functional structure of the **The American Parent Company's** corporate group, and because of the operational interdependence of the corporate components of the **The American Parent Company's** business enterprise, **The N. American Purchasing Company** will be considered **The W. Va. Manufacturing Company's** agent with respect to purchases of tangible personal property and services used in the construction of the new manufacturing facility and installation of the production line, and will be entitled to provide **The W. Va. Manufacturing Company's** direct pay permit to vendors.

REQUESTED RULING 2:

- (2) **Second, The N. American Purchasing Company, as agent for The W. Va. Manufacturing Company, is entitled to use the Sales Tax exemption for manufacturers for all purchases of materials and/or equipment, which qualify as directly used or consumed in the activity of manufacturing and which property, will be installed by the building general contractor or other contractors as part of the construction of the new facility or by contractors as part of the installation of the production line.**

RESPONSE:

In accordance with the discussion set forth above, **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, is entitled to use the Sales Tax exemption for manufacturers for all purchases of materials and equipment, which qualify as directly used or consumed in the activity of manufacturing and which property, will be installed by the building general contractor or other contractors as part of the construction of the new facility or by contractors as part of the installation of the production line.

**REQUESTED RULING 3:**

- (3) Third, upon completion of the facility, **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will be entitled to use the Sales Tax exemption for manufacturers in fulfillment of its function of centralized purchaser of raw materials, component parts, and other items purchased to keep **The W. Va. Manufacturing Company** supplied. **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will be required to file a West Virginia Direct Pay Permit return on a monthly basis for items purchased by **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**. Items directly used or consumed by **The W. Va. Manufacturing Company** in the activity of manufacturing shall be exempt and items purchased which will be used or consumed in West Virginia but not directly in the activity of manufacturing shall be subject to tax.

**RESPONSE:**

In accordance with the discussion set forth above, upon completion of the facility, **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will be entitled to use the Sales Tax exemption for manufacturers in fulfillment of its function of centralized purchaser of raw materials, component parts, and other items purchased to keep **The W. Va. Manufacturing Company** supplied. **The N. American Purchasing Company**, as agent for **The W. Va. Manufacturing Company**, will be required to file a West Virginia Direct Pay Permit return on a monthly basis for items purchased by **The N. American Purchasing Company** as agent for **The W. Va. Manufacturing Company**. Items directly used or consumed by **The W. Va. Manufacturing Company** in the activity of manufacturing shall be exempt and items purchased which will be used or consumed in West Virginia but not directly in the activity of manufacturing shall be subject to tax.

**Basis of Conclusions and Findings.** -- The conclusions reached in this Technical Assistance Advisory are based upon the facts submitted and application of current law. In the event there is a material change in the facts, or if it is determined that material facts were omitted or are materially different from those furnished

to us for purposes of this ruling, or if there is a material change in the applicable law, the conclusions reached in this advisory may no longer apply.

**Declaration of Precedential Value.** -- Under W. Va. Code § 11-10-5r(b), a Technical Assistance Advisory has no precedential value, except to the Taxpayer who requests the advisory, unless the Tax Commissioner specifically states that it has precedential value. Due to the specialized nature of the questions presented for ruling, this Technical Assistance Advisory is declared to have no precedential value, and may not be relied upon by any person other than the specific Taxpayers which requested the advisory.

**Publication.** -- Under W. Va. Code § 11-10-5r(e), the Tax Commissioner is required to release Technical Assistance Advisories to the public after they are modified to delete identifying characteristics. This advisory will be released as Technical Assistance Advisory 97-002.

Issued July 28, 1997

Rich Boyle  
State Tax Commissioner