No. C-1321

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

HUGH H. C. WEED, Executive Director of Revenue, State of Colorado, Petitioner, v. CITY OF PUEBLO, a municipal corporation of the State of Colorado, Respondent.	)	Certiorari to the Colorado Court of Appeals

MEMORANDUM OF THE COLORADO MUNICIPAL LEAGUE

REQUESTING COURT TO CONSIDER MODIFICATION OF

OPINION ON ITS OWN MOTION

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The Colorado Municipal League is a non-profit association of approximately 220 Colorado cities and towns. The League was not a party to nor an amicus curiae in the above-captioned case. The case has, however, become a matter of concern to the League, insofar as the Court's opinion seems to impose new restrictions on the availability of sales and use tax refunds for all public works construction projects, and not only for projects financed through the issuance of industrial development revenue bonds pursuant to the County and Municipality Development Revenue Bond Act (article 3 of title 29, Colorado Revised Statutes 1973).

The Court's decision in the case is that the state Director of Revenue [illegible] refund to a municipality state sales and use taxes paid by a contractor, and reimbursed by the municipality, on construction materials incorporated into a project [illegible] [illegible] Development Revenue [illegible] [illegible] governmental [illegible] section 39-26-114(1)(a) and (2)(c), Colorado Revised Statutes 1973] is a uniquely complex question of legislative intent and policy, due to the interaction of public purpose and private benefit inherent in such projects. However, the Court's opinion is not expressly limited to industrial development revenue bond [illegible] and appears to have drastic implications for the incidence of [illegible] use taxes with respect to public construction projects in general.

The Court has apparently held that the 39-26-114[illegible] exemption [illegible] there be a sale to the exempt entity, and [illegible] r the exemption only if there [illegible] p between the contractor and the exempt entity [illegible] can bind the exempt entity in favor of [illegible] Company, [illegible] Colo. [illegible], 470 P.2d 576 ([illegible]

authority for this proposition, along with Mesa Verde Company v. Board of County Commissioners, 178 Colo. 49, 495 P.2d 229 (1972), Alabama v. King and Boozer, 314 U.S. 1 (1941), and United States v. New Mexico, ____ F.2d ____ (10th Cir. 1978).

These cases all involve the federal government's immunity from state or local sales and use taxes based on the supremacy clause (art. VI, sec. 2) of the United States Constitution. In Venneri, there was also some reliance upon a local exemption provision paralleling 39-26-114(1)(a). However, none of the cases involved any provision comparable to 39-26-114 (2)(c).

The League contends that, at least as to ordinary public construction projects, the language of 39-26-114(2)(c) is crucial, and establishes a clear legislative intent which is inconsistent with the Court's holding that an agency relationship is required. While 39-26-114(1)(a) exempts sales "to" exempt entities, 39-26-114(2)(c) liberalizes that exemption provision by providing for a reimbursement-and-refund procedure to be used when sales or use taxes are paid on a purchase "on behalf of" an exempt entity. Presumably the legislature intended for this phrase to have its common-sense meaning -- that the property so purchased eventually becomes the property of the exempt entity.* If the legislature had intended to incorporate agency law concepts into this provision, it easily could have, and presumably would have, used language so indicating.

This interpretation of 39-26-114(2)(c) is reinforced by administrative practice as reflected in 1 C.C.R. 201-4, section 26-114.2(c) and in 1 C.C.R. 201-5 (Special Regulations, pp. 10-13 on "Contractors"). These regulations, promulgated by the Department of Revenue pursuant to

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* Where the property is part of an industrial development revenue bond project, the determination whether a purchase is made "on behalf of" the exempt entity will obviously encounter special complexities; but this only reinforces the contention that such projects should be governed by special rules of limited application.

the statutory directive of section 39-26-122, Colorado Revised Statutes 1973, clearly contemplate that a reimbursement-and-refund procedure will be used for ordinary public works construction projects. No requirement of an agency relationship is contained in these regulations, nor can such a requirement readily be implied from them.

It is the League's belief that construction contracts rarely create an express agency relationship between the owner of the project and the contractor. While municipalities and other public entities could include such agency provisions in their construction contracts, this would not be desirable in view of the broadening of the public entity's contract and tort liability which might result from such an agency relationship. See, e.g., Marron v. Helmecke, 100 Colo. 364, 67 P.2d 1034 (1937) (principal liable for torts committed within scope of agency); Cook v. Hargis, 164 Colo. 368, 435 P.2d 385 (1967) (principal liable for contracts executed by agent acting within apparent scope of authority).

In its present form, the Court's opinion will compel municipalities and other public entities constructing public improvements to either confer an agency upon the contractor, and thus assume these expanded risks of liability; or to bear a financial burden which the legislature clearly did not intend to impose. If state sales and use taxes cannot be refunded, presumably municipalities will no longer undertake to reimburse them, but contractors will no doubt raise their prices to absorb the tax payments; thus the taxes will ultimately be reflected in the cose of public works construction projects, and will ultimately be borne by local taxpayers.

Thus unfortunate result is not necessary to the decision of the question before the Court in this case, and can easily be avoided by adding a statement to the Court's opinion expressly confining its appli-

cation to industrial development revenue bond projects.

Respectfully submitted,

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39-26-114. Exemptions - disputes - credits or refunds. (1) There shall be exempt from taxation under the provisions of this part 1 the following:

(a) All sales to the United States government, to the state of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only;

(2) (c) A refund shall be made or a credit allowed by the executive director to any person entitled to an exemption where such person establishes: That a tax was paid by another on a purchase made on behalf of such person; and that a refund has not been granted to the person making the purchase; and that the person entitled to exemption paid or reimbursed the purchaser for such tax. No such refund shall be made or credit allowed in an amount greater than the tax paid less the expense allowance on such purchase retained by the vendor pursuant to section 39-26-105 (1).

39-26-122. Administration. The administration of this part 1 is vested in and shall be exercised by the executive director of the department of revenue who shall prescribe forms and reasonable rules and regulations in conformity with this part 1 for the making of returns, for the ascertainment, assessment, and collection of the taxes imposed under this part 1, and for the proper administration and enforcement of this part 1.

Regulation 26-114.2(c).

This regulation pertains only to tax-exempt entity refunds.

Refunds of the sales or use tax paid by contractors and subcontractors engaged in the building, erection, alteration or repair of structures owned or used by the State of Colorado, its political subdivisions, municipalities, or religious, charitable or eleemosynary corporations will be made to such tax-exempt entities after full compliance with the following requirements:

(1) The contract between the tax-exempt entity and the contractor, and the contract between the prime contractor and the subcontractor shall require that the sales and use tax shall be paid by the contractor or the subcontractor on all purchases whether in-state or out of state made in pursuance of the contract.

(2) Claims for refund shall be executed and filed with the department of revenue on forms prepared by the department and in accordance with the instructions accompanying such forms or appearing thereon.

(3) The refund claims shall be signed by an authorized officer or employee of the tax-exempt entity.

(4) The claim shall be supported by an affidavit of the contractor or subcontractor that the sales or use tax sought to be refunded has been paid and that the tangible personal property so taxed has been "built in" to the structures owned and used by the tax-exempt entity, and shall indicate therein where the books and records and other substantiating evidence of payment of the said tax are located and where they may be examined by authorized representatives of the department of revenue.

(5) The claim shall also be accompanied by a certificate of the architect, superintendent of construction, or other person who shall have personal, technical and official knowledge that the property on which the tax has been paid has in fact been "built in" by the contractor in accordance with the specifications of the contract and in the amount required thereby.

(6) Refunds will be made only on taxes paid by the contractor or the subcontractor within three years prior to the date the claim is filed with the department of revenue.

(7) In order to properly verify the contents of a claim for refund, the department may require such other and additional information as may be deemed necessary before payment of the claim will be authorized.

CONTRACTORS

(1) Contractors defined: Any individual, partnership, firm, association, corporation, trust, estate or joint venture who performs work on real property for another party under the terms of an agreement, is a contractor within the meaning of this regulation. An individual working for a salary or wages is not considered a contractor.

"Contractor" includes building contractors, road contractors, grading and excavating contractors, electrical contractors, plumbing and heating contractors, and also includes any other person engaged, under a contractual arrangement, in the construction, reconstruction, or repair of any building, bridge or structure. For the purposes of this rule, "subcontractor" has the same meaning as "contractor".

(2) Application of sales tax: All contractors, as defined in (1), above, who purchase in this state tangible personal property which is to be built in by them into some building or structure, are regarded for purposes of the Act as retail purchasers and must pay sales tax to the vendors. Contractors must pay tax on all tangible personal property used in their business or on their jobs if the delivery, storage, use or consumption of the property is in Colorado. The contractor must pay the use tax directly to the state. Sales or use tax is payable on all purchases of equipment, material, supplies, tools, etc.

Contractors may not avoid the payment of sales or use tax by means of contract provisions whereby the invoice is made out in the name of a tax-exempt entity and the contractor is designated as the agent thereof. The tax immunity accorded to the state government, a political subdivision thereof, a municipality, or to religious, charitable and eleemosynary corporations shall be effected by means of a refund to the tax-exempt entity of the tax paid by the contractor less the vendor's collection fee. No tax refund will be made to the exempt entity for purchases, rental or lease of equipment, materials not built into the structure, supplies, tools, etc.

Construction jobs for the United States government are subject to sales or use tax on all materials purchased unless an exemption certificate is obtained from the department of revenue before any work is done under the contract. No immunity attaches to a contractor's purchases of tangible goods merely because the goods will be built into structures which are to be used by, or which become the property of the federal government or other tax-exempt entity.

(3) Application of sales and use tax for the retailer-contractor: Some contractors, as defined in (1), above, also may be retail merchants of building supplies or construction materials which were purchased tax-free for resale. In the performance of their own construction contracts they might remove from their own stock whatever is needed for their contract operations. Such use of tax-free merchandise is subject to tax, based on the finished goods inventory value of the merchandise at the time of withdrawal.

An over-the-counter sale of a complete unit not made to order, with an agreement for installation of the unit, is not

a building contract. This rule includes sales of stoves, refrigerators, furnaces, air conditioners, washing machines, dryers, carpets, electrical fixtures, ready-made cabinets, storm doors, storm windows, screens, sod and similar items. On such sales the sales tax must be collected from the purchaser by the retailer-contractor. If the installation charges are segregated in the bid proposal or sales invoices, the charges are not taxable. Repairs of such articles are not considered repairs to real property as contemplated in the "contractor's rule".

(4) Sales Tax Returns: (a) Contractors are not required to make sales tax returns. They will pay the sales tax to the persons in Colorado from whom they make purchases of tangible personal property or, if purchased out of Colorado or from an unlicensed person, the contractor will report the tax on a consumer's use tax return. (b) Retailer-contractors are required to include in their sales tax returns the tax on the inventory value of materials and supplies removed by them from their tax-free stocks and used under the circumstances described in paragraph (3), preceding.

(5) Licenses: Retailer-contractors must have a Colorado store or sales tax license for each store location. No sales tax license will be issued to regular contractors because they are not retailers of tangible personal property; they are deemed to be the users or consumers of all articles used by them.

(6) Subcontractors: Any subcontractor purchasing materials for his job is the user or consumer of the materials and liable for the payment of the sales or use tax on the purchases. The subcontractor is not selling or reselling tangible personal property to his prime contractor or to the owner of the building, whether a lump-sum or cost-plus contract is involved and whether the prime contractor holds a store or sales tax license.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing memorandum have been served upon the following listed parties of record by first class mail, postage prepaid, this 13th day of February, 1979.

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