New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(36)S
Sales Tax
September 7, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S000601A

On June 1, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Trade-Winds Environmental Restoration Inc., 100 Sweeneydale Avenue, Bay Shore, New York, 11706. Petitioner, Trade-Winds Environmental Restoration Inc., submitted additional information with respect to the Petition on July 7, 2000.

The issue raised by Petitioner is whether Petitioner is entitled to a refund or credit of sales taxes paid on certain purchases of items of tangible personal property.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner performs the service of asbestos removal. Petitioner purchases the following items of tangible personal property for use in performing its asbestos removal service.

1. Air filters for negative air machines
2. Asbestos bags
3. Asbestos encapsulant
4. Disposable towels
5. Disposable gloves
6. Disposable suits
7. Smoke tubes
8. Spray adhesive
9. Duct tape
10. Foam sealant
11. Glove bags
12. Hepa filters for negative air machine
13. Hepa Vacuum dust bags
14. Polyethylene
15. Reinforced feed bags
16. Respirator cleaning wipes
17. Respirator cartridges

Petitioner states that federal and state regulations dictate that the generators of asbestos waste (i.e., Petitioner's clients) will always own the waste regardless of where it is buried or who removes or transports this waste. This includes all materials required to be disposed of with the asbestos, such as the polyethylene sheeting, personal protective equipment, bags or drums used for disposal and all filtering devices for water and air that are used to complete the project. During each project ownership of these consumable, contaminated materials is transferred from Petitioner to the generators of the asbestos waste.

Applicable Law

Section 1101(b)(4)(i) of the Tax Law defines a "retail sale," in part as follows:

> A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed....

Section 1105(a) of the Tax Law imposes sales tax upon receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c)(5) of the Tax Law imposes sales tax upon receipts from every sale, except for resale, of the following services:

> Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public....

Section 1116(a) of the Tax Law provides for exemption from the sales and compensating use taxes with respect to New York State governmental entities, United States governmental entities, certain nonprofit organizations and other entities who have received New York State exempt organization status.

Section 1119(c) of the Tax Law provides:

> A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty-nine. Such application shall be in such form as the commissioner may prescribe. Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit. The procedure for granting or denying such applications for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty-nine.

Opinion

The asbestos removal service performed by Petitioner is subject to tax under Section 1105(c)(5) of the Tax Law, unless the service is performed as a constituent part of a capital improvement to real property, property or land. Where an asbestos removal service is performed for an organization that is exempt from tax under Section 1116(a) of the Tax Law, receipts from the sale of such service to the exempt organization are not taxable. (See Modern Management Group, Inc., d/b/a Modern Environmental Service, Adv Comm T& F, November 13, 1998, TSB-A-98(78)S.)

Sales of tangible personal property to Petitioner, as a contractor, for use in performing its asbestos removal service are retail sales subject to tax under Section 1105(a) of the Tax Law. However, Petitioner may be entitled to a refund or credit equal to the amount of tax paid on these sales where Petitioner purchases the tangible personal property and later transfers the property to a client in conjunction with performing a service subject to tax under Section 1105(c) of the Tax Law for such client, or makes a retail sale of the property to a client (Tax Law, §1119(c)).

In Chem-Nuclear Systems, Inc., Dec Tax App Trib, January 12, 1989, TSB-D-89(2)S, the Tax Appeals Tribunal determined that liners used in the processing of radioactive waste were "actually transferred" to customers in conjunction with the performance of a taxable service. Once exposed to the radioactive waste and contaminated, the liners were no longer usable by Chem-

Nuclear, but were effectively consumed in the processing of the waste. In addition, under state and federal law, the customers had a continued legal responsibility for the liners as well as the radioactive waste. (See, also, Waste Management of New York, Inc., Dec Tax App Trib, March 21, 1991, TSB-D-91(19)S.)

Except for the asbestos encapsulant, the items of tangible personal property typically used by Petitioner in performing its asbestos removal service, and listed in this Opinion, when exposed to asbestos become contaminated and therefor part of the asbestos waste. These items are no longer usable by Petitioner, but are transferred from Petitioner to its clients in the same manner as were the liners in Chem-Nuclear. As in Modern Management Group, Inc., d/b/a Modern Environmental Service, supra, it is assumed for purposes of this Petition that Petitioner and its clients are responsible for the proper disposal of the waste, including the items in question, pursuant to applicable federal and state laws and regulations. Accordingly, all of these items are considered actually transferred by Petitioner to its clients. As described in Modern Management Group, Inc., d/b/a Modern Environmental Service, supra, the asbestos encapulant is sprayed on a clients' properties to "lock down" residual asbestos fibers and does not necessarily become part of the disposable asbestos waste. However, the encapsulant remains part of the clients' properties and is also actually transferred to the clients. Consequently, Petitioner is eligible for a refund or credit under Section 1119(c) of the Tax Law equal to the amount of sales tax paid on these items, including the encapsulant, provided such items are transferred by Petitioner in connection with performance of a service that is subject to sales tax. If, however, the asbestos removal service is performed in conjunction with a capital improvement to real property, property or land, and thus is not subject to tax, Petitioner would not be entitled to this refund or credit. (See Modern Management Group, Inc., d/b/a/ Modern Environmental Service, supra.)

If Petitioner performs its asbestos removal service (other than as part of a capital improvement) for an exempt organization under Section 1116(a) of the Tax Law, although the purchaser of the service is exempt from tax, Petitioner will still be eligible for the refund or credit. In a case where a copy of a Direct Payment Permit is properly issued to Petitioner by a client (see 20 NYCRR 532.5 and Part 541), in order to claim the refund or credit Petitioner must be able to establish that the service was ultimately subject to tax and was not part of a capital improvement.

DATED: September 7, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.