

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-94 (2)S
Sales Tax
February 18, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940107A

On January 7, 1994, a Petition for Advisory Opinion was received from Miller Environmental Group, P.O. Box 610, Calverton, New York 11933.

The issues raised by Petitioner, Miller Environmental Group, are:

1. Whether the services provided by Petitioner in connection with toxic waste clean ups are subject to sales and use taxes.
2. Whether the supplies consumed during toxic waste clean ups are subject to sales and use taxes.

Petitioner operates a business that cleans up toxic waste spills and sites. All work is performed within New York State. The toxic waste spills are generated by several means.

- 1) A vehicle that is carrying toxic materials is involved in an accident that causes the release of toxic materials.
- 2) A vessel or motor vehicle releases toxic chemicals into the environment during the process of loading or unloading.
- 3) An industrial plant releases toxic chemicals into the environment during operation of the facility. The release may be the result of normal operations or during an accident.

Petitioner contracts to perform the clean up. The work is performed on a time and material basis.

When a spill occurs, Petitioner is contacted and makes a preliminary evaluation of the situation and sends out its own equipment, personnel and supplies to the site. The personnel use the supplies and equipment to cure the problem. Usually absorbents are spread and collected and placed in containers. The New York State Department of Environmental Conservation determines the procedures to be followed. Petitioner never assumes title to the containerized waste. The law requires that the wastes remain the property of the generator of the waste. These containers are either delivered to a location specified by the customer or directly delivered to a disposal site. Many customers take possession of the containerized waste and make their own disposal arrangements. The absorbents and containers cannot be reused by Petitioner. In addition, the disposable uniforms become contaminated and are disposed of.

Petitioner provides equipment and supplies to be used during the clean up of toxic wastes. The equipment consists of booms that are used to contain oil spills, vacuum cleaners used to remove oil from water, and earth moving equipment to remove contaminated soil. The supplies include

disposable uniforms and other protective items, absorbent materials, and packaging materials such as drums which are used to contain the absorbents and waste.

Section 1101(b)(4)(i) of the Tax Law provides, in part, that:

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.... (emphasis added)

Section 1105 of the Tax Law imposes sales tax upon:

- (a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

- (c) The receipts from every sale, except for resale, of the following services:

* * *

- (2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed.

* * *

- (5) 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 chapter, by excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

Section 532.5(a) of the Sales and Use Regulations provides that:

A direct payment permit is a notice to a vendor that the holder thereof is authorized to pay directly to the Commissioner of Taxation and Finance any tax due on purchases made. The vendor's responsibility for the collection of tax from the permit

holder is waived upon receipt of such permit.

The service of cleaning up waste and processing it is subject to the sales tax imposed under Sections 1105(c)(2) and (c)(5) of the Tax Law. (See: Cecos International, Inc. v. State Tax Commission, 126 A.D. 2d 884, affd 71 N.Y.934)

There are no exemptions in the sales tax law for the purchase or lease of equipment used to clean up toxic wastes. Therefore, if Petitioner uses equipment such as booms, vacuum cleaners, and earth moving equipment in providing its services, it would be required to pay sales tax on the purchase or rental of such equipment. Morton L. Coren, P.C., Adv Op Comm T&F, October 5, 1993, TSB-A-93(54)S.

Petitioner is not considered to be reselling drums, absorbents or packaging material to its customers, but is considered to be the ultimate consumer of such items and thus the purchase of such items are subject to sales tax. (See: Marine Pollution Control, Adv Op Comm T&F, June 13, 1991, TSB-A-91(45)S). However, in those instances where Petitioner's customers retain ownership and legal responsibility for the toxic waste, the drums, absorbents, and packaging would be considered to be actually transferred to such customer and as such may be purchased for resale by Petitioner in accordance with Section 1101(b)(4)(i) of the Tax Law. (See: Chem-Nuclear Systems, Inc., TSB-D-89(2)S). The items used by Petitioner such as protection gear and disposable uniforms are not transferred along with the service and are thus subject to sales tax whether or not Petitioner's customers retain ownership of the waste product. Morton L. Coren, P.C., supra.

Pursuant to Section 532.5(a) of the Sales and Use Tax Regulations, Petitioner will not be responsible for collecting sales tax where its customer gives Petitioner a copy of the customer's direct payment permit.

DATED: February 18, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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