

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

TSB-A-99(33)S
Sales Tax
June 24, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990121A

On January 21, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Certified Asbestos Corp., 360 A West Merrick Road, Valley Stream, NY 11580.

The issue raised by Petitioner, Certified Asbestos Corp., is whether the purchase of plastic bags, plastic poly and protective clothing to be used in performing asbestos removal service for exempt organizations is subject to State and local sales and use taxes.

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

Petitioner is a contractor that provides the service of asbestos removal. Petitioner performs asbestos removal on real property owned by organizations exempt under Section 1116(a) of the Tax Law.

Due to regulatory requirements of the Environmental Protection Agency, the New York State Department of Environmental Conservation and the New York City Department of Environmental Protection regarding the removal and disposal of asbestos materials, plastic bags, polyethylene ("plastic poly") and protective clothing must be used to remove all asbestos. The plastic bags, plastic poly and protective clothing are delivered directly to the exempt property site for exclusive use at the site. Petitioner purchases the plastic bags, plastic poly and protective clothing and submits the invoices to the exempt organization.

The plastic poly is used to protect the asbestos removal area. The asbestos is removed and placed in the plastic bags. All the contaminated plastic poly and protective clothing from the work areas are also placed in plastic bags.

Everything must be disposed of in a landfill licensed to accept asbestos materials. The plastic bags, plastic poly and protective clothing remain on the facility site and are then transported by independent haulers licensed and insured to perform this service. Even if the bags and plastic are not used, they must be disposed of by the independent hauler.

The hauling of the asbestos to the landfill is performed by an independent subcontractor. Petitioner submits a list of the haulers to the owner of the property for the owner's approval. Once the approval is granted, the chosen hauler is hired to dispose of the asbestos. Petitioner does not participate in the approval process. The exempt organization assumes the liability for the safe storage of the material at the site until it is disposed of by the independent hauler.

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 chapter, 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 service of asbestos removal 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.

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.(Tax Law, §1119(c)).

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In Chem-Nuclear Systems, Inc. (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., Tax App Trib, March 21, 1991, TSB-D-91(19)S.)

The plastic bags, plastic poly and protective clothing used by Petitioner in performing its asbestos removal service when exposed to asbestos become contaminated and therefore 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. Petitioner and the exempt organizations are responsible for the proper disposal of the waste, including the items in question, pursuant to applicable federal and state laws and regulations. Accordingly, the plastic bags, plastic poly and protective clothing are considered actually transferred by Petitioner to the exempt organization. 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, provided such items are transferred by Petitioner in connection with the 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, Adv Op Comm T&F, November 13, 1998, TSB-A-98(78)S.

DATED: June 24, 1999

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

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