

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

TSB-A-05(39)S
Sales Tax
October 26, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040927A

On September 27, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Frontier Insulation Contractors, Inc., 2101 Kenmore Ave., Buffalo, New York, 14207.

The issue raised by Petitioner, Frontier Insulation Contractors, Inc., is whether it is entitled to a refund or credit of sales taxes paid on purchases of the following items of tangible personal property that are typically used by Petitioner 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. Duct tape
8. Foam sealant
9. Glove bags
10. HEPA filters for negative air machines
11. HEPA vacuum dust bags
12. Polyethylene
13. Reinforced feed bags
14. Respirator cartridges
15. Respirator cleaning wipes
16. Smoke tubes
17. Spray adhesive
18. Disposal drums

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

Petitioner, a New York State corporation, is a contractor that provides the service of asbestos removal. Petitioner removes asbestos-contaminated materials from boilers, piping, roofs, floors, walls, ceilings and anywhere else asbestos-contaminated materials are encountered. Clients of Petitioner include commercial, industrial and manufacturing facilities; hospitals; schools; various New York State agencies and authorities; and county and municipal entities. Petitioner does not provide asbestos removal for residential customers.

During the course of removing asbestos materials, Petitioner must comply with regulations of the New York State Department of Labor (Asbestos, 12 NYCRR Part 56), the United States Environmental Protection Agency (National Emissions Standards for Hazardous Air Pollutants, 40 CFR Part 61), the New York State Department of Environmental Conservation, the United States Department of Transportation and the Occupational Safety and Health Administration.

The sequence of removing asbestos begins with isolation of the work area. Petitioner is required to erect an enclosure isolating the asbestos from surrounding areas. Such an enclosure is constructed of either metal or wood studs (16 inches on-center) with plywood or aspenite sheathing (minimum thickness of 5/8 inch) applied to the work side of the studs. On the work side of the plywood or sheathing, Petitioner is required to install at least two layers of fire retardant polyethylene (minimum thickness of 6 mils). These layers are installed one at a time and must overlap at the seams by 6 feet. The floors and ceiling areas inside the barrier are covered with polyethylene in the same manner as are the walls. There are two additional layers of polyethylene required to cover windows, electrical outlets, HVAC diffusers, grills and any other protrusions to the work area. Foam sealant is also used to seal protrusions. The polyethylene sheeting is generally held in place with spray adhesive, duct tape and staples.

A decontamination system is erected at the entrance to the work area through which all persons entering or exiting the work area must pass. This decontamination system is erected and enclosed in the same manner as the work area described above. When the barrier and decontamination system are completed, they are tested using smoke delivered through smoke tubes.

The work area must remain under constant negative air pressure. This is accomplished by installing portable negative air machines that are equipped with a three-stage filtration system including a prefilter, secondary filter and a HEPA (High Efficient Particulate Air) filter. Special vacuum cleaners equipped with disposable dust bags and HEPA filters must also be used. In addition, disposable rags, towels and sponges are used to wipe down the work area.

Once the decontamination system and barrier are completed and tested, workers begin the actual asbestos removal process. The asbestos-contaminated materials are removed and placed into asbestos burial bags. These bags must also be 6 mils thick and preprinted with "Asbestos Danger" verbiage as required by regulation. Nonpermeable disposal drums may be used in lieu of these bags. Glove bags (i.e., bags with gloves incorporated into them) are used to remove asbestos and to seal objects, such as pipes. Heavy or sharp debris, such as floor tiles, may be placed in reinforced feed bags before being placed in the asbestos burial bags. After the asbestos-contaminated materials are removed and the work area is wiped and vacuumed clean, an asbestos encapsulant is sprayed on the work area surface to "lock down" any residual asbestos fibers that may be present.

The workers performing the removal process must wear personal protective equipment that is required by regulation. These items include disposable suits, respirators (complete with disposable HEPA filter cartridges) and disposable rubber gloves. Each time upon exiting the enclosure, the workers are required to remove the personal protective items in the "dirty" chamber of the decontamination system and to take a shower. The removed items are placed in asbestos disposal bags and are required to be disposed of as asbestos waste, together with the towels used after the workers' showers. This process is continued until the asbestos has been removed and bagged and air samples confirm that there is no asbestos present in the air.

At the end of the project, the polyethylene sheeting placed on the walls, floors and ceilings must be removed and placed into asbestos disposal bags and disposed of as asbestos waste. At this time, the studs and plywood or sheathing are removed and the project is complete.

Petitioner collects and remits sales tax on the asbestos removal service it provides to its clients. On certain projects, Petitioner also receives Certificates of Capital Improvement or copies of Direct Payment Permits from its clients.

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 waste includes all materials provided by Petitioner that are required to be buried 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 and regulations

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

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 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a 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:

* * *

(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 article, but excluding (i) services rendered by an individual who is not in a regular trade or business offering his services to the public, (ii) services rendered directly with respect to real property, property or land used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting and (iii) services rendered with respect to real property, property or land used or consumed predominantly either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both.

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 that 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.

Section 526.6(c)(6) of the Sales and Use Tax Regulations provides, in part:

Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

Example 9: A painter purchases plastic drop cloths and sandpaper and after painting a customer's premises, leaves the used drop cloths and sandpaper at the premises. The drop cloths and sandpaper, even though limited or no use after the painting, have not been purchased for resale as they are items used by the painter in performing a taxable service. The drop cloths and sandpaper are not actually transferred to the purchaser of the service in conjunction with the performance of the service.

Title 40, section 61.141 of the Code of Federal Regulations provides, in part:

Definitions.

* * *

Asbestos-containing waste materials . . . includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with commercial asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos-containing material waste and materials contaminated with asbestos including disposable equipment and clothing.

* * *

Asbestos waste from control devices means any waste material that contains asbestos and is collected by a pollution control device.

* * *

Owner or operator of a demolition or renovation activity means any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

* * *

Renovation means altering a facility or one or more facility components in any way, including the stripping or removal of [asbestos containing material] from a facility component. Operations in which load-supporting structural members are wrecked or taken out are demolitions.

* * *

Waste generator means any owner or operator of a source covered by this subpart whose act or process produces asbestos-containing waste material.

Waste shipment record means the shipping document, required to be originated and signed by the waste generator, used to track and substantiate the disposition of asbestos-containing waste material.

Title 40, section 61.150 of the Code of Federal Regulations provides, in part:

Standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations.

Each owner or operator of any source covered under the provisions of §§ 61.144, 61.145, 61.146, and 61.147 shall comply with the following provisions:

(a) Discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or transporting of any asbestos-containing waste material generated by the source, or use one of the emission control and waste treatment methods specified in paragraphs (a) (1) through (4) of this section.

(1)(v) For asbestos-containing waste material to be transported off the facility site, label containers or wrapped materials with the name of the waste generator and the location at which the waste was generated.

* * *

(b) All asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at:

(1) A waste disposal site operated in accordance with the provisions of § 61.154, or

(2) An EPA-approved site that converts RACM [regulated asbestos-containing material] and asbestos-containing waste material into nonasbestos (asbestos-free) material according to the provisions of § 61.155.

* * *

(d) For all asbestos-containing waste material transported off the facility site:

(1) Maintain waste shipment records, using a form similar to that shown in Figure 4, and include the following information:

The name, address, and telephone number of the waste generator.

* * *

(2) Provide a copy of the waste shipment record, described in paragraph (d)(1) of this section, to the disposal site owners or operators at the same time as the asbestos-containing waste material is delivered to the disposal site.

(3) For waste shipments where a copy of the waste shipment record, signed by the owner or operator of the designated disposal site, is not received by the waste generator within 35 days of the date the waste was accepted by the initial transporter, contact the transporter and/or the owner or operator of the designated disposal site to determine the status of the waste shipment.

(4) Report in writing to the local, State, or EPA Regional office responsible for administering the asbestos NESHAP program for the waste generator if a copy of the waste shipment record, signed by the owner or operator of the designated waste disposal site, is not received by the waste generator within 45 days of the date the waste was accepted by the initial transporter. Include in the report the following information:

A copy of the waste shipment record for which a confirmation of delivery was not received, and a cover letter signed by the waste generator explaining the efforts taken to locate the asbestos waste shipment and the results of those efforts.

Section 360-1.3 of the New York State Department of Environmental Conservation Regulations provides, in part:

References. (a) Federal. The following documents are incorporated by reference and are on file with the New York State, Department of State. The documents are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 and for inspection and copying at the department's offices at 625 Broadway, Albany, NY 12233-4010 in the office of the Division of Solid Waste.

* * *

(2) Code of Federal Regulations (CFR):

* * *

(ii) 40 CFR - title 40 of the Code of Federal Regulations (Protection of Environment):

(a) parts 53 through 80, revised as of July 1, 1985;

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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. Whether Petitioner performs its service in conjunction with a capital improvement or for a client that qualifies as an exempt organization, although relevant, is not directly at issue in this Advisory Opinion.

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. See section 1101(b)(4)(i) of the Tax Law. However, Petitioner may be entitled to a refund or credit equal to the amount of tax paid on these sales if Petitioner purchases the tangible personal property for use in performing a taxable service and the property becomes a physical component part of the property upon which the service is performed or is transferred to the purchaser in conjunction with the service, or if Petitioner makes a retail sale of the property to its customer. See section 1119(c) of the Tax Law.

Supplies, meaning those items that are used or consumed by a contractor in the performance of a contract and that are not incorporated into real property, are generally subject to sales tax when purchased by the contractor. The credit for tax paid on items transferred to the customer is not applicable to items used or consumed by the contractor in the performance of its service. This is true regardless of whether the contractor leaves such materials behind at the completion of the job, in effect transferring such materials to the customer. See section 526.6(c)(6), Example 9 of the Sales and Use Tax Regulations.

In *Chem-Nuclear Systems, Inc.*, Tax App Trib, January 12, 1989, DTA Nos. 801549, 801582, 801909, 802046, the Tax Appeals Tribunal discussed liners used in the processing of radioactive waste. Once exposed to the radioactive waste and contaminated, the liners were no longer usable by the petitioner, but were effectively consumed in the processing of the waste. More importantly, under State and federal law, the customers had a continuing legal responsibility for the radioactive waste which, by law, now also included the liners encapsulating the customer's waste. The Tribunal determined that under these circumstances the liners were actually transferred to customers in conjunction with the performance of a taxable service. In essence, the liners were considered sold at retail to these customers. See also *Waste Management of New York, Inc.*, Tax App Trib, March 21, 1991, DTA No. 805791.

With the exception of the asbestos encapsulant, the items of tangible personal property listed in this Opinion and typically used by Petitioner in performing its asbestos removal service are considered to be taxable supplies. However, when exposed to asbestos these items become contaminated and thereafter become a part of the asbestos waste. Though Petitioner is required to properly dispose of the waste pursuant to applicable federal and State laws and regulations, Petitioner's customers are responsible for the waste itself. See 40 CFR 61.150 and 6 NYCRR 360-1.3(a)(2)(ii). These items are no longer usable by Petitioner and are transferred from Petitioner to its customers. Assuming that, as Petitioner states, New York State and federal regulations dictate that Petitioner's customers own the asbestos waste, the items of tangible personal property used by Petitioner which become contaminated during the cleaning process are considered actually transferred or sold at retail by Petitioner to its customers. See *Modern Management Group, Inc., d/b/a Modern Environmental Service*, Adv Op Comm T&F, November 13, 1998, TSB-A-98(78)S.

The asbestos encapsulant that is sprayed on the customers' properties to "lock down" residual asbestos fibers does not necessarily become part of the disposable asbestos waste. Rather, the encapsulant becomes part of Petitioner's customers' properties and is also actually transferred to the customers.

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 the items that are considered to be contaminated waste as well as the encapsulant, provided such items are transferred by Petitioner to its customer 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

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property, property or land, Petitioner would not be entitled to a refund or credit of the sales tax paid on the disposal materials or encapsulant. See *Modern Management Group, Inc., d/b/a Modern Environmental Service, supra*; *Certified Asbestos Corp.*, Adv Op Comm T & F, June 24, 1999 TSB-A-99(33)S; *Trade-Winds Environmental Restoration Inc.*, Adv Op Comm T & F, September 7, 2000, TSB-A-00(36)S.

It is noted that if Petitioner performs its asbestos removal service for an exempt organization described in section 1116(a) of the Tax Law and the service is not part of a capital improvement, Petitioner is eligible for the refund or credit of sales tax paid on items actually transferred to the customer (i.e., disposable materials or encapsulant). However, if the asbestos removal service is part of a capital improvement project for an exempt organization, Petitioner is not eligible for the refund or credit. It is further noted, where a copy of a Direct Payment Permit is properly issued to Petitioner by a client, in order to claim the subject 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.

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