

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-09(28)S  
Sales Tax  
July 14, 2009

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090206A

Petitioner [REDACTED], requests an advisory opinion as to whether its charges for the sale of asphalt delivered at a railway terminal in Albany, New York are subject to sales tax. The customers may use the asphalt in the performance of contracts with federal, state, and local governments, and other exempt entities. Some of the customers will sell or otherwise use the asphalt out of state. We conclude that Petitioner's charges for sales of asphalt delivered to its customers within New York State are subject to tax, unless the asphalt is (1) purchased for resale by in-state or out-of-state vendors who are not construction contractors; (2) purchased by construction contractors registered as New York vendors who will be incorporating the asphalt as an integral component part of the real property of a governmental entity or exempt organization described in section 1116(a) of the Tax Law; or (3) delivered to the custody of a common carrier for delivery by the common carrier to the customer outside New York State for use outside the State.

**Facts**

Petitioner is one of the largest asphalt refiners and marketers in the United States. Petitioner's product comes into the railway terminal in Albany, New York in railroad cars in a "wet" and "heated/warmed" condition. The asphalt is delivered to customers at the Albany terminal by loading the product into tractor-trailer (tanker) combinations or tank trucks capable of maintaining the product in its wet and heated condition during transport. These vehicles may be owned by the customer or may be owned and operated by a third-party carrier contracted and paid directly by the customer to transport the asphalt from Albany to the customer's desired destination. Many of Petitioner's customers are out-of-state entities that are not doing business in New York. The customers may subject the asphalt to further processing and either resell the asphalt or use it in fulfillment of construction projects. These customers all assert that the asphalt is not for use in New York. Additionally, some customers claim that the asphalt will be used outside the State in projects for the federal government or other state governments and political subdivisions.

**Analysis**

Generally, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate. See 20 NYCRR 525.2(a)(3); Tax Law §1213 (with respect to local sales tax). Section 526.7(e)(2) of the Sales and Use Tax Regulations provides that a sale of tangible personal property, where title to the property passes in New York State, but delivery occurs outside of New York State, is not subject to tax. Accordingly, sales of tangible personal property that are delivered to customers, or their designees, in New York are subject to tax, unless otherwise exempt. Out-of-state delivery to the customer, whether by the vendor's own vehicles, private and contract carriers hired by the vendor, or common carrier, is considered to be a nontaxable out-of-state sale.

If a vendor relinquishes possession of tangible personal property directly to a common carrier, the sales tax is to be collected at the combined State and local rate in effect where the common carrier delivers the property (*Audio-Video Corporation*, Adv Op Comm T&F, November 14, 1989, TSB-A-89(42)S). This is so, even if the common carrier is directly contracted and paid by the purchaser (*Norman Levy Associates*,

*Inc. Adv Op Comm T&F*, April 22, 1996, TSB-A-96(23)S). Thus, regardless of the contract terms of sale (e.g., FOB, FAS., etc.), for purposes of the incidence of the sales tax, delivery by common carrier is deemed to be delivery by the seller. See *Crowe Chizek & Company LLC Adv Op Comm T&F*, December 15, 2008, TSB-A-08(53)S; *1982 Legislation Information For Sellers and; Purchasers of Automotive Fuel*, October 26, 1982, Technical Services Bureau Memorandum, TSB-M-82(28)S.

Accordingly, if Petitioner relinquishes possession of the asphalt directly to the custody of a common carrier, Petitioner is required to collect the appropriate sales tax in effect at the point where the common carrier delivers the asphalt to the customer. Provided that Petitioner maintains records indicating points of delivery, Petitioner is liable to collect sales tax only on deliveries made to locations in New York. All sales are deemed to be taxable unless satisfactory evidence to the contrary is maintained. Records indicating delivery should include, in addition to the records required to be kept by section 1135 of the Tax Law and section 533.2 of the Sales and Use Tax Regulations, the customer invoice showing the location of the delivery and copies of bills of lading from the common carrier (*Norman Levy Associates Inc, supra*). Petitioner is not required to collect New York State and local sales tax when the records indicate that Petitioner has released the asphalt directly to a common carrier for delivery by that common carrier to the customer at an out-of-state destination. *Crowe Chizek & Company LLC, supra*.

However, any delivery of the asphalt to an agent, representative, employee, or other designee of the customer would be considered a taxable transfer of the possession of the asphalt to the customer in New York. If a vendor delivers property to a customer's own truck in New York (*F & M Schaefer Brewing Co. v Gerosa*, 4 NY 2d 423, 427; *affd* 3 AD2d 898; *appeal dismissed*, 358 U.S. 282) or to the customer's private or contract carrier (*Matter of Savemart, Inc. v State Tax Commission*, 105 AD2d 1001, *appeal dismissed*, 64 NY2d 1039, *lv denied*, 65 NY2d 604), an in-state transfer of possession of purchased goods is considered to have occurred. If the customer itself is a common carrier, in-state delivery to the customer, after which the customer will provide its own transportation and delivery to an out-of-state location is also considered a transfer of possession within New York (*James Waite, Officer of Harrison Radio Corp; Michael Waite, Officer of Harrison Radio Corp*, Det Tx App Trib, January 12, 1995, DTA Nos. 806363, 806419). Thus, if Petitioner's customers take delivery of the asphalt in their own vehicles or by a private or contract carrier hired by the customer for the purposes of transporting the asphalt to the customer, regardless of whether the ultimate destination is within or without New York, Petitioner is required to collect sales tax on the receipts from those sales, unless the sale is otherwise exempt.

If Petitioner's customer is not a construction contractor (i.e., the customer never sells asphalt to its customers on an installed basis) and the customer will resell the asphalt as such or will further process the asphalt and sell it as a new product, then Petitioner's customer may purchase the asphalt for resale without paying tax by issuing to Petitioner a New York State Form ST-120, *Resale Certificate*. An out of state vendor who is not registered or doing business within New York but who is registered for purposes of its home state sales and use tax may also use Form ST-120, *Resale Certificate*, to make purchases of the asphalt for resale. A construction contractor who paid tax on its purchase of asphalt and subsequently resells the asphalt on an uninstalled basis may claim a refund or credit of the tax it paid on that purchase. (See Tax Law §1119(c).)

An out-of-state construction contractor who purchases from Petitioner asphalt that is delivered to the contractor's own vehicle or to a contract or private carrier hired by the contractor may be eligible for a credit or refund of the New York State and local sales tax paid to Petitioner on that sale, if the contractor subsequently installs the asphalt into realty outside the State. (See Tax Law §1119(a)(1).)

Purchases of tangible personal property by contractors for use in adding to, altering, or improving real property of an organization or governmental entity exempt from sales tax under Tax Law §1116(a), or for use in maintaining, servicing, or repairing real property of an exempt organization or governmental entity, are exempt from sales tax, provided that the tangible personal property becomes an integral component part of the real property. See Tax Law §1115(a)(15), (16). Accordingly, asphalt used by Petitioner's customers in projects for the federal government may qualify for exemption. A contractor must be registered as a vendor with New York in order to use the *Contractor Exempt Purchase Certificate* (Form ST-120.1) to make exempt purchases of tangible personal property. States other than New York, and their political subdivisions, are not exempt under section 1116(a) of the Tax Law. See *Lockwood Support Services, Inc.*, Adv Op St Tx Comm, August 31, 1987, TSB-A-87(26)S. Sales of asphalt to a customer for installation into the real property owned by other states and their political subdivisions or by private organizations that are not exempt under Tax Law §1116(a) are not exempt. Petitioner is required to collect tax from the customer on those sales. However, the refund and credit provisions under Tax Law §1119(a)(1) for tangible personal property installed into realty outside New York would apply to those purchases.

DATED: July 14, 2009

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.