

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

TSB-A-98(78)S
Sales Tax
November 13, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971027A

On October 27, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Modern Management Group, Inc., d/b/a Modern Environmental Service, 747 Erie Avenue, North Tonawanda, New York 14120.

The issue raised by Petitioner 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

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 materials are encountered. Clients of Petitioner include industrial and manufacturing facilities, hospitals, schools, the State University Construction Fund, the New York State Department of Transportation, the Erie County Department of Public Works and various municipalities. 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 (Transportation and Disposal of Asbestos), the United States Department of Transportation (Transportation of

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Asbestos) and the Occupational Safety and Health Administration (Worker Protection).

The sequence of removing asbestos begins with the work area isolation. Petitioner is required to erect an enclosure isolating the asbestos from surrounding areas. Such an enclosure or barrier is constructed of either metal or wood studs (16 inches on-center) with plywood or aspenite sheathing (minimum thickness of 5/8 of an inch) applied to the work side of the studs. On the work side of the 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 where all persons entering or exiting the work area must pass through. This decontamination system is erected and enclosed in the same manner as the work area described above.

The work area must remain under constant negative air pressure. This is accomplished by installing portable negative air machines that are equipped with three stage filtration systems. A prefilter, secondary filter and a HEPA (High Efficient Particulate Air) filter must be used. Special vacuum cleaners equipped with disposable dust bags and HEPA filters must also be utilized. 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 using smoke delivered through smoke tubes, workers begin the actual asbestos removal process. The asbestos materials are removed from where they are located and placed into asbestos burial bags. These bags must also be 6 mils thick and preprinted with "Asbestos Danger" verbiage that is required by regulation. Nonpermeable drums may be used in lieu of these bags. Glove bags (i.e., bags with gloves incorporated in them) are also used to seal objects, such as pipes, and allow workers to use the gloves to remove asbestos. Heavy or sharp debris, such as floor tiles, may be placed in reinforced feed bags before being placed in the asbestos disposal bags. After the asbestos is 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 fibers that may be present.

Workers performing the removal process must wear personal protective equipment that is also required by regulation. These items include disposable suits, respirators (complete with disposable HEPA filter cartridges) and disposable rubber gloves. Upon exiting the barrier each time, the workers are required to remove the personal protective items in the decontamination system prior to taking showers. These items are removed in the "dirty" chamber of the decontamination system and placed in asbestos disposal bags. The items are

required to be disposed of as asbestos waste, together with the towels used after the workers take their showers. This process continues until the asbestos has been removed, bagged and air samples confirm that there is no asbestos present in the air.

At the end of the project, the polyethylene sheeting located 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 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 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 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. 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. 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 makes a retail sale of the property to a client (Tax Law, §1119(c)).

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. In essence, the liners were considered sold at retail to these customers. 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.)

With the exception of 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 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 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 or sold at retail by Petitioner to its clients. The asbestos encapsulant that is sprayed on the clients' properties to "lock down" residual asbestos fibers 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, provided such items are transferred by Petitioner in connection with the performance of a service that is subject

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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.

It is noted that 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 would still be eligible for the refund or credit. It is further noted, 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 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.

DATED: November 13, 1998

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

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