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

TSB-A-97(25)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S960116C

On January 16, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Environmental Soil Management of New York, L.L.C., 304 Towpath Road, Fort Edward, New York 12828. Petitioner, Environmental Soil Management of New York, L.L.C., submitted additional information pertaining to the Petition on November 5, 1996.

Petitioner raised the following questions regarding the proper application of sales tax to its business activities.

1. For contracts entered into entirely within New York State:

a. Should New York State and local sales tax be charged on the total contractual amount to process contaminated materials?

b. Should sales tax be charged on transportation costs, whether or not the processed materials are returned to the customer?

c. Should the rate of sales tax be imposed based upon the location of the Fort Edward treatment facility in Washington County or at the rate imposed in the area from which the materials are removed?

2. For contracts entered into outside of New York State:

a. Should sales tax be charged on the total contractual amount to process contaminated materials at the Fort Edward treatment facility based upon the rate in effect at that location?

b. Should sales tax be charged on the total transportation cost or that portion of the cost applicable to travel within New York State, whether or not the processed materials are returned to the customer?

3. Under what circumstances would the service rendered by Petitioner be considered a waste removal service?

4. Does Petitioner's receipt of a Certificate of Capital Improvement (Form ST-124) preclude the imposition of sales tax on the service provided by Petitioner?

5. May Petitioner rely upon a Contractor Exempt Purchase Certificate (Form ST-120.1) issued by a contractor who has checked either box 3a or 3f on the certificate?

6. With regard to the Fort Edward treatment facility:

a. Should sales and use taxes be paid on the cost of the energy (natural and propane gases) to operate the thermal equipment involved in the treatment of contaminated materials?

b. Are the treatment facility's components such as the rotary dryer, oxidizer, filtration systems, etc., exempt from sales tax as production machinery and equipment?

7. If reclaimed materials are sold after processing, should sales tax be charged on the sale price?

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

Petitioner owns and operates a thermal treatment facility in Fort Edward, New York, for the treatment and recycling of petroleum and nonpetroleum hydrocarbon contaminated soil and other materials. Contaminants contained in materials that are accepted by Petitioner are treated and removed by thermal desorption technology. This process entails heating contaminated materials in a rotary dryer at temperatures between 350 and 1000 degrees Fahrenheit. The contaminants are driven from the materials and destroyed in an oxidizer. After exiting the oxidizer, the remaining flue gases are cooled and passed through a dust filtration process that removes any remaining contaminants. The decontaminated materials are returned to the customer (i.e., the site owner, or a contractor hired by the site owner) or remain in the possession of Petitioner for future sale.

Petitioner is not involved in the clearing and stockpiling of contaminated materials at the job site. Petitioner may be retained by the customer to process contaminated materials that have been transported to its Fort Edward treatment facility. Or Petitioner may contract with the customer to remove, transport and process the contaminated materials; in which case, Petitioner enters into a contractual arrangement with an independent trucking contractor to transport the materials to Fort Edward. Petitioner provides the customer with a certification of contaminant removal as prescribed by the New York State Department of Environmental Conservation.

In cases where Petitioner transports, or arranges to transport, the materials for a site owner and these materials are not returned to the job site after processing, the site owner on occasion issues Petitioner a Certificate of Capital Improvement indicating that the described work results in a capital improvement to the real property within the guidelines indicated on the back of the certificate. In cases where Petitioner performs the same service for a contractor, the contractor on occasion issues a Contractor Exempt Purchase Certificate to Petitioner indicating that the purchase of Petitioner's service is exempt from tax by checking either box 3a (i.e., tangible personal property incorporated into a project for an exempt organization under Section 1116(a) of the Tax Law) or box 3f (i.e., services for a project that will be resold).

Applicable Law and Regulations

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

> When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:
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> * * *
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> (3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale ....
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> (4) Retail sale. (i) 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 ....
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> (5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume ... conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.
>
> (6) Tangible personal property. Corporeal personal property of any nature ....

Section 1105(a) of the Tax Law imposes tax upon, "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1105(b) of the Tax Law imposes tax, in part, upon "[t]he receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature ...."

Section 1105(c)(2) of the Tax Law imposes tax upon receipts from every sale, except for resale, of the following services:

> 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 services are performed.

Section 1115(a) of the Tax Law provides in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property ... for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting ....

Section 1115(c) of the Tax Law provides in part:

Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property ... for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten.

Section 1115(d) of the Tax Law provides:

Services otherwise taxable under paragraph (1), (2), (3), (7) or (8) of subdivision (c) of section eleven hundred five shall be exempt from tax under this article if the tangible property upon which the services were performed is delivered to the purchaser outside this state for use outside this state.

Section 1132(c)(1) of the Tax Law provides in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five ... are subject to tax until the contrary is established, and the burden of proving that any receipt ... is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe ... to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen ... the sale shall be deemed a taxable sale at retail .... Where such a resale or exemption certificate ... has been furnished to the vendor, the burden of proving that the receipt ... is not taxable hereunder shall be

solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a resale or exemption certificate ... in proper form ....

Section 528.13 of the Sales and Use Tax Regulations provides, in part:

(b) Production. (1) The activities listed in paragraph (a)(1) of this section are classified as administration, production or distribution.

(i) Administration includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) Production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

(2) The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

(3) The determination of when production begins is dependent upon the procedure used in a plant. If on receiving raw materials, the purchaser weighs, inspects, measures or tests the material prior to placement into storage, production begins with placement into storage, and the prior activities are administrative. If the materials are unloaded and placed in storage for production without such activities, the unloading is the beginning of production.

* * *

(4) Production ends when the product is ready to be sold.

* * *

(c) Directly and predominantly. (1) Directly means the machinery or equipment must, during the production phase of a process:

(i) act upon or effect a change in material to form the product to be sold, or

(ii) have an active causal relationship in the production of the product to be sold, or

(iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

* * *

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process.

Section 528.22(c) of the regulations provides, in part:

Directly and exclusively. (1) Directly means the fuel, gas, electricity, refrigeration and steam and like services, and must during the production phase of a process, either:

(i) operate exempt production machinery or equipment; or

(ii) create conditions necessary for production; or

(iii) perform an actual part of the production process.

(2) Usage in activities collateral to the actual production process is not deemed to be use directly in production.

* * *

(3)(i) Exclusively means that the fuel, gas, electricity, refrigeration and steam and like services are used in total (100%) in the production process.

(ii) Because fuel, gas, electricity, refrigeration and steam when purchased by the user are normally received in bulk or in a continuous flow and a portion thereof is used for purposes which would make the exemption inapplicable to such purchases, the user may claim a refund or credit for the tax paid only on that portion used or consumed directly and exclusively in production.

(iii) In the alternative, an exempt use certificate (Form ST-121) may be used, providing full liability is assumed for any State and local tax due on any part of purchases used for other than the exempt purposes described in subdivision (a) of this section. The taxable portion of these purchases is to be reported as a 'purchase subject to use tax' on a sales and use tax return required to be filed with the Department of Taxation and Finance.

(iv) The user must maintain adequate records with respect to the allocation of fuel, gas, electricity, refrigeration and steam used directly and exclusively in production and for nonexempt purposes.

(v) For the purpose of substantiating the allocation of fuel, gas, electricity, refrigeration and steam and like services used directly and exclusively in production from that used for nonexempt purposes, the user must, when claiming a refund or credit, submit an engineering survey or the formulae used in arriving at the amounts used in an exempt manner.

Section 532.4(b) of the regulations provides in part:

Burden of proof. (1) The burden of proving that any receipt ... is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

Opinion

When Petitioner is retained by a site owner, or by a contractor hired by the site owner, to treat and recycle contaminated materials that have been transported by the site owner or contractor to Petitioner's Fort Edward treatment facility, Petitioner is processing tangible personal property regardless of whether the processed materials are returned to the customer or remain in the possession of Petitioner for future sale. (See, Matter of Cecos Intl. v State Tax Comm, 71 NY2d 934.) Except as otherwise provided below, receipts from the sale of this service are subject to New York State and local sales tax under Section 1105(c)(2) of the Tax Law and pursuant to the authority of Article 29 of the Tax Law, provided the site owner or contractor does not retain the processed materials for resale. Processing services rendered by Petitioner on property held for resale by the purchaser of the services are not taxable. If Petitioner

charges its customer for shipping or delivering the processed materials back to the customer in New York State, Petitioner's taxable receipts for the processing service would include any amount charged for such shipping or delivery and the entire amount would be subject to tax.

Accordingly, the tax is imposed on the total contractual amount at the combined New York State and local sales tax rate in effect in the taxing jurisdiction where the service is delivered to the customer or where the materials upon which the service is performed are delivered to the customer. In those instances where Petitioner retains possession of the processed materials for future sale or where the customer picks up the processed materials at Petitioner's Fort Edward treatment facility or where Petitioner delivers the processed materials to the customer elsewhere in Washington County, the tax is imposed at the combined State and local 7% sales tax rate in effect in Washington County. Where Petitioner delivers the processed materials to the customer elsewhere in New York State, tax is imposed at the combined State and local rate in effect in the jurisdiction where delivery takes place. As indicated, the taxable receipts for the service include any charge by Petitioner for shipping or delivering the processed materials back to the customer, even if Petitioner separately states such charge. The entire amount charged for the service, including any separately stated shipping or delivery charge, is exempt from tax under Section 1115(d) of the Tax Law if delivery of the materials occurs outside New York State for use outside the State. (The location where the contract is entered into has no effect on whether the transaction is subject to tax or on the rate of sales tax to be imposed.)

When Petitioner enters into a contractual arrangement with an independent trucking contractor to transport the materials from Petitioner's customer's site to Petitioner's Fort Edward treatment facility and Petitioner processes the materials, Petitioner is also considered to be performing a processing service under Section 1105(c)(2) of the Tax Law regardless of whether the processed materials are returned to the customer or remain in the possession of Petitioner for future sale. As indicated, the tax is imposed on the total contractual amount at the combined New York State and local sales tax rate in effect in the taxing jurisdiction where the service is delivered to the customer or where any materials upon which the service is performed are delivered to the customer. In these cases, Petitioner's taxable receipts for the service include any such transportation costs incurred by Petitioner to have the materials transported to Petitioner's facility, as well as any charge by Petitioner for shipping or delivering the materials back to the customer. (See, Matter of Penfold v State Tax Comm, 114 AD2d 696.) However, if delivery of the materials occurs outside New York State for use outside the State, the entire amount charged for the service is exempt from tax under Section 1115(d) of the Tax Law.

Transportation, per se, is not a service subject to sales or use tax. Thus, if Petitioner's customer hires a trucking contractor to transport the customer's contaminated materials to Petitioner's Fort Edward facility for processing, and to return them to the customer after they are processed, the transportation charge, per se, to transport the materials to and from Petitioner's Fort Edward facility would not be subject to tax. Likewise, if

Petitioner hires a trucking contractor to transport contaminated materials to or from Petitioner's Fort Edward facility for processing, the transportation charge paid by Petitioner is also not subject to tax.

As described in the facts submitted, Petitioner is in the business of treating and recycling petroleum and nonpetroleum hydrocarbon contaminated soil and other materials in New York State in accordance with Department of Environmental Conservation guidelines. The decontaminated materials are returned to the customer or remain in the possession of Petitioner for future sale. This is not a waste removal service.

In accordance with Section 1132(c) of the Tax Law and Section 532.4 of the regulations, the burden of proving that Petitioner's receipts from the sale of its processing service are not subject to sales tax is upon Petitioner and its customers. If Petitioner, in good faith, timely accepts a properly completed resale or exemption certificate, Petitioner is relieved of its liability to collect the sales tax with respect to the applicable sale, and the burden of proving whether the sale is taxable rests solely upon the customer. Petitioner is not relieved of this duty to collect tax if Petitioner has actual knowledge (i.e., more than a mere suspicion or belief) that the resale or exemption certificate is false or fraudulent. Where Petitioner accepts the certificate in good faith, it is under no duty to investigate or police the customer or to debate the taxability of the sale with the customer. (See, Matter of Saf-Tee Plumbing v Tully, 77 AD2d 1; Harron's Electric Service, Inc., Adv Op Comm T&F, October 14, 1981, TSB-A-81(44); Sharon P. Sheinfeld, Adv Op Comm T&F, August 7, 1990, TSB-A-90(39)S.)

The question of whether a resale or exemption certificate is accepted in good faith is a factual matter that cannot be determined in an Advisory Opinion (see, Copelco Leasing Corporation, Adv Op Comm T&F, May 18, 1995, TSB-A-95(15)S). However, given the fact that Petitioner performs a processing service, the receipts from which are taxable under Section 1105(c)(2) of the Tax Law and that this section of the Tax Law contains no provision for a capital improvement exemption, Petitioner may not accept a Certificate of Capital Improvement from a customer in good faith. (See, Matter of Robert Bruce McLane Associates v Urbach, -- AD2d --, 649 NYS2d 487.) Accordingly, Petitioner's receipt from a customer of a Certificate of Capital Improvement (or a copy thereof) indicating that the described work results in a capital improvement to the real property as indicated on the back of the certificate does not preclude the imposition of sales tax on the service provided by Petitioner.

Petitioner may accept in good faith and rely upon a Contractor Exempt Purchase Certificate issued by a contractor who checks box 3f on the certificate (i.e., services for resale). Petitioner's processing service may be purchased for resale in appropriate circumstances. However, in the situations presented by Petitioner, box 3a is not applicable because this box pertains to the sale of tangible personal property and not to the performance of a service. Petitioner may also accept in good faith and rely upon a Resale Certificate (Form ST-120) issued by someone other than a contractor who purchases Petitioner's service for resale (including the servicing of tangible personal property held for sale by the purchaser of such service). Where Petitioner accepts either of these certificates in good faith, Petitioner is not responsible for collecting sales

tax from its customer on its service. Rather, the customer is responsible either for the tax or for proving that its purchase of Petitioner's service is not taxable.

The rotary dryer, oxidizer, filtration systems, etc. that are located at Petitioner's Fort Edward treatment facility and the energy (natural and propane gases) used to operate the thermal equipment involved in the treatment of materials are exempt from tax pursuant to Sections 1115(a)(12) and 1115(c), respectively, of the Tax Law only if the machinery and equipment and the energy are used or consumed "in the production of tangible personal property ... for sale," as follows. In the case of machinery or equipment, this use or consumption must be "directly and predominantly" as defined in the sales tax regulations; in the case of energy, the use or consumption must be "directly and exclusively" as so defined.

Petitioner's rotary dryer, oxidizer, filtration systems, etc. are used, and the energy used to operate the thermal equipment is consumed, in the production phase. However, Petitioner has indicated that after decontamination, materials are either returned to the customer or remain in the possession of Petitioner for future sale. Accordingly, if the machinery and equipment are used by Petitioner predominantly (over 50 percent) to produce decontaminated materials for sale, by either Petitioner or Petitioner's customers, the machinery and equipment are eligible for the exemption from tax provided in Section 1115(a)(12) of the Tax Law. (See, Lindemann Recycling Equipment, Inc., Adv Op Comm T&F, January 31, 1989, TSB-A-89(3)S; Vigliotti Recycling Corp., Adv Op Comm T&F, December 24, 1990, TSB-A-90(58)S.) However, if the machinery and equipment are predominantly used to treat materials that will be reused by the customer, or otherwise not sold, the machinery and equipment would be subject to tax. Any energy used or consumed exclusively to operate the machinery and equipment in the production of decontaminated materials for sale is eligible for the exemption from tax provided in Section 1115(c) of the Tax Law and administered in accordance with Section 528.22 of the regulations. Petitioner is required to pay sales or compensating use tax on its purchases of energy, except to the extent that Petitioner can substantiate that a portion of the energy is used exclusively to operate the machinery and equipment while producing materials for sale. (See, Matter of Midland Asphalt v Chu, 136 AD2d 851, lv denied 72 NY2d 806.)

Petitioner's sales of reclaimed soil and other decontaminated materials are sales of tangible personal property subject to tax under Section 1105(a), 1107 and 1109 of the Tax Law and county and city sales taxes enacted pursuant to the authority of Article 29 of the Tax Law. Tax is imposed on the receipt from the retail sale of the materials at the combined New York State and local tax rate in effect in the taxing jurisdiction where the materials are delivered to the purchaser. It is noted that if Petitioner sells this tangible personal property

to a contractor for incorporation into a project for an organization that is exempt from tax under Section 1116(a) of the Tax Law, Petitioner may accept a Contractor Exempt Purchase Certificate with box 3a checked.

/s/
DATED: April 24, 1997 John W. Bartlett
Deputy Director
Technical Services Bureau

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