

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

TSB-A-91 (45)S  
Sales Tax  
June 13, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910123A

On January 23, 1991, a Petition for Advisory Opinion was received from Marine Pollution Control, 460 Edwards Avenue, Calverton, New York 11933.

Petitioner, Marine Pollution Control, is a diversified company deriving its income from the following sources:

- Offshore spill removal
- Onshore spill removal
- Monitoring of offshore and onshore spill removal
- Distribution of oil spill materials
- Removal of contaminated waste materials

Petitioner sells chemicals and materials to be used in the cleanup of oil and chemical spills both offshore and onshore. These sales consist of, but are not limited to, sales made to other dealers, to governmental agencies, to exempt organizations and to the ultimate consumer. The chemicals and materials may be delivered to locations in and out of the state.

Petitioner may be called upon to perform any one or more of these services and any combination thereof:

- Cleanup and disposal of contaminated materials
- Providing materials for said cleanup and disposal
- Providing labor and materials to clean and dispose of the contaminated waste

Petitioner has set forth various questions concerning the application of New York State and local sales and use tax to its business activities. The following are the questions presented by Petitioner and the appropriate answers:

- Q. 1. a. Is Petitioner a contractor as defined in Section 541.1 of the New York State Sales and Use Tax Regulations?
- b. Is Petitioner a service company that provides cleanup and disposal services of contaminated materials for its customers.
- A. 1. a. The spill removal services performed by Petitioner are considered to be maintaining, servicing or repairing real property as defined under Section 541.2(1) of the Sales and Use Tax Regulations. Therefore Petitioner is considered to be a contractor in accordance with the provisions of Section 541.1 of the Regulations.

- b. Petitioner is considered to be a contractor engaged in performing cleanup and disposal services.
- Q. 2. Petitioner is retained to remove offshore oil spills.
- a. Is this service taxable when performed in New York State?
  - b. Is this service taxable when performed outside New York State?
  - c. Is Petitioner engaged in interstate and international commerce when performing these services?
- A. 2. a. Petitioner's service of cleaning up and disposing of oil spills is considered to be a service of maintaining, servicing or repairing real property, as defined under Section 541.2(1) of the Sales and Use Tax Regulations and subject to the tax imposed under Section 1105(c)(5) of the Tax Law when such services are performed within New York State. However, in any instance where Petitioner performs the cleanup and disposal services under the terms of a contract entered into with a governmental agency or an exempt organization, the receipts from charges for such services will not be subject to sales tax provided the governmental agency or exempt organization is the direct purchaser and payor of record.
- b. When Petitioner performs cleanup and disposal service outside New York State, the receipts from charges for such services will not be subject to New York State and local sales or use tax as such services are not being performed within New York State.
  - c. Section 1115(a)(8) of the Tax Law provides an exemption from sales tax for commercial vessels engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs. Section 528.9(a)(3) of the Regulations defines a commercial vessel as any vessel used or engaged in the transportation for hire of persons or property on water. Section 528.9(a)(5) of the Regulations defines interstate or foreign commerce as the transportation of persons or property between states or countries. Accordingly, as Petitioner provides a cleanup and disposal service and does not transport passengers or property for hire, Petitioner is not considered to be engaged in interstate or international (foreign) commerce for sales tax purposes.
- Q. 3. Petitioner is retained to clean up and dispose of an onshore oil spill. Petitioner constructs a removal facility for such spills at the site of its customers. The removal facility generally consists of wells and a water treatment system whereby subsurface water is pumped through the treatment system and then returned to the subsurface. The removal facility remains in place for the duration of the cleanup procedure, after which the removal facility is dismantled by Petitioner and generally salvaged. The well casings are also removed and the wells are refilled with dirt, etc., by Petitioner.

- a. Does the construction meet the requirements of a capital improvement?
  - b. What is the taxable status of the materials used in the above construction, when:
    1. Possession is transferred to the customer in New York State?
    2. Possession is transferred outside New York State?
    3. Construction is for an exempt organization?
    4. Utilities purchased for the job site are resold to the customers?
- A.
3. a. Section 1101(b)(9) of the Tax Law defines a capital improvement as an addition or alteration to real property which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, and becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself, and is intended to become a permanent installation. Since Petitioner installs the removal facility only for the purpose of performing a cleanup and disposal service with the intention of dismantling and removing such facility upon completion of the cleanup, the construction of the removal facility is not considered to be a capital improvement as such installation does not meet the requirements of substantially adding to the real property, being permanently affixed to the real property or being intended as a permanent installation.
  - b. Petitioner's purchases of materials for use in constructing a removal facility are subject to New York State and local sales tax at the time purchased by Petitioner. As such materials will be incorporated into the removal facility for use by Petitioner in performing the cleanup and disposal service at a spill site, Petitioner is considered to be the consumer of the materials.
    1. Since Petitioner is considered to be the consumer of the materials, title and possession of the materials does not transfer to the customer and Petitioner is liable for the sales tax due on the purchase of such materials.
    2. Where Petitioner constructs a removal facility outside New York State Petitioner will be liable for New York State and local sales and use tax if the materials are purchased within New York State and if Petitioner takes delivery of the materials within New York State. However, if Petitioner purchases such materials in bulk, and stores any portion of such materials within New York State and subsequently ships such materials outside New

York State for use by Petitioner outside New York State, Petitioner will be allowed a refund or credit for the New York State and local sales tax paid on the purchase price of such materials.

3. See 1.) above. The fact that Petitioner is performing the cleanup and disposal for an exempt organization does not relieve Petitioner from being liable for sales tax on the purchase of the materials to be used in constructing the removal facility.
4. Petitioner's purchase of utilities for use in operating a removal facility during a cleanup operation will be subject to New York State and local sales tax. As the utilities are used or consumed in performance of the cleanup operation, Petitioner is deemed to be the consumer of the utilities and is not considered to resell the utilities to the customer.

Q. 4. Petitioner is responsible for monitoring the removal sites during the performance of the cleanup and disposal service at onshore and offshore spill sites.

- a. Is this service taxable when performed within New York State?
- b. Is this service taxable when performed outside of New York State?

A. 4. a. Petitioner's monitoring service is considered to be part of the cleanup and disposal service performed by Petitioner and charges for such are subject to New York State and local sales tax when such services are performed within New York State. If the only service performed by Petitioner is the monitoring of a spill site, the charge to the customer will be considered a charge for the service of maintaining or servicing real property and will be subject to New York State and local sales tax provided such service was performed within New York State. However, when such services are provided in accordance with a contract between Petitioner and a governmental agency or an exempt organization, the charges for such services will not be subject to New York State and local sales tax, provided the governmental agency or exempt organization is the direct purchaser and payor of record.

b. In those instances where Petitioner performs monitoring services outside New York State, the charges for such services will not be subject to New York State or local sales tax.

Q. 5. Petitioner purchases absorbants, chemicals and booms for resale. What is the sales tax status of these materials when,

- a. the materials are resold and Petitioner receives a form ST-120, Resale Certificate from the customer?
  - b. the materials are resold to out of state vendors and delivery takes place
    - 1. outside New York State?
    - 2. within New York State?
  - c. the materials are resold to exempt organizations?
  - d. direct sales are made to customers within New York State in which Petitioner collects sales tax from the customer?
- A. 5. a. Section 532.4(d) of the New York State Sales and Use Tax Regulations prohibits use of a resale certificate by a contractor when purchasing tangible personal property for use in performing repairs to real property. Section 541.1(b) of the Regulations provides that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax.

Since it has been determined that Petitioner is a contractor under the provisions of Section 541.1 of the Regulations (see Q. & A.1.a. above), Petitioner may not make any purchases for resale purposes. Petitioner must pay the applicable New York State and local sales or use tax on all purchases where delivery occurs within New York State and on any out-of-state purchases when the items purchased by Petitioner are subsequently brought into New York State for use in the state.

When Petitioner sells absorbants, chemicals and booms to customers, without performing cleanup and disposal services for such customers, the sale of such items will not be subject to New York State or local sales tax provided the customer gives Petitioner a properly completed form ST-120, Resale Certificate. However, because Petitioner must pay New York State and local sales tax on Petitioner's purchases of materials, Petitioner may claim a credit, in the amount of such tax paid, on the sales tax return filed for the appropriate period in which Petitioner resells the items to the customer.

- b. When Petitioner sells only materials to out-of-state vendors without performing any services and delivery occurs,

1. outside New York State, the sale will not be subject to New York State or local sales tax.
  2. within New York State, the sale will be subject to New York State and local sales tax unless the out-of-state vendor presents Petitioner a properly completed form ST-120, Resale Certificate or form ST-128, Out-of-State Resale Permit.
- c. When Petitioner makes sales of only materials to an exempt organization without performing any services, the sales will be exempt from New York State and local sales tax provided the exempt organization gives Petitioner a properly completed form ST-119.1, Exempt Organization Certificate. However, because Petitioner must pay New York State and local sales tax on Petitioner's purchases of materials, Petitioner may claim a credit, in the amount of such tax paid, on the sales tax return filed for the appropriate period in which Petitioner resells the items to the customer.
- d. When Petitioner makes sales of only materials to customers located within New York State without performing any services, Petitioner must collect New York State and local sales tax on such sales unless the customer provides Petitioner a properly completed exemption certificate. However, because Petitioner must pay New York State and local sales tax on Petitioner's purchases of materials, Petitioner may claim a credit, in the amount of such tax paid, on the sales tax return filed for the appropriate period in which Petitioner resells the items to the customer.

It is noted that if in any of the transactions outlined in situations a, b.2, c or d. Petitioner also uses the materials in conjunction with performing cleanup and disposal services, then it will not be considered to have made a sale of the materials. Instead, Petitioner will be considered to be the ultimate consumer of the materials. Accordingly, in such instances the materials will not be considered to have been sold for resale purposes.

- Q. 6. Petitioner is retained to remove contaminated waste and/or supply the material needed to remove said waste. What is the sales tax status of Petitioner's receipts from each of the following transactions and what is Petitioner's sales tax liability when purchasing drums and chemicals for use in such transactions?
- a. Petitioner sells drums and chemicals to its customer for the removal of waste material by the customer.
  - b. Petitioner is hired to remove and transport waste material from a site within New York State to another site within the state.
  - c. Petitioner is hired to remove and transport waste material from a site in New York State to a site outside the state.

- d. Petitioner is hired to remove and transport waste from a site outside New York State to another site also outside the state.
- A.
- 6. a. When Petitioner sells only drums and chemicals to its customer, without performing any service, for the removal of waste material by the customer, Petitioner will be considered to be selling tangible personal property to the customer and will be liable for collecting New York State and local sales tax on the total receipts from the sale of such drums and chemicals. However, in any instance where the customer is a governmental entity, an exempt organization or a vendor purchasing such items for resale purposes, Petitioner will not be liable for collecting sales tax on the transaction provided the customer provides Petitioner with a governmental purchase order or voucher, or a properly completed exemption certificate, whichever is applicable. Because Petitioner must pay sales tax on these items at the time purchased, Petitioner may claim a credit, in the amount of such tax paid, on the sales tax return filed for the appropriate period in which Petitioner resells the items to the customer.
  - b. In a transaction where Petitioner is hired to remove and transport waste material from a site within New York State to another site within New York State and the drums and chemicals are used by Petitioner in performing the removal and transport service, Petitioner is considered to be servicing or maintaining real property, as well as performing a waste removal service, all of which are considered to be services subject to the tax imposed under the provisions of Section 1105(c)(5) of the Tax Law. Accordingly, the receipts from Petitioner's charges to customers for the removal and transport service will be subject to New York State and local sales tax.  
  
Since Petitioner will be using the drums and chemicals in performing the removal and transport service, Petitioner is not considered to be reselling the drums and chemicals to the customers, but is considered to be the ultimate consumer of such items. Petitioner must pay New York State and local sales tax to the supplier when purchasing the drums and chemicals or in the alternative, if sales tax is not paid at the time of such purchase, Petitioner must report such items as purchases subject to use tax on the sales tax return filed for the applicable period in which such items were purchased by Petitioner.
  - c. When Petitioner is hired to remove and transport waste material from a site within New York State to a site located outside New York State, Petitioner's tax liability will be identical to 6. b. above. As the removal and transport originate within New York State, Petitioner is considered to be performing a taxable service within New York State. The fact that the waste is transported to a site located outside New York State does not have any affect on the imposition of tax in this transaction.

- d. When Petitioner is hired to remove and transport waste material from a site located outside New York State to another site located outside New York State, Petitioner's charges to the customer will be for services performed outside New York State and will not be subject to New York State or local sales tax. If Petitioner takes delivery of the drums and chemicals used in this transaction within New York State, Petitioner will be liable for New York State and local sales tax based on the purchase price of such items.

However, where Petitioner purchases such items in bulk, and stores any portion of such items within New York State and subsequently ships such items outside New York State for use by Petitioner outside New York State, Petitioner will be allowed a refund or credit for the New York State and local sales tax paid on the purchase price of such items.

- Q. 7. What are Petitioner's tax liabilities in each of the above transactions when dealing with a customer who is a holder of a Direct Payment Permit.

- A. 7. Section 532.5(a) of the New York State Sales and Use Tax Regulations states in part:

A direct payment permit is a notice to a vendor that the holder thereof is authorized to pay directly to the Tax Commission any tax due on purchases made. The vendor's responsibility for the collection of tax from the permit holder is waived upon receipt of such permit.

Accordingly, in any of the above transactions, Petitioner will not be responsible for collecting sales tax where the customer gives Petitioner a copy of the customer's direct pay permit.

DATED: June 13, 1991

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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