



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

**REVENUE LEGAL COUNSEL**

Post Office Box 1272, Room 2380  
Little Rock, Arkansas 72203-1272  
Phone: (501) 682-7030  
Fax: (501) 682-7599  
<http://www.arkansas.gov/dfa>

September 28, 2020

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

RE: Sales Tax – Asphalt Paving Contracts  
Opinion Number 20200608 (Renewal of 20180119)

[REDACTED]:

This letter is in response to your May 20, 2020 email to the Department of Finance and Administration (DFA), Revenue Legal Counsel, requesting a renewal of Legal Opinion 20180119. Opinion 20180119 addresses the taxation of materials used in performing asphalt road construction contracts in Arkansas. Set forth below are the facts from Opinion 20180119, which you have confirmed to be correct in all material aspects:

*A significant portion of the highway and road construction in the state of Arkansas is performed by asphalt paving contractors. The majority of paving contracts are entered into with the Arkansas Highway Transportation Department (“AHTD”) and a smaller portion of paving contracts are entered into with other government entities. Asphalt paving contracts for the private sector are relatively insignificant.*

*In general, new road construction is bid and performed in stages that include (i) preparing the surface (dirt work); (ii) applying and compacting a subbase of base stone made up of coarse and fine rock; and (iii) applying and compacting multiple layers of asphalt. Repair and resurfacing contracts may involve one or more of these steps. “Asphalt” is the lay term for “asphalt concrete.” “Hot mix asphalt concrete” (commonly abbreviated as “HMAC” or “HMA”) is most common and is used in road construction in Arkansas. Asphalt is made up of an asphalt binder and a mineral aggregate mixed together and then applied in layers and compacted. Asphalt binder is a petroleum product manufactured by petroleum refiners. Aggregate is fine and coarse particulate material made up of sand, gravel, crushed stone, slag or recycled concrete. The components are heated and mixed at a central facility and placed on the road using an asphalt spreader.*

*Highway contracts are typically awarded on a “fixed bid” basis. The AHTD requires highway contractors to bid the base stone/laydown, liquid asphalt concrete/laydown and aggregate/laydown separately, notwithstanding the mixing of the latter two materials at the mixing facility. Mixing facilities may be designed*

*as either fixed or moveable, and both types are used in Arkansas.*

*Most large highway contractors operate their own asphalt mixing facilities. There are many different grades and specifications of asphalt. Approximately 20 mix designs or formulations are certified by the AHTD for use on a regular basis, and up to 100 or more mix designs are used on a more occasional basis. The raw materials and mixing facilities used in performing highway contracts are subject to AHTD regulation, inspection and oversight.*

*Asphalt is mixed to the required paving specification at time of use, and the material moves from the raw material stage through mixing, laydown and compaction as a continuous process without intermediate storage or interruption.*

*Most, but not all, asphalt contractors who operate their own mixing facilities will also make occasional sales of asphalt to others. But some contractors only mix asphalt for their own contracts; and others only make their mixing facilities available on a “tolling” basis, and mix raw materials for others for a fee.*

*According to anecdotal information available to the Association, the tax compliance practice followed by most asphalt contractors that operate their own mixing facilities is to pay sales tax on raw materials at the time of purchase. Under these circumstances, contractors that make occasional sales of asphalt to others take an offset for the tax paid on the raw materials when they collect and remit tax on sales of asphalt to others. Other asphalt contractors purchase raw materials under exemption certificates, remit tax on the raw materials when withdrawn from stock to perform a construction contract, and charge sales tax on sales of asphalt to others.*

*Contractors that have been audited within the last five years report that this compliance practice has been questioned on audit, but that no assessments of additional taxes under these circumstances have been made. Nevertheless, the auditor’s comments have raised significant concerns on the part of the members of the Association.*

## **RESPONSE**

Before addressing your specific questions, it is necessary to have a general discussion of the law that is applicable to this opinion as a whole.

## **GENERALLY APPLICABLE LAW FOR CONTRACTORS**

The Arkansas Gross Receipts tax, commonly referred to as “sales tax,” generally applies to all sales of tangible personal property and certain enumerated services unless otherwise exempted. Ark. Code Ann. § 26-52-301 (Supp. 2019). The tax is computed based on the total value of consideration paid for the taxable property or service. *Id.*; *see also* Ark. Code Ann. § 26-52-103(19) (Supp. 2019).

In addition, special provisions exist for contractors in Arkansas. Ark. Code Ann. §§ 26-52-103(6) and 26-52-307 (Supp. 2019); *see also* Arkansas Gross Receipts Tax Rule GR-21. A contractor is defined as “any person who contracts or undertakes to construct, manage, or supervise the construction, erection, alteration, or repair of any building or other improvement or structure affixed to real estate, including any of their component parts.” Ark. Code Ann. § 26-52-103(6) (Supp. 2019); *see also* Arkansas Gross Receipts Tax Rules GR-3(D) and GR-21(A)(3). Sales of services and tangible personal property, including materials, supplies, and equipment, made to contractors who use them in the performance of any contract are declared to be sales to consumers or users and not sales for resale. Ark. Code Ann. § 26-52-307 (Supp. 2019). Arkansas Gross Receipts Tax Rule GR-21(A)(1) similarly explains:

“Consumer” or “user” means the person to whom the taxable sale is made or to whom the taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales. The contractor must pay tax at the time of purchase or pay tax at the time the materials are withdrawn from stock for use in the performance of the contract. A contractor cannot rely on the direct pay permit of the other party to the contract for payment of the tax on the construction materials.

Contractors holding a sales tax permit should purchase all materials (with the exception of tools, equipment, and other items that are not transferred to a customer) used in its business exempt from tax as a sale for resale and should self-assess, report, and pay sales tax on the purchase price of the materials at the time they are withdrawn from stock. Arkansas Gross Receipts Tax Rule GR-21(D)(1). Withdrawal from stock occurs when a taxpayer withdraws an item of property for its own use in performing the service or when a taxpayer withdraws the item of property to give to the customer or a third party. Arkansas Gross Receipts Tax Rule GR-18.

#### **Issue A: Asphalt paving contractors that mix asphalt for their own use.**

Question 1: Asphalt paving contractors that mix their own asphalt should pay sales tax on the cost of the asphalt binder and aggregate at the time of purchase. No additional taxes apply. Is this correct?

Answer 1: Yes. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales. Arkansas Gross Receipts Tax Rule GR-21(A)(1).

Question 2: Asphalt paving contractors that produce a portion of their own aggregate from quarries should pay sales tax on the value of the stone when it is separated from the earth. Is this correct?

Answer 2: Yes. Contractors holding a sales tax permit should purchase all materials (with the exception of tools, equipment, and other items that are not transferred to a customer) used in its business exempt from tax as a sale for resale and should self-assess, report, and pay sales tax on the purchase price of the materials at the time they are withdrawn from stock. Arkansas Gross Receipts Tax Rule GR-21(D)(1). Withdrawal from stock occurs when a taxpayer withdraws an item of property for its own use in performing the service or when a taxpayer withdraws the item of property to give to the customer or a third party. Arkansas Gross Receipts Tax Rule GR-18.

Question 3: Crushing, separating and sorting rock for use as aggregate is not taxable. Is this correct?

Answer 3: Yes

**Issue B: Asphalt paving contractors that mix asphalt for their own use and also mix asphalt for sale to the general public.**

Question 1: Asphalt paving contractors that mix their own asphalt and mix asphalt for sale to the general public should have two compliance options.

- a. Pay sales tax on the cost of the asphalt binder and aggregate at the time of purchase, collect sales tax on sales to the general public, and offset any sales tax previously paid on the materials.
- b. Purchase the raw materials on an exempt basis as a purchase for resale, collect sales tax on sales to the general public and pay sales tax on the cost of materials withdrawn for mixing to perform a paving contract. No additional taxes apply.

Answer 1: Yes. However, administering offsets, credits, and refunds can complicate the efficient processing of returns. For this reason, the Department would recommend option b.

Question 2: Asphalt paving contractors in this category that also produce a portion of their own aggregate from quarries have the same compliance options as set forth directly above in Question 1(a) and Question 1(b) with respect to these materials. Is this correct?

Answer 2: Yes

Question 3: Crushing, separating and sorting rock for use as aggregate is not taxable. Is this correct?

Answer 3: Yes

**Issue C: Asphalt paving contractors that purchase asphalt from third parties.**

Question 1: Asphalt paving contractors that purchase asphalt from third parties pay tax on the asphalt purchase price, including delivery if applicable. Is this correct?

Answer 1: Yes. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales. Arkansas Gross Receipts Tax Rule GR-21(A)(1).

Question 2: However, asphalt paving contractors that do not operate their own mixing facilities may purchase raw materials on the same basis as set forth above in Issue A, and contract for non-taxable mixing services from others on a “tolling” basis. Is this correct?

Answer 2: My understanding of an asphalt “tolling” contract is that it is simply an arrangement where an asphalt contractor pays another party to mix and prepare the contractor’s asphalt raw materials. As you noted, the mixing is a non-taxable service. It may not be feasible to apply the answers from **Issue A** to this question since the fact scenarios are different. Generally speaking, an asphalt paving contractor should pay sales tax on the purchase price of its raw materials either at the time of purchase or later as a withdrawal from stock.

This opinion is based upon my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any changes in the facts or law could result in a different opinion. In accordance with Arkansas Gross Receipts Tax Rule GR-75, this opinion will only be binding upon the Department for three (3) years from the date of issuance.

The Arkansas Tax Rules cited in this opinion may be viewed on DFA’s website at [http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008\\_3.pdf](http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008_3.pdf).

Sincerely,

Nina Samuel Carter  
Office of Revenue Legal Counsel