

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

TSB-A-94 (54)S
Sales Tax
December 23, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940705C

On July 5, 1994, a Petition for Advisory Opinion was received from Singer Transport, Inc., 2470 Allen Avenue, Niagara Falls, New York 14303.

The issue raised by Petitioner, Singer Transport, Inc., is whether Petitioner's receipts for the transporting of recyclable raw material are subject to State and local sales and use taxes under Section 1105(c)(5) of the Tax Law as services for maintaining real property.

Petitioner is a common carrier trucking company. Petitioner is subject to regulation by the New York State Department of Transportation (the "DOT") and the Federal Interstate Commerce Commission (the "ICC"). The DOT and ICC both regulate and approve Petitioner's rates for its services, i.e., Petitioner's tariffs. Different tariffs are established for transportation of different products. Petitioner's tariff schedules, and the actual selection of tariffs used to charge specific customers, have been audited by the DOT and the ICC. The DOT and the ICC view the appropriate tariff for the services Petitioner provides as the "general commodities" tariff. Petitioner does not have a "waste" tariff.

Petitioner's services at issue arise under one of two scenarios. In the first scenario, Petitioner is retained by an entity engaged in the business of recycling tangible personal property (hereinafter the "Recycler"). The Recycler uses a byproduct generated by a separate entity (hereinafter the "Supplier") as its raw material. The Recycler purchases this raw material directly from the third party Supplier, i.e. the Recycler pays the Supplier for the by-product. The Recycler recycles the raw materials it has purchased from the Supplier into a product which the Recycler then sells at retail. At no time does the Recycler charge the Supplier a fee of any kind or provide to the supplier a service of any kind.

Petitioner is retained by and invoices the Recycler directly for the transportation services provided. Petitioner picks up the Recycler's raw materials at a location designated by the Recycler (typically the Supplier's facility) and delivers the same raw materials to a different location also designated by the Recycler (typically the Recycler's facility). The pick-up points and delivery points are both in New York State.

Neither the Recycler nor the Supplier are related to Petitioner in any way. The Recycler has no ownership or possessory interest in the Supplier's real property from which Petitioner picks up the raw materials for transport.

Under the second scenario, Petitioner is retained by a third party broker (hereinafter the "Broker"). The Broker is in the business of locating, on behalf of Recycler, sources of supply of recyclable raw materials. The Broker either purchases the by-products directly from the Supplier on

speculation that it can sell them at a profit to a Recycler, or acts as a middleman between the Recycler and the Supplier, receiving a commission from the Recycler based on the purchase price paid by the Recycler to the Supplier.

In all transactions involving a Broker, the underlying relationship between the Recycler and the Supplier remains the same. The Recycler is purchasing for value, the recyclable materials from the Supplier directly or through the Broker. The Recycler charges no fee whatsoever to the supplier nor does the Broker charge the Supplier any fee.

The only difference from Petitioner's perspective between the first scenario and the second scenario is that Petitioner in the second scenario is retained directly by the Broker, rather than by the Recycler, to pick up the raw materials from the Supplier's facility and transport them to the Recycler's facility. Petitioner invoices the Broker directly and the Broker tells the Petitioner where to pick up and deliver the raw materials.

Neither the Broker, the Recycler nor the Supplier are related to Petitioner in any way, neither does the Broker nor the Recycler have an ownership or possessory interest in the Supplier's real property from which Petitioner picks up the raw materials for transport.

Section 1105 of the Tax Law provides, in part, as follows:

Sec. 1105. Imposition of sales tax.--... there is hereby imposed and there shall be paid a tax ... upon:

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(5) 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 526.5(g) of the Sales and Use Tax Regulations provides, in pertinent part, as follows:

* * *

(3) A charge for transporting or delivering property by a transportation or delivery company to the person or business requesting that the property be transported or delivered is not a receipt subject to tax, since transportation

and delivery are not themselves services subject to tax.

Section 527.7 of the Sales and Use Tax Regulations provides, in part, as follows:

Reg. Sec. 527.7. Maintaining, servicing or repairing real property.--(Tax Law, § 1105(c)(5)). (a) Definitions. (1) Maintaining, servicing, and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

* * *

(b) Imposition.

* * *

(2) All services of trash or garbage removal are taxable, whether from inside or outside of a building or vacant land.

Example 3. A carting firm picks up trash and garbage at its customer's, premises and dumps the materials at sites away from its customer's, premises. Receipts from the sale of this service are taxable. (Emphasis added)

In C. K. Industries Corp., Ad Op Comm T&F, February 8, 1988, TSB-A-88(14)S the Commissioner opined that services rendered by a trucking firm which transported materials for building contractors, building supply yards, etc. were not subject to sales tax since the services rendered by the trucking firm represented exempt transportation services in accordance with Section 526.5(g) of the Sales and Use Tax Regulations.

In the instant case, Petitioner at the request of its customer, either a Recycler or a Broker, picks up recyclable raw materials from a Supplier and delivers it to location designated by the Recycler or the Broker. Neither the Recycler, the Broker nor the Supplier are related to Petitioner in any way, nor does the Broker or the Recycler have an ownership or possessory interest in the Supplier's real property from which Petitioner picks up the raw materials for transport. Petitioner is retained by and invoices the Recycler or the Broker directly for the transportation services provided. The Recycler or the Broker purchases the raw material directly from the Supplier and the Supplier is not charged a fee for removal of the raw material.

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Accordingly, if Petitioner is retained and paid by the Recycler or the Broker to pick up the raw material at the Supplier's location and deliver it to a location designated by the Recycler or Broker, and the Supplier is not charged a fee for the removal of the raw material from its real property, Petitioner is not providing a trash and garbage removal service under Section 1105(c)(5) of the Tax Law and Section 527.7 of the Sales and Use Tax Regulations. Rather, Petitioner is providing a transportation service to the Recycler and the Broker which is exempt from sales tax pursuant to Section 526.5(g) of the Sales and Use Tax Regulations (See C. K. Industries Corp. supra.)

DATED: December 23, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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