

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

TSB-A-98(15)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950221B

On February 21, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Waste Technology Services, Inc., c/o Christopher L. Doyle, Esq., Hodgson, Russ, Andrews, Woods & Goodyear, 1800 One M&T Plaza, Buffalo, New York 14203-2391.

Petitioner, Waste Technology Services, Inc., raised the following issues:

1. Whether the Tax Law imposes sales tax on Petitioner's receipts for the services of removal, transportation and treatment or disposal of hazardous waste generated in New York State and transported outside New York State for treatment or disposal or both.
2. Whether certain of Petitioner's purchases of hazardous waste treatment/disposal and transportation services are exempt from sales tax because the services are purchased for resale.

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

Petitioner, a registered sales tax vendor, is engaged in the business of hazardous waste disposal. Petitioner acts as a liaison between hazardous waste generators, treatment/disposal facilities and transporters.

Typically, a waste generator will contract with Petitioner to provide certain services related to the disposal of hazardous waste. These services may include transportation (including removing the waste from the generator's property), and treatment or disposal or both. Petitioner identifies treatment/disposal facilities that are properly permitted to accept the generator's waste. Based on cost and reputation for quality of work, Petitioner determines which treatment/disposal facility is best suited to accept the generator's waste. Petitioner then enters into a subcontract with the selected treatment/disposal facility to treat and dispose or merely dispose of the generator's waste.

If requested, Petitioner also identifies properly permitted transportation firms to transport the waste from the generator's facility to the selected treatment/disposal facility. Petitioner determines the best transporter based on a reputation and cost analysis. Petitioner then enters into a subcontract with the selected transporter to ship the generator's waste to the proper treatment/disposal facility.

Many of the treatment/disposal facilities are located outside New York State. Therefore, much of the transportation occurs outside New York State.

Petitioner never takes possession of the waste, nor does Petitioner directly handle, transport or dispose of any generator's waste. Petitioner marks up the prices that Petitioner is required to pay to the subcontracted treatment/disposal facilities and transporters. Petitioner sends periodic invoices to generators, including markup charges for waste treatment/disposal and any transportation (including pickup). These invoices separately state charges related to treatment/disposal and transportation expenses.

The following hypothetical situations demonstrate typical arrangements:

HYPOTHETICAL SITUATION I

Company G is a hazardous waste generator that is located in New York State. As part of its efforts to comply with relevant environmental regulations, Company G contracts with Petitioner to provide waste transportation services and treatment/disposal. Petitioner subcontracts with Company T, a hazardous waste transporter, to transport G's waste to Company D's treatment/disposal facility that is located in Detroit, Michigan. Petitioner also enters into a subcontract with Company D to dispose or treat and dispose of Company G's waste at D's Michigan facility.

Petitioner pays Company T \$2,000 to transport 20 cubic yards of toxic sludge and hazardous construction debris from Buffalo, New York, to Detroit, Michigan. Of the 300-mile trip to Detroit, 75 miles (or 25 percent) are in New York State and the remaining 225 miles (75 percent) are outside New York State. Petitioner charges Company G \$2,200 for transportation (reflecting a 10 percent markup). Petitioner pays Company D \$5,000 for treatment or disposal of the waste. Petitioner charges Company G \$5,500 for treatment or disposal (again reflecting a 10 percent markup). Petitioner's invoice to Company G separately states the costs and fees for transportation and treatment/disposal services provided to Company G.

HYPOTHETICAL SITUATION II

This hypothetical situation assumes the same facts as Hypothetical Situation I, except all of Company D's treatment/disposal services are performed in New York State and all of Company T's transportation services are performed in New York State.

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:

* * *

(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. For special rules governing computation of receipts, see section eleven hundred eleven.

(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, 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, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale....

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

* * *

(2) 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.

* * *

(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 527.7(a) of the Sales and Use Tax Regulations provides, in part:

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 as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

Section 527.7(b) (2) of the regulations provides:

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

Opinion

The application of sales tax to Petitioner's receipts from the sale of the services of removal, transportation and treatment or disposal (or both) of hazardous waste depends, among other things, upon whether Petitioner acts in a representative capacity as agent for the waste generator. To establish an agency relationship there must be a "manifestation" that Petitioner consents to act on behalf of the waste generator, subject to its control, and that the waste generator authorizes the fiduciary relationship. (See, Matter of Hooper Holmes v Wetzler, 152 AD2d 871, lv den, 75 NY2d 706; Matter of Swet, Dec Tax App Trib, February 22, 1991, TSB-D-91(10)S.) Whether Petitioner acts as an agent of the waste generator is a question of fact that must be resolved based upon the circumstances in each case. See also Section 541.5(c) of the Sales and Use Tax Regulations for guidelines on agency contracts.

If, in the hypothetical situations presented by Petitioner, Petitioner acts as the agent of Company G (the waste generator), then Company G is purchasing separate services from Company D and Company T. Company D performs the service of treatment and disposal of hazardous waste for \$5,000. By itself, this would constitute the service of processing tangible personal property for purposes of Section 1105(c)(2) of the Tax Law. (See, Matter of Cecos Int. v State Tax Commn., 126 AD2d 884, affd 71 NY2d 934.) New York State sales tax is imposed on the \$5,000 receipt from the sale of the service of treatment and disposal of hazardous waste when the waste is treated and disposed of in New York State. (See Hypothetical Situation II.) No New York State sales tax is imposed on the

receipts from the sale of the services of treatment and disposal of hazardous waste when the waste is treated and disposed of outside New York State. (See Hypothetical Situation I.) In some cases, Company D may only perform the service of disposal of hazardous waste, without treating the waste. No New York State sales tax is imposed on receipts solely from the sale of the disposal service, regardless of whether the waste is disposed of within or outside New York State, where no processing service is performed on the waste in conjunction with the disposal. The mere disposal of hazardous waste is not one of the services enumerated under Section 1105(c) of the Tax Law and therefore is not subject to tax.

As indicated, if Petitioner acts as the agent of Company G, then Company G is purchasing a separate service from Company T. Company T picks up Company G's waste and transports it to Company D's treatment/disposal facility for \$2,000. The removal and transportation of hazardous waste from real property located in New York is taxable under Section 1105(c)(5) of the Tax Law as maintaining, servicing or repairing real property, regardless of whether the waste is transported to a point outside of New York. (See, Matter of Tonawanda Tank Transport Service v Tax Appeals Tribunal of State of N.Y., 168 AD2d 748.)

If Petitioner acts as the agent of Company G, then Petitioner does not purchase the services of Company D and Company T for resale. In this case, Company D and Company T are deemed to sell their services to Company G, with Petitioner acting as Company G's agent. Petitioner is merely earning a \$700 commission (\$500 + \$200) which is not subject to sales tax if separately stated on Petitioner's bill to Company G.

If in the hypothetical situations described above Petitioner does not act as the agent of Company G, then Petitioner itself is deemed to provide the services in question to Company G. In this case, Company G contracts with Petitioner to remove, transport and dispose, or remove, transport, treat and dispose, of Company G's waste. Petitioner subcontracts out to Company T the pickup and transportation, and to Company D the disposal or treatment and disposal functions that Petitioner contracts to perform for Company G. These services are taxable. If the waste is merely disposed of, i.e. not processed, by Company D, the entire charge by Petitioner is subject to tax under Section 1105(c)(5) of the Tax Law as an integrated waste removal service (see, Michael Gross, Adv Op Comm T&F, September 23, 1996, TSB-A-96(57)S). If, however, Company D processes and disposes of the waste outside New York, as may occur in the case of Hypothetical Situation I, the charge for processing the waste is not subject to sales tax. If the out-of-state processing charge is not separately stated, then a reasonable allocation should be made of the total charge, and the portion reasonably allocated to out-of-state processing would not be subject to tax. The balance allocated to remove and transport the waste would be subject to tax. If, as may occur in Hypothetical Situation II, treatment and disposal occur in New York, then the total charge is subject to tax.

It is noted that the above conclusions stated in this Advisory Opinion are not inconsistent with the Tax Appeals Tribunal decision in Olin Corporation, Dec Tax App Trib, September 11, 1997, TSB-D-97(34)S. In Olin, the Tribunal held that the imposition of New York State sales tax on the entire receipt from the sale

of an integrated waste removal service where the waste processing occurs outside New York violates the Commerce Clause. In affirming the Administrative Law Judge's method of apportioning receipts based on mileage in the circumstances of the case, the Tribunal referred to two possible methods of apportionment: apportionment based on miles traveled within this State and apportionment based on the charge for the transportation portion of the entire receipt. The Tribunal noted, "we do not hold that in every case such as this an apportionment based on miles traveled within New York State is necessary in order to find a constitutional application of Tax Law §1105(c)(5)."

As indicated, if Petitioner does not act as the agent of Company G, then Petitioner is deemed to be purchasing services from Company D and Company T. The pickup and transportation service and any disposal service that Petitioner purchases from Company T constitutes the enumerated taxable service of maintaining, servicing or repairing real property under Section 1105(c)(5) of the Tax Law and the waste treatment service provided by Company D is a processing service taxable under Section 1105(c)(2) of the Tax Law. Petitioner may purchase these services exempt from tax as purchases for resale, provided Petitioner timely furnishes Company T and Company D with properly completed Resale Certificates, Form ST-120.

DATED: March 3, 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.