

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

TSB-A-98(16)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960607C

On June 7, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from the NDL Organization, Inc., 1013 Brown Street, Peekskill, New York 10566. Petitioner, NDL Organization, Inc., provided additional information pertaining to the Petition on March 24, 1997.

Petitioner raised the following issues:

1. Whether containers (e.g., drums) purchased by Petitioner outside New York State and used in the State constitute tangible personal property purchased at retail and, as such, are subject to the compensating use tax.

2. Whether the imposition of sales tax on 100 percent of the fees charged by Petitioner to its New York State customers for its radioactive waste disposal service violates the Commerce Clause of the United States Constitution when part of the service is conducted in New York State and part of the service is conducted outside of the State.

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

Petitioner has its offices in Peekskill, New York and services the radiological needs of customers in health care, research, industry and the environment. Some of the radiological services rendered by Petitioner include: radioactive waste disposal, radioactive decontamination, scintillation media disposal, calibration and repair of radiation survey instruments, environmental surveys and leak-testing of radioactive sealed sources. Potential radioactive waste categories are: dry solid waste, biological waste, solidified liquid waste, scintillation media, certain mixed wastes, sealed sources, source material and special nuclear material.

Petitioner is licensed for its operations by the New York State Department of Labor (DOL) and the United States Nuclear Regulatory Commission (NRC). Petitioner is also permitted by the New York State Department of Environmental Conservation (DEC). In addition, Petitioner holds the necessary licenses, permits, registrations, etc. required by state and local authorities for disposal of waste at sites located outside of New York State. Petitioner indicates that due to the high degree of regulation, the complexities of the radioactive waste disposal process and the multitude of compliance issues, there are few organizations providing the services that Petitioner provides to its customers.

Petitioner furnishes customers who request its radioactive waste disposal service with the following:

- steel containers approved by the Department of Transportation (DOT), including delivery of the containers;
- necessary packaging materials and the packaging and labeling criteria relevant to the particular radioactive waste category;
- pick up of the containers when full, or at customers' requests; and
- transportation of the containers and waste to approved, licensed disposal sites.

Petitioner will not accept radioactive waste from customers unless Petitioner is certain that it can dispose of the waste. Improper packaging, certain isotopes with unacceptable concentrations, waste that does not meet criteria, waste generators without site permits, waste requiring case-by-case approval from a regulatory agency, etc. can cause problems for Petitioner. Therefore, Petitioner reserves the right for prior approval of waste. For known customers with consistent waste streams, knowledge of the packaging and labeling criteria, and proven track records, Petitioner does not require prior approval. However, for others, such as first-time customers or one-time customers, prior approval is necessary because Petitioner may need additional information, waste profiles, certifications of non-RCRA (i.e., not chemically hazardous), copies of manifests, laboratory analyses and so forth.

Unless prior approval is necessary, at the time that the customer identifies the nature and extent of the radioactive waste for disposal, Petitioner provides the containers, packaging materials and packaging and labeling criteria required by the DOL and/or the NRC for the particular waste category. A customer may also order containers and packaging materials from Petitioner, not yet knowing the waste stream for which they will be used. If a customer decides to purchase the containers and not use them for disposal or disposal by Petitioner, the customer is free to do so. Petitioner purchases these containers and packaging material from vendors who are located outside New York State. (Occasionally, Petitioner will dispose of waste that is packaged in labeled containers that are not furnished by Petitioner. These containers must meet all regulatory agency requirements and be approved by Petitioner or the containers will not be accepted by Petitioner for disposal.)

The containers are filled with waste by the customer at the customer's location. The length of time that the containers remain at the customer's location varies from several days to several years. This is a matter of the rate at which the customer generates waste and health department ordinances with respect to holding radioactive waste in the particular locality. Once the radioactive waste is placed in containers, the containers are irrevocably contaminated and cannot be used for another purpose or returned to either Petitioner or the customer. The containers along with the contents must be incinerated or buried, as appropriate to the waste category, at the disposal site. That is, each container is used once; it then becomes part of the waste stream and is consumed in the waste disposal process.

When the customer contacts Petitioner to arrange for the pick up of the waste, the customer identifies the waste category and the quantity of waste to be picked up. As indicated, when Petitioner returns to the customer's location to pick up the radioactive waste, the waste now includes the containers. Certain customers generate a large quantity of containers so that a tractor-trailer is needed to transport the waste. Other customers generate smaller quantities so that a smaller vehicle, such as a van, may be used. In the alternative, a tractor-trailer may be used to pick up the containers of several customers located in the same general geographic area. At any time, however, a customer may request that only the customer's container or containers be transported on a vehicle. For this exclusive service, the customer is billed appropriately. In order for a customer to transport containers itself, the customer would have to be a registered and approved DOT transporter. Because Petitioner's customers are engaged in a variety of enterprises such as medical facilities, research centers and manufacturing operations, it is not practical or cost effective for each customer to be DOT registered and approved.

Depending on the quantity of containers, Petitioner may either return with the containers to its Peekskill warehouse for consolidation with the containers from other customers and then proceed on to the disposal site, or proceed directly to the disposal site. The selection of the site is made by Petitioner. Disposal sites are located in South Carolina, Washington, Utah, Tennessee, Florida and Texas.

Waste is often buried without treatment. Sealed sources and Category R biological material in double-walled containers must be disposed of without treatment. Containers of dry waste weighing 300 pounds or more and higher activity containers are also not treated. However, all sites to which Petitioner brings waste for disposal must employ appropriate waste handling technologies for proper disposal to be in compliance with their licensing requirements and the individual criteria for each disposal site. Unlike normal trash which can merely be tipped by a transporter and disposed in a landfill, the waste Petitioner ships has either a radioactive constituent or a RCRA-hazardous constituent, or both.

For example, at a shallow-land disposal site in Barnwell, South Carolina, all radioactive waste is placed in engineered concrete trenches. Manifests of all shipments must be submitted prior to shipment and must have prior approval before they can be dispatched. Each container holding waste is manifested on the shipping papers with detailed information required by the NRC to meet reporting requirements of federal and state agencies for the safe transportation and disposal of low-level radioactive waste. All of the information must be verified while the shipment is at the site, before the shipment is officially accepted. Containers are re-monitored. Containers may be opened to verify their contents with the information on the shipping papers. Transport trucks are not released and drivers are held until after a release survey of the vehicle is conducted and documented by site personnel. Trucks and drivers can be held at the site for the better part of a week. Once the site accepts the shipment, the containers are then sorted as to "Waste Class." All Class A materials are disposed of together. Classes B and C and greater than Class C waste are overpacked into concrete overpacks and placed in the B/C trenches. Containers may also be removed from 20WC transport containers, overpacked by site personnel and then buried. The same thing applies to cask and liner shipments, which require special handling. Some types of sealed sources require prior and direct approval from the South

Carolina Department of Health and Environmental Control. Approval letters must accompany their respective waste containers. Copies of the shipping manifests, upon return, must also be forwarded to the New York State Department of Conservation.

For the waste going to the site in Richland, Washington, the above also applies. However, on a case-by-case basis, Petitioner must also receive a prior determination for each and every container from the Washington Department of Ecology that the waste meets NARM/NORM criteria (NARM is accelerator produced radioactive materials; NORM is naturally occurring radioactive materials). If the waste is approved, Petitioner receives a variance from the State of Washington authorizing shipment of only the approved containers.

Waste shipped to disposal sites in Tennessee is processed by supercompaction, metal melt, steam reforming, incineration, sorting, decay and/or burial. The Texas disposal site also treats various mixed waste streams by fuel blending, retort processes, chemical digestion, separation and incineration. When waste is shipped in vials to Florida, the vials are crushed and washed and the fluid is blended and incinerated.

For those orders where a customer desires disposal of a known waste stream, the charge for Petitioner's service includes the containers, category preparation, labeling, delivery, transportation and disposal. Two billings are made in this case. The first billing is against the delivery of the prepared containers. After the containers are filled and ready for disposal, the second and final billing is against the removal of the waste. For those situations where a customer orders containers without yet knowing the particular waste stream for which they will be used, Petitioner charges only for the containers. If and when the containers are removed as waste, the customer is charged the full waste disposal price. If a customer decides to purchase the containers and not use them for disposal, the price is relative to the value of the containers sold and is lower than, and does not relate to, the first billing referred to above for delivery of containers as part of the waste removal service. If the customer orders packaging materials to accommodate the waste stream, these materials are also billed as separate additional items. On those occasions when a customer uses containers that are not furnished by Petitioner, the customer is charged the full waste disposal price as if Petitioner had provided packaging for the waste.

In holding itself out as a licensed radioactive waste disposal service provider, Petitioner represents to all its customers that it holds the necessary licenses, permits, registrations, etc.; that it has the expertise and authority necessary to provide this service; and that the containers, packaging materials and packaging and labeling criteria are in complete compliance with all state and federal regulations. Should the DOL or the NRC amend or change the packaging or labeling materials or criteria, it is Petitioner's responsibility to bring its services in line with the changes or amendments. Petitioner also guides its customers as to the customers' obligations and responsibilities in keeping abreast of changes or amendments to proper disposal procedures. The customers do not interact with the DOL or the NRC on these matters. However, Petitioner's customers share in the responsibilities with Petitioner for ensuring that the containers comply with NRC specifications and that the containers with the radioactive contents are transported in accordance with NRC and DOT regulations. If any containers do not comply with all regulatory requirements, both the customers and Petitioner are subject to sanctions and fines.

After the containers are delivered to customers and remain at the customers' premises, no matter the length of time, the customers are totally responsible for the radioactive waste and the proper handling, storage and maintenance of the waste and containers at the customers' premises. Other than responsibilities stemming from providing defective containers, Petitioner has no responsibility for the waste while it remains on the customers' premises and is not required to be cognizant of local health requirements or other requirements relative to the retention of the radioactive waste.

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:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

* * *

(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

(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

* * *

(6) Tangible personal property. Corporeal personal property of any nature

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

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

Section 1110(a) of the Tax Law imposes compensating use tax, in part, as follows:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state ... except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail

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) of the regulations provides, in part:

Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

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

Opinion

Issue 1

In those instances where containers (and packaging materials) are furnished to customers in conjunction with the performance of Petitioner's radioactive waste disposal service and are irrevocably contaminated so as to be of no further use, the containers are considered to be "actually transferred" to customers in conjunction with a service that is subject to tax under Section 1105(c) of the Tax Law (infra). Therefore, the containers are not purchased at retail by Petitioner within the meaning and intent of paragraphs (1) and (4) of Section 1101(b) of the Tax Law and the use of the containers within New York State by Petitioner is not subject to the compensating use tax imposed under Section 1110(a)(A) of the Tax Law. (See, Waste Management of New York, Inc., Tax App Trib, March 21, 1991, TSB-D-91(19)S; Chem-Nuclear Systems, Inc., Tax App Trib, January 12, 1989, TSB-D-89(2)S; Johns' Insulation, Inc., Modified Adv Op Comm T&F, January 8, 1993, TSB-A-92(65.1)S.)

It is noted that Petitioner's receipts from the sales of containers and other items of tangible personal property to customers who purchase these items other than as part of the charge for Petitioner's radioactive waste disposal service are subject to sales tax under Section 1105(a) of the Tax Law when these items are delivered to the customers in New York State.

Issue 2

Petitioner's radioactive waste disposal service constitutes an integrated waste removal service under Section 1105(c)(5) of the Tax Law. Receipts from the sales of this service are subject to sales tax as the maintenance of real property, property or land. (See, Matter of Tonawanda Tank Transport Service v Tax Appeals Tribunal, 168 AD2d 748; Matter of Cecos Intl. v State Tax Comm, 126 AD2d 884, affd 71 NY2d 934; Matter of Rochester Gas and Electric v State Tax Comm, 128 AD2d 238 affd 71 NY2d 931.)

The Commerce Clause concerns raised in the matters of General Electric Company, Dec Tax App Trib, March 5, 1992, TSB-D-92(22)S, and subsequent Tax Appeals Tribunal decisions regarding the removal of waste from New York State are not at issue where Petitioner performs its radioactive waste disposal service and the waste is buried at disposal sites located outside this State without further processing of the waste. (See, Michael Gross, Adv Op Comm T&F, September 23, 1996, TSB-A-96(57)S.) Thus, Petitioner's entire receipt (100%) from the sale of such a service is subject to New York State sales tax. This is so, regardless of the waste approval and handling procedures employed by the disposal site.

Obtaining regulatory and other approvals, content verification and handling are not processing services. Nor is the overpacking or sorting of waste, provided such overpacking or sorting does not involve any "solidification," "demineralization" or "dewatering" as described in Chem-Nuclear Systems, supra, or other processing activities which change the nature or form of the waste.

Petitioner also performs its radioactive waste disposal service with respect to waste that is processed at disposal sites located outside of New York State (e.g., by supercompaction, chemical digestion, incineration). In such an instance, because the processing occurs wholly in another state, the portion of the receipt attributable to processing the waste is not subject to New York State sales tax. Accordingly, only that portion of the receipt from the sale of Petitioner's radioactive waste disposal service that is reasonably attributable to providing containers and other items of tangible personal property, picking up and removing the radioactive waste from the customer's New York State location and transporting the waste to the disposal site is subject to tax. The total charge to transport the waste is subject to New York's sales tax as part of the integrated waste removal service and is not subject to apportionment notwithstanding the mileage traveled within and outside of New York State. (The matter of how the receipt is to be apportioned in order to distinguish processing from these other activities is a question of fact which must be resolved based upon the circumstances in each case and is beyond the scope of this Advisory Opinion.)

It is noted that the 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)."

DATED: March 4, 1998

/s/
John W. Bartlett
Deputy Director
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.