

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

TSB-A-92 (65.1) S
Sales Tax
January 8, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

MODIFIED ADVISORY OPINION PETITION NO. S920505A

On May 5, 1992, a Petition for Advisory Opinion was received from Johns' Insulation, Inc., 38-38 43rd Street, Long Island City, New York 11101.

The issue raised by Petitioner, Johns' Insulation, Inc., is whether its purchase of plastic bags and plastic poly used by it to contain asbestos material removed for disposal from real property owned by exempt organizations is subject to sales tax.

Petitioner is engaged in the business of removing asbestos containing material from real property owned by organizations exempt under Section 1116(a) of the Tax Law. In addition, in a particular project Petitioner may be required to reinsulate the area from where the asbestos was removed.

Due to regulatory requirements of the Environmental Protection Agency, the New York State Department of Environmental Conservation and the New York City Department of Environmental Protection regarding the removal and disposal of asbestos materials, plastic bags and plastic poly must be used as follows:

- 1) Designated areas must be fully contained so as not to allow contamination of other areas of the facility from the asbestos removal operation. This is done by covering all walls and floors with plastic poly.
- 2) All asbestos must then be removed in accordance with regulatory requirements of federal, State and local agencies and placed in plastic bags.
- 3) All contaminated plastic from the work area must be placed in plastic bags and disposed of in a landfill licensed to accept asbestos waste.
- 4) The bags remain on the facility site generally for 1 or 2 weeks and then are transported by independent haulers licensed and insured to perform this service.

Petitioner never assumes ownership of the asbestos. Its customers are legally responsible and remain owners of the asbestos even though it is removed from the job site and buried in a landfill. All plastic is labeled as to the location and origin of the asbestos being disposed of.

The hauling of the asbestos to the landfill is performed by a subcontractor. Petitioner submits a list of haulers to the owners or the owners' representatives for approval. Once the approval is granted, Petitioner contacts the hauler to dispose of the asbestos. Petitioner does not participate in the approval process. The subcontractor is paid by Petitioner from the requisition presented to the owners for its work.

Section 1101(b)(4)(i)(B) of the Tax Law defines a retail sale in part as:

- (i) A sale of tangible personal property to any person for any purpose, other than ... (B) for use by that person in performing the services subject to tax under paragraphs (1), (2),(3) and (5) 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.

Section 526.6(c)(6) of the Sales and Use Tax Regulations provides, in part, as follows:

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

Example 9: A painter purchases plastic drop cloths and sandpaper and after painting a customer's premises, leaves the used drop cloths and sandpaper at the premises. The drop cloths, and sandpaper even though of limited or no use after the painting, have not been purchased for resale as they are items used by the painter in performing a taxable service. The drop cloths and sandpaper are not actually transferred to the purchaser of the service in conjunction with the performance of the service.

In a similar situation, the Tax Appeals Tribunal held in Chem-Nuclear Systems, Inc., Dec Tax App Trib, 3 January 12, 1989, TSB-D-89(2)S that liners purchased by Chem-Nuclear Systems, Inc. were not subject to sales tax since Chem-Nuclear actually transferred the liners to its customer in connection with a taxable service.

The decision set forth, in part, that:

. . . said business involves the sale of a radioactive waste management services which include consulting services and waste processing, packaging, transportation and disposal. Chem-Nuclear provides such services primarily to nuclear utilities, however, it also performs services for other commercial nuclear businesses and governmental agencies.

* * *

Petitioner's only customers located within the State of New York during the period at issue were Niagara Mohawk Power Corporation, Consolidated Edison of New York and the Power Authority of the State of New York. Said customers employed Chem-Nuclear to process and dispose of the nuclear waste generated by their power plants. In performing its processing and disposal services, petitioner provided, from its headquarters in South Carolina, personnel, equipment, technology and liners either on a full-time or demand basis, depending upon the customer's needs.

* * *

After being filled with nuclear waste, the liners at issue herein were transported by petitioner to its disposal site for burial. In some instances, the liners remained on the job site for as little as eight hours or as long as two to three months if the customer elected to store said liners for multiple shipment. Petitioner's customers were not obligated to use its transportation and burial services, as they could elect to have said services provided by other vendors. However, all three of petitioner's customers located in New York State utilized petitioner to process the nuclear waste and to transport and bury the liners in its Barnwell, South Carolina disposal site.

Once the radioactive waste is introduced into the liners, the inside surfaces of said liners are contaminated and, for all practical purposes, they cannot be, and are not, reused. Chem-Nuclear charges its customers separately for the processing of nuclear waste and the disposal of said processed waste.

* * *

A "retail sale" is generally "the sale of tangible personal property to any person for any purpose" (Tax Law §1101[b][4]). Unless excluded or exempted from this general definition, petitioner's purchase of the liners in South Carolina would have been at retail subjecting petitioner to use tax upon the subsequent use of the liners in New York. One exclusion from a retail sale is the "use by that person in performing the services subject to tax under paragraphs (1), (2), (3), and (5) of [Tax Law §1105(c)] where the property so sold becomes 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" (Tax Law 1101[b][4][i][B]).

The facts before us reveal that physical possession of the liners was transferred to petitioner's customers. The liners would remain on the customer's premises for varying periods of time ranging from eight hours to three months.

Petitioner would ultimately retake physical possession of the liners only because all three of its New York customers elected to have petitioner transport the radioactive waste. Petitioner's retaking of the liners was only for the purpose of transporting them for disposal. The liners were not reused in any manner by Chem-Nuclear since they were for all practical purposes not reusable after the processing phase. The customer's charge for the processing service reflected the number of liners utilized.

* * *

We conclude that these facts - the actual physical possession of the liners by the customers, the effective consumption of the liners in processing the customer's waste and the customer's continued legal responsibility for the liners together indicate that the liners were "actually transferred" by petitioner to its customers. (emphasis added)

In the instant case Petitioner uses the plastic bags in a similar manner to the way that the liners were used in Chem-Nuclear Systems, Inc., supra. First, like the liners, the plastic bags are used to contain hazardous material for disposal. Second, that once asbestos is removed, the plastic bags remain on the customer's property for a period of time before their disposal. Third, while the bagged asbestos is on the customer's property awaiting disposal, the customer assumes liability for its safe storage. Fourth, the plastic bags are not reusable. Lastly, the customer has the discretion as to what vendor to hire to carry out the transportation and burial of the asbestos material removed.

Accordingly, pursuant to Chem-Nuclear System, Inc., supra, since Petitioner's customers take possession of the plastic bags through their consumption and the continued legal responsibility assumed for their proper disposal, the plastic bags are deemed to be actually transferred to the customer as part of the service of removing the asbestos. Therefore, Petitioner's purchases of plastic bags do not constitute retail sales subject to sales tax in accordance with the meaning and intent of Section 1101(b)(4)(i)(B) of the Tax Law. It is further noted that since the services of removing asbestos are being performed for organizations exempt under Section 1116(a) of the Tax Law, such services are not subject to sales tax.

However, pursuant to Section 526.6(c)(6) Example 9 of the Sales and Use Tax Regulations Petitioner's purchase of plastic poly is subject to sales tax since the plastic poly is an item used by Petitioner in performing the service of asbestos removal which is not considered to be transferred to the purchaser in conjunction with the performance of the service.

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It is noted that in situations where the removal of the asbestos results in the performance of a capital improvement, the purchase of plastic bags and plastic poly will be subject to sales tax since Petitioner will be the consumer of the tangible personal property.

DATED: January 8, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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