

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

TSB-A-96 (64) S
Sales Tax
October 1, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960229A

On February 29, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Co-Steel Recycling, Advance Division, P.O. Box 1131, 776 Ohio Street, Buffalo, New York 14240.

The issues raised by Petitioner, Co-Steel Recycling, are whether the payments made by Petitioner for transportation fees and tipping fees are subject to sales tax under Section 1105(c)(5) of the Tax Law as payments for a trash or garbage removal service.

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

Petitioner is engaged in the business of shredding automobiles. One component of the materials resulting from the shredding of automobiles is referred to as "shredder fluff." The fluff results from shredding the glass, plastic and upholstery of automobiles. The heavy metal and other materials resulting from the shredding of automobiles are not included in the fluff.

Petitioner pays an unrelated trucking company to transport the shredder fluff to the County's sanitary landfill. Petitioner also pays the landfill a tipping fee with respect to the shredder fluff. Petitioner currently pays sales tax on both the payments for transportation and the tipping fees.

The landfill uses the shredder fluff it obtains from Petitioner as a daily cover. The landfill is required to put a cover material on the landfill at the end of each day. The cover material is not removed. Instead, items disposed of in the landfill the next day are placed on top of the previous day's cover material. When and if the landfill does not use the shredder fluff as its daily cover material, it is required to use other material such as soil it purchases or excavates.

The tipping fee that Petitioner pays to the landfill per ton of shredder fluff is less than the tipping fee that would apply if the shredder fluff could not be used by the landfill as a daily cover material. The normal tipping fee is \$30.00 per ton. The tipping fee for shredder fluff usable as daily cover material is \$6.50 per ton.

The New York State Department of Environmental Conservation ("DEC") has informed the landfill that shredder fluff may be used as daily cover. DEC requires that the shredder fluff be tested on a quarterly basis for TCLP (toxic control leachate process) and PCBs (polychlorinated biphenyl). The landfill requires Petitioner to have the shredder fluff tested on a quarterly basis.

Applicable Law and Regulations

Section 1105(c)(5) of the Tax Law imposes tax upon receipts from every sale, except for resale, of:

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

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

Opinion

Section 1105(c) of the Tax Law imposes tax on receipts from the sale of certain enumerated services. Where Petitioner contracts directly with unrelated vendors to transport shredder fluff and to dispose of shredder fluff, two distinct and separate services occur and the taxability of each service must be determined independently. A service involving only the disposal of waste without transport or treatment of the waste is not an enumerated service under Section 1105(c) of the Tax Law. (See, Cecos Intl. v State Tax Commn., 71 NY2d 934; Penfold v State Tax Commn., 114 AD2d 696; Counsel Opn, May 7, 1992, TSB-M-92(3)S.) Therefore, the \$6.50 per ton tipping fees paid by Petitioner to the landfill for the disposal of shredder fluff are not subject to sales tax.

Regarding the transportation of shredder fluff, in Seneca Foods Corp. (Tax App Trib, July 6, 1995, TSB-D-95(30)S), the Tribunal recently addressed whether the transportation of certain food by-products and sludge constituted the servicing of real property, that is as a trash and garbage removal service, within the context of Section 1105(c)(5) of the Tax Law and Section 527.7(a) of the regulations. The Tribunal opined that the "crux of the matter" was whether the food by-products and sludge were "trash" within the meaning of Section 1105(c)(5) of the Tax Law or whether they had "value." Having determined that the food by-products and sludge had economic value as feed and fertilizer, the Tribunal concluded that the payments made to farmers for their removal did not constitute payments for a trash or garbage removal service taxable under Section 1105(c)(5). (See, also, Marisol, Tax App Trib, January 4, 1996, TSB-D-96(2)S; Auburn Steel Co., Tax App Trib, September 13, 1990, TSB-D-90(49)S; Tonawanda Tank Transport Service v Tax Appeals Tribunal, 168 AD2d 748; Rochester Gas and Electric v State Tax Commn., 71 NY2d 931; Cecos Intl., supra.)

The decision in Seneca Foods and the case law upon which it was based suggest that trash and items of value are mutually exclusive. However, given today's recycling and resource

recovery efforts very little, if any, trash has no value. This calls into question the use of the term "trash" in relation to Petitioner and Section 1105(c)(5) of the Tax Law. Unlike Seneca Foods, Petitioner's shredder fluff is disposed of in a landfill and it remains in the landfill. Also, in Seneca Foods, the Tribunal found that "[t]he dollar value of the food by-products and sludge is reflected in the statements from both farmers to the effect that their charges represented the difference between their expense in picking up and transporting the food by-products and sludge and the value of the food by-products and sludge". That is, the Tribunal in effect found a payment flowing from the farmers to the petitioner for the purchase of the byproducts and sludge in the form of a credit against the removal and transportation charge. That is not the case here. There is no payment by the landfill to Petitioner for the shredder fluff; Petitioner pays the landfill a fee, albeit at a reduced rate, to dump the shredder fluff.

"The obvious legislative intent was to tax trash removal" (Rochester Gas and Electric, *supra*). A "landfill," as defined in Section 52-0101(11) of the Environmental Conservation Law, disposes of all matters of solid waste.

"Solid Waste" means all putrescible and non-putrescible materials or substances discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection, ... including but not limited to garbage, refuse, industrial and commercial waste, sludges from air or water control facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris, discarded automobiles and offal but not including sewage and other highly diluted water carried materials or substances and those in gaseous form. (ECL, §27-0701(1), emphasis added)

Semantics aside, trash and garbage removal services are only one example of the services of maintaining, servicing or repairing real property, property or land as set forth in Section 527.7 of the regulations. Regardless of the value of shredder fluff as daily cover material at the landfill, the removal and transportation of this fluff constitutes the removal and transportation of solid waste, as defined in the Environmental Conservation Law, from Petitioner's place of business to a landfill and these activities are related to keeping Petitioner's real property in a condition of fitness, efficiency, readiness and safety or restoring it to these conditions. Accordingly, payments made by Petitioner for the transportation of shredder fluff are subject to sales tax pursuant to Section 1105(c)(5) of the Tax Law.

DATED: October 1, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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