STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions of **CHEM-NUCLEAR SYSTEMS, INC.** for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1980 through May 31, 1983.	:	DECISION DTA NOS. 801549/ 801582/801909/ 802046

Petitioner, Chem-Nuclear Systems, Inc., P.O. Box 1866, Belle Vue, Washington 98009, filed an exception to the determination of the Administrative Law Judge issued on February 4, 1988 with respect to its petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through May 31, 1983 (File Nos. 801549, 801582, 801909 and 802046).

Petitioner appeared by Moot and Sprague (Arnold N. Zelman, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq. of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition to the exception. Oral argument was heard at the request of the petitioner on July 12, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether liners purchased by petitioner outside New York State constitute tangible personal property purchased at retail and, as such, were subject to the use tax imposed by Tax Law section 1110 when used in New York State.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by this reference. We also find additional facts as indicated below.

To summarize these facts, petitioner, Chem-Nuclear Systems, Inc. (hereinafter "Chem-Nuclear"), is headquartered in Columbia, South Carolina and operates its business nationwide. Said business involves the sale of radioactive waste management services, which include consulting services and waste processing, packaging, transportation and disposal. Chem-Nuclear provides the aforestated services primarily to nuclear utilities, however, it also performs services for other commercial nuclear businesses and government agencies.

As the result of a field audit of petitioner's books and records for the period June 1, 1980 through May 31, 1983, the Division of Taxation issued four notices of determination and demand for payment of sales and use taxes due, as follows:

Notice Number	Date	Period	Tax	Interest	Total
S840806455Z	8/6/84	6/1/80-5/31/81	$ 21,327.32	$ 8,863.41	$ 30,190.73
S840920474Z	9/20/84	6/1/81-8/31/81	12,465.56	4,675.05	17,140.61
S841220780Z	12/20/84	9/1/81-11/30/81	21,199.11	7,846.78	29,045.89
S850320847Z	3/20/85	12/1/81-5/31/83	54,511.54	14,478.29	68,989.83
TOTAL			$109,503.53	$35,863.53	$145,367.06

Subsequent to the issuance of the four aforementioned notices, the Division reduced the additional tax due from $109,503.53 to $78,275.22, plus minimum interest.

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.

Due to certain regulatory requirements, all water must be removed from radioactive nuclear waste prior to disposal. Said waste must be in a dry or solid state for disposal. As pertinent

herein, petitioner utilized the following three methods to process the radioactive waste generated by its customers' nuclear power plants:

(a) Solidification - This process involves pumping sludge-like radioactive waste into a liner where it is mixed with chemicals and cement. The cement hardens together with the radioactive waste and is permanently encased within the liner.

(b) Demineralization - This process involves pumping a liquid radioactive waste stream into liners, also known as pressure vessels. The radioactive waste is removed from the waste stream by filtration and/or ion exchange media which have been preloaded into the liner. Thereafter, the water is removed leaving within the liner the radioactive waste, in a dry or solid form, together with the filtration and/or ion exchange media.

(c) Dewatering - The dewatering process is similar to the demineralization process except that demineralization takes place in the customer's liners. Once the filtration and/or ion exchange media contained in the customer's liners have reached full capacity, said media are pumped with water from the customer's liners into Chem-Nuclear's liners. The water is then removed leaving within Chem-Nuclear's liners the radioactive waste and the filtration and/or ion exchange media.

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.

The entire $78,275.22 of revised tax due represents use tax due on liners purchased by petitioner in South Carolina which were subsequently used in processing and removing the nuclear waste from Chem-Nuclear's three customers located within New York State. Of the $78,275.22 of revised tax due, $24,822.13 represents use tax due on liners used in the solidification process, $42,230.11 represents use tax due on liners used in the demineralization process and $11,222.98 represents use tax due on liners used in the dewatering process.

We find as an additional fact that petitioner's customers are legally responsible for the integrity of the liners to contain the radioactive waste after it has been processed and that this responsibility continues while the waste is being transported, whether transported by petitioner or another transporter.

We also find that though petitioner did not, in all instances, state a separate charge for the liners on its invoices, the amount charged by petitioner to a customer did reflect the number of liners used by the customer.

OPINION

The Administrative Law Judge determined that: (1) petitioner processed and removed nuclear waste in a combined trash removal service pursuant to Tax Law section 1105(c)(5), and (2) that use tax assessed upon petitioner for the liners used by Chem-Nuclear within New York State to capture and store the radioactive waste was properly assessed under Tax Law section 1110 and not excluded by Tax Law section 1101(b)(4)(i)(B).

On exception, petitioner argues that: (1) Chem-Nuclear provided to its New York customers two separate and distinct taxable services, those being a processing service and a trash removal service within the meaning of paragraphs (2) and (5) of Tax Law section 1105(c), (2) the liners became a "physical component part" of the radioactive waste stream or, in the alternative, that the liners were "actually transferred" to its customers - both alternatives as within the intended meaning of Tax Law section 1101(b)(4)(i)(B), and (3) therefore, that the liners were not "purchased at retail" (Tax Law § 1101[b][1]) and are therefore not subject to the use tax of Tax Law section 1110.

The Division asserts that: (1) petitioner provided a unified trash removal service which did not involve transferring the liners to petitioner's customers, and (2) the liners were subject to use tax when used in New York because they were purchased at retail, under Tax Law section 1105(b)(4), outside of New York.

We reverse the determination of the Administrative Law Judge.

Use tax is imposed on the use of tangible personal property in New York State where the property was purchased at retail out of state (Tax Law §1110[A]). It is "levied on the privilege of ownership or possession in the storage, use or consumption of tangible property within the taxing area" (Niagara Junction Ry Co. v. Creagh, 2 AD2d 299, 303-04), including the affixation of the property upon which the use tax is applied to real or personal property in New York (Tax Law § 1101[b][7]). Here, petitioner used its liners within New York to affix them to the radioactive isotopes within nuclear waste, clearly a "use" contemplated by the use tax. Thus, the remaining issue is whether their purchase out of state was at retail. We conclude it was not.

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 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" (Tax Law § 1101[b][4][i][B]).

We first address whether petitioner "actually transferred" the liners to its customers in conjunction with the performance of the taxable service.

We find no definition of the terms "actually transferred" in the law or regulations. The regulations at 20 NYCRR 526.6(c)(6) do provide examples of property actually transferred, but the examples do not attempt to define the scope of the meaning of the words. Neither have we

found any cases construing these words in the context of the sales tax. In these circumstances, "[W]e are required to give these common words their commonly accepted meaning . . ." (Building Contractors Assoc., Inc. v. Tully, 87 AD2d 909, 910).

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 petitioner 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.

To support its contention that the liners were actually transferred to its customers, petitioner's witness testified that the customer retained legal responsibility under state and federal law for the package of radioactive waste (the liner and its contents) while the package was being transported, whether by petitioner or another transporter. Petitioner's assertions are confirmed by federal regulations which indicate that the customers were responsible for ensuring that the liners complied with federal specifications (10 CFR §§ 71.3, 71.115) and that the liners with their radioactive contents were transported in accordance with federal law (10 CFR 71.5 and 49 CFR 173).

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.

The essence of the Division's position is that petitioner could not have "actually transferred" the liners to its customers because petitioner provided an integrated trash removal service taxable under section 1105(c)(5) of the Tax Law. Under this unified trash removal service theory, the Division argues that "at best, the liners are briefly at the customer's place of business before being

removed for disposal" (Division's letter in opposition). In support of its unified trash removal theory, the Division relies on two recent Court of Appeals decisions, Matter of Cecos International, Inc. v. State Tax Commn. (71 NY2d 934) and Matter of Rochester Gas and Electric Corporation v. State Tax Commn. (71 NY2d 931).

At issue in both of these cases was whether the transportion of a waste product could be considered a separate service from its disposal, thereby rendering the transportation a nontaxable service. In each case, the court concluded that the transportation was an integral part of the trash removal service, and that the entire receipt for the service was subject to tax. Thus, the heart of the controversy in these cases was whether the taxpayer could avoid paying or collecting tax on a service by segregating the service into distinct components. This is not the issue before us, since the petitioner here concedes that both the processing and transportation aspects of its service are subject to tax and has collected the appropriate tax.

Instead, the issue here is whether the fact that the liners are physically transferred to the customers is somehow negated by the fact that in the second aspect of petitioner's service it picks up and hauls away the liners with their radioactive contents. We see nothing in the Rochester or Cecos decisions which requires such a result, particularly on the instant facts where the customer's legal responsibility for the liners continued throughout the transportation phase. We also are not familiar with any common meaning of "actually transferred" which requires the transfer to be permanent.

Since we have determined that petitioner actually transferred the liners to its customers in connection with a taxable service, petitioner's purchase of the liners was not a retail purchase within the meaning of section 1101(b)(4) of the Tax Law. We need not address petitioner's alternative arguments that the liners became a physical component part of the nuclear waste stream.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Chem-Nuclear Systems, Inc. is granted;

2. The determination of the Administrative Law Judge is reversed; and

3. The petitions of Chem-Nuclear Systems, Inc. are granted and the four notices of determination are cancelled.

Dated: Albany, New York
January 12, 1989

/s/ John P. Dugan
John P. Dugan
President

/s/ Francis R. Koenig
Francis R. Koenig
Commissioner