Letter Ruling 01-11: Sale of Transportable Dry Storage Systems

November 8, 2001

This is in reply to the request for a ruling on behalf of ********** ("Contractor") and the request for a ruling ********** on behalf of (the "Company") that its purchase from Contractor of a ********** Transportable Dry Storage System (the "TDSS") and related items will be exempt from Massachusetts sales and use taxes.

STATEMENT OF FACTS

A. Company; Power Plant

The Company, a Massachusetts corporation, was organized in ***** as a single-plant electric public utility in order to construct, own and operate the ***** Power Plant (the "Power Plant"). The Company is owned by its ratepayers, which are all public utilities located in *****. The Company operated the Power Plant from ***** until *****. The decommissioning process began shortly thereafter and is expected to be completed by *****. The Power Plant is now substantially dismantled.

B. The Decommissioning Process; Contractor

In conjunction with the decommissioning process for the Power Plant, and after notice to the power plant operators from the U. S. Department of Energy ("DOE") that DOE would not begin removal and disposal of the spent nuclear fuel until 2010 at the earliest, rather than January 31, 1998 as provided in the contract entered into between DOE and the Company in *****,[1] the Company entered into an agreement in *****, subsequently amended in *****, with Contractor (the "Agreement") for the construction of the components of the TDSS. The TDSS will be used in connection with the on-site storage and later removal of the Company's spent nuclear fuel assemblies and related high-level waste located at the Power Plant. Prior to transfer of the Company's spent nuclear fuel and waste into the TDSS system, the fuel and waste have been stored in pools at the nuclear reactor site, so-called "wet" storage.

The Agreement provides for the fabrication of steel canisters that will be used to store and, ultimately, to remove the spent fuel assemblies and for the provision or construction of other related items. This manner of storage of spent nuclear fuel is referred to as "dry" storage. The canisters will be filled with spent nuclear fuel assemblies, sealed with a double lid, and placed in steel-lined concrete casks. The canisters and casks will then be moved onto a three-foot-thick concrete pad for temporary storage.[2] While the Company may be required to store the waste for some time, DOE

is contractually obligated to take title to and dispose of the spent nuclear fuel contained in the canisters and casks.[3] The Company is subject to stringent regulatory oversight by the Nuclear Regulatory Commission and DOE during the decommissioning process and throughout its interim storage of spent nuclear fuel.

C. Department of Energy Contract

In 1982, Congress passed the Nuclear Waste Policy Act (the "Act")[4] which provided a comprehensive statutory framework for the disposition and permanent storage of spent nuclear fuel generated by civilian nuclear reactors, such as the Power Plant. Congress recognized that "the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste . . . in order to protect the public heath and safety."[5] Pursuant to the Act, the Secretary of DOE was authorized to enter into contracts with each owner and generator of spent nuclear fuel for the removal and disposition of the spent nuclear fuel generated by the nuclear reactor.[6] The Act effectively made the execution of such contracts mandatory by prohibiting the Nuclear Regulatory Commission from issuing a license to any operator that had not entered into such a contract.[7]

DOE implemented the contractual requirement set forth by the Act by promulgating a "Standard Contract for Disposal of Spent Nuclear Fuel (the "Contract")."[8] Under the Contract, DOE was obligated to "take title to, transport and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who

execute the contract."[9] The Contract also specified certain fees which the owners and generators of spent nuclear fuel and/or high-level radioactive waste would be obligated to pay for DOE's radioactive waste disposal services so that "the full costs of [such activities] will be borne by the owners and generators . . . ."[10] In exchange for the payment of the specified fees, DOE was obligated to provide its services under the Contract, "not later than January 31, 1998."[11] The Company entered into the Contract with DOE on **********.[12] The Company has fully complied with its obligations under the Contract during its years of operation by collecting and remitting to DOE the mandatory fees paid into the Nuclear Waste Fund. DOE is required under the Contract to take title to the waste, to provide casks suitable for transport of the spent nuclear fuel, and to move the casks containing the spent fuel to a permanent storage facility.[13] DOE has failed to fulfill its contractual obligations.[14]

D. Subsequent Related Litigation

On May 3, 1995, DOE issued its "Final Interpretation of Nuclear Waste Acceptance Issues" ("Final Interpretation") in which it stated that "it does not have an unconditional statutory or contractual obligation to accept the spent nuclear fuel beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the [Act]."[15] The Final Interpretation was subsequently vacated by decision of the United States Court of Appeals, District of Columbia Circuit, in *Indiana Michigan Power Co.* v. *United States Department of Energy* ("*Indiana Power*") [16] in which the Circuit Court held that DOE's obligation under the Contract to begin disposing of the spent nuclear fuel by January 31, 1998 was "without qualification or condition."

Subsequent to the *Indiana Power* decision, DOE notified the utilities that had entered into a Contract, that it would not begin accepting spent nuclear fuel by January 31, 1998, and that it had preliminarily determined that such failure was an unavoidable, noncompensable delay under the Contract.[17] DOE's position was challenged in court, and in another decision of the United States Court of Appeals, District of Columbia Circuit, *Northern States Power Co*. v. *United States Department of Energy* ("*Northern States*")[18], the Circuit Court reiterated its holding of *Indiana Power, supra*, to the effect that DOE's obligation under the Contract to begin disposing of the spent nuclear fuel on or before January 31, 1998 was unconditional and, further, that DOE was prohibited from asserting that its failure to begin its services was due to unavoidable delay.[19]

The Company subsequently sued DOE in the United States Court of Federal Claims ("Claims Court"). [20] The Claims Court concluded that DOE had breached its contractual obligation to begin disposing of the spent nuclear fuel by January 31, 1998 and granted summary judgment to the Company. The Claims Court further stated that the Company was not restricted to the remedies provided under the Contract and thus could prove its breach of contract damages in court *de novo*.

RULING REQUESTED

The Company and Contractor have each requested a ruling that the Company's purchase of the TDSS and related items from Contractor will be exempt from Massachusetts sales and use taxes.

DISCUSSION

Massachusetts General Laws Chapter 64H, section 6(d) ("§ 6(d)") exempts from sales tax "[s]ales to the United States . . . or [its] . . . agencies."[21] The sale of TDSS and related items to the Company will not be subject to sales or use tax if the Company is acting as the agent of DOE with the result that DOE is considered the "purchaser" or "user" of the TDSS and related items.[22]

The Appellate Tax Board ruled in *Hart and McGinley* v. *Commissioner of Revenue*, 1998 Mass. App. Tax Bd. 760 (1998) ("*Hart and McGinley*") and *Araserve, Inc.* v. *Commissioner of Revenue*, 1998 WL 888985 (Mass. App. Tax Bd.) ("*Araserve*")[23] that purchases of tangible personal property by a non-exempt party on behalf of an exempt entity are exempt from sales and use tax if the non-exempt party is acting as the agent of the exempt entity.[24] In both *Hart and McGinley* and *Araserve,* the non-exempt parties were found to have acted as agents of exempt entities because the exempt entities possessed the right of control over the property at issue and thus "used" the property. Citing *New York Times Company* v. *Commissioner of Revenue* ("*New York Times*"),[25] the Board stated in *Hart and McGinley*, " '[A] right of control over property held by a non-owner . . . can amount to the exercise of rights and powers associated with ownership of property in substance, and thus qualify as a taxable "use".' "[26]

The Supreme Judicial Court has affirmed the approach taken by the Board in the sales and use tax area of looking to the substance of the relationships among the parties to determine who exercises control over the property at issue and thus is the "user." [27] The Court stated, "It is a settled principle of our taxation jurisprudence that tax statutes are 'to be construed as imposing taxes with respect to matters of substance and not with respect to mere matters of form.'" [28]Further, common law principles of agency state that the determination of the legal relationship of principal and agent is a question of fact to be determined from the conduct of the parties, "The existence of the relationship of principal and agent and the authority of the latter to represent the former are questions of fact if there is evidence of an appointment by the principal and a delegation to the agent of duties to be performed by him for the principal, or if the conduct of the parties is such that an inference is warranted that one was acting in behalf of and with the knowledge and consent of another."[29]

Under the facts presented in this ruling, DOE was, in substance, the "purchaser" or "user" of the TDSS and related items at issue. While under the facts as represented, title to the TDSS and related items is temporarily in the Company, the Contract provides that title to the waste will vest in DOE when a repository commences operation. The possession of mere title alone does not constitute ownership and "use" of the property, if the right of control is elsewhere. *See New York Times, supra*, and *Hart and McGinley, supra.* While under the Contract the Company must provide for the storage of the spent nuclear fuel until DOE fulfills its contractual obligations, it exercises little substantive control over the property. The Company must comply in every regard with the federal government's stringent regulation of the storage and disposition of the spent nuclear fuel.

The manner in which the Company may store the spent nuclear fuel, together with the timing and eventual disposition of the fuel, is determined and controlled by federal regulation. In substance, the ownership and control of the TDSS and related items is in the federal government; the Company has virtually no discretion regarding the spent nuclear fuel pending its ultimate transfer to DOE. Additionally, while the source of payment for the TDSS and related items is not, by itself, determinative as to what party will be considered the "purchaser," or "user," for purposes of § 6(d), under the circumstances presented here, the responsibility for payment of the TDSS and related items will likely rest with the federal government as determined in the litigation between DOE and the Company.[30]

In any case, the Company was fulfilling a part of DOE's contractual obligations when it contracted for the TDSS. As noted, the Act authorized DOE to enter into contracts with owners and generators of spent nuclear fuel under which the private parties were to pay the DOE statutorily imposed fees in

return for which the Secretary, "beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel."[31] The Contract also requires DOE to provide casks and take title to waste by January 31, 1998. DOE's obligation to provide the casks is set forth in the Contract in Article IV – Responsibilities of the Parties.[32]

Two federal court decisions have held that the duty of DOE is "without qualification or condition,"[33] and identified DOE's duty to "perform its part of the contractual bargain."[34] DOE has, in those cases, been ordered to proceed with contractual remedies in a manner consistent with the Act's command that it undertake an unconditional obligation to begin disposal of the spent nuclear fuel by January 31, 1998. DOE has not done so. As a result of DOE's breach, the Company has been placed in the position of providing what DOE should have provided and remains legally responsible therefor. The Company therefore acted on DOE's behalf in buying and paying for the casks.

CONCLUSION

We conclude that in substance the ownership and control of the TDSS and related items is in the federal government since the Company has virtually no discretion regarding the spent nuclear fuel pending its ultimate transfer to DOE. Moreover, the Company was performing some of DOE's duties as a result of DOE's breach of contract. As a result, based upon the facts as stated in the requests and in the materials provided, and for the reasons discussed above, we determine that the TDSS and related items will be exempt from Massachusetts sales and use taxes under G. L. c. 64H, § 6(d) since the Company acted as agent for DOE, with the result that DOE, not the Company, was the "purchaser" or "user" of the property at issue. Since the transaction is exempt from sales and use tax under G. L. c. 64H, § 6(d), we decline to rule on other possible grounds for exemption.

Very truly yours,

/s/Bernard F. Crowley, Jr.

Bernard F. Crowley, Jr.
Acting Commissioner of Revenue

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[1] The contract is discussed more fully in subsection C. below. *See also* 59 Fed. Reg. 27,008 (1994) as cited in **********. [portion of footnote redacted] **********.

[2] The Company has stated ********** that "[a]lthough dry storage entails significant up-front capital outlays, once the dry storage facility is operational, it generally costs less to operate and maintain than wet storage. Dry storage also has other important advantages over wet storage." See *****. [portion of footnote redacted]

[3] The action of the Company in transferring the spent nuclear fuel and high-level waste into dry storage inures to the ultimate benefit of DOE in that the fuel and waste is contained in a manner which makes them more readily available for eventual transport, thus resulting in cost savings to DOE in fulfilling its contractual obligation to remove and dispose of the fuel and waste. Taxpayer has represented that "The [TDSS] canisters have been designed so that they can be used for [removal of the Company's nuclear waste] . . . The design of the concrete casks also allows for their transportation and reuse at another site, such as by DOE at a temporary or permanent repository. It is possible, however, that these concrete structures may be demolished and disposed of if DOE chooses not to reuse these components."

[4] 42 U.S.C. §§ 10101-10270 (1999).

[5] 42 U.S.C. § 10131(a)(4).

[6] 42 U.S.C. § 10222(a)(1).

[7] 42 U.S.C. § 10222(b)(1)(A).

[8] 10 C.F.R. § 961 (1999).

[9] *Id*. at § 961.1.

[10] *Id.* Under the Act, the fees were to be deposited "immediately upon their realization" into a Nuclear Waste Fund established in the U.S. Treasury. 42 U.S.C. § 10222(c). Out of this Fund, DOE was authorized to make certain specifically listed expenditures relating to its services under the Contract. This list did not include payment for the costs of on-site storage. *See* *****. [portion of footnote redacted]

[11] 10 C.F.R. § 961.11.

[12] *See* *****. [portion of footnote redacted]

[13] The Contract states that "DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the [spent nuclear fuel] and/or [high-level waste] from the purchaser's site to the DOE facility. Such cask(s) shall be furnished sufficiently in advance to accommodate scheduled deliveries. Such cask(s) shall be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied by certain specified information." Contract, Article IV(B)(2).

[14] *See* *****. [portion of footnote redacted]

[15] 60 Fed. Reg. 21,793 (1995) as cited in *****.

[16] 88 F.3d 1271 (D.C. Cir. 1996). DOE did not request a rehearing or petition the United States Supreme Court for a writ of *certiorari.* The Company was *****. *See* *****. [portion of footnote redacted]

[17] *See* *****. [portion of footnote redacted]

[18] 128 F.3d 754 (D.C. Cir. 1997), *cert. denied*, 524 U. S. 1016 (1998). The Company was *****. [portion of footnote redacted]

[19] The Court in *Northern Power* issued a writ of *mandamus* to DOE to this effect.

[20] [footnote redacted]

[21] The provisions of G. L. c. 64I, §7 state that this exemption also applies for purposes of the use tax.

[22] DOE is a regularly constituted department of the United States Government. *See* Letter Ruling 81-58.

[23] Neither *Hart and McGinley* nor *Araserve* was further appealed by the Commissioner.

[24] *See also* Technical Information Releases 99-4 (February 29, 1999) and 99-21 (December 17, 1999). The latter Release extended the exemptions set forth in G. L. c. 64H, §§ 6(r) and (s) to purchases made by agents of exempt users.

[25] 1997 Mass. App. Tax Bd. 742 (1997) *aff'd* 427 Mass. 399 (1998)

[26] 1998 Mass. App. Tax Bd. at 765. (citations omitted). In *New York Times, supra*, the taxpayer argued unsuccessfully at the Board that title to the property at issue must be in the hands of the "user" as a prerequisite to a finding of "use" for purposes of the use tax provisions. The Board disagreed stating that to impose such a requirement would create a disparity in the application of the sales and use taxes based solely upon title which would defeat the complementary nature of these taxes.

[27]*Commissioner of Revenue* v. *J C. Penney*, 431 Mass. 684 (2000) *rev'g* 1999 WL 105317 (Mass. App. Tax Bd.) (use tax properly assessed against taxpayer which exercised control over catalogs sent into Massachusetts via interstate mail)

[28] *Id*. at 688. (citations omitted).

[29] *Choate* v. *Assessors of Boston*, 304 Mass. 298, 304 (1939) (citations omitted*). See also* Restatement of Agency 2d, Comment on Section (1), "The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so."

[30] The Company is seeking damages in ***** Court. *See* *****. Further, we have been advised that the Company has billed its customers, as part of the cost of electricity, for the costs for storage and removal of the spent nuclear fuel and high-level radioactive waste. [portion of footnote redacted]

[31] 42 U.S.C. § 10222(a)(5)(B).

[32] *Id*.

[33] *See supra* cases noted at footnotes 16 and 18 and accompanying text.

[34] *Indiana Power*, 88 F.3d at 1273.