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SC TECHNICAL ADVICE MEMORANDUM #89-11

TO: Mr. Marvin Davant, Director
Field Services Division

FROM: Jerry B. Knight, Manager
Tax Policy and Procedures Department

DATE: April 7, 1989

SUBJECT: Low-Level Radioactive Waste

REFERENCE: S.C. Code Ann. Section 48-47-175 (1976)

AUTHORITY: S.C. Code Ann. Section 12-3-170
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question:

Are items such as sheets of plastic, rubber gloves, masks, protective suits, etc. ("incidentals"), used by ABC, Inc. ("ABC") in handling low-level radioactive waste, subject to the tax imposed at Code Section 48-47-175?

Facts:

The Southeast Interstate Low-Level Radioactive Waste Management Compact ("Compact") was established by Act No. 452, effective June 9, 1982. The Act is codified as Chapter 47 of Title 48, South Carolina Code of Laws. The compact consists of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

The compact was created pursuant to the authority and provisions of U.S. Public Law 96-573, "The Low-Level Radioactive Waste Policy Act" . This federal act was codified as 42 U.S.C.A. Section 2021b et. seq. Section 2021e (b)(1) provides for a low-level radioactive waste disposal facility to be located at Barnwell, South Carolina.

S.C. Code Section 48-47-175 imposes a tax on the low-level radioactive waste buried at Barnwell, and reads:

- A. There is hereby imposed a tax of \$6.00 per cubic foot on each cubic foot of low level radioactive waste disposed of in this state.
- B. The owner or operator of a low level radioactive waste disposal facility shall, no later than 30 days following the end of each quarter, submit the following to the South Carolina Tax Commission:
 - 1. A report detailing the quantity and type of waste disposed of during the previous calendar quarter; and
 - 2. A check made payable to the South Carolina Tax Commission for the amount of tax imposed in "A". above.
- C. The revenues collected under this Section shall be allocated to the Education Finance Act until such time as the program is fully funded. Any excess revenues shall be credited to the General Fund of the State.

In handling the low-level radioactive waste received and buried at Barnwell, ABC uses plastic sheets, protective suits, boards, paper towels, dust masks and other materials. Many of these items, after they are used, are disposed of in trenches with waste received from other sources. Some of the materials, such as the plastic sheets, are used in the trenches to protect the surface soil in case of an accidental spill or leak.

The taxpayer also disposes of various office supplies, such as computer paper, in the trenches. This is done for public relations purposes, to alleviate the community's concerns about the possibility of radioactive waste being disposed of in county landfills. All waste, whether radioactive or not, is therefore disposed of in the trenches at the facility.

Discussion:

The issue is whether or not the plastic, rubber gloves, masks, protective suits, etc., used by ABC, constitute low-level radioactive waste, thereby subject to the tax imposed at Code Section 48-47-175.

Code Section 48-47-30, paragraph 6, defines "low-level radioactive waste" as,

...radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or by-product material as defined in Section 11e, (2) of the Atomic Energy Act of 1954, or as may be further defined by federal law or regulation (emphasis added).

Paragraph 4 of the same section defines "high-level waste" as,

...irradiated reactor fuel, liquid wastes from reprocessing irradiated reactor fuel, and solids into which such liquid wastes have been converted, and other highly radioactive waste material as defined by the U.S. Nuclear Regulatory Commission.

Paragraph 12 defines "transuranic waste" as,

....waste material containing transuranic elements with contamination levels as determined by the regulations of (1) the U.S. Nuclear Regulatory Commission or (2) any host state, if it is an agreement state under Section 274 of the Atomic Energy Act of 1954.

The term "transuranic" is defined in The American Heritage Dictionary as "[h]aving an atomic number greater than 92."

As support for their position that such incidentals are not subject to the tax, ABC argues that the appropriations bill contains an amount equal to the per cubic foot tax times 1,200,000 cubic feet; the maximum which may be disposed of at the facility in a year.

"The Low-Level Radioactive Waste Policy Amendments Act of 1985", Public Law 99-240, expanded the provisions of 42 U.S.C.A. 2021(b) et seq. and limited the amount of radioactive waste that could be accepted at Barnwell. The provisions of the 1985 Act are reflected in S.C. Code Section 48-48-10 et seq.

S.C. Code Section 48-48-30 contains language similar to that found in 42 U.S.C.A. Section 2021e (b)(1) and reads, in part:

- (A) The regional disposal facility located at Barnwell may accept not more than eight million, four hundred thousand cubic feet of low-level radioactive waste during the seven-year period beginning January 1, 1986, and ending December 31, 1992. For the duration of the period beginning January 1, 1986, and ending December 31, 1992, the facility shall accept no waste from out of the region if receipt of such waste would result in disposal in excess of one million, two hundred thousand cubic feet of waste for a calendar year except under the provisions of Sections 5 and 6 of P.L. 99-240 or as other-wise provided in this chapter.

However, our review must also include Article 2 of Chapter 7 of Title 13, which is entitled: "South Carolina Radioactive Waste Transportation and Disposal Act." Code Section 13-7-120(3) of the Act defines "radioactive waste" and reads, in part:

"Radioactive waste" means any and all equipment or materials which are radioactive or have radioactive contamination and which are required pursuant to any governing laws, regulations or licenses to be disposed of or stored as radioactive waste (emphasis added).

Code Section 13-7-160 reads, in part:

- A. The Department [of Health and Environment Control] shall issue interim regulations as needed for the implementation of this article immediately upon the effective date of this article....

* * * * *

- B. Final regulations shall be promulgated by the Department [of Health and Environment Control] within one hundred twenty days from the effective date of the article and shall be subject to the procedures set forth in Chapter 23 of Title 1....

In summary, the Legislature has authorized the Department of Health and Environment Control ("DHEC") to determine, by regulations or licenses, what is and what is not "radioactive waste", for purposes of transportation and disposal in South Carolina.

Furthermore, DHEC does not include "incidentals" in its calculation of the total volume of low-level radioactive waste permitted to be disposed of at the Barnwell facility.

It is well settled that administrative interpretations of statutes by the agency charged with their administration and not expressly changed by the legislative body are entitled to great weight. Marchant v. Hamilton 309 S.E. 2d 781(1983). When as in this case, the construction or administrative interpretation of a statute has been applied for a number of years and has not been changed by the legislature, there is created a strong presumption that such interpretation or construction is correct. Ryder Truck Lines, Inc. v. South Carolina Tax Commission, 248 S.C. 148, 149 S.E. 2d 435 (1966); Etiwan Fertilizer Company v. South Carolina Tax Commission, 217 S.C. 354, 60 SE 2d 682 (1950).

Conclusion:

Based upon the above discussion, it is determined that the tax imposed at Code Section 48-47-175 is not applicable to the items in question.