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Coal Ash: Waste or Goods?

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Abstract

The distinction between "waste" and "goods" has not yet been clearly and unequivocally defined in the world or in Israel. That which is deemed waste for one person may be deemed an item of great value for another person. The difficulty in providing a definition increases when the material involved constitutes at the same time both "waste" and raw material of value for different purposes.

There are no published court cases dealing with this question in Israel. The European Court held that it is not possible to determine in advance and with regard to all cases if a certain material constitutes "waste" as defined in the applicable Directive and that the specific circumstances of each utilization should be examined¹. In 1994, the UK Ministry of Environment published detailed guidelines which set forth indications for transactions involving materials which may be deemed waste². According to the said Guidelines, a material may be of value and nevertheless may be deemed waste if the owner or holder thereof intends to throw it away or to dispose of it, but shall not be deemed waste if the owner or holder thereof intends to utilize it or to deliver it for a use which is part of the commercial life cycle of the material. This intention may be inferred from the circumstances of the case, as for instance, when the case involves sawdust created by a saw-mill and sold to pet shops. This act is deemed part of the commercial cycle or chain of utility.

The distinction is important when the item in question has hazardous properties. The assumption is that if a person holding a hazardous material with no economic value, such person less likely to keep that material in a way that would minimize its environmental risk. Therefore specific governmental controls are required.

The definition of hazardous waste in Israel³ is derived from the definition in the Basel Convention⁴, which hinges on the subjective intent of the owner: if he disposes or intends to dispose of the material, it should be deemed "waste". Of course, one's intentions can be inferred from objective criteria such as the economic value of the material or its potential for utilization.

Since coal ash possesses potentially hazardous properties, it may fall under the hazardous / radioactive waste controls. That would depend on whether or not it should be regarded as "waste" in the first place. Our view is that as long as it continues to be utilized for other purposes, coal ash should not be deemed waste. The coal ash remains in the cycle of commercial utility and is sold for the benefit of supervised utilizations in the fields of agriculture, construction and infra-structure. Consequently, if coal ash is sold by power plants to users, such sale does not constitute disposal as defined in the Israeli regulations and therefore it should be deemed **goods** and not waste.

¹ In the matter of ARCO Chemie Nederland Ltd. [2000] case c-418/97.

² Circular 11/94

³ Business License (disposal of Toxic Substances waste) Regulations, 1990

⁴ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes