FILE NAME: Cape Asbestos (CAPE)

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MEMORANDUM

23 January 1978

To: M. E. Meyer
From: A. R. Sarabia
Re: North American Asbestos Corporation

A new corporate arrangement is being made concerning the entities which will sell asbestos to purchasers in the Western Hemisphere. This includes Canada, the United States and Mexico.

The South Africa mining companies ("Cape Mines") will own 100% of a Liechtenstein sales corporation ("Sales Corp"). Sales Corp will sell in the Western Hemisphere through an independent commission agent.

North American Asbestos Corporation ("NAAC") will be liquidated. An independent corporation owned by Mr. C. G. Morgan will be organized. This corporation will be the commission agent for the sale of asbestos in this area. It will earn commissions on the sales it arranges for Sales Corp.

The purpose of this corporate arrangement is to eliminate or reduce as much as possible the exposure in the United States of Cape Mines to lawsuits brought against it under theories of strict liability concerning products liability on the sale of asbestos in the United States. Thus Sales Corp will buy from Cape Mines and sell here.

1. If the purpose is to eliminate the risk or exposure of Cape Mines to civil actions against it for products liability on the sale of asbestos in the United States, the most certain approach is to eliminate any assets owned directly or indirectly by Cape Mines in the United States. A U.S. plaintiff would seek to pierce the corporate veil and go beyond Sales Corp to Cape Mines. Hence, the ideal way to continue to sell asbestos in the United States would be for Sales Corp to sell all asbestos f.o.b. a South Africa port, transferring full title and interest there and insisting that payment be made upon embarcation. Under these conditions Sales Corp would be paid for the asbestos under a letter of credit at the time it turned over the bill of lading showing loading of the asbestos aboard ship.

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This system of sale would eliminate any assets owned by Sales Corp in the United States. With no assets located in the United States which might be attached under legal proceedings brought against Sales Corp there would be no pressure on it to appear to defend. Any default judgment would have to be enforced in the courts of Liechtenstein.

2. Anything short of that will establish some assets in the United States owned by Sales Corp. The presence of these assets in the United States subjects them to attachment under legal proceedings which may be brought against Sales Corp.

The greater the number of assets or the greater the value, the greater the risk of this happening.

If Sales Corp sells on open account, those receivables would be subject to attachment.

The same would be true if a warehouse was maintained or if goods were shipped on consignment to the U. S. commission agent.

3. The comments made by Mrs. Joan Holtze in her letter of November 11, 1977 to Mr. A. J. Penna refer to a discussion she and I had. One question concerned the U.S. federal income tax liability of having Sales Corp sell f.o.b. New York, i.e. pass title to the goods in New York.

The other question had to do with the U.S. federal income tax consequences of Sales Corp maintaining a warehouse somewhere in the United States. Section 882 of the Internal Revenue Code ("Code") provides for the taxation of "effectively connected income" of a foreign corporation. Section 881 provides for the taxation of other income such as interest, dividends, etc. Section 861 provides that if title to personal property passes from the selling foreign corporation to the purchaser in the United States, that constitutes U.S. source income.

With respect to maintaining a warehouse where asbestos could be stored and shipped from there to U.S. customers, maintaining a warehouse assumes that the goods stored there would continue to be the property of Sales Corp. These would constitute assets within the United States which could be attached as described above. Upon the "sale" of the goods to the U.S. customer, there would be U.S. source income subject to taxation under the Code. Even if the warehouse were to be maintained in a foreign trade zone or free trade zone in the United States, under Revenue Ruling 76-161, income earned by Sales Corp from the sale of the asbestos would be subject to U.S.

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income tax. Further, the receivables from such sales would also be subject to attachment by any would-be plaintiff.

If the goods were to be sold on consignment, the net result would be the same, namely, either there would be goods owned by Sales Corp or there would be a receivable payable to Sales Corp arising from the sale of those goods. In either instance, said assets may be attached by potential plaintiffs.

ARS:klk
Attachments

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