STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TONOWANDA TANK TRANSPORT SERVICE, INC.	:	DECISION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1982 through August 31, 1985.	:	

Petitioner, Tonowanda Tank Transport Service, Inc., 1140 Military Road, P.O. Box H, Kenmore, New York 14217, filed an exception to the determination of the Administrative Law Judge, issued on November 10, 1988, which denied its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1982 through August 31, 1985 (File No. 803307). Petitioner appeared by Duke, Holzman, Yaeger & Radlin (Donald J. Holzman and Michael J. Lombardo, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

In support of its exception, the petitioner filed the same brief it submitted to the Administrative Law Judge. The Division submitted a letter in opposition to the exception. Oral argument was scheduled at the request of the petitioner for March 21, 1989; however, the petitioner failed to appear.

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

ISSUES

I. Whether the service provided by petitioner to its customers, i.e., picking up hazardous waste and transporting it to a designated disposal facility, constituted trash removal services subject to tax under Tax Law § 1105(c)(5).

II. Whether such services were properly exempt from taxes imposed under Article 28 of the Tax Law pursuant to Tax Law § 1105-B(b).

FINDINGS OF FACT

We accept and repeat the facts as determined by the Administrative Law Judge except that we modify findings of fact "4" and "6" as noted below.

On February 27, 1986, following an audit, the Division of Taxation issued to petitioner, Tonowanda Tank Transport Service, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due whichassessed $26,418.00 in tax due, plus minimum interest, for the period March 1, 1982 through August 31, 1985.

Petitioner is and was at all times relevant herein a New York corporation engaged in the business of hazardous waste transportation. The assessment results from a determination that certain services (to be described herein) provided by petitioner to its customers were subject to sales tax. Petitioner contends that such services were not subject to tax. The Division calculated the deficiency by a detailed review of all charges billed by petitioner during the audit period to its two biggest clients. With petitioner's consent, the Division conducted a test period analysis of petitioner's charges to its other clients. The calculation of the deficiency is not in dispute.

The services determined taxable by the Division involved the transportation of hazardous waste. Typically, the waste generator contacted petitioner after the generator had made arrangements with a disposal facility for disposal of its waste. The generator scheduled a time for petitioner to be at the generator's facility and petitioner was instructed by the generator as to which disposal facility the waste was to be delivered and when it was to be delivered. The generator supplied petitioner with a hazardous waste manifest which designated the disposal facility. The waste generator usually loaded the waste onto petitioner's vehicles, although on the "odd occasion" petitioner was required to load the vehicle. The waste was unloaded by the disposal facility. Petitioner was not permitted to unload. If the disposal facility rejected a load, petitioner returned it to the generator.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> Once a vehicle was loaded, petitioner's job was to transport the waste to the designated disposal facility. Petitioner did not operate a disposal facility, nor did it charge its customers a dumping fee. Petitioner charged its customers a freight charge and a load detention charge. The load detention charge was an hourly charge for the amount of time it took to load the waste.[1]

Petitioner used the following six types of vehicles in providing services to its clients: vans, flatbeds, tank trailers, vac-tank trailers, a roll-off, and a dump truck.

(a) Vans - Petitioner's vans are similar in appearance to a moving van. Drums of containerized waste are loaded onto the van and are taken to a disposal facility. Use of this type of vehicle generated 15.82% of petitioner's audited taxable sales.

(b) Flatbeds - The flatbed is similar to the van except it has no sides or roof. It is usually loaded via a forktruck at a generator's facility. The use of these vehicles generated .18% of petitioner's audited taxable sales.

(c) Tank trailers - These vehicles are similar to a petroleum gasoline tank trailer used to deliver gasoline to stations. These are generally one-compartment 5,000 gallon tank vehicles into which liquid waste is pumped. Use of these vehicles generated 65.81% of audited taxable sales. On the "odd occasion" when petitioner had to load its vehicle, it was with these vehicles.

(d) Vac-tank trailers - This vehicle is similar to the tank trailer, with the only difference being an auxiliary engine which allows the vehicle to be loaded or unloaded without the assistance of a stationary pump. Use of this vehicle generated 11.81% of audited taxable sales.

(e) Dump truck - This vehicle is similar to dump trucks used in construction, except it has 18 wheels instead of 10 and is a tractor-trailer combination unit. Use of this vehicle generated 2.59% of audited taxable sales.

(f) Roll-off - This is an 18-wheel tractor-trailer combination. It has a carriage and rails on the carriage. It drops off containers at a generator's facility and subsequently picks

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[1]The last sentence has been added to the finding of the Administrative Law Judge to reflect the record in more detail.

the container up when it is filled with waste to be deposited at a disposal facility. Use of this vehicle generated 3.78% of audited taxable sales.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> Petitioner is and was subject to special governmental regulations in its business operations. Petitioner has obtained permits from 37 states, including New York State, to transport hazardous wastes through those states. Petitioner pays a franchise tax to New York State as a transportation or transmission corporation under Article 9 of the Tax Law. Petitioner has also received intrastate authority from the New York State Department of Transportation (DOT) which permits it to transport hazardous waste to points within the State. As part of this intrastate regulation, petitioner must file annual financial reports. Also, as a regulated transporter of hazardous waste, petitioner must file a schedule of rates and charges with the DOT.[2]

The hazardous waste petitioner transported resulted from the generator's manufacture of tangible personal property.

OPINION

The Administrative Law Judge determined that the services provided by petitioner were trash removal services and as such were subject to tax under Tax Law § 1105(c)(5), and further, that such services were not exempt pursuant to Tax Law § 1105-B(b).

The petitioner in its exception argues that it is merely providing a transportation service which does not constitute "trash removal from buildings" or any form of maintaining, servicing or repairing real property within the meaning of Tax Law § 1105(c)(5). Petitioner also asserts that its services are exempt from tax pursuant to Tax Law § 1105-B(b) as the servicing of manufacturing materials used in the production of tangible personal property, or that alternatively

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[2]The Administrative Law Judge's finding of fact "6" read as follows:

"Petitioner is and was subject to special governmental regulations in its business operations. Petitioner has obtained permits from at least 37 states, including New York State, to transport hazardous wastes through those states. Petitioner pays a franchise tax to New York State as a transportation or transmission corporation under Article 9 of the Tax Law. Petitioner has also received intrastate authority from the New York State Department of Transportation (DOT). As part of this intrastate regulation, petitioner must file annual financial reports. Also, as a regulated transporter of hazardous waste, petitioner must file a tariff with the DOT."

Finding of fact "6" has been modified to more clearly reflect the record below.

the "end result" test in Building Contractors Assn. v. Tully, 87 AD2d 909 (3d Dept 1982) can be applied to exempt petitioner's services under that section.

The Division, in response to the exception, relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1105(c)(5) provides that a tax is imposed on receipts from every sale of the following types of service:

> "Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public, and excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than window cleaning, rodent and pest control and trash removal from buildings."

Tax Law § 1105-B(b) exempts from taxation receipts from the sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in Tax Law § 1115(a)(12), (machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property).

We concur in the Administrative Law Judge's determination that petitioner's services are clearly within the plain meaning of the term "trash removal" services as it is used in Tax Law § 1105(c)(5). The decisions in Rochester Gas and Electric Corporation v. State Tax Commn., 126 AD2d 238 (3d Dept 1987), affd 71 NY2d 931 (1988) and Cecos International, Inc. v. State Tax Commn., 126 AD2d 884 (3d Dept 1987), affd 71 NY2d 934 (1988), decided by the Court of Appeals on the same day, are dispositive of the petitioner's arguments to the contrary.

Petitioner argues that its services are not taxable as "trash removal" services because the only activity it engaged in was transportation and that what the petitioner transported is "irrelevant". Petitioner asserts that this position is supported by the fact that the services were

performed at the request of the waste generator and billed to the waste generator as a transportation charge and because petitioner did not load or unload its vehicles.

Both Rochester and Cecos involved the taxability of the transportation costs arising from the transportation of industrial waste products. In Rochester, the taxpayer was an energy producer which generated fly ash as a waste product of its energy production. Cecos International, Inc. operated a landfill and waste treatment facility for the disposal of chemical waste. Both companies used independent haulers to transport the waste from the waste generation location to the waste disposal location.

In response to the taxpayer's arguments in these cases, the Court held that the transportation costs were not a nontaxable transportation service but were taxable pursuant to Tax Law § 1105(c)(5) as "trash removal from buildings." The Court in Rochester specifically found that the statute did not limit taxability to "ordinary janitorial services" but applied whenever the item being transported was not a "useful product." We find no language in Rochester or Cecos which indicates that the loading or unloading of the vehicles or the charging of a dumping fee is relevant to the issue of taxability.

The Court of Appeals found in these cases that the transportation portion of the disposal service, whether contracted by the waste generator or the waste disposer, was an integral part of the services of waste removal. We find no meaningful distinction in the fact that here the taxpayer is the independent hauler transporting the waste. The activity is an integral part of the waste removal process and is therefore taxable.

The decision in Rochester is dispositive of petitioner's other arguments as well. Petitioner argues that its customers use industrial chemicals in the production of tangible personal property and therefore the disposal of the waste which is a by-product of their use is exempt under § 1105-B(b) as the servicing of machinery used in the production of tangible personal property. This argument was made in Rochester as well. The Court found that the waste product was not "machinery or equipment" as defined in § 1115(a)(12) or the servicing of such machinery or equipment as defined in § 1105-B(b). That conclusion is equally applicable here.

Lastly, petitioner argues that the application of the "end result" test in Building Contractors Assn. v. Tully, 87 AD2d 909 (3d Dept 1982) requires a finding that its services are exempt from tax. In Building Contractors, the Third Department held that the service of debris removal from a construction site was a nontaxable service because the "end result" of the activity was a capital improvement (Tax Law § 1105[c][5]), the completion of which could not have been accomplished without first removing the debris.

Petitioner argues that since the tangible personal property created by petitioner's customers will ultimately be taxed, and the waste created by the production process must be removed, the reasoning in Building Contractor's should be applied to exempt petitioner's waste removal service from tax under Tax Law § 1105-B(b).

Similar arguments were made by the petitioners and rejected by the Court in Rochester and Cecos. The "end result" test in Building Contractor's is limited to capital improvement related activities. As the Court stated in Rochester, "[T]he removal of fly ash to landfills is neither the transportation of a useful product from one location to another, nor an integral step in the erection of a capital improvement (see, Tax Law § 1105[c][5])" 71 NY2d 931, 934.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Tonowanda Tank Transport Service, Inc. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Tonowanda Tank Transport Service, Inc. is denied in all respects; and

4. The Notice of Determination issued on February 27, 1986 is sustained.

DATED: Troy, New York
September 14, 1989

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner