STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ENTECH MANAGEMENT SERVICES CORP.	:	DECISION DTA No. 809749
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1988 through August 31, 1989.	:	

Petitioner Entech Management Services Corp., 1008 Main Street, Buffalo, New York 14202, filed an exception to the determination of the Administrative Law Judge issued on January 14, 1993. Subsequent to the filing of its exception, petitioner brought a motion to vacate and set aside the determination of the Administrative Law Judge upon the ground of newly discovered evidence. Such motion was denied by order of the Administrative Law Judge. No exception was filed with respect to this order. Petitioner appeared by Rolls, Tracy, Scott, Davis, Gioia & Schop, Esqs. (James E. Rolls, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq. of counsel).

Petitioner filed a brief on exception. The Division of Taxation, after review of petitioner's brief, elected not to file a brief on the exception. On January 4, 1994, petitioner advised the Tax Appeals Tribunal that it would not appear for oral argument. The six-month period for the issuance of this decision began on January 5, 1994, the date on which oral argument was scheduled to be heard.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioner established that certain asbestos removal services which it performed were sales for resale and, therefore, not subject to sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued two notices of determination and demands for payment of sales and use taxes due both dated May 24, 1990 against petitioner, Entech Management Services Corp. The first one asserted total tax due of $25,952.78, plus penalty and interest, for the period June 1, 1988 through August 31, 1989 detailed as follows:

Period Ending	Tax Asserted Due
8/31/88	$ 732.62
11/30/88	972.00
2/28/89	1,488.80
5/31/89	133.68
8/31/89	22,625.68
Total	$25,952.78

The second notice asserted omnibus penalty totalling $2,581.91 against petitioner because the asserted tax omission was greater than 25% of audited tax due for the following periods:

Period Ending	Omnibus Penalty Due
8/31/88	$ 73.26
11/30/88	97.20
2/28/89	148.88
8/31/89	2,262.57
Total Omnibus Penalty	$2,581.91

The field audit report described petitioner's business as "Waste Management/Broker and disposal." A detailed audit was performed of petitioner which resulted in the determination of additional taxable sales of $364,271.00 and additional tax due of $25,263.58 because of "Unsubstantiated Exempt sales", and tax due of $689.20 on expense purchases of $8,883.00 consisting of "Supply items." These two amounts of tax due total $25,952.78, the amount of tax asserted as due in the notice of determination. Petitioner did not contest the tax due of $689.20 on expense purchases.

The auditor determined that additional tax was due on the following sales, which were detailed on a workpaper marked into evidence as the Division's Exhibit "H":

Customer	Invoice Date	Taxable Amount	Additional Tax Due
Diaz Chemical Co.	8/12/88	$ 10,466.00	$ 732.62
Dresser Rand Co.	9/29/88	8,150.00	652.00
Browning Ferris	11/16/88	4,000.00	320.00
Anchor Glass	1/27/89	4,486.00	314.02
Anchor Glass	2/28/89	4,688.00	328.16
Hazmat	2/28/89	11,410.00	798.70
Williams Gold	3/31/89	1,015.00	81.20
Universal Process Equipment	6/15/89	20,750.00	1,296.88
Universal Process Equipment	6/30/89	100,000.00	6,250.00
Phthalchem Inc.	7/31/89	3,000.00	210.00
Phthalchem Inc.	7/31/89	4,000.00	280.00
Universal Process Equipment	7/31/89	175,000.00	14,000.00
Totals:		$346,965.00[1]	$25,263.58

Petitioner contested the finding of additional taxable amounts for only five of the invoices itemized above: the three Universal Process Equipment invoices and the two Phthalchem Inc. invoices.

The Division introduced into evidence a photocopy of a seven-paged agreement on petitioner's letterhead dated June 26, 1989 between petitioner and Universal Process Equipment of Robbinsville, New Jersey (hereinafter, "Universal Process") described as "the Client."[2] The agreement described the "scope of work" as follows:

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[1] The field audit report shows a higher amount of $364,271.00 as the total amount of additional taxable sales. It appears that invoice amounts were used instead of "taxable amounts" from the workpaper in calculating total additional taxable sales in the field audit report. Nonetheless, it is observed that the additional tax asserted as due of $25,263.58 was the same despite the lesser amount of $346,965.00 shown above.

[2] It was unexplained why the agreement in the record was not signed by Universal Process. Furthermore, the affidavit of Harold Bogatz dated April 10, 1991, general counsel to Universal Process and to Stoney Point Technical Park, stated that the contract for the removal of "all fiberglass and asbestos insulation from the Stoney Point, New York facility" was between petitioner and Stoney Point Technical Park, Inc., not Universal Process. Nonetheless, the purchase order is on the letterhead of Universal Process and the checks in payment under this agreement were on the bank account of Universal Process.

"Entech shall provide asbestos abatement services to the Clients [sic] at its subsidiary company, Stony [sic] Point Technical Park located at 25 Kay Fries Drive, Stony [sic] Point, New York. This abatement is to include all non-asbestos as well

as asbestos materials located in the following buildings on the property:

[listing of 15 buildings omitted]

"The material being removed is located on pipes/equipment, steam lines and structural beams. All material to be removed is on the south side of the railroad tracks with the exception of the boiler building and the main steam line that leaves the boiler building. Entech will be responsible for managing the disposal of all waste material generated by this project."

The contract set a fixed price of $400,000.00 plus certain equipment to be provided by petitioner. The agreement included the following provision with regard to "time of performance":

"The parties agree that the entire project contained within this agreement shall be completed by Entech within a time period not to exceed three and one-half (3½) months from June 5, 1989, and said time limitation is an essential part of this agreement. Within five (5) days from the date hereof, Entech will provide a proposed work schedule indicating when the various buildings and sections will be started and completed, as well as a completion date for the entire project. Entech shall furnish to Client progress reports specifying the status of the removal and remediation of the various sections. These reports will be done on a weekly basis beginning two (2) weeks from the date hereof, and shall continue until the project has been completely and properly finished."

The Division introduced into evidence photocopies of eight invoices on petitioner's letterhead which appear to have been issued under the agreement described above. The invoices were in the following amounts:

Date of Invoice	Amount
June 5, 1989	$ 30,000.00
June 15, 1989	20,750.00
June 30, 1989	100,000.00
July 31, 1989	175,000.00
August 31, 1989	60,000.00
September 29, 1989	14,250.00
October 24, 1989	14,500.00
October 26, 1989	446.00
Total	$414,946.00

However, there is no explanation in the record why this total amount invoiced of $414,946.00 is greater than the contract amount of $400,000.00. It is observed that the invoices dated June 15,

1989, June 30, 1989, July 31, 1989, August 31, 1989 and September 29, 1989 were all billed to Universal Process, and the invoice dated June 5, 1989 was billed to "Stony [sic] Point Technical Park, Inc., Universal Process Equipment, Inc." of Roosevelt, New Jersey. The total of these six invoices is $400,000.00. In contrast, the last two invoices, dated October 24, 1989 and October 26, 1989, were billed to Stoney Point Technical Park of Stoney Point, New York and Roosevelt, New Jersey, respectively. However, these two invoices include a similar "description" as the other six invoices: "asbestos abatement project". But it is noted that they are outside the audit period which ended August 31, 1989. It appears that additional tax was asserted due on the three invoices dated June 15, 1989 of $20,750.00, June 30, 1989 of $100,000.00 and July 31, 1989 of $175,000.00 only because they showed a "ship from" address in New York of Stoney Point Technical Park, Stoney Point, New York (and not the invoices dated June 5, 1989 of $30,000.00 and August 31, 1989 of $60,000.00). The invoices which were not included in the assessment showed a "ship from" address as "same" as the Roosevelt, New Jersey address of Universal Process. It would appear that the auditor could have asserted tax due on these two additional invoices totalling $90,000.00, based upon the same rationale he used to claim tax due on the other invoices, but for the fact that information on these two invoices proved misleading in terms of where the work was performed.

Petitioner did not collect sales tax on the five invoices described above, which were within the audit period, because it relied upon a resale certificate dated May 24, 1989 provided to it by Universal Process. A close review of the photocopy of this certificate, which petitioner introduced into evidence as its Exhibit "1," shows that it is a State of New Jersey form. The certificate noted that Universal Process is principally engaged in the sale of used equipment and that the merchandise or services being purchased from Entech Management were "used equipment". The certificate also noted that the merchandise was being purchased "[f]or resale in its present form".

Subsequently, petitioner substituted a resale certificate on a State of New York form dated October 18, 1989. A close review of the photocopy of this certificate, which the Division

introduced into evidence as its Exhibit "G," shows Stoney Point Technical Park of Roosevelt, New Jersey as the purchaser, which was principally engaged in the "sale of used chemical equipment." The certificate described the service being purchased for resale as the "removal of asbestos from equipment to be sold." However, it appears that Stoney Point Technical Park was principally in the business of operating a chemical plant. Cosimo Polino, Jr., petitioner's president, described Stoney Point Technical Park's business as follows:

> "Stoney Point Technical Park purchased or I should say was the owner of the former Kay Fries property [located in Rockland County]. Kay Fries was an operating facility that was purchased and subsequently after a number of years of operating was shut down. Stoney Point intended to after the shut down of this plant to convert it into an industrial park and prior to doing that they had to take care of the environmental concerns on the property . . . . In order for them to sell the equipment that was on the property, they had to remove the asbestos before they could sell it."

Mr. Polino testified that the asbestos was located on the equipment and associated piping, not on the ceiling and walls of the buildings. He described the equipment as "vessels or tanks, boilers, pipe lines, reactors, conveyor belts." However, the work performed by petitioner included the removal and disposal of non-asbestos material as well, and Mr. Polino testified that:

> "To the best of my recollection, I do not think more than ten percent of the work done in that property was building, was real property oriented."

Petitioner introduced into evidence an affidavit, dated April 10, 1991, of Harold Bogatz,[3] general counsel to both Universal Process and Stoney Point Technical Park, Inc., which he noted was "a wholly owned subsidiary of Universal Process Equipment." He stated that the agreement described above was actually between petitioner and Stoney Point:

> "All of the monies paid by Universal Process Equipment for the benefit of Stoney Point Technical Park were reimbursed by Stoney Point to Universal upon the availability of funds from Stoney Point. The monies expended by Universal were carried as an advance to Stoney Point on the books of Universal, and as a liability on the books of Stoney Point. In due course, Stoney Point re-paid Universal for all of these advances."

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[3]At the hearing, petitioner introduced into evidence a photocopy of the affidavit of Mr. Bogatz that was not signed and notarized. Petitioner was given additional time after the hearing to submit a signed and notarized affidavit which was submitted on August 4, 1992.

The two Phthalchem Inc. invoices, both dated July 31, 1989, of $3,000.00 and $4,000.00, respectively, as noted above, represented cleaning services performed by petitioner on equipment owned by a Cincinnati, Ohio company that brought the equipment to Rochester, New York for cleaning by petitioner.

OPINION

In order to foster the proper administration of the sales tax and to prevent tax evasion, Tax Law § 1132(c) presumes that all receipts from the sale of property or services of any type (mentioned in subdivisions [a], [b], [c] and [d] of Tax Law § 1105) are subject to tax until the contrary is established, and provides that the burden of proving that any receipt is not taxable is on the person required to collect the tax or the customer. Section 1132(c) also deems each sale to be a taxable retail sale and provides two exceptions to this rule. The exception relevant here is for a vendor who, not later than 90 days after the sale of the property or rendering of the services, accepts a resale certificate from the purchaser to the effect that the property or service is purchased for resale. Where such certificates are in proper form, the vendor is protected and the burden is on the purchaser to prove that the receipt is not taxable.

For the period in issue, the Division's regulations mirrored the provisions of section 1132(c) and provided that, in order to prove that a sale was exempt from tax because it was made for resale, the vendor was required to obtain a properly completed resale certificate from the purchaser and retain the certificate in his files. A resale certificate was considered to be properly completed when it contained the (i) date prepared, (ii) name and address of the purchaser, (iii) name and address of the vendor, (iv) identification number of the purchaser as shown on the certificate of authority or exempt organization number as shown on the exempt organization certificate, (v) signature of the purchaser or the purchaser's authorized representative, and (vi) any other information required to be completed on the particular form (see, former 20 NYCRR 532.4[c][2]). The regulations required a vendor accepting a resale certificate, for verification purposes, to maintain a method of associating a sale made for resale with the resale certificate (see former 20 NYCRR 532.4[d][4]). A vendor was not relieved of

the burden of proof when no exemption certificate or an improper certificate was furnished, or when the vendor had actual knowledge that a certificate was false or fraudulent (see, former 20 NYCRR 532.4[b][4]).

In Matter of Saf-Tee Plumbing Corp. v. Tully (77 AD2d 1, 432 NYS2d 409), the court enunciated a "good faith standard" with regard to the protection afforded vendors by section 1132(c).[4] The Division's regulations in effect for the periods at issue did not amplify this good faith test. However, the Division's current regulations provide that:

> "[a] certificate . . . is 'accepted in good faith' when a vendor has no knowledge that the exemption certificate . . . issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax" (20 NYCRR 532.4[a][2][i]).

Against this legal backdrop, the Administrative Law Judge determined that the resale certificate, dated May 24, 1989, consisting of the New Jersey form showing Universal Process as the purchaser was not on an exemption form prescribed by the Division as required by Tax Law § 1132(c) and the Division's regulation, 20 NYCRR former 532.4. The Administrative Law Judge also determined that the certificate was inconsistent with petitioner's contention at

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[4]The Court in Matter of Saf-Tee Plumbing Corp. v. Tully (supra), in reviewing the applicability of section 1132(c) in the context of the exemptions provided in sections 1105(c)(5) and 1115(a)(17) concerning capital improvements, concluded that:

> "[t]hese statutes . . . evidence the Legislature's intention to insulate from sales tax liability vendors who obtain certificates of capital improvement from their customers in good faith. Although there may be valid reasons for attaching different consequences to the receipt of a certificate of resale vis-a-vis a certificate of capital improvement, since the vendor who obtains the latter certificate is in a better position to determine its validity, we reject the argument that the Legislature intended such a distinction since both types of certificates were included in the same statutory provision without any evidence that they be given disparate treatment.
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> "[The Division's] position would virtually emasculate the language contained in section 1132 (subd. [c]) relating to certificates for capital improvements, since vendors receiving them could still be held personally liable for sales taxes they failed to collect in reliance on certificates later found to have been improvidently issued. A vendor should not be required to police or investigate his customers [cite omitted] and [the Division's] fear that such a rule will lead to abuse is unfounded so long as it is required that the vendor be found to have accepted the certificate in good faith, a finding which was specifically made by [the Division] in the instant proceeding" (Matter of Saf-Tee Plumbing Corp. v. Tully, supra, 432 NYS2d 409, 410-411).

hearing that the asbestos removal services were performed on equipment owned by Stoney Point, which then resold the equipment to Universal Process.

The Administrative Law Judge determined that the second resale certificate dated October 18, 1989 was on the form prescribed by the Division, identified Stoney Point Technical Park as the purchaser and was dated within 90 days of the July 31, 1989 invoice in the amount of $175,000.00. However, the Administrative Law Judge concluded that this resale certificate did not prevent the Division from seeking the tax from petitioner because petitioner failed to prove that:

> "the sale of its services was to Stoney Point Technical Park. The testimony of Mr. Polino and the affidavit of Mr. Bogatz do not counterweigh the evidence in the record that the agreement was in the name of Universal Process and the checks were on Universal Process' checking account. The terms of the agreement cannot be varied by Mr. Polino's testimony and/or the affidavit of Mr. Bogatz (cf., Matter of Emery Air Freight Corp., Tax Appeals Tribunal, October 17, 1991, affd 188 AD2d 772, 591 NYS2d 264)" (Determination, conclusion of law "E").

The Administrative Law Judge also observed that:

> "in the matter at hand, petitioner is not claiming that the asbestos removal services provided were resold as asbestos removal services. Rather, such services resulted in certain equipment being placed in a saleable condition. It is accepted that such services may be viewed as a resale of services since they were necessary for the ultimate sale of the equipment (cf., Matter of Capital District Better TV, Tax Appeals Tribunal, September 5, 1991 [where the Tribunal determined that services to install cable encompassed not only the installation occurring within the subscriber's premises, but also the cable installation outside the premises necessary for the subscriber to be fully hooked up to the cable system]). However, petitioner failed to shoulder its burden of proving that its services were necessary for the ultimate sale of the equipment by Stoney Point Technical Park (cf., Matter of Leland Stations, Tax Appeals Tribunal, January 25, 1991)" Determination, conclusions of law "F").

On exception, petitioner asserts that it relied in good faith upon the resale certificates.

Petitioner asserts that:

> "[t]he Division's position and [the Administrative Law Judge's] Determination would emasculate the language contained in §1132(c) since vendors receiving [resale certificates] could still be held personally liable for sales taxes they failed to collect in reliance on certificates later found to have been improvidently issued. See Matter of SAF-TEE Plumbing Corporation v. Tully, 77 A.D.2d 1, 432 NYS2d 409 (Third Dept. 1980). A vendor should not be required to police or investigate his customers (see Matter of RAC Corp. v. Gallman, 39 A.D.2d 57, 61, 331 NYS2d 945.) and

> there has been no attempt by the Division or [the Administrative Law Judge] to assert that Petitioner did not accept the certificate in good faith" (Petitioner's Brief, pp. 9-10).

Petitioner also asserts that the Administrative Law Judge improperly disregarded the Polino testimony and the disinterested affidavit of Harold Bogatz, Esq., counsel for Universal Process and Stoney Point, Inc. Petitioner asserts that the Administrative Law Judge's reliance on Matter of Emery Air Freight v. New York State Tax Appeals Tribunal (188 AD2d 772, 591 NYS2d 264) is misplaced since Emery concerned the interpretation of an "unambiguous" lease while the "instant case is clearly different" involving, in petitioner's words an "Agreement for services [that] was, at the very least, ambiguous, if not indicative of exactly the opposite of [the Administrative Law Judge's] contentions" (Petitioner's brief, p. 8).

Petitioner finally asserts that, even if the plant had been briefly operated by Stoney Point, Inc. which it was not, if the property and the equipment were purchased for resale, all of petitioner's services would still be exempt from tax because they were necessary in order for the building and the equipment to be sold.

The Division elected not to file a brief on exception, but asserts that the determination of the Administrative Law Judge is correct in all respects and requests that it be affirmed by this Tribunal.

The Administrative Law Judge dealt fully and correctly with the issues in this case and we affirm said determination for the reasons stated therein.

We emphasize the fact that the "good faith" standard, relied upon by petitioner, is contingent upon the acceptance by the vendor of a properly completed resale certificate which correctly identifies the purchaser of the vendor's services (Tax Law § 1132[c]; 20 NYCRR 532.4[b][3]). In this case, the Administrative Law Judge determined that the October 18, 1989 certificate, while containing all of the information required on the New York form, was not "properly completed" since it was inconsistent with the agreement between Universal Process and petitioner, which agreement listed Universal Process as the purchaser of petitioner's services. We find nothing in the record to cause us to disturb the weight assigned to

the evidence by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Entech Management Services Corp. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Entech Management Services Corp. is denied; and

4. The notices of determination dated May 24, 1990 are sustained.

DATED: Troy, New York
June 23, 1994

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

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