STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WASTE CONVERSION, INC.	:	DECISION DTA No. 810194
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 June 1, 1986 through May 31, 1989.	:	
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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 3, 1993 with respect to the petition of Waste Conversion, Inc., 101 Jessup Road, Thorofare, New Jersey 08086. Petitioner appeared by Finkelstein, Bruckman, Wohl, Most and Rothman, Esqs. (George T. Bruckman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a letter in lieu of a reply brief which was received on March 7, 1994 and began the six-month period for the issuance of this decision. The Division of Taxation's request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation properly imposed sales tax on the fees charged by petitioner to its New York customers for the processing and treatment of waste products by petitioner at its plant in Pennsylvania. If so, whether such taxation is in violation of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2" and "5" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

In addition to the facts found by the Administrative Law Judge, we find the following.

> The parties entered into a stipulation, dated July 23, 1992, which provides that the facts as stipulated along with the exhibits identified in the stipulation "shall constitute the record of the proceeding."
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> Paragraph "3" of the stipulation provides that "[d]epending upon the nature of the waste material involved, Petitioner charges its customers for processing either by volume or weight." Paragraph "4" of the stipulation provides that "Petitioner charges for transportation by mileage and type of truck."
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> The parties stipulated that the sole issue presented by this case is whether petitioner's charges to customers for treatment and processing of waste materials in Pennsylvania is subject to taxation in New York under Tax Law § 1105(c)(5), where petitioner accepts said waste products at its customers' premises in New York and transports said materials to petitioner's plant in Pennsylvania for processing, treatment and disposal.
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> On March 29, 1990, the Division of Taxation ("Division") issued to petitioner, Waste Conversion, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1986 through May 31, 1989 in the amount of $186,086.98, plus penalty and interest. On the same date, the Division issued to petitioner a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing additional omnibus penalty (only) for the period June 1, 1986 through May 31, 1989 in the amount of $28,608.70.
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> We modify the Administrative Law Judge's finding of fact "2" to read as follows:
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> The above-described notices of determination were issued following an audit of petitioner's books and records. The parties agree that upon audit it was found that petitioner had adequate books and records and a detailed audit was conducted. The parties further agree that neither the audit results or audit method are in issue in this proceeding.[1]

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

Petitioner is a Pennsylvania corporation which is fully licensed as an industrial waste treatment facility. Petitioner has customers located in the State of New York. However, petitioner has no offices located within the State of New York.

Petitioner accepts solid waste for treatment and storage/disposal. All of the treatment is performed in Pennsylvania, as is some storage/disposal. Petitioner does contract for storage/disposal in other states, but no storage, disposal or treatment is done in the State of New York. Petitioner accepts contaminated waste in dump trailers and containerized drums, and accepts liquids in drums and bulk tankers. Depending upon the nature of the waste material, petitioner imposes charges for processing either by volume or by weight.

We modify the Administrative Law Judge's finding of fact "5" to read as follows:

> Approximately 75% of the waste materials accepted by petitioner at its treatment facility in Pennsylvania are transported by or on behalf of petitioner. All loading onto petitioner's trucks is done by the customer. The service in dispute in this proceeding relates to the transportation of these waste materials from the customers' premises in New York, by or on behalf of petitioner, to petitioner's Pennsylvania plant for treatment and ultimate disposal outside the State of New York. Petitioner charges for transportation by mileage and type of truck. The parties agreed (by stipulation) that where petitioner accepted waste products in New York and transported such products to its plant in Pennsylvania, the transportation and dumping (or disposal) fees which petitioner charged its customers would be taxable as an integral part of the maintenance service of trash removal pursuant to Tax Law § 1105(c)(5). However, the parties disagree (by stipulation) as to the taxability of fees charged for processing and treatment. More specifically, where the waste products picked up by or on behalf of petitioner at its customers' places of business in New York are treated in petitioner's Pennsylvania plant, petitioner views the amounts charged its customers for such
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> processing and treatment as nontaxable by New York. By contrast, the Division views such charges as taxable parts of the same integrated

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"The above-described notices of determination were issued following an audit of petitioner's books and records. The parties agree that petitioner maintained and made available complete and adequate books such that a detailed audit could be conducted. The parties further agree that neither the audit methodology employed (detailed examination of invoices) nor the resulting dollar amount of tax as calculated based thereon are at issue in this proceeding."

We modified this fact to reflect the parties' stipulation of fact which stated that a detailed audit was conducted.

maintenance service of trash removal together with the transportation and disposal described immediately hereinabove. The parties agreed that the amount of tax asserted that is attributable to the treatment and processing of waste materials is presently being segregated by the auditor and would be set forth on a separate page of an exhibit.

By letter dated August 6, 1992, the Division informed the Administrative Law Judge as follows:

> "[i]n the last sentence of paragraphs 7 and 8 of the Stipulation, it was agreed that the auditor 'would attempt' to separately state the charges and applicable tax relating to transportation and dumping (para. 7) and the charges and applicable tax relating to Treatment and Processing. In the event that was not possible, since only four (4) invoices (out of over 300 invoices) could be found where Petitioner separately billed for Treatment and Processing. That being the case, it was not possible to provide the segregated figures contemplated by the last sentence of paragraphs 7 and 8. The audit papers do include those four invoices along with samples of the majority of invoices where all charges are lumped together" (Division's letter of August 6, 1992, emphasis added).

In its brief at hearing, the Division reiterates that:

> "[o]nly four invoices out of the 300 examined by the auditor separately stated Petitioner's charges for transportation from its charges for processing of the waste. (Ex. D)" (Division's hearing brief, p. 4).

Exhibit "D" is the audit report dated "5/21/90" which has attached to it four invoices which show separately stated transportation charges. In a footnote preceding the above statement, the Division states as follows:

> "[w]hile the parties were negotiating the Stipulation in this matter, we felt it might be helpful to the ALJ, if the tax attributable to the various services could be separately stated. Accordingly, the parties requested that the auditor look at the invoices again to see if he could separately determine the amount of tax asserted which was attributable to services described under paragraphs 7 and 8 of the Stipulation. The auditor was not able to complete his efforts until after the Stipulation had already been signed.
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> "In the event, the auditor was unable to separately determine the tax attributable to transportation and dumping from those attributable to 'processing,' since except for four invoices, Petitioner did not separately charge for its various services. Samples of the invoices, including the four invoices where charges are separately stated, are contained as part of Exhibit D" (Division's hearing brief, p. 3, footnote 2).

In its reply brief at hearing (dated February 4, 1993), petitioner refutes the Division's assertion stating, in relevant part, as follows:

> "[the Division's] statement relating to Petitioner's invoices is gravely in error. True copies of these invoices are maintained at the offices of [petitioner's representative]. These invoices, which approximate four inches in length, have been fully reviewed and without apparent exception, contain separate charges for each element of the services provided by Petitioner. Because of the volume of these documents, they have not been forwarded with this Reply Brief. However, in the event the Administrative Law Judge requests review of them, they will be forwarded immediately" (Petitioner's reply brief at hearing, footnote "1", pp. 7-8).

By letter dated February 8, 1993 to the Administrative Law Judge, the Division's representative stated as follows:

> "I am in receipt of the Petitioner's Reply Brief in the above referenced matter. In his cover letter to you, Mr. Milano mentions that he has the original invoices and that they separately state the tax. (footnote: As noted in my cover letter forwarding the exhibits in this matter, a copy of which was provided to Mr. Milano, I noted that I was only providing samples of the invoices, since they did not appear to be at issue, and they are voluminous.) This is contrary to what the auditor indicated to me, and as I have argued in my brief, would not affect the determination in any event. However, if there is any possibility that these invoices might play a role in your decision, I agree with petitioner that you should have them. Accordingly, I am enclosing the complete folder of invoices which auditor used in this audit. As noted in Mr. Milano's letter, he already has a complete set" (Division's February 8, 1993 letter to ALJ).[2]

Petitioner notes that pursuant to section 903 of Pennsylvania Act No. 1988-108, the "Hazardous Sites Clean Up Act" (35 Pa Cons Stat § 60.20.903), it pays amounts ranging

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[2] We modified the Administrative Law Judge's finding of fact "5" by adding various facts contained in the stipulation, information contained in the Division's correspondence dated August 6, 1992 and February 8, 1993, and statements in the Division's brief at hearing. We also deleted the footnote of the Administrative Law Judge's finding of fact, which read:

> "The parties' stipulation anticipated that the auditor would be able to segregate out, based upon review of invoices, the amount of tax assessed which is attributable to transportation and disposal as opposed to the amount of tax that is attributable to treatment and processing. However, it appears the parties were unable to arrive at such segregated amounts."

We modified this fact to reflect the record in more detail.

between $4.00 and $12.00 per ton for transporting, storing or treating hazardous waste in Pennsylvania. Petitioner refers to this fee as a tax. However, the Pennsylvania statute refers to the same fee as a "hazardous waste transportation and management fee."

Petitioner challenged the assessments herein by filing a request for a conciliation conference. A conference was held and, on May 10, 1991, a Conciliation Order was issued sustaining the tax, penalty and interest as assessed. However, petitioner submitted certain documents subsequent to issuance of the Conciliation Order which have resulted in an agreed-to reduction of the amount of tax due. As set forth in a letter from petitioner dated January 27, 1992, and confirmed by an undated response thereto from the Division (and also as conceded in the Division's brief), the amount of tax at issue has been reduced to $124,907.63, plus penalty and interest, and the amount of omnibus penalty at issue has been reduced to $22,490.77.

OPINION

Tax Law § 1105(c)(2) imposes sales tax on the receipts from the service of processing tangible personal property including trash (Matter of Cecos Intl. v. State Tax Commn., 126 AD2d 884, 511 NYS2d 174, affd 71 NY2d 934, 528 NYS2d 811). Tax Law § 1105(c)(5) imposes sales tax on the receipts from the service of maintaining real property including trash removal (Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552). Tax Law § 1101(b)(3) defines receipt as "the amount of the sales price of any service . . . without any deduction of expenses" (emphasis added).

Initially, we will briefly review our decision in Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992) since it is the basis for the determination of the Administrative Law Judge and at the heart of the Division's exception. In General Electric, this Tribunal rejected General Electric's contention that the disposal of waste material, i.e., PCB contaminated oil, through the process of incineration, which took place wholly in Arkansas, was a separate service from the "removal" of the waste from General Electric's facility in Hudson Falls, New York and the "transportation" of that waste to Arkansas. Guided by Matter of Cecos Intl. v. State Tax Commn. (supra) and Matter of Penfold v. State Tax Commn. (supra), we

concluded that the removal, transportation and the ultimate disposal of the waste was an integrated service.

We next considered and rejected General Electric's assertion that the tax imposed on the processing was unconstitutional because the activity did not have sufficient nexus with New York State since the processing was completed in Arkansas. We rejected that assertion and concluded that, since the integrated waste removal service occurred partly within New York State, it was taxable under Tax Law § 1105(c)(5) which imposes a sales tax upon the receipts for services of maintaining, servicing or repairing real property which includes the service of waste removal (see, 20 NYCRR 527.7[b][2]).

We next considered General Electric's assertion that since the incineration of the waste was done wholly in Arkansas, the Division's imposition of sales tax on the entire receipt for the waste removal service was clearly not fairly apportioned under Commerce Clause standards and created the possibility of double taxation.

We considered first whether the tax was internally consistent, i.e., if the New York tax was applied in every jurisdiction, no multiple taxation would result (Goldberg v. Sweet, 488 US 252). We concluded that the tax was not internally consistent since, if Arkansas had the same tax as New York, it would also view waste removal as an integrated service and since one aspect of that service, i.e., the processing, occurred wholly in Arkansas, then Arkansas could tax the entire receipt for the integrated service, just as New York taxed the entire receipt for the integrated service because the pick-up and removal occurred in New York.

We considered next whether imposition of the tax on the entire receipt for the integrated service passed the external consistency test, i.e.:

> "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed [cite omitted]. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity" (Goldberg v. Sweet, supra, at 262).

We concluded that it did not pass the external consistency test since:

> "there does exist a practical way to apportion the New York State tax to a part of the entire service. The apportionment could be based on miles travelled in New York State or based upon the charges for the transportation portion of the entire charge" (Matter of General Electric Co., supra).

We also noted that although the tax involved in Goldberg was a state excise tax, the reasoning used by the Court in its opinion was applicable in General Electric.

> "In its analysis, the Court discussed the similarity between the tax at issue and a sales tax (Goldberg v. Sweet, supra, at 262). A sales tax, as a transactional tax, is typically based upon an activity that occurs entirely within one state and that no other state would have jurisdiction to tax (see, McGoldrick v. Berwind-White Coal Min. Co., 309 US 33, 58). Our facts are similar to the facts in Goldberg in that an activity is occurring in two states and each state has possible jurisdiction to tax the activity. The crucial difference in our present case is that New York does not provide any type of credit for sales tax paid on an integrated removal service which could be taxed by another jurisdiction. For this reason, our case demands an opposite result than that reached by the Court in Goldberg" (Matter of General Electric Co., supra).

Shortly after our decision in General Electric, the Division issued an Opinion of Counsel (TSB-M-92[3]S), of which we take official notice. The opinion indicates the Division received a number of inquiries regarding imposition of the sales tax on various transactions for removal and/or processing of waste or trash in "the aftermath" of our decision in General Electric.

> "In the main, the confusion prompting the inquiries seems to have resulted from the misstatements by the petitioner in arguments proffered to the Tribunal concerning the sales taxes imposed on integrated trash removal services. The 'internal consistency test,' garnered from a United States Supreme Court decision involving the avoidance of unconstitutional discrimination against interstate commerce, (Goldberg v. Sweet 488 US 252, 260-261), was correctly applied to an incorrect depiction of the facts and law at issue" (TSB-M-92[3]S).

The opinion also states that:

> "[g]enerally, pursuant to section 2016 of the Tax Law the Department has been precluded from seeking judicial review of decisions of the Tax Appeals Tribunal. If an error is not one of an action taken in excess of jurisdiction or a decision founded on constitutional interpretation of a state statute which is beyond the power of an administrative adjudicatory body, judicial review is not available New York City Dept. of Environmental Protection v. New York Civil Service Commission, 78 NY2d 318.

> "The line between whether the [Tax Appeals] Tribunal's decision constituted a finding that the statute was unconstitutional on its face or whether it was only a misapplication of the law to the facts in the particular case is not sufficiently clear in this case so that the availability of judicial review can be determined at this juncture. Therefore, the best interests of clear and consistent administration of the sales tax in this area of law will be served by (1) viewing the General Electric decision as restricted to the specifics of that particular matter as pled and argued, and (2) a clear explanation of the Division of Taxation's consistent administrative position consistent with the law as written and interpreted by the courts" (TSB-M-92[3]S).

In the opinion, the Division states its interpretation of the law of New York as follows:

> "[w]here a transaction involves an integrated trash removal service of pickup and transportation, and which also may include the service of processing and disposal of the trash, the taxable receipt includes the total amount charged, without any reduction for costs of any component of that integrated service, such as containers (U-Need-A-Roll Off Corp. v. NYS Tax Commn, 67 NY2d 690), transportation (Cecos Int'l, Inc. v. State Tax Commn, 71 NY2d 934), processing of the waste (Cecos Int'l, supra), or dumping or tipping fees (Matter of Penfold v. State Tax Commn, 114 AD2d 696). Regardless of the taxable status of the cost components of the service, the vendor's entire receipt is subject to tax if the real property from which the trash is removed is located within this State. None of the receipt is subject to tax if that real property is located outside this State.
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> "Separately stating a charge for a component cost of an integrated trash removal service does not change the character of the integrated service and does not mean that separate services distinct from an integrated 1105(c)(5) service are being performed; Cecos Int'l, supra, U-Need-A-Roll Off, supra, Penfold, supra). Accordingly, the portion of the receipt from the sale of such a trash removal service attributable to the processing component of such service could not be subject to a separate, mutually-exclusive tax under section 1105(c)(2).
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> "A service involving only the processing of trash within New York is subject to tax under section 1105(c)(2)" (TSB-M-92[3]S).

The Division asserts that our decision in General Electric:

> "does not appear to focus on the true nature of the transaction and therefore the singular and exclusive situs of the taxable event for purposes of section 1105(c)(5) of the Tax Law because the application of the tax was misrepresented at [oral] argument.
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> "The actual meaning of the New York sales tax scheme must be inferred from the statutory language as well as the interpretation it has consistently been given by the Department and the courts . . . .

> Consequently, New York's tax on integrated trash removal services does not fail to meet the internal consistency test because such services could only be taxed in the state where the real property being serviced is located. Furthermore, since an integrated trash removal service is subject to tax as an 1105(c)(5) service and may not be treated for purposes of the tax law as consisting in part of an 1105(c)(2) service, another state imposing an identical tax would not, despite the Tribunal's acceptance of the taxpayers argument to the contrary, deem the portion of an integrated service occurring within its borders to be a processing service taxable under section 1105(c)(2)" (TSB-M-92[3]S, emphasis added).

This situs argument was not made by the Division in General Electric.

At hearing, the Division presented these and other arguments to the Administrative Law Judge. The Administrative Law Judge, based on our decision in Matter of General Electric Co. (supra), concluded that while the services provided by petitioner, i.e., transport, disposal and processing of waste constituted an integrated waste removal service taxable under Tax Law § 1105(c)(5), the application of the sales tax to the entire invoice, even though part of the transport and all of the processing occurred in Pennsylvania, violated Commerce Clause (apportionment) standards.

The Division filed an exception to the determination of the Administrative Law Judge asserting in essence that our decision in General Electric was wrong. The Division reiterates the position stated in TSB-M-92(3)S and the arguments made in its brief at hearing before the Administrative Law Judge.

On exception, petitioner asserts that our decision in General Electric was correct and that the Administrative Law Judge's reliance on General Electric as the basis for his determination that the Commerce Clause requires apportionment of the tax is proper.

> "The Commerce Clause of the United States Constitution mandates that the tax herein be 'fairly apportioned.' New York State has made no apportionment at all. Rather, it seeks to tax all the receipts when the overwhelming amount of activity giving rise to the receipts (and the only substantive parts thereof, the complex decontamination of hazardous wastes) occurred outside of New York. Dealing with the transportation of hazardous waste from New York and its decontamination and storage outside of the State of New York in this fashion is bad public policy as well as unconstitutional" (Petitioner's brief, pp. 10-11).

We believe our decision in General Electric was correct and that the Administrative Law Judge properly applied that decision to the facts in this case. Nevertheless, in view of the Division's more expansive articulation of its position post General Electric, and in the best interests of clear and consistent administration of the sales tax, it is appropriate that we review our decision.

We deal first with the Division's assertion that the case law in New York stands for the proposition that removal, transportation and ultimate disposal of industrial or hazardous waste from a customer's New York property is taxable as an integrated trash removal service and is subject to the provisions of Tax Law § 1105(c)(5).

We agree with the Division that the service is an integrated service and that since part of the service occurred within New York, it is taxable under section 1105(c)(5) (see, Matter of General Electric Co., supra).

We deal next with the Division's assertion that this case is distinguishable from the situation before the Tribunal in Matter of General Electric. Co. (supra), where the invoices separately stated the charges for the alleged nontaxable portion of the services, thereby allowing a breakdown of each invoice into taxable and nontaxable amounts. The Division asserts that in this matter, nearly all of petitioner's invoices did not specify the amount being charged for the various elements of petitioner's overall service. Rather, according to the Division, with the exception of four invoices, all of petitioner's billings contain a lump sum charge covering all of petitioner's services to its customers. Petitioner denies this assertion.

We cannot agree with the Division's assertion. By stipulation, the parties agreed that: (1) the facts as stipulated along with the exhibits shall constitute the record of the proceeding; (2) the sole issue was whether the charges for processing were subject to tax; (3) a detailed audit was conducted and books and records were adequate; and (4) the auditor was segregating out, based upon review of invoices, the amount of tax assessed which was attributable to transportation and disposal as opposed to the amount of tax that is attributable to treatment and processing. We cannot "permit a party to a stipulation to qualify, change or contradict a

stipulation in whole or in part, except where justice requires" (20 NYCRR 3000.7[f]). Here, contrary to the Division's August 6, 1992 letter, that the auditor "would attempt" to segregate the charges, the stipulation states clearly that the "amount of tax which is attributable to services described are presently being segregated by the auditor and will be set forth on a separate page in Exhibit D." Second, the stipulation by its very terms states that "the facts as stipulated along with exhibits identified in the stipulation shall constitute the record of the proceeding." Under these circumstances, the Division's submission of invoices with its post-hearing brief, is a unilateral attempt to vary the terms of the stipulation. What is more troubling is that a review of the invoices submitted by the Division with its February 8, 1993 letter bears out what petitioner asserts, i.e., the invoices invariably show separate charges for the services provided by petitioner.[3] In summary, there is no evidence in the record as to why the terms of the stipulation should not be adhered to by the parties; therefore, the parties are bound by it.

We deal next with the Division's assertion that, in effect, our decision in General Electric was that section 1105(c)(5) was unconstitutional per se and not merely the Division's misapplication of the law to the facts in that case.

We cannot agree.

First, the petitioner in General Electric did not challenge the validity of section 1105(c)(5) per se. The petitioner challenged the validity of the assessment issued to it by the Division on the ground that application of section 1105(c)(5) by the Division to the entire receipt for the service purchased, including the processing of the waste in Arkansas, violated the apportionment standard of the Commerce Clause.

Second, it is clear that General Electric was required to raise this issue of the proper application of the statute first through the administrative hearing process (Young Men's Christian Assoc. v. Rochester Pure Waters Dist., 37 NY2d 371, 372 NYS2d 633).

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[3]For example, 90 of the invoices submitted by the Division were for services rendered by petitioner to General Motors. Eighty-six of the invoices showed separate charges for transportation and processing.

Third, it is clear that this Tribunal has the jurisdiction to determine the validity of assessments issued by the Division (Tax Law §§ 2000 and 2006[4][7]) and whether the Division has applied the statute in a constitutional manner (Young Men's Christian Assoc. v. Rochester Pure Waters Dist., supra).

Fourth, the governing principle as to whether our decision was that the statute was unconstitutional as applied was the necessity of the factual record upon which our decision was based.[4] On this point, it is clear that our decision in General Electric was not, as asserted in the Opinion of Counsel, decided on a question of law, i.e., "the absence of a statutory provision which apportions to another jurisdiction part of the receipt subject to tax under section 1105(c)(5) or provides a credit against New York sales tax for taxes paid to another jurisdiction" (TSB-M-92[3]S). On the contrary, in that portion of our opinion referred to by the Division, we merely applied the "practical inquiry" framed by the Supreme Court and determined, based on the facts of the case, that the Division could apply the statute in a way that would apportion the tax. In the instant case, the facts are more compelling since the Division has stipulated that the sole issue was whether the processing is subject to tax; a detailed audit was conducted and the books and records were adequate and, the auditor was segregating, based upon the review of invoices, the amount of tax assessed which was attributable to treatment and processing.

We deal next with the Division's assertion that:

> "[n]otwithstanding that the Tribunal does not have jurisdiction to rule on the constitutionality of the tax statute in question, a proper

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[4]See also: CPLR § 7801 Practice Commentaries C7801:6 "When a claim is made that a statute is unconstitutional on its face, the proper procedure is to maintain an action for a declaratory judgment; when the claim is that a statute has been unconstitutionally applied by a state officer, the proper way to proceed is to bring an Article 78 proceeding [cites omitted].

"The reason for the distinction is obvious. When the attack is upon the essential validity of the statute, a question of law is presented and no particular record need be developed. Accordingly, an action for declaratory judgement lies. On the other hand, when the basis of the attack is that the statute has been unconstitutionally applied to the petitioner, an appropriate factual record must be developed which can then be reviewed in an Article 78 proceeding in the nature of either certiorari or mandamus."

> legal analysis of the controlling case law would lead to a determination that the subject taxing provision does not violate the Commerce Clause of the United States Constitution.
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> "The ALJ erroneously found that the Tribunal's reasoning in General Electric is applicable here, concerning whether the tax in controversy is fairly apportioned, and has thereby implied that the tax being imposed fails the internal and external consistency test articulated in Goldberg v. Sweet" (Division's brief, pp. 18-19).

The Division's rationale for this position is as follows. First, there is no evidence that petitioner has suffered any actual double taxation as a result of the tax being imposed by New York since:

> "petitioner has not established either that the cited Pennsylvania statute imposes a tax on the activities being taxed by New York, or that petitioner ever paid any amounts to Pennsylvania pursuant to this statute, regardless of the legal characterization of the [hazardous waste management] fees provided for in the subject statute" (Division's brief, p. 21).

We cannot agree. The test is whether there is a "risk" of double taxation not "actual" double taxation as the Division asserts (Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 US 425). As we stated in General Electric in responding to the same implication by the Division "Arkansas does not need to have an identical tax, but rather, the mere possibility of it imposing an identical tax cannot result in multiple taxation" (Matter of General Electric, supra; see also, Hellerstein State Taxes ¶ 4.06[1][a] for a definitive discussion of this issue).

We deal next with the Division's assertion that there is no possibility of multiple taxation in the present case under the internal consistency test in Goldberg because:

> "under the transactional approach of New York's sales tax, the only rational situs of a taxable event under § 1105(c)(5) is the location of the real property . . . . On the other hand, a transaction involving an integrated service of waste removal from real property located outside of New York would, under the provisions of New York's statute, have a taxable situs outside the State. Such a transaction would therefore not be subject to tax under § 1105(c)(5), even if the processing and disposal components of the integrated service took place within New York.
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> "Thus, there is no risk of duplicate taxation by another state, if that state's law is identical to New York's Tax Law" (Division's brief, pp. 22-24).

We cannot agree. The result of the Division's position is that under a similar statutory scheme Pennsylvania would be precluded from taxing the processing of the waste in Pennsylvania if the waste came from outside the state in an integrated waste removal service. We find this position inconsistent with the interstate nature of the service and oblivious to the efforts by state and local governments, through taxation and other means, to develop efficient waste control systems.[5] Moreover, we find no discernible legal basis for the Division's position.

The heart of the Division's position is that sections 1105(c)(2) and 1105(c)(5) are mutually exclusive and that the case law in this State prevents the Division from imposing tax on the receipts for the service of processing of waste in New York where such waste is initially generated from outside New York and the processing is part of an integrated service.

The underlying issue in Penfold and Cecos, cited by the Division, was the definition of receipt in Tax Law § 1101(b)(3), i.e., "the amount of the sale price of any service . . . without any deduction of expenses" (emphasis added), and efforts by vendors to reduce the price of the service provided by deducting specific expenses. Neither of these cases, or any other case law relied upon by the Division, dealt with the authority of New York State to tax, pursuant to section 1105(c)(2), the processing of waste in New York where the waste was generated outside of New York State.

What is clear to us is that both section 1105(c)(5), which views trash removal as integrated service consisting of removal, transportation and disposal, and section 1105(c)(2), which allows the taxing of the processing of tangible personal property which takes place in the

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[5]See Justice Kennedy's opinion in C & A Carbone v. Town of Clarkstown (114 Sup Ct 1677, 128 L Ed 2d 399):

> "[a]s solid waste output continues space and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment. The difficulty of their task is evident from the number of recent cases that we have heard involving waste transfer and treatment. See Philadelphia v. New Jersey, 437 U.S. 617 (1978); Chemical Waste Management, Inc. v. Hunt, 504 U.S. ___ (1992); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. ___ (1992); Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. ____ (1994). The case decided today, while perhaps a small new chapter in that course of decisions, rests nevertheless upon well-settled principles of our Commerce Clause jurisprudence."

state, comprise the statutory scheme to be considered in the application of the internal consistency test. If Pennsylvania had the same law, then it could tax the processing that takes place in its state on either basis, i.e., under section 1105(c)(5) or 1105(c)(2). The result would be double taxation between New York and Pennsylvania.

Along these lines, we would point out that the Division's assertion that sections 1105(c)(5) and 1105(c)(2) are mutually exclusive appears inconsistent with a recent Advisory Opinion (TSB-A-93[54]S, October 5, 1993). The question was whether the services of cleaning up toxic waste spills and sites are subject to sales tax. The service was described as the clean up and the delivery of the waste to a location specified by the customer or to a disposal site designated by the customer. The opinion stated that "[t]he service of cleaning up toxic waste and processing is subject to the sales tax imposed under sections 1105(c)(2) and (c)(5) of the Tax Law (see, Cecos Intl. v. State Tax Commn., 126 AD2d 884, affd 71 NY2d 934)" (TSB-A-93[54]S).

We deal next with the Division's assertion that the external consistency test requires an analysis of the actual statutes of other states. There is no such discussion of Arkansas law in General Electric asserts the Division, nor any discussion of how the absence of a credit provision in New York's Tax Law resulted in actual double taxation to General Electric. "In view of these circumstances, it appears that the General Electric decision erroneously considered the absence of a credit provision in New York's tax to be fatal, thereby leading to the conclusion that Tax Law § 1105(c)(5) is not externally consistent" (Division's brief, pp. 27-28).

The Division goes on to assert that our conclusions in General Electric concerning external consistency:

> "appear to be grounded on the absence of a statutory provision which either apportions to another jurisdiction part of the receipt subject to tax under § 1105(c)(5), or provides a credit against the New York tax for taxes paid to another jurisdiction. However, since the Legislature did not enact an apportionment provision of this type, there is no apportionment statute in existence for the Tribunal to consider the constitutionality of, 'as applied' to a given set of facts. Rather, it would seem that, under these circumstances, a holding by the Tribunal that

> New York's statute is unconstitutional amounts to a declaration that the statute is unconstitutional per se. Of course, such a holding exceeds the authority granted to the Tribunal by the Legislature [cite omitted]" (Division's brief, pp. 17-18).

The Division's final point is that apportionment would require New York to assume the type of administrative burden that Goldberg found inappropriate. It will be helpful if we first briefly review the external consistency analysis in Goldberg. The Court first considered the taxpayer's assertion that "any tax assessed on the gross charge of an interstate activity cannot reasonable reflect in-state business activity and therefore must be unapportioned" (Goldberg v. Sweet, supra, at 262, emphasis added). The Court rejected this argument noting that:

> "[t]he tax at issue has many of the characteristics of a sales tax. It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States . . . the Tax Act reasonably reflects the way that consumers purchase interstate telephone calls" (Goldberg v. Sweet, supra, at 262, emphasis added).

In Goldberg, the Court also agreed with the State that since the Tax Act reaches only those interstate calls which are "(1) originated or terminated in Illinois and (2) charged to an Illinois service address" the risk of multiple taxation is "exaggerated." The Court noted that it was doubtful if other states would have nexus to tax the call.[6]

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[6]Specifically, the Court in Goldberg stated:

> "[w]e doubt that States through which the telephone call's electronic signals merely pass have a sufficient nexus to tax that call . . . . We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call [cite omitted].
>
> "We believe that only two States have a nexus substantial enough to tax a consumer's purchase of an interstate telephone call. The first is a State like Illinois which taxes the origination or termination of an interstate telephone call charged to a service address within that State. The second is a State which taxes the origination or termination of an interstate telephone call billed or paid within that State [cite omitted].
>
> "We recognize that, if the service address [State #1] and billing location of a taxpayer [State #2] are in different States, some interstate telephone calls could be subject to multiple taxation. This limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme [cite omitted]. To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation [cite omitted]. ('The . . . taxing scheme is fairly apportioned, for it provides a credit against

The Court went on to state in effect that it was not feasible to devise an apportionment formula that would be practical given the electronic technology of interstate phone services.

With the analysis as a guide, we conclude as we did in General Electric that taxing the entire receipt, when the entire processing and part of the transportation takes place in Pennsylvania, results in New York taxing more than that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

As we earlier stated, our decision in General Electric was not, as the Division asserts, decided on a question of law, i.e., the absence of a statutory provision which apportions to another jurisdiction a part of the receipt subject to tax under section 1105(c)(5) or provides a credit against New York sales tax for taxes paid to another jurisdiction.

Here, as in General Electric, we make the "practical inquiry" and find a service which has distinct elements; i.e., removal of the waste from the real property which is performed entirely in New York State; transportation of the waste from the real property to Pennsylvania where it is to be processed which is performed both in and out of New York; and processing of the waste, which is performed wholly outside New York.

While there is no question that the purchase of an integrated service is commonplace, unlike the holding in Goldberg, there is clear nexus for Pennsylvania to tax the processing which takes place in that State. We find, as we did in General Electric, that there is a practical method to apportion the cost, one which does not, as the Division asserts, create the administrative inconvenience sought to be avoided in Goldberg. Once again, we point out that the facts here are even more compelling than the facts in General Electric, since the Division has stipulated that the sole issue was whether the processing is subject to tax; a detailed audit was being conducted and the books and records were adequate; and the auditor was segregating,

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its use tax for sales taxes that have been paid in other States') [cite omitted]" (Goldberg v. Sweet, supra, at 263-264).

based upon the review of invoices, the amount of tax assessed which was attributable to treatment and processing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "3" below;

3. The petition of Waste Conversion, Inc. is granted to the extent that tax is to be imposed, as per the stipulation, only on the amount attributable to transportation and dumping (or disposal) fees; and

4. The Division of Taxation is directed to modify the notices of determination and demand for payment of sales and use taxes due issued March 29, 1990 in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
August 25, 1994

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

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