STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **EXXON MOBIL CORPORATION** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of th Tax Law for the Period December 1, 2000 through February 29, 2004.	:	DECISION DTA NO. 823437

Petitioner, Exxon Mobil Corporation, filed an exception to the determination of the Administrative Law Judge issued on May 24, 2012. Petitioner appeared by McCarter & English, LLP (Michael A. Guariglia, Esq., and David J. Shipley, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 5, 2012 in Albany, New York.

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

ISSUE

Whether certain environmental testing and monitoring services are taxable under Tax Law § 1105 (c) (5) as the maintenance, service or repair of real property, where such services are performed at sites where a discharge of petroleum has occurred and where: i) no subsequent environmental remediation of the real property occurs; ii) such services are performed prior to

the commencement of any remediation; or iii) such services are performed following the completion of remediation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact "2," "4," "5," "7," "13," "16," "46" and "49." The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.[1]

1. During the period at issue, petitioner, Exxon Mobil Corporation (EMC), owned or operated petroleum bulk and retail stations and terminals within New York State.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> 2. In 1999, EMC sold a number of its retail service stations. Pursuant to the contract of sale, EMC retained environmental responsibility for the stations until 2003. A petroleum discharge, or oil spill, occurred on each of the properties at issue.[2]

3. EMC handled and transacted business with materials that are subject to certain federal and state environmental regulations at its New York properties.

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

> 4. In particular, EMC must comply with New York law, including Article 12 of the Navigation Act, commonly referred to as the Oil Spill Act (Navigation Law § 170 et seq.), and the respective Department of Environmental Conservation (DEC) regulations (6 NYCRR § 611 et seq.). These rules govern and require the investigation, cleanup and removal of oil spills, otherwise referred to as petroleum

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[1] We have retained the Administrative Law Judge's numbering of the facts for clarity.

[2] We modify this fact to more accurately reflect the record.

discharges, in New York State.[3]

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

> 5. During the period at issue, petitioner, EMC, was required to report to DEC any known discharge of petroleum in accordance with the relevant provisions of the Navigation Law and DEC regulations.[4]

6. Upon the reporting of such an incident to DEC, DEC opens a "spill number" for internal tracking purposes.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> 7. Pursuant to DEC requirements, EMC is required to perform an environmental investigation at sites where a discharge of petroleum occurrs. In particular, Section 1 of the DEC Guidelines for Petroleum Spill Inactivation, February 23, 1998, provides:
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> > "Every site will require a complete site characterization to determine the full extent of contamination in all affected media. Groundwater plumes must be defined in their entirety without regard to property lines. Soil contamination must be identified to describe the full volume and concentration of the contaminants (SGM, Part I, Section 4, 'Site Investigation Procedure')" (DEC Guidelines for Petroleum Spill Inactivation, February 23, 1998).
>
> The referenced section of the Spill Guidance Manual (SGM), provides technical information and requirements involving, among other items, soil borings and monitoring wells.[5]

8. Once a spill number has been assigned to a site, EMC begins preliminary investigative measures to determine if there is any immediate danger from the release.

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[3] We modify this fact to more accurately reflect the record.

[4] We modify this fact to more accurately reflect the record.

[5] We modify this fact to more accurately reflect the record.

9. Typical activities performed at an EMC site to which a spill number has been assigned include the following:

a. The development of a work plan for DEC review. The work plan proposes various locations for monitoring wells and/or soil borings.

b. Once DEC approves a work plan, EMC uses the services of an environmental consultant to determine feasible locations for monitoring wells and/or soil borings based on health and safety concerns and physical constraints.

c. The environmental consultant mobilizes to the site, usually with subcontractors, to install monitoring wells and conduct soil borings.

d. The environmental consultant uses technicians, geologists, hydrogeologists, and other qualified personnel to collect groundwater and soil for sampling.

e. The groundwater and soil samples are shipped to a laboratory that provides lab results to the environmental consultant.

f. The environmental consultant evaluates concentrations of contaminants and submits reports to DEC, typically on a quarterly basis.

10. As indicated above, EMC hires contractors, referred to herein as environmental consultants, who perform the environmental testing and monitoring services required by New York law.

11. EMC and its environmental consultants develop purchase orders and work scope documents that include costs for installation, oversight, sampling and other requirements, depending on the site.

12. The work scope and purchase order documents are developed at the beginning of the year by EMC and its environmental consultant for a particular site. These documents lay out the scope of work to be conducted during that year. The scope of work is based on conversations with DEC and is the plan for the site.

We modify finding of fact "13" of the Administrative Law Judge's determination to read

as follows:

> 13. The environmental consultant's qualified personnel prepare reports that petitioner, EMC, uses to determine whether, under New York Law, it is required to engage in "active" remediation as a part of the petroleum discharge cleanup.[6]

14. EMC project managers review the environmental consultant's reports before such reports are finalized.

15. The same environmental investigation and testing protocol is followed regardless of whether an incident eventually requires remediation or never requires remediation.

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

> 16. Some of the environmental investigation and testing activities at issue may occur on properties adjacent to the site of the oil spill. This occurs in situations where the contamination presents the potential for "offsite impacts." For example, EMC may be required to sample the potable wells on residential properties adjacent to the property affected by the petroleum discharge.[7]

17. Typically, after the assignment of a spill number, a Sensitive Receptor Survey is conducted by EMC's environmental consultant to locate and identify areas and structures in the vicinity of the spill to determine if there are any immediate or adverse effects upon adjacent properties or structures, such as residential homes with basements, potable wells or private wells.

18. A sensitive receptor is anything that may be susceptible to a spill.

19. A Sensitive Receptor Survey is conducted with a file search using U.S. Geological Survey (USGS) historical maps, aerial photographs of the property, and a site visit to the

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[6] We modify this fact to more accurately reflect the record.

[7] We modify this fact to more accurately reflect the record.

property.

20. Once the Sensitive Receptor Survey is completed, EMC's consultant prepares a report of the survey and submits it to the DEC case manager.

21. EMC is required to update a Sensitive Receptor Survey every three years. Such surveys continue to be conducted after the shutdown and removal of a remediation system.

22. Invoices from EMC's consultants include charges for Sensitive Receptor Surveys.

23. The report of the Sensitive Receptor Survey, and subsequent communication between EMC and the DEC case manager, usually lead to investigative measures, such as collection of soil samples and installation of monitoring wells.

24. Such investigations are performed by EMC's environmental consultant.

25. As per DEC requirements, both soil and water samples are taken during an environmental investigation to determine the nature and extent of contamination present.

26. EMC's environmental consultant charges EMC for the geoprobe assessment of soil samples.

27. A geoprobe is a type of drill rig that protrudes into the ground and is used to collect soil samples.

28. Soil samples at a site are collected by a staff hydrogeologist or a scientist using a rod connected to the geoprobe.

29. Soil samples are collected during the initial investigation with the use of a geoprobe.

30. To conduct the tests of groundwater during an environmental investigation, monitoring wells must be installed.

31. Following the geoprobe assessment, EMC's consultant and its subcontractor will

install monitoring wells in the bore holes created by the geoprobe.

32. The number of wells and the frequency with which they are monitored varies from site to site.

33. The determination of the location and number of wells is based upon the work plan that is submitted to DEC for review in collaboration with EMC and its environmental consultant.

34. The monitoring wells are essentially PVC pipes with slide screens that interface the groundwater and soil.

35. A plug prevents anything from going into the top of the monitoring well.

36. Samples taken from monitoring wells located on EMC's property where a spill number has been assigned are typically tested for approximately four quarters (four times in one year) to observe seasonal fluctuations in groundwater and other trends.

37. Invoices from EMC's consultants include charges for installation of soil borings and monitoring wells.

38. Invoices from EMC's consultants include charges for monitoring and sampling of wells, which include visiting a site, collecting a groundwater sample, analyzing the sample and reporting on the sample.

39. If a site requires remediation, new wells are installed specifically for remediation purposes, such as soil vapor recovery wells.

40. EMC's consultant for a particular site prepares a report of findings based on the geoprobe assessment and the initial monitoring well installation and sampling event to document the concentrations of contaminants in soil and groundwater. The report is submitted to the DEC case manager.

41. After performing a quarterly groundwater sampling event, EMC's consultant prepares site status update reports (sometimes titled quarterly monitoring reports) to document its findings.

42. Site status reports and quarterly monitoring reports are submitted to the DEC case manager.

43. Invoices from EMC's consultants include charges for preparation of monitoring reports based on the testing of well samples. Such reports are submitted to the DEC case manager.

44. Invoices from EMC's consultants include charges for subsurface investigation reports.

45. Invoices from EMC's consultants include charges for office-related work, including administrative costs associated with project management of the site, scheduling and project support.

We modify finding of fact "46" of the Administrative Law Judge's determination to read as follows:

> 46. As per DEC requirements, the data gathered during the initial environmental investigation is used to:
>
> > (1) determine whether any contaminants exist at the site above applicable standards, criteria or guidance;
> >
> > (2) delineate the areal and vertical extent of contaminants in all media, including soil and groundwater, at or emanating from the site;
> >
> > (3) determine the surface and subsurface characteristics of the site, including the depth to groundwater; and,

(4) identify the source or sources of contamination.[8]

47. The data gathered during the environmental investigation is also used to determine whether any remediation is necessary.

48. Once sufficient data is collected and trend analyses are completed at an EMC property where a spill number has been assigned, EMC or DEC propose future work, which may consist of further investigation and/or remediation.[9]

We modify finding of fact "49" of the Administrative Law Judge's determination to read as follows:

> 49. Not all incidents of petroleum discharges that are assigned a spill number receive "active" remediation, because DEC does not require such in all instances. However, the fact that a site does not receive "active" remediation does not mean that the property's soil and groundwater are not contaminated, or that the contamination is resolved.[10]

50. For example, natural attenuation processes that occur without human intervention can reduce the concentration of contaminants in soil or groundwater through a variety of physical, chemical or biological processes.

51. Whether or not remediation is necessary is determined on a site-by-site basis as a result of the required site investigation and testing of environmental media.

52. In some cases, neither EMC nor DEC can determine whether natural attenuation processes will be sufficient or whether remediation will be required until many years after testing begins.

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[8] We modify this fact to more accurately reflect the record.

[9] We altered the wording, but otherwise, we have not substantively modified this fact.

[10] We modify this fact to more accurately reflect the record.

53. If concentrations of impacts remain consistent or are decreasing during the testing period and no remediation is required, EMC will request closure of the spill number from DEC.

54. After investigative measures and monitoring and testing of the monitoring wells at a site, if it is determined that no remediation is required based on site concentrations, a case closure request is prepared and submitted to DEC.

55. At the hearing, EMC submitted detailed documentation related to two spill sites where, during the period December 2000 to February 2004, no remediation occurred and the activities at both sites were purely investigative.

56. Some incidents that are assigned a spill number eventually require remediation.

57. The record does not indicate, with any specificity, the percentage of spill number-assigned sites that eventually require remediation. In the experience of Charles Kolb, an employee of Exxon Mobil Environmental Services Company and a witness for EMC at the hearing in this matter, DEC case managers "often" require some type of "active" remediation. Mr. Kolb also testified that natural attenuation is "a slower process and not really the best route to go" (Hearing Transcript at p. 81).[11]

58. If it is determined that remediation will be required at a site, EMC conducts a pilot test plan to select the most applicable technology for the location.

59. In its oversight role with respect to the remediation performed by EMC, DEC typically requires that, after the environmental investigation and prior to any required remediation, EMC prepare a Corrective Action Plan for DEC approval.

60. EMC does not begin remediation of a site until DEC approves EMC's Corrective

[11] We have inserted a citation to the record, but otherwise we have not modified this fact.

Action Plan.

61. Remediation services consist of the installation of a remedial system, periodic sampling, testing and monitoring to ensure that the remedial system is working, replacement of contaminated soil, removal of abandoned or orphaned storage tanks, and the disposal of any waste.

62. Periodic sampling, testing and monitoring to ensure that the remedial system is working involves the continued use of the monitoring wells installed during the initial investigation.

63. The periodic sampling, testing and monitoring conducted at an EMC site that is being remediated are not included within the testing and monitoring services that are the subject of the contested portion of the assessment at issue. EMC does not contest the imposition of sales tax on any testing and monitoring or remediation services provided subsequent to DEC's approval of the EMC Corrective Action Plan and prior to the shutdown of any remedial system.

64. When EMC makes a determination to shut down a remedial system at a contaminated site, it notifies DEC of its proposed shutdown.

65. If DEC approves a proposed remediation system shutdown, DEC will notify EMC of its approval and EMC will shut down the remediation system.

66. For approximately one year following the initial shutdown of a remedial system, EMC will use the environmental testing and monitoring services of environmental consultants to evaluate seasonal fluctuations and rebounding of impacts to determine the nature and extent of any remaining contamination. Such testing and monitoring will involve the use of the monitoring wells installed during the initial investigation.

67. EMC's consultants charge EMC for the testing and monitoring services conducted after the remediation system is shutdown.

68. If concentrations of impacts remain consistent or are decreasing during the period of testing and monitoring following system shutdown, EMC will request permanent shutdown of the remediation system from DEC.

69. If DEC agrees that no further remediation and no further testing and monitoring are required, DEC issues a "no further action letter," a "closure letter," or other form of documentation evidencing that EMC has completed the required remediation at a site.

70. Once EMC receives permanent shutdown approval from DEC, it decommissions or removes the remedial system.

71. In most cases, the same environmental consultant that provides the testing and monitoring services also provides any related remediation services, although this is not always the case and EMC can and will use different consultants to provide remediation services.

72. In the experience of Mr. Kolb, such a use of different consultants is rare.

73. At the hearing, EMC submitted detailed documentation related to two spill sites showing that no remediation activity continued after the remediation system in place at each site was shut down, in 1995 and 1999, respectively.

74. During the period at issue, EMC paid for the services of environmental testing and monitoring conducted as part of investigations to determine whether environmental remediation must be performed as described herein, and did not pay any sales tax on any investigative testing and monitoring services performed prior to the commencement of remediation.

75. The investigative testing and monitoring services performed prior to the

commencement of remediation were purchased by EMC for sites where no remediation action was taken, as well as sites where remediation occurred subsequent to the completion of investigative testing and monitoring, but prior to (i) the approval of a remediation Corrective Action Plan and (ii) the commencement of any remediation action.

76. EMC submitted into evidence samples of documentation and invoices for the category of testing and monitoring services performed prior to the commencement of remediation described in Findings of Fact 74 and 75.

77. During the period at issue, EMC paid for the services of environmental testing and monitoring conducted as part of investigations to determine whether environmental remediation of a site was complete as described herein, and did not pay sales tax on any investigative testing and monitoring services performed subsequent to the completion of an approved and implemented remediation plan.

78. EMC submitted into evidence samples of documentation and invoices for the category of testing and monitoring services performed subsequent to the completion of an approved and implemented remediation plan described in Finding of Fact 77.

79. EMC also performs environmental testing similar to that described herein for purposes of conducting baseline investigations prior to divesting a property. None of the services described herein were performed as part of such baseline investigations.

80. On July 2, 2007, following an audit, the Division of Taxation (Division), issued to EMC, a Notice of Determination asserting $501,031.32 in additional sales and use tax due, plus interest (and less a credit in the amount of $23,443.76), for the period December 1, 2000 through February 29, 2004. The tax asserted in the statutory Notice is premised solely on the Division's

assertion of tax due on EMC's purchase of services relating to environmental testing and monitoring where no remediation occurs, where such services are provided prior to the commencement of any remediation and where such services are provided subsequent to the completion of remediation, as described in Findings of Fact 74, 75 and 77.

81. While EMC contests the Division's audit determination that the services described above fall within the enumerated services properly subject to tax under Tax Law § 1105 (c), it does not otherwise contest the audit methodology or results.

82. The uncontested audit methodology involved a computer-assisted statistical sample of purchases of the services described herein. A list of all purchases included in the sample is in the record. Except for the documentation and invoices submitted into evidence by EMC (see Findings of Fact 76 and 78), however, the record does not indicate whether any particular purchase was for services provided where no remediation was performed, where remediation was subsequently performed, or where remediation was previously performed.

83. The Division contends, and EMC does not dispute, that the testing and monitoring services that are the subject of the contested portion of the assessment did not result in any capital improvements.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that petitioner, EMC, contested only whether Tax Law § 1105 imposed sales tax on environmental testing and monitoring services on properties that were not actively remediated, or on such services rendered prior to and post active remediation. The Administrative Law Judge noted that narrow construction was appropriate because the statute imposed tax. In reviewing the burden, the Administrative Law Judge

determined that, in order to prevail, petitioner had to come forward with clear and convincing evidence that the Division issued the subject Notice based upon an erroneous interpretation of Tax Law § 1105.

The Administrative Law Judge found that Tax Law § 1105 (c) (5) imposed tax on the subject testing and monitoring services as "maintaining, servicing or repairing" real property. Analyzing these services in context, the Administrative Law Judge found that they were motivated by petitioner's environmental responsibility for these properties impacted by petroleum discharges. The Administrative Law Judge found that the presence of a petroleum discharge indicated some level of disrepair to a property, and that the environmental testing and monitoring services provided EMC with essential information about the condition of the property. The Administrative Law Judge also found that the services were integral to the cleanup of the impacted properties because, as required by DEC, they were provided during the cleanup period. As such, the Administrative Law Judge determined that the primary function of these services was to facilitate the cleanup and removal of petroleum discharges. Therefore, the Administrative Law Judge concluded that Tax Law § 1105 imposed sales tax on these services as maintaining, servicing or repairing real property.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to the determination, arguing that the Administrative Law Judge incorrectly held that Tax Law § 1105 imposed tax on the subject services. In support of its position, EMC raises three principal points: first, that the Administrative Law Judge improperly held that petitioner had the burden of proof; second, that the interpretation of "maintaining, servicing or repairing" utilized by the Division, and accepted in the determination, conflicts with

the plain meaning of the terms; and, third, that the Administrative Law Judge improperly utilized an "entire context" analysis to determine the taxability of the subject services.

On the procedural issue, petitioner argues that the Administrative Law Judge improperly construed Tax Law § 1105 by holding that petitioner had the burden of proving that its interpretation was the only rational one. Petitioner, EMC, submits that the Administrative Law Judge confused rules of statutory interpretation with the evidentiary burden borne by the party challenging the notice of determination. EMC contends that the Administrative Law Judge improperly deferred to the Division's interpretation of "maintaining, servicing or repairing," because taxing statutes are to be construed against the government. As such, petitioner argues that, properly construed against the taxing authority, the services at issue fall outside the scope of services enumerated under Tax Law § 1105 (c) (5), and, therefore, the determination of the Administrative Law Judge should be reversed.

Petitioner also argues that the Administrative Law Judge sanctioned an interpretation of Tax Law § 1105 (c) (5) that is inconsistent with the plain meaning of the statutory language. It is EMC's position that, in order for a service to be taxable under Tax Law § 1105 (c) (5), the maintenance, service, or repair must alter the condition of a property. Petitioner contends that the environmental testing and monitoring services at issue do not constitute a taxable service because, standing alone, these services do not reduce or change the amount of pollution on a petroleum discharge site. Therefore, petitioner submits that the determination should be reversed because the Administrative Law Judge sanctioned an interpretation of "maintaining, servicing or repairing" that impermissibly goes beyond the plain meaning of the words.

Regarding the functional analysis of the subject services, petitioner submits that the

Administrative Law Judge improperly viewed the services in connection with the remediation efforts. EMC submits that an "entire context" analysis only applies where a taxpayer seeks an exemption as a capital improvement. Petitioner contends that the environmental testing and monitoring services are separate and distinct from "active" remediation and cannot be considered "maintaining, servicing or repairing" on an independent basis. Therefore, EMC contends that the determination should be reversed because the Administrative Law Judge utilized the incorrect legal analysis.

Opposing the exception, the Division argues that the Administrative Law Judge properly determined that the services at issue were subject to tax. It rejects petitioner's attempts to shift the burden to the Division, noting that the presumption of correctness attaches to a notice of determination. The Division also notes that the Administrative Law Judge properly concluded that, in order to prevail, EMC had to prove that the Division's interpretation is unreasonable and that the taxpayer's interpretation is the only reasonable one. It contends that petitioner's argument should be rejected because the Administrative Law Judge properly construed Tax Law § 1105 and determined that petitioner failed to meet its burden.

The Division also submits that there is no basis for adopting petitioner's definition of "maintaining, servicing or repairing" in Tax Law § 1105 (c) (5). Initially, it notes that EMC did not argue that the Division's interpretation was irrational or unreasonable. It emphasizes the Administrative Law Judge's conclusion that the properties at issue were in a state of disrepair because of the petroleum discharges. The Division argues that, in this context, the subject environmental testing and monitoring services were necessary in order for petitioner to meet its statutory obligation to resolve the oil spill. The Division argues that this upkeep correlates to the

regulatory definition and the enumerated services in Tax Law § 1105 (c) (5). Accordingly, the Division submits that it would be inappropriate to reverse the determination on the ground that the Administrative Law Judge sanctioned an improper interpretation of "maintaining, servicing or repairing."

Regarding the primary function analysis, the Division adopts the position of the determination that an inquiry into the purpose of a service requires an examination of the entire context. It rejects petitioner's position that the subject environmental testing and monitoring services must be viewed apart from the remediation. Moreover, the Division also adopts the Administrative Law Judge's position that, even viewed in isolation, these services constitute "maintaining, servicing or repairing" because they form a core component of cleaning up and removing a petroleum discharge. As such, the Division contends that this argument fails to present grounds for reversal and requests that the exception be denied in its entirety.

OPINION

Tax Law § 1105 imposes a tax upon the sale of certain services in the State of New York. On exception, the parties limited their arguments to whether subsection (c) (5) of Tax Law § 1105 applies to testing and monitoring of contaminants on petroleum discharge sites. This subsection imposes sales tax upon the following services:

> "Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law" (Tax Law 1105 [c] [5]).[12]

The Division's regulations define "maintaining, servicing or repairing" as follows:

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[12] Insofar as the phrase, "as such terms are defined in the real property tax law," may be read to apply to "maintaining, servicing or repairing," we note that the Real Property Tax Law does not define these terms. Neither party raised this issue on exception.

> "Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal" (20 NYCRR 527.7 [a] [1]).

Applying the foregoing, the Division determined that the instant environmental testing and monitoring services constituted "maintaining, servicing or repairing" real property, and issued a Notice of Determination to petitioner, EMC.

In this matter, we are asked whether petitioner clearly established that the Division applied an unreasonable definition of "maintaining, servicing or repairing" by determining that tax was due upon environmental testing and monitoring services performed upon petroleum discharge sites, for which EMC bore environmental responsibility.

It is well settled that "an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness" (***Lorillard Tobacco Co. v Roth***, 99 NY2d 316, 322 [2003] [internal quotation marks omitted]).

> "'While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term' by the agency charged with administering the statute" (***Matter of Island Waste Servs., Ltd. v Tax Appeals Trib. of the State of N.Y.***, 77 AD3d 1080, 1082 [2010], ***lv denied*** 16 NY3d 712 [2011], ***quoting Matter of O'Brien v Spitzer***, 7 NY3d 239, 242 [2006]).

In prior cases involving Tax Law § 1105 (c) (5), the Court of Appeals and the Appellate Division deferred to the Division's interpretation and application of "maintaining, servicing or repairing" because these were determined to be broad statutory terms (***see Matter of Island Waste Servs., Ltd. v Tax Appeals Trib. of the State of N.Y.***, 77 AD3d 1080, 1082 [2010], ***lv denied*** 16 NY3d 712 [2011], ***supra***). As such, it follows that the application of Tax Law 1105 (c) (5) "involves

knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (***Kurcsics v Merchants Mut. Ins. Co.***, 49 NY2d 451, 459 [1980]). As the instant matter involves the same language from the same statute, we accord appropriate deference to the Division's application of "maintaining, servicing and repairing" (***see*** 20 NYCRR 527.7 [a] [1]).

Petitioner, EMC, bears the burden in this proceeding because it challenges the Division's interpretation and application of Tax Law § 1105 (c) (5). As stated in ***Matter of McKee v Commr. of Taxation & Fin.*** (2 AD3d 1077 [2003], ***lv denied*** 2 NY3d 701 [2004]):

> "The [Division's] deficiency notice is presumed correct, with the burden on petitioners to prove the notice erroneous by clear and convincing evidence" (***Id***. at 1078 [2003]).

In order to prevail, EMC must demonstrate "that its interpretation of the statute is not only plausible, but also that it is the only reasonable construction" (***Matter of Moran Towing & Transp. Co. v New York State Tax Commn.***, 72 NY2d 166, 173 [1988]). As this matter involves a taxing statute, we must find that the Division's application of 20 NYCRR 527.7 (a) (1) is unreasonable if it seeks to "extend the meaning of legislation so as to permit the imposition of a tax in situations not embraced within the statute" (***DeBevoise & Plimpton v New York State Dept. of Taxation & Fin.***, 80 NY2d 657, 661 [1993] [internal quotations omitted]). Bearing these principles in mind, we turn to the question of whether EMC has proven that the Division erroneously determined that "maintaining, servicing or repairing" real property includes the subject environmental testing and monitoring services.

The record indicates that the services at issue were motivated by EMC's environmental responsibility for the subject petroleum bulk and retail stations and terminals, which it once

owned or operated. Each of the properties at issue suffered from a petroleum discharge.[13] We take official notice of the common knowledge that, at retail gas stations and terminals, oil or petroleum may be spilled, discharging hazardous chemicals into the soil and groundwater (***Merrill Transp. Co. v State of New York***, 94 AD2d 39 [1983], ***appeal denied*** 60 NY2d 555 [1983]; State Administrative Procedure Act § 306 [4]).

Acknowledging these dangers, "[t]he Legislature enacted the Oil Spill Act to prevent the unregulated discharge of petroleum and to accomplish speedy, effective cleanups when spills occur" (***State of New York v Speonk Fuel, Inc.***, 3 NY3d 720, 723 [2004][citations omitted]; Navigation Law § 170, et seq.). This law prohibits discharges of petroleum (Navigation Law § 173 [1]), identifies these hazards as "threat[s] to the economy and environment of this state" (Navigation Law § 170), which may result in damage to "lands, waters or natural resources" (Navigation Law § 171), and empowers DEC to resolve these discharges (Navigation Law § 170, et seq.; 6 NYCRR 611, et seq.).

The courts have liberally construed the provisions of the Oil Spill Act in order to accomplish the legislative purpose (***see State of New York v Getty Petroleum Corp.***, 89 AD3d 262, 264 [2011]). The process of resolving a petroleum discharge and restoring the environment is "cleanup and removal," which are defined as:

> "(a) containment or attempted containment of a discharge, (b) removal or attempted removal of a discharge or, (c) taking of reasonable measure to prevent or mitigate damages to the public health, safety, or welfare, including but not limited to, public and private property, shorelines, beaches, surface waters, water

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[13] New York Navigation Law § 172 (8) defines a petroleum discharge as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state."

> columns and bottom sediments, soils and other affected property, including wildlife and other natural resources" (Navigation Law § 172 [4]).

In ***State of New York v Neill*** (17 AD3d 802 [2005], ***appeal dismissed*** 5 NY3d 823 [2005]), the Appellate Division found that the definition of a "cleanup" includes testing and monitoring of an affected property on a stand-alone basis. As stated therein:

> "Most assuredly, the investigative and monitoring costs incurred in attempting to locate and remove a substantial quantity of missing fuel oil discharged on defendant's property comes within the broad definition of 'cleanup and removal' contained in [Navigation Law § 172 (4)]" (***State of New York v Neill***, 17 AD3d at 803-804).

In ***Neill***, the Appellate Division upheld a discharger's liability for investigative testing and monitoring, similar to those at issue, even where no petroleum contamination was found (***id.***). Herein, as stipulated by the parties, the petroleum was discharged on the properties at issue and DEC required the instant testing and monitoring on each site.[14]

We find the foregoing significant because the courts have held that Tax Law § 1105 (c) (5) imposes tax on services involved in "removing hazardous waste [because it] is necessary to maintain real property" (***Matter of Tonawanda Tank Transp. Serv. v Tax Appeals Trib. of State of N.Y.***, 168 AD2d 748, 750 [1990]). As this Tribunal stated in ***Matter of SSOV '81, Ltd.*** (Tax Appeals Tribunal, January 19, 1995),

> "In order to determine a service's taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated."

Analyzing a service in its entirety includes, considering the surrounding context because an activity that may be taxable under one set of facts may be exempt under an alternative set (***id***.;

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[14] ***See*** Findings of Fact 7, 25, 29, and 30; s***ee also*** Exhibit E Paragraphs 22-25 and 29-33.

see also Matter of F.W. Woolworth Co., Tax Appeals Tribunal, December 1, 1994).

We find that, where the context involves the potential for, or an actual hazardous contamination of property, as it does herein, reasonable interpretations of "maintaining," "servicing," and "repairing" include any activity related to ensuring the property's safety. Petroleum discharges constitute hazardous waste (***see*** Navigation Law § 170 et seq.). The services provided in a "cleanup" constitute a specific type of "maintaining, servicing or repairing" designed to address and resolve the discharge. As such, we find that all activities that fall under the definition of "cleanup" are taxable services under Tax Law § 1105 (c) (5).

Our review finds that the instant testing and monitoring services constitute "maintaining, servicing or repairing" real property because they fall within the definition of a "cleanup." The instant services are integral components of resolving petroleum discharges because they indicate the type of chemicals discharged into the soil and groundwater, and whether the amounts of hazardous material are above acceptable levels (***see Matter of Penfold v State Tax Commn.*** 114 AD2d 696 [1985]). Indeed, the record indicates that the services at issue were performed on each site during the cleanup time frame (i.e., after the assignment of a spill number and prior to the issuance of a "no further action" or "closure" letter), regardless of whether the site required "active" remediation. As stand-alone services, testing and monitoring constitute "cleanup," even in the absence of a hazardous contamination (***State of New York v Neill***, 17 AD3d 802 [2005], ***appeal dismissed*** 5 NY3d 823 [2005], ***supra***). Therefore, we must find that the instant services to grounds are also "cleanup" because they were performed on properties actually impacted by petroleum discharges. As such, we conclude that Tax Law § 1105 (c) (5) imposes tax upon the subject environmental testing and monitoring services because they were "maintaining, servicing

or repairing" oil spill sites.

Additionally, we find the instant services to be taxable because they were necessary for the properties to be in compliance with DEC cleanup procedures. In our view, "keeping real property in a condition of fitness [and] . . . safety" necessarily includes ensuring compliance with the duly imposed requirements of this State (20 NYCRR 527.7 [a] [1]). The Legislature has empowered DEC to control the cleanup of petroleum discharges (Navigation Law § 176 [2]). As previously noted, DEC required the instant testing and monitoring at each discharge site at issue (***see*** Findings of Fact 7, 25, 29, and 30). As it accepted environmental responsibility for the subject sites, EMC was bound to comply with the DEC requirements, and perform the instant services, or be liable for the costs of the testing and monitoring (***see e.g. State of New York v Getty Petroleum Corp.***, 89 AD3d 262 [2011], ***supra***; ***State of New York v Speonk Fuel, Inc.***, 3 NY3d 720 [2004], ***supra***). Accordingly, we also conclude that Tax Law § 1105 (c) (5) imposes tax on the environmental testing and monitoring services because DEC required the maintenance for these properties due to the petroleum discharges.

Petitioner's burden of proof argument lacks persuasiveness. While we agree that taxing statutes should be narrowly construed (***see e.g. DeBevoise & Plimpton v New York State Dept. of Taxation & Fin.***, 80 NY2d 657 [1993], ***supra***), contrary to EMC's assertions, narrow construction does not result in a negative inference against the agency's interpretation. As the challenger, petitioner must still demonstrate that the Division's interpretation was unreasonable (***see e.g. Lorillard Tobacco Co. v Roth***, 99 NY2d 316 [2003], ***supra***; ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193 [1975], ***appeal denied*** 37 NY2d 708 [1975]). Narrow construction means that the agency's interpretation must be found unreasonable insofar as it

defines the statute's terms beyond "the clear import of the words used" (***People ex rel. Mutual Trust Co. of Westchester County v Miller***, 177 NY 51, 57 [1903]). In this matter, petitioner failed to carry its burden.

Addressing this argument, we reject the contention that the plain meanings of the words "maintaining," "servicing," and "repairing" exclude testing and monitoring the toxicity of soil and groundwater after an oil spill. For the purpose of this analysis, we accept petitioner's definitions of the terms at issue.[15] We find that the discharge of petroleum inherently places a property into a state of disrepair and unfitness. Even absent the Oil Spill Act, this is true because the pollutants may contaminate the property, presenting a potential danger to the environment, wildlife, and the community. The impact suffered by a particular property cannot be ascertained without testing and monitoring the soil and groundwater for the discharged chemicals. Under these facts, we find that ensuring the safety of a property after a petroleum discharge falls squarely within the plain meanings of "maintaining," "servicing," or "repairing," whether the activity is classified as "general repair and upkeep," "to make fit for use," or "to restore to sound condition" (***see*** footnote 15). As such, we conclude that the plain meaning of "maintaining, servicing and repairing" includes testing and monitoring property after it suffers a petroleum discharge.

We find petitioner's remaining arguments either properly resolved by the Administrative Law Judge or without merit.

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[15] In its papers, EMC provides the following: "Maintaining" means "to care for [property] for purposes of operational productivity or appearance; to engage in general repair and upkeep" (Black's Law Dictionary, 9th Ed., p. 1039 [2009]) or "to keep in a condition of good repair or efficiency" (American Heritage Dictionary, 4th Ed., p. 1055 [2006]). "Servicing" means "to make fit for use, adjust, repair, or maintain" (***Id.*** at 1591), while "repairing" means "to restore to sound condition after damage or injury; fix" (***Id.*** at 1478).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Exxon Mobil Corporation is denied;

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

3. The petition of Exxon Mobil Corporation is denied;

4. The Notice of Determination, dated July 2, 2007, is sustained.

DATED: Albany, New York
May 23, 2013

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner