STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Tonowanda Tank Transport Service, Inc., 1140 Military Road, P.O. Box H, Kenmore, New York 14217, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1982 through August 31, 1985 (File No. 803307).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York on March 23, 1988 at 1:15 P.M., with all briefs to be submitted by June 24, 1988. Petitioner appeared by Duke, Holzman, Yaeger & Radlin (Donald J. Holzman and Michael J. Lombard, Esqs., of counsel). The Audit Division appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether certain services provided by petitioner to its customers, which services consisted of picking up hazardous waste and transporting said waste to a designated disposal facility, constituted a waste removal service subject to tax under Tax Law § 1105(c)(5).

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

FINDINGS OF FACT

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

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

deficiency is not in dispute.

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

4. Once a vehicle was loaded, petitioner's job was to transport the waste to the designated disposal facility. Petitioner did not operate a disposal facility, nor did it charge its customers a dumping fee. Petitioner charged its customers a freight charge and a load detention charge.

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

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

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

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

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

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

(f) Roll-off - This is an 18-wheel tractor-trailer combination. It has a carriage and rails on the carriage. It drops off containers at a generator's facility and subsequently picks the container up when it is filled with waste to be deposited at a disposal facility. Use of this vehicle generated 3.78% of audited taxable sales.

6. Petitioner is and was subject to special governmental regulations in its business operations. Petitioner has obtained permits from at least 37 states, including New York State, to transport hazardous wastes through those states. Petitioner pays a franchise tax to New York

State as a transportation or transmission corporation under Article 9 of the Tax Law. Petitioner has also received intrastate authority from the New York State Department of Transportation (DOT). As part of this intrastate regulation, petitioner must file annual financial reports. Also, as a regulated transporter of hazardous waste, petitioner must file a tariff with the DOT.

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

CONCLUSIONS OF LAW

A. Receipts from waste removal services are subject to sales tax pursuant to Tax Law § 1105(c)(5). (See also 20 NYCRR 527.7[a][1];[b][2]). Petitioner contends that the services it provided, as described herein, were not taxable waste removal services, but were, in petitioner's words, "transportation services through which its customers may dispose of their hazardous wastes in accordance with environmental law" (Petitioner's Brief p. 9). While this description of the services at issue is accepted, petitioner's contention that such services are not subject to tax is rejected. Petitioner's business is providing a service whereby companies which are waste generators get rid of their waste. Petitioner is not in the business of providing services to any other types of companies. To say, as does petitioner, that its business is simply that of transportation (Petitioner's Brief p. 9) is not entirely accurate. More accurately, petitioner's business involves the removal of hazardous waste from a generator's facility (Finding of Fact "3") and the transportation of that waste to a disposal facility (Findings of Fact "3" and "4"). Petitioner uses equipment specially designed for the task of trash removal (Finding of Fact "5") and petitioner hauls nothing except hazardous waste. Petitioner's services are thus clearly "trash removal" services within the plain meaning of that term and within the meaning of Tax Law § 1105(c)(5).

B. Petitioner argued that its business was distinguishable from a "true" trash removal business because petitioner did not load its vehicles and did not charge a dumping fee; therefore, its services cannot be said to constitute an "integrated service" and cannot be taxable (see, Rochester Gas and Electric Corp. v. State Tax Commn., 71 NY2d 931, 934).

Petitioner's argument is unconvincing. Its business is indistinguishable from other so-called "integrated waste removal services" for the purpose of taxability under Tax Law § 1105(c)(5). While petitioner's employees may not have physically loaded the vehicles, petitioner provided specially equipped vehicles by which the waste was removed from the generator's property. This is clearly more than "mere transport"; it is the removal of waste from the generator's property. It is noted that the service subject to tax is "trash removal", which obviously implies getting rid of trash from property, but does not necessarily imply the disposal thereof. Thus, the fact that petitioner did not charge a dumping fee is of no moment. In Rochester Gas and Electric Corp. v. State Tax Commn. (126 AD2d 238, affd 71 NY2d 931) the Appellate Division upheld a determination of the former State Tax Commission which found that the transportation of waste constituted a taxable service. The instant matter is indistinguishable from Rochester Gas and Electric.[1] The tax at issue is therefore properly imposed.

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[1]Contrary to petitioner's argument set forth in its brief, no dumping fees were charged by the independent carriers in Rochester Gas and Electric. The carriers charged the petitioner in that case to "haul fly ash away in trucks" (Matter of Rochester Gas and Electric Corporation, State Tax

C. Petitioner also argued that, in light of Building Contractors Assn. v. Tully, (87 AD2d 909), it would be improper to focus on the isolated act of debris removal instead of viewing debris removal in relation to the "end result" of petitioner's activities. The end result in this instance, petitioner argued, was a nontaxable transportation service.

Petitioner's reliance on Building Contractors Assn. v. Tully is misplaced. In that case, at issue was the taxability of trash removal services in the context of capital improvement work. The Appellate Division held that the taxability of such trash removal services must be determined in light of the "end result" test set forth at 20 NYCRR 527.7(b)(4) (Building Contractors Assn. v. Tully, supra, at 911). That is, if the "end result" of services performed with respect to property is a capital improvement to that property, then the trash removal services are not subject to tax. Here, there is nothing in the record to indicate that the waste removal services were related to any capital improvement work. The services in question were clearly routine waste removal services. Based on the "end result" test, then, the services herein constituted maintaining or servicing the real property of the waste generators and were therefore properly subject to tax.

D. Section 1105-B(b) of the Tax Law exempts from taxation under Article 28 (but not Article 29) receipts from sales of services of installing, maintaining or servicing the tangible personal property (Tax Law § 1105[c][3]) described in Tax Law § 1115(a)(12) (machinery and equipment used or consumed directly in production). Petitioner contends that the section 1105-B(b) exemption applies to all aspects of hazardous waste disposal services, since such services represent the servicing of manufacturing materials. Petitioner's contention is premised upon an erroneous presumption, for the removal of waste does not constitute the servicing of tangible personal property (manufacturing materials). Rather, the removal of waste constitutes the servicing of "real property, property or land". Waste removal services are taxed under Tax Law § 1105(c)(5) ("[m]aintaining, servicing or repairing real property, property or land") as opposed to Tax Law § 1105(c)(3) which pertains to "maintaining, servicing or repairing tangible personal property". The tax at issue is thus imposed on services to real property, property or land. Petitioner is seeking an exemption applicable to tangible personal property. Services which are taxable under section 1105(c)(3) of the Tax Law fall within the exemption offered by Tax Law § 1105-B(b), but services taxable under Tax Law § 1105(c)(5) (the services at issue) do not. Accordingly, the exemption offered by section 1105-B(b) is unavailable to petitioner.

E. The petition of Tonowanda Tank Transport Service, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 27, 1986, is sustained.

DATED: Albany, New York
November 10, 1988

/s/ Timothy J.
Alston
ADMINISTRATIVE LAW JUDGE

Commn., March 6, 1985, Finding of Fact "6").