STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WASTE CONVERSION, INC.	:	DETERMINATION 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.	:	

Petitioner, Waste Conversion, Inc., 101 Jessup Road, Thorofare, New Jersey 08086, 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 June 1, 1986 through May 31, 1989.

On July 25, 1992 and July 30, 1992, respectively, petitioner by its duly appointed representative, Finkelstein, Bruckman, Wohl, Most & Rothman, Esqs. (George T. Bruckman, Esq., and Joseph Milano, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon a stipulation of facts, documents and briefs to be submitted by February 5, 1993. The parties submitted a Stipulation of Facts together with documents as exhibits on August 10, 1992. Petitioner submitted a brief on December 21, 1992. The Division of Taxation submitted a responding brief on January 21, 1993. Petitioner submitted a reply brief on February 5, 1993. After due consideration of the stipulated facts, documents and briefs, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly imposed sales tax on petitioner's waste removal and processing services pursuant to Tax Law § 1105(c)(5), where petitioner accepts waste products at its customers' premises in New York and transports the same to petitioner's premises in Pennsylvania for processing, treatment and disposal.

FINDINGS OF FACT

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.

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 and records 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.

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.

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 processing and treatment as nontaxable by New York. By contrast, the Division views such charges as taxable parts of the same integrated maintenance service of trash removal together with the transportation and disposal described immediately hereinabove.[1]

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 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

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[1]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.

and interest, and the amount of omnibus penalty at issue has been reduced to $22,490.77.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argued in its initial brief that even assuming the transportation and disposal charges were properly taxable as constituting parts of an integrated waste removal service performed with respect to New York real property, the processing and treatment charges were not properly subject to tax. Petitioner cites to Matter of Cecos Intl. v. State Tax Commn. (71 NY2d 936, 528 NYS2d 812) for the proposition that the processing and treatment are not taxable under Tax Law § 1105(c)(5) but rather may be taxed, if at all, under Tax Law § 1105(c)(2) as the separate service of processing. Petitioner goes on to argue that because the instant processing charges represent services rendered outside of New York State, the same may not be subjected to New York State's sales tax. The Division argues, by contrast, that transportation, processing and disposal are all parts of an integrated waste removal service performed with respect to New York real property, and that the aggregate charge for these services, without segregation, is subject to tax under Tax Law § 1105(c)(5).

Petitioner also argues that a 1990 amendment to Tax Law § 1105(c)(5) (L 1990, ch 190, § 172), serves to overcome the imposition of tax herein. More specifically, Tax Law § 1105(c)(5) was amended, effective September 1, 1990 (the amendment served to eliminate the portion thereof enclosed within brackets below), as follows:

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

Petitioner argues that the elimination of the material in brackets should serve, as a matter of policy, to exempt the transactions at issue herein from tax. The Division notes, in response, (and without conceding to petitioner's argument) that the amendment applies to periods

subsequent to those at issue herein.

By its brief, the Division argues that it was proper to impose tax on petitioner's entire receipts for pick-up, transport, processing and storage/disposal of hazardous wastes, since the same constitutes an integrated waste removal service performed with respect to New York real property. Contrary to petitioner's position as espoused in its reply brief, the Division challenges the Tax Appeals Tribunal's holding in Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992), arguing that the tax in question passes constitutional muster as applied to petitioner, and/or that the Tribunal exceeded its authority by addressing issues of constitutionality (apportionment) in General Electric.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c) imposes a sales tax on receipts from sales, other than for resale, of certain enumerated services. The situs for the taxable event under section 1105(c) is found where the service is delivered (20 NYCRR 526.7[e][1]).

B. In this case, the relevant portions of Tax Law § 1105(c) are subdivisions (2) and (5) which provide, respectively, for tax on specified services, as follows:

> "(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.
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> * * *
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> "(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public . . . ."

C. As described, the tax at issue herein is based on petitioners' entire receipts for waste transportation, treatment or processing and disposal/storage. The Division argues that petitioner's pick up, transportation, processing and disposal/storage charges, in total, constitute charges for an integrated waste removal service properly taxable as a service performed with respect to New York real property. The Division maintains that the New York situs of the

waste generator(s) allows taxing the entire receipt, notwithstanding that the treatment and disposal activities occur outside of New York. By contrast, petitioner argues that imposing the tax is improper as violating Commerce Clause standards, both because the services of treatment and disposal occur outside of New York and because petitioners' contacts with New York do not constitute sufficient nexus or connection with New York to allow taxation.

D. The issues presented herein have been addressed by the Tax Appeals Tribunal in Matter of General Electric Co. (Tax Appeals Tribunal, March 5, 1992). General Electric had engaged a single vendor, Environmental Systems Company ("ENSCO"), to handle General Electric's PCB contaminated wastes. ENSCO sent its trucks into New York from Arkansas to pick up the hazardous waste and transport such waste back to Arkansas. ENSCO subsequently processed the waste by incineration in Arkansas and buried the postincineration ash and soot in a fully-permitted Arkansas landfill. The Division attempted to tax the entire cost charged by ENSCO to General Electric on the theory that all of the activities were part of an integrated trash removal service performed with respect to real property located in New York.

The Tribunal agreed that ENSCO's transportation, incineration and burial activities constituted an integrated waste removal service, citing Matter of Cecos Intl. v. State Tax Commn. (126 AD2d 884, 511 NYS2d 174, affd 71 NY2d 934, 528 NYS2d 811). However, the Tribunal, determined that the Division's attempt to impose tax on the out-of-state processing and disposal aspects of such service violated the Commerce Clause of the United States Constitution. More specifically, the Tribunal applied the four criteria articulated by the United States Supreme Court in Complete Auto Transit v. Brady (430 US 274, 51 L Ed 2d 72 [1977]) which must be satisfied in order for a tax on interstate activities to withstand Commerce Clause scrutiny. Under Brady, a tax will withstand Commerce Clause scrutiny if: (1) the activity is sufficiently connected to the State to justify a tax (the "substantial nexus" requirement); (2) the tax is fairly related to benefits provided the taxpayer by the taxing jurisdiction; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly apportioned.

At issue in the General Electric case were the first and fourth criteria. The Tribunal held,

as noted above, that the services performed by ENSCO (transportation and treatment and disposal) constituted an integrated waste removal service performed (at least partly) in New York, and that General Electric had a significant presence in the State. Therefore, the Tribunal concluded that a sufficient nexus existed with New York State to support the tax. However, the Tribunal determined that the tax as applied failed the fourth criteria under Brady inasmuch as the sales tax imposed on ENCSO's services was not fairly apportioned. In reaching this latter conclusion, the Tribunal applied the two-prong analysis articulated in Goldberg v. Sweet (488 US 252, 102 L Ed 2d 607 [1989]) for determining fair apportionment. The first prong requires an analysis of whether the tax sought to be imposed is internally consistent, that is, the tax must be structured so that if an identical tax were to be imposed in another state, multiple taxation would not result. The second prong requires the tax to be externally consistent, that is, New York may tax only that portion of the revenues from the interstate activity which reasonably reflect the New York component of the activity being taxed. The Tribunal held that imposition of the sales tax in General Electric failed both the internal and external consistency tests, noting first that if an identical tax statute existed in Arkansas, such state could impose tax on the entire transportation, processing and disposal charges on the theory that the transportation was an integral part of the waste removal service. The Tribunal noted that, at the least, tax could be imposed on the waste treatment as processing of tangible personal property. This apparent risk of multiple taxation, coupled with the lack of any credit provision in the New York statute to avoid such a result, violates the internal test. Further, the Tribunal held that since there exists a practical way to apportion the New York tax to the New York component portion of the integrated service (e.g., New York miles travelled or the New York transportation portion of the entire charge), a tax on the entire invoice amount, without apportionment, fails the external test.

In this case, as in General Electric, the entire invoice charge (transport, processing and disposal) was subjected to tax under Tax Law § 1105(c)(5) as an integrated waste removal service. Even though part of the transport, and all of the processing and disposal occurred outside of New York, no apportionment was made. Accordingly, based upon the reasoning and

holding of the Tribunal in General Electric, the sales tax as applied to petitioner herein violates Commerce Clause (apportionment) standards.[2]

E. Petitioner has argued in the alternative that the described services do not constitute an integrated waste removal service, but rather are separate and distinct services of transport and disposal (taxable [if performed in New York] under Tax Law § 1105[c][5]), and processing (taxable [if performed in New York] under Tax Law § 1105[c][2]). Petitioner maintains that while transport and disposal may together be treated as an integrated waste removal service, processing may not be included therein (citing Cecos Intl. v. State Tax Commn., supra). This alternative argument merits brief discussion.

Petitioner's argument runs counter to the Tribunal's analysis in General Electric. In fact, the Tribunal specifically addressed such an

argument in its General Electric decision. In this regard, the Tribunal observed as follows:

> "Petitioner's assertion herein that processing of waste is not an integral part of the service of trash removal is apparently based on the [Cecos] court's conclusion that the processing of waste is a taxable transaction under section 1105(c)(2) (Matter of Cecos Intl. v. State Tax Commn., supra, at 937). Petitioner fails to place that discussion in the context of the facts in Cecos, namely, that the petitioner had transactions where it charged customers only for the processing of waste brought to its facilities by the customers and asserted that such charges were not taxable. In this context, the court held such charges taxable as processing under section 1105(c)(2)." (Id.; emphasis added.)

Simply stated, the fact that processing charges alone may be taxed under Tax Law § 1105(c)(2)

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[2]Given the foregoing, it is unnecessary to address the substantial nexus prong of the Brady test. However, in General Electric, the Tribunal did find substantial nexus because General Electric contracted for an integrated waste removal service which was performed (at least partly) in New York and because General Electric had a significant presence in New York. Here, petitioner provided an integrated waste removal service as described, apparently maintained ongoing relationships with New York customers, and regularly sent its vehicles into New York and travelled over its roadways. Hence, petitioner would face a difficult hurdle in establishing a lack of nexus with New York (see, Quill Corp. v. North Dakota, ___ US ___, 119 L Ed 2d 9). Furthermore, and in the same manner, it is unnecessary to address petitioner's argument vis-a-vis the 1990 amendment to Tax Law § 1105(c)(5). However, as the Division points out, such amendment did not take effect until September 1, 1990, a date falling after the period at issue herein.

does not require a conclusion that such charges cannot be included and taxed under Tax Law § 1105(c)(5) as part of an integrated waste removal service when such overall service, as opposed to simply processing by a landfill operator, is being offered. In this regard processing, which occurs between transport and disposal, could reasonably be called the "middle step" in an integrated waste removal service taxable as an integral part thereof under Tax Law § 1105(c)(5). To place petitioner's argument in full context, "tipping" or disposal fees alone are not taxable (at an in-state landfill), yet when coupled with pickup and transport become a taxable part of an integrated waste removal service (Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552). Unlike tipping fees, processing of waste is taxable under Tax Law § 1105(c)(2), yet when processing is included together with pickup, transport and disposal, the same constitutes an integrated trash removal service the entire fee for which is taxable under Tax Law § 1105(c)(5) (Matter of Cecos Intl. v. State Tax Commn., supra). It does not follow that because processing, when offered alone, may be taxed under Tax Law § 1105(c)(2), it must be segregated out and taxed alone under such section in all instances and is precluded from being taxed under Tax Law § 1105(c)(5) as part of an integrated waste removal service. Such a conclusion would be inconsistent with the combined holdings of Penfold, Cecos and General Electric.

F. The petition of Waste Conversion, Inc. is hereby granted, and the notices of determination dated March 29, 1990 are cancelled.

DATED: Troy, New York
June 3, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE