STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARISOL, INC.	:	DETERMINATION DTA NO. 811226
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 September 1, 1985 through November 30, 1988.	:	

Petitioner, Marisol, Inc., 125 Factory Lane, Middlesex, New Jersey 08846, 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 September 1, 1985 through November 30, 1988.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 18, 1993 at 9:15 A.M. The parties were granted until March 22, 1994 to file their respective briefs. All briefs were filed by the prescribed date. Petitioner appeared by Urbach Kahn & Werlin, P.C. (David L. Evans, CPA). The Division of Taxation appeared by William F. Collins, Esq. (Mary R. Hurteau, Esq., of counsel).

ISSUES

I. Whether petitioner, a New Jersey corporation, has shown by clear and convincing evidence that its removal of used or spent industrial chemicals from its customers' business premises located in New York State and its transporting said chemicals to its plant in New Jersey for recycling is not subject to tax because:

(a) Petitioner is purchasing the used chemicals for resale; or

(b) The imposition of sales tax by New York on such transactions is unconstitutional under the Tax Appeals Tribunal decision in Matter of General Electric Co. (March 5, 1992); or

(c) Petitioner's acquisition of the chemicals is not part of a trash removal business, but

rather, is part of a continuing manufacturing process; and/or

II. Whether the Division of Taxation has failed to show that the tax asserted has a rational basis because:

(a) Dorothy Barnes ("Barnes"), supervising Section Head of the Division's Binghamton District Office, was an incompetent witness because her testimony was based on her review of the audit report and workpapers, and conversations, as supervisor, with the auditor and the team leader, rather than based on her direct participation in the audit; and

(b) Assuming Ms. Barnes is an incompetent witness, her testimony cannot be used as a foundation for introduction of the the audit report and workpapers; and

(c) Assuming the audit is not properly in the record and Ms. Barnes is an incompetent witness, both her testimony and the audit itself cannot be considered in determining whether a rational basis exists for the assessment.

III. Whether, assuming Ms. Barnes' testimony constituted impermissible hearsay, and the auditor was not present to testify, petitioner has been deprived of its "fundamental right to appropriately cross-examine or otherwise explore the naked documents proffered by the Tax Department" and has therefore been "denied the ability to properly represent itself" (Petitioner's Brief, pp. 6-8).

FINDINGS OF FACT

During all relevant periods, Marisol, Inc. ("Marisol" or "petitioner") was a corporation having its plant and offices in the State of New Jersey and doing business in the State of New York. Marisol is engaged in recycling various used or "spent" chemical waste. Petitioner operates pursuant to environmental protection laws and regulations governing the proper handling of hazardous materials. Examples of the type of chemical waste Marisol deals with include oil, degreasers, antifreeze, paint strippers and common industrial solvents, mineral spirits and acetone (referred to infra, variously as "chemical waste" or "hazardous waste" or

"waste material").[1] These chemical wastes are the by-products of various industrial and manufacturing processes of petitioner's customers. After petitioner obtains the chemical waste, it is treated (recycled) to remove contaminants and the recycled product is sold by petitioner.

Petitioner obtains the chemical waste from its customers in various states, including New York.

When petitioner is notified that a company has chemical waste it wants removed, petitioner arranges to have one of its trucks, or a common

carrier, pick up the waste and transport it from the New York customer's plant to petitioner's plant in New Jersey.[2]

Petitioner's customers (sometimes infra, "waste generators") are notified prior to the removal of the chemicals that the customer must ship the chemicals in containers approved by the United States Department of Transportation with a complete Hazardous Waste Label. If the material is flammable, a "Flammable Label" must also be attached.

Material is generally received at Marisol's plant in either bulk tank wagons or 55-gallon drums. Due to the nature of the chemical waste, all shipping to Marisol is done on a hazardous materials manifest system. Bulk material is analyzed before unloading at petitioner's on-site laboratory. If the chemical waste meets Marisol's recycling criteria, it is accepted and the manifest is signed. Not until satisfactory completion of the testing and petitioner's signing of the manifest evidencing its acceptance, does title to the material transfer to petitioner. Petitioner has seven days to complete necessary testing and to accept or reject the chemical waste material.

Depending on the chemical waste that has been accepted for recycling, various

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[1]While petitioner objects to use of the term "hazardous waste", instead preferring the term "raw product", its objection does not appear to be that the chemicals involved are not "hazardous", but rather that they are not "waste". However, a review of petitioner's exhibits shows that its own internal documents routinely refer to these chemicals as various types of "hazardous waste", "flammable waste" or "chemical waste" (Ex. "4", "5", "6" and "9").

[2]Sometimes petitioner's customers arrange and pay for their own transportation of the chemical waste to petitioner's plant. However, no tax was asserted on these transactions.

recycling processes are utilized by Marisol. During the audit period, petitioner recycled 100 percent of the chemical waste it accepted. None of the tax asserted in this proceeding was asserted on petitioner's "processing" or "recycling" activities in New Jersey.

Exhibits "5" and "6" are bid letters from petitioner to AT & T and IBM, respectively, and are representative of petitioner's pricing. For example, Exhibit "5" states:

"AT &T Waste Stream No.	Cost for Disposal
NESC-1 Waste Oil	As Specified--$60.00/drum Over 2% Chlorine or Over 10% Water-$90.00/drum
NESC-2 Oil & Flux	As Specified--$60.00/drum Over 2% Chlorine or Over 10% Water-$90.00/drum"

The right hand column is an example of what petitioner charged AT & T to pick up and remove waste oil, and the amount charged would vary depending on the chlorine and water content. On the other hand, sometimes, depending on the percentage and quality of a recycled chemical that could be recovered and the price it could be sold for by petitioner, petitioner may pay a nominal amount to its customer for chemical waste.

Petitioner's invoices and bid letters charged its customers for removal of the waste material plus an amount for "freight" or "transportation" or "hauling". The transportation or freight charge was not always separately stated (see, e.g., Exhibits "5" and "6"; tr., p. 67). Some of petitioner's customers prefer to have everything, including transportation, worked into one price. Even in those situations where petitioner paid its customer a nominal amount for its waste chemicals, the customer still paid a freight or transportation charge for having the chemical picked up and transported by petitioner, or its designated common carrier, to petitioner's plant.

The audit in this proceeding asserted no tax on amounts petitioner paid when it purchased waste chemicals, and no tax was asserted on amounts petitioner received when it sold the recycled products. The only invoices upon which tax was asserted here were those for waste or trash removal and associated freight and transportation charges.

At the time petitioner picked up the chemical waste from its customer, the chemical belonged to that customer. The chemical waste remained the property of the customer during transport through New York and even after it was delivered to petitioner's plant. The chemical waste did not become the property of petitioner, if at all, until after it was analyzed for content and acceptance by petitioner was signified by signing of the manifest. Such analysis could take several days.

On or about December 15, 1988, the Division of Taxation ("Division") undertook an audit of petitioner's books and records. The Division's auditor, Angelo Spano, sent an appointment letter dated December 28, 1988 to petitioner, which requested that specified books and records covering the audit period be made available for audit. The requested books and records were made available, reviewed by the auditor and it was concluded that they were adequate to conduct a detailed audit.

The audit reflects, and Ms. Barnes testified, that petitioner was providing its customers with a waste hauling service. The auditor examined each of petitioner's invoices for the audit period reflecting New York State customers. Since petitioner was not charging its New York customers sales tax on its removal and transportation services, any of petitioner's invoices issued to New York customers charging for chemical waste removal and transportation or freight were assessed. It is undisputed that none of the invoices upon which tax was asserted included a charge for processing or recycling.

Petitioner's removal of the chemical waste from its New York customers' facilities and the transporting of it to New Jersey are characterized in the record as "solvent removal", "hauling of chemical waste", "transportation" or "freight" (Ex. "5", "6", "10"; Ex. "D"). The audit shows, and Ms. Barnes testified, that the tax asserted in this proceeding is based solely on the integrated service of waste removal and freight and/or transportation charges paid to petitioner by its customers (tr., p. 119). No tax was asserted on processing charges (id.). In addition, no tax was asserted on: (i) the amounts paid by petitioner to New York customers for the purchase of waste chemicals; or (ii) the amounts paid to petitioner upon the sale of recycled

chemicals.

During the audit period, petitioner was not a registered vendor in New York State pursuant to Article 28 of the Tax Law and so was not entitled to issue resale certificates.

Prior to issuance of an assessment, a conference was held with James Nerger,[3] on behalf of Marisol, the auditor and the auditor's team leader, Stephen Klimow. At this meeting, documentation was provided by petitioner which permitted adjustments to the audit; however, no agreement could be reached by the parties with regard to the taxability of petitioner's services. It was suggested at that meeting that petitioner request an Advisory Opinion from the Division. On November 20, 1989, petitioner requested an Advisory Opinion as to whether it was providing a taxable service.

Petitioner's request for Advisory Opinion argued that it was not subject to tax using various alternative, sometimes inconsistent, sometimes

irrelevant, arguments, i.e.: (a) its purchase of waste chemicals was exempt as a purchase for resale; (b) under Tax Law § 1115(d), its services otherwise taxable in New York are exempt because the tangible property upon which the services were performed is delivered to the purchaser outside New York for use outside of New York; or (c) that the waste generators (petitioner's customers) continue to own the chemicals during transport to New Jersey and during the "recovery" (recycling) process and that petitioner is not disposing of the waste, "but merely processing it for the generator" (emphasis added).[4] The evidence in this record presented by petitioner shows that the latter statement is a misstatement of fact which

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[3]A power of attorney filed in this matter and running from Marisol, Inc. to David Evans is signed by H. Peter Nerger, president of Marisol.

[4]It is noted that the request for Advisory Opinion, and consequently the Advisory Opinion itself, addressed the question as to whether the "processing" of the waste chemicals was subject to tax. Similarly, although the evidence at hearing was that no tax was asserted on charges for "processing" as a component of the integrated service here, petitioner nevertheless continues to argue that "processing" is not properly subject to tax. The Division's brief, in turn, responds to this argument with its own. Such arguments on issues that are precluded by the facts in the record are not helpful or commendable and further the interests of neither party.

necessarily sullies petitioner's case.

Based on information provided by petitioner, an Advisory Opinion (No S891205D) was issued on April 16, 1990. The Advisory Opinion supported the auditor's position and concluded that petitioner's charges for removing and transporting chemical waste from the real property of its New York customers was an integrated service within the scope of Tax Law § 1105(c)(5). Since the tax is imposed upon the servicing of real property located in New York, the opinion stated, "it is immaterial that the material being picked up is recyclable or that it is delivered outside of New York State."

Based upon petitioner's invoices showing charges for chemical waste removal from New York customers' real property and charges for freight and transportation to petitioner's New Jersey plant, the audit determined that petitioner had additional taxable sales of $322,875.91. As a result of the audit, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 10, 1991 asserting sales tax in the amount of $18,835.29, plus penalty and interest.

A short conference was held on October 10, 1990, with James Nerger, Angelo Spano and Stephen Klimow, the team leader. On February 13, 1991, a second conference was held with James Nerger, his accountants, Jim Daniels and David Evans, Mr. Spano and Stephen Klimow. At this meeting, petitioner continued to disagree with the tax asserted. Petitioner and its accountants argued that the method of obtaining a product, i.e., the chemical waste, was immaterial, as the product was for resale and exempt under New York's resale provisions.

Petitioner filed a timely request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On July 17, 1992, a Conciliation Order (CMS No. 114022) was issued to petitioner cancelling penalties, but otherwise sustaining the notice of determination.

Petitioner thereupon filed a timely petition with the Division of Tax Appeals and the instant proceeding ensued.

The Hearing

The auditor, Mr. Spano, could not attend the hearing in this matter due to recent spinal surgery. Mr. Klimow, his supervisor and team leader, could not attend the hearing because he was out of the country. Ms. Dorothy Barnes ("Barnes"), Section Head for the Division's Binghamton District Office, appeared as the Division's only witness.

At hearing, Mr. Evans objected to introduction of the Notice of Hearing, arguing that there was no testimony supporting "that document" or to show that it had ever been mailed or delivered.

When asked by the Administrative Law Judge if he was denying that he received the Notice of Hearing, Mr. Evans replied "I am not here to provide testimony" (tr., p. 4). Official notice was taken that Mr. Evans and Mr. Nerger appeared for petitioner on the date and time set for the hearing.

Mr. Evans also repeatedly objected to Ms. Barnes' testimony on the grounds of hearsay. Ms. Barnes' knowledge, he said, was based only on her review of the audit file and her discussions with Mr. Spano and Mr. Klimow, and was not based on her "direct knowledge." Consequently, Mr. Evans urged, at hearing and in his brief, that Ms. Barnes did not qualify as a competent witness and her testimony could not be the foundation for introduction of the audit report.

Mr. Evans argued that Ms. Barnes was not competent to testify because she was not really familiar with the audit. Mr. Evans asked Ms. Barnes on cross examination for "illustrative examples out of the audit workpapers of where Marisol was not charged sales tax in a transaction it dealt with a New York vendor" (tr., pp. 41-43). Ms. Barnes responded with two examples from page 10 of the audit workpapers.

Later, Mr. Evans, in his direct questioning of James Nerger, referred him to the same two examples on page 10 of the audit workpapers (tr., pp. 77-78; Ex. "D", workpaper, p. 10). Mr. Nerger stated that the transactions referred to by Ms. Barnes actually involved situations where Marisol sold chemicals to New York customers where no tax had been asserted.

When asked the relevance of this line of questioning, Mr. Evans stated that it went "to the credibility" of Ms. Barnes, "who despite the protestations she is familiar with the file, . . . point[ed] to two specific examples of situations where product was picked up in New York and no tax was charged."

Unfortunately, that was not the question posed by Mr. Evans to Ms. Barnes. Mr. Evans' question was whether Ms. Barnes could give examples where Marisol had not been charged sales tax in a transaction with a New York customer (tr., pp. 40-43). Ms. Barnes answered the question asked. Ms. Barnes' response, among others, demonstrated that she was thoroughly familiar with the audit.

Mr. Evans, at hearing and in his brief, also objected to introduction of the audit report based on the fact that Ms. Barnes had not signed the cover sheet. Evans urged that since Barnes' knowledge of the audit was not "direct knowledge" and she did not sign the audit cover sheet, Ms. Barnes' testimony could not constitute a proper foundation for introduction of the audit report and workpapers. Since the audit was not properly before the Administrative Law Judge, Mr. Evans argues, the Division has failed to put in any evidence to prove a rational basis for the assessment.

As of the date of hearing, petitioner had not indicated to the Division that there was any disagreement as to the facts of this case. At hearing, in order to clarify the issues in dispute, the Administrative Law Judge asked Mr. Evans if there was a disagreement on the facts. Mr. Evans claimed he did not know (tr., pp. 18-19).

Petitioner did not attempt to rebut any of the Division's factual showings. By the conclusion of the hearing, it was clear that there was no disagreement on the facts between the parties. The sole disagreement in this matter is how those facts should be interpreted, i.e., whether petitioner's services constituted an integrated trash removal service for purposes of Tax Law § 1105(c)(5) or a purchase for resale.

The audit methodology, audit computations and audit results were not raised as an issue by the petition, at hearing or in the briefs.

SUMMARY OF THE PARTIES' POSITIONS

The Division argues that since the tax imposed by Tax Law § 1105(c)(5) relates to enumerated services to New York real property (including trash removal and transportation), the only rational situs of the taxable event under the sales tax (a "transactional" tax) is the location of the real property being serviced. Accordingly, the Division argues that since the real property being serviced or maintained is located in New York, the entire receipt for petitioner's integrated trash removal service for removal and transportation of chemical waste to Marisol's New Jersey plant is taxable to New York. The fact that petitioner recycles these chemicals when they reach New Jersey, says the Division, is irrelevant to the taxability of petitioner's integrated waste "removal and transportation" service.

Petitioner argues that no tax can be asserted on its processing based on the Tax Appeals Tribunal decision in Matter of General Electric Company (March 5, 1992) ("G.E.").

The Division rejects the holding in G.E. and argues that, in any event, G.E. has no application to the facts of this case.

The Division urges that if New Jersey passed a statute identical to New York's Tax Law § 1105(c)(5), there could be no possibility of double taxation because the imposition of the tax would be tied to the situs of New Jersey real property being serviced.

Petitioner urges that it is not in the trash removal business. Petitioner says its sole business is the acquisition of solvents, which it refers to as raw material, the processing of these solvents and then the subsequent sale of these recycled solvents.

Petitioner urges that its purchases of used chemicals are exempt from sales tax as purchases for resale pursuant to Tax Law § 1101(b)(4)(i).

Petitioner also urges that its "processing" of chemicals in New Jersey is not part of an integrated waste removal service subject to sales tax under Tax Law § 1105(c)(5).

At the hearing, petitioner raised the argument that the Division has failed to establish a rational basis for the assessment since: (i) no proper testimonial foundation was laid for introduction of the audit; (ii) therefore, the audit was not properly part of the record; and (iii)

the testimony of Dorothy Barnes, a person with no "direct knowledge" of the audit, cannot constitute evidence as to the basis for the assessment. In the absence of a rational basis for the assessment being shown, the assessment must be cancelled.

In its brief, petitioner raised the argument that:

> "Given the lack of direct knowledge on the part of Ms. Barnes . . . the taxpayer has been effectively denied the ability to properly represent itself . . . . At no time has the taxpayer been permitted the fundamental right to appropriately cross-examine or otherwise explore the naked documents proffered by the Tax Department . . . .
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> "The taxpayer was totally unable to explore exactly what the Tax Department did, understand positions and explore the depth, height and breadth of its actions. To be presented with a pile of papers purporting to summarize and support the Notice with a witness having no direct knowledge of the actions of the Tax Department represents the denial of due process and equal protection of the law for the taxpayer" (Petitioner's brief., pp. 7-8).

CONCLUSIONS OF LAW

A. At hearing, petitioner stated that one of the theories upon which it was proceeding was that its removal and transportation of chemicals to New Jersey was part of a continuing manufacturing process. This manufacturing argument was not pursued in petitioner's brief and is deemed abandoned.

B. Petitioner urges that the audit is not properly part of the record, since it lacks Ms. Barnes' signature. However, this Administrative Law Judge could find no statute or case law[5] that requires, as a condition to its validity and admissibility, that an audit of the Division be reviewed and signed by a section head. While it may be desirable in furtherance of departmental policy, it is not a necessary precondition to an audit's validity. Accordingly, petitioner's argument is rejected.

C. At hearing, the Division, in support of its case, presented Ms. Barnes, Section Head of the Binghamton District Office and supervisor of Mr. Spano, the auditor who performed the audit, and his team leader, Mr. Klimow. Barnes testified that, as part of her role as section head, she was responsible for reviewing audits completed by her office to insure compliance

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[5]Nor was any such authority cited by petitioner.

with the Division's policies and procedures.

Ms. Barnes testified that prior to the hearing in this matter she had reviewed the audit, was thoroughly familiar with the audit and its contents, that the audit was prepared and maintained in the regular course of business

of the Division and is an official record of the Binghamton District Office of the New York State Department of Taxation and Finance.

Petitioner claims that Ms. Barnes' testimony was not based on "direct knowledge", but rather "hearsay" derived from her review of the audit file and her discussions with the auditor and team leader. While Ms. Barnes' testimony may, in part, be hearsay, that did not render her incompetent to testify. Hearsay is admissible in an administrative proceeding (300 Gramatan Avenue Associates v. State Division of Human Rights, 45 NY2d 176, 408 NYS2d 54 [1978]; People ex rel. Vega v. Smith, 66 NY2d 130, 139, 495 NYS2d 332; Matter of Meskouris Brothers v. Chu, 139 AD2d 813, 526 NYS2d 679), and may constitute substantial evidence where sufficiently relevant and probative of an issue to be determined (Flanagan v. State Tax Commn., 154 AD2d 758, 546 NYS2d 205 [1989]; Matter of Kuen Hai Chen v. Ambach, 121 AD2d 777, 779, 504 NYS2d 237, lv denied 68 NY2d 610, 508 NYS2d 1027; Gelco Builders v. Holtzman, 168 AD2d 232, 562 NYS2d 120 [1990], lv denied 77 NY2d 810, 571 NYS2d 913). Based upon Ms. Barnes' responses to questions on direct and upon cross-examination, it is concluded that she was competent to testify and her testimony was properly admitted (Ex. "D"; Findings of Fact "12", "13", "24" and "25").

D. Ms. Barnes' testimony regarding her involvement with, and knowledge of the audit, coupled with the fact that the written audit report was a record prepared and maintained by the Division in the regular course of business, was more than sufficient foundation for accepting the audit report and related workpapers into evidence (State Administrative Procedure Act § 306[2]; CPLR 4518[a]).

E. Tax Law § 1105(c)(5), imposes a tax on the receipts from every sale, except for resale,

of the service of "[m]aintaining, servicing or repairing real property, property or land , as such terms are defined in the real property tax law . . . . "

The Division's regulations provide:

> "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 the 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]; emphasis added).

The situs of the taxable event is where the service is performed (20 NYCRR 526.7[e][1]). Where a vendor removes waste or trash products from New York real property and transports, or arranges transportation of, such waste products to another location within or without the State for processing or disposal or recycling, the removal and transportation fees charged for this service to the New York customer are taxable as an integral part of the maintenance service of trash removal pursuant to Tax Law § 1105(c)(5) (Matter of Auburn Steel Co., Tax Appeals Tribunal, September 13, 1990).

Such conduct by a vendor may constitute an integrated trash removal service subject to tax under Tax Law § 1105(c)(5), whether such vendor provides, and tax is assessed on, the processing and disposal services, or whether the vendor only provides, and tax is only assessed on, removal and transportation of the waste to the processing and disposal facility (Matter of Cecos International v. State Tax Commn., 126 AD2d 884, 511 NYS2d 174 [3d Dept 1987], affd 71 NY2d 934, 528 NYS2d 811 [1988]; Matter of Auburn Steel Co., supra).

F. It has been concluded that Ms. Barnes was a competent witness, thoroughly familiar with the contents of the audit. It has also been concluded that the audit report and workpapers are properly in evidence. The question now to be addressed is whether the audit report and workpapers or the testimony of Ms. Barnes, either separately or together, are sufficient to establish that there was a rational basis for the disputed assessment. The audit papers and the testimony of Ms. Barnes show that the auditor commenced the audit December 28, 1988 by making a request for the taxpayer's books and records for the audit period. The requested books and records were provided by petitioner and duly reviewed by the auditor. Upon reviewing the

books and records, the auditor concluded that they were adequate to conduct a detailed audit. The auditor reviewed all of petitioner's invoices with its New York customers and assessed any that were for "waste removal", since waste removal is a taxable service in New York (Ex. "D"; tr., p. 26). The invoices that were assessed did not include any charges for processing or recycling. Marisol would arrange to have its trucks, or a common carrier, go to its New York customers' business locations, remove their chemical waste and transport it back to Marisol's plant in New Jersey. Marisol would sometimes pay a nominal amount to its customers to obtain a particular chemical waste product if, after processing, a sufficient amount and quality of recycled chemicals could be generated. However, it is concluded that the chemical waste in this case had no, or only nominal, value until and unless it was recycled by petitioner.

In any event, regardless of whether Marisol charged for, or paid a nominal amount for, a particular chemical, its customers were always charged for removal of the used chemicals and for their transportation. Tax was assessed only on invoices showing charges for removal of the chemicals from the New York business locations and the charges for freight and transportation of the chemicals from those New York locations to Marisol in New Jersey (tr., p. 119).[6]

No tax was assessed on any of Marisol's purchases, or on its sales of recycled chemicals in New Jersey. The total amounts charged on invoices for removal and transportation of waste were assessed because petitioner had not charged tax to its New York customers, and such services were regarded by the Division as part of a taxable integrated waste removal service under Tax Law § 1105(c)(5). Based on this record, I conclude that the Division has established a rational basis for the assessment.

G. Petitioner claims that it was denied a fair hearing because it was deprived of its right to cross-examine an auditor who performed, or had knowledge of, the audit. There is no merit to this contention. Mr. Evans, petitioner's representative, at no time prior to the hearing raised any challenge to the audit methodology. There was no reason for the Division to believe that

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[6]Sometimes petitioner's customers arrange and pay for their own transportation of the chemical waste to petitioner's plant. However, no tax was asserted on these transactions.

the auditor's presence would be required or desirable at hearing. In fact, petitioner did not even raise the audit methodology as an issue at the hearing itself.

At no time prior to, or during, the hearing did Mr. Evans request that the hearing be set for a date when the auditor who performed the audit, Mr. Spano, could be available at the hearing. Nor did Mr. Evans issue a subpoena to Mr. Spano to secure his presence at the hearing. Absent issuance of a subpoena, the Division was not obligated to have the auditor present at the hearing (see, Matter of Robritt Liquor Store, Tax Appeals

Tribunal, December 27, 1991; Matter of 3 Guys Electronics, Tax Appeals Tribunal, September 9, 1988; Matter of Anray Service, Tax Appeals Tribunal, December 1, 1988). The fact that the auditor did not testify in no way denied petitioner a fair hearing (Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458 [1986], lv denied 68 NY2d 602, 505 NYS2d 1026).

While the auditor was not present to testify, the Division produced a competent and knowledgeable witness to testify. The Division's witness, Ms. Barnes, was thoroughly familiar with the audit and ready, willing and able to respond to any questions petitioner might pose. To use petitioner's prose, it was given the opportunity to cross-examine the Division's witness as to the "depth, height and breadth" of the audit. The questions that were asked of Ms. Barnes by petitioner's representative, Mr. Evans, tended to buttress the conclusion that petitioner had no real dispute with the audit itself.

While petitioner had the opportunity to cross-examine the Division's witness, what petitioner did with that opportunity was up to petitioner. The failure to take full advantage of an opportunity for cross examination does not give rise to a due process or equal protection claim. Certainly, the fact that Mr. Evans did not like Ms. Barnes' answers to his questions does not constitute grounds for petitioner's claim that it was denied a fair hearing (see, Matter of Mira Oil Co. v. Chu, supra).

H. Any suggestion by petitioner that it was confused or unfamiliar with the audit and, for

that reason, required the auditor's presence to explain the audit is simply not credible. Petitioner and its representative have had at least three years to obtain documents, and to review and familiarize themselves with every aspect of this case. Based on petitioner's presentation at hearing, there is no doubt that it was thoroughly familiar with the the audit and the basis for the tax assessed. There is no evidence in this proceeding that petitioner, during the audit or later, expressed any confusion as to the audit or the audit methodology. In fact, at the conclusion of the audit (September 8, 1989) a meeting was held between James Nerger, for petitioner, the auditor and the team leader to discuss the audit and audit results. As a result of this meeting, the audit results were adjusted, but there is no indication of confusion on petitioner's part. Similar meetings were held on October 11, 1990 and February 13, 1991. In the latter conference, David Evans, petitioner's then new representative, was also present. This record does not reflect that any confusion was exhibited by petitioner or Mr. Evans at these meetings regarding the conduct of the audit or its results. These meetings led to petitioner's filing of a request for an Advisory Opinion. That request for Advisory Opinion, which is part of Exhibit "D", does not suggest any confusion by petitioner regarding the basis of the assessment. In fact, that request, and the fact that petitioner made a subsequent request for conciliation conference, belie any claim by petitioner that it was not fully aware of the basis of the assessment and the audit.

I. In the same vein as petitioner's earlier claims (Conclusions of Law "G" and "H"), petitioner cites Matter of Basileo (Tax Appeals Tribunal, May 9, 1991)[7] for the proposition that if the Division, through witnesses or documents, is unable to respond "meaningfully" to inquiries concerning the nature of the audit performed, it may be found that a taxpayer has been "deprived of his or her opportunity to meet its burden of

proving that the audit methodology is unreasonable." While it is true that Basileo stands for that proposition, petitioner never raised audit methodology as an issue in this case. The essence

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[7]Petitioner's brief, p. 8.

of petitioner's argument here is that it has somehow been deprived of its constitutional right to ask the auditor questions concerning an issue it never raised. This argument, in its most complimentary light, is vacuous.

Although audit methodology was not an issue, the Division's witness did respond "meaningfully" to all of petitioner's questions concerning the audit. As noted earlier, petitioner was given every opportunity to cross examine Ms. Barnes. The extent to which petitioner took advantage of that opportunity was a matter of petitioner's own choice.

J. There are two other arguments by petitioner that can be disposed of summarily. Although no tax has been assessed on petitioner's purchases or on its processing, petitioner continues to argue that: (i) its "purchases" of solvents are exempt from sales tax as purchases for resale; and (ii) its "processing" of chemicals in New Jersey is not part of an integrated waste removal service subject to sales tax.

The disputed issue in this case is whether petitioner's charges for removal of chemical waste from its New York customers' real property and transport of said waste to New Jersey is part of an integrated waste removal service taxable by New York. On this issue, the Division presented evidence which establishes that the disputed tax was imposed only upon petitioner's removal of the waste chemicals from its New York customers' real property and its transportation of those chemicals to Marisol in New Jersey (Ex. "D"; tr., pp. 26, 40, 119-120). Petitioner did not attempt to rebut this evidence or deny that these were in fact the services upon which tax was assessed.

Since no tax was assessed on petitioner's purchases or on its processing (recycling), its arguments and evidence presented on these two non-issues are irrelevant to the outcome here.

K. Petitioner urges that the chemicals it picks up in New York at its customers' premises are not "hazardous waste", but "raw material" or "raw product", which had value and was useful to petitioner. As noted earlier, if the chemical waste in this case had any value at all, it was nominal. The chemical waste in this case did not become something other than waste until after it went through petitioner's recycling process. In any event there is no evidence in this record to

show the actual economic value of chemical waste to petitioner.

The facts here are very similar to those in Matter of Auburn Steel Co., Inc.(Tax Appeals Tribunal, September 13, 1990). Auburn Steel, a New York company, hired a New Jersey company to remove baghouse dust, a by-product of Auburn Steel's manufacturing processes, and transport it to New Jersey for processing and/or disposal. Auburn argued that the baghouse dust was not "worthless trash", but rather tangible personal property having a value because it contained zinc which could be recovered by recycling.

The Tribunal held that the dust did not cease to be "trash" because some portion of it may have had value to the disposal site.

Similarly, in Matter of Rochester Gas & Electric Corp. v. New York State Tax Commn. (71 NY2d 931, 528 NYS2d 810), even though a portion of the fly ash generated as a by-product of a production process was sold, the charges for removal and transport of the fly ash were held taxable because the fly ash was a waste product with little or no economic value.

When a person buys a newspaper, reads it and discards it in the trash, it becomes waste. It is true that discarded newspapers, with today's technology, may have value to someone if it were to be recycled. The same can be said of abandoned cars, glass and plastic containers and empty soda cans. Nevertheless, when the car has been discarded, or the above-referenced containers are empty and discarded, these items are trash to the waste generator. The chemicals in this case are the by-products of various industrial processes and are trash to the waste generator. Some or all of these chemical solvents are toxic and/or flammable, i.e., hazardous. Whether they are hazardous or non-hazardous, these used chemicals have in common that they are "waste" and are no longer useful products.

The fact that the chemical waste here involved may have value to petitioner in New Jersey after undergoing recycling or processing does not change the fact that, in the hands of its customers in New York, these chemicals are merely waste by-products of manufacturing. Waste does not cease to be trash merely because some portion of it may have value to the disposal or processing site (Matter of Auburn Steel Co., supra), or even if some portion of the

waste is sold (Matter of Rochester Gas & Electric Corp. v. State Tax Commn., supra). Accordingly, it is concluded that petitioner was engaged in a waste removal service on behalf of its customers. What petitioner chooses to do with this chemical waste when it is returned to New Jersey does not change the essential nature of petitioner's business activity in New York, i.e., removal and transportation of chemical waste.

L. Nor can petitioner successfully claim that it has purchased these chemicals in New York and is merely transporting its own chemical waste from New York to New Jersey. The facts are clear in this case, that at the time the chemical waste is being removed and transported to Marisol's New Jersey plant, the chemicals still belong to petitioner's customers. The decision whether petitioner will accept a particular chemical or not, and whether to pay or not to pay, is not made until after (sometimes days after) the chemicals have reached petitioner's New Jersey plant. By the time petitioner makes the decision whether to accept or reject the waste chemicals, the integrated trash removal and transportation service giving rise to the tax here has already been concluded.

M. In Matter of Cecos International v. State Tax Commn. (supra), petitioner operated the landfill and hazardous waste treatment facility in New York. Petitioner arranged with independent truckers to have waste picked up and transported to its facility. The Court of Appeals sustained the State Tax Commission holding that freight and disposal charges are a taxable maintenance service of trash removal from buildings.

> "By arranging for the hauling of the waste to its facilities, . . . petitioner has performed this taxable service and it cannot, by merely separating the disposal and freight costs on its invoices, render the freight portion of the charges nontaxable (see, Matter of Penfold v. State Tax Commission, 114 AD2d 696, 697, 494 NYS2d 552). Petitioner's contention that the removal of the industrial waste does not fall within the definition of trash removal from buildings is also without merit. The applicable regulation (20 NYCRR 527[b][2]) is quite broad, and through it respondent rationally interprets the governing statute as encompassing, '[a]ll services of trash and garbage removal . . . whether from inside or outside a building or vacant land' (citation omitted)" (id., at 936-937 [emphasis added]).

In Matter of Rochester Gas & Electric v. State Tax Commn. (71 NY2d 931, 528 NYS2d 810 [1988]), the Court of Appeals affirmed a decision of the State Tax Commission which held that petitioner was performing the service of trash removal from buildings, a type of

maintenance service to New York real property, taxable pursuant to Tax Law § 1105(c)(5).

Matter of Cecos International v. State Tax Commn. (supra), Matter of Rochester Gas & Electric v. State Tax Commn. (supra) and Matter of Tonowanda Tank Transport Service (Tax Appeals Tribunal, September 14, 1989) each dealt with the question of whether removal and transportation of waste by-products from manufacturing could be considered a service separate from its disposal. Each of these cases stands for the proposition that removal and transportation of industrial or hazardous waste from a customer's New York property is taxable as an integrated trash removal service.[8]

In Matter of Auburn Steel Co. (supra), the processing and the disposal, as well as some of the transportation of the waste, occurred outside New York State, but since it was part of an integrated trash removal service, even that portion of the charge which was attributable to transportation and other services which occurred out of state was held by the Tribunal to be taxable under Tax Law § 1105(c)(5).

In Matter of Chem-Nuclear Systems (Tax Appeals Tribunal, January 12, 1989),[9] the petitioner was a South Carolina-based company that did business with Niagara Mohawk Power Corporation and other New York utility companies. The utilities employed Chem-Nuclear to remove nuclear waste from their New York locations and transport it to Chem-Nuclear's South Carolina plant for processing. The Tribunal held that this was an integrated trash removal service taxable in New York.

Petitioner has offered no evidence or argument to distinguish its service of chemical waste removal and transportation from those in the above-referenced cases. It is concluded that

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[8]Unlike this case, Cecos also involved "processing". Cecos held that where a charge for "processing" is included as a component of an integrated trash removal service, along with "removal and transportation", it is also taxable as part of that same integrated service. As has already been noted, a charge for processing was not included on any of the invoices upon which tax has been asserted here.

[9]Under the unique facts of Chem-Nuclear, this finding actually worked to the taxpayer's advantage by exempting its purchase of liners used in its business from use tax.

Marisol was, during the audit period, performing the integrated service of trash removal from buildings located in New York, a type of maintenance service to New York real property and taxable pursuant to Tax Law § 1105(c)(5).

N. As previously noted, not all of petitioner's invoices separately state the charges for removal and transportation of chemical waste from petitioner's New York customers' business locations. However, for purposes of taxability it does not matter whether the charges are lumped together or separately stated, because both "removal" and "transportation", when components of the integrated service of trash removal from New York real property, are subject to tax (Tax Law §§ 1105[c][5]; 1101[b][3]; Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552 [3d Dept 1985]). Where charges for separate services (removal and transportation) are combined in one amount on an invoice, the tax is based on the total amount of the invoice, without any deduction for expenses or otherwise (Tax Law § 1101[b][3]; Matter of Penfold v. State Tax Commn., supra).

O. Even if Marisol is engaged in an otherwise taxable integrated service of trash removal from New York real property, the assessment here must be cancelled if it is concluded, as urged by petitioner, that this tax is unconstitutional based upon the decision of the Tribunal in Matter of General Electric Company (March 5, 1992) (hereinafter "G.E."). In G.E., the taxpayer was a corporation maintaining places of business in the State of New York. G.E. contracted with an Arkansas company, Environmental Systems Company ("ESC"), to pick up G.E.'s waste products in New York and transport said waste back to Arkansas for treatment and disposal.

G.E. argued that: (i) New York did not have sufficient nexus with G.E.'s and ESC's activities to assert the tax; and (ii) that the imposition of tax by New York on ESC's out-of-state processing and disposal, as if it were part of a maintenance function to real property performed in New York, violated the Commerce Clause of the U.S. Constitution in that the tax was not "fairly apportioned" between New York and Arkansas. G.E. claimed that since the waste was incinerated in Arkansas, then New York's imposition of sales tax pursuant to Tax Law § 1105(c)(5) on the entire receipt for the waste removal service was not fairly apportioned and,

further, "creates the possibility of double taxation."

Based on the proof presented in G.E., the Tribunal held that ESC was engaged in an integrated trash removal service constituting a maintenance function to New York real property for purposes of Tax Law 1105(c)(5), and that the necessary nexus[10] existed for asserting the tax. Nevertheless, the Tribunal held, relying on the Court decisions in Complete Auto Transit v. Brady (430 US 274, reh denied 430 US 976) and Goldberg v. Sweet (488 US 252, 109 S Ct 582 [1989]), that the tax could not be imposed on that portion of ESC's charges which were attributable to out-of-state "processing and disposal". The Tribunal in G.E. based this conclusion on its finding that, as applied to G.E., there was a "possibility of double taxation."

P. G.E. is distinguishable from this case and, for that reason, has no application to the facts here. In G.E., unlike the instant matter, the issue was whether "processing and disposal" of waste material in Arkansas

were taxable by New York as component parts of an integrated waste removal service. In this case, processing or "recycling" of the chemical waste in New Jersey takes place after the taxable events involved here (removal of the waste from New York real property and its transportation to New Jersey) have been completed. Therefore, unlike G.E., Marisol's charges for processing or recycling have not been taxed as a component of the integrated service in this case, and are not an issue. In any event, as the following discussion demonstrates, if G.E. were applied to the facts here, it would not inure to petitioner's benefit.

Q. It must be borne in mind that the holding in G.E. is limited to the facts presented in that case. It was not a per se holding that Tax Law § 1105(c)(5) was unconstitutional, but rather that, based on the evidence presented, Tax Law § 1105(c)(5), as applied to G.E., was unconstitutional.

G.E. argued, inter alia, that the imposition of tax by New York on ESC's out-of-state processing, as if it were part of a maintenance function performed in New York, violated the

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[10]Not raised as an issue here.

Commerce Clause of the U.S. Constitution in that the tax was not fairly apportioned between New York and Arkansas. G.E. claimed that since the waste was incinerated in Arkansas, then New York's imposition of sales tax pursuant to Tax Law § 1105(c)(5) on the entire receipt for the waste removal service was not fairly apportioned and, further, "creates the possibility of double taxation".

R. Based on the evidence presented in G.E., the Tribunal held that, as applied to G.E., the tax imposed by Tax Law § 1105(c)(5) was unconstitutional. For the Tribunal to reach this result, it was necessary for G.E. to have demonstrated to the Tribunal's satisfaction that the tax, as it applied to G.E., imposed a burden upon G.E. which was unique, either in kind or severity, from any other taxpayer. Based on the petitioner's evidence presented in G.E., the Tribunal held that the subject tax failed the external consistency test.

Complete Auto Transit v. Brady (supra) prescribed the criteria that must be satisfied in order for a state tax on an interstate transaction to comport with the Commerce Clause of the Constitution. That case held that a state's tax will be found constitutional if: (1) the activity is sufficiently connected to the state to justify the tax; (2) the tax is fairly related to benefits provided the taxpayer; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly apportioned (hereinafter "the Auto Transit criteria") (id.; Matter of General Electric Co., supra). The holding in G.E. was based on the last of the Auto Transit criteria as followed by the court in Goldberg v. Sweet (supra).

S. Marisol makes no claim with respect to the first three Auto Transit criteria. The sole basis for Marisol's Commerce Clause claim is that the facts here are similar to those in G.E. and, as held in G.E.:

> "there is a substantial risk of multiple taxation because if New Jersey had a tax statute identical to the New York Tax Law, it could impose a tax on both the transportation and processing charges paid by customers of Marisol" (Petitioner's Brief, p. 11).

Marisol views the Tribunal's decision in G.E. as holding "that the state's attempt to tax one hundred percent of this transaction constitutes a double taxation that is prohibited by the United States Constitution" (tr., p. 11).

T. In deciding whether the tax was fairly apportioned, the Tribunal, in G.E., looked to Goldberg v. Sweet (supra) ("Goldberg") for guidance.

Goldberg involved a challenge to an Illinois excise tax imposed upon the gross charge of interstate communications ("phone calls") originating or terminating in Illinois regardless of where the charge for the phone calls was billed or paid. The tax was assessed upon "the act or privilege" of making or receiving intrastate or interstate phone calls in Illinois (id., at 255, footnote "5"). Plaintiffs charged, in relevant part, that the Illinois tax act violated the Commerce Clause of the United States Constitution because it was not fairly apportioned. The Illinois trial court held, on this issue, that the Illinois tax was not fairly apportioned because Illinois was attempting to tax the entire cost of an interstate act which took place only partially in Illinois (id., at 258). On appeal, the Illinois Supreme Court ("State Court") reversed. The U.S. Supreme Court ("the Supreme Court"), referring to the State Court's decision, noted its beginning premise that an unapportioned tax is constitutionally suspect because of its risk of multiple taxation. The State Court decided, however, that the Illinois tax adequately avoided this danger because: (i) with respect to interstate calls originating in Illinois, the court noted that no other state could levy a tax on such calls; and (ii) with respect to calls originating in another state, terminating in Illinois and charged to an Illinois service address, e.g., collect calls, the risk of multiple taxation was eliminated by the Illinois statute's credit provision (id.).

The Supreme Court in Goldberg noted that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction" (id., at 260-261). To make that determination, the court examined whether the tax was internally and externally consistent (id.).

U. The "external consistency" test is a practical inquiry, and asks 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. This requires an examination of the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity (id., at 262). This portion of the test allows for some possibility of

multiple taxation.

In Goldberg, the Illinois Director of Taxation ("Sweet") argued that his state's tax was fairly apportioned because the tax reached only those interstate calls which were: (i) charged to an Illinois address; and (ii) originated or terminated in Illinois (id., at 262). The Supreme Court agreed, concluding that only two states would have a substantial nexus 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" (id., at 263; emphasis added).

The Court recognized that if the service address and billing location of a taxpayer were in different states, some interstate calls could be subject to multiple taxation, but this "limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme" (id., at 264). The court then went on to note that, in any event, no multiple taxation was possible in Goldberg because of the credit provision contained in the act (id.).

V. Applying the above cases to the facts here, the starting point for an analysis of "external consistency" must be that New York's Tax Law requires that the total receipt in an integrated trash removal service from New York real property be the measure of the tax (Matter of Penfold v. State Tax Commn., supra; Tax Law § 1101[b][3]). The in-state component of the activity being taxed includes both Marisol's maintenance services to New York real property and its use of New York's highways, etc., in providing its services to its customers. As will be seen infra, the analysis of internal consistency focuses on the hypothetical of, "What would happen if other states passed an identical tax?"

The analysis of external consistency, on the other hand, is required to focus on:

> "[T]he extent that other States have passed tax statutes which create a risk of multiple taxation . . ." (Matter of Goldberg v. Sweet, supra, at 261; emphasis added).

Marisol has failed to demonstrate the "actual" statute of any other state that would create the "risk of multiple taxation" on its trash removal from New York real property and the transportation of that waste or trash to New Jersey.

Indeed, since there is no out-of-state "processing" involved in this case (as there was in G.E.), it would appear that the only state having the necessary nexus to impose a tax on petitioner's charges for its service of waste removal from its New York customers' real property and the transportation of that waste on New York highways to Marisol's New Jersey plant, would be the State of New York. New Jersey's only significant contact with these transactions is that Marisol is the terminus.

Petitioner has shown no evidence that the tax imposed by Tax Law § 1105(c)(5), as applied to it, has resulted in actual double taxation, or that under the laws of the several states that the risk of multiple taxation even exists. Therefore, it is concluded that Tax Law § 1105(c)(5) has survived the "external consistency" test.

W. Even though the subject tax survives the "external consistency" test in that no actual statute of another state has been shown to pose the risk of multiple taxation, it must still be determined whether there is any "possibility" of double taxation, i.e., internal consistency. "Internal consistency" requires that the tax be structured so that if every state were to impose an identical tax, no multiple taxation would result. This test focuses on the text of the challenged statute and posits a hypothetical of, "what would happen if every state passed an identical tax?" (id., at 261). This portion of the test would allow for "no multiple taxation."

The Supreme Court in Goldberg v. Sweet (supra) concluded that the Illinois statute was internally consistent, "for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call" (id.; emphasis added).

The Tribunal stated in G.E. (supra) that:

> "The Court in Goldberg stated that to be internally consistent, the tax must be structured so that if an identical tax were to be imposed in another state, no multiple taxation would result (Goldberg v. Sweet, supra, at 261). Therefore, 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" (citing, Goldberg v. Sweet, 488 US 252, 109 S Ct 582 [January 10, 1988]).

X. If New Jersey were to enact a statute identical to New York's Tax Law § 1105(c)(5), such a New Jersey law would impose a tax on a vender's maintenance services to New Jersey

real property, including the integrated service of trash removal and transportation of such trash within or without the State of New Jersey, for processing, disposal or otherwise. Under the provisions of such an "identical" New Jersey statute, the tax would be imposed by New Jersey (as with Tax Law § 1105[c][5]) on integrated maintenance services, including trash removal, from real property located in New Jersey. Where the real property being serviced was in New Jersey, then, under such an identical statute, charges for all components comprising that integrated service would be subject to tax by New Jersey, the situs of the real property. Just as with the interstate phone call originating in Illinois or billed to an Illinois service address, only one state could tax this transaction originating in New Jersey (cf., Goldberg v. Sweet, supra).

Clearly, under such an identical statute, no multiple taxation would be possible. Accordingly, it is concluded that if New Jersey and every other state passed a tax statute identical to New York's Tax Law § 1105(c)(5), there could be no possibility of double taxation, because, in each instance, the tax would be imposed on charges for integrated maintenance services to real property located within the respective states. Tax Law § 1105(c)(5) is internally consistent. Accordingly, even if G.E. were applied to the facts of this case, petitioner would not prevail.

Y. There is an additional reason why petitioner cannot prevail. In order to hold that a tax is unconstitutional, as applied to a particular taxpayer (as was done in G.E.), the taxpayer must show by clear and convincing evidence that the tax imposes a burden upon it which is unique, in kind or severity, from other similarly situated taxpayers (cf., Phillips Chemical Co. v. Dumas Independent School District, 361 US 376, 80 S Ct 474, reh denied 362 US 937 [1960] [where a Texas statute was held unconstitutional as applied where proof established that a lessee of Federal government property was paying property taxes on full value of leasehold, while similarly situated lessees of the State and its political subdivisions were not taxed on their leaseholds at all]). Marisol has made no such showing here.

There being no proof by petitioner that it has suffered a burden unique from any similarly situated taxpayer, to grant the relief requested on constitutional grounds would require a finding

that Tax Law § 1105(c)(5) is unconstitutional, per se. Unfortunately, constitutional renderings are not within the purview of the Division of Tax Appeals (see, Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

Z. The petition of Marisol, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 20, 1991, as modified by Conciliation Order (CMS No. 114022), is sustained.

DATED: Troy, New York
September 8, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE