STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
MODERN DISPOSAL SERVICES, INC.	:DETERMINATION DTA NO. 812565
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 December 1, 1986 through November 30, 1989.	:

Petitioner, Modern Disposal Services, Inc., 4746 Model City Road, Model City, New York 14107-0209, 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 December 1, 1986 through November 30, 1989.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 26, 1994 at 1:15 P.M. All briefs were due to be filed by February 20, 1995. Both parties submitted their briefs within the prescribed time period, and the time for filing of this determination is measured from that date.

Petitioner appeared by Magavern and Kanaley (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James P. Connolly, Esq., of counsel).

ISSUE

Whether petitioner's purchase of waste containers and compactors ("containers"), used in its waste removal business,

is taxable, or whether such purchase is exempt from sales tax as a purchase for resale under Tax Law § 1101(b)(4)(i)(A).

FINDINGS OF FACT

Petitioner, Modern Disposal Services, Inc., was, during the period in question, engaged in the business of waste collection, removal, transportation and disposal ("collection and removal") within the State of New York.

As part of its waste collection and removal business, petitioner provides waste containers to its customers. These containers vary in size. The fee charged to petitioner's customers varies with the size of the container, i.e., the larger the container, the larger the fee. The record doses not contain a copy of any resale certificates for petitioner as vendor, in connection with the purchases of these containers.

Petitioner's comptroller, David Kyser, testified. Mr. Kyser stated that a number of elements go into the total cost charged petitioner's customers, i.e., a rental fee for the containers, a disposal cost and transportation cost.

Mr. Kyser stated that rental fees and fees for waste removal service are separately stated on petitioner's invoices and on quotes to customers (tr., p. 15). Not all of the documents offered in evidence by petitioner support that testimony. Rental fees for containers, says Mr. Kyser, do not depend on a customer's using petitioner's waste removal service.

With respect to whether petitioner's customers could rent containers without utilizing its trash removal services, Mr. Kyser stated, "It could happen. Yes" (tr., p. 16).

Petitioner offered no evidence as to the extent of petitioner's business that falls within this category.

Most often, however, petitioner provides waste removal and collection services to the customers for whom it provides containers.

Petitioner offered sample copies of customer purchase orders, its invoices, correspondence with customers stating billing information, bid proposals and service agreements with its customers (collectively "contracts"). Petitioner would accept a purchase order as a contract (tr., p. 41), but it also had its own forms for service agreements.

One of petitioner's contract provisions states, inter alia, that:

> "All equipment furnished by the Contractor [petitioner] for use by the Customer which the Customer has not purchased, shall remain the property of the Contractor and the Customer shall have no right, title or interest in it" (Division's Exhibit "G" [emphasis added]).

When containers and waste removal service are both provided, containers are placed on the customer's property and remain there. The customer has unrestricted access to and use of the container(s). When filled with waste, the containers, depending on the type, are either emptied into one of petitioner's trucks and hauled away, or the container itself is picked up by petitioner, hauled off, emptied and returned to the customer's property for further use.

Petitioner's documents in evidence sometimes separately state the charge for rental of containers.

Petitioner's invoices sometimes specify a combined fee for

"supply and service" of a container without separately stating a rental fee (Petitioner's Exhibit "1", p. 2).

Some of petitioner's invoices describe a container, e.g., "40 cubic yard open top container", with a corresponding fee "per haul" without any rental charge stated for the container (Petitioner's Exhibit "1", p. 2).

Some of petitioner's invoices describe a container with a corresponding fee, but do not specify whether the fee is for waste removal, rental of the container, or both (Petitioner's Exhibit "3", p. 4).

Some of petitioner's invoices reflect that a customer has been provided with several different sizes or types of containers, but only set forth a rental charge of a single type. Those without the separately-stated rental charge have a specified fee "per pick up" or "per ton" (Petitioner's Exhibit "7").

The Division of Taxation ("Division") conducted an audit of the books and records of petitioner for the audit period. Petitioner's witness, Mr. Kyser, testified that the auditor was provided with the invoices evidencing the purchase of containers (tr., p. 18; Division's Exhibit "F", workpaper # 2). The audit report indicates that petitioner's purchase records were adequate.

The audit resulted in sales tax due of $67,302.67 on additional audited sales of $961,465.28. Audit of petitioner's tax accrual account found $2,594.00 in tax that had been accrued but not paid.

The audit report and workpapers show that an audit was conducted of petitioner's asset purchase invoices including container purchases. Although there is no request for records in the field audit report, the audit of petitioner's asset purchases was conducted in detail. This portion of the audit resulted in additional tax of $74,107.39 on asset purchases of $1,058,677.00.

Petitioner signed a consent agreeing to the additional tax of $81,193.48[1] plus minimum interest asserted under Notice of Determination No. S901031001E, which represented tax asserted on additional sales, the accrual account and a portion of the tax asserted on assets purchases (Division's Exhibit "F", pp. 4-5 of Audit Report). This portion of the audit is not in dispute.[2]

Petitioner disagrees with additional tax of $62,810.58 plus minimum interest asserted on its asset purchases by Notice of Determination No. S901031000E (Division's Exhibits "C", "F", Schedule B). As noted, supra, this portion of the audit was conducted in detail.

Petitioner filed a timely request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services.

---

[1]A portion of the tax agreed to by petitioner included tax asserted on non-container asset purchases.

[2]$11,664.77 of this tax asserted on additional sales was arrived at by using a one-year test of sales (Division's Exhibit "F", audit report, p. 2). Since there is no request for records in the hearing record, that could have compromised this portion of the assessment, except that petitioner has agreed to it and signed a consent.

A Conciliation Order (CMS No. 110757) dated October 22, 1993 was issued to petitioner sustaining the tax asserted on asset purchases asserted by Notice No. S901031000E.

Thereupon, petitioner filed a petition with the Division of Tax Appeals and the instant proceeding ensued.

No dispute as to the audit methodology or audit calculations was raised at hearing or in the petition.

At the time of the hearing in this matter, Angelo Gazzo, the auditor in this matter, had retired, and both of his then supervisors (John McKusker and Robert Sicconalfi) were deceased. However, Thomas Riggs, subsequent Team Leader in the Sales Tax Section of the Division's Buffalo District Office, gave an affidavit as to Mr. Gazzo's and his participation

in preparation of the audit papers. The audit report and workpapers, in relevant part, were attached to the Riggs affidavit (Division's Exhibit "F"). Petitioner had no objection to the affidavit or the audit report and workpapers being received in evidence (tr., pp. 8-9).

The Riggs affidavit stated that he had no part in the actual audit, but did help prepare some of the paper work. Mr. Riggs signed the audit cover sheet as Team Leader. He reviewed the audit report and workpapers in preparation for a conference before the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Page WP-2 of the audit workpapers is the detailed audit of petitioner's asset purchase invoices. Mr. Riggs crossed out the amounts in the "Add'l Tax Due" column

for each invoice, the taxability of which petitioner agreed to, i.e., non-container asset purchases.

SUMMARY OF PETITIONER'S POSITION

Petitioner argues that its purchase of containers is not subject to tax, because they are purchased for resale (rental) to its customers. Both parties agreed at hearing that this was the sole issue in dispute (tr., pp. 10-11, 16.)

However, in its post-hearing brief petitioner objects to introduction of the audit report as hearsay, since the auditor was not present to lay the foundation. This lack of an auditor, says petitioner, deprived it of an opportunity to cross examine and deprived it of an "essential element of a fair trial."

Petitioner's brief also argues that the assessment here should be cancelled because tax was estimated and there was no request for records placed in evidence.

CONCLUSIONS OF LAW

A. Petitioner claims that it was denied a fair hearing because it was deprived the opportunity to cross examine the auditor. There is no merit to this contention. Petitioner never raised the audit methodology or the auditor's calculations as an issue in the petition. In fact, at hearing petitioner stated there was only one issue in this case, i.e., whether its containers were purchased for resale. All other issues had been resolved according to petitioner's counsel (tr., p. 16). Under these circumstances, there was no way for the Division to know that petitioner might like Mr. Riggs, the only remaining member

of the audit staff that had any contact with the audit, produced as a witness. It is noted that petitioner did not issue a subpoena for Mr. Riggs (or anyone else) to appear. In the absence of a subpoena, the Division was not obligated to produce someone from the audit staff as a witness (Matter of Robritt Liquor Store, Tax Appeals Tribunal, December 27, 1991; Matter of 3 Guys Electronics, Tax Appeals Tribunal, September 8, 1988; Matter of Anray Service, Tax Appeals Tribunal, December 1, 1988). The fact that no auditor testified did not deprive petitioner of a fair hearing (Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, lv denied 68 NY2d 602, 505 NYS2d 1026), especially since petitioner never raised the audit as an issue.

B. Petitioner now argues that the audit report and workpapers should be rejected by the Administrative Law Judge because of a lack of foundation, hearsay, and lack of proof of authenticity. In April 1990, prior to his retirement, Mr. Gazzo was assigned to the audit team of Thomas Riggs, Team Leader. Mr. Riggs executed an affidavit as to the preparation of the audit report and workpapers. The cover sheet of the audit report is signed by Thomas Riggs. The Riggs affidavit with the attached audit report and workpapers were introduced in evidence with no objection by petitioner (tr., pp. 8-9). Based on my review of the audit report and workpapers and affidavit of Thomas Riggs, I am satisfied that the document is an authentic, partial copy of the report and workpapers for the Division's audit of petitioner.

Even if petitioner regards the affidavit and audit report as

hearsay, hearsay is admissible in an administrative proceeding (300 Gramatan Avenue Associates v. State Division of Human Rights, 45 NY2d 176, 408 NYS2d 54 [1978]; 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 (Matter of 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).

In any event, if petitioner wished to object to this evidence, it had that opportunity at hearing. When the Riggs affidavit and the audit report and workpapers were offered in evidence, petitioner's counsel stated "I have no objections, Judge" (tr., p. 8). Having failed to object, the objection was waived and the Division's Exhibit "F" is properly before the Administrative Law Judge.[3]

C. Petitioner also urges, again for the first time, that the disputed tax must be cancelled because it was estimated and the request for records was not included with the audit file in evidence. Contrary to petitioner's argument, the only portion of the tax which was estimated in this case was that asserted upon its "sales". Petitioner has already agreed to that portion

[3]The record was left open after hearing for the sole purpose of permitting petitioner to offer, if it wished to, additional evidence. It was not left open so that petitioner could make objections post-hearing that should have and could have been made during the hearing.

of the audit, signed a consent and paid the tax on its sales. The tax asserted on petitioner's sales and the method used in auditing its sales is not an issue in this proceeding.

The tax which is at issue here was arrived at upon audit of petitioner's asset purchases in detail (Division's Exhibit "F"). This detailed audit establishes a rational basis for the Division's assessment. The audit report recites that petitioner's books and records were adequate for this purpose. Since the disputed tax was the result of a detailed audit, and was not estimated, the fact that there is no request for records in the audit file is irrelevant to the outcome.

D. We now come to the issue raised by the petition. There is no question that waste removal services are taxable pursuant to Tax Law § 1105(c)(5). The question here is whether the purchase by petitioner of the containers used in its waste removal business is subject to tax as a retail sale, or whether such purchase is exempt from sales tax as a purchase for resale under Tax Law § 1101(b)(4)(i)(A).

E. Tax Law § 1105(a) imposes a tax upon every retail sale of tangible personal property unless otherwise excluded, excepted or exempted. A "retail sale" is defined by Tax Law § 1101(b)(4)(i) as:

> "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property . . . ."

A purchaser who acquires an item for the purpose of sale or rental purchases it for resale within the meaning of the statute (Matter of Albany Calcium Light Co. v. State Tax Commn., 44 NY2d

986, 408 NYS2d 333). Because a "sale", as defined by Tax Law § 1101(b)(5), includes the rental of property, petitioner argues that the rental of trash containers to its customers constitutes a sale and, in turn, the purchase of these containers by petitioner constitutes a purchase for resale, not subject to sales tax. To qualify for this resale exclusion, petitioner must show by clear and convincing evidence that these containers were purchased exclusively for the purpose of resale (Matter of Micheli Contr. Corp. v. New York State Tax Commn., 109 AD2d 957, 486 NYS2d 448), i.e., that the containers were purchased with the intent to resell them, as such, and not to use it as a component of a service provided to its customers.

F. An argument similar to petitioner's, based on similar facts, was presented to the Tax Appeals Tribunal in Matter of Waste Management of New York (Tax Appeals Tribunal, March 21, 1991, confirmed 185 AD2d 429, 585 NYS2d 883, lv denied 80 NY2d 762, 592 NYS2d 670). And, in Waste Management, the Tribunal relied upon the Court of Appeals decision in U-Need-A-Roll Off Corp. v. New York State Tax Commn. (67 NY2d 690, 499 NYS2d 921), as that case "involved substantially identical facts" to those in Waste Management[4] (Matter of Waste Management of New York, supra).

These three cases share the following facts: (1) during the

[4]The Appellate Division in Waste Management noted that, while U-Need-A-Roll Off was not directly on point, the Tribunal properly relied upon it as persuasive authority because it was "factually analogous" to Waste Management (Matter of Waste Management of New York v. Tax Appeals Tribunal, supra, 585 NYS2d at 884-885).

relevant periods, the petitioners were all trash removal companies which supplied containers or compactors to their customers for the collection of refuse; (2) these containers remained on the customers' property until the petitioner was asked to unload or remove them; (3) the containers were emptied by the petitioners as needed by the customers; (4) some customers rented containers without purchasing the trash removal service; (5) the fees charged by the petitioners varied depending upon several factors, including the size of the equipment rented; and finally, and most importantly, (6) the charges by the petitioners could not be separated out into a service component and a use component, based on the record.

In addition, in Waste Management, the petitioner showed that a small number of its customers purchased the trash removal service from petitioner without renting a container. This petitioner makes the same claim, but offers no evidence of it ever happening.

G. The decisions in Waste Management and U-Need-A-Roll Off are based on the principle that tangible personal property purchased by a vendor and supplied to its customers as a component of its services to its customers is not purchased for resale within the meaning of Tax Law § 1101(b)(4)(i)(A) (see, Matter of Waste Management of New York, supra; Matter of Atlas Linen Supply Co. v. Chu, 149 AD2d 824, 540 NYS2d 347, lv denied 74 NY2d 616, 550 NYS2d 276, U-Need-A-Roll Off Corp. v. New York State Tax Commn., supra).

In Matter of Waste Management of New York (supra), the Tax

Appeals Tribunal rejected the petitioner's "resale" argument, noting that:

> "the record clearly demonstrates that the provision of the subject equipment [trash containers] to petitioner's customers was inseparably connected to the waste removal service and cannot be considered a separate transaction for sales tax purposes" (citing, Matter of Atlas Linen Supply Co. v. Chu, supra; Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552).

The Tribunal was particularly persuaded in its decision by the fact that the charges made by the vendor in that case could not be separated into a service component and a use component, holding that the charges associated with the provision of the trash containers "cannot be reasonably construed as arising from a separate transaction" (citing, Matter of Atlas Linen Supply Co. v. Chu, supra, 540 NYS2d at 349; Matter of Penfold v. State Tax Commn., supra, 494 NYS2d at 553). In Waste Management, at both the Tribunal and Appellate Division levels, the emphasis was on the nature of the transaction, i.e., that a waste removal service was provided, not an equipment rental. The Tribunal, in analyzing the facts, noted "the artificiality of the separation of charges for a service component and a separate use component" (Matter of Waste Management of New York, supra) in the context of these cases.

H. Significantly, petitioner's "contracts"[5] with its

[5]Petitioner uses the term "contracts" loosely. In this record, "contracts" refers collectively to "purchase orders" from customers, "service agreements", and letters from petitioner to its customers which contain price quotes. The record was left open at the conclusion of the hearing to permit petitioner time to submit sample copies of actual contracts and leases showing terms thereof, e.g., whether specific containers are identified in the agreements by some number or letter designation and whether a lease term is set forth. No additional contract or lease documents were submitted.

customers expressly state that containers provided to customers, unless purchased, "shall remain the property" of petitioner and "the Customer shall have no right, title or interest in it" (see, Finding of Fact "6"; Division's Exhibit "G"). Since a lessee of real or personal property does acquire "a

right" to use and possession of the property during the term of the lease, this language in petitioner's contract militates against a finding that its containers are leased or rented.

I. In this case, petitioner's invoices separately state rental charges for some, but not all, containers. Some invoices show a charge corresponding to a container but it is unclear whether the charge is for rental or for the service of waste removal. Some invoices show four or five types of containers provided to a customer, but only have rental charges for one. The charges for the other containers are a "per load" or "per haul" charge. Some of petitioner's exhibits clearly show a rental charge for containers, but other invoices are, at best, ambiguous.

J. Further, while petitioner asserts that its container rentals qualified as "resales", in that its customers could rent the containers without purchasing the trash removal services or to purchase the services without renting the containers, petitioner has offered no proof to show the extent of its gross sales generated in this way (Finding of Fact "5") (see, Jackson Welding Co., Advisory Opinion, TSB-A-86[46]S).

K. As petitioner has the burden of proof in this matter

(see, 20 NYCRR 3000.10[d][4]), it was incumbent upon petitioner to establish the extent to which its containers were rented separately and not as part of its taxable trash removal service (see, Matter of Albany Calcium Light Co. v. State Tax Commn., 44 NY2d 986, 408 NYS2d 333, rearg denied 45 NY2d 839, 409 NYS2d 1032).

L. In light of the requirement that each container purchased or rented by petitioner be used exclusively for resale (rental) in order for petitioner to avoid the tax here, petitioner must establish that its billing invoices separately state a rental fee for each container provided to its customers (Matter of AGL Welding Supply Co., Tax Appeals Tribunal, April 28, 1994; Matter of AGL Welding Supply Co., Tax Appeals Tribunal, May 11, 1995). The evidence submitted by petitioner does not show that it charged a rental fee for each container. If a separate rental fee was charged for some containers and not others, then petitioner's burden was to show what portion of, i.e. to what extent, its containers were used exclusively for rental (resale) purposes. Petitioner has not met its burden, so the purchase of all of its containers is subject to sales tax (Matter of AGL Welding Supply Co., supra; Matter of Valley Welding Supply Co. v. Chu, 131 AD2d 917, 516 NYS2d 366).

M. The petition of Modern Disposal Services, Inc. is denied and Notice of Determination No. S901031000E dated October 22, 1990 is sustained.

DATED: Troy, New York
August 10, 1995

/s/ Carroll R. Jenkins

ADMINISTRATIVE LAW JUDGE