STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OLIN CORPORATION	:	DETERMINATION DTA NO. 813095
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, 1990.	:	

Petitioner, Olin Corporation, Attn: Ken Ritter, 120 Long Ridge Road, Stamford, Connecticut 06902, 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, 1990.

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 May 23, 1995 at 9:15 A.M., with all briefs to be submitted by December 8, 1995. Petitioner, appearing by MacKenzie, Smith, Lewis, Michell and Hughes, LLP (Carter H. Strickland, Esq. and Clayton H. Hale, Esq., of counsel), filed a brief on July 24, 1995. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Robert J. Jarvis, Esq., of counsel), submitted a brief on November 15, 1995. Petitioner's reply brief was submitted on December 4, 1995, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]).

On September 15, 1995, this matter was reassigned to Dennis M. Galliher, Administrative Law Judge, who renders the following determination.

ISSUES

I. Whether the Division of Taxation properly imposed sales tax on waste removal, transportation and processing/disposal fees paid by petitioner.

II. Whether, if so, such imposition violates the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

1. Petitioner, Olin Corporation ("Olin"), is a Virginia corporation with headquarters located in Stamford, Connecticut. Petitioner's operations include chemical manufacturing at plants located, respectively, in Niagara Falls, New York and Rochester, New York.

2. During the period at issue herein, September 1, 1985 through November 30, 1990, petitioner contracted with Stablex Canada, Inc. ("Stablex"), a Canadian corporation, to take delivery of hazardous wastes generated in the manufacture of chlorine and caustic at petitioner's Niagara Falls facility, and transport such wastes to Stablex's facility at Blainville, Canada for processing/disposal.

3. During the same period (9/1/85 through 11/30/90), petitioner also contracted with Rollins Environmental Services (NJ) ("Rollins"), a Delaware corporation, to take delivery of hazardous wastes generated in the manufacture of small batches of various chemicals at petitioner's Rochester facility, and transport such wastes to Rollins's facility in Bridgewater, New Jersey for processing/disposal.

4. Each of these contracts was entered into on petitioner's behalf by its purchasing department, which is located at petitioner's headquarters in Stamford, Connecticut. Petitioner's witness explained that such contracts were extended from time to time via amendments, as opposed to copying and re-executing entire new contracts. These periodic amendments typically involved extensions of the duration of the basic contract and changed the dollar amounts for the services being performed. In this case, the Stablex contract was entered into on March 3, 1986 (some five months into the audit period), and the Rollins contract was entered into on December 15, 1984 (some nine and one-half months prior to the audit period).

5. In the case of petitioner's Niagara Falls facility, petitioner's personnel would load the wastes into roll-off type dumpsters brought to the facility by the trucking company hired by Stablex. The loaded dumpsters would then be winched onto trucks by the trucking company's employees, and driven by such employees to Stablex's facility in Blainville, Canada. In the case of petitioner's Rochester facility, metal drums (typically 55 gallon drums) would be loaded by

petitioner's personnel onto trucks supplied by Rollins, and would be driven by Rollins employees to Rollins's facility at Bridgewater, New Jersey.

6. Each of the contracts is essentially identical in its terms. Pursuant to the contracts, the "service" contracted for is defined (at section one) to mean "to take delivery, treat, store, and/or otherwise dispose of Waste Products pursuant to this Agreement." Said section goes on to define "Waste Products" to include both the waste materials and the containers in which the materials are placed. Said section also defines "Delivery" to mean "the earliest to occur of (a) the transfer to Disposer [i.e., Stablex or Rollins] of Waste Products, or (b) the taking of possession or control by Disposer of Waste Products." Section 4(c) of the agreements provides that the Disposer agrees not to use, reuse, recycle, recover, reclaim, resell, transfer or give away the waste products or containers without petitioner's written permission. Section 6(a) of the agreements provides that the Disposer takes delivery of the waste products at petitioner's facility, while section 6(b) provides that title and all incidents of ownership of the waste products pass to the Disposer upon delivery.

7. Sample invoices from both Stablex and Rollins, each of which fall within the audit period at issue herein, show the type of wastes involved, note generally the method of processing/disposal (e.g., incineration, landfill, secure landfill, etc.), and show separate charges for the transportation of the waste and for its disposal.

8. On June 1, 1993, following a field audit of petitioner's operations, the Division of Taxation ("Division"), issued to petitioner a Notice of Determination assessing additional sales tax due for the period September 1, 1985 through November 30, 1990 in the amount of $176,972.83, plus interest. The tax at issue was assessed on the full amounts paid by petitioner to Stablex and Rollins for the services described above. Specifically, the Division assessed tax of $82,307.51 based on amounts paid by petitioner to Stablex in connection with wastes generated at petitioner's Niagara Falls facility, and tax of $94,665.32 based on amounts paid by petitioner to Rollins in connection with wastes generated at petitioner's Rochester facility.

9. At hearing, the parties agreed that the audit methodology and the mathematical accuracy of the amount of tax determined as a result of the application thereof was not at issue. Subsequent to the hearing, the parties entered into a stipulation regarding the tax amounts associated with various components of the services purchased by petitioner, as well as mileages between certain locations. According to this stipulation, if it is determined that the tax amount assessed on petitioner's purchases from Stablex should be separately allocated to transportation and disposal activities, the tax amount corresponding to transportation of the waste is $27,408.17, and the tax amount corresponding to disposal of the waste is $54,899.34. Similarly, for petitioner's purchases from Rollins, the tax amount corresponding to transportation of the waste is $9,466.03, and the tax amount corresponding to disposal of the waste is $85,199.29. In addition, the parties have stipulated that the road mileage between petitioner's Niagara Falls facility and Stablex's facility in Blainville, Canada is 431.9 miles, of which 3.0 miles (0.7%) are within New York State, and that the road mileage between petitioner's Rochester facility and Rollins's facility in Bridgeport, New Jersey is 362 miles, of which 166 miles (45.9%) are within New York State.

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]). 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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> "(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 . . . ."

B. In this case, the Division assessed tax on the entire amounts paid by petitioner to Stablex and to Rollins for their services of pickup, transport, and treatment/disposal of the wastes generated at petitioner's facilities as part of the chemical manufacturing process. The Division's basis for assessment rests on the position that such services are taxable in their entirety as an integrated waste removal service under Tax Law § 1105(c)(5). Petitioner, in turn, does not dispute the basic premise that the services in question constituted an integrated waste removal service per Tax Law § 1105(c)(5). However, petitioner maintains that imposing tax on the entire amount charged, without apportionment and in circumstances such as the present where the records (invoices) separately state the amounts charged for transportation and for treatment/disposal, violates the Commerce Clause requirement of fair apportionment. The Division, in response, argues that petitioner has failed to meet its burden of establishing that the services here included a "processing" service that occurred out of state which could be taxed under a provision akin to Tax Law § 1105(c)(2). Thus, the Division maintains that without proof that the out-of-state segment of the integrated service could be subjected to tax, there is no possibility of multiple taxation of the same receipts and that the need for fair apportionment is therefor eliminated.

C. The basic issue presented in this case has been addressed by the Tax Appeals Tribunal in a number of decisions (see Matter of General Electric Co., Tax Appeals Tribunal, March 5, 1992; Matter of Bristol-Myers Company Industrial Division, Tax Appeals Tribunal, September 15, 1994; Matter of Rollins Environmental Services (NJ), Inc., Tax Appeals Tribunal, September 15, 1994; Matter of Waste Conversion, Inc., Tax Appeals Tribunal, August 25, 1994). In each of these decisions, the Tribunal held that the removal, transportation and treatment/disposal of industrial or hazardous waste from a customer's New York property constitutes an integrated trash removal service subject to tax under the provisions of Tax Law § 1105(c)(5). However, the Tribunal also concluded in each of these cases, relying on a number of U.S. Supreme Court cases including specifically Complete Auto Transit v. Brady, (430 US

274, 51 L Ed 2d 326, reh denied 430 US 976, 52 L Ed 2d 371) and Goldberg V. Sweet, (488 US 252), that taxing the entire receipt, when the processing/disposal and part of the transportation takes place outside of New York State, results in New York taxing more than that part of the revenues from the interstate activity which reasonably reflects the in-state component of the activity, thus violating the constitutional requirement of fair apportionment.

D. It is noteworthy that in three of the above-cited cases (General Electric, Bristol-Myers and Waste Conversion), the only item at issue was the out-of-state processing/disposal, with the parties having agreed by stipulation that the pickup and transportation charges could be subjected to tax. The other cited case (Rollins) did not include such a clear stipulation regarding the pickup and transportation charges, and the Tribunal cancelled the entire assessment including the portion which was attributable to transportation. It appears that in Rollins the invoices, at least in some instances, separately stated the charges imposed including charges for transportation and for special transportation equipment in some circumstances (Matter of Rollins Environmental Services (NJ), Inc., supra). However, it also appears that, unlike the present case, the parties were unable or unwilling to calculate the dollar portion of the taxed transactions specifically attributable to in-state activities (pickup and transport) versus out-of-state activities (transport and processing/disposal), and thus did not stipulate that only the out-of-state activities were at issue vis-a-vis taxability.

E. Resolution of this case begins with the Division's assertion that petitioner has not met its burden of proving that part of the services paid for by petitioner included a "processing" component (as opposed to mere disposal by tipping or dumping) which could itself be taxed by the other jurisdictions under a provision like Tax Law § 1105(c)(2). This assertion, upon which the Division's position is hinged, is rejected. First, the evidence in the record, even though not extensive, does not support the Division's assertion. In this regard, both contracts define the "service" provided to petitioner to mean "to take delivery, treat, store and/or otherwise dispose of Waste Products pursuant to the Agreement" (emphasis added). Further, the various documents attached to the contracts describe the various wastes, including hazardous wastes, to

be disposed of and the methods of disposal. Such specified methods of disposal include "chemical waste treatment-approved landfill", and "incineration". The reasonable view is that the first description means that the waste is chemically treated (i.e., "treatment" or "processing") and subsequently disposed of by burial in a landfill and, in the second instance, that "incineration" was the "process" or "treatment" by which disposal was effected.[1] In fact, it nearly begs the question to accept, in today's environmentally conscious age and in light of the nature of the wastes involved and the type of service described and defined, that there was disposal without prior processing or that the method of disposal was not itself a "process". Thus, it is concluded that more than mere "tipping" or "dumping" was undertaken with regard to the subject wastes.[2]

F. The Tribunal's prior cases reach the conclusion that taxing the entire receipt when all of the processing/disposal takes place outside of the State results in New York's taxing more than that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. That is, as in each of the Tribunal's prior cases on this subject, the facts reveal a service which has at least three distinct elements, to wit: 1) removal of the wastes from the real property, which element is performed entirely in New York State; 2) transportation of the wastes from the real property to the disposer's facilities for processing, treatment and disposal, which element is performed both in and out of New York State; and 3) processing, treatment and disposal of the wastes, which element is performed wholly outside of New York State. Since the entire transaction has been subjected to tax, and

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[1]One would assume that disposal by incineration involves the "process" of incineration of the wastes followed by disposal (presumably by landfill burial) of the ash or other residue resulting from the incineration.

[2]The limited number of invoices in the record in fact support the proposition, especially in conjunction with the definitional sections of the contracts, that processing of the wastes was among the services provided to petitioner. In addition, the fact that the parties did not contest the audit method used or the results derived therefrom, coupled with the fact that there was no challenge to the existence, accuracy or availability of the invoices, and no claim that such invoices did not in each instance separately state transportation charges and processing/disposal charges, may explain why a complete set of invoices was not introduced in evidence. Furthermore, the fact that the parties were able to specify and agree by stipulation to a breakdown of the amounts attributable to the particular segments of the service itself supports the proposition that submission of all invoices to establish by weight of repetition the nature of the processing/disposal was not contemplated as necessary. Finally, given that petitioner was not the "Disposer" of the wastes, it is not entirely surprising that the specific steps undertaken with regard to treating, processing and disposing of the various wastes were not described in more detail.

since part of the integrated transaction, including specifically the processing/disposal segment which is potentially taxable in its own right, takes place out of state, the possibility of double taxation arises. Under these circumstances the Commerce Clause fair apportionment standard is implicated.

It would appear that if only "tipping" or "dumping" occurred out of state, with no processing or treatment, then New York could tax the entire receipt. That is, even if the other state had tax statutes identical to New York's (i.e., provisions identical to Tax Law § 1105[c][2], [5]), there would be no double taxation. Under such circumstances, the other state would not tax the integrated service under a (c)(5) provision since the real property being serviced was not located in such state and, furthermore, would not tax the mere dumping or tipping without processing under a (c)(2) provision since it is the processing or treatment which triggers the tax under such section (see, Matter of Cecos Intl. v. State Tax Commn, 126 AD2d 884, 511 NYS2d 134, affd 71 NY2d 934, 528 NYS2d 811; Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552). However, in this case it is apparent from the terms of the contracts that the out-of-state activities included processing, thus leaving the out-of-state component susceptible to tax under a provision akin to Tax Law § 1105(c)(2). To conclude, as the Division argues, that there was no interstate (or, in the case of Stablex, international) transaction would be to accept that petitioner merely paid for pickup, removal and transport of wastes from its New York facilities, but not for processing/disposal of such wastes. As outlined above, however, this is not the case since the service contracted and paid for by petitioner clearly included treatment/disposal of the wastes, with such part of the overall integrated service occurring out of New York, to wit, in New Jersey (Rollins) and in Canada (Stablex). In sum, given the Tribunal's prior decisions, assessment of tax on the entire receipt without apportionment runs afoul of the Commerce Clause fair apportionment standard, and the assessment cannot be sustained in full as issued.

G. As an additional basis for relief, petitioner notes that with respect to Stablex the processing/disposal and most of the transportation took place in Canada. Therefore, petitioner

maintains that in addition to the four-part interstate commerce clause test set forth in Complete Auto Transit v. Brady (supra) [3] the Stablex transactions represent international transactions which are required to pass two additional foreign commerce tests. Specifically, as identified in Japan Lines, Ltd. v. County of Los Angeles, 441 US 432, 60 L Ed 2d 336), an impermissible or undue foreign commerce burden will result if a state tax creates a substantial risk of international multiple taxation or impairs Federal uniformity and prevents the United States government from speaking with one voice in regulating commerce with foreign nations. On this latter score, a "state tax at variance with Federal policy will violate the 'one voice' standard if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear Federal directive" (Container Corp. of America v. Franchise Tax Bd., 463 US 159, 194, 77 L Ed 2d 545, 571-572). State taxation with "foreign resonances" will not be held void unless violative of a clear Federal directive (see, Matter of Reuters, Ltd., Tax Appeals Tribunal, March 21, 1991, confirmed 180 AD2d 270, 584 NYS2d 932). As the Court in Container observed:

> "if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer '[a]bsent some explicit directive from Congress . . . that treatment of foreign income at the federal level mandates identical treatment by the States'" (Container Corp. of America v. Franchise Tax Bd., supra, at 194).

H. As to petitioner's foreign commerce claim, the Division correctly points out that there is no showing that the United States government has given any directive, clear or otherwise, on the impact or permissibility of state taxation of the entire integrated service of waste removal, transport and processing/disposal where part of such service occurs outside of the United States. Thus, it cannot be said that the Division's assessment violates the "one voice" foreign commerce test by violating any enunciated Federal foreign policy, or represents an aberration in national policy where uniform national policy has been deemed essential. Turning to the question of the risk of international multiple taxation, the Division points out that petitioner's agreement with

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[3]The Complete Auto four part test, which must be met in order to successfully overcome an interstate commerce challenge, requires that the tax must be applied to an activity with a substantial a nexus with the taxing state, must be fairly apportioned, must not discriminate against interstate commerce, and must be fairly related to the services provided by the state.

Stablex includes the statement "[n]o taxes applicable to this contract in Canada", thus maintaining that there is, in fact, evidence against a conclusion that there is any risk of international multiple taxation. Petitioner responds by arguing that a showing of actual multiple taxation is not required, but rather only that such result could occur if the other jurisdiction enacted a taxing provision similar to New York's Tax Law § 1105(c)(2). Under the facts of this case, there is no actual multiple taxation nor is there more than a hypothetical risk (as opposed to a "substantial" risk) of the same in the future. There is no evidence that the State's imposition of the tax on the entire receipt, as here, itself has resulted in any threat of possible retaliation by the other jurisdiction via the enactment of a tax provision akin to Tax Law § 1105(c)(2). In sum, the evidence does not bear out the assertion that the Division's assessment without apportionment, though failing the fair apportionment prong of the Complete Auto test, violates either of the additional specific foreign commerce tests set forth in Japan Line.

I. In view of the foregoing, the only remaining question becomes whether to cancel the assessment in its entirety as representing an application of the sales tax statute in violation of the Commerce Clause fair apportionment standard or, instead, to apportion the tax in accordance with the parties' stipulation. In each of its prior cases on this issue, the Tribunal has observed that "there is a practical method to apportion the cost, one which does not, as the Division asserts, create the administrative inconvenience sought to be avoided in Goldberg" (Matter of Rollins Environmental Services (NJ), Inc., supra). As noted above, the Tribunal has not disturbed the parties' stipulations agreeing to tax on the in-state portions of the receipts and has upheld the Division's notices of determination as modified to the extent of such stipulations, while in each such instance cancelling the remaining portion of such notices assessing tax on the out-of-state processing/disposal services (see, Matter of Waste Conversion, Inc., supra; Matter of Bristol-Myers Industrial Division, supra; Matter of General Electric Company, supra). This result, dictated by the existence of stipulations, may nonetheless be taken as an endorsement of the results reached by such stipulations as the practical and appropriate method and result of apportionment. In contrast, the Tribunal cancelled the entire assessment remaining

in issue in the Rollins case, including by implication the portion thereof which would be attributable to in-state activities. This result appears to follow from the inability or unwillingness of the parties to arrive at a stipulation as to some apportionment.

In contrast to the prior cases, the present matter falls somewhere between the two results. That is, unlike Rollins, the parties have stipulated to the amounts of tax attributable to the various parts of the integrated service and have provided mileage information from which an apportionment of the in-state charges could be made. Such stipulation lays to rest any argument that the parties were unable to arrive at such figures due to inadequate record specificity and again clarifies that the charges were separately stated on invoices and were thus readily discernible. However, the parties have not stipulated to applying such figures or agreed to the resultant apportioned tax. Consistent with the fact that the parties have in essence placed the issue and basis for apportionment in question, and noting that in the above cases the stipulations reducing the tax were based on post-assessment review of information, it is appropriate to apply the information furnished by the parties (per stipulation) in apportionment of the tax due.[4]

[4]Applying the information from the stipulation results in a recomputation and reduction of the assessment to $4,536.77 as follows:

Stablex: the tax attributable to out-of-state disposal ($54,899.34) is to be eliminated and the balance of tax assessed ($27,408.17), which is attributable to transportation, is to be eliminated except to the extent that such transportation occurred in New York. Accordingly, multiplying the percentage of transportation within New York (0.7%) by the tax attributable to transportation ($27,408.17) results in tax due of $191.86.

Rollins: the tax attributable to out-of-state disposal ($85,199.29) is to be eliminated and the balance of tax assessed ($9,466.03), attributable to transportation, is to be eliminated except to the extent that such transportation occurred in New York. Accordingly, multiplying the percentage of transportation within New York (45.9%) by the tax attributable to transportation ($9,466.03) results in tax due of $4,344.91.

J. The petition of Olin Corporation is granted to the extent that tax may be imposed only on the in-state apportioned receipts; the petition is otherwise denied; the Notice of Determination dated June 1, 1993 is to be modified in accordance with Conclusion of Law "G" (note "3"); and said Notice as modified is sustained.

DATED: Troy, New York
May 30, 1996

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE