STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **CWM CHEMICAL SERVICES, INC.** **AND** **CWM CHEMICAL SERVICES, LLC** for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1998 through November 30, 2000.	:	DETERMINATION DTA NO. 818757

Petitioners, CWM Chemical Services, Inc. and CWM Chemical Services, LLC, 1550 Balmer Road, P.O. Box 200, Model City, New York 14107-0200, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1998 through November 30, 2000.

Petitioners, by their duly appointed representative Buchanan & Ingersoll (Daniel M. Darragh, Esq., of counsel), brought a motion dated April 12, 2002, including a stipulation of undisputed facts and exhibits together with a brief in support, seeking summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.9(b). On May 28, 2002, the Division of Taxation ("Division"), by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel), submitted an affirmation in opposition to petitioners' motion and brought a cross motion for summary determination, together with a brief in support. Petitioners' reply brief in opposition to the Division's cross motion for summary determination was submitted on June 21, 2002, which date commenced the 90-day period for issuance of this determination. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether there exists sufficient nexus to support the imposition of sales tax on all or some apportioned part of petitioners' receipts for removing, transporting, processing and disposing of hazardous waste where a part of the transport, as well as the processing and disposal services occur in New York, but where the waste is initially located at an out-of-state real property site from which it is removed and transported into New York State.

II. Whether, assuming such sufficient nexus exists, the Division upon audit properly apportioned the imposition of sales tax to the treatment and disposal segments of the service which occurred in New York State.

III. Whether petitioners' argument that the tax may not be apportioned under the circumstances at hand constitutes a challenge to the facial constitutionality of Tax Law § 1105(c)(5) which may not be maintained in this forum.

FINDINGS OF FACT [1]

1. Prior to February 28, 1999, petitioner, CWM Chemicals Services, Inc. ("CWM"), was a Delaware corporation qualified to do business in the State of New York, and it was the owner and operator of a duly licensed hazardous waste treatment, storage and disposal facility, located on Balmer Road in the Town of Porter, Niagara County, New York and known as the Model City Facility. Thereafter, CWM changed its form from a "C" corporation to a Delaware limited

[1] The parties executed a Stipulation of Facts in this matter. Such stipulated facts are set forth herein as the Findings of Fact, omitting therefrom only references to documents attached to the stipulation, the existence and authenticity of which documents is not disputed.

liability company, also registered to do business in the State of New York, and CWM Chemical Services, LLC (also referred to as "CWM") then owned and operated the Model City Facility.

2. The Model City Facility has been issued permits from the New York State Department of Environmental Conservation and the United States Environmental Protection Agency relating to the receipt, storage, treatment and disposal of a wide variety of liquid, solid and semi-solid industrial and hazardous wastes, including certain types of PCB wastes. The facility permits have been issued pursuant to the Resource Conservation and Recovery Act, 42 USC §§ 6901, *et seq*., the Federal Water Pollution Control Act, 33 USC §§ 1251 *et seq*., the Clean Air Act, 42 USC §§ 7401 *et seq*., the Toxic Substances Control Act, 15 USC §§ 2601 *et seq*., and various provisions of the New York Environmental Conservation Law and its implementing regulations related to hazardous waste management and disposal, point source discharges, and air emissions.

3. The services offered by CWM at or related to the Model City Facility include waste pickup or collection at the customer's property, transportation of the waste to the Model City Facility in duly licensed vehicles, various forms of treatment such as stabilization, neutralization and precipitation, and land disposal. Customers may elect to have their wastes picked up at their property and transported to the Model City Facility for treatment and disposal, or they can elect to deliver their wastes to CWM at the Model City Facility for treatment and disposal. In most instances where CWM provides waste pickup, the transportation vehicle is provided by a subcontractor hired and paid by CWM, and CWM provides resale certificates to such subcontractors. Upon arrival at the Model City Facility, whether by CWM pickup or delivery by the customer, the waste is subject to CWM's waste receipt acceptance procedures to verify that the waste being received conforms to the contract documents and the waste manifest.

4. Pursuant to the terms of CWM's Standard Form Environmental Service Agreement, CWM takes title to the customer's waste either upon completion of loading into CWM's transportation vehicle at the customer's property, or, if the customer transports its waste to the Model City Facility, upon acceptance of the waste at the facility.

5. CWM's customers are located within New York State, as well as in a number of other states. When CWM picks up a New York customer's waste at its property in New York and transports it to the Model City Facility for treatment and disposal, CWM, as provided in New York Tax Law § 1105(c)(5), collects New York sales tax on the total receipts for transportation, treatment and disposal, with the tax rate determined by the rate applicable in the county where the customer's property is located. When a customer transports its waste to the Model City Facility for treatment and disposal, CWM, as provided in Tax Law § 1105(c)(2), collects New York sales tax at the Niagara County rate on the total receipts for treatment and disposal. When a customer delivers its waste to the Model City Facility for disposal only, no sales tax is collected because none is due under either section 1105(c)(2) or (5). When CWM picks up a non-New York customer's waste at its property located in another state and transports the waste to the Model City Facility for treatment and disposal, CWM does not collect or pay any New York sales tax on any part of the receipts from the transaction.

6. The Division of Taxation ("Division") conducted audits of CWM's sales tax returns for the periods March 1, 1998 through February 28, 1999 and March 1, 1999 through November 30, 2000. The Division identified CWM's transactions with its out-of-state customers where CWM picked up the waste at the customer's out-of-state property and transported it to the Model City Facility for treatment and disposal. Typically, though not always, the customer was billed at an out-of-state address and payment came from an out-of-state address. CWM had not collected or

paid any sales tax on receipts from any such transactions. The Division asserted that sales tax, pursuant to Tax Law § 1105(c)(5), was due on the in-State portion of the receipts from such transactions, and the Division determined that the receipts for treatment and disposal would fairly represent that portion of the revenues attributable to New York activity. During the course of the audit CWM provided the auditors with a March 12, 2001 letter from its counsel explaining why CWM believed that the interstate transactions in question were not subject to tax. The Division provided its response in a letter dated July 5, 2001.

7. Because of the very large number of records CWM would have had to review in order to identify and produce the documents related to each out-of-state customer transaction during the entire period under audit, CWM proposed that he Division use a test period audit method. The Division and CWM agreed to use May 2000 as the sample month, and CWM provided the documents requested by the Division for the transactions that occurred during that month. The Division also requested and was provided data regarding CWM's stabilization cost center revenues for the entire audit period.

8. CWM's stabilization cost center revenues represent the revenues paid by customers specifically related to treatment and disposal services. If a transaction involved disposal only or transportation and disposal, no part of those revenues was allocated to the stabilization cost center. If a transaction involved transportation, treatment and disposal or simply treatment and disposal, the revenues attributable to the treatment and disposal services were allocated to the stabilization cost center.

9. Using information from the sample month, the Division determined that 12.45% of the stabilization cost center revenues represented the revenues that would be attributable to the treatment and disposal services rendered by CWM for its out-of-state customers where CWM

picked up the waste at the customer's out-of-state property and transported the waste to the Model City Facility for treatment and disposal. With regard to those transactions, the Division asserted that the portion of the revenues attributable to treatment and disposal was taxable under Tax Law § 1105(c)(5), as representing the New York portion of the transaction, and it then calculated sales tax, at the Niagara County rate of 7%, on the stabilization cost center revenues attributable to CWM's transactions with its out-of-state customers involving waste pickup out of state and transportation to the Model City Facility for treatment and disposal. The Division excluded from its sales tax calculation the revenues received by CWM for the pick up and transportation component of those services, attributing that portion of the revenues to non-New York activity.

10. On September 17, 2001, the Division issued to petitioner two notices of determination. These notices, based upon the methodology described in Findings of Fact "7", "8" and "9", assessed sales tax in the amount of $83,514.74 for the period March 1, 1998 through February 28, 1999, and in the amount of $171,347.28 for the period March 1, 1999 through November 30, 2000, plus interest.

11. CWM does not agree that any sales tax is due on the waste treatment and disposal services that it provided to its customers where the waste was picked up at the customer's out-of-state property and transported to the Model City Facility for treatment and disposal, nor does it agree that the Division has the authority to determine an appropriate allocation of any tax that might be imposed on such interstate transaction or that the allocation determined by the Division is appropriate. However, for purposes of this proceeding, in the event that it is determined that a sales tax is due on such transactions, and that the Division has the authority to determine the appropriate allocation, CWM does not challenge the methodology used by the Division to

conduct the audit, nor does CWM challenge the calculations performed by the Division to determine the amount of sales tax that might by assessed on the transactions in question.

CONCLUSIONS OF LAW

A. The parties have stipulated to the relevant facts in this case. In turn, there is no claim raised, nor is it in any manner apparent, that any material facts are in dispute. Accordingly, it is appropriate to resolve this matter on the merits by way of summary determination (20 NYCRR 3000.9(b); ***see, Winegrad v. New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316, 317).

B. Tax Law § 1105(c) imposes sales tax on receipts from sales, other than for resale, of certain enumerated services. Subdivisions (2) and (5) of section 1105(c) are relevant to this matter, and provide for the imposition of tax on receipts from sales of the following specified services:

> (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 the 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 . . . .

C. The services contracted for between petitioner and its customers which are at issue in this proceeding are those which involve petitioner's removal of hazardous waste from its customers' out-of-state real estate, including transporting such waste to petitioner's Model City

Facility for treatment and disposal. The courts have consistently held that such contracts for trash or waste collection (pickup), transport, treatment and disposal constitute the provision of an integrated real property maintenance service taxable under the plain language of section 1105(c)(5) and 20 NYCRR 527.7(a)(1).[2] Attempts to segregate such an integrated maintenance service into its various component service segments, in general as well as by specific invoicing of the component parts of the integrated service, have been specifically rejected (***see, Rochester Gas and Elec. Corp. v. New York State Tax Commn.,*** 71 NY2d 931, 528 NYS2d 410; ***Penfold v. State Tax Commn.,*** 114 AD2d 696, 494 NYS2d 552; ***Tonawanda Tank Transport Serv., Inc. v. Tax Appeals Tribunal,*** 168 AD2d 748, 563 NYS2d 900; ***CECOS Int'l., Inc. v. State Tax Commn.,*** 126 AD2d 884, 511 NYS2d 134, ***affd*** 71 NY2d 934, 528 NYS2d 811). The Tax Law, and the courts in the foregoing cases, have drawn a clear distinction between (1) a waste generator who pays someone to perform a maintenance service upon its real property, versus (2) a waste generator who brings its waste to a facility either for treatment and disposal or simply for disposal. In the former instance the entire waste removal process, consisting of pickup, transportation, treatment and disposal, is considered one integrated real property maintenance service. This service transaction occurs and is delivered at the location of the customer's real property, and the tax due thereon per Tax Law § 1105(c)(5) is calculated based on the tax rate applicable in the county where the real property being serviced is located (***see also,*** 20 NYCRR 525.2[3]; 20 NYCRR 526.7[e][1]). In the latter instance where waste is delivered by the customer to the disposal facility for treatment and disposal, the customer is not purchasing a real property maintenance service but rather is purchasing a treatment and disposal service. This

[2] The statute makes no specific provision for different tax treatments based upon the type of waste (including hazardous waste) involved (***Matter of Auburn Steel Company, Inc.***, Tax Appeals Tribunal, September 13, 1990).

service, taxable under Tax Law § 1105(c)(2), is delivered and the sale transaction (i.e., treatment and disposal) occurs at the disposal company's facility, with the tax calculated based upon the tax rate applicable in the county where the treatment and disposal facility is located.[3]

D. The Tax Appeals Tribunal has consistently followed this line of cases, initially in ***Matter of General Electric Co., Inc.*** (Tax Appeals Tribunal, March 5, 1992), as well as in a number of subsequent cases (***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; ***Matter of Olin Corp.***, Tax Appeals Tribunal, September 11, 1997). In each of these cases, the Tribunal concluded that the removal, transportation, treatment and disposal of industrial or hazardous waste from a customer's New York property constitutes an integrated real property maintenance service subject to tax under Tax Law § 1105(c)(5). In each of these cases, the service was performed for a New York customer with respect to that customer's New York real property. Hence, there was clearly sufficient nexus between the taxable service transaction, the in-State real property, the taxpayer customer purchasing the integrated real property maintenance service and New York State to support the imposition of tax on the receipt for such service. However, while consistently concluding that the entire receipt was properly subject to tax under the terms of Tax Law § 1105(c)(5), the Tribunal

[3] Where a waste generator brings its waste to a facility for disposal only (without treatment) no tax is due, since disposal alone is not one of the enumerated services subject to tax under Tax Law § 1105(c)(2) (***see, CECOS, Int'l., Inc. v. State Tax Commn., supra.***). In addition, use of a third-party hauler to transport the waste is not determinative of whether the transaction is a (c)(5) real property maintenance service or a (c)(2) processing service. The service provider, such as petitioner, who sells a real property maintenance service may arrange for a third-party hauler to remove or retrieve the waste from the real property and transport it to the service provider's facility for treatment and disposal without changing the fact that it is providing the waste generating customer with a (c)(5) integrated real property maintenance service. So too, a waste generator may arrange with a third-party hauler to bring its waste to a treatment and disposal facility rather than doing so itself, without changing the fact that it is purchasing a (c)(2) treatment and disposal service from such facility (***id.***).

nonetheless went on to conclude that taxing the entire receipt, when a portion of the integrated service occurred (physically) in a jurisdiction outside of New York State, would be in violation of the Commerce Clause of the United States Constitution for failure of proper apportionment. In reaching this conclusion, the Tribunal reasoned that since the transaction was an interstate transaction with components thereof, i.e., parts of the integrated service, occurring in more than one jurisdiction, there existed the possibility of multiple taxation of the same activity in violation of the internal and external consistency requirements discussed by the United State Supreme Court in ***Goldberg v. Sweet*** (488 US 522, 102 L Ed 2d 607).

E. In ***Matter of Olin Corp. (supra.)***, the Tribunal explained its holding in ***General Electric*** (and its other cases) as follows:

> In ***Matter of General Electric, Co. (supra)***, we held that the service of removing, transporting and disposing/processing of waste material was an integrated waste removal service subject to sales tax under Tax Law § 1105(c)(5). We rejected General Electric's argument that the disposal of waste material, i.e., PCB contaminated oil, through the process of incineration, was a separate service from the "removal" of the waste from General Electric's facility in New York and the "transportation" of that waste to Arkansas. We likewise reject the identical argument presented by the Division in its exception [in ***Olin***]. We also rejected General Electric's constitutional argument that the activity being taxed did not have sufficient nexus with New York State. We concluded that because the service being performed occurred, at least partly, in New York State, and General Electric had a significant presence in New York State, sufficient nexus with New York State existed to support the tax. However, we agreed with General Electric's second constitutional argument that imposing sale tax on the entire receipt for the waste removal service when the disposal or processing of the waste occurred out of New York State and the transportation of the waste occurred both in and out of New York State, did not fairly apportion the tax so that New York State taxed only its fair share of the interstate transaction.

F. Petitioner's position in this case focuses on two main points. First, petitioner maintains that since the taxable sales transaction occurs outside of New York State, with the taxpayer customer and the real property being serviced located outside of New York, there is no nexus between the transaction sought to be taxed and New York State. Petitioner thus maintains that there is no ability for New York to impose any tax and, as a consequence, there is no issue of apportionment presented. Secondly, petitioner argues that there is no requirement for apportionment under the facts of this case in any event, and that there was no requirement for apportionment in the ***General Electric*** line of cases. On this score, petitioner asserts that it is constitutionally permissible for the jurisdiction where the sale of the taxable service transaction occurs and where provision of some of the contracted for service is provided to impose sales tax on the entire receipt without apportionment. Petitioner's position, which is directly opposite to the conclusion reached by the Tribunal in ***General Electric***, relies on the United States Supreme Court's opinion in ***Oklahoma Tax Commn. v. Jefferson Lines*** (514 US 175, 131 L Ed 2d 261). According to petitioner, the key relevant factual difference between this case and each of the Tribunal's prior cases, is that the transactions at issue in this case involve an integrated real property maintenance service sold and performed on real property located outside of New York State. Petitioner posits that under ***Jefferson Lines***, it is the concept of a sale transaction and where that sale transaction occurs, and not the fact that the contracted-for service may subsequently occur over time and in different jurisdictions, which controls.

G. As described, petitioner's primary focus in this case involves the issue of nexus. It is elemental that in order for New York State to impose its sales tax on a given transaction, there must be some minimum connection or nexus between the transaction sought to be taxed, the taxpayer and New York State (***see, e.g., Orvis Co., Inc. v. Tax Appeals Tribunal***, 204 AD2d 916, 612 NYS2d 503, ***mod*** 86 NY2d 165, 630 NYS2d 680, ***cert denied***, 516 US 989, 133 L Ed 2d 426). Petitioner posits that tax may be imposed on the entire receipt for the sale of an integrated real property maintenance service, without apportionment, where the taxpayer customer and the real property upon which the taxable service is performed are, as in the prior Tribunal cases, located in New York State. Petitioner also admits that it has sufficient contacts with New York to qualify as a vendor, and agrees that if the transactions in question are properly subject to tax it would be obligated to collect the tax from its customers and remit the same to the state. Petitioner points out, however, that it is not the taxpayer and that the tax is imposed on the purchaser, i.e., petitioner's customer, at the time of the sale. Petitioner thus claims that the only question in this case is whether New York can reach beyond its borders to tax an integrated real property maintenance service sold to an out-of-state purchaser who takes delivery of the service at its out-of-state real property, based on the fact that a portion of the contracted for integrated service is performed within New York State.

It is noteworthy that each of the Tribunal's prior cases not only involved in-State customers whose in-State real property was being serviced, thus leaving the issue of nexus essentially a foregone conclusion, but also that each of such cases, save for ***Matter of Olin Corp. (supra.)***, were decided before ***Jefferson Lines*** and did not include any analysis or discussion of the impact of ***Jefferson Lines***. This case, involving out-of-state customers purchasing a maintenance service to be performed on their out-of-state real properties requires application of the law to the opposite fact situation presented in such prior cases, and thus a discussion as to nexus and apportionment, with specific reference to the guidance provided by ***Jefferson Lines***, is required. Such analysis leads to a conclusion that the tax may not be imposed as sought by the Division.

H. It is clear that the transactions in question are interstate transactions, since portions of the contracted for integrated service in fact physically occurred in different states. As a result, the Commerce Clause of the United States Constitution is implicated. In ***Complete Auto Transit, Inc. v. Brady*** (430 US 274, 51 L Ed 2d 326, ***reh denied***, 430 US 976, 52 L Ed 2d 371), the Supreme Court set forth a four-part test for determining whether a state tax imposed on an interstate transaction would withstand Commerce Clause scrutiny. This test requires that the tax must (1) be applied to an activity with a substantial nexus with the taxing state, (2) must be fairly apportioned, (3) must not discriminate against interstate commerce, and (4) must be fairly related to the services provided by the taxing state (***id.***). At issue in this case are the questions of nexus and of fair apportionment. The concept of nexus turns on the basic question of whether a state has sufficient connective basis for taxing a given transaction. Stated differently, without nexus there is no predicate for imposing tax. Assuming there exists sufficient nexus to impose tax, the question then becomes whether apportionment is required so as achieve both (a) internal consistency, and thus avoid multiple taxation of the same taxpayer and transaction, as well as (b) external consistency, so as to tax only the portion of the interstate activity that reasonably reflects the in-state component of the activity (***Goldberg v. Sweet***, 488 US 252).

I. Resolution of the case at hand starts with the fact that the tax in question, like that in ***Jefferson Lines***, is a sales tax. What obviously troubled the Tribunal in ***General Electric*** and its progeny was the fact that some portions of the contracted-for service, including the treatment and disposal of the waste, occurred outside of New York State. Without the benefit of the ***Jefferson Lines*** analysis, the Tribunal concluded that the receipt and the resulting tax must be apportioned so as to reflect the occurrence of such out-of-state activities and avoid violating the Commerce Clause. Apparently notwithstanding its clear conclusion that the contracted-for service was an integrated real property maintenance service fully taxable pursuant to Tax Law § 1105(c)(5) as purchased by a taxpayer with presence in New York for performance on that taxpayer's New York real property, the Tribunal recognized that the overall stream of activity included services performed out of state and was specifically concerned that such out-of-state segments of the integrated service could be subjected to tax by another jurisdiction.[4]

J. Application of the ***Complete Auto*** factors in the context of a sales tax imposed on the sale of a service performed across state lines was examined in ***Oklahoma Tax Commn. v. Jefferson Lines, supra.***). ***Jefferson Lines*** involved Oklahoma's imposition of a four percent tax on the full purchase price of a ticket for interstate travel sold by a Minnesota bus company doing business in Oklahoma. The ticket was purchased by the customer in Oklahoma and the travel originated in Oklahoma but terminated in another state. The Court ultimately held that a state sales tax on the entire unapportioned receipt from the sale of a transportation service originating in the taxing state does not present an undue burden on interstate commerce in violation of the Commerce Clause. In ***Jefferson Lines***, the Court concluded that the sale of a service, like the sale of goods, has sufficient nexus to the state in which the sale is consummated to be treated as a local transaction taxable by that state. Since the ticket for interstate travel was purchased in Oklahoma and the service purchased (transportation) commenced in Oklahoma, the Court determined there was sufficient nexus between Oklahoma and the interstate transaction to meet the nexus requirement outlined in ***Complete Auto***.

K. In ***Jefferson Lines***, part of the interstate travel service contracted and paid for was delivered outside of Oklahoma. Nonetheless, the Supreme Court concluded that it was

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[4] As noted, all of the Tribunal's prior cases, except for ***Olin Corp.***, were decided prior to ***Jefferson Lines***. Further, although ***Jefferson Lines*** had been issued prior to the Tribunal's decision in ***Olin Corp.*** (and noting that the Division brought ***Jefferson Lines*** to the Tribunal's attention in its arguments in ***Olin Corp.***), the Tribunal nonetheless did not address the impact of ***Jefferson Lines*** in its decision in ***Olin Corp.*** This may be because the fact pattern in ***Olin Corp.*** followed that in ***General Electric*** and the Tribunal's other earlier cases, with the real property, the taxpayer and the waste situated in New York State, thus clearly providing nexus to tax the transaction. Ultimately, however, the Supreme Court holding in ***Jefferson Lines***, coupled with the fact that here the taxpayer and the real property being serviced are situated outside of New York, requires a different conclusion than that reached in ***General Electric*** and its progeny.

permissable for Oklahoma to impose its sales tax on the entire receipt from the contracted-for service without apportionment, since the sale of the service (occurring upon the purchase of the ticket) as well as the provision of some of the travel service occurred in Oklahoma. The Court went on to state that the provision of the balance of the contracted travel service outside of the state of Oklahoma did not mandate apportionment so as to avoid Commerce Clause infirmity. Under this holding, then, the out-of-state performance (or delivery) of some portions of the integrated real property maintenance service contracted for in New York in the case of ***General Electric***, without apportionment of the receipt (or of the sales tax imposed thereon), would not have resulted in a violation of the Commerce Clause and its internal and external consistency tests developed thereunder in ***Goldberg v. Sweet (supra).*** The Court in ***Jefferson Lines*** concluded that sales of services were fundamentally the same as sales of goods for purposes of the imposition of sales taxes thereon. The Court relied on a line of cases including ***McGoldrick v. Berwind-White Coal Mining Co.*** (309 US 33, 84 L Ed 565), in which sales tax on the sale of coal shipped into New York was sustained against an out-of-State coal mining company which maintained a New York sales office, executed contracts for the sale of coal in New York, and delivered coal to its New York customers using its own barges, notwithstanding that the company could also be subject to a severance (or other) tax in another jurisdiction on the same coal. After examining its prior cases on the sale of goods and services, the Court in ***Jefferson Lines*** reasoned that Oklahoma had nexus to impose its sales tax on the full unapportioned receipt for the in-state sale of the ticket for providing the service of interstate travel commencing in Oklahoma but terminating elsewhere, as follows:

> A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which the buyer is taxed. We have therefore

> consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.
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> Such has been the rule even when the parties to a sales contract specifically contemplated interstate movement of the goods either immediately before, or after, the transfer of ownership . . . [A] necessary condition for imposing the tax was the occurrence of "a local activity, delivery of goods within the State upon their purchase for consumption . . . ." [T]he very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place, insulated the buyer from any threat of further taxation of the transaction.
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> . . . *A sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery*. (***Oklahoma Tax Commn. v. Jefferson Lines***, 514 US at 186,187; emphasis added)

The ***Jefferson*** Court continued its analysis and conclusion that unapportioned taxation of a sale, whether of goods or of services, by the state where the sale occurs and the goods are delivered or some of the service is provided, is not subject to the risk of multiple taxation since the sale is "consummated in only one State" (***id***. at 187). The Court stated:

> [a]s we put it in ***Berwind-White***, a necessary condition for imposing the tax was the occurrence of "a local activity, delivery of goods within the State upon their purchase for consumption." So conceived, a sales tax on coal, for example, could not be repeated by other States, for the same coal was not imagined ever to be delivered in two States at once. Conversely, we held that a sales tax could not validly be imposed if the purchaser already had obtained title to the goods as they were shipped from outside the taxing State into the taxing State by common carrier [citation omitted]. The out-of-state seller in that case "was through selling" outside the taxing State [citation omitted]. In other words, the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place, insulated the buyer from any threat of further taxation of the transaction.
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> Here . . . the tax falls on the buyer of services, who is no more subject to double taxation on the sale of these services than the buyer of goods would be. The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of

> the same combination. The economic activity represented by the receipt of the ticket for "consumption" in the form of commencement and partial provision of the transportation service thus closely resembles the ***Berwind-White's*** "delivery of goods within the State upon their purchase for consumption," especially given that full "consumption" or "use" of the purchased goods within the taxing State has never been a condition for taxing the sale of those goods. Although the taxpayer seeks to discount these resemblances by arguing that the sale does not occur until delivery is made, nothing in our case law supports the view that when delivery is made by services provided over time and through space a separate sale occurs at each moment of delivery, or when each State's segment of transportation State by State is complete. The analysis should not lose touch with the common understanding of a sale . . . (***id.***, at 187-191).

L. According to the Court in ***Jefferson Lines***, the taxable transaction is the sale, an event identified by "agreement, payment and delivery of some of the services. . . ." This event occurs at a single time and place, even when delivery is made "by services provided over time and through space. . . ." The single imposition of a sales tax with respect to that particular identified event thus occurs only once, and upon only one taxpayer, to wit, the *purchaser* of the goods or services being sold. As a result, taxing such purchaser on the full value of the sale as measured by the receipt therefor at the time of the sale event, without apportionment, results in no consequent opportunities for multiple taxation *of the same taxpayer* (the purchaser) since no other time and place can claim to be the site of the sale event as identified (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***).

In the context of the transactions in issue in this case, nexus focuses on the relationship between New York, the taxable transaction (i.e., the sale of the integrated real property maintenance service) and the purchaser of that service (i.e., the taxpayer customer as opposed to the vendor of the service who is charged with the obligation of collecting and remitting the tax). In ***General Electric*** and the following cases, the Tribunal first determined that New York had sufficient nexus, via the sale of the integrated real property maintenance service to be performed on property located within New York State, to impose sales tax under Tax Law § 1105(c)(5). Having thus first found sufficient nexus to impose the tax, the Tribunal then went on to consider, and ultimately determine, the need for apportionment thereof (a conclusion rendered incorrect in light of ***Jefferson Lines***). In contrast to ***General Electric*** and its progeny the facts in the instant matter, involving the sale of an integrated real property maintenance service to be performed on property located outside of New York State, do not provide sufficient nexus to support imposition of New York sales tax in the first instance. Without such nexus, there is no tax imposed and, as a consequence, no tax to be apportioned.[5]

M. The Division attempts to distinguish ***Jefferson Lines*** by arguing that a transportation service has no "discrete elements," whereas the service at issue in this case includes processing of tangible personal property in New York, which is a discrete service activity performed in New York upon "the property" while it is situated in New York. The Division is correct only to the extent that waste processing can constitute a discrete service in its own right. In point of fact, such a service, contracted for on its own, is taxable under Tax Law § 1105(c)(2) (***CECOS Int'l., Inc. v. State Tax Commn.***). However, in this case, such processing is a part of the overall unitary integrated real property maintenance service sold by petitioner to its customers for performance with respect to their out-of-state real property. There is no separate, or subsequent, sale of a processing service to such taxpayer customers which would link them to New York or subject them to tax on such basis. In fact, the only link between the processing which petitioner

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[5] The Division's position would require apportionment (or allocation) of a portion of the out-of-state sale receipt to New York, and then subject the same to tax based on the fact that part of the service sold to petitioner's customer was delivered, post sale, in New York. The majority opinion in ***Jefferson Lines*** recognized that part of the transportation service sold was delivered, post sale, in jurisdictions outside of Oklahoma, but nonetheless supported Oklahoma's taxation of the full receipt for the interstate service provided initially in Oklahoma and subsequently in other jurisdictions. The Division's position, in contrast, essentially arrives at the result flowing from the dissenting opinion filed by Justice Breyer in ***Jefferson Lines***.

performs in New York and petitioner's customers is that the tangible personal property (the waste) being processed was removed from the customers' out-of-state real property. Such removal is the very service to real property which such customers contracted for and which would be subject to sales tax under section 1105(c)(5) in its unapportioned entirety (including all of its service segments or components as a whole), if such (c)(5) service transaction had nexus with New York (i.e., if the transaction, the taxpayer customer and the real property upon which the (c)(5) service is performed were located in New York). Petitioner is not selling, and its customers in these transactions are not buying, simply a processing and disposal service. Rather, petitioner is selling to its customers a real property maintenance service which includes, within its integrated components, a processing and disposal segment. The courts and the New York Tax Law have given significance to this distinction between selling a discrete (c)(2) service and selling a (c)(5) maintenance service to real property (***see, CECOS Int'l., Inc. v. State Tax Commn., supra.***). In this case, the place of sale, the customer and the provision of service at the out-of-state real property leaves no nexus between such discrete taxable event (the sale and service), the taxpayer customer, and New York pursuant to which New York could apply its Tax Law and impose tax on such customer or, as a result, obligate petitioner to collect and remit such tax.

N. The Division argues that petitioner's position essentially negates New York's right to tax the service of processing and disposal of waste when such service is performed in-State upon waste brought here from another jurisdiction. Petitioner, for its part, does not challenge such taxation, but rather only points out that there must be nexus to support the same. Thus, where an out-of-state purchaser taxpayer delivers (or arranges the delivery of) its waste to the in-State waste processor, it is purchasing a taxable (c)(2) service. Nexus between the purchaser of the service, the provision of the service and New York is in such instances readily apparent. In contrast, where (as here) an out-of-state customer purchases the service of removal of waste from its out-of-state real property, it is purchasing just that, a real property maintenance service. The seller's performance of such service, delivered outside of New York by the removal of the waste from such property, does not result in nexus between New York and the out-of-state purchaser of the service to be performed on its out-of-state property so as to allow New York to impose its sales tax on the service purchased. This is true even though provision of the service contemplates and in fact includes performance of the balance of the *seller's* activities in fulfilling its contract (processing and disposing of the waste) in New York State (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***) As the Court in ***Goldberg v. Sweet (supra.)***, observed, the terminus of a service in one jurisdiction would not, without more, provide the requisite nexus for that state to impose a sales tax on a sale which occurred in another jurisdiction (***id.***, at 261).

The Division's argument not only overlooks the fact that the tax in question is imposed on the service of maintaining *real* property (as opposed to the service of processing *tangible personal property*), but also overlooks the fact that a transportation service, as acknowledged by the Court in ***Jefferson Lines***, could easily be viewed, for apportionment purposes, on a state-by-state segmented basis (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***, at 191). The Court in ***Jefferson Lines*** refused to endorse this view, but instead focused on the locale and point in time when the sale and commencement of the service occurred. In ***Jefferson Lines***, the service delivered within and without Oklahoma was a continuum of transportation. In ***General Electric*** and its progeny, the service delivered within and without New York State was maintaining real property via the continuum of handling (pickup, transport, treatment and disposal) hazardous waste. In each instance, the sale occurred and delivery of the service was initiated in the taxing jurisdiction. Unlike ***General Electric***, these factors were found sufficient by the Supreme Court in ***Jefferson Lines*** to allow unapportioned sales taxation of the entire receipt for the service sold.

O. The Division also argues that the segments of the integrated service which occur in New York (processing and disposal) are the *more significant economic segments* of the integrated service, a fact which allegedly militates in support of requiring taxation of the portion of the receipt attributable to such segments. However, the Court in ***Jefferson Lines*** ascribed no particular significance to the types of service segments which might be performed in and out of the taxing state, or the relative economic value or substantiality thereof. Rather, the Court focused on the time and place of the *sale* of the service and its connection at that time, via the "agreement, payment and delivery of at least some of the contracted for service," to the taxing jurisdiction (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***, at 190). The Court noted that the taxable event is the sale, which occurs at a single time and place, even when "delivery is made by services provided over time and through space" (***id.***).

P. Applying the foregoing analysis to the facts of this case leads to the conclusion that New York may not tax the receipts from the transactions at issue. Simply stated, the integrated service at issue is a real property maintenance service sold and to be performed on real property located outside of New York State. Delivery of the service commences in the jurisdiction of the sale, outside of New York, with the removal of waste from the real property and transportation thereof. The sale transaction is thus consummated and the performance of the service is initiated outside of New York State. The fact that petitioner concludes performance of its contracts at its New York facility is of no moment. In short, there is no "sale" in New York upon which to impose a sales tax. New York is attempting to impose a *sales* tax on a transaction where the sale of the service occurs outside of New York, the real property upon which the taxable service is being performed is located outside of New York, and delivery of the service is initially undertaken outside of New York. Under these facts, New York lacks the requisite nexus to impose tax under Tax Law § 1105(c)(5) on the sale of the integrated real property maintenance services at issue.[6]

Q. The practical impact of this determination, which arrives at a different result than that reached in ***General Electric*** and its progeny, is that New York, for lack of nexus, may not tax under section 1105(c)(5) any part of the receipts from petitioner's contracts for the provision of the integrated service of removing hazardous waste from out-of-state real properties, including the portions thereof which might be said to represent the in-state treatment and disposal charges, notwithstanding that such latter portions of the integrated service physically occur in New York State. Conversely, of course, it follows that New York may impose tax, under section 1105(c)(5), on the entire unapportioned receipts for providing such an integrated service for real property located in New York, notwithstanding that a portion of such integrated service occurs, as in ***General Electric***, outside of New York State. The analysis in ***General Electric*** and its progeny, at least for purposes of internal and external consistency and apportionment, focused on the segments of activities included and performed within the integrated service, while ***Jefferson Lines***, consistent with the cited New York cases, focused on the taxing state and the taxable transaction as a whole or unit at the time of its sale.[7]

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[6] It is important to remember that petitioner is not the *taxpayer*, but rather is the vendor who collects the tax due from the purchasing customer and remits the same to the State of New York. The taxpayer is the purchaser, the customer who contracts with petitioner for the provision of the desired service (***see,*** Tax Law § 1101[b][2] [which defines "purchaser" as "[a] person who purchases property *or to whom are rendered services, the receipts from which are taxable under this (Article 28)*]; emphasis added).

[7] As the Administrative Law Judge who authored the determinations in ***Bristol-Myers***, ***Rollins Environmental***, ***Waste Conversion*** and ***Olin Corp.***, each consistently following the rationale and result reached in ***General Electric***, and each being affirmed in turn by the Tribunal, I am acutely aware that the determination in this case departs from the rationale and result in such cases. Such departure is compelled by the subsequent rationale and holding of the U.S. Supreme Court in ***Jefferson Lines***.

R. Under the holding in ***Jefferson Lines***, the sale of the taxable service transaction and the provision of some of the contracted for services at the location of the real property is sufficient predicate for imposition of a sales tax on the unapportioned receipt for the service sold. Further, the ***Goldberg*** tests of internal and external consistency, upon which the Tribunal ultimately focused in concluding that apportionment was required are clearly met under the reasoning set forth in ***Jefferson Lines***. Internal consistency requires a conclusion that if every state enacted a sales tax identical to that being applied, there would be no multiple taxation of the same transaction. That is, if each of the jurisdictions in which petitioner's customers were located had enacted a sales tax provision identical to Tax Law § 1105(c)(5), there would be no multiple sales taxation of such customers with regard to the sale of the integrated real property maintenance service to such customers. That is, each such state would have the requisite nexus under ***Jefferson Lines*** to tax the entire receipt from the sale of the integrated maintenance service including all components (removal, transport, processing and disposal) comprising such integrated service without apportionment. As in ***Jefferson Lines***, the sale is a discrete event and no other state could claim to be the site of the sale coupled with initial delivery of the service to the real property ("agreement, payment and delivery of some of the service"). Such necessary combination of elements would be lacking with respect to any other jurisdiction seeking to impose tax on any part of the receipt (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***, at 186, 189). Turning to external consistency, the same requires an examination of whether the tax is imposed only on the portion of the interstate activity that reasonably reflects the in-state component of the activity being taxed. In ***Jefferson Lines***, the taxed activity was the sale of the service of transportation. The sale occurred in Oklahoma, and the transportation commenced in Oklahoma and continued into and terminated in other jurisdictions. Here, the taxed activity is the sale of the service of maintenance of real property. The sale occurs and the real property is located outside of New York State, and the provision of the real property maintenance service of removing the hazardous waste from the property (in all of its various phases) commenced in such other jurisdictions, although continuing into and terminating in New York State. The Court in ***Jefferson Lines*** found sufficient basis to localize the sale transaction to the jurisdiction where the sale and initiation of service occurred, and concluded such in-state components of the activity were sufficient to support sales tax on the entire receipt therefor, with no apportionment by such jurisdiction, without violating the external consistency test of ***Goldberg v. Sweet*** (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***, at 196). The same reasoning applies to the transactions in question here, providing the basis for concluding that the sale of the integrated real property maintenance service occurs and is properly taxable in the real property jurisdiction. In this case, the transactions in issue were not subject to sales tax by New York State, via apportionment or otherwise, under section 1105(c).

S. In view of the foregoing, the Division's argument that petitioner's challenge goes to the facial constitutionality of Tax Law § 1105(c)(5) is rejected. Petitioner's challenge in fact is to the Division's resort to apportionment as dictated by the Tax Appeals Tribunal in its earlier cases. This is not a facial challenge to the Tax Law, but rather is a challenge to the Tribunal imposed requirement of apportionment to an otherwise fully taxable (or in this case otherwise nontaxable) transaction and receipt. Petitioner accepts that the Tax Law, at sections 1101(b)(3) and 1105(c)(5), contemplates taxing the entire receipt for the provision of the services enumerated thereunder, including a real property maintenance service as is at issue herein, as opposed to taxing some apportioned part of such receipt intended to represent the value of such segments of the service as are physically performed in New York. As written, the statute fully taxes the receipt for the service, constrained of course only by the constitutional limitation that no tax may be imposed where there is insufficient nexus to support its imposition. In light of ***Jefferson Lines***, which supports the conclusion that the transactions in issue are not subject to the tax for lack of nexus with New York and which also concludes that apportionment is not required, it becomes clear that the Division's attempt to impose tax constitutes an invalid application of a facially constitutional statute rather than a claim that the statute as enacted violates constitutional standards.[8]

T. The Division also argues in its brief that it may impose sales tax, independently, under Tax Law § 1105(c)(2) on the portion of petitioner's sales receipts derived from the New York segments of the activities performed (processing/treatment and disposal). The Division's attempt to tax in this manner apparently relies in part on an argument that the clear categorization within petitioner's accounting system as reviewed on audit ("stabilization cost center revenues") reveals the independent New York identity and value of such service segments. This argument is rejected. First, the transactions at issue are sales of an integrated real property maintenance service and not sales of section 1105(c)(2) processing services. This is made clear from the stipulated facts. Moreover, the case law is consistent and clear that the types of transactions as are in issue here are treated as one integrated service rather than a series of severable services (***see, CECOS Int'l., Inc. v. State Tax Commn., supra.***). The transactions in issue are each a sale of an integrated service, and there is no separate or later sale of a treatment and disposal service. Thus, the only transaction which may be subject to tax is the sale

[8] For its part, the Division is not to be chastised for attempting to achieve the result directed by the outcome of the prior Tribunal cases, to wit, imposing the tax only on the portion of the receipts which might be said to be related or apportioned to the segments of the service which are delivered within New York State (the processing and disposal of the waste).

of the entire integrated service. As explained above such sale transaction, at its full value, is beyond the reach of New York's tax law for lack of nexus, and neither by apportionment nor by treating the processing and disposal parts of the service as severable may New York impose tax. (Conclusion of Law "C".)[9] Petitioner is "through [i.e., finished] selling" when it commences performance of the sold service by removing the waste from its taxpayer customers' out-of-state real properties. There is no new (or ongoing) sale when the parts of the service which occur in New York take place, nor is there any further connection between the sale, the real property being serviced, or the *taxpayer* customer and New York occasioned by virtue of petitioner's performance of processing and disposal in New York (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***, at 187, ***citing McLoed v. J.E. Dilworth Co.***, 322 US 327, 88 L Ed 1304). To accept the Division's argument would be to conclude that the petitioner's customers purchased two separate services, to wit, an integrated real property maintenance service and a processing service with disposal. Such a conclusion is not supported by the facts, nor is it consistent with the case law. If the transaction is an integrated real property maintenance service including all of its segments per section 1105(c)((5), it cannot also fairly be classified as a separate sale of a section 1105(c)(2) processing service. Completion of the contracted-for service by petitioner in

[9] As petitioner notes, this argument is put forth for the first time in the Division's brief and conflicts with the stipulated facts which indicate the Division's position to be that it could tax the in-state portion of the receipts from the sale of the transactions under section 1105(c)(5) via the apportionment required by the Tribunal in ***General Electric*** and its progeny. It is noteworthy that neither party disputes, and ***Jefferson Lines*** supports, the position that New York may impose other taxes (e.g., a gross receipts tax or an income tax) on *petitioner* on the income derived from the in-state portion of the receipts derived from *petitioner's* provision of the service segments in New York (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***, at 187, 188, ***citing McGoldrick v. Berwind-White Coal Mining Co., supra.***, at 53). However, as petitioner stresses and ***Jefferson Lines*** makes clear, in the context of a sales tax the focus, for nexus and apportionment analysis, must be on the location of the sale transaction and the delivery of at least some of the service in such locale. Thus, while a state in which a given service occurs may tax the *service provider* on that state's fair share of the income or receipts derived from providing such service, such state cannot tax the *purchaser* in a sale transaction when such discrete event (the sale and provision of some of the service) occurs in another jurisdiction simply on the basis that some elements of the service sold are subsequently performed in their state (***Oklahoma Tax Commn. v. Jefferson Lines, supra.***).

New York does not provide nexus with the out-of-state customer to whom a real property maintenance service has been sold. The court in ***Jefferson Lines*** focused on the sale transaction and not on the various times and places, including disparate jurisdictions, where the segments of the service purchased might ultimately be performed. In so doing, the Court found not only nexus between the taxpayer, the transaction and the taxing jurisdiction, but also concluded that apportionment of the sale receipt is not necessary. In sum, New York may not, by apportionment of receipts or otherwise, impose a sales tax on petitioner's out-of-state customers who purchased from petitioner an integrated real property maintenance service to be performed on their out-of-state real property. Such *purchasers* simply are not engaged in any sales taxable activities in New York State in connection with such transactions.

U. Petitioners' motion for summary determination is granted, the Division's cross motion for summary determination is denied; the petition of CWM Chemical Services, Inc. and CWM Chemical Services, LLC is granted and the notices of determination dated September 17, 2001 are hereby canceled.

DATED: Troy, New York
September 12, 2002

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE