STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of **ISLAND RECYCLING CORP.**[1] for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1994 through May 31, 1997.	:	DETERMINATION DTA NOS. 822193, 822194 822195, 822196 AND 822197

Petitioners, Island Recycling Corp. et al., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1994 through May 31, 1997.

On March 29, 2011, the Division of Taxation, by its representative, Mark F. Volk, Esq. (James Della Porta, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, for summary determination in its favor pursuant to 20 NYCRR 3000.9(a)(1)(i). Accompanying the motion was the affirmation of James Della Porta, Esq., dated March 28, 2011, and annexed exhibits supporting the motion. On September 10, 2012, petitioners, appearing by Kenneth I. Moore, Esq., submitted an opposing affidavit with supporting documentation and a cross-motion for permission to file an amended petition.[2] Accordingly, the 90-day period for the

[1] These motions involve five petitions that have been consolidated. The petitioners are: Island Recycling Corp. (DTA# 822193), Omni Recycling of Babylon, Inc. (DTA# 822194), Anthony Core, Officer of Omni Recycling of Babylon, Inc. (DTA# 822195), Patricia DiMatteo, Officer of Island Recycling Corp. (DTA# 822196), Patricia DiMatteo, Officer of Omni Recycling of Babylon, Inc. (DTA# 822197).

[2] Petitioners were granted an extension of time to respond until September 10, 2012.

issuance of this determination commenced on September 10, 2012. After due consideration of the affidavits, annexed exhibits, and all pleadings and proceedings had herein, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the parties are bound by the terms of a stipulation.

II. Whether petitioners' cross-motion to amend the petitions should be granted.

III. Whether petitioners are liable for the frivolous petition penalty.

FINDINGS OF FACT

1. On May 24, 1999, the Division of Taxation (Division) issued to each of the petitioners a Notice of Determination assessing sales and use tax due as follows:

(a) The Division issued a Notice of Determination, dated May 24, 1999, to Island Recycling Corp., (Island Recycling) that assessed sales and use taxes for the period June 1, 1994 through May 31, 1997 in the amount of $865,040.83 plus interest for a balance due of $1,162,060.72. The Division also issued a Notice of Determination to Patricia DiMatteo, dated June 17, 1999, as a responsible officer or responsible person of Island Recycling, that assessed sales and use taxes for the period June 1, 1995 through May 31, 1997 in the amount of $547,718.83 plus interest for a balance due of $704,033.03.

(b) The Division issued a Notice of Determination, dated November 5, 1999, to Omni Recycling of Babylon, Inc., (Omni Recycling) that assessed sales and use taxes, for the period March 1, 1996 through May 31, 1998, in the amount of $700,798.02 plus interest for a balance due of $838,691.67. The Division also issued notices of determination to Patricia DiMatteo and Anthony Core as responsible officers or responsible persons of Omni Recycling that assessed

sales and use taxes, for the period March 1, 1996 through May 31, 1998, in the amount of $700,798.02 plus interest.

(c) The basis of the liability asserted against the corporations, and the derivative liability that was asserted against the individual petitioners, was premised on the conclusion that sales tax is due on the charges paid for the transfer of solid waste materials from a transfer station to approved disposal facilities.

2. Petitioners filed requests for conciliation conferences with respect to each of the notices and, in conciliation orders dated December 28, 2007, each of the requests was denied and the statutory notices were sustained.

3. The Division of Tax Appeals received petitions challenging the respective notices issued to petitioners.

4. On May 8, 2008, an administrative law judge in the Division of Tax Appeals issued a determination in ***Matter of Island Waste Services*** that held that the amounts paid to third-party trucking companies for the removal of solid waste materials from a licensed transfer station to an approved disposal facility were not subject to sales tax.

5. Island Recycling and Omni Recycling entered into a stipulation of facts with the Division, dated August 8, 2008, which provided, in pertinent part, as follows:

> 17. Each of the Petitioners herein, by a stipulation duly executed by their authorized representatives and by Counsel for Respondent, agrees to be bound by a final decision rendered in the Matter of the Petition filed by Island Waste Services, Ltd.
>
> 18. The parties herein agree that should the Tax Appeals Tribunal, or an appellate court, affirms [*sic*] the determination of the Administrative Law Judge or otherwise grants [*sic*] the Petition filed by Island Waste Services, Ltd., Petitioners herein will be liable only for sales tax due relating to the removal of waste generated by their recycling activities in the following amounts:

Island Recycling	$43,252.00
Omni Recycling	$35,040.00; plus statutory interest thereon.

19. The parties herein further agree that in the event that the Tax Appeals Tribunal, or an appellate court, reverses the determination of the Administrative Law Judge or otherwise decides that a sales tax is due on the charges paid by Island Waste Services, Ltd. for the transfer of the solid waste materials from its transfer station to approved disposal facilities, such final decision shall be binding on and control the disposition of the instant matter.

20. Petitioners' representative herein, Stephen L. Solomon, is also the duly authorized representative of the parties listed below, all of whom timely filed petitions with the Division of Tax Appeals to contest Notices of Determinations assessing sales taxes on them as responsible officers/persons of Petitioners. Each of those parties, by a stipulation duly executed by their authorized representative and by Counsel for Respondent herein, agree to be bound by a final decision rendered in this matter without separate hearings and the issuance of separate decision pertaining to each of such petitions.
Responsible Officer Assessments:

Anthony E. Core	(Omni Recycling)	DTA # 822195
Patricia DiMatteo	(Island Recycling)	822196
Patricia DiMatteo	(Omni Recycling)	822197

6. In August 2008, the Division and the individual petitioners also entered into stipulations. Each of the stipulations provided: that "the sole issue presented in the instant matter is whether the transportation of waste from a waste transfer station to an approved disposal facility was and is considered to be maintaining, servicing, or repairing of the real property on which the transfer station is located," that the same issue was being considered by the Division of Tax Appeals in ***Matter of Island Recycling Corporation*** and ***Matter of Omni Recycling of Babylon, Inc.***, that each petitioner has requested that the final decision as to the taxability of the transfer of waste from the transfer station in the forgoing cases be applied to them, and that, when the final decision in the forgoing cases is reached, it will control the disposition of their individual matters.

7. In ***Matter of Island Waste Services, Ltd.*** (Tax Appeals Tribunal, April 16, 2009), the Tax Appeals Tribunal held that waste hauling from a transfer station was a service subject to sales tax. This conclusion was confirmed by the Appellate Division in ***Matter of Island Waste Services, Ltd v. Tax Appeals Tribunal*** (77 AD3d 1080 [3d Dept 2010]). Thereafter, the Court of Appeals denied leave to appeal (16 NY3d 712 [2011]).

8. In or about 2004, Island Recycling and Omni Recycling, commenced a declaratory judgment action to contest the taxability of the waste hauling services that they purchased. In the course of the action, the parties stipulated that the only issues in dispute were whether the service performed by the haulers is an exempt transportation service or a taxable waste removal service or whether a portion of the service that occurred outside of New York State is subject to New York State sales tax. The Court concluded that since the service provided by the haulers was to remove a waste product from a site for disposal, rather than the transportation of a useful product to a different location, the activity was taxable as a maintenance service to real property. The Court's opinion then proceeded to reject plaintiffs' claims of discriminatory treatment as well as plaintiff's argument that it was unconstitutional to impose tax on the entire receipt for waste removal services notwithstanding the fact that a portion of the service occurred outside of New York State. The Department of Taxation and Finance's cross-motion for summary judgment was granted declaring Tax Law § 1105(c) and 20 NYCRR 526.5(a) constitutional as applied to plaintiffs, that the service performed by plaintiffs was taxable as a maintenance service and that sales tax was properly imposed on the whole receipt for the service (***Island Recycling Corp. v. New York State Dept. of Taxation and Fin.***, Supreme Court, Suffolk County, April 1, 2005). The order of the Supreme Court, Suffolk County was affirmed in ***Island Recycling Corp. v. New***

York State Department of Taxation and Fin. (34 AD3d 739 [2d Dept 2006], ***lv denied*** 8 NY3d 956 [2007]).

9. A representative of the Division asked petitioners' representative to withdraw the petitions filed in these matters and the request was refused.

10. In opposition to the motion, petitioners submitted affirmations by Kenneth I. Moore, Esq., and Stephen L. Solomon, Esq. The affidavit of Mr. Moore states that, notwithstanding the stipulations entered into between the parties, the pending petitions should not be dismissed because there are unresolved issues regarding "the proper apportionment or computation of the amounts paid by Petitioner for such claimed maintenance services, as distinguished from amounts paid for non-taxable disposal services (i.e., the amounts paid for dumping the waste at a final disposal site - landfill or burn center." Petitioners contend that this issue was not addressed in the ***Island Waste*** case and is a question of fact requiring a hearing. Petitioners also posit that the Commissioner "has unconstitutionally, unlawfully, arbitrarily and capriciously discriminated against Petitioners by knowingly and willfully failing to apply the sales tax law equally to similarly situated competitors." Petitioners further maintain that the order of the Supreme Court that was affirmed by the Appellate Division, Second Department[3] related to the "sales tax due on the transportation of waste generated by their recycling activities . . . [i]t did not address the broader issue of the transportation of waste from a waste transfer station, nor the selective enforcement issue involving Waste Management NY, . . . whose sales tax audit was not even concluded until after the Supreme Court issued its order." It is submitted that there is nothing in

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[3] ***Matter of Island Recycling Corp. v. NYS Dept. of Taxation and Fin.*** (Supreme Ct., Suffolk County, April 1, 2005, ***affd*** 34 AD3d 739 [2d Dept 2006], ***lv denied*** 8 NY3d 956 [2007]).

the August 8, 2008 Stipulation that precludes the raising of new issues. Petitioners also note that the same issues were raised in amended petitions that are pending administrative review.

11. Petitioners also offered an affirmation by Stephen L. Solomon, Esq., to support their position that they were the victims of selective enforcement.

12. In opposition to the cross-motions made by petitioners, the Division submitted a letter that stated that the cross-motions to amend the petitions should be denied because: petitioners are bound by their stipulation; the Division would be prejudiced by having to litigate what occurred during an audit of an unrelated taxpayer a number of years in the past, and the claim of selective enforcement lacks merit.

SUMMARY OF THE PARTIES' POSITIONS

13. The Division maintains that the refusal of petitioners' representative to withdraw the petitions is in bad faith and that each of the petitions in this matter should be dismissed based on the respective stipulations. In the alternative, the Division posits that under the terms of the stipulation, the petition should be dismissed because it fails to state a cause of action for which relief may be granted. As an additional ground, the Division contends that summary judgment should be granted because the petitions have no merit as a matter of law.

14. The Division also posits that petitioners' continuance of this proceeding after the Court of Appeals decision in ***Matter of Island Waste Services v. Tax Appeals Tribunal*** is frivolous and is being done for the purpose of delay. Accordingly, the Division requests that the Division of Tax Appeals assess each petitioner a frivolous petition penalty in the amount of $500.00.

15. Petitioners submit that the stipulation to be bound by the decision in the ***Island***

Waste Services case was merely an agreement to be bound by the final determination as to the question there in issue, i.e., whether the transportation of processed waste from a transfer station was a taxable service. Petitioners contend that they did not waive their right to raise new issues. It is also submitted by petitioners that there is no prejudice by having to litigate the constitutional issue and that their cross motion sets forth a prima facie case of disparate treatment that they should be allowed to address. It is submitted that this is not a case of deciding to audit one corporation and not another but a situation where a large corporation was not taxed, but two other corporations, which were significantly smaller, were taxed on payments to third-party truckers.

CONCLUSIONS OF LAW

A. The threshold issue in this case is the effect of the stipulation since, if the Division's interpretation of the stipulation prevails, it will be dispositive of a portion of the remaining issues. In New York, stipulations have generally been treated as binding upon the parties. This principle was set forth in ***McCoy v. Feinman*** (99 NY2d 295, 302, 755 NYS2d 693) as follows:

> Stipulations not only provide litigants with predictability and assurance that courts will honor their prior agreements (see Kaplan v. Kaplan, 82 N.Y.2d 300, 307 [1993]), but also promote judicial economy by narrowing the scope of issues for trial (see Hallock v. State of New York , 64 N.Y.2d 224, 230 [1984]). To achieve these policy objectives, a stipulation is generally binding on parties that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the stipulation orally on the record in open court (see CPLR 2104 ; Siegel, N.Y. Prac § 204, at 323; see also Hallock, at 230; Covert v. Covert, 50 A.D.2d 622, 623 [1975]).
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> When a stipulation meets these requirements, as it does here, courts should construe it as an independent contract subject to settled principles of contractual interpretation (see Keith v. Keith, 241 A.D.2d 820, 822 [3d Dept 1997]; De Gaust v. De Gaust, 237 A.D.2d 862, 862 [3d Dept 1997]). As with a contract, courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress (see e.g. Hallock, 64 N.Y.2d at 230; Matter of

> Frutiger, 29 N.Y.2d 143, 150 [1971]); or unless the agreement is unconscionable (see Christian v. Christian, 42 N.Y.2d 63, 73 [1977]; Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199 N.Y.479, 485 [1910]) or contrary to public policy (see e.g. Eschbach v. Eschbach, 56 N.Y.2d 167, 171 [1982]); or unless it suggests an ambiguity indicating that the words did not fully and accurately represent the parties' agreement (see e.g. Keith, 241 A.D.2d at 822) (***McCoy v. Feinman***, ***supra***, 755 NYS2d at 698).

B. The Rules of Practice and Procedure of the Tax Appeals Tribunal recognize the conclusive effect of stipulations in section 3000.11(e) of the Rules as follows:

> A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the tribunal, administrative law judge or presiding officer, or agreed upon by the parties. The tribunal, administrative law judge or presiding officer will not permit a party to a stipulation to qualify, change or contradict a stipulation in whole or in part, except where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and cannot be used against any of the parties thereto in any other proceeding.

C. The language of the stipulations should be interpreted according to the rules governing the interpretation of contracts (***McCoy v. Feinman***). It is a cardinal principle of contractual interpretation that "[a] written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties." (***Brad H. v. City of New York***, 17 NY3d 180, 928 NYS2d 221 [2011]; ***see also Scotto v. Georgoulis***, 89 AD 3d 717, 932 NYS2d 120 [2d Dept 2011]).

D. As set forth above, the corporate parties and the Division stipulated that "in the event that the Tax Appeals Tribunal, or an appellate court, reverses the determination of the Administrative Law Judge or otherwise decides that a sales tax is due on the charges paid by Island Waste Services, Ltd. for the transfer of the solid waste materials from its transfer station to approved disposal facilities, *such final decision shall be binding on and control the disposition of the instant matter*" (emphasis added). Here, the Appellate Division confirmed the decision of the

Tax Appeals Tribunal, which held that waste hauling from a transfer station was a service subject to sales tax. Since the Court of Appeals denied leave to appeal, the decision is final.

E. The plain and ordinary meaning of the quoted language in the stipulations entered into by the corporate petitioners permits only one conclusion - the final decision in the ***Island Waste Services*** case controls the disposition of these matters and requires that the petitions be dismissed. Although petitioners now have additional arguments that they wish to present, they have not offered any convincing reason why the stipulation is not dispositive.[4]

F. With respect to the individual petitioners, the parties stipulated that "when a final decision is reached in the Matter of Island Recycling Corporation and Omni Recycling of Babylon, Inc., the result of such decision shall be binding on and control the disposition of the instant matter." As discussed in the paragraph dealing with the corporate petitioners, the plain language used in the stipulations is subject to only one reasonable interpretation, and therefore, it must be enforced according to the words chosen by the parties (***McCoy v. Feinman***). A final decision has been reached in ***Matter of Island Recycling Corp.*** and ***Matter of Omni Recycling of Babylon.*** Although the individual petitioners may have additional arguments and evidence that they wish to present, they have not raised any of the recognized grounds for disregarding a stipulation. Accordingly, the stipulation agreed to by the individual petitioners controls the disposition of their petitions and requires that the petitions be dismissed.

G. Since the petitions are dismissed, the cross-motion to amend the petitions is denied as moot.

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[4] The limited grounds for disregarding a stipulation are set forth in ***McCoy v. Feinman***. None of these grounds have been raised in petitioners' pleadings.

H. The Division has requested that the frivolous petition penalty be imposed for maintaining a proceeding primarily for delay. Section 3000.21 of the Rules of Practice and Procedure provides for a penalty of not more than $500.00 if a petitioner maintains a proceeding primarily for delay or if the position maintained by petitioner is frivolous. This provision sets forth the following examples of frivolous petitions:

> (a) that wages are not taxable as income;
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> (b) that petitioner is not liable for income tax because petitioner has not exercised any privileges of government;
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> (c) that the income tax system is based on voluntary compliance and petitioner therefore need not file a return;
>
> (d) that Federal Reserve Notes are not "legal tender" or "dollars," and petitioner therefore cannot measure his or her income; and
>
> (e) that only states can be billed and taxed directly.

In ***Matter of Presutti*** (Tax Appeals Tribunal, June 23, 2011), the Tax Appeals Tribunal denied the Division's request to impose the frivolous petition penalty in response to a motion to reopen a proceeding. It was concluded that the petitioner's motion, though lacking in merit, did not warrant the imposition of a penalty because it was not similar to the examples listed in the regulation. Employment of the same test as that used in ***Presutti*** leads to the conclusion that, although petitioners' position lacks merit, the Division's request for the imposition of penalties against petitioners is denied because petitioners' position is not similar to the examples listed in 20 NYCRR 3000.21.

I. The Division of Taxation's motion for summary determination is granted, and the petitions of Omni Recycling of Babylon, Inc., Anthony Core, officer of Omni Recycling of Babylon, Inc., Island Recycling Corp., Patricia DiMatteo, officer of Island Recycling Corp., and

Patricia DiMatteo, officer of Omni Recycling of Babylon, Inc. are dismissed. The Division's request for the imposition of frivolous petition penalties is denied. Petitioners' cross-motion to amend the petitions is denied as moot.

DATED: Albany, New York
December 6, 2012

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE