STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TRUGREEN LIMITED PARTNERSHIP	:	DETERMINATION DTA NOS. 822258 AND 822499
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2001 through November 30, 2006 and June 1, 2007 through August 31, 2007.	:	

Petitioner, TruGreen Limited Partnership, 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 periods December 1, 2001 through November 30, 2006 and June 1, 2007 through August 31, 2007.

On March 24, 2009 and April 1, 2009, respectively, petitioner, appearing by Nixon Peabody LLP (Scott F. Christman, Esq., of counsel) and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Clifford M. Peterson, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by September 9, 2009, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner's purchase of certain printed warning materials, including product information guides and product information lists, for chemicals applied in the course of its service delivery was subject to sales tax.

II. Whether petitioner properly claimed a credit against sales or use tax for tax paid on its purchases of certain yard posting signs, or visual notification markers, used for marking treated areas.

FINDINGS OF FACT

The parties entered into a stipulation of facts, executed on March 19, 2009, comprised of 20 numbered paragraphs, all of which have been incorporated into the facts below, except stipulated facts 5, 9, 11, 12, 14, 15, 17, 18 and 20, which recite procedural matters or attachments and are either irrelevant or unnecessary.

The Division of Taxation submitted 48 proposed findings of fact, which have been incorporated into the facts below, except for proposed findings 1, 19 and 38, which did not accurately reflect the record, findings 2, 9, 18, 20, 21, 22, 23, 24, 27, 28, 33, 34, 36, and 37, which are not relevant or necessary, and findings 44, 45 and 46, which are in the nature of argument.

1. Petitioner was a Delaware limited partnership, authorized to do business in the State of New York during the periods December 1, 2001 through November 30, 2006 and June 1, 2007 through August 31, 2007 (the audit periods).

2. Petitioner provided taxable lawn, tree and shrub care services in New York including the application of fertilizer, pesticides and other maintenance services, for which it collected and remitted sales tax pursuant to the Tax Law.

3. Prior to performing any lawn, tree or shrub application containing pesticides, petitioner posted one or more visual notification markers (VNM's) on the customer's property, the delivery of which to the customer was required by New York State law. These VNM's were required to remain posted until the treated area was no longer hazardous, after which the customer was free

to do as it wished with them. VNM's were also posted for lawn, tree and shrub applications not containing pesticides.

The affidavits of Robert Mangan, petitioner's Northeast regional technical manager, and Ray Williamson, petitioner's tax supervisor, two employees with personal knowledge of petitioner's operations, confirmed petitioner's business practices with respect to its actual transfer of both pesticide and nonpesticide VNM's to customers and the fact that provision of the markers was intended as part of the service and that petitioner never intended to retrieve the used signs.

4. At the time petitioner entered into a contract with a customer in New York, petitioner delivered to it a product information guide which contained the safety information from the product labels of chemicals that might be used on the property. The guide was required to be delivered pursuant to New York law and must be approved by the New York State Department of Environmental Conservation (EnCon).[1] Its purpose was to enable customers to make an informed decision about the use of pesticides.

5. Each year prior to the first application of chemicals to a customer's property in New York, petitioner delivered to the customer a product information list which contained the information from product labels for each product which might be used on the customer's property. The product information list was required by law to be delivered annually to each New York customer and approved by EnCon. Petitioner delivered or attached the list to the homeowner's front door.

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[1]The technical compliance of TruGreen's printed warning materials or visual identification markers with EnCon's regulations is not at issue.

6. Although the State of New York required petitioner to deliver the product information guide and product information list to customers and install VNM's on their property, petitioner was not legally required to deliver VNM's to customers for applications of nonpesticide lawn, tree or shrub treatments like those containing fertilizers. However, petitioner delivered VNM's for those applications as well, believing that its customers benefitted from having the notification. After the VNM's were delivered to customers, petitioner did not return to the customer's property to retrieve the VNM's and it did not attempt to reuse the VNM's, product information lists or guides.

7. The VNM's delivered to customers for application of nonpesticide lawn, tree and shrub treatments contained printed material on the back including a brief description of TruGreen's various services, methods of payment, its website and a coupon.

8. The Division of Taxation (Division) audited the sales and use tax returns for petitioner for the audit period, including its purchases of printed informational materials and VNM's. The auditor, with the consent of petitioner, tested purchases from March 1, 2003 through May 31, 2003, and determined that petitioner had purchased printed warning materials for the chemicals used on customers' lawns without paying tax. The Division determined that these purchases were not part of petitioner's taxable services or bought for resale and represented .0532% of petitioner's gross sales for the test period. Using this percentage, the Division projected that petitioner should have paid a use tax of $81,005.69 on its purchases of printed warning materials for the period December 1, 2001 through November 30, 2006.

9. In addition to the tax determined to be due on the printed warning materials, the Division inspected petitioner's purchases of VNM's for the period March 1, 2006 through May 31, 2007 and noted that petitioner had paid sales tax on these purchases in the sum of

$11,249.03. However, on its form ST-810, New York State and Local Quarterly Sales and Use Tax Return for Part-Quarterly Filers, for the period ended August 31, 2007, petitioner reduced its sales tax payments by $225,967.53 in "credits against sales or use tax." Of the credits against tax, $11,249.03 represented the amount paid on the purchases of VNM's. The Division informed petitioner that it did not agree with its claim for credit since it believed the tax was properly due and payable on the VNM's for the same reason the tax was due on the printed warning materials, i.e., they were not bought for resale and were not part of petitioner's taxable services.

10. On February 15, 2008, petitioner received a Notice of Determination, L-029716309-1, which asserted additional sales and use taxes due of $81,005.69 plus interest, representing the tax due on the purchases of the printed warning materials.

11. The Division of Taxation issued a second Notice of Determination to petitioner, dated June 27, 2008, L-030306735-5, which asserted additional sales and use taxes due of $11,251.96 plus interest, representing the tax due on the purchases of the VNM's. Of the tax determined to be due, petitioner conceded its liability for $2.93, for purchases of tangible personal property other than the VNM's, and that amount is no longer in issue.

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioner contends that, as part of its taxable lawn care service, it provides to its customers certain printed materials which should not be taxed when purchased. Petitioner argues that Tax Law § 1101(b)(4) and § 1105(c)(5) exclude the imposition of tax on the purchase of printed materials when they are later actually transferred to the purchaser in conjunction with the performance of the taxable service. Further, the product information guide, product information list and the pesticide VNM's, required by EnCon regulations to be delivered to customers prior to the application of certain chemicals, are therefore also required to complete the sale of services to

petitioner's customers. Petitioner reasoned that this requirement reinforced its belief that the printed materials and VNM's were inextricable parts of the taxable service rendered.

13. Petitioner asserts that, although the VNM's delivered to customers for nonpesticide applications were not required by EnCon regulation, they were also transferred to customers as part of the taxable service, providing added value to the service, and therefore properly exempt from tax when purchased by petitioner.

14. Petitioner argues that the Division's assertion of tax on the purchase of the written materials and VNM's amounts to double taxation since they are a part of the taxable service which is taxed at the point of final sale. Petitioner believes that if it is required to pay a tax on its purchase of the property later sold to its customer, that customer will be paying a tax on the sales tax, amounting to an improper pyramiding of taxes.

15. The Division of Taxation contends that the written materials and VNM's are not actually transferred to customers in conjunction with the performance of the service subject to tax. The Division believes this language and the decision in ***Matter of Chem-Nuclear Sys.*** (Tax Appeals Tribunal January 12, 1989) support its view that the timing of the actual transfer is critical, and that the transfer of the printed materials and VNM's was not accomplished close enough in time to the performance of the taxable service. The Division also asserts that the written materials and VNM's are analogous to the paper on which a contract is printed and later given to a customer, which has nothing to do with the performance of the taxable service rendered and therefore not actually transferred to the customer in conjunction with the taxable service.

16. With respect to the VNM's, the Division argues that, in addition to the timing argument, petitioner's failure to retrieve or reuse the VNM's does not strengthen petitioner's

position. Property used in performing a service that has limited or no use thereafter, does not translate to an actual transfer of the property in conjunction with the performance of the service simply because petitioner chose not to reclaim the property because it may have been inconvenient.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a tax on the receipts from every sale of tangible personal property, except as otherwise provided. One of the exceptions to the imposition of tax is found in the definition of the term retail sale in Tax Law § 1101(b)(4), where it provides:

> A sale of tangible personal property to any person for any purpose, other than . . . [B] for use by that person in performing the services subject to tax under [1105(c)(5)] . . . where . . . the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Petitioner provides taxable lawn services in New York State and collects and remits sales tax pursuant to Tax Law § 1105(c)(5). The question presented is whether the printed materials and VNM's purchased by petitioner were actually transferred to its customers in conjunction with its lawn services, thus qualifying for the exception set forth in Tax Law § 1101(b)(4)(i) and further explained in 20 NYCRR 526.6(c)(6)(ii).

B. Purchases of the printed materials, specifically the product information list and the product information guide, were properly taxable pursuant to Tax Law § 1105(a) and did not escape taxation through the exception set forth in Tax Law § 1101(b)(4)(i) as property actually transferred to a purchaser in conjunction with the performance of a taxable service.

During the periods in issue, petitioner was in the business of making commercial lawn applications, a taxable service, defined in EnCon's regulations as the application of pesticide to ground, trees, or shrubs on public or private outdoor property. (6 NYCRR 325.1[s].) Pursuant to

EnCon regulations, petitioner was required to enter into a written contract with the owner of the property to which the commercial lawn application was to be made. The regulations provided that the contract "must" include a written copy, in at least 12-point type, of a list of pesticides to be applied including brand names and generic names of active ingredients and any warnings that appear on the labels of the pesticides to be applied, pertinent to the protection of humans, animals or the environment. (6 NYCRR 325.40[a][1],[4][i], [ii].)

Unfortunately, the form of the contract utilized by petitioner during the periods in issue was not placed in evidence, but it is assumed that petitioner was in compliance with EnCon regulations and included the elements listed in 6 NYCRR 325.40 in its contract, whether in the body of the contract, in an addendum or in separate documents incorporated by reference. Supporting this assumption is petitioner's own argument that the guide and list were provided to customers to satisfy the EnCon requirements. Since the information contained in the list and guide was required to be in the contract, it is reasonable to assume that those documents were incorporated by reference.[2] If petitioner desired to demonstrate that the list and guide were not intended to be part of the contract, it was incumbent upon it to prove it. (***Matter of Allied New York Services, Inc. v. Tully***, 83 AD2d 727, 442 NYS2d 624, 626 [1981]; 20 NYCRR 3000.15[d][5].)

Petitioner argues that its provision of the product information guide and product information list is excluded from the imposition of sales tax on their purchase pursuant to Tax Law § 1101(b)(4) and § 1105(c)(5) since they are later actually transferred to the purchaser in

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[2]"Generally, all writings which are part of the same transaction are interpreted together. One application of this principle is the situation where the parties have expressed their intent to have one document's provision read into a separate document. So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document . . . ." (11 ***Williston on Contracts*** § 30:25 [4th ed].)

conjunction with the performance of the taxable service. Petitioner's argument would be convincing if it were not for the provision of 6 NYCRR 325.40(a)(1) which mandates that pesticide application businesses enter into contracts with property owners prior to the service, the terms of which must include a list of the pesticides to be applied, including the brand and generic names of the active ingredients, and the warnings contained on the labels of pesticides to be applied, as pertinent to the protection of humans, animals and the environment.

The EnCon regulation does not specify the form of the contract to be used or how the required information is to be presented. Petitioner, in its own discretion, provided the required information in the form of discreet documents, the product information guide and product information list, to satisfy the regulatory mandate. Regardless of whether the information was made a part of the body of the contract, attached as an addendum or incorporated by reference, the information must be considered a contractual provision, given the EnCon regulation, which was distinct from the lawn care services provided. Since the contract was not made a part of the record, it is not known how the product information guide and list were referenced. However, it is assumed that the documents were referenced and that petitioner was in compliance with 6 NYCRR 325.40 (a)(1),(4)(i) and (ii), a point conceded by petitioner.

The auditor noted that 6 NYCRR 325.40 provided that the guide and list were mandated to be included in the contract and concluded that, in his experience, taxpayers were not exempt from the imposition of tax on written contracts upon transfer to customers. It is determined that the auditor's conclusion was correct, but for the reason that the product information list and guide, although actually transferred to the purchaser of the service, were not transferred in conjunction with *the performance* of the service subject to tax, i.e., the lawn care service; rather, they were

contractual terms, mandated by regulation, which petitioner chose to present in a commercially prepared format.

The EnCon regulations also provide that every certified applicator supply its customers, prior to the application of pesticides, with a written copy of the information, including any warnings, contained on the labels of the pesticides to be applied. (6 NYCRR 325.40[i][1].) This provision is separate from the contract provisions contained in 6 NYCRR 325.40(a)(1), which one could argue contradicts the conclusion that the provision of the list and guide was part of the contract and not transferred in the performance of the taxable service. However, given petitioner's own argument that the list and guide were provided to satisfy the regulatory requirements without ever specifying a particular subsection of 6 NYCRR 325.40 and its failure to submit a contract in evidence to support such an argument, it is determined that the correct conclusion from the facts which were presented is that the list and guide were part of the contract and not part of the performance of the service provided.

C. Petitioner's argument that taxation of the list and guide amounts to double taxation or a pyramiding of taxes is in error. Since it has been determined that the list and guide were part of the contract and therefore not actually transferred to the customer in conjunction with the performance of a taxable service, they were not taxed a second time. The list and guide were purchased for use by petitioner in its preparation of the contract to be incorporated as contract provisions, consistent with the EnCon regulations. As such, the list and guide did not qualify for the exception to the imposition of tax under Tax Law § 1101(b)(4)(i).

D. The purchases of VNM's, both those mandated by the EnCon regulation (6 NYCRR 325.40[f][g][h]) and those provided by petitioner for nonpesticide applications, are not subject to

the imposition of tax by virtue of the exception provided for in Tax Law § 1101(b)(4)(i). The clear language of the statute controls the interpretation of the circumstances presented herein.

First, the regulation requiring the posting of VNM's in connection with the application of pesticides separates the provisions dealing with contractual provisions (including the sections regarding the lists and guides) and those dealing with the VNM's. Therefore, the analysis for purposes of the VNM's must go beyond that applied to the list and guide above.

The VNM's were unquestionably purchased for use in performing the taxable service of applying lawn, shrub and tree pesticides and nonpesticide products. In the case of pesticides, they were mandated by regulation (6 NYCRR 325.40[f]), while provided as a courtesy in the case of nonpesticide applications. It was established that petitioner posted and left the VNM's on a customer's property as part of each application in the ordinary course of its business practice and did not intend to retrieve or reuse them. The affidavits of Robert Mangan, petitioner's Northeast regional technical manager, and Ray Williamson, petitioner's tax supervisor, two employees with personal knowledge of petitioner's operations, confirm petitioner's business practices with respect to its actual transfer of the VNM's to customers and the fact that provision of the markers was intended as part of the service and that there was no intent to retrieve the used signs.

The Division of Taxation argues that the VNM's were not actually transferred to petitioner's customers in conjunction with the performance of the service. The Division argues that the term "in conjunction with" must be interpreted as "simultaneously" and because the provision of the VNM's was prior to application of both pesticides and nonpesticides it was not simultaneous and therefore not in conjunction with the service. This argument is rejected because the term "in conjunction with" does not imply that the provision of the VNM's be simultaneous with the lawn, shrub and tree applications, only within a reasonable frame of time as dictated by

the circumstances. Webster's Third New International Dictionary of the English Language Unabridged (479 [1986]), defines conjunction as the state of being conjoined, as a union, association or combination. A secondary meaning is an instance of conjoining, union or association. Yet a third, even less common, definition is occurring together. None of these definitions uses or implies the concept of simultaneity.

Words of ordinary import are to be construed according to their ordinary and popular significance. (McKinney's Cons Laws of NY, Book 1, Statutes § 232.) Further, the Tribunal has stated that these common words are to be given their commonly accepted meaning. (***Matter of Chem-Nuclear Systems Inc.***) Given the primary dictionary definition above, there is no basis for imposing a requirement that the transfer of the VNM's be simultaneous with the performance of the taxable service when the common meaning only implies an association, union or combination of the property transfer and service. Here, the placement of the VNM's on a customer's lawn immediately prior to the service was adequately close in time to meet the statute's requirement.

The Division also contends that petitioner's failure to retrieve or reuse the VNM's supports its determination that they are not "actually transferred" to customers. The Division cites an example of a painter who leaves a used drop cloth and used sand paper at a job site as analogous to petitioner's leaving VNM's on a customer's property. The regulatory example concludes that the painter could have come back for his supplies but chose not to and that these circumstances did not amount to an actual transfer of property. (20 NYCRR 526.6[c][6][example 9].) However, the analogy sought to be drawn by the Division fails to recognize the difference between the painter's supplies, which were intended to be consumed or used on the job by the painter and then removed and petitioner's VNM's, which were meant (and in some circumstances required) to be provided to the property owner and left on the customer's property to alert the public and the

homeowner of a pesticide or nonpesticide application. In petitioner's case, it was the business practice and intent *not* to retrieve or reuse the VNM's, the ultimate disposal of which was left to the property owner's discretion. The same cannot be said of the painter in Example 9 of the regulation.

In the case of VNM's provided to property owners as required by regulation, it appears self-evident that the markers are part of the service purchased by the customer, since he or she has an expectation that the contract is compliant with all laws pertaining to the application of pesticides and the health and safety of the public at large that may be affected by the service. Those VNM's for nonpesticide applications, provided to property owners and not required by regulation, serve as a reminder that fertilizers and other nonpesticide chemicals have been placed on the property, which, according to the product information list, can also present hazards to humans and animals. Petitioner's nonmandated provision of such markers is environmentally prudent, beneficial to humans and animals and indicates a commitment to responsible use of its products in the community. It is contrary to this demonstrated commitment and petitioner's business practice to suggest that petitioner would return to a property to remove or reuse the VNM's it supplies in conjunction with the performance of the application.[3]

[3]Those VNM's required by regulation may also specify the time and date of the application unless the property owner is notified immediately after the application. (6 NYCRR 325.40[f][2].)

E. The petitions of TruGreen Limited Partnership are granted consistent with Conclusion of Law D above, but in all other respects are denied, and the notices of determination, dated February 15, 2008 and June 27, 2008, are sustained.[4]

DATED: Troy, New York
March 4, 2010

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

[4]Since petitioner has conceded its liability for tax of $2.93 on purchases of tangible personal property other than VNM's included in the tax asserted in notice number L-030306735-5, that amount is no longer in issue.