

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

CECOS INTERNATIONAL, INC. :

DECISION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1977
through February 29, 1980. :

Petitioner, Cecos International, Inc., 2321 Kenmore Avenue, Buffalo, New York 14207, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1977 through February 29, 1980 (File No. 39140).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York on February 7, 1985 at 2:45 P.M., with all briefs filed by May 2, 1985. Petitioner appeared by Dewey, Ballantine, Bushby, Palmer & Wood (Richard Keefe, Esq., of counsel) and Duke, Holzman, Yaeger & Radlin (Donald J. Holzman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner's separately stated freight charges in conjunction with its charges for processing and disposing of industrial waste are subject to sales tax.

II. Whether petitioner's charges for treatment and disposal of chemical wastes are subject to sales tax.

FINDINGS OF FACT

1. On April 27, 1982, the Audit Division issued to Cecos International, Inc. a Notice of Determination and Demand for payment of Sales and Use Taxes Due in the amount of \$142,379.61 plus interest for the period March 1, 1977 through February 29, 1980.

2. Validated consents had been executed on behalf of Cecos International, Inc. ("petitioner") pursuant to which assessment of sales and use taxes for the periods in question could be made on or before June 20, 1982.

3. As the result of a pre-hearing conference at which petitioner submitted additional documentation, adjustments were made with respect to petitioner's asserted liability for the period March 1, 1977 through February 29, 1980 reducing said amount to \$121,085.00 in tax exclusive of interest. Petitioner consented and issued a partial withdrawal of petition with respect to \$85,184.47 of such liability, leaving at issue (exclusive of interest) \$35,910.53 in tax.

4. Petitioner operates a secure landfill and waste treatment facility for the disposal of chemical waste.

5. When a customer first contacts petitioner, a sample of such customer's waste product is tested by petitioner to determine whether, pursuant to the rules of the New York State Department of Environmental Conservation, petitioner may accept such customer's waste at its facility. Petitioner accepts from its customers bulk waste, liquid and solid waste in drums, and liquid waste by the tanker load for treatment and disposal in its secured landfill. Petitioner sample tests each load to determine if the waste being disposed is that which was tested and approved for acceptance.

6. Bulk waste, typically contaminated soil, arrives in dump truck loads, is taken to the secure landfill and buried. Likewise, solid waste in drums is taken to petitioner's landfill, placed in the ground and buried.

7. Petitioner may not bury liquid waste. Thus, liquid waste (which for petitioner's purposes means less than 85 percent solid) must be either: solidified so that it may be disposed of by burial, or neutralized and filtrated at petitioner's water treatment facility so as to remove the hazardous material. To solidify the waste, an agent such as "speedi-dri" may be added to drummed liquid until the requisite solidification occurs such that the drummed waste may be buried.

8. Petitioner charges customers a greater fee for disposal of equivalent amounts (drums, gallons, pounds, tons, etc.) of waste where petitioner must either solidify the waste or treat the waste at its water treatment facility.

9. For many of its customers, petitioner arranged to have waste transported from the customers' locations to petitioner's facility. Upon contact by the customer, petitioner would contact an independent contractor hauler to pick up waste from a customer's location and to transport such waste to petitioner. If a customer had a "preferred" hauler, the customer might notify petitioner of the same and petitioner would attempt to arrange for said hauler. None of the transporters, whether preferred by the customer or chosen by petitioner, were affiliated with petitioner. Petitioner separately stated on its invoice to the customer "freight" charges for the services of the hauler. Petitioner did add an amount to the actual cost of the hauler in billing its customers on the "freight" charges, the profitability in such instances never being more than five to ten percent.

10. Petitioner did not charge sales tax upon the "freight" charges it separately stated on its invoices to its customers.

11. Throughout the audit period (except where it believed it had on file proper exemption documents), petitioner charged sales tax on its fees (exclusive of the "freight" charge) for disposal of a customer's waste.

12. Petitioner claims that its charges for freight are nontaxable transportation charges and that its disposal services are also not subject to the sales tax, notwithstanding that it had charged and collected sales tax on such services during the audit period.

13. Petitioner's records of its freight and disposal charges were audited pursuant to a statistical sampling, the use of which was consented to by petitioner. The sampled period disclosed a total of \$3,186.51 in errors out of a total sample of \$1,035,003.75 for a sales tax error rate of .003079. This sales tax error rate was applied to petitioner's total sales of \$11,663,042.94 resulting in the \$35,910.53 sales tax deficiency at issue herein. The \$3,186.51 in total errors determined in the sample period were allocated as follows:

	<u>Amount</u>	
Disposal	\$1,617.51	(50.76%)
Freight	1,354.56	(42.51%)
Detention	24.04	(0.75%)
Vac Trucks	113.40	(3.56%)
Other	77.00	(2.42%)
Total	<u>\$3,186.51</u>	(100. %)

The \$35,910.53 in total tax liability thus is allocable as follows:

Disposal	\$18,228.18
Freight	15,265.58
Detention	269.33
Vac Trucks	1,278.42
Other	869.05
Total	<u>\$35,910.53</u>

14. Petitioner, at the hearing herein, declined to present evidence and testimony with respect to asserted liability for "Detention", "Vac Trucks" and "Other", in effect conceding the tax liability in respect thereof.

15. Of the invoices sampled in the test period, no liability for tax was asserted on "freight" unless such "freight" charge was associated with petitioner's disposal service.

16. Of the invoices sampled in the test period, \$389.83 of claimed liability involved "disposal service" charges only. These customers delivered their waste to petitioner's facility by their own means and were not charged for "freight" by petitioner. While the record indicates that certain of such invoices involved "liquids", the record does not show that any of such subject invoices were bulk waste or solid waste in drums which were not "serviced" prior to disposal.

CONCLUSIONS OF LAW

A. That section 1101(b)(3) of the Tax Law in defining the term "receipt" provides that receipt excludes the cost of transportation of tangible personal property sold at retail where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser.

B. That section 1105(c)(2) imposes a tax upon the services of:

"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 such services are performed."

C. That section 1105(c)(5), in pertinent part, imposes a tax upon the services of:

"Maintaining, servicing or repairing real property, property or land, ..., whether the services are performed in or outside of a building, ...excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than...trash removal from buildings."

D. That petitioner is providing a "trash removal" service for its customers in those instances where petitioner arranged the pick up of the chemical waste. Under such circumstances, petitioner's total charges for freight (the cost of which, plus profit to itself, petitioner billed to the customer) and disposal are subject to sales tax.

E. That petitioner, therefore, properly charged sales tax on its disposal services (see Finding of Fact "11"), regardless of whether the waste was solid or liquid, but failed to collect tax on the total charge for its taxable services which includes the "freight charge", whether or not such charge is separately stated on its billings to the customer.

F. That petitioner's charges for processing liquid waste either by solidifying such waste prior to disposal or by neutralizing and filtrating such waste in its water treatment facility to remove the hazardous material are subject to the tax imposed by section 1105(c)(2) of the Tax Law.

G. That petitioner has otherwise conceded and/or failed to adduce evidence to meet its burden of proof with respect to any remaining disputed items and issues (see Findings of Fact "14" and "16").

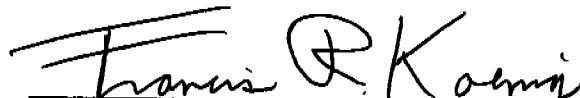
H. That the petition of Cecos International, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 27, 1982, as reduced to \$35,910.53 in tax (see Finding of Fact "3"), is sustained together with applicable minimum statutory interest.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER