

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DIAZ CHEMICAL, 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 June 1, 1978	:	
through May 31, 1981.	:	

Petitioner, Diaz Chemical, Inc., Box 194, Jackson Street, Holley, New York 11470, 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 June 1, 1978 through May 31, 1981 (File No. 40475).

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 May 1, 1986 at 9:15 A.M., with all briefs submitted by June 25, 1986. Petitioner appeared by Walsh, Roberts & Grace, Esqs. (Thomas E. Roberts, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether certain purchases of services made by petitioner were subject to sales tax as the maintenance, service or repair of real property.

FINDINGS OF FACT

1. On September 3, 1982, the Audit Division issued to petitioner, Diaz Chemical, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$142,914.72, plus interest of \$45,241.62, for a total due of \$188,156.34 for the period June 1, 1978 through May 31, 1981.

2. On June 9, 1982, petitioner, Diaz Chemical, Inc., by its Chairman Theodore M. Jenney, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1978 through May 31, 1979 to December 20, 1982.

3. Following a pre-hearing conference, the tax due was reduced from \$142,914.72 to \$134,656.06. The revised figure represents the amount of sales tax asserted to be due from petitioner on purchases of what the Audit Division considered to be the service of waste removal and therefore taxable under section 1105(c)(5) of the Tax Law.

4. Petitioner does not dispute the amount of the revised figure, but argues that certain of the asserted taxable purchases were not of waste removal services, rather that said purchases consisted of transportation charges, and are not taxable under Article 28 of the Tax Law.

5. Petitioner, Diaz Chemical, Inc., was formed in 1973 by Theodore M. Jenney and two partners. Petitioner manufactures products for approximately fifty (50) major chemical companies. These products are typically used by agricultural/pharmaceutical businesses. One product made by petitioner, Treflan, requires the use of a mixture of nitric acid and sulfuric acid for nitration. During the nitration process, the sulfuric acid takes up the water that is formed leaving "wet sulfuric acid" as a by-product. This by-product can be used to make ammonium sulfate for fertilizer.

6. Petitioner sold as much of the wet sulfuric acid it produced as possible and disposed of what it could not sell. Petitioner sold wet sulfuric acid to American Recovery Corporation ("American") which in turn sold the product to other companies, including Northeast Chemical Company ("Northeast"). To develop a market and establish itself as a supplier of wet sulfuric acid,

petitioner delivered the first few loads to American at no cost. Subsequently, petitioner received \$100.00, then \$150.00, per truckload from American.

Petitioner also sold wet sulfuric acid directly to Northeast, which uses it in the production of ammonium sulfate. Petitioner paid for the cost of shipping the wet sulfuric acid to Northeast and American. If American used its own trucks to transport the wet sulfuric acid to American's Philadelphia facility, petitioner paid American \$.50 per gallon for this service; otherwise, petitioner hired Chemical Leaman Company or Matlack, Inc. to transport the by-product. The freight cost to petitioner usually exceeded the selling price to American and Northeast.

7. Petitioner also sold wet sulfuric acid to Elderlee, Inc., which paid \$396.00 per truckload, which included the cost of shipping via Matlack, Inc.

8. The wet sulfuric acid which petitioner did not sell was shipped to waste disposal companies, which neutralized and buried it. Petitioner did not pay sales tax on purchases of waste disposal from Erie Way Pollution Company, Frontenac Company, or Ohio Liquid Company, believing it to be unnecessary because the companies are Ohio based. Petitioner also failed to pay sales tax on similar transactions with Chemtrol Company and Frontier Company.

9. Petitioner no longer performs the nitration process.

10. At hearing, evidence was introduced showing that Chemtrol Company had paid the tax of \$4,033.29 asserted due from petitioner on transactions between said parties. The Audit Division agreed that this amount should be credited to petitioner.

11. There is no evidence to support petitioner's contention that Frontier Company had paid the sales tax due on transactions between said company and

petitioner, nor is there evidence showing that petitioner paid sales tax to Frontier Company with its payment of the disposal service charge.

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the service of "[m]aintaining, 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" and including the service of trash removal from buildings.

B. That 20 NYCRR 527.7(a)(1) provides:

"Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal."

C. That the removal of wet sulfuric acid from petitioner's facility by Erie Way Pollution Company, Frontenac Company, Ohio Liquid Company, and Frontier Company falls within the category of trash removal and is maintenance and service of real property within the meaning and intent of section 1105(c)(5) of the Tax Law. The wet sulfuric acid, a waste product of the production of Treflan, is merely hauled away by these companies and disposed of as any other trash and debris. This service is a service to the property, which is located in New York State, and the fact that three of the companies performing said service are Ohio based (see Finding of Fact "8") is irrelevant.

D. That the shipping of wet sulfuric acid from petitioner's facility to American Recovery Corporation, Northeast Chemical Company and Elderlee, Inc. by

American Recovery Corporation, Chemical Leaman Company and Matlack, Inc. is a transportation service, and does not constitute maintenance and service to petitioner's property within the meaning and intent of section 1105(c)(5) of the Tax Law. American, Northeast and Elderlee purchased the wet sulfuric acid from petitioner for a consideration, and utilized the product either by reselling it or in the production of ammonium sulfate for fertilizer. The requirement that petitioner bear the shipping cost was part of the sales agreements between petitioner and the purchasers, and the fact that these costs exceeded the sales price does not transform the transportation service into a waste removal service.

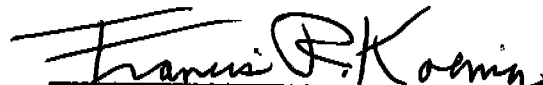
E. That the petition of Diaz Chemical, Inc. is granted to the extent indicated in Findings of Fact "3" and "10" and Conclusion of Law "D"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 3, 1982 accordingly; and, except as so granted, the petition of Diaz Chemical, Inc. is denied.

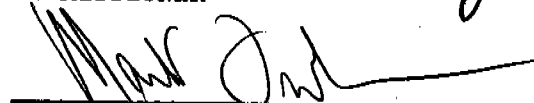
DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER