

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 25, 1984

Richard C. Penfold
d/b/a C.I.D. Refuse Service
18 Sugarbush Way
Hamburg, NY 14075

Dear Mr. Penfold:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Donald A. Fisher
Cohen, Lombardo, Blewett, Fisher, Hite & Spandau
343 Elmwood Ave.
Buffalo, NY 14222
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard C. Penfold :
d/b/a C.I.D. Refuse Service :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Period :
6/1/77-2/29/80. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 25th day of May, 1984, he served the within notice of Decision by certified mail upon Richard C. Penfold d/b/a C.I.D. Refuse Service, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard C. Penfold
d/b/a C.I.D. Refuse Service
18 Sugarbush Way
Hamburg, NY 14075

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard C. Penfold :
d/b/a C.I.D. Refuse Service : AFFIDAVIT OF MAILING
:
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 6/1/77-2/29/80. :

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 25th day of May, 1984, he served the within notice of Decision by certified mail upon Donald A. Fisher, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald A. Fisher
Cohen, Lombardo, Blewett, Fisher, Hite & Spandau
343 Elmwood Ave.
Buffalo, NY 14222

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
25th day of May, 1984.

David ParChuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
RICHARD C. PENFOLD	:	DECISION
D/B/A C.I.D. REFUSE SERVICE	:	
	:	
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, 1977	:	
through February 29, 1980.	:	

Petitioner, Richard C. Penfold d/b/a C.I.D. Refuse Service, 18 Sugarbush Way, Hamburg, New York 14075, 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, 1977 through February 29, 1980 (File No. 35824).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 21, 1983 at 1:15 P.M., with all briefs to be submitted by August 5, 1983. Petitioner appeared by Cohen, Lombardo, Blewett, Fisher, Hite and Spandau (Donald A. Fisher, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether a dumping charge, which is separately stated on petitioner's invoices to its customers, is an element of the cost of providing a refuse removal service and thus properly includible in taxable receipts.

II. Whether petitioner's container sales were sales for resale.

FINDINGS OF FACT

1. On June 19, 1981, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against CID Refuse Service (sic) in the amount of \$30,159.12, plus interest of \$4,697.14, for a total due of \$34,856.26 for the period June 1, 1977 through February 29, 1980.

2. Petitioner, Richard C. Penfold d/b/a C.I.D. Refuse Service, had executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1977 through February 29, 1980 to December 20, 1981.

3. Petitioner is engaged in the business of providing refuse removal services to commercial, industrial and residential customers. In billing his customers, petitioner breaks down the charges into amounts for service, sales tax and dumping. On commercial and industrial accounts, petitioner also itemizes a charge for rental of refuse containers. Prior to January, 1980, petitioner charged residential customers a flat rate plus sales tax. In January, 1980, petitioner began separately stating an amount for dumping fees. Petitioner collected sales tax only on the service portion of the bill, not the dumping fee. Petitioner instituted a similar billing change for his commercial and industrial customers in 1978. On commercial and industrial accounts, petitioner collected sales tax on the service and rental fees, but not on the dumping fee.

4. Most of petitioner's commercial and industrial customers either own their own refuse containers or rent them from petitioner. For commercial and industrial customers with large containers, petitioner picks up and dumps the containers one at a time; for customers with smaller quantities of refuse, the waste from several customers is collected on one truck. Petitioner dumps the refuse collected from customers at Chaffee Landfill, which is owned by a corporation controlled by petitioner, and at other sites including those operated

by Cecas, Inc., Newco Waste Systems, Lancaster Landfill, Hooker Waste Energy, and SCA. The landfills charge petitioner by the cubic yard or by the ton for each truckload dumped. It is this dumping charge which petitioner passes along to its customers and which is reflected as a dumping fee on the invoices.

5. The dumping fee for each customer is computed as a proportion of the charge for dumping the entire truckload. The dumping fee for residential accounts is a flat rate for each account, it is not determined on the basis of the quantity of refuse collected from each customer. Commercial and industrial dumping fees are related to the size of the customer's container rather than the actual amount of refuse collected. Petitioner computes the total cost to service each account and subtracts a proportion for the dumping charge incurred from the landfill to determine the service charge. One of petitioner's commercial customers has its own account with a landfill. The landfill charges the customer directly for the dumping fee. Such fees by the landfills are not subject to sales tax.

6. On audit, the auditor determined that the dumping fees were expenses incurred by petitioner in making his sales of refuse removal services and, thus, were improperly separately itemized as a non-taxable item on the invoices. Petitioner maintains that the dumping fees were not expenses of doing business, but rather that he was acting, more or less, as a conduit for collection of the dumping charge for the landfills. Petitioner argues that, particularly with Chaffee Landfill which he owns, if Chaffee billed the customers directly for use of the dumping facilities, there would be no tax; however, since he pays Chaffee and the other landfills and then passes the cost along to his customers, the State has assessed a tax. Such a situation creates an inconsistency in the application of the law.

7. Petitioner also made sales of trash containers of various sizes, but did not collect tax at the time of sale. Petitioner obtained either a resale certificate or an exempt organization certificate from some of the container purchasers. On audit, the auditor deemed sales of the containers to be subject to tax; however, credit was allowed where an appropriate certificate was submitted. Petitioner considered all these sales, except those to exempt organizations, to be for resale because each of the purchasers were in the refuse removal business. However, petitioner could not say whether each of his purchasers did business exactly as he did, that is, renting the containers to their own customers and charging tax on such rental. Petitioner was unable to produce any further evidence with respect to the methods his purchasers used in conducting their businesses.

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law provides, inter alia, for a tax on the receipts from sales of the service of maintaining, servicing or repairing real property, property or land. According to 20 NYCRR 527.7(a)(1), such services include trash and garbage removal. Section 1101(b)(3) defines the term "receipt" to include "the charge for any service taxable under this article... without any deduction for expenses...". Under 20 NYCRR 526.5(e), "[a]ll expenses...incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts."

B. That the dumping fee paid by petitioner to the landfills is an expense to him which is incurred in providing his refuse removal service. While fees for use of a landfill facility are not taxable to the user, such fees, when passed along to customers by the user, become part of the expense incurred by

the user and the regulations clearly state that such expenses may not be deducted from receipts regardless of whether or not such expenses are taxable to the direct user. Therefore, the dumping fee was subject to sales tax despite the fact that it was separately stated on petitioner's invoices.

C. That section 1132(c) of the Tax Law provides, in part, that sales will be deemed taxable at retail unless the vendor takes from the purchaser a proper resale certificate or exempt organization certificate. Although this presumption may be overcome by sufficient evidence in the absence of proper certification (see Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983), petitioner has not presented sufficient evidence to meet his burden with respect to container sales in this case. Petitioner did not know, and could produce no evidence indicating whether the container purchasers actually resold or rented the containers to their own customers. It is just as likely that the container purchasers retained dominion and control over the containers in conducting their business. Absent any proof to the contrary or resale certificates from said purchasers, such sales must be deemed subject to sales tax.

D. That the petition of Richard C. Penfold d/b/a C.I.D. Refuse Service is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 19, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 972

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Richard C. Penfold	
Street and No.	
18 Sugarbush Bay	
P.O., State and ZIP Code	
Lanburg, NY 14025	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982