STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DVL, INC.	:	DETERMINATION DTA NO. 824165
for Redetermination of a Deficiency or for Refund of Special Assessments on the Generation of Hazardous Waste under Article 27 of the Environmental Conservation Law for the Year 2006.	:	

Petitioner, DVL, Inc., filed a petition for redetermination of a deficiency or for refund of the special assessment on generation of hazardous waste under Article 27 of the Environmental Conservation Law for the year 2006.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Agency Building 1, Empire State Plaza, Albany, New York, on November 26, 2012 at 10:00 A.M. with all briefs to be submitted by April 11, 2013, which date commenced the six-month period for issuance of this determination. By letter dated September 18, 2013, the Administrative Law Judge extended the time for issuance of the determination for three months pursuant to Tax Law § 2010(3). Petitioner appeared by Nolan & Heller, LLP, (David A. Engel, Esq., and Brendan J. Carosi, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq., (Clifford Peterson, Esq., of counsel).

ISSUES

I. Whether DVL, Inc.'s transportation of hazardous waste while engaging in the remediation of a site containing hazardous waste constitutes the "generation of hazardous waste"

within the meaning of Environmental Conservation Law § 27-0923(3)(c).

II. Whether DVL, Inc. is entitled to claim the statutory exclusion from imposition of the special assessment on generation of hazardous waste because it acted under an "agreement" with the Department of Environmental Conservation pursuant to ECL 27-0923(3)(c).

FINDINGS OF FACT

1. During the period of time relevant to this proceeding, petitioner, DVL, Inc., (DVL), conducted business as a mortgage finance company, general partner of partnerships and owner of real estate. It did not engage in any industrial processes as part of its business nor did it undertake any commercial activities that involved the generation or creation of hazardous waste and materials.

2. Fort Edward Associates was the owner of a parcel of real property located at 354 Upper Broadway, Fort Edward, New York (DVL site). The property was leased to the Grand Union Company. In 2002, DVL acquired the property by foreclosure after Fort Edward Associates defaulted on the mortgage. The area where this property is located is known as the Upper Broadway Barrel Site in the Town of Fort Edward (Upper Broadway Site).

3. In August 2003, Mr. James Ludlam, on behalf of the Department of Environmental Conservation, approved the performance of a Preliminary Site Assessment (PSA) of The Upper Broadway Site. In general, the purpose of the PSA was "to determine whether waste has been disposed on site and, if so, whether this disposal has impacted or threatens to impact human health and/or the environment" (Work Plan for Preliminary Site Assessment at the Upper Broadway Site Fort Edward, New York).

4. The PSA was conducted by the firm of Ecology and Environment Engineering, P.C. (E

& E) on behalf of the Department of Environmental Conservation (DEC). E & E collected and tested subsurface soils as well as performed test pit excavations and sampling on the DVL site. On the basis of the test pit excavations and sampling, the DEC requested that DVL investigate and possibly remediate the area of two test pits. The area was southeast of the former Grand Union store and east of a nearby Agway establishment. DVL retained Malcolm Pirnie, Inc. (MPI) to perform the investigation of the test pits.

5. In October 2004, E & E issued the Report for the Preliminary Site Assessment at the Upper Broadway Site, Fort Edward, New York (PSA Report). The PSA Report found that polychlorinated biphenyls (PCB) waste was present at the DVL site "above their screening criteria in two test pit subsurface soil samples" and "well above criteria in one localized subsurface soil test pit sample." The DEC never identified the source of the PCBs.

6. Mr. Ludlam informed DVL that it was necessary to remove the PCB-contaminated soil in the area of the test pits. Consequently, MPI, on behalf of DVL, developed a work plan for the removal and disposal of soil containing PCBs in the area of the two test pits. In a letter dated December 2, 2004, MPI submitted the work plan to the DEC via a letter to Mr. Ludlam. On December 7, 2004, Mr. Ludlam sent an e-mail to Mr. Bruce Nelson of MPI approving the remedial work plan.

7. In accordance with the December 2, 2004 approved work plan, MPI, on behalf of DVL, removed the PCB-contaminated soil identified in the PSA. The remediation effort consisted of the excavation, removal and disposal of the soil. Mr. Ludlam, on behalf of the Division of Environmental Remediation, witnessed the soil remediation effort as well as the confirmation sampling that followed. Thereafter, on February 28, 2005, MPI, on behalf of DVL, submitted a

closure report to the DEC. On March 9, 2005, Mr. Ludlam mailed a letter to petitioner that stated:

> Having reviewed and approved the closure report prepared by MPI (February 28, 2005), I can attest that the removal was conducted to the State's satisfaction and in full compliance with the approval plan. . . . The Department will administratively reclassify the site from Category P to D4 indicating it is not appropriate to classify the site as a listed inactive hazardous waste site. The Department has no further concerns with the site.

8. A consultant's review of the PSA Report prompted DVL, through MPI, to voluntarily undertake an additional investigation of the DVL site to ascertain if additional PCB-contaminated soil was present. Additional contaminated soil was discovered whereupon DVL informed the DEC of the presence of contaminated soil. The DEC advised DVL that an additional work plan should be submitted because the level of the contamination required further excavation and removal.

9. In a letter dated June 19, 2006, MPI submitted an additional work plan for the removal and disposal of the PCB-contaminated soil. MPI discovered additional PCB-contaminated soil on the DVL site and in a letter dated August 1, 2006, it submitted a supplemental work plan to the DEC. Thereafter, the DEC advised DVL that it approved the June 19, 2006 and August 1, 2006 work plans.

10. During the period October through December 2006, DVL undertook the task of removing the PCB-contaminated soil from the DVL site. Before and during the remediation process, DVL communicated with the DEC regarding its removal activities, including informing the DEC of the anticipated commencement of the removal activities on October 17, 2006, seeking DEC guidance pertaining to certain removal activities and submitting progress reports to the DEC.

11. In order to engage in the removal process, MPI submitted to the DEC 54 Uniform Hazardous Waste Manifest forms. Thereafter, DVL submitted to the Division a form TP-550-MN, dated January 19, 2007, stating that each ton of hazardous waste removed from the DVL site during the forgoing period was done so "under an order of, or agreement or contract with, the New York State Department of Environmental Conservation."

12. DVL commenced an action against, among others, General Electric Company, Niagara Mohawk Power Company and National Grid Service Company, Inc., in order to obtain a recovery of costs it incurred as a result of its investigation and remediation of the DVL site. DVL was unsuccessful in this action (***DVL, Inc. v. General Electric Company***, 811 F Supp 2d 579 [2010], ***affd*** 490 Fed Appx 378 [2012]).

13. On the basis of a review of the Uniform Hazardous Waste Manifest forms, the Division of Taxation (Division) issued a Discrepancy Statement of Audit Adjustment to DVL, dated November 24, 2009, that asserted a deficiency of $43,173.00 plus interest for a total assessment of $66,298.57. The Discrepancy Statement explained that it was based upon the transportation of 1,599 tons of hazardous waste.[1] On December 30, 2009, the Division issued a Notice of Deficiency to DVL that asserted tax due in the amount of $43,173.00 plus interest for a balance due of $67,286.51.

14. From 2004 through 2007, James N. Ludlam was employed as a project manager with the Remedial Bureau D in the Division of Environmental Remediation. Mr. Ludlam was not delegated with the authority to execute an order or agreement on behalf of the DEC pursuant to

[1] DVL had reported that it had generated 1,303.2 tons of hazardous waste on its Uniform Hazardous Waste Manifest forms.

titles 13 or 14 of Article 27 of the Environmental Conservation Law.

15. DVL never applied for participation in the Brownfield Cleanup Program pursuant to Title 14 of Article 27 of the Environmental Conservation Law.

SUMMARY OF PETITIONER'S POSITION

16. Initially, petitioner maintains that the Special Assessment imposed under ECL 27-0923(1) was erroneous because DVL's remediation of the DVL site did not constitute "generation of hazardous waste." Petitioner submits that while the Environmental Conservation Law and the applicable regulations define the generation of hazardous waste as an act or process "producing" or which "produces" hazardous waste, they do not define what it means to engage in the production of hazardous waste. According to petitioner, the term "producing" or "produces" does not include the removal of preexisting hazardous waste. Petitioner contends that when narrowly construed against the taxing authority, ECL 27-0923(1) does not authorize the imposition of a special assessment based on the removal of preexisting hazardous waste.

17. Petitioner further argues that ECL 27-0923(3)(c) states, in part, that the generation of hazardous waste shall not include "retrieval or creation of hazardous waste which must be disposed under an . . . agreement with the Department [DEC] pursuant to title thirteen" of Article 27 of the Environment Conservation Law. It is petitioner's position that it proceeded only upon the DEC's review and approval of all such removal plans. Petitioner states that:

> Based upon DVL's repeated communications with the DEC, DVL's submissions of its work plans to the DEC, and DEC's approval of those work plans, DVL respectfully submits that it removed the preexisting PCB waste from the DVL Site pursuant to an "agreement" with the DEC under ECL § 27-0923(3)(c), such that the removal did not constitute "generation of hazardous waste" under ECL § 27-0923.

18. Lastly, petitioner submits that since it inherited the hazardous waste from a prior

owner, voluntarily engaged in investigations that found the hazardous waste on the site, advised the DEC of the hazardous waste, secured the DEC's examination and approval of the removal plan, and bore a significant expense in removing the waste, a conclusion that DVL is not subject to a special assessment is necessary to promote the goal of encouraging the removal of hazardous waste from contaminated sites.

CONCLUSIONS OF LAW

A. In this proceeding, petitioner has raised issues concerning the interpretation and construction of the Environmental Conservation Law. In order to address these concerns, it is helpful to briefly outline the pertinent provisions of the titles that are in issue.

B. In 1978, the Legislature enacted Title 9 of Article 27 of the Environmental Conservation Law in order to regulate the management of hazardous waste "from its generation, storage, transportation, treatment and disposal" in New York (ECL 27-0900). The legislation directed that the DEC create a manifest system which conforms with that adopted pursuant to RCRA[2] (ECL 27-0905) and establish "regulations . . . which shall be applicable to generators of hazardous waste" (ECL 27-0907).

C. Title 13 of Article 27 of the Environmental Conservation Law was adopted by the Legislature to control inactive disposal sites (L 1079, ch 282, § 1). The title authorized the DEC to issue orders that required generators of hazardous waste to remediate contaminated sites (ECL 27-1313[3][a]). The current version of the Special Assessment was adopted by the Legislature in 1985 (L 1985, ch 38, § 21). ECL 27-0923(5) authorized the DEC and the Division to administer the Special Assessment. The Legislature intended the Special Assessment, in part, to generate

[2] RCRA is the Resource Conservation and Recovery Act of 1976.

revenues in order to provide funding for the cleanup of inactive hazardous waste sites (Philip Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Environmental Conservation Law § 27-0923). ECL 27-0923(4)(a) required generators of hazardous waste to report and pay the amount due to the Division on a quarterly basis on a return prescribed by the Division. The Legislature further provided that the provisions of Article 27 of the Tax Law apply to the provisions of ECL 27-0923 (ECL 27-0923[6]). In particular, this section states that the term "special assessment" means "tax" for purposes of the application of Article 27 of the Tax Law.

D. Title 14 of the Environmental Conservation Law was enacted by the Legislature in 2003 (L 2003, ch1). This Article is also known as the Brownfield Cleanup Program (Philip Weinberg, Practice Commentaries, McKinney's Cons Laws of New York, Environmental Conservation Law § 27-1401). The Brownfield Cleanup Program was "designed to facilitate the remediation of parcels contaminated by hazardous waste and restore them to the tax rolls." (***Id***.) The Legislature intended this Article "to provide incentives for the expeditious cleanup of parcels not so immediately dangerous to health as to be ineligible." (***Id***.) In order to participate in this program, a person must make an application (ECL 1407[1]). The DEC is permitted to enter into an "agreement" with those who follow this procedure (ECL 27-1405(4); 1409).

E. As set forth above, DVL argues that its remediation of the DVL site did not constitute the "generation of hazardous waste" within the meaning of ECL 27-0923(1). This section provides, in pertinent part, as follows:

> there is hereby imposed upon every person who is engaged within the state in the generation of hazardous waste identified or listed pursuant to this title a special assessment to be determined as follows: (a) Twenty-seven dollars per ton of hazardous waste generated which is disposed of in a landfill on the site where the waste is generated or which is designated for removal or removed from the site of

> generation for disposal in a landfill or which is designated for removal or removed from the site of generation for storage prior to disposal in a landfill.

F. The Legislature did not define the phrase "generation of hazardous waste" for purposes of ECL 27-0923(1). However, it did direct that the purpose of Title 9 of Article 27 of the Environmental Conservation Law was to regulate the generation of hazardous waste in a manner consistent with the Federal Solid Waste Disposal Act as amended by RCRA and as further amended by certain subsequent legislation (ECL 27-0900). ECL 27-0900 further provided that "[n]othing in this title shall authorize the department to adopt or amend any rule or regulation in a manner less stringent than provided in RCRA." (***Id***.) The forgoing provisions clearly establish that RCRA and Title 9 are *in pari materia* and should be interpreted in a consistent manner (McKinney's Cons Laws of NY, Book 1 Statutes, § 221).

G. The Environmental Protection Agency (EPA) has defined "generator" for purposes of RCRA, in part, as follows:

> *[A]ny person, by site*, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or *whose act first causes a hazardous waste to become subject to regulation* (emphasis added) (40 CFR 260.10).

H. The New York Code of Rules and Rules and Regulations incorporates a similar definition of generator as that set forth above. Specifically, 6 NYCRR 370.2(b)(83) provides:

> 'Generator' means any person, by site, whose act or process produces hazardous waste as defined in Part 371 of this Title, or *whose act first causes a hazardous waste to become subject to regulation*. (Emphasis added.)

I. The EPA has provided the following guidance regarding when an act first causes a hazardous waste to become subject to regulation:

> [W]aste is not subject to hazardous waste regulation unless the waste is physically disturbed (e.g., exhumed). Once a person excavates the waste, he or she is considered the generator since he or her act first caused the waste to become

> subject to hazardous waste regulation. (EPA, RCRA Training Module: *Introduction to Generators*, 40 CFR Part 262, p.15, September 2005).

In this instance, the hazardous waste in issue became subject to hazardous waste regulation, when DVL excavated and disposed of the waste during the period October 1, 2006 through December 31, 2006 (***Id***., 6 NYCRR 370.2[b][83]). It follows that DVL was "engaged within the state in the generation of hazardous waste" within the meaning of (ECL 27-0923[1]). It is noteworthy that the standards of RCRA and, accordingly Title 9, establish that a person does not have to engage in the creation of hazardous waste to be considered a generator of hazardous waste. Accordingly, no conclusion has been drawn regarding whether DVL had any role in the creation of the hazardous waste in issue. In view of the foregoing analysis, which concludes that the Environmental Conservation Law must be interpreted *in pari materia* with RCRA, petitioner's analysis, which relies upon maxims of statutory construction for its support, is rejected. Such rules should not be relied upon when the intention of the Legislature is clear (McKinney's Cons Laws of NY, Book 1, Statutes § 76).

J. DVL maintains that it disposed of the hazardous waste under the terms of an agreement with the DEC. In 2004, the Legislature amended ECL 27-0923(3)(c) and adopted the following exclusion from the assessment of a special assessment:

> [G]eneration of hazardous waste shall not include retrieval or creation of hazardous waste which must be disposed of under an order of or agreement with the department pursuant to title thirteen or title fourteen of this article or under a contract with the department pursuant to title five of article fifty-six of this chapter.

K. As set forth above, DVL submits that DEC's approval of its work plans constituted an agreement, and therefore, it remediated the hazardous waste pursuant to an agreement with the DEC pursuant to Title 13. This argument raises numerous difficulties. First, it confuses the

terms "order" (ECL 27-1405), "work plan" (ECL 27-1407[2]; 27-1441) and "agreement" (ECL 27-1405[4]). Each of these terms has a specific meaning and may not be used interchangeably. Title 13 of the Environmental Conservation Law does not authorize the DEC to enter into an "agreement" with a generator of hazardous waste. Rather, this title only authorizes the DEC to issue an order (***see*** ECL 27-1313[3][a]). As noted by the Division, the Legislature's decision to not include "work plan" in the language of ECL 27-0923(3)(c), reveals the intention that a party that cleaned up a site pursuant to a work plan without an order or agreement would not be eligible for an exemption. In this regard, it is noted that the remediation program approved by Mr. Ludlam was specifically labeled as a work plan and that Mr. Ludlam did not have the authority to enter into an agreement. In ***Matter of Golub Corporation*** (Tax Appeals Tribunal, May 31, 2012), the Tax Appeals Tribunal decided that in order to establish entitlement to a tax credit the pertinent statutory language required a specific form of agreement between the taxpayer and certain authorities and determined that "[t]o construe the [statutory] language otherwise would violate our authority because 'an administrative agency may not extend the meaning of statutory language to apply to situations not embraced within the statute' (internal citations omitted)." The same reasoning employed by the Tribunal in ***Golub Corporation*** applies here and compels the conclusion that DVL and the DEC did not enter into an "agreement," and therefore DVL is not entitled to the benefit of the hazardous waste special assessment exclusion.[3]

L. DVL argues that the conclusion that DVL is not subject to a special assessment is necessary to promote the goal of encouraging the removal of hazardous waste from contaminated sites. This argument is also without merit. The Environmental Conservation Law clearly creates

[3] Petitioner's reliance upon a determination of an administrative law judge is misplaced because such determinations may not be cited as precedent (Tax Law § 2010[5]).

an incentive for individuals to proceed under an order or an agreement with the Department of Environmental Conservation. DVL could have made an application pursuant to the Brownfield Cleanup Program and, if the application were accepted, it would have avoided the imposition of a special assessment. However since it chose to proceed through a work plan, it must accept the consequences. Moreover, petitioner's argument that this approach taken herein is contrary to public policy should be addressed to the Legislature and not this forum.

M. Petitioner argues that ECL 27-0923 is specifically excluded from the federal RCRA program rendering the Environmental Protection Agency's RCRA guidance materials irrelevant to this matter. The premise of this argument does not support its conclusion. Unquestionably, 40 CFR 272.1651(c)(3)(I) expressly excludes the provisions of ECL 27-0923. However, this does not mean that the Environmental Conservation Law does not incorporate the standards in RCRA. As noted earlier, the Department of Environmental Conservation is expressly prohibited from adopting any rule or regulation less stringent than that provided in RCRA (ECL 27-0900).

N. The petition of DVL, Inc., is denied and the Notice of Deficiency, dated December 30, 2009, is sustained together with such interest as is lawfully due.

DATED: Albany, New York
November 21, 2013

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE